

INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS

SUBMISSIONS OF APRA AMCOS TO THE PRODUCTIVITY COMMISSION

21 DECEMBER 2015

Introduction

1. APRA is the collecting society in Australia in respect of the public performance and communication rights of songwriters and music publishers. This covers the performances of music in more than 126,000 businesses across Australia and New Zealand, including retail shops, nightclubs, restaurants and festivals, among many other settings, as well as the communication of musical works online, such as in download and streaming services like Apple iTunes and Spotify, and on commercial television and radio. AMCOS is the collecting society in Australia in respect of reproduction of music in certain formats. This covers the reproduction of songs and compositions on CD, DVD, online, for use as production music, and for radio and some television programs. Together, APRA and AMCOS control the copyright for such purposes in almost all commercially available musical works, by virtue of assignments from its local members and affiliations with similar overseas societies. Since 1997, the two organisations have been administered in tandem, and these submissions represent the united view of both.
2. APRA has approximately 86,000 members and AMCOS has more than 15,000 members. Together, they represent an extremely diverse membership, ranging from unpublished writers to major music publishers.
3. Since 2000, APRA has operated under the terms of authorisations granted initially by the Australian Competition Tribunal, and subsequently by the ACCC. APRA most recently renewed its authorisations in 2014, and is authorised for a period of five years.

Approach

4. The Issues Paper notes that this inquiry “presents an opportunity for a high-level and holistic consideration of Australia’s IP arrangements” (IP, p1). APRA AMCOS acknowledges Recommendation 6 of the Competition Policy Review, but does have concerns about the value of such a high-level and holistic approach. In the Terms of Reference, the then-Treasurer noted that “The Australian Government seeks to ensure that the appropriate balance exists between incentives for innovation and investment and the interests of both individuals and businesses, including small businesses, in accessing ideas and products” (ToR, p1). But there is no mention of any specific problems or concerns, to which Australian legislators must respond. There are some references to theoretical concerns about intellectual property rights giving rise to rights-holders exercising market power or engaging in anticompetitive practices such as extracting excessive licensing royalties (IP, p5-6). There is also a reference to a theoretical concern that intellectual property rights restrict the diffusion of knowledge (IP, p6). But again, it is not clear – neither from the Competition Policy Review nor the Issues Paper of the current inquiry – what specific concerns have caused the Government to reconsider the fundamental elements of the Australian intellectual property regime. Some clues are provided by way of the questions asked, and these will be addressed below. But APRA AMCOS feels obliged to question the usefulness of such a broad Inquiry at this Issues Paper stage.

