



Australian Law Reform Commission Issues Paper (August 2012)

Copyright and the Digital Economy

Submission by Commercial Radio Australia

16 November 2012

Commercial Radio Australia (**CRA**) welcomes the opportunity to respond to the Australian Law Reform Commission (**ALRC**)'s issues paper relating to copyright and the digital economy.

CRA is the peak national industry body for Australian commercial radio stations. CRA has 261 members and represents approximately 99% of the commercial radio broadcasting industry in Australia.

CRA's members, as both creators and users of copyright material, are keen to see a balance struck between fairly compensating owners of copyright material while at the same time permitting innovative use of copyright materials to deliver new products and services to the public.

Currently, the system of rights clearance in the digital world is often complex, costly and inefficient. There are no easy solutions to this problem. The commercial radio industry would ideally like to see a regime that balances copyright protection with straight forward access to copyright material. Such a regime should be simple, cost effective and, most importantly, platform neutral.

CRA has grouped relevant questions on broad topics together and has made submissions on those topics generally. Not every question appears at this stage to be relevant to the commercial radio industry, although CRA might comment on additional questions following publication of the ALRC's Discussion Paper.

A. Copyright and participation in the digital economy

Question 1. The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- affects the introduction of new or innovative business models;
- imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- places Australia at a competitive disadvantage internationally.

1. The commercial radio industry is both a creator and a user of copyright material. It is as a copyright user that it encounters the greatest problems, particularly when developing innovative business models and new services.

Complexity and cost of copyright clearance system

2. The commercial radio industry has been quick to adapt to technological changes. All of the metropolitan networks have at least one smartphone application available. The majority of commercial radio broadcasters – both metropolitan and regional – make their broadcasts available as online simulcasts.
3. While digital technology has provided many opportunities for broadcasters, it has also presented challenges, particularly in relation to copyright clearances. Currently, clearances are often linked to the platform of delivery. This causes difficulties in an era in which the distinction between technology platforms is less important than the rights that are sought, such as reproduction for ephemeral purposes, availability on demand or permanent downloads.
4. Continuing focus on platform delivery risks hindering innovation, as the navigation of the complexities of copyright licensing over a diverse set of platforms greatly increases the administrative and financial cost of producing content and communicating it in new and innovative ways.
5. Obtaining copyright clearances for material such as music, video and photographs can be prohibitively costly and administratively complex. It is not always possible to identify the rightholder with certainty. Even where rightholders are represented collectively, the collecting society does not usually have the authority to licence for all types of uses.

Music licensing

6. The complexity of the copyright clearance system is particularly problematic in relation to music licensing. The commercial radio industry has blanket agreements with the Australasian Performing Right Society (**APRA**), representing songwriters, composers and publishers, and the Phonographic Performance Company of Australia (**PPCA**), representing record labels and performers. The existence of blanket agreements greatly facilitates the administration of music copyright, particularly where such agreements cover a wide range of uses and recognize that broadcasts can take place on different platforms, as is the case with the industry's agreement with APRA.

7. However, the fragmentation of copyright makes it difficult, and sometimes impossible, to obtain clearances for a new service from all rightholders. For example, the industry blanket agreement with APRA allows it to communicate music via podcast. However, the industry has not reached an agreement as to a podcast licence with PPCA. The cost of negotiating licences with the record labels is prohibitive, and the commercial radio industry therefore strips music out of its podcasts before making them available to the public. This means that although the industry has a licence from some rightholders – songwriters, composers and publishers – it is unable to use this licence due to an inability to reach agreement with other right holders - the record labels.
8. To some extent, the commercial radio industry accepts that cost will be an issue in any commercial bargain that is struck, including those between broadcasters and record labels. It may be that a business model is not commercially sustainable or that a business will choose not to pay the price offered for a product, such as copyright material.
9. However, these difficulties are exacerbated where the market does not deliver clear information about price or availability of product. There is a need for increased transparency in the marketplace as to the extent and price of a right and the cost of comparable alternatives. This is particularly important given the natural monopoly power that collecting societies hold.
10. The Australian Competition and Consumer Commission (**ACCC**) identified this as a concern in relation to PPCA, in its Determination in respect of PPCA's collective licensing arrangements (the **Determination**).¹ It said:

