

SUBMISSION TO TRIENNIAL REVIEW OF CODE OF CONDUCT FOR COPYRIGHT COLLECTING SOCIETIES

8 December 2021

Universities Australia welcomes the opportunity to make this submission to the Triennial Review of the Code of Conduct for Copyright Collecting Societies.

For many years, Universities Australia has made submissions to the Triennial Reviews and Annual Compliance Reviews and our position remains the same. The Australian statutory licensing system is broken. The existing regulatory regime does not ensure accountability, transparency or fair conduct on the part of the declared collecting societies. To allow declared collecting societies to create their own voluntary Code of Conduct and then determine if they have complied with it is an inappropriate mechanism for ensuring accountability. As custodians of royalties collected from publicly-funded educational institutions under a legislated declaration, there must be more robust oversight of their operations.

In our view, the obligations that declared collecting societies owe both members and licensees regarding use of statutory funds, as well as the standards of transparency that the collecting societies are required to meet, should be mandated by Government at least partly on the basis that there is a clear market failure in the existing arrangements. Universities Australia would support a comprehensive transparency review into the declared societies as a first step in moving towards a mandated accountability system.

Universities Australia has continued at each opportunity to make submissions to this effect, including as part of the most recent Annual Compliance Review undertaken by The Hon Kevin Lindgren AM, SC. While we recognise that the Annual Review relates to compliance with the Code, rather than oversight of the Code itself, we take the view that it is important at each opportunity to remind interested parties that the system of accountability for declared societies is, in general, not fit for purpose.

We urge the Triennial Code Reviewer to consider the attachments to this document as Universities Australia's position on this matter. Attachment A is Universities Australia's submission to the most recent Annual Code of Conduct Compliance Review and Attachment B is our submission to the consultation on the Code of Conduct undertaken by the Department of Communications in August 2017.

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".¹

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.

¹ Copyright Agency Annual report 2019-2020 para 14.8.1.

ATTACHMENT B

UNIVERSITIES AUSTRALIA SUBMISSION

REVIEW OF THE CODE OF CONDUCT FOR COPYRIGHT COLLECTING SOCIETIES

SEPTEMBER 2017

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EXECUTIVE SUMMARY

Universities Australia agrees with the Productivity Commission that there is a need to strengthen the governance and transparency arrangements that apply to declared collecting societies.

- The current regime does not impose appropriate obligations of transparency or accountability. There is insufficient transparency around how declared collecting societies are using statutory funds, as well as who benefits from the remuneration paid under the statutory licence.
- Declared collecting societies have an inappropriate degree of discretion regarding how statutory funds will be used.
- There is no effective oversight of declared collecting society compliance in the current governance arrangements. The current triennial Code Review process has been ineffective in addressing concerns that have been raised by statutory licensees.

Declared collecting societies - and in particular, Copyright Agency - have strayed beyond what UA considers to be their appropriate role. Copyright Agency has adopted a commercial, profit-making approach to administering the statutory licence. This approach appears to regard universities' changing copying practices, that have led to universities relying less and less on the statutory licence, as a "threat" to its business model. To address this "threat" Copyright Agency is taking steps to ensure that statutory licensing income continues to increase. While this kind of approach may be appropriate for commercial licences, it is not an appropriate way to administer the statutory licence. It is therefore timely to consider whether operational separation between the commercial and statutory functions of declared collecting societies is needed to ensure that commercial imperatives are not applied to statutory functions, and that statutory funds are not used for non-statutory purposes.

There is currently no effective check on the ability of declared collecting societies to exploit their monopoly position to engage in what amounts to rent seeking from publicly funded entities. The high cost of Copyright Tribunal proceedings has greatly limited the scope of the Copyright Tribunal to play this role. The ACCC should be given an oversight role over declared collecting societies with a view to ensuring that they do not use their market power in a way that is contrary to the public interest.

The shortcomings cannot be fixed through Code of Conduct amendments. Broad reform is required that includes:

- Legislative obligations for declared collecting societies to have regard to the interests of licensees as well as their members;
- Mandatory guidelines, to be issued by the Minister, that set the standards of transparency and accountability that declared collecting societies are required to meet; and
- An effective mechanism for ensuring compliance with such guidelines. This role could be played by the ACCC.

INTRODUCTION

Universities Australia welcomes the opportunity to contribute to this review.

We agree with the Productivity Commission that there is a need to strengthen the governance and transparency arrangements that apply to declared collecting societies.

The two declared collecting societies - Copyright Agency and Screenrights - have a central role to play in the educational copyright framework. Their declared status, and the monopoly position that they hold, make it vital to ensure that the governance arrangements that apply to them reflect the highest standards of accountability and transparency.

The current regime does not, in our view, meet this standard. There is no effective oversight of how declared collecting societies use money paid by the education sector when those funds cannot be distributed to rights holders. There is limited transparency about who benefits from payments made by the education sector. There is also no effective check on the ability of declared collecting societies to exploit their monopoly positions to engage in what amounts to rent seeking from publicly funded entities. We therefore welcome the involvement of the Australian Competition and Consumer Commission (ACCC) in reviewing the current arrangements.

