



AUSTRALIAN RECORDING  
INDUSTRY ASSOCIATION

# **ARIA and PPCA joint submission on the Copyright Amendment (Access Reform) Bill 2021**

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## Table of Contents

Executive summary .....	2
Schedule 4: Update and restore education exceptions .....	3
Schedule 2: New fair dealing exception for non-commercial quotation .....	7
Schedule 5: Streamline the government statutory licensing scheme.....	9
Schedule 1: Limitation on remedies for use of orphan works.....	10
Schedule 3: Update and clarify library and archives exceptions .....	13
TPMs and other matters .....	15
About Us – ARIA & PPCA.....	15

### Annexures

CONFIDENTIAL ANNEXURE A – Sample educational sector licensing revenue.....	16
ANNEXURE B – Section 106 comparison table.....	17
ANNEXURE C – Quotation exception provisions comparison – UK, Singapore and New Zealand (underline added for emphasis) .....	20

## **Executive summary**

The facilitation of “access” to copyright material should not by default mean that access should be free. Amendments to the Act must be sensible and workable and must strike a fair balance between copyright owners and creators on the one hand and copyright users on the other. ARIA and PPCA support many of the proposed amendments set out in the Exposure Draft where the intention is to facilitate legitimate, fair and balanced access to copyright material where the Act is not operating efficiently or providing adequate guidance to stakeholders.

However, there are a number of proposed reforms which ARIA and PPCA strongly oppose and others where we have major concerns around the drafting and implementation even though we support the underlying objective in principle.

- **We strongly oppose** the proposed s 113 and the amendments to s 106. This drafting will expand rights to the benefit of educational and other institutions more broadly without any compensation or regard to the impact and detriment of rights holders and creators. The drafting undermines existing and heavily negotiated arrangements between rights holders and such institutions which fairly compensate rights holders with licensing revenue that is then distributed to artists and creators. Confidential Annexure A highlights the potential financial impact by reference to a portion of the educational sector. Lastly, the changes would severely impact the legitimate interests of rights holders and breach Australia’s international copyright obligations.
- **We do not support** a quotation exception for fair dealing in relation to sound recordings embodying musical works. It would have a material and tangible impact on the recorded music market, in particular the synchronisation licensing market for sound recordings causing loss of a minimum of a million dollars in licensing revenue for rights holders each year.
- **We do not support** the government use scheme and query the need for its introduction in circumstances where the Act allows for broad uses by government and there is a potential impact on remuneration for rights holders.
- **We support** an orphan work scheme in principle but cannot support the current drafting in the Bill because there are inadequate safeguards to protect rights holders’ interests. An orphan work scheme cannot override the right to be remunerated for prior use once the owner of the relevant copyright material becomes known and is contacted, and all remedies (such as injunctive relief) must remain available to rights holders (including the refusal of a licence and choice of legal forum for disputes).
- **We support** the library and archives use scheme subject to minor comments on the drafting and in particular, the commercial availability test as it relates to sound recordings (whether in digital or physical format) and subject to any amendments passing the three step test.

## **Introduction**

The Australian Recording Industry Association (**ARIA**) and the Phonographic Performance Company of Australia (**PPCA**) (together **we, us, our**) thank the Department of Infrastructure, Transport, Regional Development and Communications (the **Department**) for the opportunity to make a submission and provide comments on the exposure draft of the *Copyright Amendment (Access Reform) Bill 2021* (the **Exposure Draft**) and associated discussion paper published by the Department, *Discussion Paper – Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions December 2021* (the **Discussion Paper**).

We welcome and support many of the proposed amendments and appreciate the need for reform of the relevant sectors and areas of copyright law as set out in the *Copyright Act 1968* (Cth) (the **Act**). However, although we agree with some of the proposals in principle, we do not agree with the precise details and methodology in which they are proposed to be implemented. The facilitation of “access” to copyright material should not by default mean that such access should be free. We seek sensible and workable refinements that strike a fair balance between copyright owners and creators on the one hand and copyright users on the other.

## **Schedule 4: Update and restore education exceptions**

ARIA and PPCA do not support the proposed changes to the educational sector exceptions set out in Schedule 4 of the Exposure Draft. Of particular concern is the proposed introduction of ss 113MA, MB and MC and the proposed changes to s 106 contained in the Act. The changes represent a wholesale expansion of rights to the benefit of educational institutions (and in respect of s 106, other organisations such as libraries, archives and not for profit organisations) without any compensation or regard to the impact and detriment of rights holders and creators.

We appreciate that the COVID-19 pandemic has presented several issues for the delivery of education, but the impact of the COVID-19 pandemic has devastated numerous industries, including the live music industry severely impacting the livelihoods of artists and associated workers such as managers and touring and hospitality workers. The proposed changes negatively impact recording artists and labels and reduce revenue streams at a time when the industry has been extremely hard hit by the pandemic. The pandemic should not be used as a catalyst or justification for the expansion of rights to meet the needs of online and digital delivery without any compensation to rights holders, particularly when existing comprehensive voluntary licences are in place with the education sector.

ARIA and PPCA together with APRA AMCOS currently have in place various voluntary licences for the schools, universities, TAFEs and commercial education providers sectors. These licences are commercially negotiated and are customised to meet the requirements of the relevant entity. When COVID-19 necessitated the introduction of remote learning, APRA AMCOS, ARIA and PPCA worked with the schools and universities sectors to make sure that the licences were able to meet the requirements of bringing the classroom online. We remain open to addressing any perceived licensing deficiencies with the education sector as a part of our voluntary licences.

### ***Sections 113MA, MB and MC***

We strongly oppose the introduction of s 113MA as drafted in the Exposure Draft, for two main reasons – one, it fails the three-step test of which Australia is obligated to comply in respect of international copyright

law<sup>1</sup> and two, it unfairly undermines the market and invalidates existing licensing schemes that were extensively and rigorously negotiated between rights holders and the educational sector, and deprives rights holders of considerable revenue streams.

