

Australian Copyright Council

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Copyright Royalties for Music Played by Small Business

Submission to the House of Representatives Legal and Constitutional Affairs Committee

Thank you for providing us with an opportunity to make a submission in relation to this inquiry.

1. Australian Copyright Council

The Australian Copyright Council is a non-profit organisation. We are partly funded by the Australia Council. Information about our services and activities, and a list of the 25 organisations affiliated with the Copyright Council, are listed in the information sheet enclosed with our submission.

2. Purposes of copyright law

We submit that the following are the justifications for copyright protection, and that any changes to copyright law need to be considered in the context of these purposes:

1. to reward creative and intellectual endeavour;
2. to provide stimulus and incentive to innovate or create; and
3. to encourage respect for the value of intellectual and creative work.¹

3. International treaties

As the Committee is aware, Australia is a party to the Berne Convention. The rights which countries party to the Convention must give composers include:

- a) a right of public performance (Article 11(1)(i))
- b) a right of public communication of a broadcast of the work (Article 11bis(1)(iii))

3.1 Right of public performance

Article 11(1) relevantly provides:

Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:

- i) the public performance of their works, including such public performance by any means or process

The *WIPO Guide to the Berne Convention* confirms that this right covers performances by means of audio and audiovisual recordings, as well as live performances (page 64).

In relation to the meaning of “public”, Professor Ricketson in *The Berne Convention for the protection of literary and artistic works: 1886 to 1986* says:

... the following general principle can be derived from a study of the structure of the Convention. Article 11 deals with one of the author’s pecuniary rights, that is, one of the ways he can exploit his work. Accordingly, the right of public performance must refer to the author’s capacity to authorise performances of his work before his “public”, that is, those who are willing to pay for the benefit of hearing or seeing the work performed. This therefore will exclude only performances in the immediate family circle. [paragraph 8.71]

This has been the approach to the meaning of “public” taken by Australian courts, most recently in the High Court decision in *Telstra v Australasian Performing Right Association*.

3.2 Right of public communication of a broadcast

Article 11bis(1) relevantly provides:

Authors of literary and artistic works shall have the exclusive right of authorizing:

...

(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

Article 2(1) provides that “literary and artistic works” includes “dramatico-musical works” and “musical composition with or without words”.

In relation to Article 11bis(1)(iii), the *WIPO Guide to the Berne Convention* says:

The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or may not be for commercial ends.

The Convention’s answer is “no”. Just as, in the case of a relay of a broadcast by wire, an additional audience is created ... so, in this case too, the work is made perceptible to listeners (and perhaps viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work. [pages 68-69]

4. Practical implications of copyright for composers

Most composers do not receive a salary or fee for creating new music; their income derives from the sale and licence of their copyrights.

The income from any particular work will depend on how often it is recorded, broadcast and played; the more often it is used, the higher the income. People pay

for the benefit they receive from the use of the music. The benefit may be indirect: for example, businesses play music in the workplace because it makes a more pleasant environment for their employees, and this indirectly benefits their business.

The fact that one person benefits from the use of a musical work does not diminish the benefit to another person who uses the same work. For example, the benefit to a radio station playing music may be to attract more listeners and more advertising revenue; the benefit to a person playing music in a shop, for example by playing CDs or having the radio on, is to create a pleasant environment for customers.

5. Our experience in dealing with enquiries about performance of music

Our services include giving free legal advice and information about copyright to members of the public. We receive 80 to 100 calls a day; most of these are from people seeking information or advice about copyright. About half of these enquiries are dealt with by a staff lawyer. Enquirers who do not receive free legal advice usually receive information in relation to their enquiry.

Our enquirers include both creators and users of music. People who contact us about public performance of music usually want to know what the law is and what their obligations are, and may also want to know whether APRA and/or PCCA is a legitimate organisation. In addition, many callers want to know the difference between APRA and PCCA and why they are being asked to take out a licence in relation to the playing of sound recordings when they already have a licence with APRA. Some callers want to know how the fees collected by APRA and PCCA are distributed to copyright owners.

