627. \_org\_Alfred Music Publishing Aust, AMEB, Hal Leonard Aust, LTP Publishing and Music Sales Aust

**From:** ALRC [mailto:web@alrc.gov.au]
**Sent:** Wednesday, 31 July 2013 3:16 PM
**To:** Marie-Claire Muir
**Subject:** Online submission to DP79

Submitted on Wednesday, July 31, 2013 - 15:15

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I wish this submission to be treated as:

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If you are making this submission on behalf of an organisation, please provide the name:

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Proposal 4-1:

Print music publishers believe that the current Fair Dealing provisions are adequate. Not only do we not support a ‘broad, flexible exception for fair use’, we are disappointed the ALCR has seen fit to propose it.

It seems that ALRC has spent considerable effort in understanding the point of view of those who would seek to gain free access to a marketable commodity. How much effort has been spent in gaining an understanding of the commercial constructs for that commodity – especially when it comes to the already fragile print music publishing business in Australia?

A brief overview of our business environment including some of the main challenges:

* Some Australian print music publishers are the local subsidiaries of global print music publishers, while others originate in Australia.
* A common business element amongst Australian print music publishers is the investment in the creation of printed music product for consumption in the Australian market.
* The education market is the back-bone of the print music publishing industry. Australian print music publishers invest in the creation of quality, locally relevant educational materials for the Australian market, which include songs and compositions by Australian writers and composers.
* Another commonality amongst the print music publishers, is the several significant commercial challenges currently in play:
* The diminutive size of the Australian print music market has always been a challenging factor.

* The lack of a single, common music curriculum for Australian schools means that investment in educative resources is not always rewarded with significant sales.

* Customers of print music product are now obtaining freely available (illegal) print music arrangements via digital sources.
* Market forces dictate that locally produced editions are likely to be much more expensive compared with similar imported product. For example, a locally produced Missy Higgins sheet music folio retails for $34.95 compared with an imported Pink folio at $24.95.

Proposal 4-2:

Print music publishers do not support any aspect of this proposal.

Proposal 4-3:

In the Copyright Act 1968 (Cth), the current fair dealing list of considerations is as follows:

1. The purpose and character of the dealing or recording
2. The nature of the work, adaptation, audio-visual item or performance
3. The possibility of obtaining the work, adaptation, audio-visual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price
4. The effect of the dealing or recording upon the potential market for, or value of, the work, adaptation, audio-visual item or authorised recordings of the performance; and
5. In a case where part only of the work, adaptation, audio-visual item or performance is reproduced, copied or recorded – the amount and substantiality of the part copied, taken or recorded in relation to the whole work, adaptation, item or performance.

The ALRC’s proposed list of fairness factors is:

1. The purpose and character of the use
2. The nature of the copyright material used
3. In a case where part only of the copyright material is used – the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
4. The effect of the use upon the potential market for, or value of, the copyright material.

Comparing the above two lists, a) of each list could be said to be equal. The same could be said of b) from each list. In addition, e) from the current list (regarding use of part of a work) may be said to be equal to c) from the proposed list. Finally, one could say that d) from the current list is equal to d) in the proposed list. In other words:

|  |  |
| --- | --- |
| Current fair dealing considerations | Proposed fair use factors |
| a) | a) |
| b) | b) |
| e) | c) |
| d) | d) |

That leaves c) from the current list which unfortunately (and hopefully mistakenly), has been omitted from the proposed new fairness factors:

**The possibility of obtaining the work, adaptation, audio-visual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price.**

What could be the argument for omitting this factor from the proposed new list? What message does this send to consumers? How can print music publishers in Australia continue to invest in making available physical and digital sheet music product in a ‘fair use’ regime when this factor is not taken into account?

Here is the list of current fair dealing exceptions:

* Research or study
* Criticism or review
* Parody or satire
* Reporting news
* A legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice

Looking at the above list, why would any of these uses of copyright sheet music necessitate a free use reproduction when the sheet music is obtainable within a reasonable time frame at an ordinary commercial price?

Can we really justify free use of Australian and other works in sheet music format for the above uses when the sheet music is readily available? Given the small size of the overall Australian market, we say ‘no’.

