AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED

SUBMISSION TO SENATE COMMITTEE ON COPYRIGHT AMENDMENT BILL 2006

OCTOBER 2006

APRA|AMCOS:

APRA is the largest and longest-established copyright collecting society in Australia. It administers the rights of public performance and communication to the public in musical works on behalf of songwriters, composers and music publishers. APRA has over 45,000 members in Australia and NZ.

In addition to representing the interests of its Australasian members, APRA represents the world's songwriters, composers and music publishers through reciprocal agreements with 134 performing right collecting societies around the world.

In the financial year to 30 June 2006 APRA collected gross revenue of $133.4m and distributed more than $110.7m. APRA's financial statements are available on the APRA|AMCOS website at http://www.apra.com.au/corporate.

AMCOS is a smaller collecting society, whose membership also consists of songwriters, composers and music publishers, but whose area of copyright administration relates to the right of reproduction. It accordingly licenses bodies such as record companies, mobile phone ring-tone operators, film producers, production studios and so on, to record or synchronise music into a variety of media. Because music publishers have generally administered recording rights on behalf of songwriters, many fewer writers have historically required AMCOS' services than have required APRA's services. Accordingly the membership base of AMCOS is much smaller than APRA's, with some 697 writers currently members, in addition to 368 publishers. AMCOS has reciprocal agreements with 115 collecting societies around the world.

In the financial year to 30 June 2006 AMCOS collected gross revenue of $41m and distributed $35m. A copy of its financial statements is available on the APRA|AMCOS website at http://www.apra.com.au/corporate.

Since 1997, APRA has managed the operational functions of AMCOS, and the two societies, although separate legal entities, effectively operate as an integrated organization. A combined financial commentary is available on the APRA website.

THIS SUBMISSION:

APRA-AMCOS is widely regarded by its members as their voice on copyright issues. It should be noted in that regard that the APRA Board consists of six prominent writers, representing the writer constituency of the organization (and directly elected by them), and six publisher members, representing the publisher constituency (similarly, directly elected by the publisher members).

Within such an enormous membership base, there will naturally be a diverse range of opinions about contentious copyright issues like file-sharing, private copying and so on, but it should be pointed out that in relation to the central and major issue of concern to our members in the Bill – ie, the format-shifting exception – there is both Board unanimity and almost universal support within the membership base for the position put by APRA-AMCOS.

APRA is actively engaged in international aspects of copyright development and practice through the International Confederation of Societies of Authors & Composers ("CISAC"), which is the pre-eminent worldwide representative of creators' interests. APRA's Chief Executive currently chairs the Board of Directors of CISAC. Several of the issues dealt with in the Bill are of great international interest and concern to the international community of authors, and the APRA-AMCOS submission strongly reflects the views of that community.

ISSUES:

The Bill is of course long and complicated, and it will make the Copyright Act an even longer and more daunting piece of legislation, even for legal practitioners. Our comments are confined to those issues of practical significance to our members, and with the exception of two issues – namely, those of format-shifting and use of copyright material for parody or satire – are confined to matters that we believe involve unintended consequences.

1. **Schedule 3, Paragraph 2: new definition of "Record":**

   Presumably arising out of the drafting of the format shifting exception (new sec. 109A) the definition of "record" is extended to include [an] *electronic file*.

   As a consequence of this small change an enormous policy change is effected – we presume in an entirely unintended way – through extension of the compulsory licence for the recording of musical works (Division 6, Part III) to include activities such as digital downloads and ring-tone sales.

   It is important to understand the impact of this change. The compulsory licence is itself an historical anachronism which gives any record company in Australia the right to record and release for sale any piece of music which has been the subject of a previous recording. The compulsory licence is subject to notice and payment provisions set out in sections 54 to 64 which have largely been supplanted by industry agreement, but the fundamental effect of the provisions is to remove the right of a songwriter to deny permission to a record company for the release of his work on record or to negotiate a royalty higher than the statutory average.

   Currently the licence only applies in its terms to the physical manufacture and sale of records (ie, for practical purposes – CDs). But with the extended definition, Digital Service Providers such as Apple and Microsoft, as well a plethora of Mobile Phone Ring-Tone suppliers, will gain an automatic statutory right to override any writer's objection to the commercial use of his or her work in such a way.

