

AMPAL Submission to the Productivity Commission Draft Report: Intellectual Property Arrangements

AMPAL

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

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 Productivity Commission Issues Paper on Intellectual Property Arrangements in November 2015 and our comments made therein.

Introductory Comments

AMPAL disagrees with some of the findings and recommendations made by the Productivity Commission (the **Commission**) in relation to copyright following our submission to the Issues Paper, and indeed is disappointed by the general attitude displayed by the Commission in relation to copyright and the creators that depend on the current certainty of Australia's robust, flexible copyright laws in order to encourage their innovation and to be rewarded for their creative efforts in advancing the cultural heritage of Australia. The Commission adopting the terms 'copy(not)right'¹ and "creators"² in inverted commas is indicative of this, and reveals the Commission's ideological stance from the outset.

We note that the Draft Report's findings and recommendations in relation to copyright largely comprise findings made in recent copyright inquiries, without presenting substantial new evidence or economic analysis. Furthermore, AMPAL also submits that the Commission has unnecessarily devoted its attention to issues where the Australian Government has little scope to influence any change of policy, such as term of protection for copyright and moral rights, due to the constraints of international agreements. The Commission also focuses on matters

¹ Draft Report page 16.

² Draft Report page 95.

that are already a current part of government policy, such as streamlining statutory licences and aligning the term of protection for unpublished copyright material with published copyright material, as revealed by the recently released exposure draft of the *Copyright Amendment (Disability Accedes & Other Measures) Bill*. It appears that an opportunity has been missed by the Commission to make a productive and constructive contribution to copyright discourse in Australia.

AMPAL supports the Commission's statements that the '*main premise of IP arrangements is to ensure that creators of new and valuable knowledge are able to appropriate sufficient returns to motivate their initial investment*'³ and '[o]f course the notion that an author must get a sufficient expected reward is integral to the Commission's framework as this is the driver of the incentives for creation'.⁴ However, it is submitted that some of the recommendations and findings that are made in the Draft Report in relation to copyright have the potential to undermine the appropriate returns to songwriters and composers for their creative efforts. Furthermore, the Commission has not placed appropriate weight on the value that creators' works contribute to Australia's cultural identity, as well as their economic contribution. The World Intellectual Property Organisation has previously noted that one of the primary purposes of copyright is: '*...to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence...*'⁵ This aim of copyright law must be given sufficient consideration by the Productivity Commission.

The Commission states that '*Some participants (for example, the Australasian Music Publishers' Association Limited, sub. 34 and the International Confederation of Music Publishers, sub. 32) argued that the copyright system was aimed at providing creators with a 'just reward' or a 'living income'. Evidence suggests much of the returns from copyright protected works are earned by intermediaries, rather than authors, musicians and the like*'.⁶ AMPAL does not submit that providing an income for creators is the sole aim of copyright, this is one aspect of the purpose of copyright. Furthermore, in relation to the statement that '*much of the returns from copyright protected works are earned by intermediaries*', AMPAL submits that music publishers make a critical contribution to the creation of great Australian music. Music publishers actively invest in, and 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 earn income on the basis of the valuable service provided to songwriters and composers which is the subject of individual negotiated contracts with them.

We again reiterate the economic and cultural importance of the work of music publishers and the songwriters and composers they represent as detailed in our submission to the Commission's Issues Paper, and again note that Australia's IP system has adapted well to changes in economic, commercial and technological changes in the past, and if it remains as a robust IP framework, it will continue to do so into the future. AMPAL is hopeful that the Commission will give full regard to the views of rights holders and creators, and the commercial realities of the market that they provide in their submissions, in finalising its recommendations in its final report.

³ Draft Report page 3.

⁴ Draft Report page 101.

⁵ <http://www.wipo.int/copyright/en/> (last accessed 31 October 2015).

⁶ Draft Report page 102.

Comments on the Productivity Commission's Draft Findings and Recommendations

We make the following comments in relation to the specific findings and recommendations of the Commission.

DRAFT FINDING 4.1

Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.

