

AMPAL Submission to the Productivity Commission Issues Paper: Intellectual Property Arrangements

AMPAL

The Australasian Music Publishers Association Limited (AMPAL) welcomes the opportunity to respond to the Productivity Commission Issues Paper on Intellectual Property Arrangements.

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

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

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

We also refer to our submission to the Online Copyright Infringement Consultation in September 2014.

Introductory Comments

A theme that seems to be running through recent debates on copyright is that there will always be music and that the commercial music industry is an impediment rather than a facilitator of the creation of meaningful cultural content. Nothing could be further from reality. Compelling music content requires investment, production, talent and marketing.

Music publishers actively support their writers to allow them the time and resources to create. They work with other intermediaries in the business such as record companies and managers to bring the works to market. They are responsible for the collection of songwriters' income on a global basis and they create new income streams for songwriters by facilitating licences within the evolving digital space.

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

An argument frequently raised in copyright debates is that with regard to creative content in

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Australia, there is a problem with price and availability. However, the music industry has comprehensively demonstrated that even when music is available immediately, globally and at a variety of price points - including (ad-supported) free - many consumers are locked into a pattern of using websites where there are no restrictions at all (though there may well be other dangers from malware etc.).

As stated by the Hon Malcolm Turnbull MP, then Minister for Communications, *‘...it seems to me that the music industry has recovered some ground by making their content available relatively cheaply and conveniently through many platforms including iTunes, iTunes Radio, Spotify (my favourite), Pandora etc. There are now more than 30 legitimate online music services available in Australia yet piracy remains a significant issue for the industry and many artists would argue that all this plethora of cheap and convenient availability has done is drive down artists' returns’*.¹

It is our submission that despite the challenges that the music industry faces, the current copyright arrangements in Australia *‘...strike the right balance between incentives for innovation and investment, and the interests of both individuals and businesses in accessing ideas and products’*.² We also submit that copyright arrangements *‘...will be efficient, effective and robust through time, in light of economic and technological change’*.³ As noted by Senator the Hon George Brandis QC (Attorney General), *‘...the fundamental principles of copyright law, the protection of rights of creators and owners, did not change with the advent of the internet and they will not change with the invention of new technologies’*.⁴

The significance of the economic contribution of Australia’s copyright industries to the Australian economy was highlighted by PricewaterhouseCoopers (PWC) in 2015.⁵ In its report, PWC found that Australia’s copyright industries employed just over 1 million people (8.7% of Australia’s workforce) generated economic value of \$111.4 billion (7.1% of GDP) and generated over \$4.8 billion in exports (1.8% of total exports). With respect to music publishing, AMPAL’s annual survey of its members in 2014 reported the value of the Australian and New Zealand music publishing business at more than AUD\$200 million a year.⁶

While it is acknowledged that at present Australia may be a net importer of music, we submit that the best way to reverse that situation is to increase our performance as an exporting nation by encouraging the continuing success of Australian music in preference to foreign music. A 1% penetration of Australian music in the US and EU markets would more than compensate for a 75% share of the Australian market by foreign music. The best assistance to exporting music is a healthy local market. Australian music is not interchangeable with foreign music. It is more important to the nation and national identity than a shoe or a car or other fungible economic commodity. It receives very little Government support. It seeks no further protection than that afforded to our international competitors.

Music reflects our lives and our culture. A purely theoretical economic-analysis approach may suggest that we shouldn’t have an Australian music industry if we can import one cheaper.

Finally, the Issues Paper states that the Productivity Commission’s role, *‘expressed most simply, is*

¹ ‘Copyright, the Internet and Piracy’, Hon Malcolm Turnbull MP, then Minister for Communications, 4 August 2014, <http://www.malcolmturnbull.com.au/media/copyright-the-internet-and-piracy> (last accessed 31 October 2015).

² Issues Paper, page i.

³ Issues Paper, page i.

⁴ Senator the Hon George Brandis QC (Attorney-General and Minister for the Arts Address at the Opening of the Australian Digital Alliance Fair Use for the Future: A Practical Look at Copyright Reform Forum held at Canberra, Act 14 February 2014.

