

## AMPAL submission to the ALRC Issues Paper “Copyright and the Digital Economy”

### *Introduction*

AMPAL is the trade association for music publishers in Australia and New Zealand. AMPAL’s members range from the three large multi-national companies through to owner-operated small businesses. AMPAL’s members represent the overwhelming majority of economically significant musical works enjoyed by Australians. We are an affiliate of the International Confederation of Music Publishers (ICMP).

Music publishers invest in songwriters across all genres of music. They play a critical role in nurturing and commercially exploiting musical works created by the songwriters they represent.

A theme that seems to be running through the ALRC issues paper and much of the commentariat is that there will always be music and that the commercial music industry is an impediment rather than a facilitator of the creation of meaningful cultural content. Nothing could be further from reality. Compelling content requires investment, production, talent and marketing.

The theory of “the long tail” has been repudiated by the work of Will Page at PRS for Music<sup>1</sup> with his economic analysis of the use of music on the internet. Will’s research found: “... a *'hit-heavy, skinny-tail,' log-normal distribution for legal online music consumption; a distribution not that dissimilar from what one might expect from a more traditional, bricks & mortar store.*” P2P services had a similar distribution curve.

Digital services (and traditional services) need quality more than quantity.

It remains the case that people want to hear music that has been developed and nurtured and promoted and marketed.

For artists, even though their return from the sale of their music has declined enormously in recent years, it is still the “hits” that are the single most important element in furthering their career. Successful recorded product helps to build their profile and expand their opportunities in areas such as touring.

Music publishers actively support their writers to allow them the time and resources to create. They work with other intermediaries in the business such as record companies and managers to bring the works to market. They are responsible for the collection of songwriters’ income on a global basis and they create new income streams for songwriters by facilitating licences within the evolving digital space.

Music publishers make a critical contribution to the creation of great Australian music. The business of music publishing is twofold: signing and developing song-writing talent and licensing their works in a way commensurate with their value and the moral rights of the creators.

We believe that licensing is always better than regulation – particularly when the digital environment is in its nascent stages. The transition from the analogue to the digital world has not been easy for the music business but we are at the point where there are a plethora of digital services available to the Australian public. These services are just now gaining traction but the market is still in a fragile space.

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<sup>1</sup> <http://www.prsformusic.com/creators/news/research/Documents/The%20long%20tail%20of%20P2P%20v9.pdf>

It is interesting to note that Australia has been one of the early markets for new services. Those with a viable business model have been able to get the licences they need. Clearly our copyright laws have not prevented services such as iTunes, Spotify, Rdio and others from starting here. In contrast, these services have chosen not to enter territories where copyright protection is weak.

We are also unclear as to the exact nature of the problems that this review seems to be trying to solve. Australia already has more than its share of exceptions and statutory licence schemes which encroach on the exclusive rights of copyright owners and limit their ability to freely license. A raft of possible new exceptions have been raised without any clear rationale of the need for them. We think it is incumbent on those pushing for new exceptions to clearly provide details of the market failures that would necessitate new exceptions or statutory licences and provide the evidence to support their proposed solutions. We will then be in a better position to review them and to comment.

We are also not clear on the meanings of many of the terms put forward in the Issues Paper. It would be helpful to have clear definitions of terms such as “non-commercial”, “social”, “transformative” etc.

It would seem that much of the push for greater exceptions to copyright comes from the proponents of “innovation”. However innovation should not be used as an excuse for building businesses that free ride on other people’s intellectual property.

Now is not the time for one-sided Government intervention in the marketplace. We are concerned that this Inquiry is taking place out of context. We do not see how it is possible to dispassionately consider increasing the free use of copyright materials without looking at the question of ISP liability and the safe harbour provisions. However we note that the review is explicitly constrained from such considerations.

AMPAL members are also members of APRA and AMCOS and we endorse their submission to the ALRC and will refer to their comments.

AMPAL is also a member of the Copyright Council and Music Rights Australia.

## Questions

### Question 1. Copyright law's participation in the digital economy.

Creators depend on copyright for their income. Without such income there is little incentive for investment in the creation of musical works. Such investment is one of the fundamental roles of music publishing.

The various exclusive rights of copyright in a musical work<sup>2</sup> each have a corresponding income stream. This allows creators to benefit from various areas of commercial exploitation.

Music publishers recoup their investment from part of the revenue derived from the exploitation of the works they represent. Songwriters receive directly a minimum of 50% of the income derived from performance and communication to the public revenues by virtue of their membership of APRA.

According to the World Intellectual Property Organisation one of the primary purposes of copyright is: "... to encourage a dynamic creative culture, **while returning value to creators so that they can lead a dignified economic existence.....**"<sup>3</sup> This aim of copyright law seems not to have received much attention in the Issues Paper.

Since the Statute of Anne, it has been accepted that creators need copyright laws to protect them from others stealing their creations.

