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To the Executive Director,

Nightlife has been operating for 24 years and is one of the largest Nightclub-Foreground-Background Music Suppliers in the Australian market. Nightlife provides over 2500 Hard Drive Music Systems (**NDMS**[®]) in the field, across approximately 2100 clients. Nightlife is a business to business platform servicing bars, hotels, clubs, gyms, bowling alleys, restaurants and retail outlets – among others. Nightlife is in the majority of the venues in Australia where music matters. For the avoidance of doubt, Nightlife has no business to consumer interface. Additionally, Nightlife has direct licensing agreements with over 120 record companies for reproduction of the sound recordings and of those a further 75 have provided a non-exclusive license for the right to collect and distribute public performance royalties. Nightlife also collects public performance fees for its client base on behalf of the Phonographic Performance Company of Australia (PPCA).

Nightlife's clients hold licenses for the public performance of works under a range of concurrent licence categories including, but not limited to, the following:

- Recorded Music for Dancing
- Feature Recorded Music
- Background Music
- Radio
- TV Screens
- Audio Jukebox
- Video Jukebox
- Fitness Centres
- Music on Hold
- Live Performance
- Karaoke
- Retail

All of Nightlife's clients have the same proprietary hardware, using the **NDMS**[®] and proprietary software that has been continually developed over the last 13 years by its in-house team. Each system is tracked and registered and can be located at all times.



Bring your venue to life![®]

All updates (in terms of new content, list updates and software updates) are delivered to clients on a fortnightly basis on an encrypted DVD which is used for file transfers and cannot be played on any other device. The software achieves two main goals for the company and its licensors (copyright owners):

- 1) It encodes and protects every file by a proprietary cryptographic algorithm;
- 2) It ensures that clients are only able to play Nightlife music from the subscriptions they pay for.

Given the underlying motivational factors pertinent in public submissions, it should be noted that there are certainly aspects to Nightlife's recommendations that may provide a benefit to the business directly, but these benefits only translate by addressing the whole industry and its various stakeholders.

Nightclub-Foreground-Background Music Suppliers maintain and increase value in music. As music business operators, Nightlife is directly connecting content users with the copyright owners through a sophisticated understanding of our clients' needs, demographics and entertainment scope. Thus, Nightlife is able to increase revenue and continue to leverage the value of music, at a time when the ubiquity of free is difficult to contest.

Further, music suppliers are at the forefront of diminishing piracy in commercial settings. It is in every music suppliers' interest to ensure that the content they are providing commercially is legal and cannot be copied. This allows predictable and controlled use of music, by protecting and sustaining performance rights through a transparent model that reports accurately on what is played, where it is played and the exact tariff applicable. Given music suppliers have a vested interest in protecting copyright, it is fair to say that they can and do play an integral role in detection of piracy matters, and further support rights owners in their enforcement endeavours.

The value to licensors is increased in direct correlation with the data that accompanies Nightlife's repatriation technology. As accurate royalty distribution models begin to redact out dated analogy methodologies, licensors begin to receive accurate and predictable income. This transparent technology has been at the core of Nightlife's business model for well over a decade. During this development the impact of exceptions on creators' ability to leverage a reasonable income has been an issue Nightlife has come to take very seriously.

Potential impact of the recommendations of the discussion paper

Nightlife does not have the resources at hand to answer every question in the discussion paper; however some perspective will be offered surrounding the five guiding principles of reform. The main areas of concern for Nightlife are the proposals around broadcasting and exceptions. Further, this submission will focus on these areas and intersect with the way Copyright and the Digital Economy converge around, and diverge from the panopticon of technology and data.

Principle 1: Acknowledging and respecting authorship and creation

Nightlife supports the role of authors and creators in copyright material, yet respects that in many areas of culture ‘ownership’ may be a more community concept than individual. With exclusive blanket licensing dominating economically, Nightlife believes the ultimate moral rights of the creator, either as an individual or as community, should remain with the creator, even when the rights are outsourced.

Principle 2: Maintaining incentives for creation of works and other subject matter

Nightlife has been an advocate of transactional transparency throughout the 24 years it has been in business. Nightlife takes its responsibility to pay the correct royalties to the correct creators very seriously. Nightlife has seen that tension can be created when licensees cannot see a direct correlation between the fee applicable for a specific work and the distribution of this fee to the actual creators. While our expertise has traditionally influenced the music and audio-visual sectors, there is no reason why a more transparent transactional system would not offer greater efficiency in education, government and beyond. This could be achieved without the need for seemingly abandoning creators altogether through excessive exceptions for commercial use. Nightlife fully supports exceptions for genuine cultural and humanitarian needs, but feels — to make them accessible — that the multiple rights in music should be dealt with as identical under copyright law wherever possible. The ambiguous nature of the current framework for music licensing is creating more detriment than good through a combination of factors including: a lack of synergy across performance rights, aggressive pricing structures, select targeting of low volume high value users over high volume low value users, and a complete lack of transparency in repatriating royalties.