5. Australia has recently considered its intellectual property arrangements in a number of different fora. In just the last three years, all intellectual property laws in Australia underwent a major reform with the enactment of the *IP Laws Amendment (Raising the Bar) Act 2012*, which came into full effect on 15 April 2013. IP Australia labels it “Australia’s biggest intellectual property system overhaul in twenty years.” The patent industries underwent the comprehensive *Review of the Innovation Patent System* by the Australian Council on Intellectual Property (2011-2014). The Designs System was reviewed by the Advisory Council on Intellectual Property earlier this year. And the copyright industries underwent the most comprehensive review of the relevant legislation since the enactment of the *Copyright Act 1968 (Act)*, when the ALRC considered the interaction between copyright and the digital economy in 2013. Around the same time, the Standing Committee on Infrastructure and Communications tabled its report on the inquiry into IT pricing titled *At what cost? IT pricing and the Australia tax*. In 2014, the Attorney General and the then Minister for Communications enquired into online copyright infringement, raising the issues of extended authorisation liability, extended injunctive relief to block infringing overseas sites, and the safe harbour scheme. The issue of extended injunctive relief subsequently led to further discussions about the *Copyright (Online Infringement) Bill 2015*, which ultimately gave rise to the new remedy contained in section 115A of the Act. There is now a further inquiry into the practices and procedures of the Copyright Tribunal, with which the copyright industries are actively engaged.
6. Of course, these are all worthwhile initiatives. APRA AMCOS holds a first-hand appreciation for the value of intellectual property to the Australian economy and, for the most part, welcomes the Government’s enthusiastic approach to finessing intellectual property policy. APRA AMCOS notes that the Australian Bureau of Statistics National Accounts for 2013-2014 valued intellectual property in Australia at \$222 billion, with expenditure on intellectual property products in Australia at \$38.5 billion (Australian Bureau of Statistics National Accounts for 2013-2014, 5204.0, p.25). And, in respect of the copyright industries in particular, PricewaterhouseCoopers calculated in 2015 that the copyright industries employed just over 1 million people in Australia, which constituted 8.7% of the Australian workforce, and generated economic value of \$111.4 billion, the equivalent of 7.1% of GDP. Australia’s copyright industries generated just over \$4.8 billion in exports, equal to 1.8% of total exports (which is greater than the manufacturing and health care sectors). APRA AMCOS shares the view of The Hon. Karen Andrews MP, Parliamentary Secretary to the Minister for Industry and Science, that “a well-functioning and effective IP system is important to underpin Australia’s innovation, trade and investment efforts and the Government’s Industry Innovation and Competitiveness agenda”, (IP Australia, Australian Intellectual Property Report 2015).
7. There is other evidence to suggest that the Australian intellectual property system is working effectively. As Ms Andrews notes: “Australia has a world class IP system that is consistently ranked in the top tiers across the range of global measures.” In the World Intellectual Property Organisation’s Global Innovation Index for 2015, Australia maintains its 17th place overall Global Innovation Index rank and 10th place rank in the Input Sub-Index from 2014. It also maintains its top 10 rankings in three pillars: Human capital and research (9th), Infrastructure (4th), and Market sophistication (9th). It improves by three places in the Infrastructure pillar across two sub- pillars: ICTs (7th) and Ecological sustainability (27th). It also improves in Business sophistication by three places to 23rd, as a result of improvements made in two sub-pillars: Knowledge workers and Innovation linkages. In relation to innovation outputs, Australia also improved in Creative outputs by five places to 7th place, with improvements within all three sub-pillars (WIPO, Global Innovation Index 2015, p24.)

8. APRA AMCOS wishes to make three key introductory points about the Inquiry. First, any inquiry into the suitability of Australia's intellectual property arrangements should begin from the premise that they do actually function quite successfully. That is not to say that there is no room for improvement; of course there is, and this will be elaborated on below. But a comprehensive review of Australian intellectual property arrangements in the manner apparently contemplated by the Issues Paper is unnecessary.
9. Secondly, intellectual property is too broad a subject-matter to be effectively reviewed in the high-level manner proposed by the Issues Paper. Recommendations about intellectual property laws that are of a general nature often suffer from a deficiency of nuance: the copyright industries are very different from the patent industries, and both face challenges which are unlike anything faced by those dealing with plant breeders' rights, circuit layout rights, trade marks, geographical indications or designs. Theoretically, there are some similarities between the various intellectual property rights – they each grant proprietary rights to a creator for a period of time. But, in practice, the differences are so great as to make any discussion of intellectual property rights far too general to be productive. Even within just the copyright industries there are such disparate businesses, products, challenges, interests and practices that considering appropriate regulation is better serviced by taking a more specific approach to solving particular problems. Respectfully, for this Inquiry to be of real practical use, in such a way that it leads to better policy for regulating actual businesses with actual products, it will need to be more appreciative of the nuances that exist in reality than the Issues Paper foreshadows. For example, the copyright challenges that are faced by the video gaming industry are different from those faced by the music industry. The business practices of the music industry are, in turn, widely dissimilar to those of the film industry. The political and legal agendas of the entertainment industries will often differ internally, and from those of, say, the software engineering industries.
10. Thirdly, the Inquiry is directed towards the encouragement of innovation, without much clarity as to what is meant by that term. In APRA AMCOS' view, the term innovation ought not be limited to notions of technical or scientific creativity. Cultural creativity (such as art of song writing) can also be innovative, and it is just as important to set a regulatory framework that encourages the creation of content as well as the creation of the technical means as distributing that content. And copyright is a key framework by which that innovation (technical or cultural) is rewarded. If innovative content is a desired outcome of the Inquiry, and it should be, then APRA AMCOS queries the merit in shifting rights from innovative content creators to their consumers.
11. Another form of innovation involves the development of new business models. APRA AMCOS has been, *for years*, actively and fruitfully engaged with a large number of music service providers operating various disruptive technologies. APRA AMCOS considers that these innovative platforms involve game-changing and innovative methods, and APRA AMCOS welcomes new and exciting methods of assisting its members to commercialise their work. Simply put, in APRA AMCOS's experience of the music industry, there have been no undue delays, expenses or other hurdles leading to any difficulties in bringing these innovative music service methods to market, and APRA AMCOS would welcome any critic of status quo to suggest otherwise. Where certain service providers have experienced difficulties – and APRA AMCOS notes references to the Optus TV Now case peppering both the Issues Paper and the Competition Policy Review which triggered it – it is exclusively because the service providers wanted to offer a service that exploited a copyright owner's content (or the content of a class of copyright owners), and do so without any remuneration. Almost always, the method itself is not problematic (or indeed innovative), it is merely a matter

