ARIA RESPONSE TO THE "COPYRIGHT MODERNISATION" CONSULTATION PAPER

JULY 2018

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 retailers and data suppliers across Australia;
- providing, in certain cases, a reproduction licensing function for various copyright users on a non-exclusive basis; 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 Comments in Response to the Consultation Paper

ARIA welcomes the opportunity to participate in this consultation process (the **Consultation**). ARIA thanks the Department of Communication and the Arts (the **Department**) for considering ARIA's submission to this important process.

ARIA has fully participated in all reviews of Australian copyright legislation, and we note in particular the most recent reviews conducted by the Australian Law Reform Commission and the Productivity Commission. In the course of those inquiries we provided considerable information and evidence, and made ourselves available to meet with those conducting the reviews. As a result we do not propose to burden the Department by restating all of that detail, as we believe our position is well understood. We would of course be happy to provide, on request, any additional information the Department may require or provide copies of those earlier submissions.

It has been our experience that some inquiries into potential reform have, unfortunately, led to increased tension and acrimony between the various stakeholder groups, further entrenching opposing positions. We did note with great interest the productive consultative process that resulted in the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (excluding Schedule 2 on Safe Harbours). We trust that the current process and Consultation will create an environment in which all relevant stakeholders can engage constructively to develop suggestions for balanced and sensible reform to solve real, rather than theoretical, issues. It is certainly ARIA's intent to so engage.

At the outset, we note and take issue with some currently prevailing myths:

- That innovation is the purview only of technology companies. This is far from the truth, and ignores the fact that each new piece conceived and produced by a creator is, in itself, innovative. This lens also completely overlooks the revolutionary change in the mode of delivery for music products over recent years. The Australian recorded music market is now at around 75% digital in value, with at least half of that digital component coming from streaming services[1] that did not even exist as recently as five years ago. This demonstrates how rapidly the recording industry is embracing innovation and change. Through its commercial partnerships and evolving licensing models the industry has been able to ensure that sophisticated delivery models are available to Australian consumers, allowing them to access millions of recordings across all genres when, where and how they want. Advances in technology should not result in a degradation of creators' rights;

- The suggestion from some quarters that modernising copyright legislation is as simple as reducing the rights of creators to allow those who use technology to access and utilise copyright content in an unchecked and unremunerated manner. We reject this philosophy. The recording industry's licensing of copyright has resulted in the innovative new ways of consuming music that consumers now enjoy, creating a predominantly digital music industry. The recorded music industry is a digital industry. It is copyright, not exceptions to it, that has underpinned these developments. At the same time, technological developments have in some cases severely impacted the ability of creators to manage and properly enforce their rights, emphasising the need to ensure, not diminish, copyright protection; and

- Modernisation is not necessarily synonymous with simplification. The Copyright Act 1968 (Cth) (the **Act**) is the result of careful consideration over many years, and its operation underpins a host of complex commercial arrangements across billion dollar industries. Whilst we accept that technological developments may necessitate some reform, we believe it is an unreasonable leap to assume that such reform should focus almost exclusively on unremunerated exceptions. The fundamental economic and legal principles remain, and there is no reason that those operating commercial services should expect to be able to utilise copyright material as a business input without having established relevant commercial licences, which operate to benefit all those involved in creating recorded music.

[1] see ARIA 2017 Music Industry Figures at http://www.aria.com.au/documents/ARIA2017MusicIndustryFiguresShow10.5pcGrowth.pdf

As a member of the Australian Copyright Council (**ACC**), ARIA endorses and supports the submissions made by the ACC, particularly in relation to the models circulated by the Department for consideration. ARIA also supports and endorses the submission made by Music Rights Australia (**MRA**) in relation to some specific aspects of this Consultation.

ARIA's response to the specific issues identified in the Consultation Paper is as follows:

Flexible Exceptions

The recording industry's position on the potential introduction of a 'fair use' style exception is well known and, as indicated earlier, we do not propose to burden the Department with unnecessary material to restate our strong objection to its importation to the Australian market. We refer to our submissions to earlier inquiries and note that nothing has occurred in the interim that would lead us to reconsider our position. We would be happy to provide more detail at any time should the Department wish.

