

29 June 2018

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
CANBERRA, ACT 2601

By email: copyright@communications.gov.au

Dear Director,

Copyright Modernisation Consultation Paper

Nightlife appreciates the opportunity to provide a response to the Copyright modernisation consultation paper and participate in this review. We note however the Report is missing some material aspects that undermine confidence in the Code, particularly for businesses like ours which rely on a copyright landscape designed for the digital age.

We note that the Government's view is that it is important to balance "the interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole" Australian Government (2017), (*Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements*, pg.3). Further, the Australian Copyright Council also quote in their values that copyright laws are designed to "balance the interests of consumers and service providers" (Australian Copyright Council). Importantly, this review aims to "*inform advice to the government to support copyright policy that reflects the interests of copyright creators, users and distributors*".

On the basis of the two points above, Nightlife as both a user and distributor is able to provide input into those elements of the consultation that it is well versed from a commercial operator context. Specifically, Nightlife will address:

- Fair Dealing Exceptions; and
- Orphaned Works.

Kind regards,



Mark Brownlee
Managing Director

BACKGROUND ON NIGHTLIFE

Established in 1989, Nightlife is Australia's premier music subscription service for business and with 120 staff, it is the country's largest employer in the music-tech space. Privately owned and headquartered in Brisbane, it represents locally developed IP and technology consistently adapted to meet the evolving needs of our 3,500 clients nationally. Our clients cross all industry segments, but our primary verticals are hospitality and fitness, where the value of music is greatest.

As a music tech business, Nightlife depends on the rights holders and collection societies to not only provide content but also to ensure certainty in licensing to underpin the business and provide confidence to continue investing in the product. Equally Nightlife and our peers rely on the rights holders and collection societies to ensure the industry is functional and distributing revenues appropriately from the users that we invoice to the creators that they represent.

Given Nightlife's twenty-nine-year history working with both the licensors (our 250+ content suppliers globally) and licensees (our clients throughout Australia and export territories) of copyright protected content and our tech background, we are uniquely positioned to provide informed insights into Copyright reform and amendments in Australia. Creating stability for the technology innovators as well as the creators can only result in a positive benefit to the Australian public from an economic and social context. Creating avenues that ensure the commercial exploitation of content is inextricably linked to licensed frameworks should be mandated and supported by any proposed reform.

Nightlife is an avid supporter of artists and since inception has ensured that it delivers sufficient information to rights holders and collection societies alike, to enable them to pay the appropriate artist when their music has been used. The music industry is more complex today than ever before with more rights holders, content and service providers creating an explosion in data. Defining a consistent standard for repatriation that ensures the fair distribution of revenues and is manageable by all parties is now possible but relies on a close collaboration between tech and music businesses. Nightlife can play an important role in facilitating this opportunity and is pleased to be supporting reform that promotes a robust, reliable and simplified copyright framework.

PREAMBLE

Digital disruption has amplified issues inherent in the background music sector for decades. Thirty years ago the background music sector was in its infancy and as such the amount of content in use was relatively small and policing infringement was simple. Nightlife and a small number of our peers, were correctly licensed, routinely paid appropriately for the use of music and it was easy for us to tell the rights holders who to pay. There was no such thing as consumer services and hence infringement was rare and easy to shut down.

Fast forward 30 years and the landscape has changed dramatically, with technology innovations significantly outpacing copyright law. There are now many more options for businesses to turn to for music, some legitimate and licensed, others not. And the breadth of content and complexity associated with ownership has exploded. Crucially, businesses like Nightlife have been a constant and since the beginning have respected copyright and ensured that we provide our licensors with the requisite data to support the accurate payment to artists for the use of their work. But we have become the exception rather than the norm.

There are two key issues impacting the public performance music ecosystem today that should be considered as part of the current suite of copyright reforms and may have been overlooked by both the Australian Law Reform Commission and the Productivity Commission's recommendations. We have raised this with the Department in the context of the Review of Code of Conduct for Australian Collecting Societies but for the sake of completeness, we have highlighted them again here:

- 1) Ensuring that the flow of revenue from user to creator is as accurate as possible (“transparency through data”); and
- 2) The lack of infringement policies that outline the responsibilities of all parties to uphold copyright laws.

