



AUSTRALIAN RECORDING
INDUSTRY ASSOCIATION

**ARIA RESPONSE TO THE PRODUCTIVITY COMMISSION
ISSUES PAPER:
INTELLECTUAL PROPERTY ARRANGEMENTS**

DECEMBER 2015

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1. Introduction

The Australian Recording Industry Association (**ARIA**) is the peak trade body for the recorded music industry in Australia. ARIA is a not for profit, national industry association that proactively represents the interests of its members.

ARIA has more than 100 members ranging from small "boutique" labels typically run by 1-5 people, to medium sized businesses and very large companies with international affiliates.

ARIA is active in many key areas of the music industry, for example:

- acting as an advocate for the industry, both domestically and internationally;
- supporting Australian music, and creating opportunities to help it be heard;
- playing an active role in advancing the protection of creators' rights and making submissions to government on copyright reform, regulation and other issues where it has the information and expertise to do so;
- collecting statistical information from members and retailers and compiling numerous ARIA Charts with data provided by over 1,100 retailers and data suppliers;
- providing, in certain cases, a reproduction licensing function for various copyright users; and
- staging the prestigious annual ARIA Awards which recognises the achievements of Australian recording artists.

ARIA's primary objective is to advance the interests of the Australian recording industry. The role of ARIA is not to monitor, supervise or intervene in the pricing or other commercial decisions of its members.

ARIA has consulted extensively with other music industry representative groups in relation to the Productivity Commission Issues Paper and supports and endorses the submissions made by Music Rights Australia, Phonographic Performance Company of Australia Ltd (**PPCA**) and the Australian Copyright Council.

2. The Productivity Commission’s Framework

The concept of the encouragement and promotion of “innovation” is central to the Productivity Commission’s inquiry (**Inquiry**) – although little guidance is provided as to what constitutes “innovation” in the context of the Inquiry. Properly understood, “innovation” should cover not only industrial innovations or business models but also the creation of new works and other products protected by copyright. Copyright, which is also subject to this Inquiry, is the foundation upon which the music industry operates.

Copyright serves to encourage creativity and innovation by protecting the rights of creators and their ability to receive a fair return for their creative work. This in turn encourages the development of innovative business models as creators seek to earn returns from emerging technologies and consumer trends. As ARIA’s members are primarily creators of copyright, ARIA’s responses relate to copyright and the enforcement of copyright, rather than other intellectual property regimes such as trademarks, patents or registered designs.

ARIA’s members range from sole traders and small businesses through to multinational corporations. Regardless of the size of the business, copyright and the protection offered by a strong copyright framework are crucial to the success and viability of these businesses.

The Productivity Commission has proposed a framework for this Inquiry which is based upon four principles: *effectiveness, efficiency, adaptability and accountability*. ARIA is supportive of a review process which is underpinned by clear principles and an evidence based approach. In considering the framework and the application of the principles, we hope that the Commission will take into consideration that intellectual property cannot be characterised as a uniform regime where a “one-size fits all” approach would be beneficial. Wholesale intellectual property reforms that do not take into consideration the variances between categories of intellectual property may have unintended consequences for intellectual property owners whereby their rights are diminished.

Effectiveness

The Issues Paper asks whether “*IP rights encourage genuinely innovative and creative output that would not have otherwise occurred*”?¹

IP rights (particularly copyright) foster innovation and provide safeguards to allow innovative output to flourish.

