

# **Australian Vice-Chancellors' Committee Submission to Ergas Committee on Competition Reform and Intellectual Property Laws**

## **EXECUTIVE SUMMARY**

### **A. The monopoly power of collecting societies**

1. The Australian Vice Chancellors' Committee(AVCC) submits that the statutory licensing regimes created under Parts VA and VB of the *Copyright Act* 1968 would be more efficient and less restrictive of competition if the *Copyright Act* was amended to allow the gazettal of more than one collecting society for the purpose of these licences.
2. The Review Committee should also consider whether CAL and Screenrights should be subject to periodic review by the Australian Competition and Consumer Commission(ACCC) to ensure that their market power is not being used contrary to the public interest, that increases in their prices and costs are justified and that the terms of their constitutions, contracts and licensing schemes are as unrestrictive as possible.
3. If, contrary to the submission of the AVCC, the statutory monopoly that each of CAL and Screenrights enjoys under the statutory licence provisions of the *Copyright Act* is to remain then the AVCC submits that it is important for government to:
  - (a) resist any attempts by the monopoly collecting societies to remove the record keeping option which is currently available to universities and schools; and
  - (a) extend the jurisdiction of the Copyright Tribunal to embrace all aspects of the terms upon which the collecting societies license or offer to license universities.

### **B. Changes to Section 51(3) of the Trade Practices Act 1974**

1. The AVCC submits that section 51(3) of the *Trade Practices Act* 1974 should not be altered. If there is to be change along the lines suggested by the National Competition Council(NCC) report, AVCC submits that guidelines need to be developed which reduce the uncertainty and cost of compliance.

# **Australian Vice-Chancellors' Committee Submission to Ergas Committee on Competition Reform and Intellectual Property Laws**

The Australian Vice-Chancellors' Committee (AVCC) is the peak body representing 37 Australian Universities.

The AVCC has identified two issues within the reference to this Committee which are of particular importance to the higher education sector. First, the existence and exercise of monopoly powers conferred by statute on those collecting societies which are central to the exercise of the educational statutory licences under Parts VA and VB of the *Copyright Act*, 1968. Secondly, the amendments to section 51(3) of the *Trade Practices Act*, 1974 which were proposed in the National Competition Council's(NCC) final report of July 1999.

The AVCC's recommendations on each of these issues is set out in bold in the analysis which follows.

## **A. The monopoly power of collecting societies**

1. The statutory licences created by Parts VA and VB of the Copyright Act allow for the copying of broadcasts and works by educational institutions for educational purposes in return for the payment of equitable remuneration. In each case equitable remuneration is assessed either on the basis of a records system or a sampling system. The relevant university (or school) gives the notice to the relevant collecting society stating on which basis it wishes to be assessed for its licensed copying. Where a records notice is given, the relevant university (or school) must make a record of every licensed copy made by it. Where a sampling notice is given, a sampling system is used to determine the number of licensed copies made. Equitable remuneration is then paid to the relevant collecting society on the basis of the assessed number of licensed copies made during the relevant period.
2. For the purpose of the Part VA statutory licence, "collecting society" is defined to be the body declared to be the collecting society under section 135P. This section gives the Attorney-General the power to nominate a body as the collecting society by notice in the Gazette. Sub-section 135P(2) prohibits the Attorney-General from naming more than one body by such a declaration at any one time. Audio-Visual Collecting Society (doing business as Screenrights) is the gazetted collecting society for the purpose of this licence.
3. For the purpose of the Part VB statutory licence, section 135ZZB defines "collecting society" as the body declared to be a collecting society under section 135ZZB. Again, this allows for the gazettal of only one collecting society for any one class of copyright owner. At present there is a single collecting society, Copyright Agency Limited ("CAL").
4. In the case of each of the statutory licences the *Copyright Act* expressly preserves the right of an individual copyright owner to grant a licence to a university. In other words, it is possible to conclude voluntary licence arrangements rather than copy pursuant to the statutory licence schemes. Equally, it follows that it would be possible to establish a collecting society to act on behalf of many copyright owners for the purpose of their

voluntary licensing arrangements. However, the monopoly collecting societies enjoy significant advantages which mean that for practical purposes almost all licensed copying of broadcasts and works for educational purposes will be done pursuant to the statutory licence and involve negotiation with and payment to the gazetted monopoly collecting societies. Payment to these collecting societies by the university sector currently exceeds \$10 million per year. This figure will increase significantly in future years due to a recent decision in the Copyright Tribunal

