

4 July 2018

The Director, Copyright Law Section
The Department of Communications and the Arts

By online submission

AMPAL Submission to the Department of Communications and the Arts' 'copyright modernisation consultation'

AMPAL

The Australasian Music Publishers' Association Limited (**AMPAL**) welcomes the opportunity to make this submission in response to the Department of Communications and the Arts' 'copyright modernisation consultation paper' (the **Consultation Paper**).

AMPAL is the trade association for Australian and New Zealand music publishers. Our members include large multi-national companies as well as many small businesses. AMPAL's members represent the overwhelming majority of economically significant musical works enjoyed by Australians.

Music publishers invest in songwriters and composers across all genres of music. They play a critical role in nurturing and commercially exploiting the musical works of the songwriters they represent and providing returns to songwriters. AMPAL and our members also recognise the immense cultural and artistic significance of the works that music publishers represent.

AMPAL members are also members of the Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) and we endorse their joint submission. We also endorse the submissions of the Australian Copyright Council and Music Rights Australia. We are an affiliate of the International Confederation of Music Publishers (ICMP) and serve on its governing body. We endorse their submission.

We also refer to our submissions in response to the Productivity Commission Issues Paper on Intellectual Property Arrangements in November 2015; the Productivity Commission Draft Report: Intellectual Property Arrangements in June 2016; and our submission to the Department of Industry, Innovation and Science consultation on the Productivity Commission inquiry into IP Arrangements in February 2017.

The Department has invited stakeholder views on the reform options and questions put forward in the Consultation Paper, as well as more general responses. We set out our comments below.

Introductory comments

From the outset, it should be noted AMPAL has been deeply concerned by some of the recent findings and recommendations made by the Productivity Commission in relation to copyright, and the creators that depend on the current certainty of Australia's robust, balanced and flexible copyright laws in order to encourage their innovation and to be rewarded for their creative efforts in advancing the cultural heritage of Australia. As the Consultation Paper notes, the Government's

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response to the Productivity Commission report recognised the importance in balancing ‘the interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole’.¹ It is hoped that in conducting this consultation and finding that balance, the Department will place appropriate weight on the value of the cultural contribution of Australian creators’ works, as well as their economic contribution. The World Intellectual Property Organisation has previously noted that one of the primary purposes of copyright is: ‘...to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence...’.² This aim of copyright law must be given sufficient consideration by the Department.

A framework for assessing IP arrangements that stresses effectiveness, efficiency, adaptability and accountability, as set out in the Consultation Paper,³ is a sound starting point. However, this analysis obviously fails to identify equally important factors such as art, culture and national identity. As Towse notes, ‘[t]he true cultural value of copyright cannot be fully captured by measuring the value-added in the cultural industries however accurate those measures are because there are external benefits that are not priced through the marketplace; the national culture, a creative environment and freedom of expression are examples of non-appropriable benefits’.⁴

Nonetheless, the remarkable economic significance of Australia’s copyright industries was highlighted by PricewaterhouseCoopers (PWC) in 2017.⁵ In its report, PWC found that Australia’s copyright industries employed just over 1 million people (8.6% of Australia’s workforce), generated economic value of \$122.8 billion (7.4% of GDP, and the third largest industry by value added in the Australian economy) and generated over \$6.5 billion in exports (2.7% of total exports). Creative Industries are strong contributors to employment growth, growing 40 per cent faster than the economy as a whole.⁶ The music industry is a highly innovative and productive industry, comprised of many small businesses, and accounts for a significant part of this economic contribution. With respect to music publishing, AMPAL’s annual survey of its members in 2016 reported the value of the Australian and New Zealand music publishing sector at more than AUD\$235 million a year.⁷

AMPAL also notes that a theme that seems to be running through recent debates on copyright is that there will always be music and that the commercial music industry is an impediment rather than a facilitator of the creation of meaningful cultural content. Nothing could be further from reality. Compelling music content requires investment, production, talent and marketing. Music publishers actively support the songwriters they represent to allow them the time and resources to create. They work with other intermediaries in the business such as record companies and managers to bring the works to market. They are responsible for the collection and distribution of songwriters’ income on a global basis and they create new income streams for songwriters by facilitating licences within the continually evolving digital space.