The ALRC Discussion Paper does not address the omission of this fairness factor. Instead, it draws parallels between the US system and the proposed Australian system.

We invite the ALRC Committee to consider the vast differences in market size between America and Australia and therefore, the specific challenges facing Australian print music publishers in bringing physical and digital sheet music editions to market in a viable, sustainable way. Print music publishers rely on the current fairness factor: **The possibility of obtaining the work, adaptation, audio-visual item or an authorised recording of the performance within a reasonable time at an ordinary commercial price.**

 Further, point 4.151 of the ALRC report notes that the proposed list of fairness factors is non-exhaustive and that other factors may be considered. It mentions a couple of possible additional factors, but even here it does not acknowledge the factor of market availability.

How can print music publishers continue to make product available if fair use would render this fact irrelevant? To what extent will Australian composers be able to benefit from having their music made available as printed music?

We are also of the view that this proposed change to the Australian system, which would omit market availability of sheet music as a fairness factor, would be out of step with the Berne three-step test. Step 2 of that test states that fair use must not be in conflict with a normal exploitation of the copyright material.

Proposal 4-4:

Print music publishers do not agree to a broadening of fair dealing (the proposed new fair use exception) in Australia. Therefore, this proposal to add to the list of illustrative purposes with the following:

e.non-consumptive

f. private and domestic

g. quotation

h. education; and

i. public administration

is not supported by print music publishers.

In particular, the proposal to include ‘private and domestic’ and ‘education’ in this list would dramatically alter the ability for print music publishing to thrive in this territory.

These matters are discussed more fully under Proposal 9-1 and Proposal 13-1 respectively.

Question 4-1:

The list of illustrative purposes should not be adopted, nor should it be added to in any way.

Question 4-2:

Fair use should not be enacted, therefore the current specific exceptions should not be repealed.

Proposal 6-1:

Question 6-1:

A fundamental business necessity for print music publishers is the ownership of copyright content. For example, owning or holding the exclusive right to create print music editions of specific works, and/or owning the copyright in music-related content such as educational materials.

The business models of print music publishers are built on finding the most cost effective means to exploit these rights. The two main commercial activities are to 1) create product for sale which contains the copyright material and 2) provide licences to third parties to allow other reproductions of the copyright material.

Given the latter key operational factor, print music publishers are always able to provide licences to third parties, such as governments and educational institutions, in relation to the rights held by print music publishers.

Therefore, there are not situations ‘where the use cannot be licensed’. This being the case, the Copyright Act does not need to be amended to provide for certain free use exceptions for governments and educational institutions – certainly insofar as printed music is concerned.

In fact, Australian print music publishers have earned a place as world leaders in the area of providing licences to educational institutions. This will be discussed in further detail under Proposal 13-1.

Proposal 7-1:

Print music publishers do not support the proposed move from the current Fair Dealing provisions in the Copyright Act to the Fair Use exceptions.

Proposal 7-2:

Proposal 7-3:

Proposal 7-4:

As discussed under Proposal 4-3, print music publishers object to the omission of the market availability factor which is currently included in the Fair Dealing guidelines, but which is excluded from the proposed Fair Use Factors.

Therefore, print music publishers do not agree with this proposal.

Proposal 8-1:

Proposal 8-2:

Proposal 8-3:

Proposal 9-1:

The ALRC review commenced in response to perceived pressure from people and companies wanting greater (free) access to copyright material in the digital environment – essentially because it is easier for them to access it, upload it, download it, reproduce it, financially gain from it or simply obtain it than ever before, and they wish to do so without infringing copyright.

Ironically, it is this same digital context in which ALRC must consider ‘private and domestic’ and therefore, be most specific in its definition. The blur between ‘private and domestic’ and ‘social’ is so great that we believe a precise and exact definition is required. ALRC has not provided such a definition. Until this is forthcoming, and demonstrates an understanding of the commercial realities relating to copyright materials, print music publishers do not support this proposal.

ALRC’s rationale for this proposal is to provide a broader exception than just the existing exceptions for format shifting and time shifting; however the Discussion Paper does not clearly enunciate the scope or extent of the intended broadening. What is it that ALRC is trying to achieve? Once again, further information, consistent with commercial reality is required.