The Australian music industry is not only investing in new artists and recordings but it has also developed and embraced innovative business models as a direct response to the converged digital environment in which our members operate their businesses and create their music. As noted in section 3 of this submission, ARIA’s members have utilised existing and emerging voluntary licensing models to enable their content to be made widely available to consumers via a wide range of legitimate channels and platforms in the digital environment. It is due to copyright - and not in spite of copyright - that these innovative digital business models have been able to launch and flourish to the benefit of the music industry and Australian consumers. Copyright provides incentive and reward to both the creators of

¹ Productivity Commission Issues Paper – Intellectual Property Arrangements October 2015 at page 8

copyright material and those that invest in the creation of copyright material. Without intellectual property rights, the incentive to invest in Australian performers, recording artists and new technologies is significantly diminished. As noted by Placido Domingo, Chairman of the International Federation of the Phonographic Industry, *“Investment in music cannot be taken for granted. Like the creativity of the artist, it is something that needs to be supported and protected by a secure legal environment. That is why a safe, adequate copyright framework for artists and labels is so crucial. It is more crucial than ever before in today’s digital world, where copyright is fighting for its place against those who would have music and culture disseminated for free or who would erode copyright protections in the name of “copyright reform”.*²

The effectiveness of Australia’s intellectual property framework should also be considered in the context of those factors that provide a disincentive for innovation and creative output. Australia is the sixth largest recorded music market in the world³, behind only the US, Japan, Germany, the UK and France. It is also the sixth largest market in the world for digital music revenues and the seventh largest market in the world for physical music revenues (i.e. revenues from CDs and vinyl sales)⁴. Innovation has been at the forefront of the Australian music industry’s digital transformation through the online delivery models adopted by the industry.

However, despite figures such as this, it is important to note that the revenues of the Australian music industry have significantly decreased over the past decade as a result of online copyright infringement. As noted by the Hon Malcolm Turnbull MP, now Prime Minister, *“If you just relied on the commentary on social media you would think this was all about Hollywood moguls and rich movie studios. But of course a lot of people create movies, TV shows, music, pictures, poetry and prose. And all of them make their living because people pay to read, listen or watch that content. And they include actors, writers, directors, sound technicians, stage managers, poets and composers - to name just a few. Every time a movie or a TV show is accessed in breach of copyright, all of those people who contributed to making that work lose out”.*⁵

The introduction this year of s115A in the Copyright Act 1968 (Cth) (the **Copyright Act**) marked an important step in addressing the problem of online copyright infringement. ARIA remains hopeful that the introduction of this amendment to the Copyright Act will strengthen the incentive for recording artists and those who invest in the careers of recording artists to continue to invest in music and innovative business models.

The Issues Paper also poses the questions: *“To what extent does the IP system actively disseminate innovation and creative output? Does it do so sufficiently and what evidence is there of this?”* and *“What, if any, evidence is there that parties are acting strategically to limit dissemination?”*⁶ From the music industry’s perspective, this question relates to the issue of “price and access” which is often touted as a reason for the prevalence of online copyright infringement. The experience of the music industry is that price and access in and of themselves cannot prevent online copyright infringement. Our industry has invested heavily in innovative digital business models to ensure recorded music is available

² International Federation of the Phonographic Industry (IFPI) Report “Investing in Music 2014” at page 4 see http://www.ifpi.org/content/library/Investing_in_Music.pdf

³ International Federation of the Phonographic Industry (IFPI) Report “Recording Industry in Numbers, 2015” page 100

⁴ *ibid*

⁵ See *Copyright, the Internet and Piracy* Hon Malcolm Turnbull MP, Minister for Communications, 4 August 2014 at <http://www.malcolmturnbull.com.au/media/copyright-the-internet-and-piracy> (last accessed December 2015)

⁶ FN 1 at page 9

at the same time as elsewhere in the world at a fair and reasonable price – yet unacceptable levels of infringement still occur.

The dissemination of music through innovative digital channels has been occurring within Australia over the past decade. Since the launch of iTunes in Australia in 2005, Australia has been at the forefront of the “digital revolution”. Global services such as iTunes, Deezer and Spotify launched in Australia due to the receptiveness of Australian consumers and the market in relation to new services and technologies, and an effective and efficient licensing regime. The digital world provides creators of content with unparalleled opportunities to disseminate their content quickly and effectively to consumers within Australia and around the world. It also provides consumers with access to vast amounts of content which can be accessed with ease and within seconds. In fact, through certain ad-supported digital subscription services, consumers can access millions of songs for free. However the continued success and ability to do so requires the safeguards of a strong copyright framework. Any reforms that undermine the copyright-based incentives to create content will ultimately impede technological innovation. Copyrighted content, and music in particular, has been driving consumer take up of a number of new innovative technologies and services, from YouTube to Spotify. To the extent that creators of content no longer find it valuable to create content because the rewards are disproportionate, the demand for technologies that provide ease of dissemination and access correspondingly decline.