AMPAL submits that rather than the copyright system 'expanding', there have been changes to copyright laws over time. These changes have generally followed the international negotiation of WIPO copyright treaties and federal government processes for implementation. We therefore disagree that these changes have been made without transparent, evidence-based policy analysis. The Commission argues that '*Australia's copyright system has progressively expanded and protects works longer than necessary to encourage creative endeavour, with consumers bearing the cost...A new system of user rights, including the introduction of a broad, principles-based fair use exception, is needed to help address this imbalance*'.⁷ It is submitted that, as detailed in our submission on the Issues Paper, this imbalance does not exist, and that this is not an appropriate justification for the introduction of fair use.

We refer to the further comments of the Australian Copyright Council on this finding.

DRAFT FINDING 4.2

While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.

AMPAL queries the basis for this finding, and notes that the scope of the Productivity Commission's inquiry establishes that the Commission is to take account of Australia's international trade obligations. The term of protection for copyright is provided by the Australia–United States Free Trade Agreement in 2005, and international standards are also set in the Agreement on Trade Related Aspects of Intellectual Property Rights, and the Berne Convention. AMPAL submits that the current term of protection is still appropriate in the digital environment due to the great investment of time and money required to bring songwriters' and composers' works to the market, and in order to incentivise the creation of new works. Songwriters and composers have comprehensively demonstrated that the current term of protection is an appropriate term, and we refer to the submission of the ICMP and the examples provided by them.

DRAFT RECOMMENDATION 4.1

The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.

AMPAL notes that this recommendation was already the subject of the recent exposure draft of the *Copyright Amendment (Disability Accedes & Other Measures) Bill*, and refers to the further comments of the Australian Copyright Council on this recommendation.

⁷ Draft Report page 2.

DRAFT RECOMMENDATION 5.1

The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.

The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.

AMPAL disagrees with this recommendation and notes that the current discussion at the EU level regarding geoblocking technology needs to be viewed in the context of that region being a single market, in contrast to Australia and other territories.

As rights holders, music publishers do not geo-block. Music publishers' core business is licensing, and it is in the interests of the songwriters and composers that music publishers represent to ensure that their repertoire is present as widely as possible worldwide, and to exploit this repertoire as widely as possible. Indeed, music publishers grant multi-territorial licenses for many different musical works.

However, when limitations exist to cross-border services through geoblocking technology, AMPAL submits that they are the result of each service's operational needs and intention to meet consumer demand by adapting to local markets. This recommendation has the potential to discourage new online services and investment in the local market.

AMPAL refers to the further comments of the Australian Copyright Council, APRA AMCOS and the ICMP in relation to this recommendation.

DRAFT RECOMMENDATION 5.3

The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- the effect of the use on the market for the copyright protected work at the time of the use*
- the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work*
- the commercial availability of the work at the time of the infringement*
- the purpose and character of the use, including whether the use is commercial or private use.*

The Copyright Act should also specify a non-exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

AMPAL disagrees with this recommendation and notes that the Commission has failed to

articulate a clear case for the implementation of fair use. As we have noted in our submission to the Issues Paper: with regard to potential new exceptions to copyright infringement, we submit that it is incumbent on those proposing new exceptions to clearly provide details of the market failures that would necessitate new exceptions or statutory licences and provide the evidence to support their proposed solutions.

AMPAL disagrees with the Commission's statement that '*given that most new works consumed in Australia are sourced from overseas and their creation is unlikely to be responsive to changes in Australia's exceptions, adoption of a fair use provision in Australia is likely to deliver net benefits to the Australian community*',⁸ and refers to the comments of APRA AMCOS in this regard. 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. The best assistance to exporting music is a healthy local market, supported by Australia's copyright framework, balanced by the current fair dealing provisions.

We do not believe that any compelling evidence has been offered to support a 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 (which operates in a different legal context), and that fair use would lead to greater legal uncertainty in Australia.

We refer to the further comments of the Australian Copyright Council in relation to this recommendation.

DRAFT RECOMMENDATION 14.1

The Australian Government should repeal s. 51(3) of the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act). The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

We refer to the comments of the Australia Copyright Council in relation to this recommendation, and emphasise the effective role that the Copyright Tribunal plays in preventing any anti-competitive behaviour by rights holders.

DRAFT RECOMMENDATION 18.1

The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).