The Discussion Paper outlines a case study of classrooms teaching via online platforms such as Zoom and Microsoft Teams and the need for this as a result of the COVID-19 pandemic and lockdowns throughout the 2020- 2021 period.<sup>2</sup> The Exposure Draft seeks to address this issue by a 'classroom' teaching exception that would extend the current s 28 of the Act to a host of additional exceptions and rights for which remuneration to rights holders is not required, including the reproduction, communication, or recording of copyright material such as sound recordings for the giving and receiving of an educational instruction. In practice, this would result in lessons containing commercially released sound recordings being stored online for downloading and viewing by students during the relevant semesters and communicated to students during livestreams on Zoom and other similar software. The proposed wording of 'giving or receiving of educational instruction' and 'a person taking part in' is not sufficiently limited in scope, noting the Discussion Paper makes reference to an 'audience' of a class performance.<sup>3</sup> By way of comparison, other similar jurisdictions have in place very limited exceptions for educational reproduction of copyright material, including that the material may only be reproduced for the purposes of illustration for teaching, for non-commercial institutions and only on the premises of institutions, amongst other limitations.<sup>4</sup>

In accordance with Australia's international copyright obligations, any new copyright law introduced by Australia dealing with exceptions must pass the three-step test, being that limitations or exceptions to exclusive rights must be confined to:

- certain special cases;
- which do not conflict with the normal exploitation of the copyright material; and
- do not unreasonably prejudice the legitimate interests of the rights holder.

In our view, the proposed changes fail the three-step test, namely because there exists statutory educational licences that have been longstanding and extensively negotiated between rights holders and educational institutions for the exploitation of the relevant copyright material, and the proposed changes would conflict with this exploitation and unreasonably prejudice the legitimate interests of the rights holders. Further, the remuneration received by rights holders under statutory licences represents a significant portion of income that, in the context of ARIA and collecting societies, is distributed to artists and creators of copyright material to compensate them for their work and promote the creation of further work. To highlight the economic impact we have set out in Confidential Annexure A the revenue for the recorded music industry via licensing fee collections by music bodies in a sample portion of the educational sector that would be impacted should s 113MA be passed. In some instances, licences with educational institutions that were heavily negotiated over many years (and in some instances, decades) and agreed between the parties, and result in adequate remuneration for such use, would become null and void.

Such a step would clearly cause unreasonable prejudice to the legitimate interests of rights holders in Australia. This revenue makes a considerable contribution to the livelihoods of our stakeholders which comprise of record labels and registered artists.

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<sup>1</sup> Namely, the *Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)*, *Trade-Related Aspects of Intellectual Property Rights Agreement 1994 (TRIPs)*, *World Intellectual Property Organization (WIPO) Copyright Treaty (WCT)* and the *WIPO Performances and Phonograms Treaty (WPPT)*.

<sup>2</sup> Discussion Paper, p 29.

<sup>3</sup> Discussion Paper, p 30.

<sup>4</sup> For example, see the copyright legislation of UK, Singapore and New Zealand.

The current s 28 and s 200, along with the voluntary or statutory licences already in place cover many of the proposed changes set out in ss 113MA, MB and MC. If any use is not covered, then such use should continue to be remunerated under the statutory licence or negotiated voluntary licences. It follows that in order to protect the interests of rights holders and achieve a fair and sensible balance, s 113 should not be introduced.

### **Section 106**

PPCA strongly opposes the proposed amendments to s 106 of the Act as contained in the Exposure Draft. The Exposure Draft would broaden the application of s 106 beyond its already unacceptable pre-2012 scope and magnify the discriminatory treatment of sound recordings compared to all other forms of copyright.

Section 106 should be amended so that the scope of the exception mirrors provisions for musical works as set out in s 46. Failing that, and in the interests of passing amendments for which there is general agreement, any proposed amendments to s 106 should be removed from the Exposure Draft. These provisions should be dealt with in a separate consultation process at a later date. PPCA does not support legislative passage of the Exposure Draft as currently drafted. For reference, Annexure B sets out the proposed amendments, current and past drafting of s 106 and the current drafting of s 46.

By way of background, PPCA collects and distributes public performance revenue to its licensors and registered artists and this continues to be a key source of revenue. In the 2020/2021 financial year, public performance revenues represented almost half of PPCA's overall revenue.

Section 106 has been a longstanding contentious issue for PPCA and rightsholders of commercially released music sound recordings. Prior to amendments to the Act in 2012, s 106 only permitted the public performance of sound recordings at premises where persons reside or sleep, or as part of the activities of or benefit of an organisation that is not conducted for profit and the principal objectives are charitable or for the advancement of religion, education, or social welfare.

In 2012, the *Australian Charities and Not-for-profits Act 2012* (Cth) (the **2012 Amendment**) amended s 106 to remove the prior exceptions and limit the public performance exception to premises where persons reside or sleep or as part of the activities or the benefit of a registered charity. PPCA did not support this amendment which created anomalies between public schools and private schools and charities. The free public performance of sound recordings by charities without permission of the relevant rights holder was also deeply problematic. 'Registered charities' is a very broad category which allows organisations that would otherwise require a public performance licence to rely on this exception and avoid seeking the permission of rightsholders (who may not support the organisation and would not want their recordings associated with the group).

PPCA is disappointed that despite liaising with the Department on this issue, the Exposure Draft restores s 106 to " ...its pre-2012 scope..." and goes further to expand to expressly include educational institutions, libraries and archives. The policy intent for further expanding the section to include libraries and archives has not been clarified.

We draw the Department's attention to the following:

- *Discriminatory treatment of sound recordings*. There is no sound policy basis for introducing additional free and unauthorised use of sound recordings for public performance while continuing to fully protect underlying musical works. Sound recordings should be afforded the same treatment and protection as musical works and any amendments to s 106 should mirror the wording and

impact of s 46. This provides consistency within the Act and allows for more streamlined licensing for musical works and sound recordings which is of benefit to users.

