



16 February 2007

John Laughlin
Acting Director
Transport & Prices Oversight Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne VIC 3001

Dear Mr Laughlin,

The Australian Library and Information Association (ALIA) welcomes the opportunity to comment on the ACCC Draft *Copyright Licensing and collecting societies: a guide for copyright licensees*.

ALIA is the national professional organisation for the Australian library and information services sector and represents 5000 individual members, 1000 institutional members and the interests of over 10.7 million library users. Most of our members and many of our users are existing or potential copyright licensees.

ALIA supports balanced copyright and intellectual property law that promotes the advancement of society as a whole by giving strong and effective protection for the interests of rightsholders as well as reasonable access in order to encourage creativity, innovation, research, education and learning

ALIA welcomes the recent amendments to the Copyright Act which give the ACCC a role in matters before the Copyright Tribunal where appropriate. This is a belated, but welcome, implementation of one of the recommendations of the *Ergas Report*¹

ALIA congratulates the ACCC on the Draft Guide, which is a succinct and helpful history of, and guide to the role of Copyright collecting societies.

¹ Intellectual Property and Competition Review Committee. *Review of intellectual property legislation under the Competition principles Agreement*, Chairman Henry Ergas, IP Australia, Canberra, 2000

There are some issues of importance to licensees on which we wish to comment

The Tribunal

The draft guide states (p22)

The ACCC understands that proceedings in the tribunal are conducted with as little formality and as quickly as possible. The tribunal has no filing fees and is not bound by the rules of evidence. It closely monitors the preparation of cases to prevent unnecessary delay and expense.

While it is true that proceedings before the tribunal are informal, they are by no means inexpensive. The guide acknowledges this and also that the collecting societies will certainly have legal representation.

This makes such proceedings beyond the resources of most individuals and many representative bodies. Even large institutions, such as the National Library, would be reluctant to be involved in such proceedings and financial considerations would make it impossible for an association such as ALIA to act on behalf of its members.

There is a mechanism for complaints in the Code of Conduct for Collecting Societies, and an annual review is conducted by the Code Reviewer, however this review only covers complaints about the operation of the code.

Recommendation

That there be some alternative process for small claims and issues to be brought before an independent body, such as an ombudsman.

Anti-competitive conduct of collecting societies

The ACCC in the Draft recognises the potential for anti-competitive conduct by the collecting societies. The library community has experienced actual instances of this, where they have endeavoured to negotiate licences for uses that fall outside the library provisions. In these cases they have been faced with absurdly high fees for the proposed use or with an unwillingness and inflexibility to consider new licensing arrangements which fall outside the standard offerings of collecting societies. The outcome of these negotiations often depends on the bargaining power of the library, with libraries in smaller institutions being at a particular disadvantage.

Institutions and individuals are at a particular disadvantage when dealing with APRA, due in part to its inflexibility, but also to its practice of insisting on exclusive licences with its members. The draft Guide mentions (p.33) that

In particular, arrangements will be less anti-competitive if they:

- *do not prevent direct negotiation between copyright owners and users*

While not entirely preventing direct negotiation, APRA's current practice makes any such direct negotiation difficult and time consuming.

A recent important example involving three music copyright collecting societies, AMCOS, APRA and PPCA is attached as appendix 1. Because the institution involved was the National Library, a moderately successful outcome was eventually achieved. It is doubtful whether other libraries with less resources and influence would have pursued the matter.

The question of responsiveness of the collecting societies has also been an issue with some of our members. Often months, if not years, elapse before satisfactory licences can be negotiated or renegotiated. This can leave the licensees or potential licensees in some doubt as to the status of copying within their institution. It also has implications for budgeting.

Licensees are often unaware of the Code of Conduct, or find it irrelevant to their situation

Recommendation

That the ACCC balance the natural monopoly of collecting societies by strengthening the sections of the code that apply to dealings with licensees and by making the existence of the code more widely known to licensees.

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Our Copyright Adviser, Moyra McAllister will be happy to answer any questions you may have regarding this submission. She can be contacted on (03) 9482 6412 or by email at moyra.mcallister@alia.org.au

Yours sincerely,



Sue Hutley
Executive Director

Appendix 1

The National Library, the largest library in Australia and one whose staff have some expertise in copyright law, has experienced considerable obstacles in negotiating licences with APRA, AMCOS and the PPCA for its innovative MusicAustralia service.

MusicAustralia <http://www.musicaustralia.org> provides a free of charge, single point of access to information on Australian music, including scores, sound recordings, websites and a range of other music-related material held in organisations such as libraries, archives and specialist organisations like the Australian Music Centre.

APRA

The National Library considers that content within MusicAustralia such as music performed on performers' websites which had been archived in PANDORA, the Library's web archive, and harvested from PANDORA into MusicAustralia is covered by existing PANDORA license agreements with copyright owners. APRA took a different view, regarding access to this content via MusicAustralia as a separate communication to the public, which should be covered by a separate license and fee. APRA was willing to consider more flexible licensing arrangements in this new business environment but it took some 18 months of continuous negotiations before a mutually acceptable position was agreed. This now serves as a basis for future negotiation on blanket licences with the National Library on behalf of all contributors to MusicAustralia.

AMCOS

MusicAustralia includes some 10 000 items of digitised sheet music, all of it currently very old material judged by the Library to be out of copyright. AMCOS has not so far been willing to consider any collective licensing model which would enable making more recent sheet music material available other than by pay per view. This is despite the fact that all the material under consideration has been long out of print, some is undoubtedly out of copyright, many are orphan works and for some material it is doubtful that AMCOS members would still have rights to the repertoire. In an effort to persuade rights owners that the free access for users via MusicAustralia would not be so great that it would have an adverse impact on the market for the works, the Library proposed a trial to enable such access and monitor its impact. One Australian music publisher agreed to make three items available for the three months trial but the license fee for access to the three items proposed at the insistence of its US parent company, was \$900. Eventually this was reduced to \$300 but at the conclusion of the trial the Library concluded that it would not be possible to reach agreement on a licence fee that the Library considered reasonable for access to a collection of many thousands of items, based on the Library's estimation of relatively low use of the material.

PPCA

PPCA refused permission to allow the Library to copy a few minutes of performed music available to users from websites in MusicAustralia to demonstrate at the launch of the MusicAustralia service. The Library has a separate license with APRA/PPCA for background music played in public at its events and the use of the music in MusicAustralia is covered by other licenses. In order to demonstrate the service to a gathering of some 500 people at the launch in the National Library foyer the short musical extracts needed to be copied to a CD which could be played through the PA system. This was a one-off event, for an audience that included many music copyright owners and featured live entertainment from performers included in

MusicAustralia, such as Robyn Archer and The Stiff Gins. APRA provided a blanket licence for the occasion but PPCA refused to provide an all-inclusive licence that would have enabled a single use reproduction of the selected extracts in a different format, insisting on copyright clearance being sought for each track separately with different publishers, which was not possible in the time frame of the event planning.

These examples indicate the difficulty and sometimes impossibility of negotiating licenses for new services in the current environment even by a large, well resourced Library which is willing to pay a reasonable fee. Ironically the end result is that the music created and performed by Australian musicians is not able to be made easily available to a wider audience.

The National Library's experience of obstacles, delays and expectations of exorbitant license fees from collecting societies for the delivery of music online are in stark contrast with its experience negotiating with a major commercial industry provider of online music. The Library was able to speedily conclude negotiations and sign a contract for the provision of end user access to some 45,000 Australian contemporary musical tracks via MusicAustralia at what it considered a reasonable fee. This content is currently being incorporated into MusicAustralia and will be available in March.