⁵ <http://copyright.com.au/wp-content/uploads/2015/08/PWCReport-EconomicContribution-AustraliaCopyright-Industries.pdf> (last accessed 31 October 2015).

⁶ <http://www.ampal.com.au/news-and-events/2015/3/31/australian-and-new-zealand-music-publishing-industry-valued-at-more-than-aud200-million> (last accessed 31 October 2015).

to help governments make better policies, in the long term interest of the Australian community'.⁷ It is hoped that in conducting this inquiry, the Productivity Commission will place appropriate weight on the value that creators' works contribute to Australia's rich cultural heritage, as well as their economic contribution.

Comments on the framework for assessing IP arrangements

AMPAL makes the following comments in relation to certain questions posed in the 'Comments on the framework for assessing IP arrangements' section of the Issues Paper. AMPAL's comments largely relate to copyright.

The Commission welcomes feedback on the framework it proposes employing to guide its assessment of IP arrangements and for recommending welfare-enhancing reforms

A framework for assessing IP arrangements that stresses effectiveness, efficiency, adaptability and accountability is a sound starting point. However, it is difficult to fathom a document on copyright that fails to mention concepts such as art, culture and national identity. As Towse notes, '*The true cultural value of copyright cannot be fully captured by measuring the value-added in the cultural industries however accurate those measures are because there are external benefits that are not priced through the marketplace; the national culture, a creative environment and freedom of expression are examples of non-appropriable benefits*'.⁸

We note that there have been a number of copyright-related inquiries in recent years both in Australia and internationally. The US Congress and the European Commission are currently grappling with copyright issues but there are no significant moves in these jurisdictions to weaken copyright protection. As the Issues Paper notes, *the system is extraordinarily dynamic*.⁹

Do IP rights encourage genuinely innovative and creative output that would not have otherwise occurred? If not, how could they be designed to do so? Do IP rights avoid rewarding innovation that would have occurred anyway? What evidence and criteria should be used to determine this?

We agree with the Commission that discussions about IP rights are often theoretical,¹⁰ and nothing illustrates this more than the oft repeated claim that because '*...much creative and inventive work is done with no expectation of remuneration or reward but is done for the personal benefit or joy it provides creators...*'¹¹ there will still be plenty of content created without the need for copyright protection. This is the sort of theorising that comes from those who have a purely academic perspective with little understanding of how the copyright industries operate in practice. Without appropriate IP rights and a structure for a return on investment, there would be little reason for investment in the creation of Australian musical content. It is true that individuals may continue to create in their spare time but these works are unlikely to find wide dissemination. Song-writing is a craft that requires inspiration and perspiration. Successful song-writers need to spend the '10,000 hours'¹² to refine their art and create works to capture the public's imagination. Those songs then need to be professionally recorded, promoted and marketed if they are to compete with the music coming from overseas. If Australia was to unilaterally weaken our copyright laws it would inevitably result in a reduction in innovative and creative output, and in even greater exposure to

⁷ Issues Paper, page 2.

⁸ Ruth Towse, 'Cultural economics, copyright and the cultural industries' (2000) *Society and Economy in Central and Eastern Europe*, Vol 22, No 4, pp 107-126.

⁹ Issues Paper, page 3.

¹⁰ Issues Paper, Box 3, page 6.

¹¹ Issues Paper, page 4.

¹² In his 2008 book 'Outliers', Malcolm Gladwell wrote that it is '*an extraordinarily consistent answer in an incredible number of fields ... you need to have practiced, to have apprenticed, for 10,000 hours before you get good*'.

foreign copyright content.

Similarly we note the comment in the Issues Paper that ‘*the internet allows creators to market and sell their works to consumers directly, both in Australia and overseas, reducing the need for (and returns to) intermediaries*’.¹³ While this is theoretically true, the reality is that there have been few real life examples in the music industry of creators discovering and developing a market solely through their internet activity and without the assistance of intermediaries. The internet has changed the way that creators can market themselves but it is hard to come up with the names of many artists who have had significant success without a music publisher, record company, manager or promotions company behind them. The valuation of music has been transferred from those who create and those intermediaries that assist in the creative process and invest in music to, other intermediaries such as Google who profit enormously from the creations of others, without contributing to or investing in the creative process.