- *Loss of revenue.* There is already a substantial financial impact from existing s 106 and the proposed amendments make things considerably worse. This expansion of the inconsistent treatment of sound recordings will further deprive artists and sound recording rights holders of real revenue streams at a time when the industry has been extremely hard hit by the COVID pandemic. We cannot see any justification for completely removing this potential revenue stream from artists and owners of copyright in sound recordings.
- *Further loss of control over use of sound recordings.* These provisions currently deprive rights owners of any ability to have a say over (or even be notified of) the public performance of their sound recordings by charities (which may include private schools). This is particularly an issue given the broad scope of organisations that can benefit from the definition of registered charity including political or religious organisations. The proposed amendment will further exacerbate this unreasonable status quo by extending the exception beyond even registered charities and include any organisation not conducted for profit, educational institutions, libraries and archives.

Precedent exists for the repeal of an equivalent public performance exception for sound recordings in a similar jurisdiction, being the UK. In 2011, after consultation with various stakeholders the UK government amended the UK Copyright Act to repeal s 67, the UK equivalent of s 106 of the Act. In publishing reasons for their decision, the UK government cited the imbalance between rights holders and copyright users caused by the considerable amount of free use of music permitted under such exceptions and the desire of most stakeholders to have a streamlined and consistent approach for collecting societies of musical works and sound recordings (in the UK, PRS and PPL respectively) and avoid costly and unnecessary disputes as to licence coverage.<sup>5</sup>

### **Response to questions**

In response to Question 4.1 of the Discussion Paper, we do not support these sections of the Exposure Draft as presently drafted. In any consideration of measures that are to be undertaken by an educational institution, any online platform utilised by such educational institution should have in place appropriate security features to prevent unauthorised copying and communication of the copyright material. In our experience, many educational institutions already employ such security features. This should include industry standard features such as:

- password protected secure login for students (including parents, caregivers and/or tutors where applicable, such as for remote learning) and staff only in a closed environment;
- restricting access, streaming and playback of sound recordings to the platform only for the purpose of the relevant course of instruction;
- attribution of copyright material;
- sufficient copyright notices informing users of copyright material of the limitations and scope of use permissible;

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<sup>5</sup> See the UK Government Response to the consultations regarding *Copyright, Designs and Patents Act 1988 (Amendment) Regulations 2010* here: [https://webarchive.nationalarchives.gov.uk/ukgwa/20110110184800mp\\_/http://www.ipa.gov.uk/govresponse-musiclicensing.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20110110184800mp_/http://www.ipa.gov.uk/govresponse-musiclicensing.pdf). See also the Explanatory Memorandum [https://www.legislation.gov.uk/uksi/2010/2694/pdfs/uksem\\_20102694\\_en.pdf](https://www.legislation.gov.uk/uksi/2010/2694/pdfs/uksem_20102694_en.pdf).

- where streaming within the platform is not practicable, then permitting download and offline playback only where files are encrypted or password protected to prevent further copying and communication by users; and
- any playback capacity of downloaded sound recordings expires after a reasonable period of time (otherwise known as a 'timed out download'), so as to prevent permanent copies being stored on user devices.

## **Schedule 2: New fair dealing exception for non-commercial quotation**

ARIA and PPCA acknowledge the potential need for the introduction of a quotation fair dealing exception for certain types of copyright material and the difficulties some stakeholders experience as raised in the Discussion Paper,<sup>6</sup> However, we do not support an amendment in the allowing free use of commercially released sound recordings.

### ***Quotation should not include sound recordings embodying musical works***

Sound recordings embodying musical works should be removed from the relevant provisions of the Exposure Draft relating to the proposed fair dealing quotation exception. Use of sound recordings by libraries and archives, educational institutions and governments are adequately dealt with in other provisions of the Act (subject to any amendments introduced as a result of the Department's consultation regarding the Exposure Draft) and note that the existing fair dealing provisions already permit quotation of a substantial part of the relevant copyright material for specified purposes, including research or study.<sup>7</sup>

### ***Impact on rights holders' commercial market***

The Discussion Paper references a case study on documentary makers<sup>8</sup> and states that the costs associated with getting copyright clearances can be prohibitive. However, this case study fails to recognise the significant costs and investment involved in creating the copyright material sought to be used by documentary makers, such as commercially released recorded music. The Discussion Paper goes on to further reference documentary films as a proposed example for the permitted use of quotation by individuals and organisations for the purpose of research. However, the 'research' purpose of documentaries is ambiguous and should not be viewed in the same context as the work of students, teachers or medical researchers. The idea that a documentary contributes to a higher research purpose is a spurious ground on which to allow greater free use of commercial sound recordings. Demand for factual documentary content from the TV and film streaming services such as Netflix, Disney Plus, and Amazon Prime is growing rapidly as Australian factual and 'observational documentary' content often works well in prime time on commercial free-to-air television and travels very well internationally. As with all TV and film content, a well-established market exists for the licensing and use of commercially released sound recordings in documentaries.

The documentary film maker would be remunerated for the sale or licensing of their film so it is unclear what the policy basis is for depriving sound recording rights holders and creators of their entitlement to remuneration for the use of their material.

To reproduce a sound recording in a film or other image is an exclusive right of the rights holder and ordinarily a licence is required by the user. This is often referred to as a synchronisation right and is a

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<sup>6</sup> The Discussion Paper, p15.

<sup>7</sup> The Act, s 103C.

<sup>8</sup> The Discussion Paper, p15.



significant market for the recorded music industry (as well as the music publishing industry for which a separate licence must be obtained for the reproduction of the musical work). Whether only small clips of music are used should not be a relevant factor in determining the need for an exception. There are established common law principles in determining a substantial part of a musical work or sound recording under the Act and the amount of copyright material used is one of a number of factors. Usage of a few seconds would still have an impact in the market as it would still be subject to obtaining a licence in most if not all instances. This also has a potential impact on the music sampling market, as the Discussion Paper does not conclusively exclude music sampling for the intention of the quotation amendment.<sup>9</sup>

The introduction of a fair use for quotation that does not contain adequate safeguards for rights holders has the potential to be abused and impact the ability for rights holders to be compensated for the costs and investment involved in creating copyright material.

