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Response to discussion paper: Performers' Intellectual Property Rights

Introduction

We support Australia's accession to the WIPO Performances and Phonograms Treaty (WPPT). We wrote to the Attorney-General and the Minister for Communications and the Arts on 4 March 1997 urging the Government to sign and implement this treaty.

Responses to key issues (Part 1)

General issues

1.1 What difference will the introduction of performers' moral and additional economic rights make, in practice, to performers in Australia, given the existence of some performers' rights under Part XIA of the Copyright Act, and the system of industrial awards and contracts which generally apply in Australia?

In contrast to the existing rights under Part XIA, performers will have rights in relation to a range of uses of authorised recordings of performances, and moral rights. The only right performers currently have in relation to an authorised recording is where a sound recording of a performance is used in a film, and the recording was not initially authorised for that purpose.

In contrast to industrial awards and agreements, performers will have a legal basis for negotiating directly with end users of authorised recordings, and the opportunity to establish income streams which are independent of the maker of the first recording of a live performance.

1.2 Where will the balance of costs and benefits lie with the introduction of performers' economic rights? If performers receive increased remuneration, will this come from higher prices or from reduced returns for other elements of the entertainment industry?

Performers will be entitled to receive payment for uses of their recorded performances; in many cases, this will be equitable remuneration determined by the Copyright Tribunal in the absence of agreement between the parties. The cost to the user will represent the value of the performance to the user.

1.3 Whatever gains or losses result from the introduction of the proposed moral rights, does Australia have any alternative in the long run to adhering to and implementing the WPPT, given the early indications of its wide international acceptance?

In our view, introducing moral rights for performers will benefit performers without creating an undue burden on those obliged to attribute performers and to respect the integrity of their performances. Moral rights should be introduced for performers irrespective of Australia's treaty obligations, but international practice is obviously an important factor to take into account when determining the position for Australia.

Specific issues

Moral rights

1.4 Is the scheme of moral rights for authors of works and directors and producers of films in the Copyright Amendment Bill 1997 an appropriate model, with appropriate adaptation, for implementing performers' moral rights as provided for in the WPPT?

Yes.

1.5 Is there any reason why performers' moral rights should not be waivable? If they are waivable, at what stage should waiver be exercisable - at the point of commissioning the performance, or on its completion?

In our view, moral rights should never be waivable, because of the risk that performers in a lesser bargaining position may be routinely compelled to waive their rights in order to get work. The result would be that the rights intended to benefit performers would have no practical effect. The consent of an author or performer to a particular act or omission is a sufficient defence.

Live performances

1.6 Do the existing performers' rights in Part XIA of the Copyright Act effectively implement the rights of performers over their live performances as provided for in the WPPT?

Yes, except in relation to communication to the public.

Recorded performances

1.7 Do the performers' rights in relation to sound recordings provided for in the WPPT constitute a reasonable package of rights?

Yes, subject to our concerns about the implementation of Article 15, and the proposals in the discussion paper regarding assignability and employees.

1.8 Should the proposed performers' rights of reproduction, distribution and making available on-line be subject to the same limitations and exceptions as apply to the counterpart rights of producers of sound recordings?

Yes, provided they comply with the “three step test” in Article 16(2) of the WPPT, and subject to our response to *Copyright Reform and the Digital Agenda* and our submissions to the Copyright Law Review Committee in response to the Committee’s five issues papers on exceptions.

Rental right

1.9 Given that the WPPT does not require Australia to provide for a performers' rental right in sound recordings, and that producers of sound recordings have uniformly refused to licence rental of their recordings, should the proposed new performers' rights exclude a rental right?

We disagree with the interpretation of Article 9 put forward in the discussion paper. According to that view, countries which already grant performers a rental right must continue to do so, and countries which do not grant the right have no obligation to do so. It is difficult to reconcile this view with the role of a treaty in setting new international standards.

In our view, Article 9 requires countries to grant performers a rental right, but allows a country to meet this obligation by providing for equitable remuneration if it had such a provision in place on 15 April 1994 (our understanding is that Japan is the only country in this position).

Irrespective of the treaty obligation, we submit that performers should be granted a rental right. We do not know whether or not the current practice of owners of copyright in sound recordings will continue, and if a market for rental of sound recordings develops, performers should benefit. We envisage that this right would be collectively administered, whether it is granted as a statutory licence or as an exclusive right.

Right in relation to broadcasting and playing in public of sound recordings

1.10 Should performers be given a legal right to a share of the remuneration now payable for the broadcasting and playing in public of sound recordings? If so, what impact on the incomes of performers is this likely to have?

Performers should be given a legal right to receive equitable remuneration for the broadcasting and communication to the public (including public performance) of their recorded performances. Owners of copyright in sound recordings should also be entitled to equitable remuneration for the broadcasting and public performance of their recordings. These two allocations can be made as a single payment to one collecting society, but each allocation must be considered separately.

