

7 April 2000

Mr James Barker  
Director  
Copyright Law Review Committee  
Attorney-General's Department  
Robert Garran Offices  
BARTON ACT 2600

Dear Mr Barker

**RE: CLRC Copyright Tribunal Response to Submissions**

CAL has been provided with the opportunity to review several of the submissions received by the Copyright Law Review Committee on the draft report of the Committee on the powers and operation of the Copyright Tribunal. CAL now offers the following comments on those submissions.

References to CAL's previous submission are a reference to its submission of 21 March 2000.

- 1. Commonwealth Department of Transport and Regional Services**
  - 1.1 CAL notes the comments of the Commonwealth Department of Transport and Regional Services that the recommendation of the draft report in paragraph 11.68 appears inconsistent with the current section 183(5) of the *Copyright Act 1968* (the Act).
  - 1.2 In its previous submission at paragraphs 6.1 to 6.9, CAL strongly opposed transactional licences offered by collecting societies coming within the scope of the Tribunal's jurisdiction.
  - 1.3 The Committee will also note that CAL is now the declared collecting society for the purposes of Division 2 of Part VII of the Act in relation to Government copies of works and published editions of works, other than works that are included in subject matter.
  - 1.4 Despite CAL's opposition to the Tribunal having jurisdiction over transactional licences (including those offered by collecting societies), in the case of Government copying it would seem prudent to maintain the current terms of s.183(5) as an exception to that general principle. The Tribunal is able to maintain independence from the Government in making such determinations, which is the fairest approach to the owners of copyright whose works are copied in that context.

## **2. Council of Australian State Libraries**

- 2.1 CAL supports the submission of CASL of 1 March 2000, and refers to CAL's previous submission at paragraphs 15.1 to 15.4.
- 2.2 CAL supports the recommendation of the Committee at paragraph 18.16 for a mechanism to be established for the Copyright Tribunal to grant licences for the use of copyright material where the copyright owner is unknown or untraceable. However, CAL does not agree with the comments of CASL that the Tribunal would, "in effect, become another collecting society for this purpose." CAL understands the recommendation of the Committee to mean that the Tribunal would essentially determine the terms and conditions of any relevant licence.

## **3. MCEETYA Copyright Task Force Submission**

- 3.1 The Task Force suggested in its original submission, and have suggested again in its submission dated 2 March 2000, that increases in licence fees should not be "retrospective" where an applicant has failed to pursue its application with due expedition.
- 3.2 CAL refers to its submission at paragraph 16.3 concerning retrospective payments, and CAL's experience in proceedings before the Copyright Tribunal with the AVCC. CAL considers it is entirely appropriate for the Tribunal to have discretion in this regard, and does not believe there is any benefit in the Act providing guidance on such retrospective payments in this context.

## **4. Attorney-General for Western Australia**

- 4.1 The Attorney-General for Western Australia in his submission dated 14 March 2000 makes a number of comments in relation to record keeping, ultimately concluding that section 135ZX(3) be repealed "as it appears to serve no useful purpose." CAL strongly disagrees with that statement and refers to its submission at paragraphs 3.2, 3.4 and 3.6. Section 135ZX(3) is an important part of the marking requirements which prove useful in administering the statutory licence in Part VB of the Act.
- 4.2 The Attorney-General for Western Australia also comments on page 3 of the submission that "one collecting society requires that persons becoming members give an indemnity to the collecting society." It is not clear which collecting society is being referred to, however CAL notes that it is not the case that CAL requires persons becoming members to give an indemnity to CAL. However, CAL requires recipients of fees to indemnify CAL against claims from other copyright owners in respect of those fees.
- 4.3 The issue of CAL membership was discussed at some length in *Nationwide News Pty Ltd and Others v. Copyright Agency Ltd* (1995) 30 IPR 159 at 178- 182. CAL particularly draws reg 23JM of the Copyright Regulations to the attention of the Committee, the relevant parts of which are reproduced in the above judgment at p 179.
- 4.4 Part VB of the Act, reg 23JM and CAL's Constitution determine the requirement to distribute shares in the distributable amount to members. The court found that there was "no substance in any of the applicants' complaints" including these concerns

over membership. An appeal by the applicants was also unsuccessful in *Nationwide News Pty Ltd and Others v. Copyright Agency Ltd* (1996) 34 IPR 53.

- 4.5 The relationship between CAL and the copyright owner as a member of the collecting society is formalised by CAL's membership terms, and CAL requires its members to warrant that it is able to grant the relevant rights to CAL at the time of becoming a member. A member is also required to undertake at the time of claiming payments that it will determine whether any other person is entitled to a share of payments claimed, which CAL considers a necessity because of the often complex contractual arrangements which underlie the rights administered.
- 4.6 The requirement for membership also allows CAL to provide members with the opportunity to represent their works outside the operation of the statutory schemes, subject to the member providing such authority.

## **5. VISCOPY**

- 5.1 CAL notes the submission of VISCOPY dated 20 March 2000, which essentially discusses input arrangements. CAL refers to its submission at paragraph 9.1 and reiterates its agreement with the Committee's recommendation that the jurisdiction of the Tribunal not be amended to include a power to review input arrangements generally.
- 5.2 CAL believes that the existing powers of, and oversight by, the Attorney-General and his department concerning the declared collecting societies are entirely satisfactory. CAL is often in contact with the department concerning its declared status and considers that the department quite diligently pursues its role of overseeing the declared collecting societies.
- 5.3 CAL also disagrees with VISCOPY in relation to the application of the *Administrative Decisions (Judicial Review) Act 1977*.
- 5.4 CAL notes the VISCOPY conclusion that the existing remedies are unsatisfactory, and the support by VISCOPY of the PPCA submission in relation to input arrangements. CAL again notes its fundamental disagreement with the Copyright Tribunal having power to review input arrangements generally.
- 5.5 Page 3 of the VISCOPY submission also makes the suggestion that the *AVCS Ltd v. ARIA Ltd* decision of the Copyright Tribunal on 20 January 2000 involved some sort of abuse of the position of Screenrights (AVCS) as the declared collecting society. CAL does not see that the decision of the Tribunal considered any other matter than the question put to it by both parties concerning the ability of two collecting societies to be declared for certain aspects of government copying. There was no suggestion of "abuses" by Screenrights.

CAL thanks the Committee for the opportunity to make these comments. If the Committee would like further information about any of the matters contained in this submission please contact me.

Yours faithfully

**Michael Fraser**  
**Chief Executive**