The market is sizeable (with yearly revenue in excess of millions of dollars) and there is a potential for considerable impact on revenue which should flow through to recording artists and copyright holders.

### ***Commercial purposes and examples of quotation***

ARIA and PPCA have serious concerns around the term 'immaterial to the commercial value of the product or service' language as used in s 113FA(1)(b)(ii) of the Exposure Draft. This is ambiguous and on one reading, could lead a copyright user to rely on this provision in instances where the recorded music use is only a few seconds and the music is unrelated to the documentary subject. The examples cited in the Discussion Paper of what would fall within the scope of the exception include subsequent uses of the copyright material such as 'excerpts of background music captured in a documentary that is aired by a commercial broadcaster'.<sup>10</sup> We strongly oppose such commercial use of sound recordings, even in a limited capacity, due to the detrimental impact on the music licensing market and the removal of the exclusive right of the creator or rights holder to withhold their work from being used in a context which they may not approve of or agree with.

Should the Department not be minded to remove sound recordings embodying musical works from the quotation exception in their entirety as set out above, then we suggest removing any exception permitting quotation for commercial purposes (whether wholly, partially commercial or in instances where the use is immaterial to the commercial value of the product or service). As such, s 113FA(1)(b)(ii) should be removed altogether from the Exposure Draft. In addition, the examples of quotation listed in ss 113FA(5)(a)-(b) should be amended such that '...of the copyright material' is added to each. The effect of this would be to limit quotation of sound recordings to where the sound recording is related to the content of the material in which the quotation is being used. For example, a sound recording used in a short research film teaching the music theory and history of a song for non-commercial use would be permissible. The Explanatory Memorandum should also provide detailed examples.

Set out in Annexure C is a table setting out relevant provisions regarding quotation exceptions in the UK, Singapore and New Zealand. These include provisions requiring sufficient acknowledgement, implementation of fair dealing factors and limitations on the amount of copyright material which can be used in order to meet the exception requirements. Such provisions should also be considered by the Department should it be minded to introduce a quotation exception notwithstanding our primary position that commercial sound recordings embodying musical works should be excluded.

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<sup>9</sup> The Discussion Paper, p19.

<sup>10</sup> Discussion Paper, p 17.

## ***Response to questions***

In response to Question 2.1 and in line with our position above, the proposed fair dealing exception in s 113FA of the Exposure Draft should not extend to unpublished sound recordings embodying musical works. It should remain the exclusive right of the rights holder in the sound recording embodying the musical work to publish such copyright material. With current provisions regarding the duration of copyright and publication of sound recordings,<sup>11</sup> and the potential for an orphan works scheme, we see no basis for extending any proposed fair dealing exception to unpublished sound recordings embodying musical works that would justify stripping a rights holder of the exclusive right of publication.

## **Schedule 5: Streamline the government statutory licensing scheme**

ARIA and PPCA do not support the amendments set out in Schedule 5 of the Exposure Draft.

We are unable to identify a sufficient need for the introduction of such amendments in circumstances where the Act allows a broad scope of use by governments. Further and by way of example, such amendments would directly impact PPCA's ability (via OneMusic Australia) to enter in to licences with governments for music use, including for the public performance of sound recordings.

We endorse and support the position set out by APRA AMCOS in relation to this issue.

Noting our position above opposing the introduction of amendments to s 183, we do not seek to make any further comments or amendments to the drafting of the relevant provisions in Schedule 5 of the Exposure Draft other than to respond to Question 5.1 of the Discussion Paper with a brief comment and suggestion to avoid unwarranted harm to copyright owners, should the Department be minded to include s 183G.

Use of music in a political context whether by government or anyone else is a particularly sensitive area for recording artists.<sup>12</sup> Section 183G(1)(d) permits the use of copyright material by the Commonwealth or State so long as the use is not for the purpose of obtaining a commercial advantage or profit. In our view, 'commercial advantage or profit' is both narrow and ambiguous in scope and should be clarified to prevent unwarranted harm to copyright owners from use of copyright material which may not fall within a strict reading of 'commercial advantage'. In order to protect the interests of recording artists and prevent unwarranted harm, this should be expanded to include uses in which a political, social or economic advantage is obtained and request that s 183G(1)(d) be amended to read as follows:

*'(d) the use is not wholly or partly for the purpose of the Commonwealth or State obtaining a commercial, social, political or economic advantage or profit; and'*

Alternatively, we would expect that any Explanatory Memorandum accompanying the Bill will adopt similar wording to clarify the types of uses in which the purpose could be characterised as the Commonwealth or State obtaining a commercial advantage or profit.

We also query what constitutes "material provided to the Commonwealth or State" and note that clarification will be required to ensure that the policy intent is applied.

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<sup>11</sup> The Act, s 93.

<sup>12</sup> For example, see *Universal Music Publishing Pty Ltd v Palmer (No 2)* [2021] FCA 434; 158 IPR 421.

We believe that the changes outlined above would not negatively affect the intended reforms to the sector, are reasonable and balanced and provide some assurances to alleviate any concerns of the recorded music sector on this issue.

## **Schedule 1: Limitation on remedies for use of orphan works**

ARIA and PPCA support an orphan work scheme in principle but cannot support the current drafting in the Exposure Draft because there are inadequate safeguards to protect rights holders' interests.

ARIA and PPCA recognise the need for a balanced orphan work scheme in the Act however the drafting in the Exposure Draft does not achieve that goal because the protections for the rightsholders are not sufficient. We understand the need to find a path forward in relation to orphan works and have outlined proposed amendments to the drafting that would create an orphan works scheme that ARIA and PPCA could support.