The music industry has also taken active steps to facilitate the dissemination of music on a timely basis through the adoption of new business policies. Staggered release dates have long ceased to operate in Australia, with local distributors releasing products as soon as they became available. In July 2015, the record industry harmonised release dates for new music within 45 countries, including Australia.⁷ The “New Music Fridays” initiative means that music fans are able to access new music on the same day worldwide rather than having to wait for the music to be released in their country.

Efficiency

In ARIA’s experience, the legislative framework set out in the Copyright Act underpinning market based voluntary licensing of sound recordings allows consumers and businesses to access legitimate music within an efficient framework. As noted in the submission made by PPCA to this Inquiry, collecting societies provide an efficient and cost effective means by which businesses are able to obtain blanket licences for a wide range of uses, in situations where individual licensing is not economically feasible or efficient.

The Issues Paper poses the question as to whether there “*are any government programs or policies that prevent, raise or lower the costs of generating IP*”?⁸ In respect of this, there is not a specific government policy that prevents the generation of IP, but certain provisions in the Copyright Act are impeding competition and creating market distortions.

As noted in the submission made by PPCA to this Inquiry, the statutory pricing caps set out in section 152 of the Copyright Act which limit the amount of fees payable by radio broadcasters to sound recording copyright owners is a legal anachronism that creates market distortions, harms competition and is inconsistent with other regulations and policies. These statutory caps were introduced in 1968

⁷ <http://www.ifpi.org/news/New-Music-Fridays-go-live>

⁸ FN1 at page 11

and there is no legitimate policy reason why the government should continue to be setting prices between mature commercial industries and limiting competition in this manner. Therefore the elimination of this cap would remove market distortions, and allow the market to operate more efficiently.

Furthermore, the Copyright Act also includes a further inhibitor on the ability of sound recording rights holders to actively and fairly compete in the market. Section 199(2) of the Copyright Act provides that *"...a person who, by the reception of a television broadcast or a sound broadcast, causes a sound recording to be heard in public does not, by doing so, infringe the copyright, if any, in that recording...."*

Due to this archaic provision in the Copyright Act, Australian recording artists and copyright holders are deprived of the ability to earn income from the public performance of radio and television broadcasts. This exception does not apply in relation to the musical work and it runs counter to the goal of ensuring that there are incentives for the continued investment and encouragement of innovation in Australia.

Adaptability

The Issues Paper has posed the question *"How well has Australia's IP system adapted to changes in the economic, commercial and technological environment and how well placed is it to adapt to such changes in the future"?*⁹

As noted in section 3 of this submission, the music industry has transformed itself and adapted to meet the challenges and benefits that digital and other technologies offer. The music industry was the first major content industry to be substantially impacted by these new technologies and has evolved to meet these challenges by investing in innovative business models to provide consumers with access to more music than ever before. Consumers can now access over 40 million sound recordings from their mobile device at various price points ranging from free to a monthly subscription. These fundamental changes occurred under Australia's IP systems, and in fact were enabled by Australia's IP systems.

Given the IP system has successfully adapted to a significant period of technological change over the past decade and a half, we see no reason why it will not remain flexible and robust enough to continue to adapt to changes in the future.

Accountability

It has been our experience that most amendments to copyright legislation have only occurred after extensive consultation with stakeholders, release of proposed legislation in exposure draft form, parliamentary committee review, and associated regulatory impact statements. We believe such protocols are important, and should continue to be followed, in order to carefully scrutinise proposed changes and identify any unanticipated consequences.