It is ARIA's view that any broadening of exceptions should only occur following consultation and careful consideration of specific fair dealing defences, as and when credible evidence demonstrates clearly that they are required.

Government Use

ARIA cannot identify any need for reform in favour of unremunerated government use of copyright material. At present, governments are able to do anything they wish with copyright material, provided it is '*for the services of the Commonwealth or a State*[2]*',* and have broad powers to authorise third parties to do any such acts on their behalf. Thus access is already unfettered, provided the government in question pays equitable remuneration as agreed or determined by the Copyright Tribunal of Australia. We accept that, in certain circumstances, this would allow government use at very low or no remuneration to creators.

Current arrangements, allowing governments to utilise copyright material before even notifying the rights owner of the intended use, already place Australian governments in a very privileged position. We are unaware of any similar provisions for government use in any other countries, nor comparable arrangements for anyone other than governments in Australia.

A copyright owner has no ability to enforce its copyright against government through infringement proceedings and related remedies, generally available for use against all other users of copyright material. The only recourse for a rights owner, once notified of the use, is to seek to agree terms or, in the absence of agreement, seek a determination by the Copyright Tribunal. In both of these circumstances the rights owner is likely to be at a significant disadvantage.

ARIA also notes that governments often levy charges for access to copyright material, and this may occur through commercial third parties. It would be completely inappropriate for governments to profit from such unremunerated uses of copyright material at the expense of the creators.

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[2] See s183 of the Act

Given the Act already provides free exceptions for '*anything done for the purposes of a judicial proceeding or of a report of a judicial proceeding'* with judicial proceeding defined to cover proceedings before a '*court, tribunal, or person having by law power to hear, receive and examine evidence on oath*'[3], we do not see any need to amend the Act to cover Royal Commissions, tribunals or other statutory inquiries.

ARIA would welcome the opportunity to consult further on any proposed models to streamline the practical application of the existing exceptions for government use.

Quotation

For all of the reasons articulated in our earlier submissions ARIA rejects proposals for the adoption of a US style fair use exception. Any new exceptions should only be introduced on the basis of clear evidence based need, and as specific fair dealing exceptions linked to the fairness factors. That is, use for a defined specified purpose, in accordance with the three-step-test set out in the Berne Convention.

We note that the existing fair dealing provisions already permit quotation of a substantial part of the relevant copyright material for specified purposes. The question then becomes whether additional purposes should be the subject of free use without the permission of the rights owner. In regard to evidence based needs, ARIA believes that the government has not, as yet, been provided with any detailed evidence that demonstrates unfair outcomes, a failure of the current legislative framework or a failure of the market to license quotations not covered by the existing exceptions regime.

ARIA notes the longstanding established market for the use of sound recording samples and cautions against any reform that would undermine those commercial arrangements (this established market practice exists in all markets, including in the US). Revenues from the licensing of samples are an important part of the industry's revenues, as is a rightsholder's ability to determine how their recordings are used in sampling.

ARIA endorses the position on 'purpose' outlined by the ACC in paragraphs 17 and 18 of its submissions and, given the opportunity, would be happy to take part in further consultation on any additional purposes that could appropriately be considered for a new fair dealing exception. Any amended quotation exceptions for fair dealing must be consistent with Article 10 of the Berne Convention and (i) subject to the application of the fairness factors; and (ii) proper acknowledgement of the original creator of the work quoted. They must also be compatible with the three-step-test and international treaties including WIPO Performances and Phonograms Treaty (**WPPT**).

Educational Use

Educational institutions enjoy extensive access to copyright material through both the statutory licences administered by Copyright Agency and Screenrights, and direct arrangements (where either the statutory licences do not cover particular uses, or the institution chooses to enter into direct arrangements with a rights owner or rights owner representative body).

[3] See sections 43 and 104 of the Act

We note that, in regard to sound recordings, the public performance and communication of those recordings for educational instruction in the classroom is already permitted under current legislation[4] and we see no requirement for additional unremunerated exceptions.