We note that existing fair dealing provisions, other exceptions, and statutory licences already apply to orphaned copyright material under the Act. As noted in the Discussion Paper, there is no express exception in the current Act for a person to use legitimately orphaned copyright material without risk of liability for infringement.<sup>13</sup>

We are aware of the introduction of orphan works provisions in a number of countries and, while we do not object in principle to such arrangements being introduced in Australia, they must be sensible and adequately scoped so as not to become an alternative to licensing copyright material that is not truly orphan and include necessary safeguards against potential abuse.

### ***Impact on the rights holders' exclusive rights***

The current drafting would unreasonably override the exclusive rights that are ordinarily afforded to copyright owners under the Act. Orphan works in which the owner or rights holder subsequently becomes known are unfairly treated and creates a class of copyright material in which many exclusive rights are lost or diminished. For example, the Exposure Draft as drafted would result in rights holders losing the right to:

- seek remuneration or any relief (whether injunctive or otherwise)<sup>14</sup> for any use of the relevant copyright material prior to the owner becoming known;<sup>15</sup>
- refuse to grant a licence to a person for the ongoing use of the relevant copyright material after the owner becomes known;<sup>16</sup> and
- seek any remuneration or any relief (whether injunctive or otherwise) from a court, as opposed to the Copyright Tribunal, for the use of the relevant copyright material.<sup>17</sup>

Such changes would unfairly and unnecessarily prejudice rights holders. We have set out an example below highlighting the issues that could arise should the Exposure Draft be passed in its current form.

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<sup>13</sup> Discussion Paper, p7.

<sup>14</sup> The Exposure Draft, s 116AJA(1) '...a court must not grant relief against the person in respect of the infringement'.

<sup>15</sup> The Exposure Draft, s 116AJB(1)(c).

<sup>16</sup> The Exposure Draft, s 116AJB(1)(e)(ii).

<sup>17</sup> The Exposure Draft, s 116AJB(1)(e)(ii) and (f).

*A rights holder of music sound recordings becomes aware of a person using the rights holder's copyright material without permission. The copyright material has been reproduced in a film and made available as physical products such as CD soundtracks and DVD films, digital products such as online downloads from websites, and has been broadcast on television and communicated via subscription streaming services. When contacted by the rights holder, the user relies on the orphan works exception.*

*The rights holder holds negative views of the film and would never have licensed the copyright material for such use and is fiercely protective of their artistry. The rights holder seeks an interlocutory injunction for the delivery up of all physical product in possession of the user and details of sales/profits but is prevented from seeking such relief as the past acts are not considered infringing.<sup>18</sup> The rights holder attempts to negotiate a settlement for remuneration for the prior use and the cessation of further use but is ignored by the user.*

*The user wishes to continue to use the copyright material and in the absence of agreement as to licence terms,<sup>19</sup> the user applies to the Copyright Tribunal for terms to be fixed. Notwithstanding the rights holder's opposition to such use, the Copyright Tribunal fixes terms for remuneration for the rights holder.<sup>20</sup> The user complies with the terms and the rights holder is prevented from seeking any relief in respect of such use.<sup>21</sup>*

### **Proposed amendments**

In order to address such an imbalance and to better safeguard rights holders, we propose the following reasonable measures:

- **Rights holders should retain the right to seek remuneration and relief for past acts.** Fair remuneration for past acts should be included within the proposed orphan works scheme. The damages principles set out in s 115 of the Act provide a framework for this and limit the prospect that the remuneration for such past use will be unreasonable. For example, s 115(2) provides relief in the form of damages or an account of profits and s 115(3) provides that relief is limited to account of profits in instances where at the time of the infringement, a user had no reasonable grounds for suspecting the act was infringing. Further, the attempts by the user to contact the owner and meet the requirements of a reasonably diligent search would be factors in the consideration of any additional damages under s 115(4). If a user of an orphan work acts in good faith and meets the necessary requirements for conducting a reasonably diligent search, then remuneration under the current provisions would be limited to damages or an account of profits, or arguably just an account of profits alone. The rights holder's ability to seek remuneration and injunctive relief is preserved.
- **Rights holders should retain the right to refuse to license copyright material.** The current drafting of the Exposure Draft does not contemplate a situation in which a rights holder does not wish to license the copyright material to a user. It is the exclusive right of a copyright owner to control how their copyright material is used. On a strict reading, the terms of such use can either be agreed or fixed by the Copyright Tribunal,<sup>22</sup> but the use itself cannot be refused. Section 116AJB(1)(e) should be amended to make it clear that that the fixing of terms whether by the Copyright Tribunal or the parties occurs in instances where the rights holder wishes to license the material, but the terms cannot be agreed. However, it should be noted that applications to the

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<sup>18</sup> The Exposure Draft, s 116AJA(1).

<sup>19</sup> The Exposure Draft, s 116AJB(1)(e)(i).

<sup>20</sup> The Exposure Draft, s 116AJB(1)(e)(ii).

<sup>21</sup> The Exposure Draft, s 116AJB(1)(f).

<sup>22</sup> The Exposure Draft, s 116AJB(1)(e).

Copyright Tribunal can be a protracted and costly endeavour, which is to the detriment of creators that are not well resourced.

- ***Rights holders should retain the right for choice of forum.*** The current drafting of the Exposure Draft does not afford rights holders the ability to seek relief from courts whether in respect of past or future use of copyright material deemed to be orphaned (or previously orphaned if the owner becomes known). There is no basis for depriving rights holders of this right.

### ***Impact on rights holders' commercial market***

The Discussion Paper makes references to public broadcasters and documentary makers as proposed beneficiaries of an orphan work scheme and notes that there are currently issues with using orphaned archival material.<sup>23</sup>

To reproduce a sound recording in a film or other image is an exclusive right of the rights holder and ordinarily a licence is required by the user. This is often referred to as a synchronisation right and is a significant market for the recorded music industry (as well as the music publishing industry for which a separate licence must be obtained for the reproduction of the musical work).