of failing to enter into a licence with the relevant content creators. To the extent that the Productivity Commission shares intellectual property law's concern for placing restrictions on unproductive free-riding – and it and the Competition Policy Review both purport to harbour those concerns – APRA AMCOS cannot see the logic in citing such cases in support of 'rebalancing' rights in favour of consumers, as far as copyright law is concerned. APRA AMCOS has been involved in licensing music used in a number of innovative products, but there has been no suggestion that the music should be provided free of charge or without conditions attached, merely because the products were innovative.

12. These comments are not intended to disparage the approach taken by the Productivity Commission. However, APRA AMCOS hold the view that the focus of any inquiry into the effectiveness, efficiency, adaptability and accountability of Australia's intellectual property arrangements should not be the intellectual property statutes themselves – which already have inbuilt balances to promote productivity – but rather Australia's competition and consumer laws. Intellectual property laws incentivise creators and inventors and their investors, as they should. Whatever concerns exist about large rights holders (or users) abusing their power in the market, even by wielding their intellectual property rights to do so, should not lead to a re-evaluation of intellectual property laws. Rather, the focus ought more appropriately be placed on trade practices laws. Because any adverse change to the rights given to so called "bad actors", if done by way of amending intellectual property statutes, affects individual creators in the same adverse manner. APRA AMCOS strongly believes that any report that purports to support productivity ought to desist from negatively affecting individual creators (and inventors) and instead promote ways of further incentivising their craft.

Issues - copyright

13. APRA AMCOS proposes only to respond to the sections in the Issues Paper that deal with copyright and with enforcement of IP rights.
14. The first point to make in relation to the questions raised about Australia's copyright arrangements is that they were not implemented in a vacuum. To a large extent, Australia's copyright law is, like the copyright laws of most jurisdictions around the world, a product of various international treaties. Australia's copyright arrangements are not perfect, but that is the nature of anything that has been negotiated. Criticism of this or that aspect of the copyright law as being unprincipled or unsuited to Australian circumstances is simplistic without considering the *quid pro quo* involved in its implementation. It may be that the duration of copyright should be longer or shorter, for example; but this discussion must also consider what economic benefits were obtained in agreeing to the Australia–United States Free Trade Agreement, which among other things led to the extension by two decades of the duration of copyright in the Act. Moreover, the ability to change this or that aspect of Australia's copyright law is likewise coloured by Australia's international treaties. That is, copyright policy is an inseparable component of Australia's wider economic policy, and cannot (and nor can any particular aspect of it) be considered in isolation. APRA AMCOS shares the view of the Australian Copyright Council in respect of the minimum standards established by international treaties, which cannot be simply amended.

