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The Director
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Office for the Arts
Department of Infrastructure, Transport, Regional Development and Communications

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AMPAL Submission to the Discussion paper—Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions

AMPAL

The Australasian Music Publishers' Association Limited (**AMPAL**) welcomes the opportunity to make this submission in response to the Department's Discussion Paper – Exposure Draft Copyright Amendment (Access Reform) Bill 2021 & Review of Technological Protection Measures Exceptions (the **Discussion Paper**) and the Exposure Draft of the Copyright Amendment (Access Reforms) Bill 2021 (the **Exposure Draft**).

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

Music publishers invest in songwriters and composers across all genres of music. They play a critical role in nurturing and commercially exploiting the musical works of the songwriters they represent 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. AMPAL is also a member of the Australian Copyright Council, and we support its submission.

The Department has invited stakeholder views on the reform options and questions put forward in the Discussion Paper and on the Exposure Draft. We set out our comments below.

Introductory comments

AMPAL has participated in all recent major reviews of copyright law in Australia. As the discussion paper notes, 'Australia's copyright framework has been subject to extensive review over recent years'.¹ AMPAL has been deeply concerned by certain findings in recent reviews in relation to copyright,² and the creators that depend on the current certainty of Australia's robust, balanced and flexible copyright laws in order to encourage their innovation and to be rewarded for their creative efforts in advancing the cultural heritage of Australia. As the Discussion Paper notes, 'Copyright law is essential in incentivising creators and their industries to produce Australian content and receive payment for their

¹ Discussion Paper, p. 5.

² For example, as outlined in AMPAL's submissions in relation to the Productivity Commission's 2016 Intellectual Property Arrangements inquiry.

creativity...The Act seeks to balance the rights of copyright owners to manage and protect their content with the public interest to access that content'.³ It is hoped that in conducting this consultation and finding that balance, the Department will place appropriate weight on the value of the cultural contribution of Australian creators' works, 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...'.⁴ This aim of copyright law must be given sufficient consideration by the Department.

A framework for assessing intellectual property arrangements that stresses effectiveness, efficiency, adaptability and accountability, as has guided recent reviews of copyright⁵ is a sound starting point. However, this analysis obviously fails to identify equally important factors 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'.⁶

Nonetheless, the remarkable economic significance of Australia's copyright industries was highlighted by PricewaterhouseCoopers (PWC) in 2020.⁷ In its report, PWC found that Australia's copyright industries employed just over 1 million people (8.3% of Australia's workforce), generated economic value of \$124.1 billion (6.8% of GDP, and the fifth largest industry by value added in the Australian economy) and generated over \$4.8 billion in exports (1.5% of total exports). Creative Industries are strong contributors to employment growth, growing 40 per cent faster than the economy as a whole.⁸ The music industry is a highly innovative and productive industry, comprised of many small local-tax-paying businesses, and accounts for a significant part of this economic contribution. With respect to music publishing, AMPAL's annual survey of its members in 2020 reported the value of the Australian and New Zealand music publishing sector at more than AUD\$300 million a year.⁹

AMPAL also notes that 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 the songwriters they represent 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 and distribution of songwriters' income on a global basis and they create new income streams for songwriters by facilitating licences within the continually 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 songwriting talent; and licensing their works in

³ Discussion Paper, p. 5.

⁴ <http://www.wipo.int/copyright/en/> (last accessed 21 February 2022).

⁵ Department of Communications and the Arts' 'copyright modernisation consultation paper', p. 5.

⁶ Ruth Towse, 'Cultural Economics, Copyright and the Cultural Industries', *Society and Economy in Central and Eastern Europe*, Vol 22, No 4, 2000, pp. 107-126.

⁷ https://www.copyright.org.au/static/ACC_pdf/The_economic_contribution_of_Australia%E2%80%99s_copyrig ht.pdf (last accessed 23 February 2022).

⁸ ARC Centre of Excellence for Creative Industries and Innovation (CCI), Queensland University of Technology, 'Australian Creative Economy Report Card 2013', 2013.

⁹ <https://www.ampal.com.au/news-and-events/2021/10/29/australian-and-new-zealand-music-publishing-industry-valued-at-more-than-aud300-million> (last accessed 23 February 2022).

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 is an abundance of digital services available to the Australian public. These services are gaining traction but the market is still developing.