Many callers have already contacted APRA and/or PCCA, and have contacted us for independent advice or information.

Our experience is that enquirers who contact us when they receive an invoice or letter of demand from APRA or PCCA often do not recall having received earlier correspondence from APRA or PCCA about their copyright obligations, although we understand from APRA and PCCA that such correspondence has been sent.

In most cases, we deal with enquiries about performance of music by sending or faxing our information sheet *Playing music: copyright, APRA & PCCA* (we have enclosed a copy with this submission). In the first half of this year, we posted or faxed at least 200 of these. This information sheet is also available on our Internet web site.

6. The Copyright Tribunal

We think the Copyright Tribunal is the most appropriate forum for small businesses seeking review of licence fees.

We understand that the Copyright Tribunal's current powers, particularly those in sections 156 and 157, allow it to take into account the matters set out in paragraphs (b) and (c) of the Committee's terms of reference. There is no need to change to the law.

There have been a number of instances where people have appeared before the Copyright Tribunal without legal representation. Our understanding is that a small business, or an organisation representing small businesses, could make an application to the Copyright Tribunal and raise the matters set out in paragraphs (b) and (c) of the Committee's terms of reference in relation to an existing licence scheme, or a licence scheme not yet formulated or in operation.

We have enclosed for the Committee's information some papers from a 1995 seminar about the Copyright Tribunal (published as a special issue of the *Copyright Reporter*).

7. Public performance of broadcast sound recordings

We support the submission by the Australian Record Industry Association (ARIA) that section 199(2) should be repealed.

8. Possible changes to the law

We oppose any diminution of the copyright rights of composers; many composers are dependant on these rights for their livelihood. In addition, any diminution is likely to be inconsistent with Australia's international treaty obligations.

Small businesses are not obliged to play music, and are thus not obliged to pay the copyright fees. In any case, we submit that the fees are low, and that neither the fees nor the procedures for taking out a licence are an unreasonable burden for small businesses. In addition, small businesses have recourse to the Copyright Tribunal in relation to the amount of the licence fee and other aspects of licence schemes.

9. Awareness about copyright

From our experience, there is still a lack of awareness and understanding in many areas of the community about the purposes of copyright law, and about copyright rights and obligations. The task of improving awareness and understanding of copyright for people who have not sought that information can be hampered by a sense of "information overload" on their part, and it can be difficult to find effective ways of communicating information about copyright to people who find they already have a lot of other new information to deal with. Nevertheless, we submit that the way forward is to improve awareness and understanding of copyright in small businesses – not only about their copyright obligations to others, but also about protection of copyright materials they may be producing.

10. Further information

We have enclosed some of our publications which may assist the Committee in its inquiry. We have also enclosed a publication list, and would be happy to provide copies of other publications which may assist.

We would also be happy to provide the Committee with further information in relation to matters raised in our submission, or in relation to copyright generally.

Libby Baulch
Executive Officer

Encl.

Information sheet about the Australian Copyright Council
Information sheet #10 *An Introduction to Copyright in Australia*
Information sheet #12 *Music & Copyright*
Information sheet #20 *Playing music: copyright, APRA & PPCA*
Publication #70 *Music & Copyright*
Copyright Reporter Vol 13 No 2 (Copyright Tribunal issue)
Copyright: An Economic Perspective
List of publications

¹ See further: Sam Ricketson, "The Copyright Term" (1992) Vol. 23 No. 6 *IIC*, 753; Gillian Davies, "Underlying Principles Governing Copyright Legislation" in *Copyright and the Public Interest* (1994) IIC Studies, Max Planck Institute, Munich 1994; S M Stewart, "The Ideology of Copyright" in *International Copyright and Neighbouring Rights* 2nd Ed, Butterworths, London, 1989.

See also Article 27 of the United Nations Universal Declaration of Human Rights, which states:

Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This principle is also stated in Article 15 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966.