AMPAL disagrees that a broader set of online service providers was intended in the *Copyright Act 1968 (Cth)* and refers to our comments in our submission on the exposure draft of the *Copyright Amendment (Disability Accedes & Other Measures) Bill* in February 2016: AMPAL is not convinced that any 'service provider' should fall within the scope of the safe harbour regime. In our submission, services going beyond the activity of a strictly neutral intermediary should not be eligible for safe harbour protection. It is unnecessary for the current safe harbour provisions to be expanded without evidence that such an amendment is required. AMPAL is not aware of online service providers' development being inhibited in Australia due to the current safe harbour laws.

Furthermore, we refer to Music Rights Australia's and ICMP's submission setting out the international experience of safe harbour protections being inappropriately used by

⁸ Draft Report page 152.

commercial entities to the detriment of copyright owners. These entities are far beyond being neutral intermediaries, and can draw significant revenue from advertising, and then compete with legitimately licensed services. Expanding Australia's safe harbour scheme will inevitably make it even more difficult and costly for Australian rights holders to take action against these entities.

Proportionality must 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. Some of the valuation of music has been transferred from those who create and those intermediaries that assist in the creative process and invest in music such as music publishers, to other intermediaries such as Google who profit enormously from the creations of others, without contributing to or investing in the creative process and who are protected by safe harbour laws in other jurisdictions. Expanding the scope of Australia's safe harbour laws can only exacerbate this problem, and its associated impact on the value that creators' works contribute to Australia's rich cultural heritage, as well as their economic contribution.

If the rationale to expand the operation of the safe harbour scheme is to make Australia's laws consistent with those of other jurisdictions such as the United States (and we note Music Australia's submission that this is unnecessary and not desirable), the other aspects of those laws relevant to rights holders such as a workable industry code of conduct for service providers, must also be introduced. Comparisons with the US law must also be considered in the context of the US system of statutory damages, which is not a part of Australian law. We refer to the comments of Music Rights Australia in their submission regarding the original intention of the legislature in restricting the scope of the safe harbour scheme in Australia.

In addition, unless section 101 of the *Copyright Act 1968* (Cth) is amended so that all service providers must take reasonable steps to assist rights holders to address infringing activity on their networks where they have knowledge of that infringement, it is not appropriate for the safe harbour laws to be extended to those service providers. The balance originally envisaged by the legislature must be maintained. The safe harbour scheme must not act as a disincentive for services to engage in legitimate music licensing. In this regard, we refer to the submission of Music Rights Australia setting out its proposals for amending section 101.

We also note that a review of safe harbour laws is currently being undertaken in the US by the US Copyright Office, and European copyright laws more broadly are currently being reviewed by the European Commission, and refer to ICMP's comments in their submission in this regard.

DRAFT FINDING 18.1

The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

The music industry has been transformed in the digital age. The Commission states that *'[b]etter use of digital data and more accessible content are the key to reducing online copyright infringement, rather than increasing enforcement efforts or penalties.'*⁹ However, the music industry has been innovative in adapting, and music copyright owners including music publishers have been very flexible in entering into licensing schemes to allow a broad range of legal digital services. The Digital Content Guide (www.digitalcontentguide.com.au) sets out the range of these services. What has made this transition possible is a strong,

⁹ Draft Report Page 2.

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.

An argument frequently raised in copyright debates is that with regard to creative content in Australia, there is a problem with price and availability. However, the 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.).

Copyright infringement in Australia is a problem that has greatly affected the music industry. 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 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.

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

AMPAL submits that copyright collecting agencies such as APRA AMCOS play a central role in reducing transaction costs, and that APRA AMCOS operate transparently, efficiently and at best practice. We refer to APRA AMCOS's comments in their submission in relation to this information request.

INFORMATION REQUEST 5.3

Will the Australian Government's proposed reforms to simplify and streamline education statutory licences result in an efficient and effective scheme? Should similar reforms be made to the operation of the government statutory licence scheme?

We refer to the submission of the APRA AMCOS in relation to this information request.

Conclusion

AMPAL thanks the Productivity Commission for the opportunity to respond to the Draft Report. However, AMPAL disagrees with some of the Commission's recommendations and findings in relation to copyright. We reiterate that with respect to music publishers, they 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 for creators, 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, as some of the Commission's recommendations are sure to do. Please contact us if we can be of any further assistance.

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