

## THE ROLE OF COPYRIGHT COLLECTING SOCIETIES IN AUSTRALIA

This is a version of Shane's report commissioned by the federal government which he presented to the Government of Western Australia in April 1996. It is an effective summary of the Review of Collecting Societies report, discussing misconceptions about collecting societies, their function and recommendations for improvement.

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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 was appointed by the Federal Government (in particular the Minister of Justice and the Minister of Communication and the Arts) to undertake the first ever inquiry into collecting societies in Australia.

At the time there had been considerable controversy about the operation of one of the societies and, for years, there had been great degree of criticism, and scuttlebutt about their effectiveness and honesty in general. When it became public knowledge that I was carrying out this inquiry, many suggested that I had won the poisoned chalice. I have lived to tell the tale.

It was a fascinating task. The results were not necessarily what was expected by many commentators.

What was revealed was the extraordinarily important role that copyright societies play in the administration and facilitation of access to intellectual property.

### 1. RIGHTS

First, some important background.

As you would all know, the term copyright is really short-hand for a diverse bundle of rights. These rights vary depending on whether we are talking about the copyright in an artistic work, literary work, musical work (the tune) or a literary work (the lyrics), a recording, a film, a video, a software program, or even a broadcast.

All of these are things that are protected under the copyright umbrella. It is copyright that determines who has the right to control the exploitation of the material and most importantly of all, who gets the money.

In the copyright business, money flows from RIGHTS. You can acquire the right by creating the copyright or you can gain the right by buying it or licensing it from its owner.

Let's take a music example: When a composer enters a contract with a music publisher, he or she usually assigns all the rights in their songs to the publisher. This means that for the term of the deal the publisher is actually the

owner of the RIGHTS in all those songs. In a way, the role of the publisher is to exploit the copyright, administer it, collect the income that flows from it and then distribute the money that has been earned. The money follows the rights.

The record company which wishes to release a record embodying a particular song; the musical director who wishes to reproduce parts for an orchestra; that advertising agency which wants to use a song in a commercial; the film director who wants to sync a particular piece of music in his or her movie, must obtain the right to do so.

All of these people wish to use the skill, inspiration and effort of the copyright creator for their own creative/commercial purposes.

Put in non-legal terms, they wish to use the private property of someone else; common courtesy demands that permission be requested and granted before you use someone else's property.

In the legal system we call the granting of such permission a "licence" and surround it with various rules for colour and movement, but basically, it is little more than a formal, social construct whereby we are forced to get permission before we use someone else's property.

Some commentators say that copyright is an artificial device somewhat like the emperor's new clothes: We say it exists so it exists; we say it is valuable, so it is valuable. That as may be.

In my view, there is a clear public benefit in rewarding those who are innovative, who take risks, who are creative.

These are the some of the people who lead our society forward, who prevent stagnation - social, cultural, economic, industrial, stagnation. At the end of the day, the rights of copyright are one way that we as a community reward that innovation, creativity and risk taking.

There may be better ways of doing it (and the new digital era is forcing us to look at new approaches to fostering those attributes) but for the moment, it is the concept of intellectual property that we use to reward these attributes and achievements.

As well as the public interest in rewarding the primary producers of intellectual property by granting them this body of exclusive rights, there is a counter-balancing public interest in ensuring that the public has access to those fruits. This is always a delicate balance (or even tension), for on the one hand, society says that the owner should have the right of control, whilst on the other, it says that the community should have a reasonable opportunity for access.

(Copyright is not the only area subject to these dichotomies. For example, the ownership of private homes may be forfeited by the Government in time of war or compulsorily acquired for road building. Tough luck on the rights owner in the interests of the greater good of the community.)

In the copyright world, this process of ensuring access by limiting the traditional rights of control, is known as "a compulsory licence".

There are several examples of compulsory licences. They include: the photocopying licences granted to educational institutions and libraries; the dubbing licence granted to schools which tape programs from the television for use in class; and the licence to make a cover recording of a song that has already been released on record.

Compulsory licences are such that it is impossible to administer the compulsory access to the rights on an individual basis. Efficient administration demands that the rights be collectively administered. This demand is in the interests of the rights owner and the party wishing to access the intellectual property.

Furthermore, even where no compulsory licence is involved, some rights are simply uneconomic for individuals to grant and to enforce and are also uneconomic for persons wishing to use them, to ask and negotiate permissions.

For example, if a record is played on the radio, that is an exploitation of the copyright in the music, the words and the recording itself. But what individual rights owner could possibly afford to monitor all radio plays and do all the administration necessary to collect a few cents. What would a composer do if the radio station simply refused to pay? It wouldn't be worthwhile suing for such a small amount. In other words, the composer's rights would be theoretically valuable but practically worthless.

That's why we have collecting societies. They are supposed to enhance nett return for rights owners and make it easier for rights users to access such rights. They are creatures of efficiency.

## 2. THE SOCIETIES

There are five main collecting societies:

**APRA** (the Australasian Performing Rights Association) which represents the public performance right on behalf of writers and publishers.

**AMCOS** (the Australasian Mechanical Copyright Owners Society) which represents music publishers to collect the mechanical income that flows from reproducing songs on records. They also administer a lot of other rights but the mechanical one is the most important.

**PPCA** (the Phonographic Performance Company of Australia) which represents record companies to collect income from the public performance of records in public.

**CAL** (the Copyright Agency Limited) which represents authors and publishers to collect income from the photocopying of books and articles in schools, government departments and corporations.

**AVCS** (the Audio Visual Copyright Society) which represents the various copyright owners involved in the videoing of television broadcasts for use in education.

There is now a sixth, called **VISCOPY** which will represent visual artists whose works are reproduced, whether in magazines, ads, annual reports, books, merchandising and so on.

Of these, only three are creatures of government legislation. These are called, "declared collecting societies": AVCS, CAL and VISCOPY. These operate within very specific legislative parameters designed to ensure equity and accountability.

They must comply with specific legal requirements in the Copyright Act, and Regulations and the Government must approve their Articles of Association. Further to these legal requirements, they operate under the supervision of the Attorney-General, who may withdraw his declaration if satisfied that the society is not functioning "adequately" as a society.

These safeguards aimed at achieving an equitable, efficient and accountable administration, are appropriate to bodies charged with the administration of compulsory licences.

### 3. THE FUNCTION OF COLLECTING SOCIETIES

The primary functions of any collecting society are documentation, identification of use, collection and distribution. They are all enormously detailed procedures, time consuming and expensive to administer.

Imagine the size of the documentation task that is required to properly document the hundreds of thousands of works which have a brief spark of commercial value and then remain forever in the so-called "dormant repertoire".

Any system with administrative integrity must undertake the task but if it were to be truly "efficient" the society would only expend its efforts on the 15% of its repertoire that is active. Of course it can't, but such cost-efficiency factors keep arising in any examination of collecting societies.

Another example of this is in the identification and distribution area. If every use of every work by every author was perfectly reported and perfectly recorded, it might be feasible to avoid instances in which a disgruntled rights owner could complain that, "I know my work was copied/performed/etc but I didn't get any royalty. Something must be wrong with the collecting society!"

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.

Collection too, is an expensive and inherently inefficient aspect of collecting societies. If one could license just a limited number of users, the process would be easy. Similarly, if all licensees were fastidious in their self-reporting of uses, it would be easy. Instead, users object to paying licence fees, or object to the quantum, or under-report

their usage of copyright material, and all of this demands that the societies have an extensive obligation to the enforcement of their members' rights.

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.

When talking about collecting societies, very few people on the outside realise how complex the operations are. 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 correct 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.

#### **4. BENEFITS OF COLLECTIVE ADMINISTRATION**

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.

But it is not all about creating a regime which favours the rights' owners. There is also a wider community benefit in enhancing access to the rights. Third parties who wish to use 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 my study showed, 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.