Music publishers make a critical contribution to the creation of great Australian music. The business

¹ Australian Government, ‘Australian Government Response to the Productivity Commission’s Inquiry into Intellectual Property Arrangements’, 2017, p. 3.

² <http://www.wipo.int/copyright/en/> (last accessed 25 May 2018).

³ Consultation Paper, p. 5.

⁴ Ruth Towse, ‘Cultural Economics, Copyright and the Cultural Industries’, *Society and Economy in Central and Eastern Europe*, Vol 22, No 4, 2000, pp. 107-126.

⁵ https://www.copyright.org.au/acc_prod/ACC/Research_Papers/PwC_Report-Value_of_Copyright_Industries.aspx (last accessed 25 May 2018).

⁶ ARC Centre of Excellence for Creative Industries and Innovation (CCI), Queensland University of Technology, ‘Australian Creative Economy Report Card 2013’, 2013.

⁷ <https://www.ampal.com.au/news-and-events/2017/7/30/australian-and-new-zealand-music-publishing-industry-valued-at-more-than-aud235-million> (last accessed 20 May 2018).

of music publishing is twofold: signing and developing songwriting talent; and licensing their works in a way commensurate with their value and the moral rights of the creators. We believe that licensing is always better than regulation – particularly when the digital environment is continually developing. The transition from the analogue to the digital world has continued apace and we are at the point where there are an abundance of digital services available to the Australian public. These services are gaining traction but the market is still in a fragile space.

The music industry has been transformed in the digital age, and the industry has been innovative in adapting. Music copyright owners including music publishers have comprehensively demonstrated their flexibility in licensing a broad range of new digital music services. The Digital Content Guide⁸ sets out the range of these services. An argument frequently raised in copyright debates is that with regard to creative content in Australia, there is a problem with price and availability. However, the Digital Content Guide indicates the availability of music immediately, globally and at a variety of price points - including (ad-supported) free. It is important to note that Australia has repeatedly been one of the earliest markets for the launch of new global music services by licensees. Those with a viable business model have been able to receive the licences they need. Clearly our copyright laws have not prevented services such as iTunes, Apple Music, Spotify, and others from successfully establishing themselves in the Australian market, nor have copyright laws acted as a disincentive to innovation. In contrast, these services have chosen not to enter territories where copyright protection is weak.

What has made the ongoing transition for the music industry possible is a strong, flexible copyright framework providing certainty for creators and other copyright owners, as well as licensees. Australia's IP system has adapted well to changes in economic, commercial and technological changes in the past, and if it remains as a robust IP framework, it will continue do so into the future. AMPAL reminds the Government of the Hon. Karen Andrews MP's, then Parliamentary Secretary to the Minister for Industry and Science, comments in relation to Australia's intellectual property arrangements: 'Australia has a world class IP system that is consistently ranked in the top tiers across the range of global measures. A well-functioning and effective IP system is important to underpin Australia's innovation, trade and investment efforts'.⁹

Comments on the Consultation Paper

Firstly, AMPAL submits that 'modernisation' of copyright should not mean weakening the rights of creators and copyright owners. AMPAL disagrees that the first response to the impact of technology on the copyright regime should be to broaden the scope of existing exceptions or to introduce new free exceptions. AMPAL respectfully notes that this is reflected in the framing of some questions in the Consultation Paper, which then require a justification of the current copyright system.

AMPAL makes the following comments in relation to the specific questions raised in the Consultation Paper. We have focused our responses on the specific reform options on which we understand the Department is particularly interested in receiving submissions.

⁸ <https://digitalcontentguide.com.au/> (last accessed 28 May 2018).

⁹ IP Australia, 'Australian Intellectual Property Report 2015', 2015, p. 3.