The risk of introducing an orphan works scheme that does not get the balance right is that it could potentially lead to loss of legitimate revenue for rightsholders, which is in excess of millions of dollars.

### ***Reasonably diligent search***

Although we support the requirement of a reasonably diligent search and the matters to be considered when determining whether a reasonably diligent search has been satisfactorily conducted<sup>24</sup> for the purposes of an orphan work scheme, the guidance in respect of these matters set out in the Discussion Paper<sup>25</sup> causes some concerns.

For example, the Discussion Paper states that 'if a response is not received within a reasonable time after various attempts to contact the copyright owner...the user may reasonably expect that the copyright owner is not actively exercising their exclusive rights and the work is orphaned'.

The licensing teams of major record labels are small and receive close to a thousand licence requests a year. Although every effort is made to respond to such requests and to do so in a timely fashion to confirm ownership and/or whether a licence would be granted, it would be entirely unreasonable to expect rights holders to respond to every request received and the result of this being a potentially orphaned work and loss of rights. There may be legitimate reasons as to why a copyright owner may not be able to be contacted or provide a prompt response. The lack of a response after a period of time should not be a determining factor for whether a work is considered orphaned following a reasonably diligent search. Further, the fact that a rights holder is not actively exercising their exclusive rights should not automatically mean a work is orphaned. Absent any statutory licensing regimes, a rights holder's decision to exploit, or not exploit, copyright material is a commercial and sometimes artistic decision and freedom that is afforded by the exclusive rights granted to such rights holder under the Act. There is no requirement that copyright material must be actively used or exploited by the owner in order to maintain copyright protection.<sup>26</sup>

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<sup>23</sup> The Discussion Paper, pp11, 13.

<sup>24</sup> The Exposure Draft, s 116AJA(2)(a)-(f).

<sup>25</sup> The Discussion Paper, p 12.

<sup>26</sup> Cf. *Trade Marks Act 1995* (Cth) ss 92-105.

To address this issue, we suggest that s 116AJA(1)(d)(ii) of the Exposure Draft be removed completely. Further, wording should be added to clarify circumstances where an owner or owners ‘cannot be contacted’ or do not respond, via a note in the subsection stating *‘For the purposes of determining whether an owner or owners are unknown under s 116AJA(1)(d)(i), whether the owner can be contacted or the absence of a response from the owner is not a determinative consideration’*. Similar wording should be inserted into an Explanatory Memorandum. As noted earlier, commercially released sound recordings are well catalogued and with the proliferation of streaming services and the use of the © notice to identify ownership,<sup>27</sup> we anticipate that reasonably diligent searches will result in confirmation of ownership but take issue with contact, or lack thereof, being a determinative factor.

Lastly, we note that the provisions relate to the doing of an ‘act’ (in the singular) comprised within the copyright material. A reasonably diligent search should be required to be conducted for each separate act. For example, a reasonably diligent search conducted for the reproduction of a sound recording for the purposes of a small library archive should not be relied upon if the same sound recording is to then be used ‘downstream’ in a film broadcast on a commercial broadcaster within Australia. This would require a reconsideration of the matters set out in the proposed s 116AJA(2) of the Exposure Draft.

### ***Response to questions***

In response to Question 1.1 of the Discussion Paper, and noting our position in respect of the Copyright Tribunal, the determination of remuneration and our general disagreement with the approach taken in the orphan works scheme in the Exposure Draft, our view is that the following matters should be included in an application to the Copyright Tribunal to fix reasonable terms for ongoing use of a former orphan work:

- The copyright material being used;
- Genuine steps statement regarding attempts to reach agreement;
- Amount of copyright material used;
- Frequency of use of copyright material;
- Type of use of copyright material;
- Geographical area of use of copyright material;
- Length of use of copyright material;
- Profit made (or to be made) from use of copyright material;
- Usual commercial market licence rates for use of copyright material;
- Historical and current market licence rates of copyright owner for similar use; and
- Remedies sought from the Copyright Tribunal.

## **Schedule 3: Update and clarify library and archives exceptions**

Subject to meeting the three step test requirements, ARIA and PPCA support the amendments set out in Schedule 3 of the Exposure Draft and appreciate and recognise the need for sensible reform of copyright as it relates to the library and archives sector. It is important however that the definition of a library does not extend to cover commercial libraries or those operated by commercial entities – even if these libraries are accessible to the public. We make the following additional comments.

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<sup>27</sup> For more information, see the PPCA Guide to the Proper Use of the P Notice at <https://www.pcca.com.au/artists/proper-use-of-the-p-notice>.

## ***Commercial availability***

Over the past decade, the music industry has adapted and responded to the diverse needs of consumers. The dissemination of music through innovative digital channels via online download and streaming services has been occurring within Australia over the past decade. Global services such as iTunes, Apple Music, Amazon Music, YouTube Music and Spotify launched in Australia due to the receptiveness of Australian consumers and the market in relation to new services and technologies, and an effective and efficient licensing regime. In fact, through certain ad-supported digital services, consumers can also access millions of songs for free. There are also licensed music services that provide library users with access to free music<sup>28</sup>. At the same time, there has been a resurgence in physical product market<sup>29</sup> and the availability of vinyl and even tape cassettes, often as limited-edition collector items.<sup>30</sup>

In light of the multitude of methods for accessing a particular sound recording at an ordinary commercial price and within a reasonable time and suitable format, we would expect that the ‘commercial availability test’<sup>31</sup> whether applicable to a library or archives or the intended end user, would almost always be answered in the affirmative in respect of music sound recordings. Further, any application of the ‘commercial availability test’ should not result in instances where product available only in a particular format (as a commercial choice by a rights holder), is then made available by a library or archives in a different format for public consumption – even if it is for a private or domestic use. Copyright owners should be in a position to retain their rights in respect of the choice of format that they make their music available. For example, a limited-edition vinyl sound recording, available only in this format, should not be reproduced and made available by a library as a digital file simply because the vinyl format is not suitable. Even though the Discussion Paper notes that the Bill is not intended to allow libraries and archives to become quasi e-book or streaming services, this policy intent needs to be precisely detailed in the drafting.