ARIA has longstanding arrangements in place with educational bodies to provide blanket licences for their further uses of sound recordings, and remains open to discussing any necessary variations to those blanket licences as the needs of educational institutions evolve. Whilst it has not been necessary to date, as with all licensing arrangements agreed through discussion and negotiation with the sector, we note that the Copyright Tribunal remains the independent environment in which contested schemes can be resolved.

Libraries and Archives

Libraries and archives already benefit from a range of protections in the Act[5], which is appropriate given their key role in preserving Australia's cultural heritage. We note that they will also soon benefit from an expansion[6] of Australia's safe harbour arrangements, through its extension to key cultural institutions.

It is ARIA's position that unremunerated exceptions should not be used as the means by which all practical issues relating to use of copyright material are solved. We do not support a broad general exception for 'libraries and archives' given the extensive range of such institutions and the activities they may undertake, especially in partnership with commercial entities. We would, however, be open to considering the operation of the existing provisions and their potential simplification, and support the submissions made by the ACC in this regard.

Incidental and / or Technical Use

ARIA supports the submissions of MRA on this issue.

ARIA is particularly concerned that any fair dealing exception ostensibly introduced for technical or incidental use would, in effect, provide a safe harbour regime without any of the countervailing obligations on the beneficiaries, which is normally the *quid pro quo* for the legislative protection. ARIA and MRA have made a number of submissions on the issue of the appropriate breadth of the safe harbour schemes, the content of which we do not propose to reiterate here. We do note that our position is unchanged, and we would be happy, on request, to provide the Department with more information.

There are already a number of protections[7] for this type of activity, and we have seen no evidence of genuine risk exposure which should be addressed through a new unremunerated exception.

ARIA notes that an unremunerated exception for technical or incidental copying may disrupt longstanding arrangements for licensing online services. Online consumer music services, for example, range in their levels of sophistication and the degree of interactivity and other

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[4] See s28 of the Act
[5] See, for example, sections 49 and 50 of the Act
[6] See *Copyright Amendment (Service Providers) Bill 2017*
[7] See, for example, sections 40C, 43, 47,103C,110AA,111, 111B, and 200AAA of the Act

functionality they offer – from online linear radio-style services to fully on demand streaming services where users can select the sound recordings they wish to listen to on an 'on demand' basis. This variety allows Australian consumers to enjoy access to the world of music at a range of price points, including free services that are made available in conjunction with advertisements.

The music industry transitioned to online delivery models some years ago and it is industry practice to provide such services with the licence coverage they need to accommodate the entirety of their service offering. If, on the basis of a newly introduced general exception, a licensee takes the view that its existing licensing arrangement should now be discounted, it will be necessary to consider and specify each instance of copying which is to be covered by the licence scheme, and which no longer require licence coverage. Such an approach will lead to greater transactional and compliance costs, as the periodic reviews of such self-reporting licensees will be much more complex. Similarly, extra burdens and costs would be placed on rightsholders and licensing bodies to confirm the more complicated reporting.

We are also concerned about the uses infringing services would make of such an exception in order to frustrate the ability of rightsholders to take effective enforcement action against them. One example is stream-ripping services, which create downloadable copies of recordings from (typically) licensed streams. An incidental/technical use exception risks at the very least emboldening these highly commercially damaging services.

Text and data mining

The potential introduction of a fair dealing exception for text and data mining is one that ARIA believes warrants further detailed consideration, as it is a complex area.

We are concerned that a potential text and data mining exception may be crafted to apply to 'non-commercial' purposes. It is ARIA's view that the acts relating to text/ data mining will go well beyond those of a technical or incidental nature, and any attempt to limit the operation to 'non-commercial' purposes will be highly problematic, given the increasing interaction of social media and related platforms with commercial activity. For this reason it is our view that rather than considering such activity alongside incidental or technical use, a separate more targeted provision would be more appropriate.

Given the complexity ARIA would welcome the opportunity to participate in any further consultation processes initiated for this issue, and suggests that the UK exception[8] may be an appropriate starting point. Another interesting example is an exception proposed by the European Commission. This is an exception to the reproduction right to enable not-for-profit research organisations (or research organisations reinvesting all the profits in its scientific research) to carry out "reproductions and extractions" for text and data mining on works and protected subject matter (which covers sound recordings) to which they have lawful access for the purposes of scientific research[9].

