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Australian Writers' Guild

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Australian Writers' Guild Authorship Collecting Society

**Submission to the
Bureau of Communications and Arts Research**

**Review into the efficacy of the Code of Conduct for Australian Copyright
Collecting Societies**

3 October 2017

CONFIDENTIAL

Introduction

The Australian Writers' Guild (AWG) protects and promotes writers' rights – on screen, on stage and on air. On behalf of its members, the AWG works to improve professional standards, conditions and remuneration, to protect and advance creative rights and to promote the Australian cultural voice in all its diversity.

The Guild maintains a strong and continuous voice representing creators of literary and dramatic works. We welcome the opportunity to contribute to this review and look forward to the positive changes that can be made to help support writers and other copyright creators and users.

The Australian Writers' Guild Authorship Collecting Society (AWGACS) was established by AWG to represent the interests of Australian and New Zealand scriptwriters in the collection and distribution of secondary royalties. AWGACS voluntarily submits to the Code of Conduct for Copyright Collecting Societies. AWGACS voluntarily submits to the International Confederation of Societies of Authors and Composers (CISAC).

AWG and AWGACS welcome the decision by the Bureau of Communications and Arts Research (BCAR) to specifically include statutory licences and Declared Societies in this review.

As representatives of copyright creators both domestically and internationally; having established and run a small voluntary collecting society, being a member of Screenrights domestically, and a member of CISAC internationally, working closely with the largest authors collecting societies in the world, we understand the complexity and cost benefit judgements required for the efficient and equitable operations of collecting societies.

We are aware of the range of material and previous recommendations BCAR are considering, and the review of international practices and guidelines. We welcome the opportunity to consult with BCAR on our experiences domestically and internationally as they relate to the broad parameters of the Review.

For the purpose of this submission we will focus on the matters about which we consider our contribution may be the most valuable to the Review; where we consider our members interests are most acutely affected; and where our position may not be adequately reflected in submissions being made by other stakeholders. Our submission will focus on statutory licences, Declared Societies and the rights of original copyright creators as they relate to the terms of the Review.

Executive Summary

The original purpose of the Code, and indeed a primary purpose of this and previous similar reviews, is to ensure the efficient, effective and equitable operation of collecting societies.

To make an informed assessment of such operations, it is essential to disaggregate the types of collecting societies covered by this review, and the stakeholders to whom the obligation for efficiency, effectiveness and equity is owed.

In particular, we consider that it is important to differentiate between societies that administer licences from those that do not, and it is critical to differentiate societies that administer statutory or compulsory schemes from those who administer voluntary schemes.

Further it is important to disaggregate the affected stakeholders when considering efficiency, effectiveness and equity. The lack of such distinctions is a fundamental weakness in the current regulatory environment.

The nature of compulsory schemes is that they remove by statute the legal rights otherwise conferred on copyright creators in return for a right of remuneration. While there is the potential for market distortion as a result of all types of collective administration, the role of government oversight with regard to the natural occurrence of voluntary monopolies engaging in commercial negotiations, is quite different from the proper role for government in governing the operations of a society with a government mandated monopoly to represent the interests of those whose ability to engage in commercial negotiations for the use of their work has been removed by the statutory schemes. The cost benefit analysis of statutory schemes is further altered by the vertical integration of rights holders (from original creators of copyright works, to the aggregators of work who create copyright material other than works, to the investors, distributors and broadcasters of that material) within one monopoly administrator.

The existing regulatory mechanisms, and, in fact, past reviews of the mechanisms, focus heavily on the balance between the rights and needs of users vis-a-vis those of the rights holders the collecting societies represent. While this balance is understandable when the rights being negotiated have been voluntarily conferred, in cases where they are compulsorily removed by statute, those whose rights are affected should be afforded greater regulatory protection and oversight.

Currently, there is no independent enforceable regulatory oversight of declared societies and there is no recourse for rights holders who are unsatisfied with the outcome of complaints or disputes with the declared society who represents them, other than by litigation. This is an unsatisfactory level of governance for a government scheme which confers a multi-million-dollar monopoly mandate on a private company.