Principle 3: Promoting fair access to and wide dissemination of content

Nightlife agrees with the ABC submission as far as ‘the digital economy is not measured purely by financial indicators, but also that cultural benefits play a significant part in the digital economy’. Combining the options of voluntary blanket licensing for non-predictable use and pay for use, or discount blanket licensing for more predictable environments could take a lot of the burden off legislation. The trouble is that it requires complete transparency, something many collection societies, voluntary or not, may not be able to comply with in the short term. At the same time there is no infrastructure for the self-management of rights. Nightlife recognises the importance of the current exceptions for cultural benefit, but sees the broadening of exceptions for commercial use as nothing more than an easy way out. Put simply, addressing the symptoms does not negate the cause. A complete revision of the Copyright Act with a more technologically neutral focus could potentially provide generations to come with unlimited access to content, while at the same time a transparent transactional model could potentially resolve many cultural and economic tensions. This would also allow creators to retain the rights surrounding the use of their works and have comprehensive information from the data applicable to the use of their content.

Principle 4: Providing rules that are flexible and adaptive to new technologies

A true sign that the current interpretation of the Copyright Act is failing occurs when legitimate use is reconsidered due to a loss of faith in the value ratio. An example of this could be screens in commercial venues. Perhaps 20 years ago it was common for televisions to be used as a primary sound source. As televisions became more affordable, venues began to install multiple screens as client demands required them. With a technologically specific interpretation of the Copyright Act in place, collection societies started treating them as exponential revenue opportunities. Even though it would be unlikely that several televisions would be running different sound sources in the same room, they are still charged for on that metric. Now that large digital screens are commonplace, this pricing structure and application remains, but in many cases the screens are not infringing the copyright in sound recordings or the works within them.

What may have been a reasonable addition to both the creator's revenue stream and the music users' environment ends up having to be avoided through an archaic anchor on the medium over the actual usage. This is also evident in the electronic distribution of classroom materials. With standard photocopying incurring a lesser fee, new technology can be ignored due to the inflated transactional costs for duplication, seemingly ignoring use. Nightlife believes these issues need to be addressed from the ground up, not just glazed over — as is apparent in the 'exception' for commercial use solution the ALRC currently recommends.

Principle 5: Providing rules consistent with Australia's international obligations

Nightlife feels that many of the key elements of Australia's international reciprocal agreements are overlooked in the transactional models available. For example, if a collection society is only tracking data on a minimal amount of use there is no guarantee that at least fifty cents in every dollar is actually getting back to the creators; as agreed to in international reciprocal agreements with CISAC. Many collection societies will boast about their 'impressive' income to administrative expense ratios, but there is near silence on the accuracy of repatriation.

For example, collection society 'X' might claim a 20% administration cost, but that does not mean that 80% (or even close to 50%) actually gets back to the creator for every title they manage. Under the current analogous radio play data, it is likely that the majority of artists would actually get nothing, with a minority commercial base receiving the bulk of income. More specifically, it has never been proven that the CISAC international standards have ever been accurately met. This is why Nightlife has focused so much resource on the infrastructure to address these issues in Australian industry.

Nightlife can see the potential for a completely transparent marketplace, even with fair use in place. For example, if creators were not rewarded financially under fair use, but given precise data around the actual use under the exceptions, there may still be high value for both users and creators.

The PPCA has been working on a pilot program around direct repatriation and data, and this has been helping lay the groundwork for a transparent future in the digital economy. APRA have recently signaled that they will also be entering into a pilot program with Nightlife. These agreements are non-exclusive and Nightlife is working with a number of companies on providing cross integration of play data over public performance, broadcast and streaming services to understand the true nature of music use and royalty repatriation. Nightlife believes that technology will make the music industry more accountable for itself from all angles in the very near future, and this is where technology and copyright converge most efficiently. With this information as a tool, industry can then diverge with potentially unlimited flexibility.

The Radio Caps

Nightlife has read the submissions by both the PPCA and ARIA and from our understanding there is no justification for making creators subsidise the broadcast sector. The 'Radio Caps' through Section 152(8) of the Copyright Act that limit the maximum fee applicable to 1% and Section 152(11) that limit the maximum fee to the ABC to \$0.5 of a cent per person in the Australian population, directly impact the ability of creators to earn a living.

Nightlife supports the primary foundation of the PPCA and ARIA submissions as relating to the Radio Caps. Specifically that the Radio Caps:

- *distort the market in various ways-including by subsidising the radio industry;*
- *are out of date-given that the financial and other circumstances of the radio industry are very different from the late 1960s;*
- *reduce economic efficiency and lack equity-including by creating non market based incentives for broadcasters in relation to increasing music use at the expense of non-music formats;*
- *are not necessary-given that the Copyright Tribunal independently assesses fees for statutory licence schemes;*
- *are inflexible and arbitrary-as the levels at which the caps are set are not linked to an economic assessment of the value of the licence;*
- *are anomalous-because the Copyright Act contains no other statutory caps, other jurisdictions do not cap licence fees, and the cap is inconsistent with Australian competition policy;*
- *may not comply with Australia's international treaty obligations-in particular, the requirement under the Rome Convention for equitable remuneration to be paid.*

These 1% and 0.5 of a cent limits are specific to the PPCA by virtue of ‘sound recordings’ and create an environment where the music industry subsidises broadcasters. The very fact that the Australasian Performing Rights Association (APRA) bases the majority of its distribution on the commercial radio logs, and then on sells this data to the PPCA to use as a repatriation tool signifies the value of music in the broadcast environment. Currently almost all royalties are repatriated based on commercial radio data. APRA have also recently signalled that they are also willing to participate in a pilot trial of incorporating a pay for play methodology in consultation with Nightlife, and we welcome this move toward transparency.

