

**COPYRIGHT LAW REVIEW COMMITTEE: COPYRIGHT AND CONTRACT
SUBMISSION BY
AUSTRALIAN RECORD INDUSTRY ASSOCIATION ("ARIA")**

ARIA is pleased to make a submission to the Copyright Law Review Committee's ("CLRC") Issues Paper.

- 1 We note and agree with the submissions by the International Intellectual Property Alliance ("IIPA"), the International Federation of Phonographic Industries ("IFPI") and the Phonographic Performance Company of Australia Ltd ("PPCA"). Accordingly, we do not propose to set out the same observations in this submission.

We note that the reference is primarily concerned with licences to use copyright works, especially those regarding digital subject matter where the licences may contain clauses that purport to exclude or modify the statutory exceptions to copyright infringement. We also note that the reference is concerned with any other types of agreement that purport to exclude or modify the copyright exceptions, and the effect that such agreements might have on the balance between copyright owners and users.

In many ways the record industry's experience is the opposite to the primary concern of the issues paper. The record industry is not at all characterised by conduct which seeks to modify copyright exceptions. Indeed, in regard to internet use the industry has been, and continues to be, subject to the massive unauthorised infringing use of its recordings by a multitude of users. This is due to various factors including the lack of adequate statutory provisions in many countries, inadequate technological protection measures and inadequate conduct by ISPs and telcos to ensure the minimisation of such infringing conduct.

Our members are unaware of any online or offline contractual terms used by record labels that exclude the exceptions under the Act.

Our industry believes there is no case for any further exceptions to be introduced in the Act.

- 2 In regard to issues 1 to 4, we confirm that the legitimate electronic trade in copyright material is still in its embryonic period and that there are a number of ways copyright owners can sell or licence their copyright products to consumers over the internet. In broad terms, copyright owners are seeking to identify where consumer on-line buying pattern

preferences lie and simultaneously protect against on-line infringement. The situation is fluid and will develop over time. As the IIPA has stated, the success of this new environment depends on a complimentary and evolving relationship between copyright and contract. The licence agreements that emerge may well draw the lines between permitted and prohibited conduct more specifically than the Act does. It may well be, for instance, that some copyright owners offer the end user in an electronic transaction use of a copy of a sound recording in a way which otherwise is proscribed by the Act. Such marketing conduct will emerge to the consumer's benefit via, in this case, the record companies' response to new legitimate marketing environments that may emerge.

Some marketing models implemented or proposed are as follows:

- (a) The offer for sale of record by download copies via the internet. The download sale transaction may allow for the making of one or more copies for personal use and may provide options in this regard;
- (b) Multi-part downloads – a sale of records by means of downloading via the internet, where the customer pays for the first part and if he or she wants, the payment of a further fee for second or other parts, with the result being the subsequent parts are unlocked.
- (c) Download or streaming subscription services – record companies may offer subscription services where the customer obtains a licence to stream or download any of thousands of recordings offered by the record company from its copyright catalogue. These services may be tailored to genre specific offers for the benefit of the consumer, for instance, rock, pop, light classical, jazz, blues, hip hop or dance.

As is evident from the above, record labels are approaching the internet retail supply channel with great flexibility.

- 3 We also note that under the present situation carve outs are numerous as indeed the Issues Papers documentation shows. In particular, we refer to the so called ephemeral provisions in section 107 of the Act which provides broadcasters with a 12 month period to maintain copies of sound recordings which otherwise would be infringements. The 12 month period is an excessive carve out period for the user broadcasters, and is in stark contrast to ephemeral periods provided in various other countries, e.g. for periods of up to one month.
- 4 In regard to Issue 4 it has always been our view that the provisions of the Act can be varied by inter parties agreement, except in regard to section 47H. We believe there is a good public policy reason for this as it allows

- the copyright owners and users to move with the times by negotiation rather than waiting years, and sometimes decades, for legislative changes to catch up. Further still, it may prove impracticable for legislation to deal with the many and varied electronic commerce supply arrangements that may emerge between copyright owners and users.
- 5 In regard to Issue 5, we believe that the legal remedies outlined in the issues paper apply in regard to licence agreements concerning copyright products. The statutes referred to such as the Trade Practices Act are comprehensive and far-reaching. We believe there is no case for any additional provisions to be enacted in this regard.
- 6 In regard to Issue 6, we believe that mass market agreements have arisen due to the necessity of the market place, and work to the benefit of the copyright owner and the users. We believe that the current statutory law and case law judgments that apply to such licensing arrangements are adequate and there is no need for further statutory provisions in this regard.
- 7 In regard to Issues 7 and 8, we refer to the IFPI and IIPA submissions.

END

Emmanuel Candi
Executive Director
ARIA
Sydney
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