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## **COPYRIGHT & MUSIC – THE BASICS**

COPYRIGHT IS FUNDAMENTAL TO EARNING INCOME IN THE MUSIC INDUSTRY. THE RIGHTS IN THE MUSIC AND THE LYRICS, THE SOUND RECORDINGS, THE PERFORMANCE AND THE PUBLISHED EDITIONS, TOGETHER WITH THE RIGHTS UNDERLYING THE MERCHANDISING, ARE THE SOURCE OF THE MONEY THAT FLOWS THROUGH THE MUSIC INDUSTRY. UNLESS ARTISTS AND THEIR ADVISERS UNDERSTAND THE BASICS OF COPYRIGHT, THEY CANNOT MAXIMISE THEIR INCOME OR FULLY PROTECT THE INTEGRITY OF THEIR WORK.

### **THIRTEEN COMMON MISCONCEPTIONS**

- Copyright is for lawyers and it's their job to understand copyright
- All lawyers understand copyright
- The copyright is in the notes, not in the way those notes are arranged
- The band playing on the record owns all copyright in the record
- If you wrote it no one else can change it
- You can record any song no matter who wrote it
- You can't record any song unless you have the composer's permission
- Mechanical royalties are called that, because they are automatic
- Mechanical royalties are the same as record royalties
- You own all the rights at the end of the contract
- If you sign a record contract you have to sign away your publishing
- Always go for the biggest advance you can
- You can always post clips of your recordings on the net, because it's your music.

### **WHY IS COPYRIGHT IMPORTANT?**

Copyright plays an essential role in any developed sophisticated society. If society is to recognise creativity, innovation and imagination, then copyright is the principal tool by which we accord that recognition. This is economically

expressed by the award of a range of exclusive rights that grant the owner the power of control and the right of commercial exploitation.

At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking. It is recognition that both the culture and the economy of our community are dependent on encouraging and fostering these characteristics.

Copyright underlies most of the ways that people make money out of music. It is fundamental. To make real money in the music industry, talent is optional but copyright is indispensable. When you consider the following points, you will see why. They all involve payment for the use of copyright material.

- Most songs that are recorded are copyright. Even the sound recording itself has a copyright.
- Much of the sheet music published is of works that are in copyright and are only able to be published because the publisher has bought or licensed the necessary rights of copyright to do so.
- There is a copyright in the published edition, distinct from the copyright in the composition itself.
- Most of the popular music played in live performances is in copyright.
- Merchandising involves the use of copyright material.
- Playing music in public places, such as shops and lifts, usually requires payment of licence fees to the copyright owners.
- Communicating music on the internet usually requires the consent of copyright owners.
- Virtually no film or television drama is now made without the use of music and thus the use of copyright.
- Most radio and television commercials use copyright music.
- Every time you listen to music on the radio you are listening to the result of several contracts involving copyright.

Like the beat, the list goes on.

Whether you are a musician, a manager, a publisher, a record company executive or an entertainment industry lawyer, your income is based largely on copyright. You should spend some effort on getting to understand the basics so that you maximise your rewards. It is by exploiting your copyright that you make real money from your music.

## **WHAT IS THE SOURCE OF COPYRIGHT?**

Copyright protection in Australia is provided by the *Copyright Act 1968*. It is federal legislation. It superseded the 1911 Act that was modelled closely on the English Act. Many people forget that the 1911 Act can still apply in some instances, though these are quite rare now.

In addition, Australia belongs to a number of international treaties, including the treaty known as the Berne Convention, which dovetail into the Australian laws. Australian copyright owners can use these treaties to get reciprocal copyright protection in other treaty countries.

Most countries use the Berne Convention as the basis for their national copyright laws, but there are differences from country to country. Sometimes the duration of protection differs from country to country; sometimes the actual rights that are recognised differ. International copyright law is not for the squeamish. The differences in international treatment are discussed in more detail in the following chapters, where relevant to the particular subject.

## WHAT IS COVERED BY COPYRIGHT?

Copyright protection is given to two classes of things:

- ‘Works’ (i.e. musical, literary, dramatic works and artistic works – which include photographs); and
- ‘Subject matter other than works’ (i.e. sound recordings, broadcasts, published editions and film – or ‘cinematograph works’).