We request that these clarifications are clearly expressed in the Explanatory Memorandum to ensure that existing licensing models and arrangements for commercially released sound recordings are not undermined or circumvented by the commercial availability test, regardless of the format of the copyright material. The rights of sound recording rights holders and creators to not digitise or make their material available in other formats (e.g. online) should be also be preserved.

## ***Contracting out***

In respect of ‘contracting out’ provisions<sup>32</sup> we do not provide any comments at this stage. However, should submissions be made by any stakeholders calling for the expansion of the preclusion of ‘contracting out’ provisions beyond that of s 47H of the Act, then we respectfully request an opportunity to respond to such submissions.

## ***Response to questions***

In response to Question 3.1 of the Discussion Paper, we suggest that any online platform utilised by a library or an archive have in place appropriate security features to prevent unauthorised copying and communication of the copyright material. This should include industry standard features such as:

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<sup>28</sup> See <https://www.freegalmusic.com/home>.

<sup>29</sup> See <https://www.aria.com.au/industry/news/australian-recorded-music-industry-figures-for-2020>. Vinyl albums saw a 32% rise year on year and now comprise 5.4% of the music market.

<sup>30</sup> For example, the limited releases of physical music product on the annual event, Record Store Day. See <https://www.recordstoreday.com.au/>.

<sup>31</sup> The Discussion Paper, pg 25. The Exposure Draft, ss 113KD(9)-(11) and 113KE(2)-(4).

<sup>32</sup> The Exposure Draft, Sch 3, items 12 and 13.

- password protected secure login for registered library members and staff only;
- restricting access, streaming and playback of sound recordings to the platform only;
- attribution of copyright material;
- sufficient copyright notices informing users of copyright material of the limitations and scope of use permissible;
- where streaming within the platform is not practicable, then permitting download and offline playback only where files are encrypted or password protected to prevent further copying and communication by users; and
- any playback capacity of downloaded sound recordings expires after a reasonable period of time (otherwise known as a 'timed out download'), so as to prevent permanent copies being stored on user devices.

We do not seek to make any comment at this time in response to Question 3.2 of the Discussion Paper and defer to the submissions made on behalf of the relevant copyright owners in respect of illustrations.

### **TPMs and other matters**

We do not support the removal of any technological protection measures in the current Act or the introduction of exemptions to the existing TPM scheme. However, we respectfully request an opportunity to review and respond should other exceptions be sought in submissions by other stakeholders or otherwise arise as a result of this review process.

### **About Us – ARIA & PPCA**

ARIA is the peak trade body for the recorded music industry in Australia. ARIA is a not for profit, national industry association that proactively represents the interests of its members. ARIA has more than 100 members ranging from small "boutique" labels typically run by 1-5 people, to medium sized businesses and very large companies with international affiliates. ARIA administers a reproduction licensing function on behalf of its participating members, for various copyright uses including the licensing of the use of sound recordings for the educational sector.

PPCA is a national non-government, non-profit Australian copyright collecting society which was established in 1969. PPCA operates on a non-exclusive basis and grants licences for the broadcast, communication or public playing of recorded music and music videos. PPCA represents the interests of over 3,000 licensors and 4,800 registered Australian recording artists.



**CONFIDENTIAL ANNEXURE A – Sample educational sector licensing revenue**

**REDACTED**

CONFIDENTIAL

## **ANNEXURE B – Section 106 comparison table**

<b>Copyright Act Reference</b>	<b>Drafting</b>
Section 46 of the current Act	<p><b>46 Performance at premises where persons reside or sleep</b></p> <p>Where a literary, dramatic or musical work, or an adaptation of such a work, is performed in public, by the operation of reception equipment or by the use of a record, at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests, the performance does not constitute an infringement of the copyright in the work.</p>
Section 106 as set out in versions of the Act prior to the 2012 Amendment	<p><b>106 Causing sound recording to be heard at guest house or club</b></p> <p>(1) Where a sound recording is caused to be heard in public:</p> <p>(a) at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests; or</p> <p>(b) as part of the activities of, or for the benefit of, a club, society or other organization that is not established or conducted for profit and the principal objects of which are charitable or are otherwise concerned with the advancement of religion, education or social welfare;</p> <p>the act of causing the recording to be so heard does not constitute an infringement of the copyright in the recording.</p> <p>(2) The last preceding subsection does not apply:</p> <p>(a) in relation to premises of a kind referred to in paragraph (a) of that subsection, if a specific charge is made for admission to the part of the premises where the recording is to be heard; or</p> <p>(b) in relation to an organization of a kind referred to in paragraph (b) of that subsection, if a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of the organization.</p> <p>(3) A reference in the last preceding subsection to a specific charge, or a charge, made for admission includes a reference to a specific charge, or a charge, made partly for admission and partly for other purposes.</p>
s 106, as set out in the 2012 Amendment	<p><b>106 Causing sound recording to be heard at guest house or club</b></p> <p>(1) Where a sound recording is caused to be heard in public:</p> <p>(a) at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests; or</p> <p>(b) as part of the activities of, or for the benefit of, a registered charity;</p> <p>the act of causing the recording to be so heard does not constitute an infringement of the copyright in the recording.</p> <p>(2) The last preceding subsection does not apply:</p>