5. These statutory licences and their efficient working are critical to ensuring that copyright law gives effect to the important public interest in the ability to access and use copyright materials on reasonable terms for educational purposes. Copyright law has never been intended to enable copyright owners to maximise their economic return from their creative efforts but rather seeks to balance the need for incentives and returns with the public interest in access to information.
6. The AVCC recognises the necessity of the central role that collecting societies must play in a workable statutory licence regime. They avoid the need for universities to deal with a multiplicity of copyright owners and enable transaction costs to be minimised. Having said this, these statutory licences have assumed an increased complexity and scope which makes it all the more important that collecting societies are established and empowered in the least restrictive possible way. In particular, the reproduction and use of digital information for a wide range of purposes is likely to make the statutory licences even more important to the access and use of information in universities. Further, the proposed creation of an additional exclusive right in favour of copyright owners, the exclusive right of communication, will likely see the *Copyright Act* amended to extend the statutory licences to include a licence of this new right. The high probability is that the same collecting societies will be the gazetted monopoly collecting societies for the purpose of these new statutory licences.
7. Collecting societies also played a central role in a predecessor to the current Part VB statutory licence. Under the previous licence, provided for in the now repealed section 53B of the *Copyright Act*, CAL did not enjoy any monopoly status as the sole gazetted collecting society for the purpose of that section. This gave rise to a concern that if licensed copying was invoiced by CAL and paid for by the universities, then if a copyright owner was not represented by CAL (ie the owner had not appointed CAL as its agent for the purpose of collecting equitable remuneration under the statutory licence), universities would be open to a claim for copyright infringement and damages by that owner. CAL in turn would have been overpaid. In practice this was resolved by CAL giving universities an indemnity against claims by copyright owners. CAL would then use the records that it received with respect to licensed copying to approach the owners of copyright in the works the subject of the relevant copying and suggest that if they were to appoint CAL as their agent then they would receive a distribution of part of the moneys that had been collected with respect to educational copying. By contrast, under Part VB of the *Copyright Act*, as long as the university gives a notice to the monopoly collecting society in which it undertakes to pay equitable remuneration for licensed copying (on either a sampling or records basis) then that copying will not infringe (see section 135ZJ). A copyright owner who is not a member of CAL cannot make a claim against the university. This change has had the effect of avoiding the need for CAL to give an indemnity to universities. The statutory monopoly granted to CAL has the effect that universities need – indeed can – only

deal with CAL and that any copyright owner who wishes to receive a return for copying done by universities under the statutory licence must do so by the appointment of CAL as their agent.

8. While collecting societies obviously involve a fixing of price and other terms across all major publishers and other copyright owners when it comes to their dealings with universities, AVCC recognises that this is justified by the public benefit of the statutory licence regime and the central role that must be played by collecting societies in such a regime. However, the importance of the statutory licence and the power that the collecting societies have make it critical that the licensing regime and collecting societies are structured in the least restrictive manner possible.
9. There are existing constraints on the power of these monopoly collecting societies. However, they are of limited efficacy.

