

PRODUCTIVITY COMMISSION
INTELLECTUAL PROPERTY ARRANGEMENTS
SUBMISSION BY COMMERCIAL RADIO AUSTRALIA

Response to Issues Paper dated October 2015 by the Productivity Commission

Commercial Radio Australia (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA has 260 member stations, comprising 99% of the Australian commercial radio industry.

CRA welcomes this opportunity to contribute to the Productivity Commission's inquiry into Australia's intellectual property arrangements. CRA does not intend to respond to all of the questions in the Issues Paper, but has addressed the broad issues that underlie the Paper.

Commercial radio broadcasters, as both creators and users of copyright material, are keen to see a balance struck between fairly compensating owners of copyright material while at the same time permitting innovative use of copyright materials to deliver new products and services to the public.

Currently, the system of rights clearance is often complex, costly and inefficient. There are no easy solutions to this problem. The commercial radio industry would ideally like to see a regime that balances copyright protection with straight forward access to copyright material. Such a regime should be simple, cost effective and platform neutral.

A. Effect of copyright framework on innovation in the commercial radio industry¹

Complexity and Cost

1. The commercial radio industry is both a creator and a user of copyright material. It is as a copyright user that it encounters the greatest problems, particularly when developing innovative business models and new services.
2. The commercial radio industry has been quick to adapt to technological changes. All of the metropolitan networks have smartphone applications available. Many commercial radio broadcasters – both metropolitan and regional – make their broadcasts available as online simulcasts.
3. While new technology has provided many opportunities for broadcasters, it has also presented challenges, particularly in relation to copyright clearances. Currently, clearances are often linked to the platform of delivery. This causes difficulties in an era in which the distinction between technology platforms is less important than the rights that are sought, such as reproduction for ephemeral purposes, availability on demand or permanent downloads.
4. Continuing focus on platform delivery risks hindering innovation, as the navigation of the complexities of copyright licensing over a diverse set of platforms greatly increases the

¹ Issues Paper, page 7.

administrative and financial cost of producing content and communicating it in new and innovative ways.

5. Obtaining copyright clearances for material such as music, video and photographs can be prohibitively costly and administratively complex. It is not always possible to identify the rightholder with certainty. Even where rightholders are represented collectively, the collecting society does not usually have the authority to licence for all types of uses.
6. By way of example, one of the collecting societies that the commercial radio industry deals with has limited podcast rights, without any synchronisation rights. This means that the industry would need to seek a limited licence from that collecting society, and would then have to approach the individual labels for the remaining rights to enable it to podcast. This is costly and time consuming. The net result is that stations may be, in practical terms, prevented from podcasting. This places consumers at a disadvantage, by removing from them a convenient and accessible means of listening to content.

Proposed Solutions

7. There are no easy solutions to the problem of rights clearance in the digital world. The commercial radio industry would ideally like to see a regime that balances copyright protection with straight forward access to copyright material. Such a regime should be simple, transparent, cost effective and platform neutral.

Copyright Hub

8. The 2011 UK report *Digital Opportunity – A Review of Intellectual Property and Growth* by Professor Ian Hargreaves (“**Hargreaves Report**”) recommended that in order to boost “access to transparent, contestable and global digital markets, the UK should establish a cross sectoral Digital Copyright Exchange”.² The idea behind this proposal is to make it “easier for right owners, small and large, to sell licences in their work and for others to buy them. It would make market transactions faster, more automated and cheaper. The result would be a UK market in digital copyright which is better informed and more readily capable of resolving disputes without costly litigation”.³
9. As a result of the Hargreaves Report, the UK Copyright Hub pilot is underway and is likely to provide useful information as to possible rights clearance solutions.
10. While it is too early to see what form, if any, the UK Copyright Hub will take, the commercial radio industry would be interested in any proposals that seek to simplify the ever more complex task of obtaining clearances for material used on a multitude of technological platforms.

Platform neutrality

11. Many of the challenges currently faced by the commercial radio industry might be addressed by regulating in a manner that is platform neutral. Currently, the commercial radio industry is subject to different copyright regimes, depending on whether it broadcasts on traditional platforms, or over the internet.

² Hargreaves Report, Recommendation 3, page 8.

³ Hargreaves Report, page 4.

12. As an example, commercial radio broadcasters who simulcast a radio program at the same time on both the broadcasting services bands and the internet are subject to two different sets of regulation and copyright fees. The idea that a broadcaster will need to comply with two separate sets of rules if it wishes a program to be received by both a traditional radio and a computer is clearly at odds with technological trends and use patterns, where the device on which content is accessed is increasingly irrelevant.
13. In an era of convergence, it no longer makes sense to require different copyright clearances for different platforms. Rather, copyright laws should be technology neutral where possible, allowing broadcasters to provide content on as many platforms as possible. This is to the benefit of consumers, who would be able to access content more easily from the device of their choice.