It is important to clarify that Section 152(8) and 152(11) apply only to the sound recording rights (PPCA) and not to the ‘works’ within the recording (APRA), although this may be obvious to many. This disparity becomes particularly alarming however, when the ALRC appears to be framing PPCA as ‘greedy’ for attempting to assert their rights with equality, when proposing to extend commercial broadcast exceptions. Especially given the extreme income levied against the ‘works’ in comparison to the sound recordings under the current legislation.

Looking at the latest available annual reports for APRA (2011-2012) the broadcast component of income is stated at 58.3% of \$185.7 million AUD, or over \$108 million. This is over 3 times the total PPCA licensing revenue of \$34.7 million AUD for the same period for ALL uses. In regard to a comparison of tariffs, the latest publicly available agreements between APRA and the Australian Broadcasting Corporation are stated in the Copyright Tribunal ruling in 1985 and demonstrate the following metric:

1. In respect of the licence granted to the Commission the Commission shall pay to the Association in respect of each licence year covered by this agreement the following fees:

(a) 2% of

(i) the Commission’s gross operational expenditure incurred in the provision of radio broadcasting services (including the Domestic Service and the Overseas Service)

Less

(ii) total direct expenditure incurred by the Commission in the broadcasting of proceedings of the Parliament of the Commonwealth; and

(b) 1.5% of

(i) the Commission’s gross operational expenditure incurred in the provision of television broadcasting services.

Less

(ii) total direct expenditure of the Commission on the purchase, hiring or production of television programmes provided that the total amount so deducted shall be no more than 40% of the Commission’s gross expenditure under sub -paragraph (i) of this paragraph during the relevant licence year. (<http://www.judgments.fedcourt.gov.au/judgments/Judgments/tribunals/acopyt/1985/1985acopyt02>)

The ABC provides very detailed annual financial information so it is quite easy to draw a comparison between how the legislation manages both performing rights. The net operating costs for 2011-12 for the ABC as stated in their annual reports is \$1,006,795,000 AUD. Assuming the maximum deduction for radio is the same as television, this figure could be discounted by 40% which would leave \$604,077,000 to which the APRA tariffs would be applicable. (<http://about.abc.net.au/wp-content/uploads/2012/10/ABC-AR-2012-combined-web-revised-17-Oct.pdf>)

Five-year Analysis					
	2012	2011	2010	2009	2008
ABC Operating	\$'000	\$'000	\$'000	\$'000	\$'000
Cost of Services	1 179 929	1 136 707	1 101 074	1 078 756	1 041 391
Operating Revenue	173 134	183 099	184 260	234 222	219 641
Net Cost of Services (a)	1 006 795	953 608	916 814	844 533	821 750
Share of (deficit)/surplus from jointly controlled entities	(2 317)	(1 732)	468	–	–
Revenue from Government	997 403	955 516	915 058	858 411	833 983
	2012	2011	2010	2009	2008
Financial Position	\$'000	\$'000	\$'000	\$'000	\$'000
Current Assets	228 804	234 548	237 927	275 761	276 332
Non-Current Assets	1 012 702	985 096	1 004 396	948 920	978 828
Total Assets	1 124 506	1 219 614	1 242 343	1 224 681	1 255 160
Current Liabilities	224 033	213 263	241 388	230 403	174 080
Non-Current Liabilities	28 907	20 590	24 161	48 187	114 002
Total Liabilities	252 940	233 853	265 549	278 590	288 082
Total Equity	988 566	985 791	976 774	946 091	967 078
	2012	2011	2010	2009	2008
Ratios					
Current Ratio (b)	1.02	1.10	0.99	1.20	1.59
Equity (c)	88%	81%	79%	77%	77%

(a) Net cost of services is cost of services less operating revenue.
 (b) Current assets divided by current liabilities.
 (c) Equity as a percentage of total assets.

The ABC details the breakdown of expenditure by use, which makes the rest quite easy. Radio is claimed as 27% of expenditure at \$163,100,790. Applying the 2% tariff to this would see an approximate figure of \$3,262,015. With Television representing 51% or \$308,079,270, the 1.5% fee can then be applied to this to get the approximate figure of \$4,621,189.

While the figures calculated here are likely far less than the ABC would actually pay, the comparison to the PPCA's annual figure of around \$104,000 really highlights the imbalance created through these caps. Keeping in mind that this is the ABC alone, and the commercial stations have yet to be quantified, this shows a bias of around 3100% (from \$104k to \$3.2 Million).

Of course these figures are merely estimations, and quite generous to the point that another 20% of net operating costs could be added across this to account for the remaining operational costs in addition to the \$4.6 million from ABC television.

