

**SUBMISSIONS BY J ALBERT SON PTY LIMITED [ACN 000 026
513] TO THE HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
REGARDING THE COPYRIGHT AMENDMENT (DIGITAL
AGENDA) BILL 1999**

1 October, 1999

SUBMISSIONS

1.0 INTRODUCTION

- 1.1 These submission are made by J Albert & Son Pty Limited [ACN 000 026 513] (“JAS”) of 9 Ranges Road, Neutral Bay, Australia.
- 1.2 JAS is a well-known, independent Australian music publisher having been incorporated in New South Wales in 1933. Prior to that time its business as a music publisher and retailer of musical instruments had been conducted as an unincorporated entity since before the turn of the century.
- 1.3 Copyright and the regulation thereof is central to the music publishing business conducted by JAS. That always has been the case.
- 1.4 These submissions are confined to one discrete aspect of the Copyright Amendment (Digital Agenda) Bill, 1999 (“the Bill”), namely the transitional provisions contained in Schedule 2 to the Bill. The submissions made by JAS in respect of those provision are set out below.

2.0 THE USE OF LICENCES AND ASSIGNMENTS

- 2.1 Assignments and licences of copyright are an integral part of music publishing and, indeed, many related businesses such as the manufacture and sale of sound recordings, the broadcasting of sound recordings and the making and broadcasting of cinematograph films.
- 2.2 Examples of typical assignments and licences commonly used by music publishers include:
 - (a) an assignment by an author of a musical work of all or part of the exclusive rights subsisting in that work as a consequence of copyright to a music publisher either for the duration of that copyright or a lesser period;
 - (b) an assignment by a music publisher to a sub-publisher of all or part of the exclusive rights subsisting in a musical work as a consequence of copyright and acquired by the music publisher by way of an assignment of the kind referred to in sub-paragraph 2.2(a) above;
 - (c) an exclusive or non-exclusive licence granted by an author of a musical work to a music publisher in respect of all or part of the exclusive rights subsisting in that work as a consequence of copyright to a music publisher for the duration of that copyright or a lesser period.
 - (d) an exclusive or non-exclusive sub-licence granted by a music publisher to a sub-publisher of all or part of the exclusive rights subsisting in a

musical work as a consequence of copyright and acquired by the music publisher as a consequence of an assignment of the kind referred to in sub-paragraph 2.2(a) above or a licence of the kind referred to in sub-paragraph 2.2(c) above.

- (f) an exclusive or non-exclusive licence granted by a music publisher to a third party to permit that third party to record a musical work and/or to cause a recording of a musical work to be embodied in a cinematograph film.

2.3 The examples of assignments and licences commonly used by music publishers (and sub-publishers) referred to in paragraph 2.2 above is not an exhaustive list of such assignments and licences. Needless to say, over time numerous such arrangements are entered into by music publishers. In the case of JAS arrangements relating to approximately 15,000 musical works remain on foot as a consequence of assignments or licences (whether exclusive or non-exclusive). Certain of those arrangements have been in force for many decades, particularly sub-publishing arrangements entered into by JAS with overseas publishers whereby various rights are conferred on JAS in respect of musical works, most commonly for the territories of Australia and New Zealand.

3.0 DISTINCTION BETWEEN LICENCES AND ASSIGNMENTS

3.1 Clearly there is a distinction at law between an assignment of exclusive rights existing as a consequence of copyright subsisting in a work and a licence of such rights (be it exclusive or non-exclusive). An assignor divests itself of the rights assigned in favour of the assignee either in perpetuity or for such lesser period as stated in the deed of assignment at the end of which period those rights would be re-assigned to the assignor. The granting of a licence does not have as its consequence a change of ownership of the copyright concerned.

3.2 Nonetheless, the practical effect of assignments and licences as commonly used in the music publishing and related industries is in many respects the same. The assignment or the licence confers on the assignee or licensee (as the case may be) an authority to deal with a musical work or a sound recording in a certain manner without a breach of the Copyright Act, 1968 (“the Act”). Accordingly, JAS submits that the transitional provisions contained in the Bill should not distinguish between assignments and licences of copyright in the manner currently found in Item 3 of Schedule 2 to the Bill. It is submitted that there is no utility in applying different transitional regimes to assignments of and licences in respect of copyright made or entered into prior to the commencement of the amendments to the Act effected by the Bill.

4.0 CURRENT ITEM 3(2) OF SCHEDULE 2

4.1 If, as submitted above, it is desirable to adopt a common approach in the transitional provisions to assignments of and licences in respect of copyright

entered into prior to the commencement of the amendments to be effected by the Bill, Item 3(2) of Schedule 2 to the Bill requires redrafting.

- 4.2 Notwithstanding the contents of the explanatory memorandum, it is our understanding of Item 2 in its current form that its consequence would be that a “broadcasting right” or a “cable transmission right” in a work or other subject-matter “that was assigned before the commencing day” would be extinguished as a consequence of the repeal of subparagraphs 31(1)(b)(iii) and (iv) which would be effected by Clause 37 of the Bill.
- 4.3 Whereas the transitional provisions (Item 3(1)) preserve certain arrangements relating to the “broadcasting right” or the “cable transmission right” in a work which were in force immediately before the commencing day, an “assignment of copyright” is excluded from those provisions. That would have dire consequences in respect of many thousands of existing assignments of the “broadcasting right” and/or the “cable transmission right”. The extinguishment of those pre-existing rights would deny music publishers and others (including some copyright users) the authority to continue to exploit the previously held “broadcasting right” or “cable transmission right” in a work, such rights in some cases having been owned by way of assignment for decades. That would have obvious adverse commercial consequences for the relevant assignees.
- 4.4 For the reasons set out above, it is submitted that Item 3(2) of Schedule 2 should be deleted and (subject to the further submissions in paragraph 5 below) Item 3(1) amended so as to apply its provisions to assignments as well as licences.

5.0 NEW MEANING OF BROADCAST RIGHT

- 5.1 The current Item 3(1) of Schedule 2 to the Bill, taken in conjunction with the definitions contained in Item 2 of that Schedule has the effect of limiting the meaning of the terms “broadcasting right” and “cable transmission right” in relation to a work or other subject-matter respectively to the exclusive right under the Act (prior to any amendment by the Bill) to broadcast the work or other subject-matter or to cause the work or other subject-matter or a television program that includes it, to be transmitted to subscribers to a diffusion service.
- 5.2 No attempt has been made since the commencement of the *Broadcasting Services Act 1992* (“the BSA”) to bring the definition of “broadcast” within the Copyright Act into line with its re-formulation in the BSA, the legislation which sets out the various forms of communication to the public which come within the regulatory regime of broadcasting in Australia.
- 5.3 It is submitted that an assignment or licence of the “broadcasting right” in relation to a work or other subject-matter arising as a consequence of an assignment or licence in force immediately before the commencement of the

amendments to the Act to be effected by the Bill should be just that – an assignment or licence of the right to engage in the conduct of broadcasting in Australia. The nature and extent of such conduct is determined by the definition of “broadcasting service” contained in sub-section 1 of the Section 6 of the BSA.

- 5.4 It is submitted that it is inconsistent for the transitional provisions to have the effect that a licence or assignment in respect of a right to “broadcast” a work or other subject-matter entered into before the commencement date should be so confined as to exclude aspects of the very right to “broadcast” as regulated by Australian law, namely the BSA.
- 5.5 It is submitted that the transitional regime in Schedule 2 to the Bill should be amended accordingly.

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