The concerns that we raise in this submission will not be addressed simply by making changes to the Code, nor by making compliance with the Code mandatory rather than voluntary. In our submission, the starting point for any consideration of what governance arrangements should apply to declared collecting societies is two questions:

- What is the role of a declared collecting society? and
- Are the two declared collecting societies straying beyond that role?

UA is strongly of the view that the role of a declared collecting society is to administer the statutory licence transparently, efficiently and with accountability to licencees: no more, no less. The Copyright Agency has strayed beyond that role. It has adopted a commercial approach to carrying out statutory functions. This approach appears to be based on a perception that the changing copying practices - that have resulted in universities relying less and less on the statutory licence - pose a threat to Copyright Agency's "business model" and that this threat must be addressed.

This submission outlines the problems with the existing regulatory arrangements that apply to declared collecting societies and how these problems can be fixed.

1 PROBLEMS WITH THE EXISTING ARRANGEMENTS

1.1 INSUFFICIENT OVERSIGHT OF THE USE OF STATUTORY FUNDS

Universities Australia has two concerns regarding the use of statutory funds by Copyright Agency:

- there is a lack of transparency concerning what Copyright Agency does with the statutory funds that have not been distributed to rights holders (that is, the so-called roll over funds); and
- there is an inappropriate degree of discretion afforded the Copyright Agency to determine how it will use these funds.

1.1.1 ROLL OVER FUNDS

Each year, Copyright Agency is unable to distribute some of the money that it receives under the educational statutory licence. Copyright Agency annual reports make it clear that reasons include:

- Copyright Agency was unable to identify or locate the rights holder (that is, the work is an “orphan work”);
- The rights holder was notified that their work had been copied, but opted not to claim the payment;
- The amount owing to the relevant rights holder fell below the threshold which Copyright Agency sets for making distributions; and
- The rights holder was from a country where Copyright Agency has no reciprocal agreement with the relevant collecting society.

These undistributed funds are retained in trust for four years after which time they are “rolled over”.

The amounts involved are significant. In 2015, the amount of money that was rolled over under the educational statutory licence was \$2.5 million.¹ Of this, the amount for orphan works was \$566,285, and the amount where the rights holders had not bothered to claim the payment (despite being notified by Copyright Agency) was \$1.3 million.²

1.1.2 TRANSPARENCY AROUND ROLL OVER FUNDS

Until recently, Copyright Agency had a long-standing practice of distributing these roll over funds as a windfall to Copyright Agency members whose works were copied in the year that the money was rolled over, even though these rights holders had no connection with the works that had been copied by

¹ See [Copyright Agency Annual Report 2015/16](#) p 35

² Ibid

universities and schools. In submissions to the ALRC during its Copyright and the Digital Economy review, and in submissions to the Productivity Commission, Universities Australia raised concerns about this use of roll over funds paid for by licencees.

UA's submission in response to the Productivity Commission's final report, noted that we became aware in early 2017 that in 2013, Copyright Agency implemented a *new* practice regarding the treatment of roll over funds. Rather than paying this money to members, Copyright Agency opted instead to retain the rolled over funds - together with all interest earned on statutory licence payments - for use in its anti-fair use advocacy. As at 30 June 2016, Copyright Agency had amassed **\$15.5 million** in a "Future Fund" earmarked for spending on "communications, research and advocacy" in relation to the copyright reforms recommended by the ALRC³ (and now the Productivity Commission).

The change in policy that resulted in the existence of the Future Fund was not clearly communicated to licensees and other stakeholders in Copyright Agency's annual reports. There was no mention of it in Copyright Agency's 2013/14 Directors' Report and Financial Report. The first mention of the Future Fund appears in the 2015 Directors' Report and Financial Report:⁴

In June 2013, the Board considered the issues which would arise in the event of a sudden and material decrease of revenue following a substantial change to the legislative structure or the unremunerated exceptions in the Copyright Act 1968.

It was resolved that in order to safeguard and manage the rights of members including but not confined to such necessary actions in communications, research and advocacy, it would establish a Future Fund to provide adequate reserves to resource such activity to the extent required consistent with its prudent judgement.

The **only** reference to this in the 2014/15 annual report is the following statement, together with the following footnote:

An allocation that has not been paid to a rights holder after four years is 'rolled over'. The Board determines how funds rolled over are applied for the benefit of members. 83

83 See Note 4 in Notes to Trust Account Statement in Directors' Report and Financial Report regarding the allocation of amounts rolled over to the Future Fund in 2014–15.

This is a significant change in Copyright Agency's practice in its treatment of the roll over money, **which comes from publicly funded educational institutions and government**. It is a matter of great concern that licencees – who strongly support fair use - would only have become aware that their licence fees would be used to advocate against them - by reading the separate Directors' Report and Financial Report. It can reasonably be assumed that few stakeholders would take the trouble to read beyond the annual report if they were familiar with Copyright Agency's long standing practice of distributing roll over funds to

³ See <http://copyright.com.au/wp-content/uploads/2015/04/CA-financials-2015-FinalLR.pdf> p 26

⁴ <http://copyright.com.au/wp-content/uploads/2015/04/CA-financials-2015-FinalLR.pdf> p 26

members. There was no reason to suspect that this footnote signalled that Copyright Agency had decided to retain roll over monies for its own purposes. Burying this detail of a major change in Copyright Agency policy in an ancillary report is not acting transparently. In fact it could be interpreted as a means for ensuring that this was not drawn to the attention of licencees.