Flexible exceptions

Question 1

To what extent do you support introducing:

- *additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?*
- *a 'fair use' exception? What illustrative purposes should be included and what factors should be considered in determining fairness?*

AMPAL notes that Australia already has established and well-functioning copyright fair dealing exceptions and statutory licence schemes which encroach on the exclusive rights of copyright owners. With regard to potential new exceptions to copyright infringement, we submit that it is incumbent on those advocating for new exceptions to clearly provide details of the market failures that would necessitate new exceptions or statutory licences, and provide the evidence to support their proposed solutions. AMPAL does not believe that the recent reviews of copyright arrangements in Australia have produced any compelling evidence to support a conclusion that Australia should move from purpose-based fair dealing exceptions to an open ended 'fair use' exception such as that provided for in the United States law. As noted by the Australian Copyright Council, 'it is not appropriate or workable for Australia to move to an open-ended exception. Rather, it is appropriate for the purposes to be prescribed by the legislature',¹⁰ as they currently are in Australia. The current copyright exemptions noted above are sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators. Introducing an open-ended exception such as fair use would remove this certainty, and could result in a loss of GDP of more than \$1 billion to the Australian economy.¹¹ AMPAL refers to its extensive comments in its previous submissions noted in above in being opposed to the introduction of a fair use exception in Australia.

Secondly, it would seem that much of the push for greater exceptions to copyright comes from the proponents of 'innovation'. However innovation should not be used as an excuse for building businesses that free ride on others' intellectual property. On the contrary - rights holders including music publishers and creators need certainty in intellectual property laws in order to encourage innovation. This will in turn encourage development of new legitimate models for distribution of creative content, while also appropriately rewarding creators. It is licensing, not exceptions to copyright, that drives innovation.

AMPAL disagrees with the Department's statement in the Consultation Paper that '...the evolution of the fair dealing regime may not be keeping pace with the exponential rate of change in contemporary society'.¹² As noted by Senator the Hon George Brandis QC (then Attorney-General), '...the fundamental principles of copyright law, the protection of rights of creators and owners, did not change with the advent of the internet and they will not change with the invention of new technologies'.¹³

Finally, AMPAL submits that any proposed exceptions must be subjected to evidenced-based impact assessment being undertaken in advance.

¹⁰ Australian Copyright Council, 'Submission to ALRC in Response to Interim Report on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws', 2015, p. 3.

¹¹ PricewaterhouseCoopers, 'Understanding the Costs and Benefits of Introducing a 'Fair Use' Exception', 2016, p. 11.

¹² Consultation Paper, p. 9.

¹³ Senator the Hon George Brandis QC (Attorney-General and Minister for the Arts) Address at the Opening of the Australian Digital Alliance Fair Use for the Future: A Practical Look at Copyright Reform Forum held at Canberra, ACT, 14 February 2014.

AMPAL understands that the Department is particularly interested in comments on the introduction of additional fair dealing exceptions for quotation, incidental or technical use, certain government uses, and certain education uses. We make the following comments.

Quotation

From the outset, AMPAL notes that the *Copyright Act 1968* (Cth) (the **Copyright Act**) already includes broad provisions for the use of quotations. AMPAL submits that any new fair dealing exception for quotation must not undermine the highly commercial, established business of licensing samples, mash-ups and remixes nor impede a copyright owner's commercial control over their intellectual property. If there were to be a new fair dealing exception for quotation, to the extent permitted by Australia's international obligations, in AMPAL's submission it should only apply to private or domestic non-commercial use, and should not extend to subsequent, public uses.

It would be a Berne Convention requirement of any exception that the excepted use did not conflict with the normal exploitation of the copyright material and did not unreasonably prejudice the legitimate interests of the owner of the copyright. The moral rights provisions of the Copyright Act would continue to apply.

In relation to sampling, mashups and remixes, it must be emphasised that there are longstanding and effective commercial practices in the market for licensing. The music publishing industry is very familiar with the issue of sampling. It is a part of a music publisher's role to deal with requests to sample a songwriter's work into a new work. In deciding whether to issue such a licence the publisher will take into account how the sample is being used, the effect on the market for the original work, and most importantly the attitude of the original creator.

