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Dear Mr Laughlin

Re: Copyright Licensing and Collecting Societies – Draft Guide for Copyright Licensees

We refer to Margaret Arblaster's letter of 13 December 2006 addressed to Kate Gilchrist of the ABC in which the ABC was invited to provide comments on the above draft guide (the "Guide").

As the *Copyright Amendment Act 2006* (Cth) has now been passed and the relevant provisions are in effect, we assume that the Guide will be updated to reflect the passage of this legislation.

1 – Introduction

Chapter 1 concludes with a summary of matters dealt with in the Guide. The sixth bullet point refers to the role of the ACCC and the seventh bullet point refers to the problem of collecting societies' market power and the tribunal's role in curbing that market power. This separation suggests that the ACCC has no role in curbing market power.

The seventh bullet point could also better correspond with the substance covered in the last section of the Guide, being the calculation of the pricing for copyright material.

2 – Copyright protection in Australia

Page 8 of the Guide lists some of the exceptions to copyright infringement. As the Guide is directed at copyright licensees, we suggest that more of the exceptions be listed; in particular, such recent additions such as the fair dealing defence for the purpose of parody or satire (sections 41A and 103AA).

3 – Copyright collecting societies

With respect to the section entitled, "Collecting societies in Australia", we suggest that the Australian Recording Industry Association be included in the list of other agencies. ARIA administers licences for the reproduction of sound recordings for certain purposes.

We suggest that the section entitled, "The code of conduct", list the agencies which have not agreed to be bound by the Code of Conduct for Collecting Societies.

4 – Licensing and remuneration for use of copyright material

Although we have not cross-checked all references, we note that footnotes 44 and 45 refer only to the relevant section in Part VB of the Copyright Act. The equivalent sections in Parts VA (s135P) and VC (s135ZZT) should also be referenced.

The section entitled, "Voluntary licences", begins with the sentence, "Where owners of copyright have assigned their rights to collecting societies, collecting societies may enter into voluntary licence agreements with copyright users." Only APRA obtains an assignment of rights from copyright owners. All other collecting societies obtain a licence of the relevant rights.

6 – The tribunal

The second paragraph of this section begins with the sentence, "The ACCC understands proceedings in the tribunal are conducted with as little formality and as quickly as possible." Although this statement is later qualified, we suggest it would be more accurate to refer to the wording of section 164 of the Copyright Act, which provides that "the proceedings shall be conducted with as little formality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit."

We suggest that the material set out in the section headed "Tribunal determination of rates of remuneration" be moved to Chapter 8 ("Remuneration for the use of copyright material").

7 – The role of the ACCC

We find it unusual that the Guide makes no reference in this section to ACCC's enforcement role. As the ACCC states on its website, *"The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Trade Practices Act."* Given that various agencies administering voluntary licences fall outside the Code of Conduct and the jurisdiction of the Copyright Tribunal of Australia, copyright users, owners and collecting societies may need to be reminded that the ACCC could play a role in curbing any abuses of market power or other anti-competitive behaviour of such agencies. It would also place the ACCC's authorisation activity in context.

It is unclear to us whether the Guide is intended to be an example of the ACCC guidelines to which the Copyright Tribunal of Australia may have regard pursuant to s157A of the *Copyright Act 1968* (Cth) (the "Copyright Act"). If this is the intention, we'd suggest that the Guide provide more detail as to how the anti-competitive effect of collecting societies' operations may be minimised. For example, it would be helpful to include a summary of the ACCC's reasoning in authorising the APRA and PPCA licensing arrangements. More concrete examples of the matters listed on page 33 could also be provided.

8 - Remuneration for the use of copyright material

The first paragraph of this chapter begins with the sentence, "The ACCC does not have a role determining the appropriate level of remuneration for the use of copyright material or other licence conditions." This sentence sits oddly with the previous chapter, particularly given the factors taken into account by the ACCC in determining collecting societies' applications for authorisation.

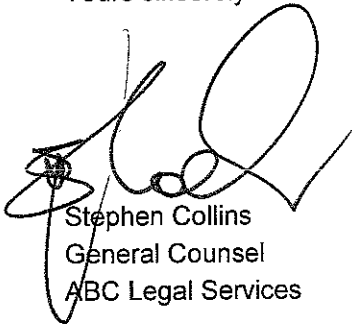
We suggest that the sections entitled, "The problem of market power" and "The role of the tribunal" be moved to a different chapter, so that this chapter deals solely with the calculation of pricing.

In the section entitled, "Price discrimination and licence fee structure", we suggest that an additional paragraph be inserted after the third paragraph which notes that it could also be appropriate to provide discounts to high-volume users, given that the initial administrative costs of entering each licence is more easily offset by the higher volume of licence fees generated.

As also mentioned above, we suggest that the Tribunal's approach to calculating remuneration be moved to this chapter.

Please contact Janine Lapworth of this office (direct line (02) 8333 1024) if you have any questions or wish to discuss the matters set out in this letter.

Yours sincerely



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