We also find it concerning that Copyright Agency took no steps to communicate its change of policy when Universities Australia and other education sector stakeholders raised concerns with the Productivity Commission based on their mistaken belief that Copyright Agency was continuing to distribute roll over funds to members. Nor was there any attempt by Copyright Agency to clarify its practice in its response to the Productivity Commission's final report, even though the report made it clear that the Commission was under the misapprehension that Copyright Agency was continuing to distribute these funds to rights holders. Copyright Agency **only** clarified its position when the existence of the Future Fund was reported by Peter Martin in *The Age* and the *Sydney Morning Herald* in April 2017.⁵ Mr Martin said Copyright Agency had told him that it planned to "cap the future fund at \$15 million" and begin distributing money collected for orphan works to its members once again.

1.1.3 DISCRETION OVER THE USE OF ROLL OVER FUNDS

It is apparent from a review of Copyright Agency's distribution policies over the last ten years that the agency has adopted differing views about what it is legally entitled to do with roll over funds. By way of example: Copyright Agency's 2007 Distribution Policy⁶ contains the following statement at page 7:

*"At the end of the trust period, the undistributed money is rolled over into the next distribution... The Board has some discretion in the allocation of these funds, however they **must** remain a distribution to rightsholders."*

Copyright Agency's 2011 Distribution Policy⁷ contains the following statement at page 16:

*"At the end of the trust period, the amount of an unpaid allocation from the statutory licence fees **must** be included in a distribution pool for statutory licence fees in the next accounting period"*

The most recent policy - the 2016 distribution policy⁸ contains the following statement at page 22:

"On expiry of the trust period, an unpaid allocation is rolled over. The Board determines how the allocated amount will be reapplied. Once an allocation has rolled over, a member has no further entitlement to it.

⁵ "Copyright Agency diverts funds meant for authors to \$15m fighting fund"

<http://www.smh.com.au/federal-politics/political-news/copyright-agency-diverts-funds-meant-for-authors-to-15m-fighting-fund-20170420-qvol0w.html>

⁶ No longer on the Copyright Agency website, but able to be accessed via the web archive:

https://web.archive.org/web/20090917052704/http://copyright.com.au/assets/documents/distribution_rules_06_07.pdf

⁷ Again, no longer on the Copyright Agency website, but able to be accessed via the web archive:

<https://web.archive.org/web/20120524063002/http://copyright.com.au/assets/documents/Distribution%20rules%202011.pdf>

⁸ <https://static-copyright-com-au.s3.amazonaws.com/uploads/2016/12/R01818-distribution-policy-Nov-2016.pdf>

Currently, amounts rolled over are applied to maintain the indemnity fund, and to offset deductions for operating costs".

It appears from this that Copyright Agency took the view as recently as 2011 that it was **required** to distribute this money to rights holders rather than retain it for its own purposes. There is no explanation given as to why Copyright Agency adopted a different view of its legal obligations in 2013 when it began to pay roll over monies into the Future Fund.

It also appears that from at least November 2016 (when the new distribution policy was released) the undistributed funds were being paid into what is referred to as an Indemnity Fund; that is, while they are no longer being paid into the Future Fund, they were not being distributed to rights holders. As we discuss above, Copyright Agency recently told Peter Martin that it planned to begin distributing money collected for orphan works to its members once again. We have no way of knowing whether or not this has actually occurred.

According to Copyright Agency's 2015-16 Directors Report and Financial Report, the Indemnity Fund reserve stood at \$2,944,246 as at 30 June 2016.⁹ There is no information provided about what the purpose of the Indemnity Fund is. There is only a statement in the Directors Report and Financial Report to the following effect: "*The company has for some years established an Indemnity Fund*".

The 2014-15 Directors Report and Financial Report contain no reference to an Indemnity Fund.¹⁰ In other words, while such a fund appears to have existed "for many years" as at 30 June 2016, its existence was impossible for stakeholders to discern prior to the 2015-16 report.

UA believes it is not appropriate for a declared collecting society to itself determine whether roll over funds are distributed to rights holders or instead used for some other purpose. Nor is it appropriate for money from statutory licences to be directed to funds, such as the Indemnity Fund, whose purpose is completely unknown to licensees or members.

1.1.4 USE OF STATUTORY FUNDS TO FUND ADVOCACY

Copyright Agency created the Future Fund in response to proposed law reforms that it said were a "challenge to our business model".¹¹ The reforms that it was concerned about included the enactment of more flexible copyright exceptions that were being supported by the entire Australian education sector, including Universities Australia.

UA is concerned that a declared collecting society appears to have power to use statutory funds – paid by licensees – to pay for advocacy campaigns that oppose positions held by those same licensees. These funds should be distributed back to the licensees.