AWG and AWGACS seek recommendations from BCAR which apply clear, enforceable and independent oversight of declared societies commensurate with the government mandates they have been given; and for the original creators of works affected by the statutory licences to be granted a declaration to be represented independently from the aggregators, investors and distributors of those works, such that one society cannot hold the declaration for different classes of rights holders.

We note that we have limited our specific comments on the current operations of declared societies to the Audio-Visual Copyright Society trading as Screenrights (**Screenrights**) with whom we have comprehensive experience.

The terms of reference of the ALRC's Issues Paper *Copyright and the Digital Economy* of 20 August 2012 outlined the need for statutory licences under the Copyright Act¹ to guarantee fair remuneration for creators of copyright works whose rights have been rarely managed actively or effectively under the current statutory framework; decrease transaction costs for copyright owners to use licensing systems thereby reducing prohibitive barriers to entry to the digital economy; and improve access to works and enhance legal certainty for non-commercial public users. We are of the view that the statutory licensing of copyright works in Australia should be measured against these values.

Given the issues the Review is seeking to address we highlight the following specifics:

Lack of data transparency - The existing statutory licensing schemes are not transparent about royalty collection and distribution. While there is extensive aggregated data available there is no facility to address the concerns of licensees or the original copyright creators about who, or even which category of rights holder, is receiving what percentage of royalties.

¹ Available here: <http://www.alrc.gov.au/publications/copyright-ip42> (accessed 22 October 2015).

Further, Screenrights does not disclose any data about which audio-visual titles it has collected royalties for.

System inherently unfair to audio-visual authors - Screenrights allows large owners and distributors of films to make wholesale warrants on their entire catalogue in the Screenrights system. In practice, scriptwriters are often in a silent competition with broadcasters for Australian royalties for the scripts they have written. Moreover, this silent competition is well and truly over, with royalties having been paid to another party, long before the scriptwriter or their representative knows there were any funds to claim to begin with. In many cases, they may never even know there were funds to claim at all.

Balance between efficiency, effectiveness and equity - The individual contract-by-contract approach used by Screenrights makes collective management of distribution largely redundant as it reduces such management to a transaction by transaction approach, with each transaction being made the subject of contract interpretation and adjudication.

Screenrights has paid and continues to pay royalties to entities immediately upon receipt of licence fees for all titles they have registered, unless authors or others have specifically registered their interests. For the most part authors are also required to enter into detailed conflict resolution processes and to produce evidence to support their claims. As a result, the system favours large owners and distributors of copyrighted works and their agents and aggregators who have the financial resources, incentives and market knowledge to put in blanket claims for entire catalogues, without any independent review by Screenrights. Nor does Screenrights give other stakeholders any access to data about the titles for which they have collected royalties. Screenrights system ostensibly requires that an extract from almost every contract needs to be sighted by it and “adjudicated” prior to any payment being to be made to an author.

On 3 March 2016, the AWG and AWGACS filed a case in the Federal Court of Australia against Screenrights over their failure to fairly protect and represent Australian and international screenwriters and their rights. We have been forced to take this step as a last resort, following years of negotiation and attempts to resolve the matter directly with Screenrights in the absence of any regulatory body overseeing the society, or any alternate means of review or dispute resolution. We note that the Code Reviewer specifically stated that the dispute was beyond his

remit and would need to be litigated if the parties could not reach agreement. This is despite the fact that the dispute is about the core principles and purpose of the Code, and between the representatives of an entire class of copyright creator and the declared society mandated to represent their interests.

The fact that there is no independent authority to review claims that Screenrights is failing in its duty as a declared society to an entire class of copyright creator, and that the only recourse for original creators in such circumstances is protracted and expensive litigation, clearly demonstrates the failure of the current regulatory regime. We note that the Discussion Paper for this review cites the Federal Court litigation brought by AWGACS and AWG and states that ‘the outcome of these proceedings may go some way to helping understand whether governance arrangements need strengthening to ensure that the societies are promoting all members rights and interests regardless of differing power or influence’.

