

Chapter 1

Introduction

Inquiry process

1.1 The House of Representatives Standing Committee on Legal and Constitutional Affairs commenced its inquiry into copyright, music and small business on 30 July 1997 at the request of the Attorney-General, the Hon Daryl Williams AM QC MP.

1.2 The inquiry was advertised in the *Weekend Australian*, the *Financial Review*, the *Sydney Morning Herald* and the *Melbourne Age* on 2 August 1997. The advertised deadline for submissions was 15 September 1997, although the Committee received and accepted submissions after that date.

1.3 The Committee received over 200 written submissions and numerous exhibits.¹ The Committee also held public hearings in all capital cities, as well as in North Queensland.²

1 The names of those persons and organisations that made submissions are listed at Appendix A. A list of exhibits is at Appendix B.

2 The full list of venues and dates for public hearings and the names of those persons who gave evidence before the Committee are listed at Appendix C.

Background to the inquiry

Summary of the present legal position

1.4 In most cases, a person wanting to play music in public in Australia must first obtain permission from the owner of the copyright in the music. Permission may be granted by the copyright owner in the form of a licence. Copyright owners generally require the payment of a fee in return for the licence to use their music. Persons and organisations that are granted a licence by the copyright owners are referred to as licensees.

1.5 Copyright is a type of property right that recognises a person's creative skills and labour. Copyright gives rights by legislation to creators and producers to prevent the unauthorised use by others of their work. In Australia, the principal statute dealing with law about copyright and the playing of music in public is the *Copyright Act 1968*. As the Copyright Act is Commonwealth legislation, it applies in the same manner throughout Australia. The way in which Australia's copyright framework operates and interacts with international agreements is outlined in Chapter 2.

1.6 The arrangements for the licensing of the use of music are complex. Persons wanting to obtain licences to play music in public may need to deal with a number of different licensing organisations or individuals. This is because a number of separate copyrights exist in music and more than one person or organisation may own the relevant copyrights.

As an example, in a CD or a cassette there could be at least three kinds of creative material which are protected by copyright:

- the tune or musical work itself (protected as a ‘musical work’ by the Copyright Act);
- accompanying words or lyrics to the musical work (protected as a ‘literary work’ by the Copyright Act); and
- the recording of the music and lyrics contained in the CD (protected as a ‘sound recording’ by the Copyright Act).

The final product may be the result of the efforts of a number of different people – composers, songwriters, lyricists and record companies all may have contributed. Each of these parties will own a separate copyright in the music.

1.7 Music may be ‘played in public’ in a number of ways. For instance:

- by the live performance of musical works with or without lyrics;
- by the playing of recorded music by CD or cassette player;
- by playing a radio or television; or
- by playing a film or video that has music in the soundtrack.

1.8 The focus of the Committee’s inquiry is the playing of recorded music, either directly, through equipment such as a CD or cassette player, or indirectly, via a television or radio broadcast.

Representations to the Commonwealth Government

1.9 In the eighteen months preceding this inquiry, government departments and members of parliament received a large number of representations from small business people unhappy about being asked to pay a fee in order to listen to music in their businesses. Many of these businesses were small retailers who were objecting to having to pay fees for the use of background music. Petitions concerning the matter were presented to parliament.³ Addresses in parliament on the matter have indicated the nature of the concerns of small businesses. Some of these concerns were:

- that the methods used by copyright collecting societies to licence businesses were intimidating and threatening, and that the contents of the material sent to small businesses could easily be confused as junk mail or a hoax to extract money from small business;⁴
- that radio and television stations pay licence fees for the right to broadcast music and to require that businesses pay a fee to play music from radio or television is 'double dipping';⁵

3 House of Representatives, *Hansard*, 26 May 1997, p. 3986; House of Representatives, *Hansard*, 24 February 1997, pp. 1072–1073.

4 House of Representatives, *Hansard*, 10 October 1996, p. 5171; House of Representatives, *Hansard*, 16 June 1997, p. 5247; House of Representatives, *Hansard*, 25 June 1997, p. 6312.

5 House of Representatives, *Hansard*, 24 February 1997, pp. 1072–1073.

- that the requirement that a business have a licence in order to play background music for the benefit of staff rather than to attract or entertain customers is ill conceived and not the intended focus of the law;⁶
- that requiring small businesses to complete forms and pay fees to obtain a licence to play music is an additional administrative burden on small business that should be removed;⁷
- that the copyright collecting societies who grant licences for the playing of music in public should consider running an information or advertising campaign to educate people about the operation of the law, rather than simply demanding payment for licences and threatening legal action.⁸

Matters the Committee must take into account

1.10 The terms of reference require the Committee to have regard to a number of matters within the existing copyright framework. These matters are introduced in this section of the report.

6 House of Representatives, *Hansard*, 10 October 1996, p. 5170; House of Representatives, *Hansard*, 16 June 1997, p. 5246; House of Representatives, *Hansard*, 25 June 1997, p. 6312.

7 House of Representatives, *Hansard*, 28 June 1996, pp. 3193–3194.

8 House of Representatives, *Hansard*, 10 October 1996, p. 5171.

Australia's membership of international agreements

1.11 There are three existing international agreements which require Australia to conform to minimum standards and principles in protecting the rights of copyright owners. These agreements are:

- *The Berne Convention for the Protection of Literary and Artistic Works* (The Berne Convention);
- *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (The Rome Convention);
- *The World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS).