6.184. The ACCC considers that while PPCA's collective licensing arrangements are likely to result in significant public benefits, PPCA's collective licensing arrangements also result in significant public detriment. The ACCC considers that PPCA's collective licensing arrangements allow owners of sound recordings and music videos to pool their rights to be supplied under a single blanket licence to users, thereby removing some of the competitive pressures that would exist if copyright owners competed individually to license their rights. The availability of PPCA's blanket licence may act as a disincentive for record companies to directly deal with users. PPCA's collective licensing arrangements create the scope for PPCA to exercise market power in the setting of licence fees and conditions because parties wishing to use copyright have limited, if any, alternatives.

6.185. Further, the ACCC considers that PPCA is in a significant bargaining position in terms of licensing, particularly with regard to smaller copyright users. This is particularly a result of the complexity and costs involved in obtaining licences directly from copyright owners when compared to the costs of obtaining a blanket licence from PPCA.

11. Lack of transparency is a particular problem in relation to the PPCA repertoire. PPCA is unable to identify the extent of its repertoire, as not all sound recordings are protected under Australian copyright law.² This makes it very difficult for broadcasters, who cannot find out

¹ ACCC Determination dated 27 September 2007 – Application for revocation and substitution of authorisations A30082, A30083, A30084, A30085, A30086 and A30087 lodged by PPCA.

² This is as a result of the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961*. Member countries of the Rome Convention have a reciprocal arrangement to provide the same copyright rights in that country to other member countries, and as such protect international recordings under domestic copyright law. The United States is not a member country and its recordings are not automatically protected under Australian copyright law by virtue of the Rome Convention.

with certainty what sound recordings a licence with PPCA will cover and therefore are poorly positioned when trying to negotiate a fair price.

12. The ACCC identified this as an issue in its Determination, and in its draft Determination proposed that PPCA should publish a list providing users with information as to what sound recordings are covered under PPCA's blanket licence. PPCA responded by outlining the practical difficulties that such a requirement would impose, saying that it would be impossible to comply with such a condition. As a compromise, the ACCC required that PPCA publish an annual list of sound recordings in relation to which it has made a distribution.³ This information is published on the PPCA website and goes some way to assisting users to identify protected recordings. However, it is accompanied by ten extensive disclaimers, including the following:

No representation is made as to whether or not any particular recording is protected in fact or law. In many cases PPCA has not made the detailed and complex factual and legal analysis required by the Copyright Act in order to conclusively determine whether or not any given recording is protected.

PPCA does not represent that the list may be relied on by anyone for any purpose.

The list cannot be relied upon as a defence to copyright infringement.

13. Accordingly, broadcasters remain unable to identify the sound recordings that are the subject of the PPCA licence. This greatly complicates the negotiation of new licences to use sound recordings on digital platforms.
14. While the commercial radio industry recognizes that it may not be possible to produce a comprehensive list of sound recordings that are protected under Australian copyright law, it nevertheless submits that further efforts should be made to provide as much information as possible to enable users to identify which sound recordings in Australia are covered by a PPCA blanket licence. This is an essential cornerstone on which to build an efficient, transparent and fair copyright licensing system, which will not obstruct the development of new and innovative services and business models.
15. It is particularly important that a workable solution is found in relation to music licensing on radio, including broadcasts on digital platforms. In order to benefit both the commercial radio and music industries, broadcasters' relationships with the music industry must be economically sustainable. In addition to paying significant royalties to the music industry, commercial radio broadcasters also add value in terms of promoting music through air-play and discussion. Yet the licensing of music is particularly complex, due in part to costs of negotiation, fragmentation of rights and, in some cases, lack of transparency as to price and extent of repertoire.