Given that print music publishers are in the business of 1) creating sheet music product for private and domestic use and 2) providing licences to individuals for their private and domestic use of sheet music reproductions, there are a number of concerns about ALRC’s proposal.

The current proliferation of sheet music product through social media avenues (an extension of private and domestic use) will be encouraged and even ligitimised by the adoption of ALRC’s proposal. For a growing proportion of the population, there is simply no longer any real disparity between ‘private and domestic’ and ‘social’, with social media sites rendering something that in one instant was ‘personal and domestic’ to being globally accessible (and very much ‘social’) in the very next minute.

The ALRC discussion on social use (from 9.85 to 9.93) holds little comfort for print music publishers. The very reason for this review (technological change) is also the reason we can no longer distinguish between ‘private and domestic’ and ‘social’.

There is widespread anecdotal evidence that people are scanning printed music for upload to digital devices in the private, domestic (and also educational) spheres. At the same time, print music publishers are investing large sums creating and maintaining digital print music platforms for customers. What market will exist for digital sheet music products should ALRC’s proposal be implemented?

How will this affect our ability to foster our cultural heritage by putting Australian songs and compositions into print?

Traditional consumers of print music product are increasingly embracing illegally sourced product. Take some of Australia’s Ukulele Clubs as an example. While some Ukulele Clubs promote the purchasing of published editions and the sourcing of legal digital sheet music product, there are a great many examples of Ukulele Clubs presenting unlicensed digital sheet music on their own websites for use of their existing and potential club members. Alternatively, they provide links to massive repositories of illegal print music arrangements. Finally, there are also examples of Ukulele Clubs stating that participants to meetings will be charged ‘a gold coin to cover the costs of photocopying’.

The current challenges for print music publishers are very real, and will only be exacerbated by the implementation of this poorly considered proposal. We strongly oppose this proposal.

Proposal 9-2:

Print music publishers are strongly against this proposal. Fair dealing should not be expanded to incorporate ‘private and domestic’ use. In addition, print music publishers do not support the proposed fairness factors.

Proposal 9-3:

Proposal 9-4:

Proposal 9-5:

Proposal 10-1:

Proposal 10-2:

Proposal 10-3:

Proposal 11-1:

Proposal 11-2:

Proposal 11-3:

Question 11-1:

Proposal 11-4:

Proposal 11-5:

Proposal 11-6:

Proposal 11-7:

Proposal 12-1:

Proposal 12-2:

Proposal 12-3:

Proposal 13-1:

Investment in the creation of educational resources is a major part of the business of print music publishers.

Print publishers interact with the educational sector in two main ways:

1. Print music publishers create product designed for educational settings, which are sold (via retailers) to schools.

1. Print music publishers, through their collection society (APRA|AMCOS) participate in the provision of a blanket voluntary licence to schools allowing for the reproduction of sheet music under specific conditions.

This proposal would jeopardise the educational sector of the print music market. Given this is the strongest performing area in print music, the very existence of some print music publishers would be undermined.

In addition, there would be little, if any, Australian print music product produced for the school education market. Almost all print music resources would be imported for use in Australian schools.

Australian composers would have little chance of being a part of the Australian school music curriculum insofar as printed music is concerned.

However, the erosion for print music publishers would go even further because ‘Educational Use’ may not be restricted to schools alone. ‘Educational Use’ may be deemed to extend to every individual student in Australia who is learning a musical instrument, and to every person teaching music in Australia in some capacity.

If every school, every student, and every teacher of music may make reproductions of sheet music as part of a ‘fair use’ regime, there can be little activity remaining in print music publishing.

The ALRC proposal is not only that Educational Use should become part of a Fair Use exception, but that the current Fair Dealing factor regarding the availability of a commercially priced product would be excluded from considerations.

There is little comfort to be gained from point 13.53 which refers to the fourth fairness factor (the effect of the use upon the potential market for, or value of, the copyright material) and goes on to say that this fair use exception should ensure no unreasonable damage to educational publishing and other markets for educational resources. What evidence does ALRC have to support this claim? What investigations have been made? How can this be said to be true in the area of print music publishing?