   Because there has been absolutely no discussion at any level of such a policy change, and because the change is so major and clearly outside the terms of what the Berne Convention would permit, we presume that the effect is entirely unintended and will be rectified through the current review process.

2. Schedule 6, Part 2: Reproducing copyright material in different format for private use:

While the Government has made plain the fact that it will not entertain further debate on the *policy* issues in the Bill, we feel that this is a matter of such great import – both from a domestic policy and international treaty compliance perspective – that we should place our views firmly on record.

The Explanatory Memorandum properly identifies the disconnect between the current statutory prohibition and consumer practices as a major public policy problem. It also, entirely correctly in our submission, identifies the relevant objectives of legislative reform as needing

> *…to ensure that exceptions and statutory licences in the Act continue to provide reasonable public access to copyright material.*

And further

> *[that] in achieving this objective there is a need to:*
>
> *a. recognise common forms of private copying that do not undermine the economic incentives provided by copyright;*
>
> *b. ensure the exceptions in the Act maintain a balance of owner and user interest in the digital environment.*

And further

> *[that] in achieving these objectives, it is necessary that any amendments to the Act comply with international copyright treaties. Australia is a party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). It is in the process of joining the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).*

The Memorandum then lists the options to deal with the problem, which include, as Option (d) a statutory licence accompanied by fair compensation for copyright owners. However, this option is rejected in favour of the exceptions contained in the Bill on the principal grounds that

> (a) *it interferes with the markets of copyright owners;*
> (b) *consumers would be concerned that they might pay twice for a copy…and that copyright owners could block the authorised private copying through applying anti-copying software to their copyright material;*
> (c) *the administrative costs of operating a statutory licence …would also be substantial.*

A number of points need to be made clear to the Committee in relation to these matters. They are as follows:

- **Songwriters, publishers and many recording artists – *support* an open access regime for private copying *achieved by way of statutory licence with accompanying fair compensation. They do not support the free exception regime in the Bill;***
- **When the memorandum refers to "interference with the markets of copyright owners" it is in fact referring to technological protection measures employed by record labels to prevent or limit private copying. There is no "market", in the sense that that term is commonly understood, involving a payment for a service or product. There is only *control* exerted by record labels.**
- **The fear of double payments held by some consumers is not borne out by the simple statistics. Given the sheer number of iPod/MP3 styled devices sold and the capacity of each device as compared to the known number of licensed digital downloads of individual musical tracks, it can be concluded that legally sourced digital downloads would constitute less than 10% of the content on portable music devices.**
- **There is no evidence of "administrative" costs presenting an impediment to efficient royalty collection and distribution in private copying schemes. Such schemes in fact operate effectively in most developed countries at minimal cost.**

In rejecting a statutory licensing regime in favour of a free exception regime, the Government has, in our submission, failed to meet its own objectives, in that

(a) *reasonable public access to copyright material* will not be achieved, because the *copyright owners' market* – which is not to be interfered with – and which consists of TPMs which control, prevent or inhibit private copying, will continue to apply;

(b) maintenance of a *balance of owner and user interest in the digital environment* will not be achieved, at least insofar as the authors – those who create the music – are concerned. Their interests have been completely overlooked.

But perhaps the most alarming aspect of the policy underpinning the format shifting exception is that it will be widely viewed internationally as a flagrant breach of the three-step test under the Berne Convention. The Convention, as the Committee will well appreciate, only permits via Article 9 exceptions to the right reproduction enjoyed by the authors of copyright owners in works, including musical works, which **(a) apply in *special cases,* (b) do *not conflict with a normal exploitation of the work* and (c) which do *not unreasonably prejudice the legitimate interests of the author.***

The format-shifting exception unequivocally fails the *special case* limb of the three-step test, and in our submission, fails the other two limbs as well – on the grounds that there are well-established markets internationally for remunerating authors for private copying, which (a) generate hundreds of millions of dollars each year for authors and other copyright owners and (b) include Australian authors as eligible recipients.

If the Bill proceeds, with the format-shifting exception in place, the following consequences are likely to occur:

- The entitlement of Australian authors to continue to share in the proceeds of private copying licence schemes internationally will come under question;
- Australia will be regarded by authors' societies around the world as being in flagrant breach of the Berne Convention; and
- Proceedings related to the breach will be initiated within the WTO.