³ Paras 6 100 to 6130, ACCC Determination.

Need for technologically neutral regulation

16. An increasing proportion of listeners choose to access commercial radio through an online platform. The issue of whether simulcasts of radio programs on the internet – that is, the broadcast of a radio program at the same time on both the broadcasting services bands and the internet - constitute “broadcasts” is currently being debated by the Full Federal Court.
17. At first instance, the Federal Court found that the platform of transmission made no difference, and that both transmissions were considered “broadcasts” and therefore subject to the same set of rules. This is a finding that clearly makes sense from a practical perspective.⁴ The idea that a broadcaster will need to comply with two separate sets of rules if it wishes a program to be received by both a traditional radio and a computer is clearly at odds with technological trends and use patterns, where the device on which content is accessed is becoming increasingly irrelevant. Foster J found that:

The service which transmits the very same radio programs at essentially the same time both to the FM transmitters and beyond and to the web stream servers and beyond is the one service. . . . the members of CRA who stream their radio programs on the Internet do so only as part of a program package which also simultaneously transmits those programs via frequency modulated radio waves to the consumer's receiver. In truth, the service is but one service being a service which combines various delivery methods or platforms and which delivers the same radio program using the broadcasting services band (para. 130).

18. The industry has invested heavily in online listening, through websites and additional content, but this has not led to an increase in overall listening. Instead, the same listeners are choosing to access radio through multiple devices. Online listeners are not generally new listeners and therefore new or growing digital use should not automatically be accompanied by a substantial fee increase. Use is fragmented across different platforms. In an era of convergence, it no longer makes sense to require different copyright clearances for different platforms. Rather, copyright laws should be technology neutral wherever possible.
19. If the Full Federal Court were to find, on the basis of existing legislation, that the same radio program should be subject to different regulation, depending on the platform of transmission, then this would be a huge barrier to innovation and use of the internet as a means of reaching a wider audience. It would become significantly more complicated for broadcasters who wish to simulcast program content, as they would effectively become subject to two different sets of rules. In an era of convergence, this approach seems highly outdated and would create significant practical problems. Further, a continuing emphasis on platforms of delivery, rather than the service being delivered, could have implications for other media.

⁴ *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia* [2012] FCA 93

Possible solutions

20. There are no easy solutions to the problem of rights clearance in the digital world. The commercial radio industry would ideally like to see a regime that balances copyright protection with straight forward access to copyright material. Such a regime should be simple, transparent, cost effective and platform neutral.
21. The 2011 UK report *Digital Opportunity – A Review of Intellectual Property and Growth* by Professor Ian Hargreaves (“**Hargreaves Report**”) recommended that in order to boost “access to transparent, contestable and global digital markets, the UK should establish a cross sectoral Digital Copyright Exchange”.⁵ The idea behind this proposal is to make it “easier for right owners, small and large, to sell licences in their work and for others to buy them. It will make market transactions faster, more automated and cheaper. The result will be a UK market in digital copyright which is better informed and more readily capable of resolving disputes without costly litigation”.⁶
22. It is too early to see what, if any, shape a UK digital exchange is likely to take. However, the commercial radio industry would be interested in any proposals that seek to simplify the ever more complex task of obtaining clearances for material used on a multitude of technological platforms.

B. Format and time shifting exceptions

Question 7. *Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?*

Question 8. *The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how?*

Question 9. *The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how?*

23. The commercial radio industry supports the development of a copyright regime that reflects current use patterns, which will include flexibility to allow private copying on different devices for viewing at different times. The current copyright framework cannot be considered fit for the digital age when so many users repeatedly breach copyright, simply by shifting a piece of content from one device to another.
24. Users expect to be able to store content on a variety of devices – including computers, mobile phones, tablets - and in a variety of locations, such as on local servers and in the cloud. Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices

⁵ Hargreaves Report, Recommendation 3, page 8.