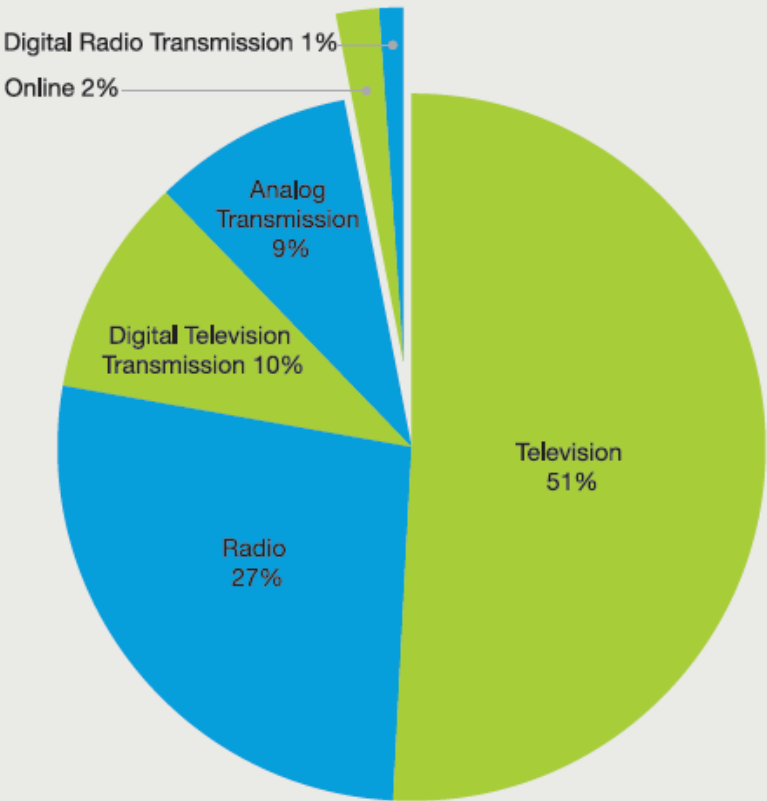
There is still a further \$100 million in income to APRA from broadcasts that are not accounted for in this calculation, so any reform must also consider this extreme legislative bias in relation to the sound recordings.

Revenue by output

This graph shows how funding is allocated to six specified Programs which relate to four Outcomes. Performance against these Outcomes is reported at page 115.

78% of Government funding was allocated to content-related activities.

ABC Revenue from Government by Output 2012-13



The true cut that APRA takes for commercial radio is much higher in comparison; due partly to market share and partly to the higher percentage of gross income in correlation with music use:

Music use percentage	Percentage of gross earnings payable (exclusive of GST)
80% +	3.76%
75 – 79.99%	3.23%
70 – 74.99%	2.96%
65 – 69.99%	2.69%
60 – 64.99%	2.42%
55 – 59.99%	2.15%
50 – 54.99%	1.88%
45 – 49.99%	1.61%
40 – 44.99%	1.34%
30 – 39.99%	1.08%
10 – 29.99%	0.54%
0 – 09.99%	0.054% for each percentage point (or part thereof) of music proportion

(<http://www.apra-amcos.com.au/MusicConsumers/BroadcastMusicRadioorTV/Radio-CommercialBroadcasters.aspx>)

The simulcast of APRA members' works has a tiered fee from 0.611% to 4.583% of gross revenue, which would suggest that the rights of PPCA are justified under the federal courts most recent ruling. This ruling has been granted special leave for appeal, with a Standing Committee seemingly looking to overturn it, and the ALRC reviewing the whole range of implications around it.

Although the APRA and PPCA rights are very different in nature, this lasting regulatory bias demonstrates a need for streamlining the publishing and recording rights in the interest of the whole industry. This could also realise a more transparent flow through to creators if managed appropriately. The management of legislation in Australia has been potentially compromised with several inquiries like the Simpson and Ergas committees calling for the repeal of commercial exceptions, only to be acknowledged by government as vital, but bizarrely not implemented.

Beyond the direct loss of income to artists as a result of these caps, they further devalue music by allowing commercial use to go under rewarded, when this has been the great challenge of the last twenty years in the digital economy. Nightlife agrees with the many calls before and during this inquiry to repeal Sections 152(8) and Section 152(11) and further, that the works and sound recording should be treated equally under legislation, with artists rewarded in a transparent and equitable manner. The framework and metric for the equal application of rights is already applied commercially when understanding how the Copyright Tribunal findings on recorded music for dance use have been applied by both APRA and PPCA. Given both societies have applied this ruling equally in terms of revenue, the argument that their respective rights should hold identical financial value would appear well grounded in law.

Overview of concerns around proposed broadening of exceptions for commercial use

Nightlife finds it of great concern that the ALRC has called for the broadening of both s109 and s199 to further apply to the transmission of television or radio programs using the internet, and to further apply this to the works. There is also concern with a number of the other proposals to broaden exceptions, especially the commercial nature of the use being proposed. The simple fact that the broadening of these exceptions would further reduce the ability of creators to leverage an income, while commercial companies turnover billions of dollars on the use of their works, could potentially devalue music beyond viability. Australia is in danger of losing the diversity and vibrancy of its culture by asking musicians to support advertisers; when it is hard enough for most acts to even get a decent paying gig. The benefits of this proposal from the ALRC are not clearly defined in the passages on broadcasting, and this is of great concern to the intellectual rights of the Australian community as a whole.

Nightlife strongly believes that the implementation of more stringent and transparent accounting procedures around the use and repatriation surrounding all rights will reduce transactional and administrative costs, and create a more positive economic footprint. It is crucial to the industry moving forward that analogous models are phased out in favour of accurate and direct pay for play models. These pay for play models could work under any license scheme — statutory or voluntary — and would help create stronger and more realistic Key Performance Indicator's for collection societies than are currently in place. This will also work to democratise copyright administration under collective, individual or hybrid administration, and satisfy the 'missing transparency link' between rights owners and licensees that appears to be the genesis of tension.