Copyright by its nature cannot be seen as an inhibitor of originality<sup>4</sup>.

Music publishers are in the business of licensing – it is in our interests to license as widely as possible. However it makes no sense to license unviable business models or services that undercut the value of music. Getting a licence is a cost of doing business. We are not aware of any serious services that have not been able to start in Australia because of our copyright laws. That's not to say there haven't been arguments over the fees. But as Richard Hooper noted in his report to the UK Government<sup>5</sup> on copyright licensing for the digital age: "*It is important to note that the price a rights owner charges for his or her rights, and the decision by a rights owner to withhold rights (e.g. the Beatles did not allow their songs on the internet for many years) are not copyright licensing process issues but are commercial business issues.*"

### Question 2. Guiding principles for reform

It is difficult to argue with the guiding principles outlined in the paper. By their nature, the principles are "motherhood statements": Innovation, competition, fair access, simplicity, flexibility, responsiveness, clarity and certainty....

However they seem a little light on recognising the vital role of copyright in protecting the creative works of Australian artists and rewarding them for their efforts. Apart from a grudging

<sup>2</sup> Section 31 of the Copyright Act of Australia 1968: Nature of copyright in original works

(1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right:

(a) in the case of a literary, dramatic or musical work, to do all or any of the following acts:

(i) to reproduce the work in a material form;

(ii) to publish the work;

(iii) to perform the work in public;

(iv) to communicate the work to the public;

(v) to make an adaptation of the work;

(vi) to do, in relation to a work that is an adaptation of the first-mentioned work, any of the acts specified in relation to the first-mentioned work in subparagraphs (i) to (iv), inclusive....

<sup>3</sup> <http://www.wipo.int/copyright/en/>

<sup>4</sup> Adam Mossoff in *The Statesman*: "Copyright does not prohibit anyone from creating their own original novels, songs or artworks. Importantly, copyright does not stop people from thinking, talking or writing about copyrighted works."

<sup>5</sup> Para 3.2 Hooper and Lynch: "Streamlining Copyright Licensing for the Digital Age"

reference to the need for reform to be consistent with Australia’s international obligations there is very little regard to the rights of creators.

Even in regard to international treaty obligations there is a hint that the Inquiry can find “flexibility within international constraints”.

The Berne Convention, TRIPs, the Free Trade Agreement with the USA and other international obligations bind Australia at a minimum to the “three-step test”<sup>6</sup> which would limit the possible remit of some of the exceptions canvassed in the Issues Paper.

In any event, users would find it difficult to rely on specific exceptions granted in Australia if they have to operate on a global basis – those exceptions would not limit their liability in other jurisdictions where they may find themselves exposed to substantial statutory damages.

**Question 3. and Question 4. Caching indexing and other internet functions**

We reserve our comments regarding these issues.

**Question 5. and Question 6. Cloud computing**

We are not aware of any music-related cloud computing service that has been denied a licence and therefore been unable to set up business in Australia.

We can see no rationale for the introduction of an exception for new cloud computing services. The development of commercial cloud services is a relatively new phenomenon (even though it is not particularly new technology) and the subject of current licensing negotiations.

Where the rights of creators are used to add value to another service then it is entirely appropriate that a licence should be sought.

**Question 7. Question 8. Question 9. and Question 10. Copying for private use**

Australia’s current private copying exceptions do not provide for any remuneration for rightsholders. According to some interpretations, this already puts them at odds with the Berne Convention’s three-step test.

It is hard to distinguish between private and public use in the online world. We recognise that unauthorised use of copyright material for private, social and sharing purposes is rampant in the digital environment and damaging to the commercial interests of the copyright owners.

The policy justification put forward for the widening of private copying is that Australians routinely make copies of copyright material and: “...*failure to recognise such common practices ‘diminishes respect for copyright and undermines the credibility of the Act’*”. We do not believe that the solution is to legalise such activities in order to gain respect for the Commonwealth’s laws. Rather a proper legislative framework to minimise unauthorised use and a regime of enforcement accompanied by clear guidelines and education on copyright is required.

Any proposals for further exceptions for private copying or statutory licences should only be considered in light of the discussions regarding ISP liability, the Safe Harbour provisions and the introduction of a proper compensation scheme.

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<sup>6</sup> The test as included in Article 13 of TRIPs reads: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."

**Question 11. Question 12. and Question 13.** Online use for social, private or domestic purposes

This is an area that needs precise definition of the terms being used. For example, “social use” and “non-commercial” may sound harmless enough but the reality is that social networking companies are huge commercial enterprises that in many cases have built their businesses on encouraging the “sharing” of music. These services, while appearing to be free to the user, are generating huge profits. Are they the intended beneficiaries of exceptions to copyright law?