⁶ Hargreaves Report, page 4.

available. Without such flexibility, there will be a growing mismatch between what is allowed under the copyright exceptions and the reasonable expectations and behaviour of users.

25. However, the commercial radio industry submits that limits should be placed on such exceptions, to prevent an erosion of rightholders' ability to control the commercial exploitation of their content. New uses and technologies should not provide a means by which rightholders might be wrested of such control.
26. In particular, the Act should make clear that private copying, format and time shifting exceptions should not be used in a way that allows third parties to make commercial gain from those exceptions. In this respect, the industry supports the findings of the Court in the recent case between Optus and TV Now.⁷
27. The commercial radio industry would support a distinction in the Copyright Act between consumers using their own technology to store content on multiple devices or in the cloud, and companies storing content on remote servers for subscribers to access. The time and format shifting exceptions should not cover copying by a company on behalf of an individual, where that company stands to make commercial gain from the copying. Commercial exploitation rights should be reserved for rightholders.

C. Provisions governing the retransmission of free to air broadcasts

Question 35. *Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?*
Question 36 *Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?*

28. The Copyright Act currently provides that copyright in underlying content in a free to air broadcast is not infringed by retransmission, if remuneration is paid under a statutory licensing scheme.⁸
29. However, this licensing scheme allows the retransmission of free to air broadcasts without the permission or remuneration of the broadcaster.⁹ Remuneration is paid to the owners of the underlying content but nothing is paid to the broadcaster.
30. The commercial radio industry is keen to see its content carried on as many platforms as possible. In many cases it would be happy to authorise such transmission free of charge, so the imposition of a statutory licensing scheme may not be appropriate. It is more important that the industry is allowed to control whether such retransmissions are made. The industry submits that the retransmission of free to air broadcasts should be allowed to continue only

⁷ *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59 (27 April 2012).

⁸ s87, Copyright Act.

⁹ s212 Broadcasting Services Act 1992.

with the permission of broadcasters, who should have the right to charge a reasonable fee if they wish to do so.

31. There is no reason why the broadcast should be differentiated from the underlying content in terms of copyright protection. Both are creative products, in which copyright lies. The right to reproduce both belongs with the rightholders and should be protected under the Copyright Act. There is no reasonable basis for the current distinction between the protection of the underlying content and the broadcast.
32. The current retransmission scheme was originally brought in to provide for the distribution of broadcast signals to areas that do not receive adequate reception of services. The industry supports this objective, and would consider a provision that allows retransmission without rightholder consent to remote communities that would not otherwise receive the broadcast. However, in the digital era, a blanket right for third parties to retransmit broadcasts without the broadcasters' permission places rightholders at a disadvantage.
33. The multiplicity of available platforms means that signals are now more frequently retransmitted for the commercial gain of another party, for example, pay television operators retransmit free to air television services as part of their subscription television packages. The commercial radio industry encounters many instances of "aggregators" retransmitting the signals of free to air broadcasters. Typically, these websites collate programs from a multitude of radio stations and make them available on a website – often via retransmission – together with paid advertising.
34. In the majority of cases, the commercial radio industry would seek no compensation for the retransmission of its free to air broadcasts. However, there are situations where compensation would be appropriate, for example, if a third party were making a significant amount of revenue from the retransmission, or if the service competed directly with one offered by the broadcaster.
35. At an absolute minimum, the industry should have the right to refuse permission for the retransmission of a broadcast. For example, aggregators might team the broadcasts with website content that does not fit well with the program's audience demographic, possibly causing offence to listeners. It might be that the licence area is so well serviced by traditional analogue and digital radio, and station simulcasts, that further fragmentation of the listenership through retransmission is unnecessary, and certainly outside the spirit of the original legislative drafters' intention.
36. Accordingly, the commercial radio industry would not support an extension of the current retransmission statutory licence to broadcasters, as remuneration is not the main issue. Rather, broadcasters would like to have the ability to refuse permission to retransmit their broadcast in certain situations and the flexibility to charge a fee for the retransmission, if appropriate.