The discussion on ‘freely available material’ (from 13.22) demonstrates the problem further. Print music publishers face the constant challenge that their own copyright content is freely available on the internet (placed there by unlicensed third parties). It is jeopardising the continued investment in product creation. The viability for continued production of copyright materials for educational use would be severely eroded by including this in a fair use regime.

A counter suggestion from print music publishers: can government assist in reducing the availability of unlicensed ‘freely available material’?

Secondly, let’s consider Australia’s voluntary sheet music reproduction licence for schools. Australian print publishers were among the first in the world to initiate and implement a licence for schools (known as the Schools’ Photocopying Licence Scheme). Through a licence provided by the print publishers’ collection society (APRA|AMCOS), print music publishers allow schools to make reproductions of their sheet music product. This has been in operation for over 20 years.

In the UK, a similar scheme has only been adopted for the first time this year. In the US, such a scheme does not exist.

While print publishers were concerned that the licence would decrease sales of sheet music product (particularly given the small size of the market), the compromise position of providing a licence in this particular setting was embraced. There is no doubt that if print publishers were to sell the same number of books to schools as the number of copies of sheet music made by schools, a great deal more would be earned by print music publishers. However, the licence is seen as a positive and successful component of the industry.

More recently, print music publishers have been in discussions with APRA|AMCOS regarding digital sheet music copying in schools and the possibility of expanding the current schools’ licence to cover these additional uses.

However, the ALRC proposals, specifically 13-1, would once again jeopardise this positive enterprise between rights holders and content users. While ALRC notes that the availability of a licence would generally, weigh against a finding of fair use, point 13.54 seems to open it to question.

Overall, the ALRC proposals make bleak reading indeed for print music publishers.

When we consider that the education market is the prime customer base for sheet music, and the fact that Proposal 13-1 would significantly erode – or even eradicate – both the sales of print music product and potentially the print music reproduction licences as well, the adoption of the proposal would leave print music publishers with little room to move.

The only remaining consumers of printed music would be those who do not see themselves as students – nor as being in the act of educating themselves. However, these remaining individuals would potentially be able to freely reproduce sheet music under the proposed ‘Private and Domestic’ exception. What would be the outcome for print music publishing in Australia?

Some of the (hopefully unintended) outcomes for printed music in Australia would be:

* No creation of quality, locally relevant, educational sheet music product.
* Most Australian composers would need international success in order to have their music professionally produced in printed format.
* Freely available, inferior, user-generated product (including the inevitable errors in music transcriptions, arrangements and lyrics, lack of instrument applicability etc) would proliferate.
* Printed music product would be almost entirely, if not completely imported for Australian market.
* Music students would potentially learn music without reference to any printed Australian music.
* The cultural implications would be that Australia’s songs and stories would be supplanted by those of countries with an economy of scale in copyright material and who can therefore afford to produce printed music product.

Proposal 13-2:

Print music publishers are emphatically opposed to this proposal. If the production of quality, locally relevant sheet music product is to continue in this country, there should not be a fair dealing exception for education.

In addition, print music publishers reiterate their lack of support for the proposed new fairness factors, which exclude the factor of market availability.

In summary, print music publishers play an important cultural role in producing valuable, Australian music product that is appropriate for the Australian educational sector. Not only this, print music publishers also supply a useful voluntary licensing scheme to schools which is currently being reviewed to be expanded into the digital arena. For these reasons, print music publishers are opposed to the ALRC proposals.

Finally, print music publishers wish to express support for the views expressed by APRA|AMCOS in its submission responding to ALRC’s Discussion Paper.

Proposal 13-3:

Proposal 14-1:

Proposal 14-2:

Proposal 14-3:

Proposal 15-1:

Proposal 15-2:

Question 15-1:

Proposal 15-3:

Question 15-2:

Proposal 16-1:

Question 16-1:

Proposal 16-2:

Question 16-2:

Question 16-3:

Proposal 17-1:

Additional comments?:

File 1:

File 2:

The results of this submission may be viewed at:

<http://www.alrc.gov.au/node/5296/submission/4893>