B. Particular complexities in relation to music licensing⁴

14. The complexity of the copyright clearance system is particularly problematic in relation to music licensing. The commercial radio industry has blanket agreements with the Australasian Performing Right Society (APRA), representing songwriters, composers and publishers, and the Phonographic Performance Company of Australia (PPCA), representing record labels and performers.
15. The existence of blanket agreements greatly facilitates the administration of music copyright, particularly where such agreements cover a wide range of uses and recognize that broadcasts can take place on different platforms, as is the case with the industry's agreement with APRA.
16. However, the fragmentation of copyright makes it difficult, and sometimes impossible, to obtain clearances for a new service from all rightholders. This means that although the industry might have a licence from some rightholders – for example in relation to podcasting and webcasting – it is unable to use this licence due to an inability to reach agreement with other right holders.
17. To some extent, the commercial radio industry accepts that cost will be an issue in any commercial bargain that is struck. It may be that a business model is not commercially sustainable or that a business will choose not to pay the price offered for a product, such as copyright material.
18. However, these difficulties are exacerbated where the market does not deliver clear information about price or availability of product. There is a need for increased transparency in the marketplace as to the extent and price of a right and the cost of comparable alternatives. This is particularly important given the natural monopoly power that collecting societies hold.
19. The Australian Competition and Consumer Commission (ACCC) identified this as a concern in relation to PPCA, in its Determination in respect of PPCA's collective licensing arrangements.⁵ It said:

⁴ Issues Paper, pages 5 and 7.

⁵ ACCC Determination dated 27 September 2007 – Application for revocation and substitution of authorisations A30082, A30083, A30084, A30085, A30086 and A30087 lodged by PPCA.

6.184. *The ACCC considers that while PPCA's collective licensing arrangements are likely to result in significant public benefits, PPCA's collective licensing arrangements also result in significant public detriment. The ACCC considers that PPCA's collective licensing arrangements allow owners of sound recordings and music videos to pool their rights to be supplied under a single blanket licence to users, thereby removing some of the competitive pressures that would exist if copyright owners competed individually to license their rights. The availability of PPCA's blanket licence may act as a disincentive for record companies to directly deal with users. PPCA's collective licensing arrangements create the scope for PPCA to exercise market power in the setting of licence fees and conditions because parties wishing to use copyright have limited, if any, alternatives.*

6.185. *Further, the ACCC considers that PPCA is in a significant bargaining position in terms of licensing, particularly with regard to smaller copyright users. This is particularly a result of the complexity and costs involved in obtaining licences directly from copyright owners when compared to the costs of obtaining a blanket licence from PPCA.*

20. Lack of transparency is a particular problem in relation to the PPCA repertoire. PPCA is unable to identify the extent of its repertoire, as not all sound recordings are protected under Australian copyright law.⁶ This makes it very difficult for broadcasters, who cannot find out with certainty what sound recordings a licence with PPCA will cover and therefore are poorly positioned when trying to negotiate a fair price.
21. Accordingly, broadcasters remain unable to identify the sound recordings that are the subject of the PPCA licence. This greatly complicates the negotiation of new licences to use sound recordings on digital platforms.
22. It is particularly important that a workable solution is found in relation to music licensing on radio, including broadcasts on digital platforms. In order to benefit both the commercial radio and music industries, broadcasters' relationship with the music industry must be economically sustainable. In addition to paying significant royalties to the music industry, commercial radio broadcasters also add value in terms of promoting music through air-play and discussion. Yet the licensing of music is particularly complex, due in part to costs of negotiation, fragmentation of rights and, in some cases, lack of transparency as to price and extent of repertoire.

Proposed Solutions

23. While the commercial radio industry recognizes that it may not be possible to produce a comprehensive list of sound recordings that are protected under Australian copyright law, it nevertheless submits that further efforts should be made to provide as much information as possible to enable users to identify which sound recordings in Australia are covered by a PPCA blanket licence.
24. This is an essential cornerstone on which to build an efficient, transparent and fair copyright licensing system, which will not obstruct the development of new and innovative services and business models.

C. Ability of copyright exceptions to cope with rapid change⁷

No need for a 'fair use' exception

⁶ This is as a result of the *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* 1961. Member countries of the Rome Convention have a reciprocal arrangement to provide the same copyright rights in that country to other member countries, and as such protect international recordings under domestic copyright law. The United States is not a member country and its recordings are not automatically protected under Australian copyright law by virtue of the Rome Convention.

⁷ Issues Paper, page 20.

