

AV-CC

Australian Vice-Chancellors' Committee

the council of Australia's university presidents

(A.C.N. 008 502 930)

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Mr James Barker
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Dear James

Jurisdiction and Procedures of the Copyright Tribunal

The Australian Vice-Chancellor's Committee has reviewed the Draft Report of the CLRC titled "Jurisdiction and Procedure of the Copyright Tribunal" released in February 2000 and is grateful for the opportunity to make the following submissions in response.

The comments which follow necessarily address those recommendations and comments made by the Committee with which AVCC disagrees. However, these areas of disagreement are limited and many of the other conclusions and recommendations of the Committee in its draft Report are supported by AVCC. For example, AVCC welcomes the suggestion that anomalies in the wording and workings of the Part VA and Part VB statutory licences should be removed so that there is greater consistency between them.

The following comments refer to chapter headings and paragraph numbers adopted in the draft Report.

Output arrangements

In a number of places the Committee suggested that greater emphasis should be placed on agreement being reached between the parties to statutory licences, with recourse to the Copyright Tribunal in the absence of agreement (see, for example, paragraph 11.17). In particular, it is recommended that the legislation should not be prescriptive with respect to record-keeping but should leave the form of records to be agreed by the parties.

In principle, this seems sensible because it delivers greater flexibility to agree a less onerous or more accurate or more efficient record-keeping system. However, the recommendation ignores the fact that the collecting societies are in effect monopolies who are not disciplined by the forces of competition when negotiating such matters. The history of agreements being reached without recourse to the Tribunal is quite poor. The great advantage of the legislation specifying the records that must be kept is that a school or university can have the benefit of

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the statutory licence provided it keeps certain records without the need to reach any agreement with a monopoly collecting society. It is hardly surprising that the collecting societies would prefer to be put in a position where an agreement was necessary (see, for example, the comments of Screenrights at paragraph 17.04).

Far from being an anomaly, as Screenrights seems to have claimed (again, at paragraph 17.04), the lack of any need for agreement over the records that must be kept for the purpose of the Parts VA and VB statutory licences is perfectly consistent with the scheme of those licences. Educational users are given a choice as to whether they wish to have equitable remuneration calculated and paid on the basis of actual use determined by records, or by an estimate of the use that they have made which is determined by sampling. In the latter case, it is clearly necessary to agree a form of sampling system in order to arrive at an estimate. A multitude of different sampling systems with different levels of sample burden, sample and non-sample error, levels of confidence, etc could be designed so that there is a need to agree one such system. In the case of record-keeping, every licensed copying needs to be recorded. There is no choice to be made. While there is an extent to which one can choose to record more or less detail about copying, there is no reason why the legislation cannot make a decision on the appropriate level at the outset – as it has – to avoid the need for ongoing agreement and dispute. The detail of the records that need to be kept in the print environment for the purpose of the Part VB licence has been specified and understood for many years without creating any real problems. The change proposed by the CLRC will create a fresh area for dispute and unnecessary Copyright Tribunal litigation.

If the Committee continues in its view that greater flexibility is required, AVCC submits that at the most, the parties should be given some ability to approach the Tribunal to request a variation to the record requirements set out in the legislation in the event that the variation cannot be agreed between the parties. This would leave greater certainty in the meantime, and put the onus on a monopoly collecting society to justify why a change was required in any particular case.

AVCC notes that MCEETYA submitted that there was a need for greater flexibility in the way that records are kept (see paragraph 11.25). To date, it has been universities rather than schools which have adopted the record-keeping option under the educational statutory licences. Schools have not had the same incentive to do so as their arrangements with CAL have involved paying a fixed fee per student irrespective of the volume of copying that they do. Their interest in accurately determining levels of copying is therefore much reduced. Nevertheless, AVCC submits that any flexibility that MCEETYA would prefer in the record-keeping arrangements would be better delivered by change along the lines of that suggested above rather than by leaving the record-keeping regime to be determined by agreement with monopoly collecting societies or through litigation in the Copyright Tribunal.

Remuneration notices

Under this heading, the Committee has recommended at paragraph 11.39 that the current choice between assessing equitable remuneration on either a sampling or a records basis should be removed and that the parties should be left free to agree between these and any other options for the determination of the amount of equitable remuneration, and the method for assessing it. Again, in default of agreement the Copyright Tribunal would have a role.

AVCC submits that this recommendation fails to take account of 2 important matters. First, the difficulty of reaching agreements with monopoly collecting societies on which comment has been made and will not be repeated. Secondly, the role and value of record-keeping as an option for educational user groups under both the Parts VA and VB statutory licence regimes.

As has been noted, there are 2 very different ways of calculating equitable remuneration for licensed copying based upon levels of use. The first is to have reference to the actual level of use by the educational institution in question. Only a record-keeping system does this. By contrast, one can estimate the level of use by reference to one of a variety of possible sampling systems. There may also be other ways of linking remuneration with use such as calculations based on a percentage of advertising revenue or expenses or other indicia of the size or activity of the business in question.