Such reviews should be evidence based, drawing on real market issues and experiences, rather than mere academic theory. Those seeking change should be required to outline specific scenarios and market failures that currently exist in Australia, and provide relevant data so that these purported problems and any proposed solutions can be properly assessed.

⁹ FN1 at page 12

We note the contribution made by the Copyright Tribunal of Australia, which has a broad role in respect of determining the terms (including rates) of industry licensing schemes, and other matters relating to copyright licensing. The ACCC has, and has exercised, the capacity to participate in Tribunal hearings and provide additional assistance to the Tribunal when it is involved in rate setting matters impacting consumers.

3. Improving Arrangements for Specific Forms of IP - Copyright

As previously noted, ARIA will restrict its further comments to the questions raised in the Issues Paper regarding copyright.

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?

In ARIA’s view, based on its longstanding experience as an association representing content owners and creators, as well as its own sound recording licensing operations, copyright stimulates creativity. It provides an environment in which creators can be rewarded for their output, and develop sustainable careers. It is the fundamental principle that supports the myriad of business transactions underpinning the creative industries, including the capacity for creators to obtain the investment capital they need to sustain their businesses, create new works and invest in new start up technologies.

This is even more pronounced in the modern digital environment. The Australian music industry was the first of the local creative industries to be severely impacted by digital disruption, and has undergone comprehensive re-imagining since the introduction of the MP3 in the late 1990s. Today over 60%¹⁰ of the industry’s revenue is derived from digital products, including digital downloads and both subscription and advertising supported streaming services. Consequently, more and more the music industry is driven by micropayments, and each of those transactions is only made possible through robust copyright protection.

A wide range of streaming and download services such as GooglePlay, Spotify and Deezer have all launched in Australia over the past years. In the case of iTunes Radio, Australia was the first country outside of the United States to launch the service.¹¹

Set out below is a graph which indicates the change in consumer preferences from physical to digital services, with digital revenues increasing by over 2000% in the period shown. 2013 marked the first time that digital channels represented more than 50% of the overall Australian market – which is a trend that has continued.

Whilst new and innovative services have been launched in Australia and provided consumers with extraordinary access to a wide range of content, the digital environment has also enabled online copyright infringement to prosper. The graph below demonstrates that although consumers may have

¹⁰ <http://www.aria.com.au/pages/documents/physvdigsalesxvalue.pdf> 2014 calendar year figures

¹¹ See: Michaela Fox, <http://www.smh.com.au/digital-life/digital-life-news/apple-launches-itunes-radio-in-australia-20140211-32f3g.html> (last accessed 1 December 2015)

embraced new digital services, the Australian recorded music industry has decreased by almost 40% in the past 10 years, contemporaneously with the proliferation of online copyright infringement.



Figure 1 ARIA Wholesale Figures 2005 to 2014 – Total Dollar Value

Whilst the digital environment has created enhanced opportunities for creators to reach and engage their fans, it has also created an environment which enables the unlicensed use of creators’ works at an unprecedented level of volume and sophistication. The 2015 Digital Music Report¹² published by the International Federation of the Phonographic Industry estimates that 20% of fixed line internet users worldwide regularly access services offering copyright infringing music, and that in 2014 there were over 4 billion downloads via Bit Torrent, the vast majority of which was infringing.

It is copyright that enables individual creators to compete against those who seek to free ride on their work and, when necessary, take action to reduce the availability of unlicensed material. Whilst we acknowledge that creativity can exist ‘with no expectation of remuneration or reward’ (Issues Paper, page 4), we believe it is unrealistic, or outright naïve, to expect and rely on creators of professionally produced content to invest their time and skill for no reward. This is particularly the case when sophisticated profitable businesses, many of which are global in size and scale, base their business model entirely upon the availability of creative content and consumer interest in that content, and obtain for themselves the return that should flow to the creator.