⁹ <https://web.archive.org/web/20170220042008/http://copyright.com.au/wp-content/uploads/2015/04/TCA4906-Copyright-Financials-30-June-2016.pdf> p 26

¹⁰ <https://web.archive.org/web/20160317065639/http://copyright.com.au/wp-content/uploads/2015/04/CA-financials-2015-FinalLR.pdf>

¹¹ <http://copyright.com.au/wp-content/uploads/2015/04/CopyrightAgency-AGMMinutes-2012-13.pdf>

Universities and schools have consistently advocated for more flexible copyright exceptions. In the absence of flexible exceptions we are currently 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 internet content. A flexible exception, such as fair use, would mean that educational institutions would no longer need to pay to copy this content. This would enable the education sector to negotiate more appropriate statutory licence fees that better reflect the true value of institutional copying.

Copyright Agency has never disputed our claim that no rights holder would be harmed if universities and schools did not have to pay to copy orphan works. Despite this, Copyright Agency saw fit to retain more than \$15 million dollars received from universities and schools for copying this kind of content with the intention of using that money to fund its advocacy against the reforms the education sector is seeking. 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 were enacted. The rhetoric relied on by Copyright Agency in advocating against these reforms - that the reforms would harm authors – seems contradictory to Copyright Agency’s practice of retaining these monies. If authors are not currently receiving this money, they cannot suffer harm if universities were no longer required to pay it.

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

1.2 TRANSPARENCY AROUND WHO BENEFITS FROM STATUTORY FEES

UA recommends that there is full transparency about how much of the money paid under the statutory licences is distributed to content creators, and how much to publishers.¹² Universities pay the licence fees, and are entitled to know who benefits from the money that is paid. Academic authors also have an interest in ensuring full transparency.

Historically, there has been no such transparency and this gives rise to many concerns.

1.2.1 TESTING THE ACCURACY OF THE “HARM TO AUTHORS”

Copyright Agency has actively engaged authors and author groups to advocate against more flexible copyright exceptions on the grounds that the education sector would rely on exceptions to the detriment of Australian authors. Universities Australia has strongly rejected this assertion. **A flexible exception, such as fair use, would apply to uses that cause *no harm* to authors, and would have no material impact on the earnings of most authors who currently receive statutory licence payments.** But Copyright Agency’s focus on authors as the potential losers if fair use is enacted highlights the lack of transparency around who actually benefits from the current statutory licence

¹² We note that in its annual report, Copyright Agency uses the term “content creator” to refer not only to the actual author of a work, but also publishers and collecting societies. We are using the term to refer only to the actual creator; ie the author.

payments. On the current information provided, we cannot test the accuracy of the claims that authors are major beneficiaries of statutory licence payments.

In its most recent annual report, Copyright Agency has provided more detail than it has in previous years. It remains the case, however, that there is no **obligation** on Copyright Agency to be fully transparent as to who benefits from the statutory licence, and **whether the bulk of statutory licence payments go to publishers who do not share them with authors.**

UA has good reason to be concerned that authors may not actually be benefiting to the same extent as publishers from the money that universities are paying under the statutory licence. The Australian Society of Authors (ASA) has publicly complained that authors of educational content actually receive little - and in some cases none - of the payments that Copyright Agency receives from educational institutions. **That is not because universities and schools are not paying to use this content, but because the money is going to the publishers rather than the content creators.**

The ASA outlined its concerns in a report, *Educational Publishing in Australia: What's in it for authors?*¹³

*To bolster declining profits, **publishers have turned on authors and used their market dominance to force them to sign over all copyright for a one-off, minimal fixed fee rather than royalties, and forgo their right to additional sources of income such as [Copyright Agency] payments and Lending Rights payments.** ...*

*There has also been consolidation in the educational sector in response to the threat of digitally available educational materials. The sector in Australia remains overwhelmingly under the control of overseas corporations. **Evidence from ASA members suggests that a number of large educational publishers are offering contracts that allocate all or a major portion of [Copyright Agency] payments to themselves. Some educational authors are asked to accept only 20% of payments from [Copyright Agency] and other collecting societies.***

In the absence of complete transparency, we have no way of knowing whether the situation described in this publication by the Australian Society of Authors continues. We have no reason to believe that publishers have changed their practices when it comes to retaining money paid under the statutory licence. It appears from Copyright Agency's 2015-16 annual report that most of education sector payments in that year went to "organisations" (71 per cent), with only 13 per cent going directly to individual creators, although Copyright Agency says, based on feedback that it sought from publishers, that most "organisation" recipients have an obligation to share their payments with individual creators.

In 2016 The Australian National University (ANU), a research-intensive Group of Eight university, surveyed academic authors about the revenue they receive for their published work. They found that payments received from declared collecting societies were as follows:

¹³https://web.archive.org/web/20120322164518/http://www.asauthors.org/lib/pdf/zReports/ASA_Educational_Publishing_Report2008.pdf

- 95.4% of book authors receive \$0, 1.1% between \$1 and \$1,000,
- 97.7% of journal authors receive \$0, 2.3% between \$1 and \$1,000,
- 96.7% of other publication authors receive \$0, 3.4% between \$1 and \$1,000

For most academic authors the returns from collecting societies are zero.