In our view, any payments performers currently receive under their contracts with record companies and/or from PPCA should be regarded as being based on their contribution to the recording costs of sound recordings; where the recording costs are initially paid for by a record company, the record company recoups those costs from the performer’s royalties. Performers thus pay for some, and in some cases all, the costs of recording.

1.11 What mechanism should there be for dividing the remuneration between existing producers and performers, or should the division be a matter for negotiation between them with recourse to arbitration by the Copyright Tribunal failing agreement?

In our view, the legislation should provide that the distributable income should be equally divided for distribution between the owners of copyright in sound recordings and the performers.

1.12 Should performers have equal standing with producers in applications to the Copyright Tribunal in relation to the level of royalties to be paid for the broadcast or playing in public of a recording?

Yes. As noted above, although there should be one payment relating to both the sound recording and the performance, our view is that determination by the Tribunal about what is equitable remuneration for performers is separate to determination by the Tribunal about what is equitable remuneration for owners of copyright in sound recordings.

1.13 Should performers be given the same right as is proposed for producers of sound recordings over use of their recordings in subscription broadcasts?

Yes.

Collective administration

1.14 Is the proposal for a single collection body a practical and fair arrangement for performers?

Yes, provided there are adequate safeguards to ensure that the performers' interests are looked after by the society, including provisions to that effect in the Copyright Act. It may be appropriate that other bodies, including other collecting societies, are involved in the distribution of the money collected.

1.15 Should the single collection body be the Phonographic Performance Company of Australia Ltd (PPCA) or another collection agency?

This should be a decision for the Attorney-General, based on applications to operate as the society by organisations complying with requirements in the Copyright Act.

1.16 Is there any need for the proposed legislation to require collective administration of any of the proposed new performers' exclusive rights?

We think that some of the rights should be subject to statutory licence and collectively administered (such as broadcasting and public performance). Performers may also elect to appoint the collecting society to administer rights which are not subject to statutory licence (such as the reproduction of recorded performances for certain purposes).

Assignability of rights

1.17 Should the proposed performers' rights over reproduction, distribution and making available on-line be made assignable?

Our preferred position is that none of the rights be assignable, but at least the rights which are subject to statutory licence and administered by a collecting society should not be assignable.

1.18 Should the existing rights over unauthorised use of live performances and the proposed right to share in the remuneration for broadcasting and public performance of sound recordings be unassignable? In the case of employed performers, should the default position be that the employer owns the rights?

No, but consideration could be given to enabling record companies with exclusive recording agreements to institute legal proceedings in respect of unauthorised recordings (as is the case in the Copyright Designs and Patents Act (UK)). This could be done by similar provisions as those applying to exclusive licensee of copyright.

We oppose the vesting of performers' rights in employers.

Application of new rights to existing sound recordings

1.19 What problems, if any, would there be under existing contractual arrangements if the proposed new performers' rights were to attach to existing sound recordings?

The rights should apply to acts or omissions occurring after the commencement of the new provisions, in relation to both existing and future recordings. We oppose the suggestion that foreign performers be given more extensive rights than Australian performers.

The legislation could provide that the rights are not infringed by an act to which the performer consented in a contract made before the commencement of the new provisions. Under the Copyright Designs and Patents Act (UK), performers' rights are not infringed by doing something in pursuance of arrangements made before the commencement of the performers' rights provisions.

1.20 Should performers' moral rights also be made applicable to existing sound recordings, even though this is not required under the WPPT?

Yes. We think that a performer's consent and the defence of reasonableness are sufficient limitations on performers' moral rights.

Audiovisual performers' rights

1.21 Should Australia follow the European approach and extend performers' rights to authorised audiovisual recordings (films, television programs and some multimedia)? If so, what would be an appropriate package of performers' rights in such recordings?

Yes.

Performers whose performances are recorded on audiovisual media should have the same rights as performers whose performances are recorded on audio media. The only difference is that equitable remuneration payable for broadcasting and communication to the public of performances recorded on audiovisual media need not be part of a “single payment”, although we envisage these rights as being subject to statutory licence and collectively administered for performers. The result may be that the owner of copyright in a film receives payment direct from the user, whereas the performers receive payment through their collecting society based on statistical information about the use of their performances.

1.22 What stance should Australia take in the future international negotiations for a protocol to the WPPT on protection of audiovisual performances?

Australia should support the protocol to the WPPT.

Responses to proposals (Part 3)

The new rights must apply to performances recorded on audiovisual media

Our major objection to the proposals in Part 3 of the discussion paper is that they do not apply to performances recorded on audiovisual media. We think the Government must apply these rights to performances on audiovisual media to implement credibly its promise to “work with the performing arts community to devise workable performers’ copyright legislation which recognises the value attached to the recording and communicating of performances” (page 2 of the discussion paper). We do not understand the reference to “the performing arts community” to include users such as broadcasters. We do not think that there will be “reasonable acceptance” of performers’ rights by some parties until the Government actually introduces the rights.

As noted above, we think all the rights proposed should apply to performers irrespective of whether their performances are recorded on audio or audiovisual media.