37. The current retransmission statutory licence does not apply to retransmissions over the internet.¹⁰ The commercial radio industry believes that any retransmission scheme should be extended to include the internet. Exclusion of the internet would lead to the internet being either unregulated, or would make it subject to a different set of regulations. A separate “internet only” set of regulations would create another layer of regulation that further complicates the copyright licensing system. The layering of platform specific regulation is something that the commercial radio industry urges the ALRC to move away from. We draw the ALRC’s attention again to the finding of Foster J set out in paragraph 17 above, in which he concludes that a service is the same, whatever its platform of delivery.

D. Statutory licences in the digital environment

Question 41. *How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?*

38. We refer the ALRC to our submissions in section A above.

39. Collective rights management is the most efficient means of creating a well organised copyright market. However, the monopoly power held by collecting societies has the potential to skew the system against users and to create an imbalance that favours the rightholders.

40. Collecting societies have the power to grant or withhold licences to use the repertoire that they control. The option of negotiating separately with individual right holders is not a practical one for the commercial radio industry, which tends to broadcast a full spectrum of music across all available record labels.

41. The difficulty is exacerbated in the case of sound recordings, as it can be difficult to identify the repertoire that PPCA controls. This leads to extensive and costly debate over the issue of whether music is within the PPCA repertoire (“protected”) or outside it (“unprotected”). The extent of the repertoire obviously has a significant impact on the value of the product licensed under the collective licensing agreement.

42. The body which exercises the greatest check on the monopoly power of the collecting societies is the Copyright Tribunal of Australia. If the commercial radio industry is unable to agree a fee with a collecting society, it has the right to ask the Copyright Tribunal to set a reasonable rate. In practice, referrals to the Copyright Tribunal are lengthy and prohibitively expensive, with costs running into several million dollars.

43. The cost and time involved may deter users from making referrals to the Copyright Tribunal. This effectively diminishes the primary mechanism for ensuring checks and balances in the

¹⁰ s135ZZJA Copyright Act.

administration of collective copyright. The commercial radio industry asks the ALRC to consider reforms that would improve the accessibility of the Copyright Tribunal for users.

E. Fair dealing/fair use exceptions

Question 52. *Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?*
Question 53. *Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

44. The commercial radio industry does not believe that a “fair use” exception would benefit copyright owners or users in Australia.
45. The current fair dealing exceptions in the Copyright Act are generally well understood and work reasonably well. The replacement of these exceptions by an undefined “fair use” provision would bring with it legal uncertainty, over-reliance on case law and litigation. A “fair use” provision accompanied by the existing exceptions might work better, but would still lead to uncertainty, with case law effectively determining a longer list of exceptions, similar to those included in statute. This would be particularly undesirable in the current era of technological change.
46. Nevertheless, an inflexible list of exceptions might mean that the Copyright Act is unable to keep abreast with technological changes. In particular, the Copyright Act should be capable of permitting acts that are an inevitable consequence of the use of a new technology but which do not exploit the creative nature of the work.
47. Accordingly, the commercial radio industry submits that a better approach might be to include an additional provision that would allow Australian copyright law to be more flexible in the face of technological change. The industry supports the recommendation in the UK Hargreaves Report that an additional exception should be created:
- to accommodate future technological change where it does not threaten copyright owners. This would permit copying where it does not trade on the underlying creative and expressive purpose on which traditional rights holders in music, publishing, film and television rely.¹¹*
48. In other words, the exception would allow the use of copyright works where the copying is carried out only in order to make the technology work.

¹¹ Hargreaves Report, Chapter 5.