



9 November 2006

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Senator Marise Payne  
Chair  
Senate Legal and Constitutional Committee  
Department of the Senate  
P.O.Box 6100  
Parliament House  
Canberra ACT 2600  
Australia

Dear Senator Payne

### **COPYRIGHT AMENDMENT BILL 2006 – COPYRIGHT TRIBUNAL**

Thank you for the opportunity to appear before the LACA Committee on Tuesday.

Following are some further observations, or submissions from CAL, following discussions about the Copyright Tribunal provisions at those hearings.

CAL welcomes the extension of the Copyright Tribunals' (Tribunal) jurisdiction to cover all aspects of collective management. We believe that confidence in collective management will be increased, as the new broader jurisdiction of the Tribunal will have the result of improving transparency of all aspects of collective management.

CAL continues to have concerns over the possibility that the Tribunal may have jurisdiction over certain transactional licence schemes. The CLRC's recommendation in its *Jurisdiction and Procedures of the Copyright Tribunal* was that the Tribunal should not have jurisdiction over individual licensing. CAL's DCM, which is described in CAL's submission dated 30 October 2006, is a one-off direct licence granted by publishers in which CAL has acted as an agent to facilitate the transaction. In the materials tabled on Tuesday is a PowerPoint presentation about the DCM licenses.

CAL also would like to comment on the extension of the Tribunal's jurisdiction to cover the records keeping system. CAL supports this extension, as it is in line with the general principle of making all aspects of a collecting society's activities reviewable and consequently achieving greater transparency of collective licensing.

Currently, when an educational institution decides that they wish to rely on the educational statutory licence they have three options for how they wish to have their copying will be assessed.

For hardcopy copying (e.g., photocopying) an educational institution may elect to have its copying assessed by either providing full records of their copying - in this instance a records keeping notice is issued to the collecting society - or by participating in a survey which estimates their copying - in this instance a sampling notice is issued to the collecting society. Currently the records keeping system is not referable to the Tribunal.

For electronic copying an educational institution must issue an electronic use notice to the collecting society. The electronic use notice is silent on what basis the educational institutions copying will be assessed. The electronic use notice allows the parties to agree on an educational institutions copying being assessed by full records; a survey or a combination of both. Currently all of CAL's electronic monitoring is by way of survey, however with advances in technology it is imagined that in the near future some form of full record keeping is likely. For example, if an educational institution electronically communicates an electronic coursepack to its students it may also at the same time communicate a copy to the collecting society. The electronic use system is also referable to the Tribunal.

CAL's view is that there should be consistency amongst these systems. By having all systems referable to the Tribunal it keeps the systems flexible and provides greater transparency.

Similarly to Screenrights, CAL has a number of problems with the current "default" system provided by the Regulations for a record keeping system.

The prescribed provisions for a records keeping system are rigid and inflexible. It proscribes the particular manner in which records must be maintained in order to gain the benefits of the licence. However it has not kept pace with changes to gain the benefits of the licence. However it has not kept pace with changes in the licence, such as payment terms. For example, the Tribunal has set differential rates of payment based on purpose of use (coursepacks, slides, overhead transparencies), the type of copyright material copied (poetry, artistic works, short stories). The prescribed provisions do not however require the educational institution to record information relating to these types of copying.

It has also been CAL's experience that the prescribed provisions do not accommodate in respect of section 135ZM copying. In practice the educational institution will only provide details on the head copying provisions that they are relying on. For example, they advise that they are copying from a book and therefore relying on section 135ZL of the Act. The Regulations do not require the institution to advise the collecting society what page is copied. Therefore the collecting society is unable to distribute on section 135ZM artistic works, which is an obligation under the Act.

The collecting society also has very limited rights to work with the educational institution to ensure that the records system is implemented and working effectively.

This is in stark contrast to the sampling and electronic use systems, which are carefully designed and conducted by the collecting society and educational institution or system.

This means that collecting societies and their members have little reason to be confident that the reporting by the institutions to the collecting society are fully representative of what they have actually copied and consequently that the licence fee paid represents equitable remuneration.

The inflexible nature of the records keeping system also means that any debates about the system quickly become legalistic. For example, under section 135ZY of the Act the collecting society is entitled to inspect the records on 7 days notice. CAL's experience, when it attempted to inspect the records of certain universities that were on record keeping notices, was first that it was denied entry to the university but when it was given access that it became a legal exercise with approximately four lawyers accompanying CAL staff on their inspection.

The clear policy intent of the change to the records keeping scheme in the Bill is to increase confidence in the operation of collectively managed schemes. To exempt the records scheme from the system would fail to meet this policy interest.

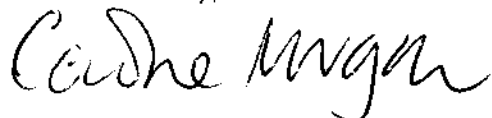
CAL also administers the statutory licences for institutions assisting persons with a print disability and institutions assisting person with an intellectual disability. Many of these organisations would prefer a records based system, but at present the "default" system that applies to records notices means that the flexibility they seek in a records system can not be agreed or negotiated.

CAL notes the AVCC's comments that removing the "default position" would require expensive negotiations and Tribunal proceedings. In CAL's view this is typically not the case. In the approximately 20 years in which CAL and educational institutions have been negotiating sampling system, by and large the parties have been able to reach agreement. The Tribunal has had one hearing in respect of a CAL sampling system and this lasted only 3 days. CAL's current application before the Tribunal on the electronic monitoring system in schools principally relates to legal questions about the licence. Otherwise the parties have worked well together in agreeing the electronic monitoring system in schools.

In any event, other changes to the Tribunal's jurisdiction such as the ability of the Tribunal to refer issues to mediation should alleviate any concerns relating to expensive Tribunal proceedings.

CAL's final comment is that the statutory licence is for the benefit of educational institutions. It permits educational institutions to use works of copyright owners in exchange for paying equitable remuneration. Copyright owners need to have confidence that they are being accurately identified and paid the appropriate licence fee for the copying of their works. The proposed amendments in the Bill are focused on increasing the confidence of all stakeholders in collective management systems. CAL supports the extension of the Tribunal's jurisdiction to cover records keeping system.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Caroline Morgan". The signature is written in a cursive, flowing style.

Caroline Morgan

**General Manager, Corporate Services**