Another common refrain is about the need for ‘*...freedom to build on existing innovation*’.¹⁴ Too often this line is trotted out by those who want to appropriate and profit from the prior work of others without entering into an appropriate licence arrangement.

The theory of the ‘long tail’ in sales of digital music has been repudiated by the work of Will Page at PRS for Music with his economic analysis of the use of music on the internet. Page’s research found: ‘*...a “hit-heavy, skinny-tail”, log-normal distribution for legal online music consumption; a distribution not that dissimilar from what one might expect from a more traditional, bricks & mortar store*’.¹⁵ Page found that P2P services had a similar distribution curve. Digital services (and traditional services) need quality more than quantity.

It remains the case that people want to hear music that has been developed and nurtured and promoted and marketed.

AMPAL submits that the current copyright arrangements do encourage innovative and creative musical output from Australian creators that would not otherwise occur. The evidence and criteria that should be used to determine whether IP rights avoid rewarding innovation that would have occurred anyway is, with respect to songwriters and composers, through direct consultation with those songwriters and composers and the music publishers who invest in them.

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? How could the diffusion of knowledge-based assets be improved, without adversely impacting the incentive to create?

What, if any, evidence is there that parties are acting strategically to limit dissemination?

AMPAL submits that the current IP system adequately disseminates music content. Music publishers are in the business of commercially exploiting the works of the creators they represent. Music copyright owners have been very flexible in entering licensing schemes to allow a broad range of services that are legal. However as the Issue Paper notes, ‘*...IP arrangements and stakeholders have been, and continue to be, affected by a number of developments, including the rise of cloud computing, the growth of the Internet, digitisation, and globalisation (OECD 2015). The clear boundaries around physical goods that once made it easy to define IP protection are now becoming increasingly blurred ... these developments have given rise to new challenges, such as the facilitation of piracy...*’.¹⁶

It is very difficult to build sustainable businesses when you are competing with absolutely free

¹³ Issues Paper, page 20.

¹⁴ Issues Paper, page iii.

¹⁵ <http://www.prsformusic.com/creators/news/research/Documents/The%20long%20tail%20of%20P2P%20v9.pdf> (last accessed 31 October 2015).

¹⁶ Issues Paper, page 12.

copyright-infringing websites. The Digital Content Guide¹⁷ shows the variety of legal services available to Australian consumers.

Do IP rights provide rewards that are proportional to the effort to generate IP? What evidence is there to show this? How should effort be measured? Is proportionality a desirable feature of an IP system? Are there particular elements of the current IP system that give rise to any disproportionality?

Proportionality should be a feature of a balanced IP system. AMPAL submits that current levels of copyright infringement diminish the proportionality of the rewards for the effort exerted in composing songs, and is harming songwriters and composers and music publishers. The value created by copyright content is more and more being realised by internet intermediaries who do not contribute to the creation of works and who are protected by safe harbour rules.

What are the relative costs and return to society for public, private and not for profit creators of IP? Does the public provision of IP act as a complement or substitute to other IP being generated? Are there any government programs or policies that prevent, raise or lower the costs of generating IP?

As songwriters and composers are largely private creators of IP, often funded by music publishers, the relative costs to society are only the costs associated with licensing creators' IP, not the creation of IP. The return to society, however, on the creation of musical compositions is an invaluable contribution to Australia's rich cultural heritage.

What are the merits and drawbacks of using other methods to secure a return on innovation (such as trade secrets/confidentiality agreements) relative to government afforded IP rights? What considerations do businesses/creators of IP make in order to select between options? How does Australia's use of methods besides IP rights to protect IP compare to other jurisdictions? Why might such differences arise?

As many songwriters, composers and music publishers are effectively sole traders, it is difficult for them to commercially exploit their works through means other than through IP rights.

Are there obstacles in the IP system which limit the efficient trade of IP between creators and users? Are there particular areas where trade, licensing and use of IP could be more readily facilitated?

AMPAL submits that the current licensing arrangements for songwriters' and composers' works are efficiently and adequately carried out by those creators, music publishers and by APRA AMCOS.

Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power? Are there ways (including examples employed overseas) to improve the dissemination of IP while preserving incentives to generate IP? Could such methods be adopted or adapted within the Australian IP system?

We submit that music creators should have the right to control how their works are used. However their intellectual property rights are already limited by a number of exceptions and statutory licences (subject to the Australian Copyright Tribunal jurisdiction). There is no compelling evidence that further compromise is necessary.

What are the longer term effects of the IP system on competition and innovation? What evidence is there to assess and measure these effects?

AMPAL submits that in Australia, there is a balance between the gains to IP rights holders and the costs to IP rights users. Fair and balanced licensing arrangements are entered into by APRA AMCOS under the authorisation of the Australian Competition and Consumer Commission, and also directly by music publishers who are in competition with each other.

¹⁷ <http://www.digitalcontentguide.com.au> (last accessed 31 October 2015).

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? What factors may make it harder for the IP system to adapt to change? What policy options are there to remedy any difficulties, and why might they be preferable?

The music industry has been transformed in the digital age. As noted above, the industry has been innovative in adapting. Music copyright owners including music publishers have been very flexible in entering licensing schemes to allow a broad range of legal services. The Digital Content Guide sets out the range of these services. What has made this transition possible is a strong, flexible copyright framework providing certainty for creators and other copyright owners. Australia's IP system has adapted well to changes in economic, commercial and technological changes in the past, and if it remains as a robust IP framework, it will continue do so into the future.

Are there other ways of ensuring the IP system will be efficient, effective and robust through time, in light of structural economic changes and the importance/pervasiveness of IP? Is a principles-based approach preferable to a prescriptive approach in this regard? Are there particular parts of the IP system that should be principles-based or prescriptive?

AMPAL acknowledges the need for broad principles to apply to the IP system but notes the scope of the Commission's Inquiry is to recommend changes that would '...provide greater certainty to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others'.¹⁸ This is more likely to be achieved by providing a prescriptive approach that clearly lays out what is acceptable. This contrasts with the recommendation made by the ALRC in their *Copyright and the Digital Economy* report where they suggest the courts should be the arbiter of appropriate behaviour.

What additional challenges does technological change and new methods of diffusion, including digitisation, present for the adaptability of the IP system? How should such challenges be approached?

We endorse Senator the Hon George Brandis QC's comments above, that the fundamental principles of copyright law have not changed with the advent of the internet. These changes should not, in and of themselves, present a challenge to the adaptability of the current robust, flexible IP system in Australia.

Ideally, what sort of information is needed to evaluate the IP system? In their absence, what alternative data or proxies are available?

AMPAL notes the number of recent copyright-related government inquiries. The submissions invited and public consultations held are the best source of information to evaluate the IP system. As noted above, AMPAL supports the framework for assessing IP arrangements proposed by the Productivity Commission, provided that sufficient weight is given to the worth of creative works and the contribution they make to the culture of Australia.

Comments on improving arrangements for specific forms of IP

AMPAL makes the following comments in relation to certain questions posed in the 'Comments on improving arrangements for specific forms of IP' section of the Issues Paper.

AMPAL's comments are confined to copyright.

It should initially be noted that Australia is a party to a range of treaties dealing with copyright. These are largely administered by the World Intellectual Property Organisation and the World Trade Organisation. Australia has also recently been an active participant in the drafting of the Trans

¹⁸ Issues Paper, page iii.

Pacific Partnership Agreement which obliges participating countries to respect the principles laid down by WIPO and the WTO.

Importantly, copyright is also recognised in two human rights documents:

- The Universal Declaration of Human Rights (Article 27) provides: *‘Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’*.
- Article 15 of the International Covenant on Economic, Social and Cultural Rights recognises the author’s right: *‘To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author’*.

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?

Creators depend on copyright for their income. Without such income there is little incentive for investment in the creation of musical works. Such investment is one of the fundamental roles of music publishing. The various exclusive rights of copyright in a musical work contained in s 31 of the *Copyright Act 1968* (Cth) each have a corresponding income stream. This allows creators to benefit from various areas of commercial exploitation.