Copyright Act Reference	Drafting
	<p>(a) in relation to premises of a kind referred to in paragraph (a) of that subsection, if a specific charge is made for admission to the part of the premises where the recording is to be heard; or</p> <p>(b) in relation to a registered charity of a kind referred to in paragraph (b) of that subsection, if a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of the registered charity.</p> <p>(3) A reference in the last preceding subsection to a specific charge, or a charge, made for admission includes a reference to a specific charge, or a charge, made partly for admission and partly for other purposes.</p>
<p>Section 106 as set out in current Act with changes marked as proposed in Copyright Amendment (Access Reform) Bill 2021</p>	<p><b>106 Causing sound recording to be heard at guest house or club etc</b></p> <p>(1) Where a sound recording is caused to be heard in public:</p> <p>(a) at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests; or</p> <p><del>(b) as part of the activities of, or for the benefit of, a registered charity;</del></p> <p><del>(b) as part of the activities of, or for the benefit of, a registered charity; or</del></p> <p><del>(c) as part of the activities of, or for the benefit of:</del></p> <p><del>(i) an educational institution; or</del></p> <p><del>(ii) a library; or</del></p> <p><del>(iii) an archives; that:</del></p> <p><del>(iv) is not established or conducted for profit; and</del></p> <p><del>(v) is not a charity; or</del></p> <p><del>(d) as part of the activities of, or for the benefit of, a club, society or other organisation:</del></p> <p><del>(i) that is not established or conducted for profit; and</del></p> <p><del>(ii) the principal objects of which are connected with advancement of religion, education or social welfare; and</del></p> <p><del>(iii) that is not a charity.</del></p> <p>the act of causing the recording to be so heard does not constitute an infringement of the copyright in the recording.</p> <p>(2) The last preceding subsection does not apply:</p> <p>(a) in relation to premises of a kind referred to in paragraph (a) of that subsection, if a specific charge is made for admission to the part of the premises where the recording is to be heard; or</p> <p>(b) in relation to a registered charity of a kind referred to in paragraph (b) of that subsection, if a charge is made for admission to the place</p>

Copyright Act Reference	Drafting
	<p>where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of the registered charity- or</p> <p>(c) in relation to:</p> <ul style="list-style-type: none"> <li>(i) an educational institution; or</li> <li>(ii) a library; or</li> <li>(iii) an archives;</li> </ul> <p>of a kind mentioned in paragraph (c) of that subsection, if a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of:</p> <ul style="list-style-type: none"> <li>(iv) the educational institution; or</li> <li>(v) the library; or</li> <li>(vi) the archives;</li> </ul> <p>as the case may be; or</p> <p>(d) in relation to a club, society or other organisation of a kind mentioned in paragraph (d) of that subsection, if a charge is made for admission to the place where the recording is to be heard and any of the proceeds of the charge are applied otherwise than for the purposes of the club, society or other organisation, as the case may be.</p> <p>(3) A reference in the last preceding subsection to a specific charge, or a charge, made for admission includes a reference to a specific charge, or a charge, made partly for admission and partly for other purposes.</p>

**ANNEXURE C – Quotation exception provisions comparison – UK,  
Singapore and New Zealand (underlining added for emphasis)**

UK CDPA	SINGAPORE COPYRIGHT ACT	NEW ZEALAND COPYRIGHT ACT
<p><b>Section 30 Criticism, review, quotation and news reporting</b></p> <p>(1) Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public.</p> <p><u>1ZA) Copyright in a work is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise<sup>33</sup>) provided that—</u></p> <p><u>(a) the work has been made available to the public,</u></p> <p><u>(b) the use of the quotation is fair dealing with the work,</u></p> <p><u>(c) the extent of the quotation is no more than is required by the specific purpose for which it is used, and</u></p> <p><u>(d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).</u></p> <p>[...]</p> <p>(2) Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.</p> <p>(3) No acknowledgement is required in connection with the reporting of current events by</p>	<p><b>Section 192 Additional requirement for sufficient acknowledgment where use is for certain purposes</b></p> <p>192.—(1) Where a work or a protected performance (including a recording of the performance) is used for the purpose of reporting news, the use is not fair unless —</p> <p>(a) <u>the work or performance is sufficiently acknowledged;</u> or</p> <p>(b) <u>sufficient acknowledgment is impossible for reasons of practicality or otherwise.</u></p> <p>(2) Where a work or protected performance (or a recording of the performance) is used for the purpose of criticism or review (whether of that work or performance or another work or performance), the use is not fair unless the work or performance is sufficiently acknowledged.</p> <p><b>Section 193 Deemed fair use where work or recording included in fairly-used work</b></p> <p>193.—(1) This section applies where —</p> <p>(a) any of the following works is used for the purpose of criticism or review:</p> <p>(i) a sound recording;</p> <p>(ii) a film;</p> <p>(iii) a broadcast;</p> <p>(iv) a cable programme;</p> <p>and (b) the use is fair.</p>	<p><b>1.1.1.1 Section 42 Criticism, review, and news reporting</b></p> <p>1.1.1.1.2</p> <p>(1) Fair dealing with a work for the purposes of criticism or review, of that or another work or of a performance of a work, does not infringe copyright in the work if such fair dealing is <u>accompanied by a sufficient acknowledgement.</u></p> <p>(2) Fair dealing with a work for the purpose of reporting current events by means of a sound recording, film, or communication work does not infringe copyright in the work.</p> <p>(3) Fair dealing with a work (other than a photograph) for the purposes of reporting current events by any means other than those referred to in subsection (2) does not infringe copyright in the work if such fair dealing is <u>accompanied by a sufficient acknowledgement.</u></p>

<sup>33</sup> The phrase “whether for criticism, review or otherwise” is open-ended and too wide in scope and we would recommend deletion of the word “otherwise”.

UK CDPA	SINGAPORE COPYRIGHT ACT	NEW ZEALAND COPYRIGHT ACT
<p><i>means of a sound recording, film or broadcast where this would be impossible for reasons of practicality or otherwise.</i></p> <p><i>(4) To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of subsection (1ZA), would not infringe copyright, that term is unenforceable.</i></p>	<p><i>(2) A work or a recording of a protected performance that is included in the work mentioned in subsection (1)(a) is deemed to be fairly used (and section 191 does not apply). (3) To avoid doubt, this section does not limit what would otherwise be a fair use.</i></p>	