

REVIEW OF AUSTRALIAN COPYRIGHT COLLECTING SOCIETIES

by

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Transcript of speech by Shane Simpson
upon the launch of the
Review of Australian Copyright Collecting Societies

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Collecting Societies provide a very important role in the economy of the cultural and social life of all Australians, yet few people understand what they do or how they do it. Indeed there is widespread misunderstanding about the purpose and operation of copyright collecting societies in Australia.

I hope that this Report goes some way to providing quality information about these bodies.

It is an inherent feature of the system of copyright that it is based on the principle of granting exclusive rights to individual creators. For individual owners, it is often difficult to maximise the economic value of their rights and to protect those rights. The cost of doing so is often greater than the potential gain.

Similarly, third parties who wish to use those rights must incur the trouble and expense of finding the appropriate rights owners, negotiating individual deals and administering and accounting to a plethora of such rights owners.

As this study shows, the collective administration of copyright is often the most effective method of managing the rights, both for the owners of the rights and those who need access to them.

Quite simply, collective administration is in the public interest. The principal issue is whether it is being carried out in a way that is economically effective and equitable to all parties - the owners, the users and the community in general.

Complex task

The procedures by which collecting societies operate are necessarily very complex. This is largely because of the complexity inherent in administering a wide range of rights on behalf of thousands of owners, for a wide range of uses and users. Achieving a satisfactory degree of accuracy in collecting, allocating and delivering the appropriate income to the appropriate rights owners, is an extraordinarily difficult task.

Given this complexity, all societies (throughout the world) must try to strike a balance between the administrative cost of achieving a perfectly accurate capture and delivery system and the maximisation of returns to rights owners.

Until technology gives us this capability to capture all information, such processes will be imperfect. Until then, we will have to rely upon sampling techniques, approximation techniques; a balance between the absurd cost of obtaining perfect records and the aim of getting as much money to as many of the right people as possible.

It is the task of all collecting societies to tackle the challenge of administering their rights as efficiently as equity allows and as equitably as efficiency allows. This is the balance that determines whether a collective administration of rights is in the interests of the relevant rights owners.

(a) Transparency

To permit all of the stakeholders to have an informed view as to the state of this balance, it is essential that collecting societies adopt an attitude of transparency to their administration. This is an aspect of their responsibilities that collecting societies throughout the world have generally been accused of failing.

Accordingly, Government took the unusual but valuable step of including in the Terms of Reference a requirement to describe fully, what the societies actually do and how they do it, as well as whether those mechanisms were efficient and equitable. It was certainly not a witch-hunt.

The Project

A multi-skilled team was formed: Ms Ann Moffatt was retained to consider issues of financial and administrative efficiency; Professor Simon Sheather to consider the statistical validity of the sampling techniques used; Mr Chris Doney to consider the Information Technology aspects of their administration.

Findings

The workings of each of the Societies was examined in detail and the general finding of the Report is that the procedures by which the data is captured, income is collected, allocations are made and distributions are performed, are generally both efficient and equitable. That is not to say that there are not alternative approaches possible as to each of these matters and it is clear that each of the societies is continually trying to improve their mechanisms.

Those who believe that collecting societies are awash with unjustifiable undistributed funds will be greatly disappointed in this Report. The undistributable sums vary according to the nature of the collecting scheme and the stage of development of each society. Certainly, all are striving to minimise such sums and maximise the return to their members.

One important qualification to this is the method by which undistributable sums are redistributed and whether those methods are truly appropriate. As you will see, the Report recommends that a greater proportion of the undistributables be allocated to the cultural purposes of the wider industry sector rather than merely redistributed as a windfall to future royalty recipients.

Ombudsman - Copyright Tribunal

Any system which requires the balancing of competing principles also requires that recourse to an independent arbiter be available if all else fails. This simple consideration is behind two of the important recommendations of the Report:

- (i) First, the establishment of an Ombudsman For Collecting Societies, - a role that must be independent of, not a creature of, the societies; and
- (ii) Secondly, an extension of the role and powers of the Copyright Tribunal. The Tribunal should have as wide a jurisdiction as possible in respect of licences and licence tariffs including the variation, approval and interpretation of all licensing schemes whether the relevant rights are administered under voluntary or statutory licence.

Too many Societies

Another issue considered was whether there were too many collecting societies.

Given the frequently expressed concern about the power of societies, it is perhaps surprising that there is also a frequently expressed opinion that there are too many societies and that they would achieve greater efficiency by amalgamating and sharing administrative expenses.