Q1	To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'? Does the 'one size fits all' approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?
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15. It is APRA AMCOS's experience from 90 years of commercialising the musical works of Australia's songwriters that copyright overwhelmingly enables and promotes creativity. This is especially true in the current digital environment. Copyright permits a creator to sell his or her works, and by allowing a creator to derive a livelihood from so creating works, copyright (that is, the ability to commercialise those works) encourages creativity. Accordingly, copyright law is fit for purpose – and increasingly so. When once, consumers had to pay for a physical product (a book, a record, a video tape), it was less challenging to sell authorised products to consumers. Moreover, commerce was conducted more publicly, so infringement was easier to detect and prevent. However, in the digital environment, creators are forced to “compete with free” and copyright is ultimately the only mechanism in place that enables creators to trade in the context of such unfair competition. Accordingly, it is APRA AMCOS's strong view that copyright encourages creativity by protecting a creator's ability to commercialise his or her creation, to attract investment, and to compete against those who can sell the same product without investing or engaging in creativity.
16. In a digital environment, too, copyright permits and encourages more creators to participate in the economic opportunities afforded by copyright. It is no longer a requirement that a songwriter form a commercial arrangement with a large multinational publisher or record label in order to achieve commercial success. Certainly, there are benefits to such arrangements; however songwriters and composers who are not able to contract with large investors, as well as smaller publishers and labels who support them, now have the means to disseminate their works and recordings to a wider audience than was ever feasible in the physical product market. Only the existence of copyright protects these small businesses and enables them to market their creations and the products of their investment.
17. The argument is made regularly that creators will create works regardless of whether the works are protected by copyright – in effect, this amounts to an argument that creators will write, or paint, or compose, “for the love of it” and not because of any money they receive. This is a flawed argument for many reasons. First, even if a person is engaged in a business, or a trade, or a profession, which they love, this is not a justification for them not to be compensated for their time and skill. There are many noble professions that attract people who might be prepared to volunteer their skills, yet those professionals for the most part do, in fact, get paid. Secondly, creative professionals produce *products* - even if a person does volunteer his or her time in the creation of a product (which is, in effect, what the majority of people engaged in the creative arts do), it is surely unreasonable to expect them to also receive no compensation when their products are consumed. Thirdly, the woefully low levels of remuneration received by the majority of people engaged in the creative industries should not be used as evidence to support the claim that people will create without the economic incentive provided by copyright. It is the incentive offered by the prospect of (extremely rare but highly visible) high earnings that very often provides the economic incentive to create, not the actual earnings received by the majority of creators.
18. With respect, the Commission has failed to realise at p.4 that while “personal benefit and joy” can be motivators to create (or indeed, to become an economist), the prospect of financial reward and personal joy are not mutually exclusive. The Commission confuses commercial success and copyright, as if the economic benefits provided by copyright are only of value if commercial success is attained. Therefore, it is argued, the open software movement does not “rely on IP rights to take place.” APRA AMCOS does not agree with this assertion. The open software movement is a highly sophisticated licensing system that permits copyright material to be used in certain circumstances under strict conditions. It is IP rights that allow these conditions to be

attached to the copyright material. Similarly, the Commission refers to the “writing of a travel blog” as an activity that does not rely on IP rights. Many very successful commercial publications had their beginnings in travel, cooking or beauty blogs, and indeed the number of monetised blogs on the internet suggests that this assertion is plainly wrong.

19. Copyright is not a ‘one size fits all’ arrangement. Copyright protects certain specified types of work, and not others, and protects each specified category of work or other subject matter differently. For example, there are fundamental differences in the rights given to the creators of musical, literary or dramatic works from those given to the creators of artistic works. And these four categories of works are treated very differently from other subject matter such as broadcasts, films, sound recordings and published editions. For example, copyright subsists in a published edition until the expiration of 25 years after the expiration of the calendar year in which the edition was first published, whereas copyright generally subsists in a work for 70 years after the death of its author. Moreover, the Act is laden with specific exceptions for a range of circumstances, which reflects the requirements of certain industries. Journalists are treated differently in relation to ownership of copyright (s35(4)); educational institutions have the benefit of the Part VA and VB statutory licences, while government organisations enjoy a statutory licence in Part VII; libraries and archives have their own arrangements (eg: Part III, Div 5), as do premises where persons reside or sleep (s46) – to name but a few examples. In fact, rather than copyright being characterised as a ‘one size fits all’ approach to property rights, a more valid characterisation – perhaps even a valid criticism – is that it contains an ever-growing list of exceptions that are bespoke for certain types of dealings by specific industries. No doubt the incrementally renovated legislation impacts on the creation of additional works – but the current state of the Act reflects political decisions to accommodate the needs and interests of specific industries over the years to use copyright material.