For example, it is inconceivable to expect a university to obtain individual permissions from every author whose work is photocopied in that institution just as it is unthinkable that the authors of those works should not be rewarded equitably for the reuse of their work. If music is to be publicly performed, it is reasonable to expect that the author of that music be rewarded for that use of his or her work, but it is unreasonable to expect each person who wishes to play music in public to identify, find and negotiate licences with each of those rights owners.

The position is similar for schools who wish to record broadcasts for use in their teaching programs.

In such circumstances it is clear that the collective administration of the individual rights of copyright, generally benefits both the owners of the primary property and those who would make secondary use of that property.

That said, it was also clear from the study that the principal issue is not whether collective administration is in itself a good thing, but rather, 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.

## **5. THE ROLE OF GOVERNMENT: THE TENSION BETWEEN STATUTORY LICENCES AND COLLECTIVE ADMINISTRATION**

As already mentioned, the international system of copyright is based upon the granting of exclusive rights of control to copyright owners. It is generally a system in which the owner of each right has the right to control that right, territory by territory, term by term and use by use. It is ruggedly individualistic: The rights of copyright grant individual owners the right to determine whether these rights are to be exploited and, if so, the terms of exploitation.

It is my firm belief that collective administration is, and should be, an exception rather than the rule.

Philosophies aside, not all rights of copyright benefit from collective administration. Many exercises of the rights are best dealt with on a one-by-one basis.

The most simple indicator of this is that no group of Australian copyright owners has transferred all of their rights of copyright to a society for collective administration.

This simple conclusion is in itself significant: Copyright owners make a decision as to what rights they are capable of administering personally, and which of their rights are best administered on a collective basis.

For example, composers, who choose to assign their public performance of the Small Rights to APRA, retain their individual control over licensing for the public performance of Grand Rights and for use in radio and television commercials. The reason is simple enough: the negotiation, collection and enforcement of public performance income in relation to Small Rights is most efficiently handled on a collective basis, whereas the other rights mentioned are quite easily administered on an individual basis.

Similarly, the writer of a novel has no need of a collecting society to negotiate or monitor his or her relationship with a publisher but has an obvious need for such a resource if he or she is to obtain income from photocopying in schools.

Such distinctions are easily drawn for every group of rights owners.

Further, where the rights owner chooses to maintain individual control of a right, it is usually where the would-be user has all the time necessary to locate the rights owner and negotiate the deal. It is not dealing in the exploitation of a mass of different copyright materials. Rather, it is dealing with the exploitation of a very limited number of copyright works (and owners), even though it may reproduce each of those works an enormous number of times. Because the number of rights owners is limited, the administration of the rights is simple enough.

In short, where the collecting society is administering a voluntarily transferred right, right's owners will only transfer the administration of the right to a society if they believe that it is in their best creative and economic interests to do so. This is one occasion when market forces is a useful indicator of value - at least to the owner.

For those copyrights which commercially need to be the subject of mass use by a large number of would-be non-exclusive licensees, obtaining and administering the necessary rights on an individual basis is difficult, if not impossible.

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.

(Examples of this include the statutory licence permitting "cover recordings" which underlies the primary function of AMCOS and the statutory licences granted to educational institutions and which are administered by CAL and AVCS).

I don't agree.

Rather than knocking down the long established structure of individual rights which comprises copyright (by the implementation of a series of compulsory licences), I believe that it is preferable to maintain the existing regime but promote the ease and efficiency of access to copyright material by promoting and facilitating the collective administration of such rights.

Collective administration should 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.

By way of example, the difficulties necessarily raised by the new world of the Internet and Multimedia, have inevitably again raised the suggestion that copyright has become an outdated concept.

In other words, it is so hard to control the use of copyright work in this digitised, computerised environment, a cyber-world without borders and few police, that old concepts such as the personal ownership and control of copyright material should be discarded as a remnant of an increasingly irrelevant age.