1.2.2 DISCRETION AFFORDED TO COPYRIGHT AGENCY FOR INFORMATION PROVISION

We welcome the fact that Copyright Agency chose to provide more information in its 2015-16 annual report than it has in previous years about payments made to “organisations” or “individual creators”. It remains the case that it has complete discretion over whether it will continue to provide this information in the future. As the governance arrangements applying to Copyright Agency currently stand, there is no obligation for it to do so. This, in our view, is unacceptable.

1.3 CONCERNS ABOUT ABUSE OF MARKET POWER

The Discussion Paper notes that some statutory licensees have argued that their fees are too high, and seeks comment on whether additional measures are needed to ensure that licensees have greater transparency over how their licence fees are calculated. As we discuss below, our concerns about the calculation of licence fees are not confined to a lack of transparency: they relate to what we see as an abuse of market power by Copyright Agency to require universities to pay unreasonably high licence fees.

1.3.1 THE DRIVERS FOR COPYRIGHT AGENCY SEEKING EVER INCREASING PAYMENTS FROM THE EDUCATION SECTOR

Universities Australia does not suggest that there is anything inappropriate about a declared collecting society seeking to ensure that rights holders receive equitable remuneration for use of their content under the statutory licences. In our submission, however, Copyright Agency’s approach to administering the Part VB statutory licence has gone beyond this.

UA is concerned that there appears to be a direct financial incentive for Copyright Agency to ensure that statutory licensing income continues to grow, regardless of whether universities and other licensees use the licence less than they have in the past.

Copyright Agency senior employees have the potential to earn incentive payments over and above their base salary if they meet key performance indicators (KPIs). In recent years, the annual reports have provided no information as to what those KPIs are, but earlier annual reports (which are no longer available on the Copyright Agency website) make clear that they include “*delivering growth in corporate and statutory licences*”.¹⁴ The incentive payments are therefore clearly tied to ensuring that statutory licensees - the

¹⁴ See, for example, the 2006-2007 Annual Report which was accessed via the Web Archive: https://web.archive.org/web/20080719121153/http://www.copyright.com.au/corporate/CAL_AR07_Web.pdf, p 53

education sector and governments - continue to pay more. So far as we are aware, Copyright Agency has never provided information on the amount of incentive payments made in any particular year.

Universities Australia submits that it is inappropriate for such profit motives to be applied to Copyright Agency's statutory function of administering the statutory licence. To illustrate this, universities rely less and less on the Part VB licence and therefore expect to pay a more appropriate fee when the licence payments are next negotiated. This reduction in the use of the licence is due partly to the fact that universities increasingly purchase content using direct commercial licences with publishers, as well as using open educational resources. It is also a result of deliberate steps taken by universities to reduce their use of the statutory licence to contain costs. However, **Copyright Agency's commercial approach incentivises senior employees to ensure that universities pay more for the licence, despite its decreasing relevance.** There would be nothing inappropriate, in our view, for a non-declared collecting society to provide financial incentives for its employees to explore new business opportunities and potential revenue streams, but this should not be the role of a declared collecting society.

One of the ways in which Copyright Agency seeks to ensure the licence fees continue to rise is to develop commercial products. For example, at the 2015-16 annual general meeting, members were told that one of the "four strategic pillars of the organisation" was to "*focus on revenue growth*", and that this would be done by "offer[ing] licensing solutions that meet the needs of clients with constant product innovation to facilitate access".¹⁵ Copyright Agency also recently advertised for an account manager to fill "*a key sales position with a focus on the education sector*". This person's duties would include "*maintaining and growing revenue by nurturing relationships within the [education] sector*", "*achieving and developing strategies for new business targets*", and "*developing an effective pipeline of sales opportunities*". The successful candidate must have "*a strong motivation to exceed sales targets*", as well as "*experience in relationship management and solution selling skills*".¹⁶

Universities Australia has recent experience of Copyright Agency's product-focused approach to seeking to ensure revenue growth under the statutory licence.

Earlier this year, Copyright Agency sought Universities Australia's cooperation in meeting with universities to discuss a new commercial product that Copyright Agency is in the process of developing. Copyright Agency described the product as one that would cost universities nothing, but deliver great benefits by "*solving real challenges in the sector*" and "*adding value*" to the licence. The product is based on a similar product that is offered by Copyright Agency's equivalent, Copying Licensing Agency, to UK universities. It comprises four elements:

- A central repository of digital books and scanned materials that could be accessed by universities;
- An "automated workflow solution" that would "make it much easier for librarians to manage copyright and check permissions";

¹⁵ Copyright Agency [2015/2016 AGM](#) minutes

¹⁶ <https://www.seek.com.au/job/33779985?cid>

- A reading list preparation tool that would “save academics and libraries considerable time when putting together course materials for students”; and
- A measurement system that “captures and reports all usage of copyright material covered by our licence automatically.