We accordingly urge the Committee to take proper account of the interests of authors and Australia's international obligations, and to recommend that option (d) – that of a compensating statutory licence scheme – should be re-considered by the Government.

3. Schedule 6, Part 3: Use of Copyright Material for Certain Purposes

In this part of the Bill, the Committee will note that an entirely novel approach to drafting has been adopted, at least in the Australian context. Rather than applying the three-step test under Berne in the body of each exception, the test is applied as an over-arching principle qualifying each of the exceptions listed in this Part.

While we are pleased to see the Convention requirements so explicitly taken into account in *this* part of the Bill (query why there is no such application in relation to the Part 2 exceptions), we do submit that as a matter of practicality, this method of drafting will make interpretation of the relevant provisions particularly difficult and uncertain. This is because anybody seeking to determine whether any of the sections applies to their particular activity will firstly have to interpret the particular provision giving the exemption, and then secondly they will have to interpret the generalities stated in the three-step test. We put our submission on this point no higher than concern about certainty, and the desirability for everyone of avoiding massive legal expense in relation to issues that could perhaps be drafted with more precision.

We do, however, additionally state our strong objection to sub-sec. 200AB(5) - *use for the purpose of parody or satire.*

In his second reading speech the Attorney-General refers to this exception as promoting *free speech and Australia's fine tradition of satire by allowing our comedians and cartoonists to use copyright material….* One might reasonably ask how our free speech or development of such a "fine tradition" has therefore occurred *without* this provision until now.

As far as we are aware, this provision has been inserted because one cartoonist used a piece of music in one cartoon on one occasion, without permission, and was faced with a claim after the event. It seems an awfully long bow to create a full statutory exception with a potential width and impact of enormous uncertainty based on one single factual issue.

Our concern is that the section will be used in a variety of contexts to avoid seeking permission to use copyright material, and that a challenge by an author to the activity will be too expensive, risky and uncertain in its outcome. We will provide the Committee with examples of how the section might be used in a way that would neither serve the interests of copyright owners nor the public. We strongly submit that the risks in the provision far outweigh any real or needed benefit.

4. Schedule 8, Part 1: Communication in the Course of Educational Instruction

In preparing this submission we have had the benefit of seeing the letter written to the Attorney-General by the Copyright Advisory Group of the Ministerial Council on Employment Education Training and Youth Affairs ("CAG") and Screenrights.

We agree with the comments in that letter that, as currently drafted, sec. 28A might inadvertently operate to exempt from copyright obligations a variety of communications which are currently, and should clearly be, regarded as communications to the public, and which are therefore covered by the statutory licence in Part VA.

We accordingly endorse the position put jointly by CAG and Screenrights in relation to that section.

5. Schedule 8, Part 5: Caching on Server for Educational Purposes

Sec. 200AAA seems to provide a virtually blanket exemption to educational institutions to download and communicate material from the internet – and then to keep it that material for an unlimited period of time. Although the heading of the provision refers to *caching*, nowhere in the body of the provision does that intention appear to be reflected.

APRA-AMCOS, together with the record industry, currently license educational institutions to use recorded music on their intranets for educational purposes, but they are prohibited, for example, from downloading music from file-sharing sites. We believe that that is a reasonable prohibition that causes no problems for institutions. Moreover, there is an acceptance that the licence fees paid for what is permitted are fair and reasonable. Sec. 200AAA, as currently drafted, might make such a licensing arrangement superfluous. We accordingly oppose it in its present terms.

Again, we have had the advantage of seeing the joint position put forward on the matter by CAG and Screenrights. We endorse that position.

6. **Schedule 11, Part 1: Copyright Tribunal: Licences and Licence Schemes**
   We congratulate the Government for introducing these long-needed reforms in line with the recommendations of the Copyright Law Review Committee. Our only submission on the provisions is that, given the intention in sec. 136(1) to apply the Tribunal's jurisdiction to collecting society licences only, the definition of *licensor* in that provision should be re-visited. As it currently stands, it would capture individual publishers, record labels and so on. Assuming that is not the intention, some further indication of the true intention should be made, perhaps by reference to some of the stated criteria applying to collecting societies in the Income Tax Assessment Act.

Brett Cottle
Chief Executive Officer
APRA|AMCOS
6-12 Atchison Street, St Leonards NSW 2065
Locked Bag 3665, St Leonards NSW 1590

02-9935 7910
bcottle@apra.com.au

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