RESPONSE TO COPYRIGHT MODERNISATION CONSULTATION

Flexible Exceptions

Question 1:

To what extent do you support introducing:

- additional fair dealing exceptions? What additional purposes should be introduced and what factors should be considered in determining fairness?
- A ‘fair use’ exception? What illustrative purposes should be included and what factors should be considered

As a precursor to responding on this question, Nightlife notes the Roundtable on incidental or technical uses of copyright held on 1 May 2018 and that there are plans to appoint an external reference group to represent the views across the copyright stakeholder base. Nightlife supports this approach and further advocates for the inclusion of users and distributors of copyright as part of this stakeholder group.

Acknowledging that the Consultation Paper has outlined 2 options to address Flexible Exceptions:

- 1) Additional fair dealing exceptions; and
- 2) A fair use copyright exception;

Nightlife is limiting its response to the provision of additional fair dealing exceptions as it holds the view that this approach presents:

- the least interruption to Government;
- strengthens the rights of copyright owners; and
- provides clarity for end users and distributors.

Nightlife will only make comment on two key areas relevant to additional fair dealing exceptions:

- 1) Non-commercial private use - the existing 'time and format shifting' copyright exceptions do not adequately capture all potential non-commercial private uses
- 2) Incidental or technical use - certain uses of copyright material such as through indexing or caching is required as part of the normal operations of many online service providers.

Non-commercial private use

Nightlife has only one key concern with respect to proposed exceptions for non-commercial private use. Non-commerciality should be a mandatory condition of any private use exception. There is a widening gap between the use of licensed and un-licensed services in public performance environments and in lieu of the lack of infringement policies from the rightsowner stakeholders, we would urge a more punitive approach that is governed by the reform intended as part of this consultation. This will serve to address concerns from creators, users and distributors where ambiguity is fostered and 3rd parties profit where services specifically intended for private use only are being commercialised. By way of reference, consumer streaming services (both for sound recordings and music videos) in the Australian market are licensed for private use only by the rights owners. These services are being used in commercial contexts and are at levels of epidemic proportion. As a retrofit approach, collection societies are relying on the premise of content caching as reproduction to issue a tariff for that use, despite those rights being explicitly not granted for

commercial contexts. It is crucial that these rights are upheld as this presents a number of going concerns for both rights holders and end users and reasonable steps to prevent infringement should be paramount.

Incidental or technical use

Nightlife supports the introduction of a specific exception on incidental technical use provided that the exception is technology neutral, is not temporary and provides an avenue to allow uses not currently covered under the existing exceptions. Provided the reproduction and / or communication of copyright material is an essential part of the technological process that provides use of those copyrights via a lawful use, then this should satisfy rightsowners concerns with respect to un-lawful exploitation. The position of Nightlife is that the best approach to adding fair dealing exceptions is directly within the Copyright Act. This will ensure that the new exceptions are enshrined at law and subject to strict controls as a precondition to amendment or removal.

Access to Orphan Works

Question 5

To what extent do you support each option and why?

- statutory exception
- limitation of remedies
- a combination of the above

The position of Nightlife is that the best approach to facilitating use of orphan works is 'limitation of remedies' in alignment with the associated recommendations made by the Productivity Commission.

Question 6

In terms of limitation of remedies for the use of orphan works, what do you consider is the best way to limit liability? Suggested options include:

- restricting liability to a right to injunctive relief and reasonable compensation in lieu of damages (such as for non-commercial uses)
- capping liability to a standard commercial licence fee
- allowing for an account of profits for commercial use

Allowing for an account of profits for commercial use is the most equitable remedy where any copyright material is being exploited. In any commercial use case, the end user of copyrighted material not only has an obligation to seek out and obtain the requisite licenses for content use but also must account for that use. Where the rights cannot be reasonably identified or located, then those same accountability measures should still be in place such that, use and ultimately revenue can be reported and returned to the rightful copyright owner.

Question 7

Do you support a separate approach for collecting and cultural institutions, including a direct exception or other mechanism to legalise the non-commercial use of orphaned material by this sector?

While not directly related to Nightlife's core business activities, this solution appears not to present any real threat to copyright owner's rights, particularly where non-commercial use is the underlying fundament.