We refer BCAR to the specifics of Australian Writers’ Guild Limited ACN 002 563 500 & Anor v Audio-Visual Copyright Society Limited ACN 003 912 310 (NSD319/2016) in support of our position that the current governance arrangements are not promoting the rights and interests of all members regardless of power or influence.

We note that reliance on the outcome of litigation brought by one of the least powerful right holder groups potentially being used to gauge the efficacy of current governance arrangements itself demonstrates the failure of the current governance arrangements.

We understand that the users of the licences remain willing, for the most part, to pay for the licences, but they are strongly committed to their monies being directed as intended to creators and to the data regarding such direction being transparent. As the representatives of the creators of original audio-visual works we consider that the interests of the creators and users of the licences are closely aligned in this respect.

Questions raised in Discussion paper	AWG/AWGACS comments
To what extent is the Code meeting its original purpose: to ensure collecting societies operate ‘efficiently, effectively and equitably’? If it is not meeting its original purpose, do the Code’s stated	We consider that from the perspective of the copyright creators we represent, the Code is adequate for the purpose of voluntary societies, particularly where ACCC oversight is available as a supplementary regulatory mechanism for large,

<p>objectives need to be revisited to better deliver on its purpose?</p> <p>How effective is the Code in regulating the behaviour of collecting societies? Does it remain fit for purpose?</p> <p>Is there sufficient clarity as to how the Code interacts with the broader regulatory framework? Should the Code be modified to help parties better understand the broader legislative obligations of collecting societies?</p> <p>Considering the differences in the way different collecting societies operate, is a framework in which a single code applies to all societies effective?</p>	<p>effectively monopoly operators or 'opt-out' licensing schemes.</p> <p>Any modification to the Code, its objectives, or application, to improve the performance of collecting societies should include differentiation as between various types of collecting societies, particularly noting the difference between societies who hold licences over their members work, where such licences operate for the primary exploitation of the members work and can prevent individual commercial negotiation for such primary use.</p> <p>The Code has failed to meet its original purpose with respect to declared societies.</p> <p>It is not fit for this purpose and modification of the Code would not suffice. Overseeing the administration of statutory schemes requires far more stringent, independently enforceable regulatory mechanisms. The Attorney General's Guideline's provide some assistance however they require supplementation, interpretation and regular review of their application by an external authority. It is inappropriate for the statutory schemes to be administered by private companies with no government oversight.</p>
<p>What have been the impacts of the internet on the collecting society business model?</p>	<p>The continued evolution of internet-based distribution models for audio-visual material creates an inability for individual creators to anticipate and monitor the use of their work. The collective negotiation and management of secondary uses for this type of distribution provides an opportunity for creators to benefit from the ongoing use of their work without creating obstacles for users.</p> <p>This opportunity is not currently realised in Australia where there is confusion about the application of statutory licences and the role of collective management organisations in administering them.</p>
<p>What administrative costs has digitalisation enabled collecting societies to reduce or avoid? How has digitalisation impacted on the way collecting societies collect and distribute funds?</p>	<p>The use of internationally centralised data systems has dramatically increased the ability of small collecting societies to interact with other societies internationally and to track the creators of works for whom royalties can be collected.</p> <p>Such centralised data systems require investment of time and money which is costly in the early stages but has great long-term benefits.</p>