1.12 Australia is a party to all of these agreements. The details of the obligations imposed by the agreements in relation to the public performance right are discussed below in Chapter 2. The Committee understands the importance of these international agreements and has formulated recommendations which it believes are consistent with the international copyright framework.

1996 WIPO agreements

1.13 Australia is in the process of considering the following World Intellectual Property Organisation (WIPO) agreements:

- WIPO Copyright Treaty, and
- WIPO Performances and Phonograms Treaty.

1.14 These agreements extend existing rights to deal with network transmissions and communications on-line. The report deals briefly with these agreements and their relevance to this inquiry in Chapter 8.

Copyright Law Review Committee

1.15 The Copyright Law Review Committee (CLRC) is conducting an inquiry into the simplification of the Copyright Act. The terms of reference of that inquiry require the CLRC report on how to simplify the Act so that it can:

... be understood by people needing to understand their rights and obligations under the Act, with particular attention to simplification of the various provisions and schemes that provide exceptions to the exclusive rights comprising copyright ...⁹

1.16 The CLRC is required to take into account the recommendations and reports on intellectual property made to government by other relevant expert or advisory bodies. Evidence received by the Committee shows that copyright law is a difficult and complex concept about which there is a great deal of public confusion. The Committee hopes that the implementation of its recommendations will assist in clarifying the role of copyright in our community, and explaining the law to copyright users.

9 Terms of Reference 1(a).

The purpose of copyright in fostering the creation and performance of music

1.17 Many submissions and witnesses directed the Committee's attention to the importance of copyright in providing moral and financial recognition of the creative skills and labour that go into creating music:

It will disadvantage composers and performers if the law is amended to permit free use of musical works and sound recordings in commercial contexts in Australia. While the amounts of licence fees ... are modest, the amounts returned to composers and performers are significant when considered as a whole. The revenue is an essential incentive which encourages participation in the music industry and the creation of new Australian cultural product¹⁰

1.18 The Committee appreciates the importance of the copyright framework in encouraging Australians to create music.

The fact that creators of music are also operators of small businesses

1.19 Many submissions and witnesses from the music industry drew the Committee's attention to the fact that they, like the small businesses who are being asked to pay licence fees for their use of music, are also operators of small businesses with limited funding. Royalties from public performance often represent a significant part of their relatively small incomes. The Committee has taken this into account in formulating its recommendations.

10 International Managers Forum (IMF), *Submissions*, p. S547.

The Simpson Report

1.20 The *Review of Australian Copyright Collecting Societies* (the Simpson Report) was commissioned by the Commonwealth government. The report was presented to the relevant Ministers in June 1995. The report, conducted by Professor Shane Simpson, made a number of recommendations in relation to the activities of various collecting societies, including those that license music. The Committee notes these recommendations, and some of them are referred to in this report.

Established dispute resolution mechanisms

1.21 The Committee notes that dispute resolution procedures have been established by one copyright collecting society, and that another collecting society intends to introduce similar procedures. The details of these procedures are discussed in Chapter 7.

Scope of this report

Structure

1.22 The report is divided into eight chapters. Chapter 2 explains the complexities of the public performance right and includes an examination of legislation, case law and international treaties. It also provides background information about the nature and activities of those copyright collecting societies which are the focus of the inquiry. Each of the remaining chapters addresses one of the six specific matters set out in part one of the inquiry's terms of reference.

Evidence

1.23 The Committee received evidence from many musicians and small business people, as well as from independent, government and community organisations.

1.24 This evidence demonstrated a degree of anger in the business community about having to pay licence fees to listen to music. Much of this anger was directed against the collecting societies and their methods of licensing. Many businesses were not aware of the law in relation to public performance of music and had been playing music in their business for some time without a licence.

1.25 The Committee also heard evidence about the importance of royalties to musicians in enabling them to earn money from their work and to continue creating new compositions. Many musicians wrote to the Committee supporting the principle and actions of collecting societies, and asking the Committee to support the retention of the protection that copyright gives them.

Nature of recommendations

1.26 In making its recommendations, the Committee has been conscious of the conflicting banks of evidence from the business and music industries. The Committee has tried to strike a balance between these two industries, while complying with Australia's international obligations.

The Committee is aware that many of its recommendations relate to the conduct and activities of copyright collecting societies, which are private organisations. The Committee expects that these organisations will act on these recommendations voluntarily and that legislative change will not be necessary to ensure their implementation.

Cooperation by collecting societies

1.27 The Committee would like to thank both the Phonographic Performance Company of Australia (PPCA) and Australasian Performing Right Association (APRA) for their cooperation during the inquiry. The Committee is pleased that it was able to consult extensively with APRA before finalising its recommendation with respect to the use of radio by small business. The willingness of APRA to enter into these discussions has resulted in agreement by APRA to voluntarily introduce changes to its licensing scheme. The Committee believes these reforms should address the more pressing concerns of small business. APRA has also implemented other changes in its licensing activities over the course of the Committee's inquiry which should assist in addressing the problems raised by small business.¹¹

11 APRA, *Submissions*, p. S877.