¹² International Federation of the Phonographic Industry (IFPI) Report “Digital Music Report 2015” at p38, see <http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>

In 2014, fully licensed subscription services, such as Spotify and Deezer, with 140 million users collectively, generated US\$1.6 billion for the music industry. By comparison, the more than 900 million music users of user-upload platforms (such as YouTube or SoundCloud), relying on liability privileges provided in legislation in the US and the EU and subsequently having either minimal or no licence coverage, generated less than half that sum, only US\$641 million in the same year. The creators should and must be able to properly share in the substantial and increasing value created from the exploitation of their works. Addressing the growing and unfair gap between the value extracted by some digital platforms for the music they use and what they pay to right holders for that use, is essential in order to ensure sustainable digital markets for creative content.

As previously noted, many of ARIA's members are small businesses or sole traders. In our experience the level of income earned by Australian creators is low, when compared to other professions. This view is supported by Australia Council research¹³ which found that artists' income compared unfavourably with employees in other occupations. This harsh reality exists despite the years of study, training and rehearsal that sound recording artists undertake to hone their craft. The fact that creators continue to pursue their creative endeavours despite the risk of low return should not be used to further limit their capacity to develop sustainable careers. In fact, the hope of achieving reasonable or even high earnings from their art still provides economic incentive to continue to create, despite the reality of much more modest earnings which is usually the case for the majority of recording artists.

In our view, in the examples cited on page 4 of the Issues Paper, the Commission ignores the capacity for creators (and indeed any individual) to contemporaneously enjoy their work AND seek to be adequately remunerated for it. The creation of open source software or a travel blog both rely on copyright. In the case of software, like many creative commons offerings, the creators have made a conscious decision on how they wish to allow their work to be used, and under what conditions. It is copyright that provides the opportunity for that choice to be made. Similarly, individuals making their writing freely available online, perhaps as a travel blog, may have made a conscious decision to invest time and effort for no initial reward in order to build a market for their future work. This is no different to a food manufacturer making a marketing decision to release a certain number of free sample products to consumers, to launch their products. In each instance the owner of the product has enjoyed the capacity to decide how and on what terms their product is made available. This demonstrates the flexibility afforded by the current copyright regime.

We query the suggestion that the current copyright framework represents a 'one size fits all' approach. In fact there are differences in the rights it confers for different categories of works (eg duration of copyright), a range of exceptions that apply to different categories of copyright material, and specific statutory licences that apply to particular classes of works and / or users of those works. It is unclear what alternatives the Commission would propose, but we can see no reasonable system under which an administrative assessment of 'worth' or 'value' was made in respect of each piece of creative output.

Absent the existing robust market economy which the flexible copyright ecosystem supports for creators and consumers there could be a greater need for and dependency on Government funding as a source of investment for emerging art forms, businesses and technologies.

¹³ http://australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_pa-54325a3748d81.pdf at p47

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?

As outlined above, different classes of copyright material already enjoy different levels of 'protection' and are subject to varying exceptions. In general terms, as outlined by the Australian Copyright Council in its submission to the Commission, the level of copyright protection relies upon the level of originality of the work. Copyright itself does not set the price or value of a particular piece of creative expression¹⁴, but rather provides the structure in which the market can operate to set prices for particular uses of items of intellectual property. It does not necessarily follow that the price is determined on the level of effort, but rather how the market values the 'product'. In this regard the market for creative content operates like any other.

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 approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

In general, licensing copyright protected is neither too difficult nor costly, but this will always depend on the desired material and the use to which it will be put. There are a wide range of licensing solutions on offer, including via relevant collecting societies. Taking recorded music as an example, there are a wide range of licensed online services which allow consumers to access millions of recordings at a range of price points, including free for some advertising supported services. Information on these services is readily available on the Digital Content Guide.¹⁵

It is relatively simple to acquire stock photographs from an agency service, or to use materials made available under standard creative commons licences. Understandably though, the featured use of a musical work and/or sound recording in a global brand marketing campaign is likely to cost substantially more, and the terms of use require more detailed negotiation. It does not seem to us that this is either unreasonable or undesirable and, happily, the current copyright framework provides the underlying structure to support the operation of this diverse market.