First, the terms upon which each of CAL and Screenrights contract with their members are non-exclusive. Members are left free to deal direct with universities and to negotiate voluntary licences. Indeed, in theory a number of copyright owners could appoint a different collecting society to negotiate voluntary licences on their behalf with universities. However, in a context where universities are making use of copyright broadcasts and works from a very large number of sources, and where the choice of what is to be copied is made shortly before the act of copying takes place, it is not practical to seek and obtain a voluntary licence in most cases. Indeed, this is the very reason for the creation of the statutory licensing regime. Further, the statutory licence will result in a copyright owner receiving a share of equitable remuneration collected for licensed copying by the sector (assuming that one or more of its works are copied) without the need to negotiate or conclude any agreement. In these circumstances the incentive to negotiate with a university is low. This reluctance to grant individual licences means that for the bulk of copying undertaken by universities there is defacto exclusivity on the part of the collecting society.

The second constraint on the power of the collecting societies under the statutory licences is the role of the Copyright Tribunal. If a university and a collecting society cannot agree what rate of remuneration is equitable with respect to licensed copying, or an appropriate sampling system to assess levels of licensed copying where it has given a sampling notice, then the *Copyright Act* allows either party to refer the issue to the Tribunal for determination. While this is a check on the power of the collecting societies in their negotiations with universities, it has fallen far short of imposing the same discipline on their conduct that would be imposed by competition. The determination of disputes before the Copyright Tribunal is slow and expensive. To all intents and purposes, it is Federal Court litigation. While the delay creates uncertainty as to the cost of licensed copying and therefore a disincentive upon universities to exercise their statutory licence rights, there is little incentive on the collecting society to reach agreements or to pursue or settle Tribunal proceedings quickly. Any determination can be made retrospective and in the meantime the society is not at risk of losing revenue to another collecting society or group of copyright owners who separately negotiate and reach agreement with the university.

Even if the Copyright Tribunal were a more effective constraint on the power of collecting societies, its jurisdiction does not extend to matters beyond determining equitable rates of

remuneration and sampling systems. The impositions of unreasonable terms or the adoption of unreasonable positions in negotiations are both outside the jurisdiction of the Tribunal.

- 10 It is AVCC's view that the evidence supports its contention that the existing constraints on the power of the monopoly collecting societies are not sufficient. There is a poor history of agreements being reached with these collecting societies on equitable rates of remuneration. The collecting societies typically adopt a "take it or leave it" approach and prefer to have the matter resolved in the Tribunal. Perhaps given the large number of copyright owners that they represent, and the conflicting interests of different groups of those copyright owners, it is natural that they would prefer to have important issues such as rates determined by the Tribunal rather than risk criticism of any agreement reached by negotiation. Nevertheless, this is not an approach that they could afford to take in a competitive market. The monopoly collecting society has a guaranteed return which means that there is no risk in delaying agreements on rate and leaving them for the Tribunal to decide. This is an approach which creates inefficiencies which delay the access to and use of information by universities and thereby frustrates the public interest.

A good example of this is the attempts to reach agreement on a rate for digital copying. In 1995 CAL approached AVCC and argued that there should be a higher rate for copying of material into or from digital formats than that which applies to copying from print into hard copy formats. An impossibly high rate was suggested and rejected. CAL eventually commenced proceedings in the Copyright Tribunal seeking, amongst other things, a rate for digital copying. It put on no evidence to support this part of its application and the decision of the Tribunal, which was not handed down until February 1999, refused to determine any rate in the absence of evidence. In the meantime, universities have been reluctant to copy information in digital formats because of the uncertainty as to cost.

- 11 **The AVCC submits that the statutory licensing regimes created under Parts VA and VB would be more efficient and less restrictive of competition if the *Copyright Act* was amended to allow the gazettal of more than one collecting society for the purpose of these licences.** This would allow other collecting societies, whether already existing (for example, Screenrights and CAL could compete with respect to certain licensed copying) or new, to play the same role with the same levels of protection as the existing statutory monopoly societies. Universities would continue to keep a single set of records or to submit to a single sampling regime and the data that is collected could be sent to each of the relevant collecting societies. The society which represented the relevant copyright owner would collect the equitable remuneration for the copying in question. If that copyright owner is represented by more than one collecting society, then it would be a matter to be resolved between them as to who collected and distributed moneys paid by universities for the relevant copying.