A fair use exception is not required (nor desirable in this case) – AMPAL believes it is entirely appropriate that a songwriter or composer can choose how and where their original work is used. We see no reason why consideration should be given to a free use exception to take the heart of a song and include it in another work without the approval of the copyright owner. How could this not be an assault on the moral rights of the original creator?

Any consideration of a fair dealing exception for quotation must address these concerns. AMPAL endorses the further comments of APRA AMCOS and the Australian Copyright Council.

Incidental or technical use

The Department has noted that 'certain uses of copyright material such as through indexing or caching is required as part of the normal operations of many online service providers'.¹⁴ AMPAL agrees that there are many different situations where caching and indexing may be undertaken. However, AMPAL is not aware of any evidence that demonstrates these functions are being impeded by Australian copyright law in practice. APRA AMCOS issues licences digital music services for all communications and technical reproductions. Some of these licensed activities can be described as caching. AMPAL does not support an exception for any of these activities that are the subject of current licence arrangements. We refer to the further comments of Music Rights Australia on this issue.

AMPAL also wishes, at this point, to express its concern with the Department's references to 'ongoing

¹⁴ Consultation Paper, p. 10.

work on safe harbour reform',¹⁵ and 'modernising safe harbours'¹⁶ in the Consultation Paper. It remains AMPAL's position that any service going beyond the activity of a strictly neutral and passive intermediary should not be eligible for copyright safe harbour protection, as detailed in our submission to the Environment and Communications Legislation Committee inquiry into the *Copyright Amendment (Service Providers) Bill 2017*. AMPAL is concerned that any fair dealing exception for technical or incidental use could establish what is effectively a separate safe harbour regime. AMPAL takes this opportunity to commend Government on the passage of the Bill, and submits that the passage of the legislation should conclude the Government's review of the safe harbour provisions of the Copyright Act.

Government uses

AMPAL notes the well-functioning voluntary licence schemes in place between APRA AMCOS and all levels of government, and respectfully submits that section 183 of the Copyright Act remains appropriate for government and that no further exceptions are necessary in this regard. AMPAL refers to the further comments of APRA AMCOS.

Educational uses

In relation to a further fair dealing exception for certain educational uses, AMPAL draws the Department's attention to the fact that the print music business has been severely affected by the distribution of unauthorised copies on the Internet. There are a limited number of companies producing print editions of Australian music for use by educational institutions. The provision of music education into schools is different to the provision of other subjects. Most music publications for education are used outside the classroom for individual or small group tuition, or by school choirs or bands.

The cost of producing high quality transcriptions in a small market is considerable. AMPAL is concerned by the potential for any further undercutting of the financial viability of these specialist publishers and the contributions they make to the Australian music industry through the broadening of statutory licences or fair dealing exceptions. The educational statutory licences in parts VA and VB of the Copyright Act contain extensive permissions for the use of copyright material, and do not require any extension. AMPAL also refers to the voluntary licensing arrangements that have been struck between APRA AMCOS and educational institutions, which demonstrate the effective licensing market that exists beyond the limits of the statutory licences, which should not be disrupted.

AMPAL refers to the further submissions of APRA AMCOS and the Australian Copyright Council on this matter.

Question 2

What related changes, if any, to other copyright exceptions do you feel are necessary? For example, consider changes to:

- *section 200AB*
- *specific exceptions relating to galleries, libraries, archives and museums.*

AMPAL submits that no other changes to copyright exceptions are currently necessary, subject to our comments below in relation to orphan works.

AMPAL is not aware of any evidence that section 200AB of the Copyright Act is not working

¹⁵ Consultation Paper, p. 5.

¹⁶ Ibid.

adequately in regard to the use of musical works by libraries or archives.

AMPAL does not agree that further broad exceptions relating to galleries, libraries, archives and museums should be granted, and refers to the further comments of the Australian Copyright Council.

Contracting out of exceptions

Question 3

Which current and proposed copyright exceptions should be protected against contracting out?

