

4 June 2020

Australian Competition and Consumer Commission  
Mandatory news media code consultation  
Via email: bargainingcode@acc.gov.au

### **ACCC media bargaining code concepts paper**

This submission is made by the Copyright Advisory Group to the COAG Education Council (**CAG**). CAG members include Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools Council of Australia. CAG is assisted by the National Copyright Unit (NCU), a small secretariat based in Sydney. NCU operates the Smartcopying website,<sup>1</sup> the official guide to copyright issues for Australian schools and TAFEs.

CAG opposes adopting mechanisms drawn from collective licensing systems to solve unrelated issues related to market power in a specific digital market.

There are two issues CAG would like to draw to the ACCC's attention relating to adopting copyright licensing mechanisms in addressing the use of news media on digital platforms:

1. Unresolved concerns with the existing governance framework for collecting societies that should be considered before adopting any collective licensing mechanisms in a mandatory news code; and
2. The risk of unintended impacts on the broader operation of copyright law and the educational statutory licences from any inclusion of copyright concepts in a news media code.

### **Unresolved concerns over existing issues with the governance of collecting societies**

CAG has long standing concerns about the lack of appropriate governance arrangements for declared collecting societies, and the practical consequences of these deficiencies.

Our concerns are set out in detail at section 5.3 of [CAG's submission](#) to the Productivity Commission's inquiry into Australia's intellectual property framework<sup>2</sup>. In summary, CAG argues that the existing governance arrangements for collective copyright licensing are deficient due to issues including:

- Inadequate legislative or regulatory oversight;
- Lack of transparency in collection and distribution practices from collecting societies;

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<sup>1</sup> <http://smartcopying.edu.au/>

<sup>2</sup> We have provided this submission for the ACCC's consideration. The relevant section is from page 31.

- Lack of meaningful obligations to protect the interests of statutory licensees are taken into account.
- The current lack of visibility in terms of the distribution by collection agencies of funds paid out of public education budgets does not meet the best practice standards required by public sector organisations, which are required to ensure value for money and accountability of public funds.

These concerns were echoed by the (then) Department of Communication in its submission to the Productivity Commission's Issues Paper:

*"In recent decades, worldwide, copyright protection has been greatly expanded in response to the growth of the digital economy and ever changing technologies. However, excessive copyright protection can lead to market dominance by owner distributors, particularly in relation to the control exercised over the dissemination and licensing of copyright material. This has the potential to harm both creators and consumers.*

*There is widespread agreement that the statutory licensing provisions in the Copyright Act are complex and outmoded. **In particular, the methodology for ascertaining licence fees is complicated, cumbersome and does not suit modern copying practices and technology. The Act is inflexible as it does not provide for alternative methods for negotiating licence fees. There are also few requirements to be transparent about how remuneration that is collected is to be distributed to members and non-members of collecting societies.**"*  
(emphasis added)<sup>3</sup>

Some of these issues were raised in the recent Department of Communications [Review](#) into the Code of Conduct for Australian copyright collecting societies. The government has not provided a response to the most recent review of the governance of collecting societies. However in any event these issues were determined to be outside the scope of the review:

*Stakeholders raised a number of issues relating to the operations of the declared collecting societies including their administration as well as their management of undistributed funds. These are outside the scope of this review, and relate to the objectives of the statutory licence schemes and the role of the declared collecting societies in administering these.*

CAG submits that the issues raised in these previous reviews should be carefully considered by the ACCC before any decision to adopt existing copyright licensing frameworks for use as part of a news media code.

### **The risk of unintended impacts on copyright law and the statutory licence**

CAG acknowledges that the ACCC has been instructed by the government to develop a mandatory code that does not impact on copyright law. However these are complex issues, and CAG urges the ACCC to give careful consideration to the potential unintended consequences on Australian copyright law before introducing any new arrangement for the remuneration of news material.

CAG is concerned about the risk of unintended consequences in two respects:

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<sup>3</sup> Department of Communications and the Arts [Submission DR 154](#) (2015) p2

1. ***Impact on the existing fair dealing regime.***

“Reporting the news” is a public interest activity specifically protected by an exception in the Copyright Act 1968 (see for example s42). There are significant public interest rationales for this important exception. It is imperative that any imposed licensing activities in relation to the use of news media be implemented in a manner that does not affect the interpretation of what may be a fair dealing for the purposes of news reporting.

2. ***Impact on the legal principle of insubstantiality.***

It is a fundamental principle of copyright law that small ‘insubstantial’ parts of copyright materials can be copied without infringing the rights of copyright owners. This is an area of law that is uncertain in relation to small extracts such as snippets.

The educational use of text and graphic materials - including some news content - is covered by an educational statutory licence. The Australian school sector pays approximately \$60 million to the Copyright Agency each year for copying and communication that occurs under this licence. CAG would be extremely concerned if any measures adopted in a news code created an implication that activities that may be considered to be ‘insubstantial’ under the Copyright Act 1968 were suddenly subject to additional licensing arrangements.

If you would like any further information on the issues raised in this submission, please contact Ms Delia Browne, National Copyright Director, [REDACTED] or [REDACTED]

Yours sincerely



Delia Browne  
**NATIONAL COPYRIGHT DIRECTOR**