Such an amendment would allow the development of both alternatives to CAL and Screenrights (ie. collecting societies that represent owners of copyright in the full range of works or broadcasts covered by the relevant statutory licence) and also specialist collecting societies for certain types of copying or certain classes of copyright owner (for example, the owners of copyright in scientific and technical journals). These would all compete with each other both for members (although a copyright owner could be represented by more than one society) and for the right to represent some or all owners in a specific licensing transaction.

- 12 The only costs or inefficiencies resulting from the amendment which the AVCC proposes are those relating to the need to determine entitlement to particular remuneration as between different collecting societies so as to enable distribution. These would be more than outweighed by the public benefit in competition between collecting societies which would benefit both copyright owners and universities. The possibility of a competitive marketplace, let alone the introduction of competition by alternative collecting societies, might force the existing collecting societies to adopt a more commercial approach in their negotiations with universities. Any reduction in Copyright Tribunal disputes and in the resources devoted to those disputes would create other public benefits for the reasons outlined above.
- 13 The AVCC recognises that the change that it proposes will not alter the level of competition overnight. CAL and Screenrights have enormous first entrant advantages which will pose significant barriers to new entry. Unless and until a new entrant can achieve representation of a significant number of copyright owners it will not be credible or viable. **For this reason, the AVCC submits that the Committee should also consider whether CAL and Screenrights should be subject to periodic review by the Australian Competition and Consumer Commission to ensure that their market power is not being used contrary to the public interest, that increases in their prices and costs are justified and that the terms of their constitutions, contracts and licensing schemes are as unrestrictive as possible.**
- 14 **If, contrary to the submission of the AVCC, the statutory monopoly that each of CAL and Screenrights enjoys under the statutory licence provisions of the *Copyright Act* is to remain then the AVCC submits that it is important for government to:**
- (a) **resist any attempts by the monopoly collecting societies to remove the record keeping option which is currently available to universities and schools.** This choice gives each university the option of paying on the basis of records of what it actually does rather than under a sampling system which, while administratively more convenient, only approximates to the licensed copying that it has done. Collecting societies prefer sampling because under such a system there is a history of increased levels of copying. By contrast, record keeping also enables a university or school to monitor and manage levels of copying and their expenditure under the statutory licence. Collecting societies will continue to lobby for the removal of the record keeping option, primarily on the basis of their assertion that universities and schools find it difficult to keep accurate records. The remedies for any failure in a record keeping system already exist and the removal of the option would increase the power of these monopoly collecting societies. Sampling systems would be offered on a "take it or leave it" basis and universities would not have a viable alternative system.
  - (b) **extend the jurisdiction of the Copyright Tribunal to embrace all aspects of the terms upon which the collecting societies license or offer to license universities.** The reasonableness of terms other than the level of equitable remuneration could then be supervised. If need be, a requirement for supervision or approval by the Australian Competition and Consumer Commission could be introduced.