The music industry has been transformed in the digital age, and the industry has been innovative in adapting. Music copyright owners including music publishers have comprehensively demonstrated their flexibility in licensing a broad range of new digital music services. The Digital Content Guide¹⁰ sets out the range of these services. 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 Digital Content Guide indicates the availability of music immediately, globally and at a variety of price points - including (ad-supported) free. It is important to note that Australia has repeatedly been one of the earliest markets for the launch of new global music services by licensees. Those with a viable business model have been able to receive the licences they need. Clearly our copyright laws have not prevented services such as iTunes, Apple Music, Spotify, Amazon and others from successfully establishing themselves in the Australian market, nor have copyright laws acted as a disincentive to innovation. In contrast, these services have chosen not to enter territories where copyright protection is weak.

What has made the ongoing transition for the music industry possible is a strong, flexible copyright framework providing certainty for creators and other copyright owners, as well as licensees. Australia's intellectual property 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. AMPAL notes the Hon. Karen Andrews MP's, then Parliamentary Secretary to the Minister for Industry and Science, comments in relation to Australia's intellectual property arrangements: 'Australia has a world class IP system that is consistently ranked in the top tiers across the range of global measures. A well-functioning and effective IP system is important to underpin Australia's innovation, trade and investment efforts'.¹¹

AMPAL submits that any 'modernisation' of copyright should not mean weakening the rights of creators and copyright owners. The discussion paper states that 'If the law does not keep pace with new technologies and emerging practices, activities that were allowed under copyright exceptions may fall out of scope and become remunerable'.¹² AMPAL disagrees that the first response to the impact of technology on the copyright regime should be to broaden the scope of existing exceptions or to introduce new free exceptions. AMPAL respectfully notes that this is reflected in the framing of some of the proposals in the Discussion Paper and the Exposure Draft, which then require a justification of the current copyright system.

Comments on the Discussion Paper and Exposure Draft

AMPAL makes the following comments in relation to the Exposure Draft and the Discussion Paper, referring to the schedules as set out in the Discussion Paper.

Schedule 1: Limitation on remedies for use of orphan works

AMPAL notes that significant practical and legal protections currently exist for users of copyright material where a reasonable attempt to locate the relevant rights holder has failed. Practically, it is

¹⁰ <https://digitalcontentguide.com.au/> (last accessed 23 February 2022).

¹¹ IP Australia, 'Australian Intellectual Property Report 2015', 2015, p. 3.

¹² Discussion Paper, p. 7.

extremely unlikely that where a rights holder cannot be located through adequate and appropriate searches, an infringement action would be brought against that user by a copyright owner. It is also common for retroactive licences to be issued by rights holders in respect of past unauthorised uses of a copyright work once discovered, so that such a licence can be entered into by a rights holder that is subsequently discovered following the use of a suspected orphan work. Furthermore, legally, the copyright user would also be entitled to the protection provided under section 115(3) of the *Copyright Act 1968* (Cth) (the **Copyright Act**) where a defendant has no reasonable grounds for suspecting that the act constituted copyright infringement.

In addition, the issue of orphan works is perhaps less relevant to the music industry than other copyright industries. APRA AMCOS maintains a comprehensive database of musical works that have been commercially exploited in Australia. Much work has also been undertaken by the international music industry to implement a structure of standards and formats to support the automated exchange of information along the digital supply chain.¹³

Nonetheless, AMPAL is supportive of sensible and balanced measures to facilitate uses of orphan works, and endorses the position of the Australian Copyright Council in relation to certain non-commercial uses of orphan works (e.g. by cultural institutions), provided that a diligent search has taken place and that there should be fair compensation for past use where a copyright owner is identified. We refer to the Australian Copyright Council's comments on the proposals in the Exposure Draft. Furthermore, any collective licensing scheme must not permit mass digitisation of orphan works. AMPAL also submits that any exception must not extend to intermediaries or service providers.

Schedule 2: New fair dealing exception for non-commercial quotation

From the outset, AMPAL notes that the Copyright Act already includes broad provisions for the use of quotations. AMPAL submits that any new fair dealing exception for quotation must not undermine the highly commercial, established business of licensing samples, mash-ups and remixes nor impede a copyright owner's commercial control over their intellectual property. If there were to be a new fair dealing exception for quotation, to the extent permitted by Australia's international obligations, in AMPAL's submission it should only apply to private or domestic non-commercial use, and should not extend to subsequent, public uses.

It would be a Berne Convention requirement of any exception that the excepted use did not conflict with the normal exploitation of the copyright material and did not unreasonably prejudice the legitimate interests of the owner of the copyright. Separately, the moral rights provisions of the Copyright Act would obviously apply.