	<p>Screenrights has failed to use any internationally recognised data exchange system for authors of audio-visual work. It uses these systems only for the data used by those eligible for its voluntary schemes.</p>
<p>Should there be more guidance around the treatment of undistributed funds held in trust? If so, what specific issues should this address?</p>	<p>There are international norms for the use of undistributed funds, including to what extent cultural funds are appropriate. The need for transparency and reciprocity internationally provides some of its own safeguards in this regard, however placing too much emphasis on this issue, absent understanding the practices and policies which guide them, can be misleading.</p> <p>Collecting societies should be held accountable for the methods and practices used to distribute as equitably as possible. The emphasis on undistributed funds can create false positive outcomes in a rush to <i>quickly</i> distribute funds at the expense of accuracy and fairness.</p> <p>It is our experience that some large multi-repertoire societies (both domestic and international) can favour distributing the money quickly rather than accurately which favours some rights holder groups over others. Generally, those favoured are the larger and more dominant groups and individuals.</p> <p>We have had to engage in extensive negotiations over several years both domestically and internationally to recover royalties paid in error to third parties not entitled, but who claimed monies owing to our members. The distribution policy of the societies in question emphasised having very low levels of undistributed funds over accuracy and verification of claims.</p>
<p>How effective is the Code in facilitating efficient, fair and low-cost dispute resolution for members and licensees? What alternative models could be considered to provide these outcomes?</p>	<p>The Code provides no fair low-cost dispute resolution options for classes of rights holders, or members who are not satisfied with the representation being afforded them by their collecting society. With regard to declared societies where representation is compulsory, this is particularly unsatisfactory.</p> <p>With regard to disputes over particular claims the Code guidelines are fair, but the process is inadequate for any large volume disputes where multiple transactions and complaints are involved.</p>

<p>Does the Code Reviewer have sufficient powers to make collecting societies accountable for their compliance with the Code? If not, what alternative monitoring and review process could be introduced to improve outcomes for members and licensees?</p>	<p>Publication of the Reviewers detailed review and findings are an effective motivation for compliance for voluntary societies.</p> <p>As outlined above compulsory, independent, regular review by an independent body with enforcement mechanisms is appropriate for declared societies</p>
<p>Does the Code need to be improved to better ensure collecting societies act in the best interests of their members? How could members be given a greater say in a collecting society's key policies and procedures, such as the distribution of funds and use of non-distributable amounts?</p>	<p>The Code is fit for purpose as between balancing individual members best interests in a representative voluntary society and the operations of the society itself. However, for the ongoing strategic decisions of an organisation Board make up and the rules governing them is essential to the fair and proper representation of members interests. The Code no longer refers to representativeness.</p> <p>Traditionally authors societies are governed by representatives from the rights holder groups who oversee the management and operations to ensure they are in the members best interests. In democratic, representative governance models with maximum terms the members have several layers of safeguard.</p> <p>In multi-repertoire societies with dominant classes of rights holders, or organisations with block voting procedures favouring those with the highest income, or organisations with no maximum term for board members, and no guaranteed appointment by a representative body of minority interest holders, the interests of minority members or potential members is at risk.</p> <p>With regard to Screenrights we note that the Screenrights rules do not provide a maximum term for Board members; some Board members, such as Jack Ford, have been on the Board for 20 years; there was no scriptwriter on the Board at all during the period 2001 to 2016; the Board of Screenrights has been dominated by particular stakeholder groups since it began.</p> <p>Screenrights exercise a weighted voting system whereby each member receives one vote, plus one additional vote for every dollar they received in the prior year up to a maximum of 15% of the entire available votes. This system disadvantages the most vulnerable members including new members, members claiming only for works they have created rather than large repertoires of works to which they have acquired rights by other means, and members who are not entitled to claim for the film portion which is the</p>

	<p>largest allocation by a large measure. Rather, this system advantages those who are already benefitting most from the status quo.</p> <p>There is no delineation between governance of, and royalties received from, the voluntary schemes and the Statutory Schemes when determining voting entitlements. This system disadvantages stakeholders who are not eligible for the voluntary schemes, those being all rights holders other than those claiming for the film entitlement.</p> <p>Rules governing Board membership should be central to any new governance measures for declared societies.</p>
<p>What would be the costs and benefits of prescribing the Code under legislation? What factors should be considered and which are most important in weighing the costs and benefits?</p>	<p>Legislative guidelines for voluntary societies would be out of step with regulation in other sectors, particularly where there are very specific concerns which can be addressed in less cumbersome expensive ways.</p> <p>Statutory guidelines for the administration of statutory licenses is essential. It is inappropriate for the statutory schemes not to be regulated in this way.</p>

Yours sincerely,



Jacqueline Elaine
Group CEO

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