## **B. Changes to Section 51(3) of the Trade Practices Act 1974**

1. Universities remain concerned about the proposed changes to Section 51(3) particularly as they relate to horizontal arrangements. The principal concern relates to how the proposed change to this section will affect licensing provisions in collaboration arrangements with private enterprise.
2. Government funding for universities is continuing to decline, placing significant pressure on universities to find alternative sources of funding for research projects from the private sector. Traditionally, a single corporate sponsor may have funded a specific research project. More recently the trend has been for collaborative research through vehicles such as cooperative research centres ("CRC"), where a university would team with multiple partners from industry and, often, other universities and the CSIRO. The CRC may be incorporated or unincorporated.
3. One of the key features of any CRC or similar collaboration is that the parties will each be committing their intellectual property to the project ("background intellectual property") for further research and development with the intention that a new product or process will emerge. Of necessity, there will be cross licences of the various background intellectual property for use by the collaborators. The resultant intellectual property embodied in the product or process may then be licensed to one or more of the organisations participating in the CRC. Often this will be an exclusive licence to enable the industry participant, which will have contributed the bulk of the funds, to recoup its investment and obtain a competitive advantage as first entrant into the new market.
4. Another area of potential impact is the cross licensing of intellectual property by universities for research purposes. For example, universities may grant licences to one another in relation to a particular protein structure for use in their respective cancer research. Again, exclusivity or other restrictions may be needed to support the investment of research time and funds in the project or in order to have some "first start" advantage that will be attractive to potential private investors at a later stage.
5. In each of these cases there may be questions under the Trade Practices Act of whether or not two or more competitors have reached an agreement which includes an exclusionary provision as defined in section 4D of that Act in breach of the section 45 prohibition. Are the exclusivity provisions included for the purpose of limiting the provision of certain services (eg. the benefit of a licence to use the relevant intellectual property) to others? Depending on the facts in each case, this will often be at least arguable. Such a contravention involves no competition analysis and the provision would require authorisation. In those cases where the provision falls to be assessed under section 47 instead of section 45, the competition analysis would often be difficult given the difficulty in defining markets in relation to emerging technologies. In the case of a potential breakthrough product or process, the possibility of a single product market would have to be taken into account.
6. More and more universities are seeing that industry partners are unable to conduct research and development on their own. It is becoming increasingly unusual to find even medium sized research and development teams within Australia's companies. Even large organisations with a strong history of research and development are closing research laboratories (e.g. BHP, Rio Tinto). In this context, competition law should not create

barriers to research and development collaborations which are usually pro-competitive and deliver significant public benefits.

7. Any changes to Section 51(3) need to take into account that obstacles to horizontal licensing of intellectual property can have significant effects in the collaboration area, which will have flow on effects to the Australian economy. The concern of the universities is that if there are competition law obstacles to the licensing of intellectual property for collaborative research and development purposes, then this will have a significant impact on the level of research within universities and the ability to attract private sector funding and participation. The AVCC is not aware of the current section 51(3) exception having given rise to demonstrated anti-competitive conduct or practices that dictate the need for a reform whose effects are uncertain.

More particularly, the AVCC's concerns are as follows:

1. Without certainty as to when horizontal licensing will be permissible, universities and their partners will be burdened with increased costs in understanding and implementing the new arrangements.
2. There is a suggestion from the NCC that horizontal arrangements between competitors could be subject to authorisation from the ACCC. However, given the delays involved and that the cost of the average authorisation is estimated to be \$200,000.00, it is not a viable option for collaborative research groups or CRCs embarking in embryonic research. It is a significant set up cost and becomes a barrier to entry into collaborative research arrangements.
3. Universities are not like corporations and do not have the same level of trade practices compliance programs or awareness. Universities have very limited resources in this area and would be reliant upon industry to assist with analysis of whether or not collaboration could proceed under the new regime.
4. It should not be assumed that all corporations have the same level of trade practices compliance programs or awareness, or the same resources to contribute to a collaborative research project requiring this type of analysis prior to research beginning. Foreign corporations in particular will be deterred by the need to invest in advice in this area as a cost of establishing a collaboration.
5. The universities are concerned that Australian industry will look towards jurisdictions with more "certain" schemes for conducting collaborative research, notably in Europe and the United States. Put another way, Australia is a very small country in comparison to the European Union or the United States and has sufficient difficulty in attracting research dollars without the additional burden of an administrative system that is costly and different to those in Europe and the United States.

**In view of these concerns, the AVCC submits that section 51(3) of the *Trade Practices Act 1974* should not be altered. If there is to be change along the lines suggested by the NCC report, AVCC submits that guidelines need to be developed which reduce the uncertainty and cost of compliance. It would be preferable if these were modelled on the US or European models rather than creating a separate and different regime that investors**

from the major sources of foreign investment in Australian research and development will struggle to understand.

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Should the Committee wish to discuss any aspect of these submissions with the AVCC, please contact Mr John Mullarvey, the Deputy-Executive Director of AVCC, who would be pleased to assist.

**1 December 1999**