In relation to sampling, mashups and remixes, it must be emphasised that there are longstanding and effective commercial practices in the market for licensing. The music publishing industry is very familiar with the issue of sampling. It is a part of a music publisher's role to deal with requests to sample a songwriter's work into a new work. In deciding whether to issue such a licence the publisher will take into account how the sample is being used, the effect on the market for the original work, and most importantly the attitude of the original creator.

A US-style fair use exception is not required nor desirable – AMPAL believes it is entirely appropriate that a songwriter or composer can choose how and where their original work is used. The broader fair use exception in the US has led to a prevalence of unauthorized samples, mash-ups and remixes. As a result many of these have been uncontested by copyright owners in the US, further undermining their rights. We see no reason why consideration should be given to a free use exception to take the

¹³ See for example: <http://www.ddex.net/> (last accessed 23 February 2022).

heart of a song and include it in another work without the approval of the copyright owner. How could this not be an assault on the moral rights of the original creator?

Any consideration of a fair dealing exception for quotation must address these concerns. AMPAL submits that the proposal for a fair-dealing exception for non-commercial quotation as contained in the Exposure Draft is unnecessary. AMPAL endorses the further comments of APRA AMCOS and the Australian Copyright Council on this matter.

Schedule 3: Update and clarify library and archives exceptions

AMPAL respects the work of libraries and archives, and their importance in the Australian cultural sector. Libraries and archives enjoy extensive rights under the existing legislation. AMPAL is not aware that these provisions are unworkable. AMPAL does not agree that further broad exceptions relating to libraries and archives should be granted, particularly given the extensive range of these institutions and their activities throughout Australia.

AMPAL refers to the further comments of APRA AMCOS and the Australian Copyright Council in this regard.

Schedule 4: Update and restore education exceptions

AMPAL strongly supports the use of music in education. AMPAL submits that the educational statutory licences in parts VA and VB of the Copyright Act contain extensive permissions for the use of copyright material, and do not require any extension. AMPAL also refers to the voluntary licensing arrangements that have been struck between APRA AMCOS and educational institutions (including during the COVID-19 pandemic for online learning), which demonstrate the effective licensing market that exists beyond the limits of the statutory licences, which should not be disrupted. In relation to any proposed expansion of educational exceptions under the Copyright Act for certain educational uses, AMPAL also draws the Department's attention to the fact that the print music business has been severely affected by the distribution of unauthorised copies on the Internet. There are a limited number of companies producing print editions of Australian music for use by educational institutions. The provision of music education into schools is different to the provision of other subjects. Most music publications for education are used outside the classroom for individual or small group tuition, or by school choirs or bands.

The cost of producing high quality transcriptions in a small market is considerable. AMPAL is concerned by the potential for any further undercutting of the financial viability of these specialist publishers and the contributions they make to the Australian music industry through the broadening of statutory licences or fair dealing exceptions.

The public performances of literary, dramatic and musical works, and sound recordings and cinematograph films shown in a classroom setting for an educational purpose are currently permitted under s 28 of the Copyright Act. AMPAL opposes the repeal of section 28 of the Copyright Act and the inclusion of the new sections 113MA, MB, and MC. AMPAL refers to the further submissions of APRA AMCOS and the Australian Copyright Council on this matter.

AMPAL does not support the proposed amendments to section 106 of the Copyright Act in relation to the playing of sound recordings in public. AMPAL submits that instead, it is appropriate that section 106 should be drafted to mirror the provisions of section 46 of the Copyright Act in relation to works. This is preferable for consistency within the Copyright Act, and to avoid the potential significant harm to creators that would result from the proposed expansion of the exception contained within section

106 under the Exposure Draft.

Schedule 5: Streamline the government statutory licensing scheme

AMPAL is not aware of any reasons for reform of the Copyright Act in relation to governments. Governments are already afforded extensive privileges under the Copyright Act. AMPAL also notes the well-functioning voluntary licence schemes in place between APRA AMCOS and all levels of government, and respectfully submits that section 183 of the Copyright Act remains appropriate for government and that no further exceptions are necessary in this regard. AMPAL refers to the further comments of APRA AMCOS and the Australian Copyright Council on this item.

Conclusion

AMPAL thanks the Department for the opportunity to make this submission. We reiterate the economic and cultural importance of the work of music publishers and the songwriters and composers they are privileged to represent, and again note that Australia's IP system has adapted well to changes in economic, commercial and technological changes in the past. If it remains as a robust IP framework, it will continue to do so into the future. AMPAL is hopeful that the Department 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 proposals. AMPAL looks forward to working further with the Department throughout that process.

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