The feedback that we received from the universities who met with Copyright Agency to discuss this product was that, for the most part, the product was of no interest to them. Universities already have in place systems that manage workflows, generate reading lists for students, and systems that ensure that universities comply with their obligations under the statutory licence. The only element of the proposed product that was of potential interest to *some* universities was the digital repository of scanned content. This was on the basis that this would relieve library staff of the task of digitally scanning content that they could not otherwise obtain in digital form via direct commercial licences or open access licences. It is important to note, however, that this digital repository was not being offered as a stand alone service: rather it was being promoted as just one element of Copyright Agency’s product. In other words, a university would be required to adopt Copyright Agency’s product to be able to make use of the digital repository. There is also nothing to prevent universities from dealing directly with publishers, or third party copying services, to “outsource” the scanning of content.

The feedback from our members indicated they had no need for a product of this kind. However, Copyright Agency has persisted in seeking to trial its product in universities. This is not demand driven product innovation - there is no such demand coming from licensees, at least in the university sector - but rather “product innovation” that is intended to “drive revenue growth”. Universities have made it very clear to Copyright Agency that they are not looking for any “added value” in the licence. **They are looking for a licence fee that better reflects the diminishing relevance of the statutory licence in the university sector.**

We understand that Copyright Agency has expended significant funds on the development of this product. We would be particularly concerned if these funds came from statutory licence payments that were unable to be distributed. There is currently no way of knowing whether or not this is the case.

1.3.2 ADAPTING TO “NEW COMPETITIVE THREATS” AND “TAKING ADVANTAGE OF NEW TECHNOLOGIES”

The Discussion Paper notes that the “traditional business models” of collecting societies are coming under challenge given the increasing use of digital content, and suggests that collecting societies need to “adapt to respond to new competitive threats”, including by “[taking] advantage of new technologies”.

Adapting to competitive threats

While we agree that the traditional business models of collecting societies are coming under challenge, we strongly disagree that it follows that declared collecting societies should “respond to new competitive threats”.

The main reason that Copyright Agency's business model is coming under challenge is that universities (and schools) are increasingly relying on other licensing models to obtain content:

- In an increasingly digital environment, universities have less need to rely on the statutory licence to make content available to students. Rather than purchasing hardcopy books or journals - which need to be copied or scanned before they can be included in course materials - they increasingly deal directly with publishers to purchase commercial licenses that permit them to use digital content to satisfy student needs.
- Like universities around the world, Australian universities are also relying increasingly on open educational resources in preference to commercially licensed content. This trend is set to continue.

So, while there is a diminishing role for the licence Copyright Agency administers, this is not a "threat" but rather a changing content distribution model that sees universities having less and less need for the statutory licence.¹⁷ A recent review of university copying practices found that universities had deliberately and consciously adopted policies of relying on the statutory licence as a licence of last resort, and that this was a significant change in usage patterns.

We are not suggesting that there is no role for Copyright Agency in the higher education sector in the future: we are still a long way from a world where all content that a university wishes to use can be obtained directly from the rights holder or via an open access licence. But we are certainly moving away from a hard copy world where the VB licence is heavily relied upon to make content available. This trend was anticipated by the Intellectual Property and Competition Review Committee more than 17 years ago when it said:

Overall, collecting societies will face substantial challenge in the decade ahead, as the growth of information transmissions over the Internet shifts the location of copyright transactions and alters the technical form they take. Some of the resulting changes seem likely to erode the position of the collecting societies, as direct contracting becomes more feasible.¹⁸

UA believes it is inappropriate for a declared collecting society to adopt a commercially-focused approach that sees the evolution of direct and open licencing as "threats" to its own business model, and that seeks to ensure "growth" in statutory licensing incomes despite these trends. Licensees and rights holders would all be better off if they were able to deal directly with each other, with no need for a "middle man" such as Copyright Agency.

Taking advantage of new technologies

The suggestion that collecting societies need to "take advantage of new technologies", should be understood in context.

¹⁷ One of our concerns with the existing administrative arrangements with Copyright Agency is that the method used to estimate copying volume produces an artificially high estimate of remunerable copying due to recording copying of open access and directly licensed content.

¹⁸ Intellectual Property & Competition Review Committee Interim Report, April 2000, <https://web.archive.org/web/20060820080341/http://www.ipcr.gov.au/interim/finalreport.pdf> , p 75

Universities already have sophisticated technology systems in place to provide Copyright Agency with the data that it needs to distribute payments under the Part VB licence. The monitoring system for the Part VB statutory licence that has been in place for many years includes an Electronic Use System (**EUS**), which monitors electronic copying and communication. Universities have invested significant time and effort in building processes to provide the data required by Copyright Agency as part of the EUS, and the EUS is, for the most part, working well. We do not consider that there is currently any additional need for new technologies to assist with this.

The Discussion Paper refers to the Enhance TV service - developed by Screenrights - as an example of a good use of technology by collecting societies. It is important to note, however, that the use of technology to stimulate demand for content can have unintended consequences for educational institutions. For example, audio-visual content aggregation services such as Enhance TV (referred to as 'resource centres') have made it much easier for staff and students to individually access broadcast content (rather than having to request a central AV copying facility to make a copy for them). However, many universities have begun to question whether the convenience that such services deliver has led to indiscriminate use that exposes universities to price increases that are out of proportion to any educational benefit. Having recently had an opportunity to review the data relating to what is actually being copied by their staff and students, some universities are now considering imposing greater control over use of these services with a view to avoiding ever increasing demands for higher payments under the Part VA statutory licence.

In 2011, Screenrights informed its members that educational copying levels (universities and schools) were **50 times higher** in 2010 than they had been in 2006. They said: "The growth in the last five years has been staggering and we're anticipating continued growth in the future".¹⁹ This increase in use of audio-visual content was a **direct** result of the resource centre model.

Universities Australia does not suggest that universities wish to avoid fair and equitably compensating rights holders for use of content. Rather, we wish to draw attention to the way in which the use of technology to facilitate use of content can generate increased payments for collecting societies without necessarily delivering increased value for universities.

1.3.3 IMPACTS ON THE STATUTORY LICENCE FEES PAID BY AUSTRALIAN UNIVERSITIES

Copyright Agency has commented that there is no comparison between what Australian educational institutions pay under the statutory licence and what educational institutions in other jurisdictions are paying because the licences are not "equivalent".

This claim should be rejected.

There are some differences at the margins - the main one being that collecting societies in other jurisdictions can only grant a licence for content that is within their repertoire - but the repertoires of the UK, Canadian and New Zealand collecting societies are extensive. The *practical* difference between what

¹⁹ <https://www.screenrights.org/sites/default/files/uploads/OTA0811.pdf>

Australian universities get for their money, and what their foreign counterparts get, is minimal and cannot in any way justify the enormous difference in the amount that is paid.

The following table illustrates the differences between what Australian universities are paying and what universities are paying in other jurisdictions for equivalent licences:

Country	Price per FTE for Part VB or equivalent licence
Australia	\$35.64
UK	£7.37 (\$A 12.12)
New Zealand	\$23.45 (\$A 21.51)
Canada	<p>In 2011, a number of Canadian universities entered into a licence with Access Copyright at \$26 per FTE (\$A26.80). The licence permits copying that exceeds what is permitted under the Australian statutory licence (up to 20 per cent of a work as opposed to the 10 per cent that is permitted under the Australian licence).</p> <p>In response to the failure of many Canadian universities to take up the licence at this price, Access Copyright began offering a new licence, permitting the same amount of copying, on the following terms:</p> <ul style="list-style-type: none"> ● 1 Year - \$18 FTE (\$A18.55) ● 3 years - \$15 FTE (\$A15.46) ● 5 years - \$12 FTE (\$A12.37)

In theory, it is the role of the Copyright Tribunal to provide a check on the ability of Copyright Agency to use its monopoly position to extract “inequitable” licence fees. The reality is very different. The Copyright Tribunal has fallen far short of imposing the same discipline on the conduct of declared collecting societies as that which would be imposed by competition. The cost of Copyright Tribunal proceedings, in Universities Australia’s experience, can run into the millions of dollars for education sector licensees and is a significant barrier to seeking the Tribunal’s intervention.

This review must consider the fact that Australian universities are paying a much higher rate compared to universities in comparable jurisdictions for a broadly equivalent licence when assessing whether the current regulatory regime applying to declared collecting societies is working.

We are strongly of the view that the difference can be explained by a combination of the lack of effective constraint on monopoly power; a commercial culture that incentivises Copyright Agency employees to ensure that statutory licence fees continue to rise; and the lack of any effective brake on the exercise of monopoly power.

2 THE CHANGES NEEDED TO ADDRESS IDENTIFIED PROBLEMS

The concerns that we raise in this submission will not be addressed simply by making changes to the Code, nor by making compliance with the Code mandatory rather than voluntary. In our submission, the starting point for any consideration of what governance arrangements should apply to declared collecting societies is to first ask two questions:

- What should be the role of a declared collecting society?

UA submits that the role of the two declared collecting societies should be confined to administering their respective statutory licences; that is, collecting information about uses made in reliance on the licence, and ensuring the collection and appropriate distribution of equitable remuneration paid under the statutory licence.

- Are the two declared collecting societies, or either of them, straying beyond that role?

For the reasons outlined in section 1, we consider that Copyright Agency in particular, has strayed beyond that role. It employs a commercial approach to carrying out statutory functions that appears to be based on a perception that changing copying practices and decreasing reliance on the statutory licence in universities are a threat to its “business model” and that this threat must be addressed.

In what follows in this section we discuss ways in which we consider this could be addressed.

2.1 LEGISLATION

Universities Australia considers that reforms to address the concerns that we have outlined in this submission should include a legislative requirement for declared collecting societies to take into account the interests of *statutory licensees* as well as the interests of members. Currently, there is no such legislative requirement. Both the current legislative framework, and the framework contained in the recently enacted *Copyright Amendment (Disability and Other Measures) Act 2017*²⁰, impose obligations on declared collecting societies towards statutory licensors but are silent on any obligations towards licensees.

UA believes that this solely member-focussed approach to determining what obligations a declared collecting society owes is inappropriate. We refer the Department to the findings and recommendations of Sir Walter Merricks, who conducted a review of the UK Code of Conduct for collecting societies in 2014. Our UK equivalent, Universities UK, submitted in that review that collecting societies - at least those dealing with the education sector - should be seen as “having a quasi-public role” rather than a purely private role. Sir Walter agreed with this. He suggested a “public benefit” or “public service” model for collecting

²⁰ See ss 113W (1)(d), 113X (1)(b) and 113Z (5)

societies in recognition of the fact that they should owe obligations to licensees, not just their members. He said that this was particularly important when it came to licensing of copyright material for use in schools and universities, which, he said, “*can be seen as important to the educational and cultural life of the nation.*”²¹

2.2 SEPARATION OF STATUTORY AND COMMERCIAL FUNCTIONS

We have given careful consideration to how the concerns that we have raised regarding the use of statutory funds for non-statutory purposes, and the financial incentives to ensure that statutory licensing continues to increase regardless of copying trends, can best be addressed.

It is clear that the current arrangements - which require declared collecting societies to hold statutory and non-statutory monies in separate accounts - are not sufficient. In our view, a further degree of separation is required to ensure that the commercial operations and the statutory functions of declared collecting societies remain completely separate. How this can best be achieved is, in our view, a matter that warrants further consideration, ideally with the input of the ACCC. Our preliminary view, however, is that a form of operational separation may be the most appropriate model.

2.3 THE CODE

The shortcomings of the Code in dealing with the concerns that we have outlined in this submission are well illustrated by the 2014 Triennial Code Review, during which the schools sector and the NSW Government sought amendments to the Code for the benefit of licensees. The amendments would have required declared collecting societies to provide licensees with details of the recipients of statutory licence payments upon request, thus enabling licensees to determine whether cost savings could be achieved by approaching these rights holders to negotiate direct licences. The Code reviewer made the following observations:

*The **member-focused nature of the legal duties of directors**, the **member-orientated nature of the constitutions** of Copyright Agency and Screenrights (and, I presume, the other collecting societies that have agreed to be bound by the code), the fact that the **code is a purely voluntary one**, and the fact that the amendment would require the agreement of all of the collecting societies... all of which have evidenced opposition to the amendment sought by the State and [the schools], combine to suggest strongly that I should not recommend the making of the amendments sought unless I am clearly convinced of the case for it. As will appear below, I am not.*²²

Having set out his reasons for declining to make the amendment that these licensees were seeking, the Code reviewer said:

²¹ Independent Code Review, Sir Walter Merricks, 2014
http://www.britishcopyright.org/files/2914/7009/7773/ICR_Report_2014.pdf

²² Lindgren K Supplementary Report of the Code Reviewer (The Hon K E Lindgren AM, QC, Formerly a Justice of the Federal Court of Australia) upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia October 2015

It may seem from those reasons that I see no merit whatever in their submissions. That is not so: I simply do not think that the present review is the occasion for the making of what I see as a fundamental change to the code. This is not, however, the end of the matter. First, the State and [the schools] could apply to the Copyright Tribunal for a determination fixing equitable remuneration which, according to [them], would be an amount that would exclude unwarranted expenditures. Second, they could make representations to the Minister for Communications, as Minister responsible for the Copyright Act. Third, and ultimately, they could seek to muster political support for appropriate amendments to the Act.

The discussion paper seeks comment on what changes should be made to the Code to improve transparency and promote accountability. We do not consider that a voluntary code of conduct is an appropriate form of governance for declared collecting societies. It should not be a matter for a declared collecting society to determine what standards of transparency and accountability should apply to it, nor whether or not to operate in accordance with such standards. **For that reason, we do not see any merit in commenting on what changes to the Code would or would not be appropriate.** It is the wrong vehicle for dealing with the profound problems that need, as a matter of urgency and priority, to be addressed.

In our view, the obligations that declared collecting societies owe both members and licensees regarding use of statutory funds, as well as the standards of transparency that the collecting society is required to meet, should be mandated by Government at least partly on the basis that there is clear market failure in the existing arrangements. These could be contained in guidelines issued by the Minister.

It will also be important to ensure that there is an effective mechanism for ensuring compliance with such guidelines. We note that the Productivity Commission - at a public hearing on 27 June 2016 - asked whether it would be appropriate for the ACCC to play such a role. We support this.

2.4 MECHANISM FOR CONTROLLING ABUSE OF MONOPOLY POWER

Finally, there needs to be an effective mechanism for ensuring that declared collecting societies do not inappropriately exploit their market power.

In 2000, Universities Australia (which was at that time known as the Australian Vice-Chancellors' Committee) called for the ACCC to have an oversight role over declared collecting societies with a view to ensuring that they were not using their market power in a way that was contrary to the public interest, and that increases in the licence fees that they sought were justified.²³ We remain strongly of that view.

²³ AVCC submission to Intellectual Property & Competition Review
<https://web.archive.org/web/20060820074519/http://www.ipcr.gov.au/SUBMIS/docs/48avcc.pdf>