Music publishers recoup their investment from part of the revenue derived from the exploitation of the works they represent. Songwriters receive directly a minimum of 50% of the income derived from performance and communication to the public revenues by virtue of their membership of APRA.¹⁹

According to the World Intellectual Property Organisation one of the primary purposes of copyright is: *‘...to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence...’*²⁰ This aim of copyright law must be given sufficient weight by the Productivity Commission.

Since the Statute of Anne, it has been accepted that creators need copyright laws to protect them from others stealing their creations. Copyright, by its nature, cannot be seen as an inhibitor of originality. As Adam Mossoff notes in *The Statesman*: *‘Copyright does not prohibit anyone from creating their own original novels, songs or artworks. Importantly, copyright does not stop people from thinking, talking or writing about copyrighted works’*.²¹

AMPAL therefore submits that the current law remains ‘fit for purpose’, and that it does not poorly target the creation of additional works the system is designed to incentivise.

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?

AMPAL submits that the protections afforded under the current copyright arrangements are proportional to the efforts of creators. A graduated approach could deter potential songwriters and composers from initially creating works, and so AMPAL does not support this approach.

As stated by Senator the Hon George Brandis, *‘It is important that, just like other workers out in our economy, those who make our great films and record our great albums are entitled to the fruits of their efforts. Without strong, robust copyright laws, they are at risk of being cheated of the fair compensation for their creativity, which is their due and the Australian government will continue to*

¹⁹ APRA rules of distribution. www.apraamcos.com.au (last accessed 30 October 2015).

²⁰ <http://www.wipo.int/copyright/en/> (last accessed 31 October 2015).

²¹ <http://www.statesman.com/news/news/opinion/copyright-doesnt-limit-online-speech/nSLRG/> (last accessed 4 November 2015).

protect them'.²²

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?

Music publishers are in the business of licensing – it is in their interests to license as widely as possible. However, whilst low-value and gratis licences are frequently afforded to not-for-profits and members of the public, it makes no sense to license unviable commercial business models or services that undercut the value of music. Obtaining a licence is a cost of doing business. We are not aware of any serious music services that have not been able to commence activities in Australia because of our copyright laws. That's not to say there haven't been arguments over the fees. But as Richard Hooper noted in his report to the UK Government on copyright licensing for the digital age: *'It is important to note that the price a rights owner charges for his or her rights, and the decision by a rights owner to withhold rights (e.g. the Beatles did not allow their songs on the internet for many years) are not copyright licensing process issues but are commercial business issues'*.²³

Copyright collecting agencies such as APRA AMCOS play a central role in reducing transaction costs. We refer to APRA AMCOS's comments in their submission on this issue.

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?

By their definition, moral rights confer certain protections to creators, irrespective of any economic interest in their creation. The moral rights are inalienable from the author. AMPAL submits that moral rights are important for songwriters and creators, separate to the law known as 'passing off' or other provisions regarding misleading and deceptive conduct contained in *Competition and Consumer Act 2010* (Cth). While the US does not recognise moral rights, this is perhaps *'because a right to integrity of authorship which enables an author to object to derogatory treatments of their work would be inconsistent with the First Amendment right to freedom of expression'*.²⁴

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 change to Australia's copyright regime has been the introduction of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) into Australian law. This law will allow copyright owners to seek an injunction to force ISPs to block parasitic overseas websites hosting unauthorised copyright material. The first cases are yet to proceed through the courts.

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

As noted in the Issues Paper, the desired outcomes of any IP system are complex.

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?

²² Senator the Hon George Brandis QC (then Attorney-General and Minister for the Arts), response to the Senate Questions Without Notice, Copyright Law Reform, Thursday 5 December 2013, <https://www.attorneygeneral.gov.au/transcripts/Pages/5December2013-TranscriptQuestionTimeSenate.aspx> (last accessed 4 November 2015).

²³ Para 32 Hooper and Lynch: 'Streamlining Copyright Licensing for the Digital Age', <http://www.copyrightshub.co.uk/Documents/dce-report-phase2.aspx> (last accessed 4 November 2015).