Q2	Are the protections afforded under copyright proportional to the efforts of creators? Are there options for a ‘graduated’ approach to copyright that better targets the creation of additional works?
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20. Respectfully, in APRA AMCOS’s view, these questions misapprehend the reality of the copyright industries. There is no inherent economic value in copyright protection *per se*. The value lies in the *ability to trade* a creative work (which requires copyright protection.) A graduated approach to copyright is not necessary, because the market already discriminates between creators according to the value of their respective works by rewarding some to a greater extent than others.

21. The protections granted to any eligible creator should be the same, but the incentives should be and are very different as between creators in practice, and are proportional to the efforts of creators (at least to the extent that “efforts” connotes an ability to market a commercially attractive product). That is, the commercial success of a work is a valid proxy for the creator’s effort.

22. Further, copyright law also does, as it must, provide a framework that allows respect for authorship – a concept difficult to quantify in economic terms but one that is nevertheless of enormous importance to creators. APRA AMCOS comment further on this point in the discussion on moral rights at Question 4 below.

Q3	Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new
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approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

23. Licensing copyright-protected works can of course be very difficult and/or costly. Doing so can also be very simple and cheap. It depends on what is being licensed, by whom, for whom and for which purposes. It depends on the nature of the negotiation, and the relationship between the parties involved. The ease with which one might obtain non-exclusive permission to reproduce and communicate a stock photo from a large agency will differ from the ease with which one might obtain an exclusive licence to broadcast an old film in Australia, or to reproduce handwritten correspondence from an unknown author in the early 20th century. As a matter of practice, APRA AMCOS deals with a wide range of licensees and always strives to offer reasonable and simple licensing solutions.
24. In respect of the second question asked, copyright collecting agencies play an essential role in reducing transaction costs. By providing a centralised source of rights, the collective needs only to collect information about licensees once, as opposed to once per each individual licensor. Moreover, by holding the rights in a virtually comprehensive repertoire of music, the collective can be assured that any public performance of music is an act comprised in the collective's copyright holding. That is, any public performance of any musical work, anywhere in the jurisdiction, by anyone, requires the society's licence. This presumption reduces considerably the costs of detecting unauthorised dealings. Furthermore, individual administrators of rights cannot possibly monitor whether one's works are being performed at any given time, anywhere around the world – let alone, by whom, or in what context. It requires an extremely well-resourced organisation, with reliable overseas affiliations, to be able to carry out such an extensive monitoring process; and even then, to have more than one is to duplicate an enormous amount of resources. In addition, the use of pro forma "blanket licences", reduces the complex negotiations that would otherwise take place but for collective administration. Furthermore, collective administration reduces costs of record keeping, payment collection, and royalty disbursement by administrative facilitation of handling of payments. Reductions in transaction costs can also result from economies of scope. It happens when collecting societies manage several rights at once within their field of activity.
25. By way of example, APRA administers the mechanical rights collective licence owned by AMCOS, and has since 1997 managed the day-to-day operations of the AMCOS business. By doing so, creators are able to benefit from specialisation and learning curve advantages. In respect of APRA in particular, the ACCC considers that "APRA's arrangements are likely to result in public benefits from transaction cost savings particularly resulting from the near comprehensive coverage of APRA's blanket licences (coupled with an exclusive assignment of all rights) which provide increased certainty for users as they are only licensed in respect of virtually the entire worldwide repertoire of musical works." Further, the ACCC considers that "there are enforcement and monitoring efficiencies as a result of the exclusivity of APRA's licensing arrangements and a reduction in uncertainty. This reduces free riding on the creativity of copyright owners and results in a public benefit in preserving the incentives for the future creation of musical works" (ACCC, Determination of the Application for Authorisation Lodged by APRA, 6 June 2014, p 31).
26. With regard to the third question asked, APRA AMCOS has lent its support to initiatives undertaken by the Copyright Hub, including the attempted establishment of the Global Rights Database for music. APRA AMCOS actively supports many initiatives designed to increase awareness and understanding about copyright, and to

clarify licensing obligations. APRA AMCOS works with other organisations including the Australian Copyright Council and Music Rights Australia in their efforts to do the same. APRA AMCOS has invested much time, effort and money in training staff to assist with queries, as well as creating helpful educative materials which are available on its website.