In our view collecting societies unquestionably reduce transaction costs, by providing a source of comprehensive blanket licences. In relation to sound recordings, PPCA's blanket offerings allow users to obtain a single licence for the use of millions of recordings from thousands of record labels, and avoid the need to negotiate separate licences with each record label. For small business in particular such offerings reduce what could otherwise be an administratively burdensome process, by streamlining and centralising licence acquisition, reporting and payment processes.

Further, since 2002, collecting societies in Australia have subscribed to a Code of Conduct¹⁶ which, amongst other obligations, requires the societies to engage in activities to promote awareness of the importance of copyright. The societies, together with organisations like ARIA and Music Rights Australia, routinely provide educative materials on copyright and licensing issues and maintain extensive materials on their websites to assist users.

¹⁴ Although in rare circumstances the Copyright Act sets caps on fees. See section 2 of this submission and PPCA's submissions on this topic, which ARIA fully supports.

¹⁵ See <http://digitalcontentguide.com.au/music/>

¹⁶ Collecting Societies Code of Conduct, see [http://www.pcca.com.au/IgnitionSuite/uploads/docs/Code%20of%20Conduct%202011%20Final\[2\].pdf](http://www.pcca.com.au/IgnitionSuite/uploads/docs/Code%20of%20Conduct%202011%20Final[2].pdf)

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?

Moral rights are necessary, and have no direct economic impact. They are designed to promote respect for creators, and recognise the immutable link between a creator and their work. Part IX of the Copyright Act provides personal rights to the author of a work (a) to have authorship attributed, (b) not to have authorship falsely attributed, and (c) not to have their work subjected to derogatory treatment. In our view, the fact that Australia amended the Copyright Act in 2000 to create the explicit rights covered by Part IX, demonstrates that other protections did not otherwise adequately discharge Australia's obligations as a signatory to the Berne Convention.

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?

The most recent amendments to copyright legislation (i.e. the introduction of s115A of the Copyright Act, allowing rights holders to seek injunctions against carriage service providers providing access to infringing online locations outside Australia) are yet to be exercised by rights holders. A review of the operation of those provisions was foreshadowed at the time of enactment and, at this point, their effectiveness is yet to be tested.

In relation to music, and as outlined in ARIA's initial submission to the ALRC, recent years have seen the development of a plethora of digital music services providing local consumers with unprecedented access to music content. Since that submission additional services have entered the local market, including iTunes Radio – which, as previously stated, Australia was the first market launched outside of the US. The existence of these licensed services demonstrates that effective licensing frameworks are in place, and that copyright has not been an inhibitor to Australian consumers accessing both locally and internationally developed music services. We see no evidence of market failure to be addressed.

In general, the fact that further changes are required from time to time should be fairly uncontroversial, and ARIA can see no reason why such changes could not be drafted in technology neutral terms.

What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

It is ARIA's position that changes should only be made based on a demonstrated need for reform, and not on the basis of hypothetical theories as to the operation of the market for creative content. Throughout the ALRC review process there was a consistent inference that copyright was somehow impeding innovation, yet no compelling evidence of such constraints was ever revealed.

From the music industry perspective, the Australian IP regime has facilitated the introduction of many digital service providers to the market – and there seems to be no major service available overseas that is not, or could not have been, made available to Australian consumers.

We note that the 2015 Australian Innovation System Report¹⁷, released by the Department of Industry, Innovation and Science stated that ‘Australian rates of entrepreneurship are among the highest in the OECD’ (at 5.2 on p87). Interestingly, in noting *barriers* to entrepreneurship, the report did not identify copyright specifically nor IP generally as stifling innovation.

