Chapter 2

The public performance right

Introduction

2.1 The purpose of this chapter is to explain the source, nature and scope of the public performance right in the context of the copyright framework as a whole. It outlines the relevant legislative, judicial and international law and provides background about the copyright collecting societies which license the public performance right.

Copyright

2.2 Copyright is a form of property which exists in the product of a person's creative skill and labour. Music, written work, painting and photographs are all examples of works in which copyright can exist. Copyright gives creators certain exclusive economic rights in relation to their creations and prevents other persons from using those creations in certain ways without first obtaining their permission. Australia's legal copyright framework is set out in the *Copyright Act 1968*. The Copyright Act protects original literary, dramatic, musical and artistic works. It also protects sound recordings, films, sound and television broadcasts and published editions of works.

Types of copyright which arise in music

2.3 Music contains a number of different elements, each of which has its own separate copyright. These elements are:

- literary works – song lyrics;
- musical works – musical compositions, melodies or tunes; and
- sound recordings – the aggregate of the sounds contained on a CD, record or cassette (or any other device on which the sounds can be recorded).

2.4 In the case of a song recorded on a CD, each of these elements may have been created by a different person. For example, one person may have written the tune, another the lyrics and yet another made the recording. Each of these people owns a distinct copyright, and has certain rights attached to that copyright. In the case of musical and literary works, the author's copyright continues for 50 years after the death of the author. For sound recordings, the duration of the copyright is 50 years after the recording is first published.

Exclusive rights

2.5 Copyright owners have a number of exclusive rights, including the rights to reproduce and broadcast the material. Copyright owners may give permission for other people to exercise these rights. This permission may be granted by way of a licence. The licence can be granted subject to payment of a fee or royalty.

The right to perform in public

2.6 This inquiry is concerned with the right to perform the work – or cause a sound recording to be heard – in public. The public performance right that arises in 'works'[1] is treated separately in the legislation from the copyright which arises in a 'sound recording'[2]. The practical consequences that flow from this distinction are discussed later in this chapter.

'**perform**'

2.7 'Performance' is defined in the Copyright Act to include 'any mode of visual or aural presentation, whether the presentation is by the operation of wireless telegraphy apparatus, by the exhibition of a cinematograph film, by the use of a record or by any other means'[3]. This definition covers most circumstances in which music is played, including:

- playing recorded music on a CD or cassette player
- playing music on a radio or television
- playing a film or video which contains any musical content (background music, opening song or theme)
- performing music live.

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1 See section 31(a)(iii) *Copyright Act 1968.*

2 See section 85(b) *Copyright Act 1968.*

3 As defined in section 27 *Copyright Act 1968.*

'in public'

2.8 There is no definition of 'public' in the Copyright Act. Courts have interpreted the meaning of 'in public' and there is a body of case law on the matter. According to the Attorney-General's Department, the case law has established that if music is played in the presence of more than one person other than in private or domestic circumstances, it is likely that it will constitute a public performance.[4]

2.9 In the case of a business playing music, it is irrelevant whether the music is played for the benefit of staff or customers.[5] Authority for this principle is found in *APRA v Commonwealth Bank*.[6] In that case, eleven employees viewed a fourteen minute training video which included background music. The music could be heard plainly for a total of about 25 seconds. The television screen was not in a public area of the bank and was not visible to any customers. Justice Gummow held that a public performance had occurred:

> The occasion of the performance was the imparting of information by the employer to its employees and the musical work was used to facilitate that process. The audience was brought together by the commercial purposes of the respondent [the Bank] and their public lives as employees.[7]

4 Attorney-General's Department, *Submissions,* p. S770.

5 Attorney-General's Department, *Submissions,* p. S770.

6 *Australasian Performing Right Association Ltd v Commonwealth Bank of Australia* (1992) 111 ALR 671.

7 *APRA v Commonwealth Bank* 111 ALR 671 at 686.

2.10 The most recent judicial consideration of the meaning of 'in public' occurred in August 1997 in *Telstra* v *APRA*.[8] That case primarily concerned the diffusion[9] and broadcasting[10] rights in the Copyright Act. In reviewing the authorities, Kirby J referred to 'three broad principles relevant to the characterisation':[11]

1. Whether the performance is taking place in a 'domestic and private' setting

The presumption is that if the performance is not taking place 'in private' then it will be a performance 'in public'. The question applied is, 'were the people who made up the audience bound together by a domestic or private tie, or by an aspect of their public life?'[12]

2. Whether the performance occurs as 'an adjunct to a commercial activity'

The presumption seems to be that if the performance takes place in connection with a commercial activity, it will be a performance 'in public'.[13]

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8 *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* 146 ALR 649.

9 Sections 31 (1)(a)(v) and 26 *Copyright Act 1968.*

10 Section 31(1)(a)(iv) *Copyright Act 1968.*

11 *Telstra v APRA* 146 ALR 649 at 690.

12 *Telstra v APRA* 146 ALR 649 at 690–691.