Q4	Are moral rights necessary, or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)? What is the economic impact of providing moral rights?
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27. APRA AMCOS considers moral rights to be absolutely necessary to promoting creativity. APRA AMCOS also considers that any inquiry about whether moral rights are economically necessary, or which questions the economic impact of granting moral rights, to have missed the point of these fundamentally non-economic rights. They are vitally personal in nature. The grant of moral rights in the Act reflects the view, one shared by APRA AMCOS, that a creator has an inalienable connection to his or her creations, like a parent to a child (see, eg, *Millar v Taylor* (1769)). Nevertheless, APRA AMCOS considers moral rights to have key, if incidental, economic importance as well. First, moral rights play a role in authenticating a work and determining its true provenance. Secondly, moral rights are critical to the way authors and performers present themselves to the market. Moral rights are a necessary means of maintaining some form of quality control over one's products.

28. There may be some crossover with other areas of law, such as defamation, passing off or, as suggested, misleading and deceptive conduct. But the grant of moral rights provides something beyond those other rights. Defamation is of no assistance where the author is unidentified, or where the work is changed in a way that does not injure the author's reputation. Likewise, passing off can be a useful substitute for instances where an infringer claims the work to have been authored by him or her, and not by the real author. But this is but one aspect of moral rights, and passing off will be of limited use even in this scenario where the author lacks a protectable goodwill or reputation, for example where the author is only known outside the jurisdiction.

29. That the other causes of action were inadequate protection of moral rights is clear from the fact that Australia specifically provided the rights that are now in Part IX of the Act. Australia was obligated to protect moral rights as a signatory of the Berne Convention, and for many years did not provide the rights that are currently in place on the basis that moral rights were protected adequately by the other causes of action noted above. The amendment in 2000 reflected that the other causes of action did not in fact adequately protect moral rights in practice. Moreover, in 2004, the addition of moral rights for performers was implemented in connection with the negotiation of the AUSFTA, and the ability to amend these provisions will be connected to our trade arrangements with the United States.

Q5	What have been the impacts of the recent changes to Australia's copyright regime? Is there evidence to suggest Australia's copyright system is now efficient and effective?
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30. APRA AMCOS considers the recent changes to Australia's copyright regime – particularly the new section 115A – to be too recent to give rise to a meaningful discussion about impact.

Q6	What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?
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31. APRA AMCOS has no concerns with being guided by the four principles espoused by the Productivity Commission in the Issues Paper, being effectiveness, efficiency, adaptability and accountability. But APRA AMCOS cautions against taking the view that intellectual property laws alone are responsible for conduct that does not meet the standards of those principles. Where a rights holder acts in a way that is contrary to public policy, it is almost always the case that the best way to protect consumer welfare will be to enforce Australia's competition and/or consumer laws – not to reduce the rights given to individual creators by way of intellectual property statutes.
32. Reducing the scope of intellectual property rights given to creators, rather than taking action against specific bad actors for their undesirable trade practices, harms all creators and their investors. APRA AMCOS urges the Commission not to treat creators and innovators who act desirably as collateral damage. Creators and their investors are the lifeblood of the digital economy.
33. APRA AMCOS does note, however, that much of what is presented as evidence of the stifling effect of copyright is in fact academic and hypothetical argument (and not infrequently, erroneous at law). It would be a superior measurement when assessing prospective changes to copyright to deal with real-world circumstances and, as the question suggests, draw on data. To that end, it would be relevant to consider an estimate of the potential decline in existing licensing revenue that may result from such a change.