Sections 45, 47A, 47, 70, 107, 67, 109 and 199

For the sake of clarity these suggestions from the ALRC have been addressed in order, but Nightlife strongly argues against taking resource of any kind away from the creators of content to provide financial windfalls for commercial corporations. Any commercial entity using cultural exceptions with a clear and demonstrated social benefit are not opposed, in principle. Nightlife proudly pays all applicable royalties to artists, and expects the same of our clients.

Broadcast of extracts of works

Section 45 provides a free-use exception for reading or recitation of a literary or dramatic work in public or for a broadcast, of a reasonable length, with sufficient acknowledgement.

Nightlife agrees that section 45 provides a reasonable exception provided that works and recordings are not mashed and/or edited under this exception to create hybrid works and recordings. Providing the use would be properly defined under the proposed new exceptions, and covered by the proposed fairness factors, the intention of this section would remain, should fair use be applied. Should the current system remain, this exception provides a reasonable facility for small sections to be used without infringing copyright. This must not be abused however, and any abuse must be dealt with strictly.

Reproduction for broadcasting

Section 47(1) provides a free-use exception that applies where, in order for a work to be broadcast, a copy of the work needs to be made in the form of a record or film to facilitate the broadcasting. Sections 70(1) and 107(1) provide similar exceptions, in relation to films of artistic works and sound recordings, respectively.

This reproduction exception does not expressly cover the 'works' within the sound recording and would therefore work to exclude ARIA from claiming a royalty while allowing APRA|AMCOS to apply a mechanical tariff to the works within the sound recording for reproduction. This may be obvious to some but for the sake of others it is worth reiterating.

The viability and purpose of excluding one right, yet retaining the other, makes absolutely no sense. There is also a risk that companies like Pandora — who are particularly vocal — will use these exceptions as a loophole to not pay creators for the use of their works in commercial environments. Pandora has actively campaigned to have creators rights diluted for their own profit, and this is unlikely to change under the models they are proposing.

Instead of creating systems that detract from the value of music, perhaps a low value high usage adjustment to the tariff structure could bring both rights into alignment and any proposed exceptions could affect both rights equally.

Without this infrastructure it is delinquent and dangerous to approach one right with prejudice, and leave the other to capitalise on any new exception proposed, especially when the creator is copying their own material.

It is also worth noting that under the current body of case law and legislation 'streaming' is not defined as a broadcast. Some of the changes proposed to Sections s109 and s199 have some potentially devastating consequences to the creators of creative content. Interfering with well-argued definitions also brings with it an amount of skepticism toward the motivation of the agent proposing change. Under the current application of the Copyright Act there is a clear favoritism toward the 'works' within sound recordings that effectively denies creators and producers equal access to income from the commercial use of their intellectual property. The fact that the PPCA and ARIA have been subjected to these archaic and bias mechanisms has had a direct flow on effect to the ability of musicians to leverage income from the commercial application of their work for far too long. An extension to this bias must be viewed with consideration to the rights of creators, as they are being exploited commercially. To simply frame PPCA as having some form of 'cash grab' agenda is out of touch with the scale and application of the current framework, and out of touch with the reality of the current legislation.

The suggestion that these exceptions should be extended to the transmission of television and radio programs using the internet introduces a 'fifth wall' to this dilemma. Considering that subsection 5 of 47, 70, and 107 of the Copyright Act state that any reproduction can only be done on the express condition that the copy be destroyed within 12 months; this simply cannot be guaranteed in the digital marketplace. There is obviously a direct commercial benefit to commercial radio, television stations and companies like Pandora who could potentially avoid public performance royalties altogether, but there is no cultural basis or reasoning to justify this proposal. Taking further rights away from creators to commercially subsidise major industry creates a dangerous and unsustainable precedent that devalues Australian music.

Sound broadcasting by holders of a print disability radio license

Nightlife agrees that be an exception for this specific use is appropriate, provided all the stated requirements are met. This endorsement would extend to either statutory or voluntary schemes. This must not be abused however, and any abuse must be dealt with strictly.

Incidental broadcast of artistic works

Providing the use would be properly defined under the proposed fair use criteria, and covered by the proposed fairness factors, the intention of this section would remain should fair use be applied. Should the current system remain, this exception provides a reasonable facility for small sections to be used without infringing copyright. This must not be abused however, and any abuse must be dealt with strictly.

Broadcasting of sound recordings

Nightlife proposes that both the sound recordings and the works within them should be treated in the same way. Having an exception that applies exclusively to the sound recordings leaves an unbalanced industry no matter how the issue is framed. Extending s109 to cover both television and radio over the internet creates a dangerous perception that content has lost value, and will act to diminish the value of content in other areas. The value of a license that complies with the Broadcasting Standards Act must be represented in the quantum of its fee, but to bequeath a new spectrum of uses to this license, without acknowledging the commercial value of the music used, sets a dangerous and unsustainable precedent.

It is clear that commercial companies would benefit greatly from being able to ignore one of the two rights applicable to sound recordings (the other being the works within sound recordings), but how this would be of value to the greater community is not justified. Simplifying the licensing process should not mean that creators are punished for the complications and lack of effort in reflexively addressing the Copyright Act in the face of new technology. There is some highly charged rhetoric around this topic that seems to leak over largely from the battles surrounding the internet radio behemoth that is Pandora.