I can see little cost advantage in the amalgamation of the existing societies. Rather, the Report recommends that there be a multiplicity of societies so that individual societies can represent the disparate interests of the separate groups of rights owners. This is more likely to ensure the equitable representation of members' rights and promote a competitive environment.

New Collecting Society For Visual Arts

In accordance with this, the Report also recommended, the establishment of a collecting society for the visual arts - one that is fully representative of the relevant rights owners. It is pleasing that the Government has already acted upon this recommendation and in the Creative Nations statement has undertaken to provide \$1 million towards the establishment of VI\$COPY.

No need for new statutory licences for Multimedia

Another of the Terms of Reference was whether there should be a statutory licence for multimedia uses. There are, after all, a number of voices saying that the obtaining of copyright clearances for multimedia uses is so time consuming and expensive, that it acts as a brake on creativity, indeed as a brake on the whole multimedia industry. When the impracticability of granting individual licences becomes apparent, it is sometimes suggested that the

simplest response is to create a statutory or compulsory licence, in effect denying the control that any individual rights owner may have otherwise had.

It is the strong recommendation of the Report that collective administration be the preferred mid-way house between the exercise of individual exclusive rights and a compulsory statutory licence where mass usage requires that the community be given access to the rights on reasonable terms. Government should not consider the imposition of statutory licences where commercial voluntary licences, collectively administered, are effective.

Accordingly, the Recommendation on multimedia was that there be no statutory licence to grant access to copyright material for the purpose of multi-media exploitations: Rather, that the existing societies be encouraged to form a joint venture to facilitate the clearance of multimedia rights.

I am delighted to be able to say that the societies have already taken up this suggestion and have sought the support of Government to establish such a joint venture.

A New Type of Collecting Society

It was recommended that a new category of collecting society be established: The "Qualified Society".

These would be societies that demonstrate that their structures, procedures, functions and conduct are within certain approved guidelines.

With the exception of the Declared Societies, it must be remembered that the societies are not subject to close government scrutiny or control. They are owned and governed by their membership. Accordingly, Government has few means of encouraging the societies to adopt practices that it considers, will represent "best practice" in their administration.

The establishment of the Qualified Society would give collecting societies an incentive to adopt the government guidelines. It calls for the establishment of a system based on encouragement rather than punishment or benign neglect.

The public benefit would be that such societies would be operating according to the highest levels of equity and efficiency and the society's incentive would be to be accorded certain Trade Practices relief.

PPCA

There has been much public controversy about the PPCA. I am not going to go into specifics today. These matters are set out in the Report in detail. Much of that detail has never been made public before and I hope that the company sees the benefit of adopting a policy of administrative transparency. One of the predominate reasons that PPCA distributes such a poor percentage of its income is that its income is statutorily limited in favour of the broadcasters. One of the recommendations of the Report is that such artificial caps be lifted. To retain them is simply unfair on the rights owners.

Moreover, radio companies are perfectly big enough to negotiate with record companies with equal bargaining power. In a world in which the search for the Holy Grail has been transformed into the search for a level playing field, Australian broadcasters no longer need protection from the big bad record companies owners.

Conclusion

To conclude, this Report is based on the somewhat unfashionable assumption that copyright will continue to play an essential role in any developed sophisticated society. If society is to recognise creativity, innovation and imagination, then copyright is the principal tool by which we accord that recognition. This is economically expressed by the award of a range of exclusive rights which grant the owner, the power of control and the right of commercial exploitation.

At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking. It is a recognition that both the culture and the economy of our community is dependant on encouraging and fostering these characteristics.

Accordingly, it is no coincidence that the Report suggests that there be further work undertaken. In particular, there should be:

- (i) a review of the relationships between the overseas and the Australian societies; and

- (ii) as a matter of urgency, further study of the impact of new technologies on copyright collecting societies and potential new methods of collection.

Perhaps the essential characteristic of the digital age is the internationalisation of data flow. One of the great challenges for every government in the world is how they are going to remain relevant to the control of intellectual property and the encouragement of the economic and cultural functions inherent in such rights

No single section of the community is capable of solving this enormous issue. Indeed, there will be no single answer. But one thing of which you can be sure, is that:

- collecting societies are going to be at the centre of the management aspects of the solution;
- technologists will contribute with the improvement of data tagging and tracing and will eventually develop IT systems which will permit the capture of 100% of all reuses of data; and
- the legal system will contribute by ensuring that an appropriate body of rights and licences is in place.

However, to allow ourselves to say, "It's an international problem: it'll be resolved internationally", is simply an elegant way of saying: "Its too hard; I haven't got the skills and I haven't got the time".

We must not let others determine for us, the economic future of our copyright and cultural industries - by default.

I am delighted that the Minister has seen fit to release this Report.