I do not believe that this response is in the interest of the general community, although it is certainly in the commercial interest of certain commercial would-be, rights-user groups. But let me come back to this, later.

Factors to be taken into account when determining whether collective administration is appropriate include the following:

- Is there a public benefit in permitting non-owners easy access to the use of copyright material?
- How hard is it likely to be, to identify a rights owner in a timely manner?

- Is the cost of negotiating and executing an individual licence, likely to be uneconomic?
- Is the cost of administering and accounting for an individual licence, likely to be uneconomic?
- Is the negotiating power of the copyright owner so much less than the copyright user that collective negotiation is desirable to better ensure equality of bargaining power?

The existing collecting societies fall within these guidelines. As such, their existence potentially benefits:

- (i) those whose business depends upon access to rights individually owned but collectively controlled;
- (ii) the owners of the rights; and
- (iii) the educational, cultural and economic interests of the community at large.

Whether the existing Australian collecting societies in fact do provide those benefits, depends upon the efficiency and equity with which they operate.

At the moment, anyone can establish themselves as a collecting society on the basis of voluntary licensing. There is no need for the approval of government. In principle, this is a good thing. It is inappropriate for the government to interfere with the right of copyright owners to form collectives for the administration of their rights on a voluntary basis.

This does not mean however, that government should not be involved in that process: for example, audio-visual copyright owners would have faced an impossible task in setting up a copyright society without government intervention. For example AVCS could not have achieved access to a substantially comprehensive repertoire without the government providing the necessary statutory authority.

## **6. OTHER ROLES FOR GOVERNMENT**

The government is also directly involved by establishing the Copyright Tribunal. The Tribunal is of central importance in achieving a system in which equity can be achieved between owner and user.

As recommended in my Report, there are various ways in which the role of the Tribunal can be made more efficient and these recommendations are being examined at the moment.

I also believe that there is an important role to be played by government in the establishment of a new statutory creature: an independent ombudsman for collecting societies who could investigate complaints and supervise the equity and efficiency of the societies.

## **7. THE FUTURE OF COPYRIGHT**

As you can tell, I am one of those who see a future for copyright.

You may say that this is a classic case of myopia which is caused by the fact that one of my specialities is intellectual property and that I cannot afford to be anything but optimistic.

I understand that criticism but hope that my view is based on a little more than ostrich-like vision.

We hear much of the “copyright is dead” cant from those who are immersed in the culture of the internet and multi-media, but if copyright is the way that our society has chosen to remunerate creativity, we need some fairly hard evidence of its death before we call in the undertaker.

It is my view that copyright is barely wounded. Let me briefly tell you why.

The copyright-based industries are among the largest in our society. Intellectual property contributes billions of dollars to our corporate balance sheets every year and it is improbable that these corporations are going to simply allow these billions to be wiped off their asset registers on the strength of a few articles in Wired Magazine or the IT pages of the local newspaper. In other words, commerce will demand an evolution not a revolution.

How will that evolution take place? I believe there are numerous engines of change:

**(I) Let's look first at Technology**

Whilst it may be simplistic to observe that technology is developing at extraordinary rates, it is also true. A considerable amount of work is being done on “copyright tagging” and this, together with the development of “intelligent agents” which are capable of trolling around cyberspace identifying these tags, is likely to contradict the present apparently anarchic state of copyright in cyberspace.

Unlikely? I think not.

This is not to say that all copyrights will be protected, because of course, not all copyright material will be tagged. But remember that the bulk of the copyright-based industry is dominated by some of the largest companies in the world.

They will tag, and search, and enforce, and thereby the major part of the world's intellectual property industry will be subject to continuing control.

**(II) Irrespective of technological developments, the ways in which we do business will change.**

We are already seeing the large corporations putting their toes into the cyberpool. Why do you think that mainstream publishers, record companies, newspapers, film studios etc are experimenting with the Internet? Its because they know that it is not going away and that unless they embrace it, get comfortable with it, learn how to make it work for them, learn how to dominate it, they will lose market share.