The copyright industries contribute significantly to the overall Australian economy. A research study recently refreshed by PwC¹⁸ found that:

- Copyright industries represented the fourth largest industry group in Australia;
- Employ 8.7% of the Australian workforce (ie over one million people);
- Generated economic value of \$111.4 billion (ie 7.1% of GDP); and
- Generated over \$4.8 billion in exports (ie 1.8% of total exports).

This is the fourth iteration of this type of study commissioned by the Australian Copyright Council, based on ABS data and WIPO methodology, which allows comparisons to be made to other industries and territories.

The study demonstrates the sophistication and value of the copyright industries to the national economy, and ARIA would urge the Commission not to advocate for unnecessary change and upset the well-developed ecosystem to satisfy academic theory that is divorced from actual market practice. Those seeking change should be required to outline specific scenarios and provide relevant data so that any purported problems can be properly assessed.

Creators and those who invest in them embrace innovative ways to connect with consumers and efficiently bring their products to market. We believe that the music industry has demonstrated that, given the opportunity, the market will respond with appropriate licensing solutions for the use of creative content.

We see no need for copyright law to provide the answer to all problems. Should a rights holder or individual creator act in an anti-competitive way, the issue is most appropriately addressed by the operation of competition and consumer law. It is inefficient and unfair to curtail the reasonable rights of all creators and those who invest in them, merely to deal with the behaviour of a small number of outliers.

ARIA also believes that considerations beyond those of an economic nature should be included in any assessment of copyright’s fitness for purpose. In our view any such assessment should include considerations of national culture and identity, and the contribution Australian creators make to our national voice both here and overseas. These external benefits are not as easily priced but are of enormous value to Australia’s cultural identity and cannot easily be replaced once lost.

¹⁷ <http://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/Documents/Australian-Innovation-System/Australian-Innovation-System-Report-2015.pdf>

¹⁸ See http://www.copyright.org.au/acc_prod/ACC/News_items/Copyright_Industries_continue_to_be_a_significant_contributor_to_the_Australian_Economy.aspx

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?

Under Australian law one of the longstanding ways that ‘balance’ between creators and consumers has been managed is via the provision of certain specific exceptions to copyright infringement. ARIA made extensive submissions to the ALRC on this topic, and we refer the Commission to those in respect of a detailed analysis of the problems associated with the introduction of a US style ‘fair use’ regime, and we do not propose to burden the Commission by duplicating all of that material here.

Regardless of the era, or whether the creative content is accessed in a digital or physical form, the most important consideration is that the balance be ‘fair’. It is our view that a range of specific exceptions, drafted in a technology neutral fashion and consistent with the three-step test¹⁹, provide much needed certainty to rights owners and content users alike and provide a superior solution to an open ended ‘fair use’ regime.

We reject the suggestion that extended fair dealing or fair use will lead to increased innovation. Innovation does not require unfettered and unremunerated use of copyright content, and it would be inherently unfair to strip rights from creators and their investors, in order to effectively subsidise a third party to build and profit from a product because it does not need to pay for the content on which its product is based. There is no reason why such a so called “innovator” should be relieved of the obligation to pay the market rate for their use of copyright material, just as they would need to pay for any other input their business requires.

We reiterate that licensing solutions exist, and indeed expand and develop in response to the needs of the market, and that a mature and sophisticated functioning market – such as that demonstrated by the Australian music industry – is the ideal outcome.

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?

Certainty is a desirable market trait, both for users and creators. In order to seek funding to support their creative endeavours creators, and those who invest in them, need to know the extent to which creative output can be exploited without remuneration. Similarly, the business community can only make useful risk assessment decisions if there is a clear understanding of what activities do or do not require the acquisition of a licence. In our view such certainty would be severely eroded by the introduction of an open ended exception that cannot be properly understood and confidently interpreted until extensive local jurisprudence has developed. Such cases can take many years to resolve, involve substantial costs to all parties and burden the judicial system. It is likely that those with greater resources will be better positioned to take action, and that individual creators will be insufficiently resourced to take action even when they believe that unlicensed uses are unfair.