²⁴ Submission by the Australian Copyright Council to the ALRC Freedoms Inquiry, <https://www.alrc.gov.au/inquiries/freedoms/submissions> (last accessed 4 November 2015).

The digital era has transformed the music business, and as noted above, music copyright owners have comprehensively demonstrated their flexibility in licensing innovative music services. The balance needs to be struck carefully, to allow consumer demand for appropriate price and availability to be met, while providing adequate reward for creators' efforts. It is interesting to note that Australia has been one of the early markets for new services. Those with a viable business model have been able to get the licences they need. Clearly our copyright laws have not prevented services such as iTunes, Apple Music, Spotify, and others from starting here. In contrast, these services have chosen not to enter territories where copyright protection is weak.

AMPAL notes that Australia already has established copyright fair dealing exceptions and statutory licence schemes which encroach on the exclusive rights of copyright owners and limit their ability to freely license. With regards to potential new exceptions to copyright infringement, we submit that it is incumbent on those pushing for new exceptions to clearly provide details of the market failures that would necessitate new exceptions or statutory licences and provide the evidence to support their proposed solutions. We will then be in a better position to review them and to comment. We do not believe that the recent ALRC Report produced any compelling evidence to support its conclusion that we should move from purpose-based fair dealing exceptions to an open ended fair use exception such as that provided for in the United States law. As noted by the Australian Copyright Council, *'it is not appropriate or workable for Australia to move to an open-ended exception. Rather, it is appropriate for the purposes to be prescribed by the legislature'*²⁵, as they currently are in Australia. Furthermore, as noted by Senator the Hon George Brandis QC, *'the government's response to the ALRC report will be informed by the view that the rights of content owners and content creators ought not to be lessened and that they are entitled to continue to benefit from their intellectual property'*.²⁶

Moreover, the US has a different legal context and the fair use defence is based on many years of case law and precedent. Each claim for fair use is subject to judicial review of the particulars at issue. Fair use contributes much more legal uncertainty than fair dealing exceptions. In the US, fair use is also counter-balanced by a regime of statutory damages for copyright infringement. Therefore, the fair use defence is really only feasible for large, well-resourced companies and of limited benefit to small innovative start-ups. AMPAL notes that in his Review of Intellectual Property and Growth to the UK government, Professor Ian Hargreaves rejected the notion that fair use should be introduced into the UK, noting *'The advice given to the Review by UK Government lawyers is that significant difficulties would arise in any attempt to transpose US style Fair Use into European law'*.²⁷

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?

The copyright exemptions noted above are sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators. Introducing an open-ended exception such as 'fair use' would remove this certainty.

It would seem that much of the push for greater exceptions to copyright comes from the proponents of 'innovation'. However innovation should not be used as an excuse for building businesses that free ride on other people's intellectual property. As an example, AMPAL was concerned by the recent US Court of Appeals for the Second Circuit decision in *Authors Guild v Google*²⁸. As noted

²⁵ Australian Copyright Council submission to ALRC Freedoms Inquiry.

²⁶ Brandis, above n22.

²⁷ Ian Hargreaves, Report of Intellectual Property and Growth, para 5.19, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf (last accessed 4 November 2015).

²⁸ *Authors Guild v. Google, Inc.*, No. 13-4829 (2d Cir. 2015).

by Mary Rasenberger, Executive Director of the Authors Guild, *'In our view this decision allows Google to seize authors' property, making it a serious threat to their livelihoods as well as the depth, resilience, and vitality of our culture'*.²⁹

Rights holders need certainty in intellectual property laws in order to encourage innovation. This will in turn encourage development of legitimate models for distribution of creative content, while also appropriately rewarding creators.

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

AMPAL congratulates the Australian Government on the successful implementation of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) into Australian law. This was an important step in tackling the problem of overseas websites infringing copyright. To be efficient and effective in the modern era, AMPAL submits that further changes to the Copyright Act must be considered to address online unlicensed use of music as appropriate over time.