Question 4

To what extent do you support amending the Copyright Act to make unenforceable contracting out of:

- *only prescribed purpose copyright exceptions?*
- *all copyright exceptions?*

Firstly, music publishers' core business is licensing, and it is in the interests of the songwriters and composers that music publishers represent to ensure that their repertoire is present as widely as possible worldwide, and to exploit this repertoire as widely as possible. Indeed, music publishers grant multi-territorial licenses for many different musical works every day.

However, when contractual terms, or technological protection measures for example, prevent access to copyright material, AMPAL submits that those terms are the result of the parties' individual commercial and personal considerations. We would be concerned by any interference with individually negotiated contractual terms, without strong evidence that current licensing practices require such interference. We submit that music creators should have the right to control how their works are used, and their intellectual property rights are already limited by the current exceptions and statutory licences (subject to the Australian Copyright Tribunal jurisdiction). AMPAL also notes the appropriate protections found in competition and consumer law limiting any imbalance of bargaining power. There is no compelling evidence that further compromise is necessary. This recommendation has the potential to discourage new investment in the local market, and add uncertainty and complexity to commercial licensing arrangements. AMPAL points to the views of PRS for Music, the BCC and UK Music in the United Kingdom, who have stated that 'It is quite within the means of business to negotiate around the exceptions to which they are entitled in a contractual licensing negotiation for uses they will have to pay for, without additional protection of the law.... [Contracts between businesses] are negotiated by willing parties. There is no logic in having the legislation interpose itself between the parties and restricting their freedom and flexibility to contract'.¹⁷

Finally, AMPAL respectfully submits that it is premature to be commenting on this matter in relation to any unconfirmed further exceptions under consideration.

¹⁷ PRS for Music, Response to the Consultation on Copyright 21 March 2012, p. 54.

Access to orphan works

Question 5

To what extent do you support each option and why?

- *statutory exception*
- *limitation of remedies*
- *a combination of the above.*

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- *restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)*
- *capping liability to a standard commercial licence fee*
- *allowing for an account of profits for commercial use.*

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

AMPAL notes that significant practical and legal protections currently exist for users of copyright material where a reasonable attempt to locate the relevant rights holder has failed. Practically, it is extremely unlikely that where a rights holder cannot be located through adequate and appropriate searches, an infringement action would be brought against that user by a copyright owner. It is also common for retroactive licences to be issued by rights holders in respect of past unauthorised uses of a copyright work once discovered, so that such a licence can be entered into by a rights holder that is subsequently discovered following the use of a suspected orphan work. Furthermore, legally, the copyright user would also be entitled to the protection provided under section 115(3) of the Copyright Act where a defendant has no reasonable grounds for suspecting that the act constituted copyright infringement.

In addition, the issue of orphan works is perhaps less relevant to the music industry than other copyright industries. APRA AMCOS maintains a comprehensive database of musical works that have been commercially exploited in Australia. Much work has also been undertaken by the international music industry to implement a structure of standards and formats to support the automated exchange of information along the digital supply chain.¹⁸

Nonetheless, AMPAL is supportive of sensible and balanced measures to facilitate the use of orphan works, and endorses the proposal made by the Australian Copyright Council in relation non-commercial uses of orphan works, provided that a diligent search has taken place. Furthermore, any collective licensing scheme must not permit mass digitisation of orphan works. AMPAL also submits that any exception must not extend to intermediaries or service providers.

¹⁸ See for example: <http://www.ddex.net/> (last accessed 28 May 2018).

Conclusion

AMPAL again thanks the Department for the opportunity to make this submission. We reiterate the economic and cultural importance of the work of music publishers and the songwriters and composers they represent, and again note that Australia's IP system has adapted well to changes in economic, commercial and technological changes in the past, and if it remains as a robust IP framework, it will continue to do so into the future. AMPAL is hopeful that the Department will give full regard to the views of rights holders and creators, and the commercial realities of the market that they provide in their submissions, in finalising its recommendations. AMPAL looks forward to working further with the Department throughout that process.

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