

# SUBMISSION TO COPYRIGHT COLLECTING SOCIETIES CODE OF CONDUCT 2021

26 July 2021

Universities Australia welcomes the opportunity to make a submission to the annual review of the Copyright Collecting Societies Code of Conduct.

## INTRODUCTION

The stated objectives of the Code of Conduct include "promoting confidence in Collecting Societies and the effective administration of copyright". It is the view of Universities Australia that this objective will not be achieved until the regulatory regime governing collecting societies is reformed to impose effective oversight of the activities of these bodies. Asking whether declared statutory collecting societies, which operate with monopoly status, have complied with their own, non-mandatory Code of Conduct, does not create a framework of ensuring accountability. Rather, it asks whether they played by their own rules or not.

In its 2017 submission to the Government's review of the Code of Conduct for Copyright Collecting Societies, Universities Australia raised concerns regarding the lack of actual oversight of declared collecting societies. There is an absence of an effective check on the ability of these organisations – Copyright Agency in particular – to exploit their monopoly positions to engage in what amounts to 'rent seeking' from publicly funded entities. Events since 2017, including Copyright Tribunal proceedings initiated by Copyright Agency against the university sector, have only heightened those concerns, and Universities Australia will continue to advocate for appropriate reform.

We do not consider that the existing regulatory regime, including the voluntary Code of Conduct, is capable of ensuring the requisite degree of accountability, transparency and fair conduct on the part of declared collecting societies. Nevertheless, we use this opportunity to highlight the following ways in which Copyright Agency has, in our view, failed to fully comply with both the letter and the spirit of the Code of Conduct in the 12 months to 30 June 2021.

- Failure to adopt fair and reasonable policies, procedures and conduct in connection with the setting of licence fees;
- Failure to ensure that its dealings with licensees are transparent; and
- Lack of transparency and inappropriate dealings in respect to the use of statutory monies to fund advocacy.

We urge the Code of Conduct Reviewer to have regard to these concerns when considering whether Copyright Agency has carried out its statutory role as declared collecting society conscientiously, transparently, and in good faith.

## **FAILURE TO ADOPT FAIR AND REASONABLE POLICIES, PROCEDURES AND CONDUCT IN CONNECTION WITH THE SETTING OF LICENCE FEES**

Copyright Agency appears to consider its role to be ensuring that statutory licensing income continues to grow, regardless of whether universities and other licensees rely less on the licence.

The recent Copyright Tribunal proceedings between Copyright Agency and universities resulted from Copyright Agency refusing to acknowledge that a dramatic decline in the amount of statutory licence copying occurring in universities should result in a reduction in the amount paid for that copying.

The universities tendered evidence showing that the commercial databases to which they subscribe enable them to make millions of resources available to their students without the need to rely on the statutory licence. The universities also tendered expert statistical evidence that showed that universities' reliance on the statutory licence has been declining at a statistically significant rate since 2000. This reduction is due largely to universities relying more on commercially licensed electronic content, rather than making copies of printed works and communicating these to students in reliance on the statutory licence.

In response to the universities' submissions, Copyright Agency argued that the Copyright Tribunal should determine an equitable remuneration according to a formula that had no connection with the amount of statutory licence copying actually occurring; that is, a rate per equivalent full-time student. Such an approach to calculating equitable remuneration would see Copyright Agency being paid more each year despite the continued decline in the amount of statutory licence copying actually occurring.

Universities Australia submits that it should not be necessary for universities (or other educational institutions) to engage in costly litigation in order to achieve a fair outcome with respect to statutory licence fees.

## **FAILURE TO ENSURE THAT ITS DEALINGS WITH LICENSEES ARE TRANSPARENT**

Copyright Agency fails to adopt a transparent approach to setting fees for non-profit independent educational institutions. In 2021, these institutions are charged \$49.47 per equivalent full-time student regardless of whether they copy one page per student, 100 pages per student, or no pages per student.

In the absence of an industry body to negotiate on their behalf, these institutions are faced with the option to 'take it or leave it' which takes no account of their actual reliance on the statutory licence.

Quite apart from the unfairness of imposing a rate that has no connection with the amount of statutory licence copying actually occurring – and which increases each year regardless of any changed trend in copying – there is no transparency around the way in which Copyright Agency has set this rate. This became starkly apparent during the 2020 Copyright Tribunal proceedings against universities.

## **LACK OF TRANSPARENCY AND INAPPROPRIATE DEALINGS WITH RESPECT TO THE USE OF STATUTORY FUNDS TO FUND ADVOCACY**

In the absence of flexible copyright exceptions, the education sector is required to pay under the statutory licence for uses that would cause no harm to rights holders, including the use of orphan works and freely available content for which no one expected payment. By way of illustration, in the 2020 Copyright Tribunal proceedings, Copyright Agency CEO Adam Suckling gave evidence that Copyright Agency considered the following freely available internet content downloaded by The University of Sydney as remunerable under the statutory licence:

- An image downloaded from the Cancer Council of NSW website. Copyright Agency would remunerate the Cancer Council of NSW for use of this image.
- Screenshots of Heath Ledger in the movie Dark Knight. Copyright Agency would remunerate Warner Brothers Pictures International for use of this image.
- Screenshots from various James Bond movies. Copyright Agency would remunerate Sony Pictures for use of these images.

- Front cover of The Cambridge Companion to *To the Lighthouse*. Copyright Agency would remunerate the Chancellor Masters and Scholars of the University of Cambridge for use of this image.
- Pictures of meat downloaded from the World Cancer Research Fund website. Copyright Agency would remunerate the World Cancer Research Fund for use of these images.
- Out of copyright drawing by Jean Honoré Fragonard (who died in 1806). Copyright Agency would remunerate the Metropolitan Museum of Art (USA) for use of this image.

The reforms that the education sector have been advocating for would permit such content to be used without payment. Copyright Agency is advocating strongly against these reforms.

Universities Australia has for many years raised concerns regarding the way in which Copyright Agency uses money received from the education sector to fund advocacy against sensible copyright reform. Copyright Agency has not yet published its 2020-2021 annual report, but according to the most recently available annual report Copyright Agency spent \$500,000 on this activity in 2019-2020. No information is provided as to exactly how the money was spent other than that it was spent on "public awareness and advocacy".<sup>1</sup>

This is particularly troubling given that the money that Copyright Agency is spending on its advocacy is money that it would no longer receive from universities and schools if the reforms that the education sector is seeking were enacted. The rhetoric relied on by Copyright Agency in advocating against these reforms – that they would harm authors – is contradictory to Copyright Agency's practice of retaining these monies for their own activities. If authors are not currently receiving this money, they cannot suffer harm if universities are no longer required to pay it.

It is our submission, there is something very broken in a governance regime that provides scope for this to occur.

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<sup>1</sup> Copyright Agency Annual report 2019-2020 para 14.8.1.