Furthermore, the *iiNet* case³⁰ had left the creative industries vulnerable - the High Court demonstrated that the protections envisaged in the original legislation were not effective. There was no longer any incentive for service providers to co-operate in establishing a meaningful 'code of conduct'. AMPAL therefore encourages all parties negotiating on the costs of the Communications Alliance's Industry Code: Copyright Notice Scheme Code to agree to reach an agreement that makes the code a viable mechanism for rights holders to employ in relation to online copyright infringement. Legislation needs to be accompanied by education. We risk a further generation believing that popular music miraculously appears out of the ether and therefore should be free.

The *Copyright Amendment (Online Infringement) Act 2015* (Cth) and Copyright Notice Scheme Code are both parts of a suite of measures that should be taken to combat the online infringement of copyright material. AMPAL acknowledges that neither initiative is a silver bullet that will solve all the problems that the music industry faces online from unlicensed use, but it will help to educate consumers about where they can find licensed music, to respect the music publishers' and songwriters' rights and importantly it gives rights holders an avenue to have a proportionate, effective process to ensure their creative content is protected online.

Comments on the broader intellectual property landscape

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

Copyright infringement in Australia is a problem that has greatly affected the music industry. As previously noted by the Hon Malcolm Turnbull MP, 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'*.³¹

Individual songwriters and composers would attest to the difficulty in enforcing IP rights in Australia, due to the costs, procedural requirements, and in relation to online copyright infringement, difficulty in determining the identity of an infringer. It is therefore incumbent on the

²⁹ <https://www.authorsguild.org/industry-advocacy/future-of-fair-use-hinges-on-supreme-court-review-of-google-books-case/> (last accessed 31 October 2015).

³⁰ *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42.

³¹ 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 30 October 2015).

Australian Government to ensure that online copyright infringement is addressed, and that songwriters, composers and music publishers are able to effectively enforce IP rights in relation to traditional infringement of IP.

Is the role expected of ISPs a practical option?

It is essential that once unauthorised content is identified, ISPs act expeditiously to not only take it down, but to make sure that it stays down. An ISP industry code should include a workable procedure for ‘notice and takedown’ but such procedures should be without prejudice to a general duty of care obliging service providers to conduct some degree of monitoring using filtering techniques. ISPs already use filtering and similar network management technology to deal with objectionable material such as pornography. Procedures according to which a single notice would result in ‘actual knowledge’ of all similar future infringements (‘notice-and-stay-down’) should be the norm. Procedures that allow for the notification of illegal content can only operate effectively if they are not too cumbersome and if ISPs are encouraged to react immediately and are shielded from liability for wrongful take down when they acted on invalid notifications. In this regard, we note that the recently published Trans-Pacific Partnership contains a requirement for a notice and takedown system to be implemented by member countries.

The ISPs and the rights holder communities should have a shared incentive to create a safe and legal online experience for consumers. The ISPs currently benefit from the traffic generated from unauthorised hosting sites – particularly when many of the services in Australia are based on a ‘per gigabyte’ usage model rather than the unlimited-data service most often seen in the US and UK. ISPs would be quick to disconnect a consumer who failed to pay their bill. Conversely the content creators are severely limited in the realistic damages that they can recover.

Litigation in this area is costly and difficult particularly for the SMEs that make up a large proportion of rights holders. Rights holders have no desire to sue individual customers - it is the various hosting sites that are profiting hugely from the unauthorised file sharing.

In relation to ‘safe harbours’, AMPAL submits that any service going beyond the activity of a strictly neutral intermediary should not be eligible for safe harbour protection.

Conclusion

AMPAL thanks the Productivity Commission for the opportunity to respond to the Issues Paper. While it is true that copyright systems are increasingly converging internationally, differences necessarily remain in national regimes. It is AMPAL’s submission that Australia’s current copyright arrangements are well suited and developed to suit Australia’s needs now and into the future, and that they strike an appropriate balance between IP users and IP creators. With respect to music publishers, AMPAL argues that music publishers have demonstrated a willingness to enter into fair and flexible music licensing arrangements, and with a robust IP framework providing certainty of a fair income, they will continue to do so. Without good evidence to the contrary, we do not agree that Australia’s current copyright arrangements should be weakened in any way. Please contact us if we can be of any further assistance.

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Company Secretary

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