25. The idea of a 'fair use' exception is considered from time to time, as a means of allowing copyright exceptions to adapt more easily to technological changes. However, the commercial radio industry does not consider that a 'fair use' exception would benefit copyright owners or users in Australia.
26. The current fair dealing exceptions in the Copyright Act are generally well understood and work reasonably well. The replacement of these exceptions by an undefined "fair use" provision would bring with it legal uncertainty, over-reliance on case law and litigation.
27. Nor would we support a "fair use" provision accompanied by the existing exceptions. This would still lead to uncertainty, with case law effectively determining a longer list of exceptions, similar to those included in statute. This would be particularly undesirable in the current era of technological change. The current provisions are well established and heavily used. If they are included in a 'fair use' provision they will be open to re-litigation. This may unintentionally diminish their utility or add further restrictions on their operation.
28. Nevertheless, the industry accepts that an inflexible list of exceptions might mean that the Copyright Act is unable to keep abreast with technological changes. In particular, the Copyright Act should be capable of permitting acts that are an inevitable consequence of the use of a new technology but which do not exploit the creative nature of the work.
29. Accordingly, the commercial radio industry submits that a better approach might be to include an additional provision that would allow Australian copyright law to be more flexible in the face of technological change. Copying could perhaps be permitted where the copying is carried out only in order to make the technology work.

Further flexibility within time shifting exceptions

30. The commercial radio industry supports the development of a copyright regime that reflects current use patterns, which will include flexibility to allow private copying on different devices for viewing at different times. The current copyright framework cannot be considered fit for the digital age when so many users repeatedly breach copyright, simply by shifting a piece of content from one device to another.
31. Users expect to be able to store content on a variety of devices – including computers, mobile phones, tablets - and in a variety of locations, such as on local servers and in the cloud. Copyright law should recognise these changing use patterns and reflect them, to permit private individuals to take advantage of new technologies and storage devices available. Without such flexibility, there will be a growing mismatch between what is allowed under the copyright exceptions and the reasonable expectations and behaviour of users.
32. Limits should accompany such exceptions, to prevent an erosion of rightholders' ability to control the commercial exploitation of their content. New uses and technologies should not provide a means by which rightholders might be wrested of such control. In particular, the Act should make clear that private copying, format and time shifting

exceptions should not be used in a way that allows third parties to make commercial gain from those exceptions.

Proposed Solutions

33. The commercial radio industry submits that existing fair dealing provisions should remain unchanged.
34. To replace or supplement these provisions with a 'fair use' provision risks reversing long established precedent and industry practice which presently maximises public access to information and copyright material on all platforms.
35. Consider adding a provision to the Copyright Act to allow private copying on different devices for viewing at different times.

D. Arrangements for the administration of copyright⁸

Collective rights management

36. The commercial radio industry deals regularly with the music collecting societies, APRA|AMCOS and PPCA. Collective rights management is the most efficient means of creating a well organised copyright market. However, the monopoly power held by collecting societies has the potential to skew the system against users and to create an imbalance that favours the rightholders.
37. Collecting societies have the power to grant or withhold licences to use the repertoire that they control. The option of negotiating separately with individual right holders is not a practical one for the commercial radio industry, which tends to broadcast a full spectrum of music across all available record labels.
38. The commercial radio industry does encounter difficulties in the case of sound recordings, as it can be difficult to identify the repertoire that PPCA controls. This leads to extensive and costly debate over the issue of whether music is within the PPCA repertoire ("protected") or outside it ("unprotected"). The extent of the repertoire obviously has a significant impact on the value of the product licensed under the collective licensing agreement.
39. The body which exercises the greatest check on the monopoly power of the collecting societies is the Copyright Tribunal of Australia. If the commercial radio industry is unable to agree a fee with a collecting society, it has the right to ask the Copyright Tribunal to set a reasonable rate. In practice, referrals to the Copyright Tribunal are lengthy and prohibitively expensive, with costs running into several million dollars.
40. The cost and time involved may deter users from making referrals to the Copyright Tribunal. This effectively diminishes the primary mechanism for ensuring checks and balances in the administration of collective copyright.
41. The commercial radio industry welcomes the current attempts by the Copyright Tribunal to offer a more streamlined and less adversarial process through an alternative

⁸ Issues Paper, page 19.

procedure, set out in a Practice Direction. The Practice Direction remains in draft form, and has been discussed amongst the Copyright Tribunal Users Group.

42. Subject to agreement on its detail, the commercial radio industry supports any efforts by the Tribunal to streamline and clarify the Tribunal process.

Proposed Solutions

43. The commercial radio industry is currently the Respondent in a reference to the Copyright Tribunal filed by PPCA. Accordingly, it would not be appropriate to comment in detail on possible ways in which the Tribunal process might be changed or updated.
44. Nevertheless, the commercial radio industry welcomes any efforts to streamline process in the Copyright Tribunal, to make it a more efficient and cost effective resource.
45. Currently, the procedures adopted by parties before the Tribunal tend to mirror those of a hearing in the Federal Court. This is not always an appropriate approach to take, and may have resulted in Copyright Tribunal proceedings being conducted in too adversarial a manner.
46. As noted above, the Copyright Tribunal Users Group is currently considering a new Practice Direction, with the aim of streamlining and simplifying Copyright Tribunal processes. The commercial radio industry supports any efforts to provide a more informal, cheaper and less adversarial process for copyright users.