Q7	How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?
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34. Respectfully, APRA AMCOS considers this question to have been dealt with in great detail by the Australian Law Reform Commission in its recent report on Copyright and the Digital Economy. APRA AMCOS does not share the view espoused by the ALRC, but can see little value in the Productivity Commission rehashing the debates that took place in that forum.
35. In the context of this inquiry, APRA AMCOS does caution against the assumption that there is any connection between fair dealing or fair use, and innovation and productivity. Innovation and productivity do not require free use of copyright material. There is no public policy reason why any property owner should have his or her rights removed so that a third party can use those rights to build an innovative product. There may be a public policy reason why owners of large numbers of published copyrights should not be able to prevent others from using those copyrights (indeed, collecting societies are not able to refuse licences, for precisely this reason). However, it is utterly reasonable that an innovator should pay a market rate to use copyright material.
36. In particular, the Commission should not be misled into believing that all third party uses of copyright material must by definition be innovative. As APRA AMCOS submitted to the ALRC, most so-called user-generated content is not innovative: it is derivative at best.
37. Where there are truly innovative uses of copyright material, licensing solutions are readily available. APRA AMCOS is willing to provide detailed examples of these uses and licences to the Commission upon request on a confidential basis. Innovators who complain about the stifling effect of copyright are generally those who seek not to pay for the creative work of copyright owners.

Q8	Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?
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38. Respectfully, APRA AMCOS considers this question to have also been dealt with in great detail by the ALRC in its recent report on Copyright and the Digital Economy. Certainty in the marketplace is something for which APRA AMCOS strives, and is something that would be dramatically reduced if an open-ended fair use defence were instituted in Australian copyright law – particularly in the early years as a body of jurisprudence develops. APRA AMCOS acknowledges the contrary view taken by the ALRC, but posits that the point of the proposed open-ended fair use defence was that it would not be certain – it would be flexible. The current exemptions are suitably clear to users, but – as with any area of law – better resourced persons (sometimes businesses) will be able to gain more certainty than persons without such resources (sometimes individuals).

Q9	Do existing restrictions on parallel imports still fulfil their intended goals in the digital era?
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39. Musical works and sound recordings long ago lost any protection they enjoyed under parallel importation provisions, at a time when the market was a physical product market. APRA AMCOS notes that the market for creative Australian products is relatively small, particularly when the competition is US creative products which are quite capable of swamping local products when the market is flooded.

40. APRA AMCOS notes that the Federal Government has already announced its intentions with respect to the provisions relating to the parallel importation of books.

Q10	To be efficient and effective in the modern era, what (if any) changes should be made to Australia’s copyright regime?
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41. APRA AMCOS did and continues to support extending the liability for authorisation in the manner proposed by the *Online Copyright Infringement Discussion Paper* in 2014. APRA AMCOS agrees with the statement in the Discussion Paper that “extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia’s international obligations.” To the extent that industry cooperation is dependent on the various parties being able to negotiate their respective rights and obligations, the current statutory framework impedes industry cooperation by granting ISPs undue leverage.

42. APRA AMCOS would support the amendment of section 183 to provide that a government body would be liable for infringement of copyright if it failed to notify a copyright owner of its use of copyright material, and the ability for copyright owners to require government bodies to disclose use. A recent example of this section’s failure to meet the standards of effectiveness and efficiency espoused by the Productivity Commission is the *Pocketful of Tunes* case before the Copyright Tribunal in 2015 (and then the Federal Court). In that case, the Government failed to enter into a licence with one of the owners of the copyright in the musical work “I am Australian” and proceeded to reproduce and perform the work on numerous occasions. The difficulty was caused only by the Government’s error. The applicants were put unfairly to enormous expense and effort to be compensated for the unauthorised exploitation of their work, because the law does not currently require the Government to disclose use and does not treat the Government’s actions as giving rise to liability for infringement.

43. APRA AMCOS would support the removal of the ephemeral reproduction licence in section 47 of the Act. Section 47 is a narrow, specialist exception that operates for the benefit of broadcasters. It is quintessential of the type of provisions in the Act that were enacted in very specific circumstances, which are no longer relevant.
44. Section 110AA of the Act should be amended by replacing the word “videotape” with the word “record”.
45. Of course, APRA AMCOS is willing to work with the Productivity Commission to the extent that further details on any of the above might be useful.