There will be lots of casualties for, at the moment, the real cyber-market is tiny in comparison to their atom-based market.

Until a large proportion of the community feels more comfortable shopping at their computer than shopping in stores, and until that community feels comfortable about the security of their financial transactions, the market is going to be 99% hype and 1% wish.

In other words, until the psychology of the public changes, there won't be a market.

This leads me to one way in which the significant players will create an intellectual property-based Internet commerce: brand recognition.

One of the ways that the public will gain the reassurance and comfort that I mentioned a moment ago is through brand recognition.

**(a) Attraction**

Given the cacophony on the Internet, one of the most valuable tools any copyright owner will have is a brand which will attract the market to its web site.

Creepy crawlies and bots may be your best friend but if you are looking to buy something particular, you are likely to prefer to go straight to where you know you'll find it. If you wanted to buy a particular Phillip Glass album, would you be more likely to buy it through the Sony Music homepage or from a no-name company using a post box out of Finland? If you want to buy a Mickey Mouse T-shirt you will be heading off to the Disney page without much further thought.

**(b) Trust**

Moreover, people will be more likely to use an unfamiliar medium for commerce if they are dealing with people or things that they trust.

That is what brand recognition is all about.

This is all very well, you say, but will we be able to stop pirates using the Internet to supply cheap copies of copyright material or from taking the work of others and using it for their own purposes and own profit?

Of course not! But that happens in the atom-based world too!

The phonograph didn't kill the live performance industry as it was prophesied (although thankfully it probably did kill off the music box)! The tape recorder didn't kill the record business! Television didn't kill the cinema!

All developments in the law of copyright are technology-driven and all significant changes in the copyright industries are similarly technology-driven. That said, do not expect the law of copyright to keep up with the Internet or the technologies that constitute it. Again, the law of copyright is

always a bit behind the times. Perhaps it is better that it should be. But that is a discussion for another time.

## **The Role Of Collecting Societies**

And what does this all have to do with collecting societies?

Everything!

At the beginning of this lecture you will remember that I described the way that collecting societies generally benefit both the owners of the primary property and those who would make secondary use of that property. Through the economies of scale they promote lawful access to the rights by making the process easy and promote the creation of new works through collecting that which would otherwise be uneconomic to collect, administer and distribute.

In my view, it is the collecting societies who will be the traffic police of cyberworld. They will have an enforcement role but also a facilitation role.

This is not to say that some of the major corporations will not provide this function for themselves, as they sometimes choose to do in the atom-based market place. Their size can mean that they create their own internal economies of scale.

Let's have an example of this. In less than ten years, CDs will no longer be the primary sound carrier of music into the home. It will be on-line. We will have access to virtually all the recorded repertoire and will be able to order anything we want to hear for, say, half a cent per track. That tiny sum would not be worth collecting unless there was a collecting society at work.

But there will be! That half a cent will be notionally divided between the telephone company, the owner of the copyright in the recording, the artist, the music publisher, the composer, and the collecting society (to meet its costs).

The interface between the public benefits of copyright, the commercial transaction, the technology and the aesthetic pleasure will be seamless.

## **Multimedia**

I would be remiss if I did not refer to Multimedia before concluding.

One of the Terms of Reference of my Inquiry was whether there should be a statutory licence for multimedia uses. As you know, there are 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.

It will not surprise you, given what you have heard today, that it was the strong recommendation of the Report that collective administration is the answer rather than yet another compulsory licence.

What we need is for existing societies to be encouraged to form a joint venture to facilitate the clearance of multimedia rights. They already represent all the rights owners. They have already established very sophisticated administrative systems to facilitate the licence process.

We should avoid duplication and use the resource that we already have.

## CONCLUSION

To conclude, I believe that copyright must continue to play an essential role in any modern developed sophisticated society. At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking.

This recognises that both the culture and the economy of our community is dependant on encouraging and fostering these characteristics.

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.