Moral rights

We would support the addition and/or amendment of provisions in the proposed new Part IX to grant moral rights to performers. As noted above, we oppose a provision allowing waiver of moral rights.

Exclusive rights

Exclusive rights in relation to live performances

The existing rights in Part XIA would largely meet the requirements in the WPPT, but we think the right to communicate a live performance to the public required by Article 6 of the WPPT has a wider scope than the right in Part XIA to transmit a live performance to subscribers to a diffusion service.

Exclusive rights in relation to reproduction of recorded performances

As noted above, our preferred position is that none of the rights be assignable, but at least the rights which are subject to statutory licence and administered by a collecting society should not be assignable. Thus, for example, performers should be entitled to remuneration for the educational copying of television and radio programs, but this entitlement to remuneration should not be assignable. Similarly, if a compensation scheme for private copying were introduced, performers should have an unassignable right to remuneration under such a scheme.

While we accept that it is arguable that the WPPT may allow performers' rights to be assignable, there is clearly no requirement that they be assignable.

We strongly oppose the proposal that performers' rights should vest in an employer, particularly for rights subject to statutory licence and administered collectively. The existing rights in Part XIA vest in performers irrespective of whether or not they are employees, and we think this is the appropriate model for the new rights. This is particularly so, given that most "employed" performers are engaged for a particular project, often for a relatively short period of time.

We would accept the application of limitations and exceptions currently applying to sound recordings providing they meet the "three step test", and subject to the submissions we have made about some of those provisions in response to *Copyright Reform and the Digital Agenda* and to the Copyright Law Review Committee's five issues papers on exceptions in the Copyright Act.

Exclusive rights in relation to distribution of recorded performances

As you are aware, our view is that there should be no change to the provisions in the Copyright Act dealing with importation (sections 37 and 102), and distribution of unauthorised imports (section 38 and 103). We think it is likely that these provisions comply with the new international standard regarding a distribution right in the WCT and WPPT. Thus, our view is that provisions similar to section 37 and 38 should apply to performers.

If the distribution right is to be implemented in other ways, our view is that it should be implemented in the same way for performers as it is for other rights holders. We understand that the Government is intending to make proposals in relation to the distribution right in a forthcoming discussion paper, and we intend to respond to the proposals in that paper in relation to all rights holders.

Our view in relation to assignability and employees is the same as for the reproduction right.

Right to authorise rental

As noted above, we submit that performers should be granted a rental right, and we envisage that this right would be collectively administered, whether it is implemented as a statutory licence or an exclusive right.

Our view in relation to assignability and employees is the same as for the reproduction right.

Right of making available

Our view in relation to assignability and employees is the same as for the reproduction right.

Right to equitable remuneration for broadcasting & communication to the public

We have made some comments about this issue above.

As stated above, we strongly oppose the proposal that the Government purport to implement the WPPT by merely giving performers a legislative entitlement to a share of the money currently collected by PPCA for the broadcast and public performance of sound recordings. A share of this money is currently paid to performers, but, as stated above, we understand that this is in recognition of the performers' investment in the recordings through recouped royalties. The Government must introduce a new right to equitable remuneration for performers, in recognition of the value of their performances. This remuneration can be paid at the same time as the remuneration for sound recordings, but must be assessed separately to the remuneration payable to owners of copyright in sound recordings.

We disagree with the view in the discussion paper at paragraph 3.35 that "the performers' right to a share of equitable remuneration for broadcasting, transmission to the public and playing in public of sound recordings is in effect optional". Article 15(2) requires the payment to be shared between producer and the performer, irrespective of whether the payment is initially claimed by (ie paid to) the producer or the performer or both.

In response to paragraph 3.37, we have commented above about the collecting society.

In response to paragraph 3.38, we oppose the reservation for "indirect" communication to the public of sound recordings proposed in the discussion paper *Copyright Reform and the Digital Agenda*, and we submit that section 199(2) should be repealed.

In response to paragraph 3.38, we repeat the submission we made in our response to the proposals in *Copyright Reform and the Digital Agenda*: section 109 should be repealed, and licence schemes relating to all broadcasting of sound recordings should be subject to the Copyright Tribunal's jurisdiction. If this submission is rejected, we support amendments to remove the "ceiling" on the amount payable in section 152.

In response to paragraph 3.40, it may be acceptable for the performers' right in relation to subscription broadcasts to be a right to equitable remuneration (rather than an exclusive right) administered by a collecting society.

Exceptions and limitations

We have no difficulty in principle with the performers' reproduction right being subject to the same exceptions and limitations as apply to other rights holders, subject to our comments about exceptions and limitations in our response to *Copyright Reform and the Digital Agenda*.

Technological measures and rights management information

We have no difficulty in principle with the application of the provisions proposed in *Copyright Reform and the Digital Agenda* relating to technological measures and rights management information to performers, subject to our comments on these proposals in our response to that discussion paper.

Transitional provisions (WPPT article 22)

We have commented above on this issue.

Yours sincerely,

Libby Baulch
Executive Officer
29 April 1998