Addendum: Accountability

46. APRA AMCOS shares the view of the Productivity Commission that accountability should be one of the key principles guiding any reform of intellectual property law, but notes that most of the questions asked in the Issues Paper are apparently designed to address the principles of effectiveness, efficiency and adaptability. APRA AMCOS accordingly considers it important to add the following.
47. APRA AMCOS welcomes, and is under significant, scrutiny from various entities, both governmental and not. APRA AMCOS’s licence schemes – that is, the aspect of APRA AMCOS’s operations that is of the most importance to consumers and the public – are subject to the Copyright Tribunal. The Tribunal bears the power to confirm, vary or substitute licensing arrangements and thereby set the rates at, and terms by, which collecting societies are forced to license dealings with their works. That is, the Tribunal and not APRA AMCOS has the ultimate say (subject, of course, to appellate courts) on the terms on which APRA AMCOS grants licences. APRA AMCOS systematically advises licensees of this, in its correspondence and on its website.
48. APRA AMCOS is moreover accountable to the ACCC, and is so in three principal ways. First, APRA’s operations are authorised on a regular basis by the ACCC following a thorough inspection of APRA’s systems, an assessment of any developments since the previous authorisation was granted, and comprehensive consultation with consumers. Secondly, under the Act the Copyright Tribunal must, under section 157A of the Act, have regard to ACCC guidelines on request and, under section 157B of the Act, may make the ACCC a party to a reference or application to the Tribunal. The third key way is simply the ACCC’s oversight of competition and consumer laws generally, with which (subject to APRA’s specific authorisation) APRA AMCOS must comply. While the authorisations have taken place periodically, APRA is keenly aware of the ACCC’s power to revoke its authorisation and as such considers itself accountable to the ACCC in an ongoing manner.
49. Furthermore, APRA and AMCOS are each accountable to the oversight of the Reviewer of the Code of Conduct for Copyright Collecting Societies. The Code is designed to ensure that the rights of all members and licensees are clear, and that the operations of the collecting societies are transparent and accessible. The Reviewer has always been a retired Federal Court judge and is currently the Hon. Dr Kevin Lindgren AM QC. APRA AMCOS takes its obligations under the Code with the utmost seriousness, and trains its staff with specific reference to obligations imposed by the Code.

Enforcement

Q11 Are IP rights too easy or too hard to enforce in Australia, and if so, why?

50. It is expensive to enforce rights of any kind by recourse to litigation. This is not a problem unique to intellectual property. However, it is important to remember that often, very expensive legal proceedings have as their subject very valuable rights. The fact that legal proceedings are expensive does not automatically mean that enforcement of rights is unreasonably difficult.
51. APRA AMCOS enforce the overwhelming majority of their rights by means of reasonable and efficient licensing activity. The costs of the APRA AMCOS business are around 13% of revenue, meaning that licensing is a far more cost effective method of enforcement than litigation, particularly in Australia where the most common measure of damages is the licence fee that would have been charged.
52. In respect of dispute resolution, at the essence of APRA's ability to enforce its rights is its exclusive mandate in respect to performance and communication rights of musical works in Australia. By virtue of it acquiring its rights by way of assignments and, for the most part, exclusive mutual arrangements with overseas societies, APRA is (with limited exceptions) the only entity in Australia that can grant a licence for the performance or communication of musical works in Australia, and therefore is able more easily to enforce its rights. If APRA had to acquire its rights by way of non-exclusive licences, it would make monitoring infringements far more costly and inefficient, because it could not rely on the simple formula that if APRA did not license the performance then the performance is unlicensed. It would need to engage in lengthy and complicated investigations into whether the performances were licensed. Moreover, under the Act, non-exclusive licensees are unable to commence proceedings for infringements (this, to protect an infringer from facing claims from a possibly infinite number of rightsholders in respect of the same infringement). Because non-exclusive licensees cannot commence proceedings, enforcement would have to be administered by individual composers (perhaps with the assistance of a collecting society) but would cease to benefit from the efficiencies of collective administration, as detailed above in response to Question 3. This would, in turn, make music creation a vastly less productive enterprise because enforcement of rights by bringing infringement proceedings is the practical condition precedent to the ability to require music users to obtain licences as envisaged by the Act.
53. APRA AMCOS otherwise supports the submissions made by Music Rights Australia in relation to enforcement.

We trust these submissions are of assistance to the Commission in refining the issues the focus of this Inquiry. APRA AMCOS remains at the disposal of the Commission and is very happy to provide whatever additional information the Commission requires over the course of 2016 as it progresses with its task.

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APRA AMCOS