At present, a school or university has a right to insist on the equitable remuneration that it pays under the statutory licence being calculated by reference to what it actually does. As the Committee notes (at paragraph 11.32), the Digital Agenda Bill proposes to remove this option in the context of electronic copies and communications. AVCC has opposed this removal. The fact that the Committee's recommendation would leave it open to the parties to agree a "pay for actual use" system based on records is far removed from a school or university having the right to insist upon such a position. There are many reasons why it might wish to do this:

- (a) sampling and other systems of estimation have always focussed on a sector rather than individual schools or universities. While in theory sampling or other schemes could focus on the individual entity, once one school or university concludes a sampling system with a monopoly collecting society it will be difficult to persuade the collecting society or the Tribunal to order a variation to suit an individual school or university even if that institution could afford the time and expense of pursuing this course. The result is that each school and university pays remuneration which reflects the copying practices of the sector. If it wishes to do much less copying under the statutory licence, or to exclude higher priced copying (eg coursepack copying), it will derive little or no benefit. In such a case the record-keeping option enables the school or university to pay for what it actually does;
- (b) experience shows that sampling systems significantly reduce the discipline which applies to copying practices. In a sampling environment, the copying that is actually done at a university or a school does not have any direct impact on the amount of equitable remuneration that it is paying, even if that university or school is being sampled at the time. By contrast, if records are kept by a university of all copying under the statutory licence, there is a stimulus to make a decision as to whether or not the copying is worth making and paying for on each occasion. The records can also serve as a basis for allocating costs to particular departments or faculties and for exercising greater management control over their copying; and
- (c) in the absence of records it is very difficult for a university or school to know whether it is copying more or less than the average university or school and therefore whether or not the sampling system results in remuneration levels which are reasonable from its perspective.

For all the above reasons, while ever the legislation insists on equitable remuneration being calculated by reference to an assessment of levels of copying, or a collecting society or Copyright Tribunal is likely to calculate equitable remuneration on this basis, it is vital to preserve a pay for actual use system as an option rather than a mere possibility that might be agreed with the collecting society. It is in the interest of collecting societies to destroy this option as record-keeping creates a disincentive to copying and alternative systems which require their agreement put them in a position to exercise their monopoly power for the benefit of members. It would be ironic if the CLRC, in a review of the jurisdiction of the Copyright Tribunal, a tribunal whose function it is to balance the monopoly power of the collecting societies, were to give the collecting societies even greater power.

Having said this, AVCC notes that a system such as the Committee proposes would be very attractive if it were clear in the legislation or otherwise that equitable remuneration under the statutory licences would not be linked to copy levels. If remuneration were calculated as a percentage of revenues or expenses or student fees or the like then assessments of copying would be primarily relevant to how the collecting society distributed its licence fee revenue. Flexibility along the lines suggested by the Committee would be most desirable. However, at least in the case of universities, a history of Copyright Tribunal decisions linking equitable remuneration to levels of copying will be difficult to escape even if the legislation is altered to allow other factors or systems to be taken into account.

At paragraph 11.37 of the draft Report, the Committee states that it is, "mindful of avoiding recommending significant substantive change to the nature of the statutory licence itself, in the absence of submissions ... from those interests that would be directly affected by such change." The Committee goes on to say that it believes its proposal with respect to remuneration notices "represents a simplification of the statutory scheme, rather than a significant substantive change". For the reasons outlined above, AVCC submits that the proposals do represent a significant substantive change and should be reconsidered.

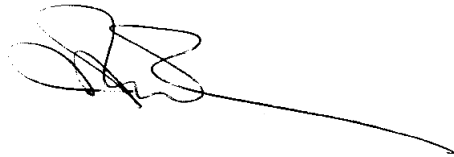
Anomalies in licensing schemes

At paragraph 17.06 the Committee again treats the fact that the Copyright Tribunal does not have a role in determining record-keeping systems as an anomaly. For reasons outlined above, this is not the case. The Committee goes on to state that "no submissions were made ... opposing the extension of the Copyright Tribunal's jurisdiction to the determination of record-keeping systems in the absence of agreement between the parties under both the Parts VA and VB schemes". This is hardly surprising given that no such proposal was put before the AVCC for comment. For the reasons outlined above, the position with respect to record-keeping is not an anomaly. For the most part it has operated satisfactorily, and AVCC submits that there is no need to give the Copyright Tribunal an extended role and good reason to avoid the additional level of disputes that this will undoubtedly generate.

Flexible purpose of sampling systems

It has recently come to the attention of AVCC that there may be a question as to whether the Copyright Tribunal has jurisdiction to determine sampling systems with respect to licensed copying where the system is required solely to assist the collecting society to distribute the equitable remuneration which it receives. For example, if a university and CAL were to agree a fixed per-student amount for a future period for all copying done under the Part VB statutory licence, they might still disagree as to how that copying should be monitored so as to enable CAL to distribute the money which it collects. AVCC submits that it is important that the expanded and more flexible jurisdiction of the Copyright Tribunal which the Committee proposes should extend to enable it to consider and determine sampling systems for a wider variety of purposes than merely determining equitable remuneration.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T J Mullarvey', with a long horizontal line extending to the right.

T J Mullarvey

Deputy Executive Director