13 *Telstra v APRA* 146 ALR 649 at 690–691.

3. Whether the audience forms part of 'the copyright owner's public'

If the nature of the audience is a group which the copyright owner would contemplate as being part of 'his' or 'her' public for the purpose of earning royalties, then it is likely that the performance is 'in public'. The emphasis is on the relationship between the audience and the copyright owner, and whether the copyright owner would be entitled to expect payment for the performance of the work.[14]

2.11 This is consistent with the international obligations which arise out of Australia's membership of various international conventions dealing with copyright. The details of these obligations are discussed later in this chapter.

Exceptions

2.12 The Copyright Act contains some specific exemptions to the public performance right.

Where persons reside or sleep

2.13 Sections 46 and 106(1)(a) of the Copyright Act allow music to be played at premises where persons reside or sleep without infringing the copyright in the work or sound recording. In 1959 the Spicer

14 *Telstra v APRA* 146 ALR 649 at 692–693.

Committee[15] commented on the issue of music in hotels and guest houses:

> In our opinion, a performance in a guest house or hotel to residents or their guests should not be treated as a public performance where there is a similarity between the type of performance given in such an establishment and the performance that a person might receive in his own home.[16]

2.14 The Committee notes that the Copyright Law Review Committee is examining the operation of this and other exceptions in the Copyright Act as part of its reference on the simplification of the Copyright Act.

Broadcasts containing sound recordings

2.15 Section 199(2) of the Copyright Act provides that a person who causes music to be played in public via radio or television *broadcasts* does not have to have a licence for the playing of the *sound recording*. A person playing music in these circumstances would only have to have a licence for the performance of *musical and literary works*. This can be contrasted with a situation where a person is playing *recorded music* (a CD, for example). In the latter case, the person will require a licence for playing the musical and literary works in public as well as a licence for causing the sound recording to be heard in public.

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15 This was the name given to the Committee appointed by the Attorney-General of the Commonwealth to consider what alterations are desirable in the copyright law of the Commonwealth. The report is referred to as 'the Spicer Report'.

16 The Spicer Report, 1959; para. 69, p. 18.

International obligations

Berne Convention

2.16 *The Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) establishes international standards for the protection of the rights of authors in relation to their musical and literary works. Australia became a signatory to the Berne Convention in 1928. Article 11 of the Convention grants authors of musical works the exclusive right of authorising:

> (i) the public performance of their works, including such public performance by any means of process;
>
> (ii) any communication to the public of the performance of their works.

2.17 Article 11bis makes it clear that the Berne Convention applies to public performances of musical works which occur by means of radio or television broadcasts. This article gives authors of literary and artistic works[17] the exclusive right of authorising:

> the public communication by loudspeaker or any other analogous instrument transmitting, by signs sounds or images, the broadcast of the work ... [18]

2.18 This makes it clear that the public performance of music by means of radio is a separate and distinct right to the broadcasting right.

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17 Literary and artistic works is defined to include 'musical compositions with or without words' in Article 2 of the Berne Convention.

18 Article 11bis(1)(iii).

'Public performance' undefined

2.19 The Berne Convention does not define 'public performance' for the purpose of Article 11. Nor does it outline the circumstances which constitute a 'public communication' for the purpose of Article 11bis. The Committee's attention has been drawn to the WIPO Guide to the Berne Convention which discusses these provisions.[19] In relation to Article 11bis, and the public communication of broadcasts, the WIPO Guide says:

> This case is becoming more and more common. In places where people gather (cafes, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc) the practice is growing of providing broadcast programmes.[20]

The broadcasting licence is stated to not cover the additional use of the broadcast in these sorts of circumstances. The WIPO Guide goes on to say:

> 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.[21]

Exemptions

2.20 There is nothing specific in the Berne Convention which allows exemptions to compliance with these provisions. However, it seems that there has been a long term understanding that some limited exceptions

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19 Dr Warwick Rothnie and Professor James Lahore, *Submissions*, p. S146.

20 Para. 11bis.11.

21 Para. 11bis.12.

are acceptable.[22] These 'minor reservations' are understood to apply to religious, charitable and patriotic celebrations.[23]

Rome Convention

2.21 *The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (Rome Convention) protects performers, and producers of sound recordings. Article 12 of the Rome Convention requires that 'equitable remuneration' be paid to performers and/or producers for the 'communication to the public' of sound recordings.

TRIPS

2.22 As a member of the World Trade Organisation (WTO), Australia must comply with the *Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS). Article 9.1 of TRIPS states that:

> Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.

2.23 Australia is already a signatory to the Berne Convention, so Article 9.1 does not impose any new obligations on Australia. However, TRIPS does ensure that there are mechanisms through which parties that

22 Attorney-General's Department, *Submissions*, p. S774; Dr Warwick Rothnie and Professor James Lahore, *Submissions*, pp. S143–S144.