[8] Section 29A of the United Kingdom's Copyright Design and Patents Act 1988
[9] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=en, Article 3

Contracting Out

The Australian recorded music industry now conducts the vast majority (75% of annual revenues and growing)[10] of its commercial activity through online services, which provide consumers and businesses with access to recordings through licensing arrangements. Access based models are increasingly the core market underpinning the commercial exploitation of our members' creative content, and the means by which creators and those who invest in them monetise their work online. These business models rely on terms which impose specific conditions of access to copyright material, tailored to meet the needs of consumers and provide differentiated access and pricing models. It is the freedom to contract that allows rights owners and service providers to deliver these services to consumers who, in turn, are protected from unreasonable conditions by general trade and consumer laws.

Given the capacity of users of content to rely on the fair dealing exceptions (in relevant circumstances) without reference to the rights owner, instances of 'contracting out' will only occur when a user has traded their legislative right for a further or alternative benefit. We can see no reason for the Act to limit the parties' capacity to negotiate such contractual arrangements, not least when the record companies' innovative approach to music licensing, based on contractual arrangements, has been proven to be beneficial both economically (the industry is growing) and culturally (users have more choice than ever before in how to consume music).

Should changes be made to remove the capacity to exclude fair dealing exceptions by contract, the only copyright material to which any changes apply should be copyright material that is already in the public domain. For example, if a tastemaker is provided with an embargoed copy of a new album prior to its release, it is entirely reasonable for the recording artist (or its record label) to seek to limit through contract the use the recipient may make of that material until it is publicly released.

Finally, we note that it may be premature to reach conclusions on this topic when the nature, extent and range of copyright exceptions are currently the subject of review.

Orphan works

Commercial sound recordings are generally well catalogued and identified, so the orphan works issues confronted by other creators (e.g. photographers) are less prevalent for ARIA's members.

We note that existing fair dealing provisions, other exceptions, and statutory licences already apply to orphaned copyright material.

We are aware of the introduction of orphan works provisions in a number of countries and, while we do not object in principle to such arrangements, they must be adequately scoped so as not

[10] ARIA 2017 Music Industry Figures at http://www.aria.com.au/documents/ARIA2017MusicIndustryFiguresShow10.5pcGrowth.pdf

to become an alternative to licensing works that are not truly orphan. The European Directive[11] on orphan works may provide a useful starting point for further discussion.

Subject to further consultation it is ARIA's view that, if necessary, a model could be introduced, providing it is adequately scoped and includes safeguards against abuse.

Under such a model, actions for infringement would be limited in respect of particular uses of an orphan work by specified users (such as libraries) only if (i) a diligent search has been undertaken prior to the use, and (ii) to the extent any information is available, the creator has been attributed. As much relevant information as possible should accompany the use, in order to aid the potential identification of the current rights owner (in circumstances, for example, where the original author is known but the rights owner has not been identified through a diligent search).

Should the relevant rightsholder subsequently be identified remedies should be limited to:

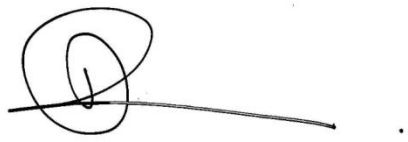
- An account of profits or otherwise reasonable compensation for past use; and
- Injunctive relief to prevent future use of the material (noting that the parties may agree terms for the continued use of the work).

A diligent search should not be defined, but linked to the principles recommended by the ALRC at recommendation 13-2 to guide the court's assessment of whether a diligent search had been conducted. Again, the Article 3 of and the Annex to European Directive is instructive on this point.

Similarly, we do not propose that the remuneration for past use should be specified, but rather left open to the parties to agree based on existing markets or, if necessary, determined by the Copyright Tribunal having regard to the type and context of use, and the prevailing or common market rates for such use.

Thank you for the opportunity to participate in the Consultation, and considering this submission. We look forward to working with the Department and other interested parties as the review process continues. Please to not hesitate to contact us if we can be of any assistance,.

Yours sincerely,



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Chief Executive Officer

[11] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF