



AUSTRALIAN
DIGITAL ALLIANCE

Code Review Secretariat
Young Street
NEUTRAL BAY NSW 2089
Email: codereviewer@gmail.com

Australian Digital Alliance Submission to the Triennial Review of the Copyright Collecting Societies' Code of Conduct.

The Australian Digital Alliance (ADA) welcomes the opportunity to provide input to the Triennial Review of the Copyright Collecting Societies' Code of Conduct.

About the ADA

The ADA is a non-profit coalition of public and private sector interests formed to provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, disability groups, libraries, galleries, museums, technology companies and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material.

Productivity Commission recommendations

The ADA would like to draw the Reviewer's attention to the recommendations of the recent PC Review of Australia's IP Arrangements regarding the need for the current Code to be reviewed, amended, replaced or made mandatory in order to provide stronger governance and transparency arrangements for Australia's collecting societies.¹

¹ See IP Arrangements, Productivity Commission Inquiry Report No. 78 (26 Sept 2016), Recommendation 5.4 and pp.153-161, <http://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>

These recommendations are relevant to the discussion in the 2014 Code Review and its Supplementary Report surrounding the need for greater transparency and accountability for declared collecting societies in Australia.

The ADA agrees with the PC that:

- the Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees; and
- the review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.

We agree with the PC that there are many benefits of collective licensing, and that there are many circumstances in which it provides the most efficient and effective means of both facilitating use of works and remunerating rights holders for this use. We support the continued use of collective licensing as an important part of Australia's copyright ecosystem.

However, we share the PC's concerns that collecting societies in Australia are not currently held up to a sufficient scrutiny or accountability. The existing voluntary code does not impose significant obligations on collecting societies, does not include mandatory enforcement mechanisms, does not well recognise the interests and rights of licensors, and is difficult to amend to address these issues internally..

In particular, we agree with the PC that.

- statutory licence users are not able to access the information needed to allow them to effectively negotiate directly with rights holders; and
- the arrangements for reviewing and amending the code are deficient.

Too often, Australian collecting societies appear to act on the basis that their only consideration in negotiating licences should be the maximisation of licensing revenue, without regard to:

- the public interest;
- appropriateness of licences and licensing terms;
- fairness to licensors; and
- the fair and equitable reward of individual creators.

In contrast, the European Commission requires its members to ensure minimum standards in collecting society regulation and management.² An example of the implementation is the UK, which has regulations³ requiring that the collecting societies code include obligations to:

² 2014, Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, 26 February, Brussels, Belgium.

- take the interests of licensees into account when negotiating with licensees;
- ensure that their dealings with licensees or potential licensees are transparent;
- consult and negotiate fairly, reasonably and proportionately in relation to the terms and conditions of a new or significantly amended licensing scheme; and
- provide to licensees, and to any potential licensees who have requested it, information about licensing schemes, their terms and conditions, and how royalties are collected.

We therefore endorse the PC's call for a fundamental external review of the current Code by the ACCC, and its potential replacement by a more rigorous and best practice code in line with international standards. We encourage the Reviewer to consider these recommendations as part of the current review.

Copyright Amendment (Disability Access and Other Measures) Bill

Although not directly relevant to the current Code Review, the ADA would like to take this opportunity to state that it is highly supportive of the legislative amendments to Australia's educational statutory licences proposed by the exposure draft of Copyright Amendments (Disability Access and Other Measures) Bill, which was released by the Government in late 2015.⁴

The ADA believes that these amendments will significantly improve the efficiency of the current system, and is keen for them to be tabled and passed as soon as possible. The Minister for Communications and the Arts stated in a recent Senate Estimates hearing that the Bill is expected to be tabled in the "near future".⁵

We suggest that the current Code Review be conducted with the proposed amendments in mind, to ensure that any amendments to the Code are appropriate to the new legislative standard once it is introduced.

³ See Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014

⁴ You can find the exposure draft and its accompanying explanatory materials at <https://www.communications.gov.au/have-your-say/updating-australias-copyright-laws>

⁵ Senate Estimates, Environment and Communications Legislation Committee, 28 February 2017, p. 25, at http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0566f88b-04fa-4e69-a689-9895a0def1bf/toc_pdf/Environment%20and%20Communications%20Legislation%20Committee_2017_02_28_4797.pdf;fileType=application%2Fpdf