It is incorrect to assume that an open ended exception such as fair use spurred technological innovation and development in the US. This issue was extensively considered by the UK Hargreaves Review. In his

¹⁹ See article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698#P140_25350

report, “*Digital Opportunity A review of Intellectual Property and Growth*,²⁰” Professor Hargreaves dismissed the proposition that the adoption of fair use would quickly stimulate innovation. He noted that other factors such as attitudes towards business risk and investor culture were more significant.

Do existing restriction on parallel imports still fulfil their intended goals in the digital era?

Sound recordings in physical form have not, for some years, enjoyed any protections under parallel importation provisions. As the market for local Australian production is relatively small, restrictions on imports can encourage local production and increase diversity to the benefit of consumers.

To be efficient and effective in the modern era, what (if any) changes should be made to Australia’s copyright regime?

ARIA would support the following enhancements to the copyright legislation:

- The removal of the ephemeral reproduction licences contained in sections 47 and 107 of the Copyright Act. These provisions operate only for the benefit of broadcasters, and are an example of provisions introduced to deal with specific circumstances that are no longer necessary;
- The extension of liability for authorisation, as proposed in the *Online Copyright Infringement Discussion Paper* in 2014. In ARIA’s view such an extension would promote co-operation between relevant industries, in order to achieve workable solutions to reduce online copyright infringement;
- The removal of the legislative caps on radio broadcast fees, contained in section 152 (sub paragraphs 8 and 11) of the Copyright Act, as they reduce economic efficiency and lack equity. These provisions are anachronistic, anti-competitive and operate to distort the market and effectively require creators to subsidise the operations of the mature broadcast radio industry; and
- The removal of the exception at 199(2) of the Copyright Act, which discriminates against sound recording rights holders. ARIA supports the more detailed submissions made by PPCA in relation to sections 152 and 199 (2).

ARIA would also recommend a review of existing exceptions so that they can be updated, where appropriate, so as to be expressed in technology neutral terms.

²⁰ See <http://www.ipso.gov.uk/ipreview-finalreport.pdf>

4. The Broader Intellectual Property Landscape – Enforcing IP Rights

Music Rights Australia, a joint venture of ARIA and APRA AMCOS, protects the creative interests of artists within the Australian music community through educational initiatives, government lobbying and the protection of artists' copyrights. ARIA fully supports the submission lodged by Music Rights Australia in respect of enforcement issues.

5. Conclusion

ARIA is grateful for the opportunity provided by the Productivity Commission to provide a response and participate in the dialogue stemming from the questions posed in the Issues Paper.

ARIA's members are active contributors to, and participants in, the digital economy. They have responded to the significant changes in technology by adapting their business practices and embracing innovative licensing models to enable their creative endeavours to be disseminated throughout the world in a timely and efficient basis. The protection of copyright is integral to the recorded music industry and it is only with such protection that there will be continued investment in Australian talent and new technologies. Copyright has fostered innovation and enabled the growth of new digital music services. Australia is now the sixth largest recorded music market in the world – and any changes to the Australian copyright laws that weaken protection or give rise to uncertainty will diminish the opportunity of local artists and record labels to participate in the digital economy.

There is no credible evidence or market based issues that indicate that Australia's copyright laws are impeding innovation or are not flexible to adapt to changes in technology. The range of licensing models that ARIA's members have in place, combined with the licensing solutions offered by collecting societies such as PPCA, ensure that consumers and businesses have the opportunity to access and consume music in a convenient and cost effective manner. There is no rationale to weaken Australia's copyright laws, particularly as there is no clear evidence that innovation is impeded by the current framework.

ARIA would be pleased to provide additional information to the Productivity Commission in respect of any of the points raised. Please do not hesitate to contact me if you require any additional information.

Yours sincerely,

Dan Rosen
Chief Executive Officer
Australian Recording Industry Association Ltd