In regard to the submissions of Pandora, there are a number of issues that are not evident in their submission that should be noted. First is the Pandora for Business by DMX, a Business to Business product that would directly benefit from the broadening of the exceptions in this way (<http://www.dmx.com/pandora/>). For Nightlife this is particularly relevant as we have spent over 20 years on the front line encouraging commercial venues to pay the correct fees for the commercial use of music, and now Pandora appear to be devaluing music with their preference to profit over sustainable business practice. With Pandora obviously eyeing increased presence in the Australian market, some consideration must be given to the fact that they are essentially asking to: be able to exploit creators works on statutory licenses, be exempt from public performance royalties under section 199, and have the definition of broadcast changed so they can compete with an advantage against companies like Nightlife and our competitors, in the Australian marketplace.

Pandora have a very clear agenda and it would appear that a sustainable industry where creators are rewarded for the use of their work is secondary to their own sense of entitlement to business practice and bottom line. This is quite natural in a free market, but the hypocrisy comes when a company wants to charge customers under free market conditions, yet call for statutory licensing and the denial of artists' rights to manage their own works so they can profit. This attitude is further reflected with the recent court cases in which Pandora have attempted to reduce the amount of royalties payable to artists and the subsequent withdrawal of artists and publishers from agreements with Pandora. The fact that an Australian Inquiry into Copyright and the Digital Economy would appear to favour big foreign business over the rights of Australian creators, users, and industry; casts a dark shadow over the future of our unique culture. (<http://www.theage.com.au/entertainment/music/radioheads-thom-yorke-joins-chorus-of-complaint-over-spotify-pandora-20130716-2q1f0.html>)

Pandora notably bought a radio station in regional America to lobby for discounts, and one can only imagine that they will either do the same or similar to get out of paying creators in Australia if these proposed conditions are confirmed by parliament (<http://thehill.com/blogs/congress-blog/technology/304763-why-pandora-bought-an-fm-radio-station>). This may also provide them with the BSA compliant license they require to avoid paying royalties at the full rate. Perhaps there is a misunderstanding as to the implications of broadening these exceptions on a commercial basis, but the recommendations so far seem to implicate a focus on imbalance.

Pandora is quite open about their intentions in their most recent submission:

Whilst we have no particular issue in principle with the intent of the Commission's recommendation, we do consider that it will be important to clarify what is meant by the term "radio program" and, in particular, to confirm that Pandora's service would fit within that concept and that such a program:

- *Can be indeterminate in length (Pandora's streams are theoretically unlimited in time – they continue until the user switches off);*
- *Can be personalised (ie it can be a one to one stream rather than a one to many as is typically the case with a radio broadcast);*
- *Does not require "pre-programming" (ie the program can be created simultaneously with its transmission); and*
- *Does not require a mix of music and other content (eg interviews, hosts etc) to qualify as a Program (http://www.alrc.gov.au/sites/default/files/subs/329_org_pandora_media_inc..pdf)*

Nightlife ask the Australian Law Reform Commission to engage companies like Nightlife and our competitors to understand the full extent of these proposals to the whole industry, not just international companies like Pandora. Nightlife write this submission, not as a result of privilege, but as the front line in the Australian music industry that will be decimated by the current proposals. Nightlife are asking that the livelihood and rights of creators be considered very carefully before any rush to provide subsidies to billion dollar corporations in the broadcast and streaming environment. As your mandate through government is to serve the people of Australia and to act in their best interests, we hope these interests are primary to any recommendations forwarded to parliament as a result of this inquiry.

To simply say that musicians would make music anyway, and question why they should get paid is purely exploitative in its nature, as is the argument that music being simulcast is somehow 'great exposure' when there are hundreds of millions of dollars in advertising revenue based on the direct use of these simulcast recordings. It is clear that commercial companies would benefit greatly from being able ignore one of the two rights applicable to sound recordings (the other being the works 'within' sound recordings), but how this would be of value to the greater community is not clear.

The only tangible argument so far is access, but access would be there if the correct fees were paid and transparent. Simplifying the licensing process should not mean that creators are punished for the complications and lack of effort in reflexively addressing the Copyright Act in the face of new technology. The role of government should be to provide and moderate a balanced framework that facilitates access with appropriate transparency surrounding all transactions.

While copyright is claimed as a complicated area, this is a result of a Copyright Act that has not moved with technology. Making the creators of works pay the price for this is like taking food away from the hungry to feed the rich. It is understood that as creators are represented by collection societies which are largely run by either publishers or record companies, there is a perception of greed at times. This is where the role of transparent pay for play technology can enable individual artists more power in the way their content is managed. With a completely transparent transactional system, it may no longer be said that collection societies have moved from a collective bargaining tool to an economic shopfront for big business, as the technology would make the repatriation process democratic, and members would have greater power over the administration. What must also be understood is that creators have no other viable option than to negotiate through collection societies, and they should not be punished for collectively asserting their rights.

Simulcasting

It is worth looking in detail at the APRA documentation on obtaining a simulcast license for broadcasters to put the argument against the PPCA having this same right in perspective. The level of bias between the recording and the works invalidates a lot of the arguments around cost when looked at in comparison to the exploitation of the works in simulcasting. Simply, the metric to separate both values is already well used.

If you have an existing APRA broadcast licence for a terrestrial radio service and wish to simulcast your service online - you will need an additional APRA|AMCOS Online Simulcast licence.

APRA|AMCOS Online Simulcast licence

The fee for this licence is based on a percentage of the Licensee's Gross Revenue (directly or indirectly related to the website or simulcast service), calculated in accordance with the level of:

<i>Music Use Percentage (inclusive of GST at 10%)</i>	<i>Percentage of Gross Revenue</i>
80% - 100%	4.583%
60% - 79.99%	3.666%
25% - 59.99%	2.138%
0% - 24.99%	0.611%

Music Use by the Community Radio Station as outlined in the table below, subject to a Minimum Fee of:

- (a) \$783.20 (inc. GST) per annum or part thereof for Metropolitan Stations; or*
- (b) \$391.60 (in GST) per annum or part thereof for Sub-Metro and Regional Stations.*

An additional \$588.50 (inc. GST) per annum or part thereof, can be paid to archive programs as on demand files. These files must have previously been broadcast on the station's terrestrial signal.

An additional \$2,350.70 (inc. GST) per annum can also be paid for the facility to have on-demand Songs, Clips and Music Videos.

<http://www.apra-amcos.com.au/downloads/file/NEWS/Net%20Simulcast%20Information%20Sheet%20September2010.pdf>

So, if Southern Cross Austereo, for example, was to license under this scheme with their annual turnover of approximately \$327 Million, the combination of the simulcast and broadcast licensing would make up nearly 30% of the PPCA's annual turnover for ALL licensing. There is something fundamentally wrong with enforcing one set of rights over another, and this can only lead to deeper discrimination if not addressed in the correct way.

With a Senate Standing Committee on Environment and Communications apparently also looking into the 'simulcast' issue, Nightlife refer to some of the Australian Copyright Council's recent submissions to the Committee Secretary namely that:

Broadcasting is distinct from communication via the Internet in three important ways:

- 1. Broadcasting is tied to the broadcast signal and is therefore limited to a reasonably confined geographic area.*
- 2. Broadcasting relates to a particular kind of technology, which also limits the potential audience (i.e. those with a radio).*
- 3. Not all sound recordings are covered by the broadcast right (under Australia's international treaty obligations, not all sound recordings are protected).*

These limitations do not apply to communications via the Internet. It follows, in our submission, that communications via the Internet are qualitatively and quantitatively different from broadcasting and require separate remuneration.

(http://www.copyright.org.au/admin/cms-acc1/_images/16538215375179f8c221a5f.pdf)

And also the statement on the most appropriate forum for change:

Given the other policy processes currently on foot and the other matters raised in this submission, the ACC does not support the Committee making any recommendations for change to the current regulatory regime for the simulcast of sound recordings.

In summary Nightlife finds the proposals offered from the ALRC on simulcast pose an extreme danger to the Australian music industry. In fact this could extend outwards and affect many international sectors as well. To simply 'sweep issues under the carpet' with exceptions for commercial use is unacceptable in this 'Digital Economy', and an oxymoron for the ages. What is apparent is that the ALRC needs to consult and engage with a higher portion of the industry, especially those that may not have the resource to respond to discussion papers like this. These proposed changes are likely to destroy many opportunities for musicians that can only become exponential given the precedent they set.

Nightlife strongly opposes these recommendations and asks for a much broader demographic of the music industry to be considered and consulted in any future proposals.

Exceptions for persons using broadcasts

Reception of broadcasts - s199

16.72 The policy behind the exception appears to be that it is reasonable to allow the reception of broadcasts in public, as it would be impractical to control this form of communication. This rationale seems to apply equally to similar content that is transmitted using the internet. The ALRC proposes that s199 should be amended to apply to the transmission of television or radio programs using the internet.

This line of thought from the ALRC is concerning enough on its own, but in combination with the points already raised so far in this submission, propose a dangerous precedent that will synthetically devalue music in the digital marketplace.

While Pandora must be excited about the proposed changes to date and making plans to relocate more resource to Australia, the majority of musicians in Australia still live below the poverty line (http://www.australiacouncil.gov.au/_data/assets/pdf_file/0016/32506/08_income.pdf). Nightclub-Foreground-Background Music Suppliers like Nightlife will face being put out of business through the proposed and further arbitrary licensing concessions to international corporations. Without protection of equity in the marketplace many other Australian businesses will follow.

Looking at the history of APRA, the right to collect for the public performance of works was one of the main driving forces in its constitution for decades. Given that these works reside within sound recordings, it makes it even harder to understand the logic of this exception and its proposed broadening. The fact the ALRC has proposed overriding the Full High Court of Australia's decision confirming Broadcast and Simulcast having a different qualitative and quantitative value is disturbing on its own. The ALRC now propose extending the exceptions from the public performance rights in sound recordings (PPCA), to the works within the sound recordings (APRA). It is quite clear that little input has been sought from musicians or music suppliers on these recommendations.