We are not aware of any instances where individuals have been prosecuted for truly private use of music in Australia. However in many cases what may start out as a private activity may subsequently end up on a variety of social networking sites or P2P services. A free use exception that legalises the original reproduction may limit copyright owners’ ability to take action once the copies are distributed more widely.

**Question 14. Question 15. Question 16. Question 17. and Question 18.** Transformative use

The issue of transformative use once again brings into question what is precisely meant by this and related terms and also the question of what is commercial and what is non-commercial.

It is not clear to us why “transformative use” should be treated in a different manner to the exclusive right under the Act to make or authorise an adaptation.

The music publishing industry is very familiar with the issue of sampling. It is a part of a music publisher’s role to deal with requests to sample one of their songwriter’s works into a new work. In deciding whether to issue such a licence the publisher will take into account how the sample is being used, the effect on the market for the original work and most importantly the attitude of the original creator. Most music publishing agreements provide that their songwriters have a right of approval over the use of their work in films, advertising or samples.

We believe that is entirely appropriate that songwriters should retain the right of control over the use of their works in samples and so-called “mash-ups” and “remixes”. We see no reason why consideration be given to a free use exception to take the heart of a song and include it in another work without the approval of the copyright owner. How could this not be an assault on the moral right of the original creator?

We refer also to our comments in the previous section regarding “non-commercial” and dispute whether services which make money piggy-backing off copyright material can qualify as non-commercial.

**Question 19. Question 20. Question 21. and Question 22.** Libraries, archives and digitisation?

We are not aware of any evidence that section 200AB of the Copyright Act is not working adequately in regard to the use of musical works for libraries.

**Question 23. and Question 24.** Orphan works

The issue of orphan works is perhaps less relevant to the music industry than other copyright industries. APRA|AMCOS maintains a comprehensive database of musical works that have been commercially exploited in Australia.

Much work has been undertaken by the international music industry to implement a structure of standards and formats to support the automated exchange of information along the digital supply chain<sup>7</sup>. This work will be complemented by the Global Repertoire Database (GRD) being built in co-operation between the music publishing community, CISAC and the collecting societies.

<sup>7</sup> See: <http://www.ddex.net/>

These initiatives mean that it is relatively easy to find out who owns a particular work and where to go to seek a licence.

We note the draft directive of the European Union on Orphan Works<sup>8</sup> and would support a similar initiative with the same limitations.

**Question 25. Question 26. and Question 27. Data and text mining**

We reserve our comments regarding these issues.

**Question 28. Question 29. Question 30. and Question 31. Educational institutions**

The print music business has been severely affected by the distribution of unauthorised copies on the Internet. There are a limited number of companies producing print editions of Australian music for use by educational institutions.

The provision of music education into schools is different to the provision of other subjects. Most music publications for education are used outside the classroom for individual or small group tuition, or by school choirs or bands.

The cost of producing high quality transcriptions in a small market is considerable. We fear that any further undercutting of the financial viability of these specialist publishers by the broadening of statutory licences or free use exceptions may see the unintended consequence of closing this market down entirely.

**Question 32. Question 33. and Question 34. Crown use of copyright material**

We refer to our comments regarding print music in the educational sector and note that they may also apply in regard to some possible Crown use of copyright material and reserve other comments regarding these issues.

**Question 35. Question 36. Question 37. Question 38. and Question 39. Retransmission of free-to-air broadcasts**

We support the APRA|AMCOS submission on these questions.

**Question 40. Question 41. Question 42. Question 43. and Question 44. Statutory licences in the digital environment**

The implementation of the GRD referred to above together with the strict use of unique identifiers and standards for exchange of information will help to provide a fairer distribution of revenues from statutory licences and may remove the necessity for them entirely in some instances.

**Question 45. Question 46. Question 47. Question 48. Question 49. Question 50. and Question 51. Fair dealing exceptions and other free-use exceptions**

We are not aware of any significant issues with the application of the current fair dealing exceptions and see no pressing rationale for the introduction of further exceptions. Any proposed exceptions must be subjected to evidenced based impact assessment being undertaken in advance.

<sup>8</sup> Orphan works Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012

**Question 52. and Question 53. Fair use**

We do not believe the importation of parts of US Copyright Law into Australia is appropriate. The US has a different legal system and the Fair Use defence is based on years of case law and precedent. Each claim for Fair Use is subject to judicial review of the particulars at issue.

Fair Use contributes much more legal uncertainty than fair dealing exceptions. In the US Fair Use is also counter-balanced by a regime of statutory damages for copyright infringement. Therefore the Fair Use defence is really only feasible for large, well resourced companies and of limited benefit to small innovative start-ups.

In his Report of Intellectual Property and Growth to the UK government, Professor Ian Hargreaves rejected the notion that Fair Use should be introduced into the UK.<sup>9</sup>

**Question 54. and Question 55. Contracting out**

We reserve our comments regarding these issues.

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<sup>9</sup> Para 5.19: “The advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law.”