23 Para. 11.6, WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works, Geneva 1978; Attorney-General's Department, *Submissions*, p. S774; Dr Warwick Rothnie and Professor James Lahore, *Submissions*, pp. S143–S144.

breach the Berne Convention can be brought to account. Part V of TRIPS provides for the resolution of disputes between members of TRIPS. The Committee's attention has been drawn to these provisions, and the potential to exposure to dispute resolution and enforcement measures of the WTO.[24]

2.24 There is some scope to limit rights under TRIPS Article 13, which provides that:

> Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

2.25 This test has been described as a three step cumulative test – the exception must be a special case, must not conflict with the normal exploitation of the work *and* must not unreasonably prejudice the legitimate interests of the right holder. Each of the three requirements must be met for an exemption to be allowable under the provision. Dr Warwick Rothnie and Professor James Lahore have argued that blanket exemptions covering a broad sector of the economy would probably be too broad to satisfy the 'special case' requirement. Any use of the music in a commercial context would probably conflict with the normal exploitation of the author's work. It is likely that any exemption which deprived copyright owners of royalties to which they would otherwise be entitled would be prejudicial to the interests of the right holder.[25]

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24 Dr Warwick Rothnie and Professor James Lahore, *Submissions*, p. S141.

25 Dr Warwick Rothnie and Professor James Lahore, *Submissions*, p. S145.

Copyright collecting societies

2.26 Copyright collecting societies are organisations which collect and distribute royalties to their members, who are copyright owners. Members of copyright societies agree that the society will administer their rights on their behalf. Usually copyright collecting societies issue licences to copyright users.

The rationale behind collecting societies

2.27 By joining copyright collecting societies, copyright owners are able to maximise the economic value of their creations and therefore their potential financial gain. There are obvious difficulties for copyright owners endeavouring to administer their rights on an individual level. They would have to identify every individual and organisation using their material, negotiate the amount of the royalty to be paid and collect the royalties. With music being used all over the world in various different ways, this would be an impossible task. Collective administration of the rights by a collecting society enables the necessary resources, expertise and funds to be dedicated to enforce the rights.

2.28 It is important to note that copyright collecting societies are not government authorities – they are private organisations which are administer property rights for their members. As such, the manner in which they collect and distribute the royalties is a matter for the members of the society alone – provided that the methods comply with the requirements of the law.

Copyright collecting societies in Australia

2.29 In Australia, there are a number of collecting societies which administer different rights for various copyright owners – they represent writers and book publishers, composers and music publishers, record companies, visual artists and film makers. The collecting societies which administer the public performance rights for composers and producers are the Australasian Performing Right Association (APRA) and the Phonographic Performance Company of Australia (PPCA).

APRA

2.30 APRA is a non-profit association of authors, composers and music publishers. It was established in 1926 and is the oldest collecting society in Australia. It has over 20, 000 members in Australia and New Zealand. Most composers are members of APRA.[26] APRA administers rights which exist within the *musical and literary works* of its members. Members assign the public performance, broadcasting and diffusion rights in relation to all of their compositions to APRA.

2.31 APRA issues licences to copyright users for these activities on behalf of its members. A person who plays music in a commercial environment is infringing copyright if he or she does not have a licence from APRA. This applies to situations where a person is listening to music from a radio or television broadcast (sometimes referred to as 'indirect' playing of recorded music) as well as to where a person listens

26 APRA believes that it represents over 99% of all writers whose works are publicly disseminated - Simpson Report para. 5.1.2.

to recorded music, such as a CD, tape or record ('direct' playing of recorded music).

2.32 The money that APRA collects from licence fees is distributed to its members. APRA distributes royalties to its members on the basis of the extent to which their works have been used. APRA has complex and advanced methods of collecting this information, including the use of radio logs and sampling.[27]

2.33 APRA is affiliated to an extensive network of international collecting societies which are administering public performance rights in other countries. These societies are subject to a reciprocal agreement to administer each others repertoires. This means that APRA collects royalties for the public performance of music in Australia written by international composers. APRA sends this money to the relevant collecting societies in other countries to distribute to their members. Through this arrangement, APRA is responsible for administering the rights of songwriters around the world. The reciprocal arrangements mean that APRA's repertoire extends to the vast majority of music which is subject to copyright throughout the world.

PPCA

2.34 The PPCA is also a non - profit organisation. PPCA's members are the owners or controllers of copyright in sound recordings and music videos. The members represent around 1, 300 labels which

27 See APRA, *Submissions*, pp. S445–S448.

together control nearly all sound recordings which are commercially released in Australia. The PPCA was established in 1969 by record companies to act as their agent for the purposes of issuing licences to cover the broadcasting and public performance of *sound recordings*.

2.35 The copyright that exists in the sound recording is distinct from that which exists in the musical and literary work. As the sound recording rights are administered by a different organisation, the PPCA, a different licence is required. A person who is playing recorded music in a commercial environment will therefore require a licence from the PPCA, as well as one from APRA. However, due to the operation of section 199(2) a person who is tuned in to a radio or television broadcast does not require a licence from the PPCA.