The justification that it would be impractical to control this form of communication is contradicted through the way APRA apply their tariffs to the use of Radios and Televisions in public spaces. If s199 is broadened to incorporate transmission over the internet and works are incorporated as proposed in 16.101...:

16.101 The broadcast exceptions also raise issues that are not directly related to broadcasting but might be dealt with as part of the reform process. For example, it is not clear, in relation to s199, why copyright in sound recordings, films and literary or dramatic works is covered, but not other subject matter, such as the script of a film. Arguably, s199(2) and (3) should be amalgamated and the coverage of s199 extended to all underlying copyright.

...then it would appear that creators will be asked to subsidise the exploitation of their own works by corporations that bring in billions of advertising dollars in revenue for the use of music. The fact that there is a statutory scheme for the sound recordings and a voluntary scheme for the works within sound recordings also defies free market logic. Nightlife also strongly opposes the suggestion from Pandora that both schemes should be statutory on the basis that — beyond all the points already raised so far — all moral rights may be lost. The recent withdrawal, on principle, of Thom Yorke and Pink Floyd from these services is an example of the very rights that may be denied artists under a combination of these elements.

At no point throughout this Discussion Paper have the benefits of these proposals been explored in any detail. Musicians will be forced to foot the bill for this whole area of reform, while billion dollar companies are given a golden ticket to exploit Australian culture commercially; without having to acknowledge the rights of creators in their repatriation modelling. It may provide useful if the ALRC discloses the full extent of their agenda to the music community, as from papers like *Collectivisation of Copyright Exploitation: Competition Issues* by Jill Mckeough and Stephen Teece, it would appear there is no lack of specialist knowledge at the ALRC regarding competition issues surrounding the commercial use of music.

Again Nightlife strongly opposes the proposed broadening of this exception to cover the use and public performance royalties for sound recordings and the works within sound recordings. Commercial users of music should pay for what they use, and music like many other commodities is appreciating in value, perhaps more so in the Digital Economy.

Use of broadcasts for educational purposes

Nightlife accepts using sound broadcasts and/or internet streams for educational purposes as defined under section 200(2) and/or as may be replaced by the proposed fair use criteria.

Copying of broadcasts by educational institutions

Nightlife accepts education reproductions of broadcasts and/or internet streams of both television and radio for educational purposes as per the pt VA licensing scheme, which may be replaced by a voluntary scheme of the same nature.

Overseas models

Nightlife can see an advantage in compartmentalising terms for the sake of control over specific aspects of them, for example:

'Broadcast' could stand under the current interpretation and reference to it only apply for that use.

'Internet transmission' could also only stand under the current interpretation and reference to it only apply for that use.

'Communications work' or the similar variations proposed could define all areas of communication, i.e. 'Broadcast' & 'Internet transmission' and reference to it extend across all forms of communication.

The scope of amended exceptions

Nightlife has addressed much of its position in the previous passages, but for the sake of clarity will provide a further summary here.

- Technological neutrality is not provided by allowing exceptions to deprive creators of income from the commercial use of their property;
- The dissemination of content will not change under these proposals, merely creators will be deprived of income from corporations generating billions of dollars in income;
- To 'sweep' issues under the carpet with exceptions is not the appropriate way forward for copyright in a Digital Economy;
- The broadening of s199 to streaming creates an unfair advantage to radio streaming providers like Pandora, while opening it up to 'on demand' services would decimate the music industry. This is a very high risk proposal to creators with no apparent benefits;
- The Nightclub-Foreground-Background Music sector is worth approximately \$60 Million annually to Australian creators. The fact that this has not been mentioned in regard to providing exceptions for commercial businesses to 'avoid fees' through exceptions (s199) is deceptive;
- The distinction between linear and non-linear consumption is constantly permeable and there are many situations where businesses could avoid paying for both a music collection and public performance under the current proposals;
- Nightlife recommends that the rights to sound recordings and the works within sound recordings are treated with an identical metric. Any exceptions should be identical across both rights and all uses to avoid creating economic 'black holes' in the marketplace.

Voluntary licensing of sound recordings

Question 16–2 *Section 152 of the Copyright Act provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings. Should the Copyright Act be amended to repeal the one per cent cap under s152(8) or the ABC cap under s152(11), or both?*

Nightlife joins the many voices in support of both 152(8) and 152(11) being repealed as a matter of urgency.

Question 16–3 *Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the Copyright Act be repealed and licences negotiated voluntarily?*

This would appear the best pathway for creators to manage their own rights and to allow technology to enable discount blanket licensing and address many needs currently unserviceable under statutory blanket licensing.

Conclusion

Nightlife thanks the ALRC for providing the opportunity for commentary on the proposed recommendations before the final draft paper is submitted to government for consideration. Nightlife understand that there are many complications in all areas of copyright and this is why Nightlife are calling for a uniform and technologically neutral application of copyright laws for the rights of creators in music. The use of music is critical to Nightlife as a business, and Nightlife always advocate for the rights of creators in maintaining and growing the value of music. At the same time Nightlife fully supports fair use as applied under the proposed fairness factors. Nightlife is in a unique position in the Australian music industry, and one that affords a detailed quantitative and qualitative perspective on the whole digital economy. Although Nightlife does not have the resources to address every question in the inquiry, Nightlife hopes you find our comments on broadcasting and exceptions of practical use. Nightlife is prepared to offer further comment throughout the process and will be following any further discussion with keen interest. Nightlife is committed to ensuring equity for, and legitimate access to the brilliant creative works of Australia's musicians.

Yours sincerely,

Mark Brownlee
Managing Director | Nightlife Music