## WHAT RIGHTS DOES COPYRIGHT INCLUDE?

Copyright is a bundle of rights. Copyright in a work includes the exclusive right to:

- Reproduce the work (this includes reproducing it in sheet music or on records or synchronising it in films, television programs and advertisements)
- Publish the work (e.g. by lawfully supplying copies of it to the public)
- Communicate the work to the public (examples include ‘live’ performances, playing recorded music in public, playing music on the radio, television and, vitally to the modern music economy, via the internet) and
- Make an adaptation of the work (e.g. arrangements, transcriptions, parodies).

## REPRODUCTION

Although the term ‘reproduction’ is used a lot when we talk about copyright, many people misunderstand the term. Reproduction may take many forms. Although it is most usually used as a synonym for ‘copy’ it actually has a wider meaning in copyright law, for the copy does not have to be exact.

It need not be a copy of the whole work, merely a ‘substantial part’ of it. For example, using four notes from a piece of music would not usually be thought of as a ‘substantial part’, but in the case of, say, the opening four

notes of Beethoven's Fifth, the answer would be different. The legal test of 'substantiality' is qualitative not quantitative.

The copy need not be in the same medium, either. For example, a song may be based on a book. Paul Kelly based his song *Everything's Turning To White* (on his *So Much Water So Close to Home* album) on a short story by Raymond Carver. A licence had to be negotiated with the Carver estate for the use. The lyrics are clearly not copied from the story, but they do re-tell it.

## PUBLICATION

Similarly, the term 'publication' is given a special meaning by the Copyright Act: supplying copies of the material to the public (whether by sale or otherwise). For a musical composition, this could be by selling sheet music. Surprisingly, supplying sound recordings of musical works is not a 'publication' of the work under the Copyright Act, even though this is the most common way music is exploited. Many are never even 'published' in printed form.

## COMMUNICATION TO THE PUBLIC

In 2001, a new right for copyright owners, the right to 'communicate' their work to the public, was introduced into the Copyright Act. This was a major development in Australian copyright law. All contracts involving copyright material should cover this new right.

The communication right is far-reaching. It expands on and clarifies the previous bundle of copyrights. It is broad enough to cover use via the internet, free-to-air television, cable, radio and mobile phones. It replaced the existing broadcasting and cable rights and extended the copyright protection afforded to sound recordings.

In relation to the internet (and its future incarnations) the communication right includes the right to 'electronically transmit' (e.g. emailing or streaming a music track), and 'making available online' (e.g. having your computer on a peer-to-peer file-sharing system so others can access the material from your hard drive).

The right is not limited to communications within Australia. It extends to communications originating here but received overseas. Australian copyright owners have a right to prevent the unauthorised communication of their material offshore. For example, the right could be used to stop an Australian-based website from making a film or song available not just in Australia but anywhere in the world. Given the global nature of the internet these remedies are essential if owners are to protect their works.

The old Copyright Act did not contemplate digital internet use, so the new provisions provided specifically for 'online' distribution. The language of the changes made the communication right deliberately 'technology neutral',

so that it could continue to operate and withstand the semantics and processes of scientific innovation, which might otherwise outdate a definition that was based on existing technology.

In a nutshell, the right to ‘communicate’ works to the public is extremely broad. It clarifies and reinforces the copyright owner’s basic and exclusive right to control the use of their material in the digital environment. The advent of widespread digital distribution of content has meant that this is the right that is most frequently infringed. For example, when a video clip containing copyright music is uploaded to a video serving site like YouTube or Vimeo, the communication right is used. That is why so much content is routinely taken down: it either infringes the communication rights in the music, the recording, or both – as well as breaching other copyright laws.

## US FREE TRADE AGREEMENT

In 2004, the Australian Government assented to the *US Free Trade Agreement Implementation Act 2004* (the ‘Implementation Act’). The Implementation Act put in place the amendments necessary to Australian law to reflect what was agreed in the Australia-United States Free Trade Agreement. The Implementation Act introduced significant changes to the Copyright Act, which directly impacted on the music industry. The key changes were:

- The term of copyright in musical compositions, lyrics and sound recordings was extended from 50 to 70 years from the end of the year in which the author died (for musical and literary works) or from the end of the year in which the recording was first published (for sound recordings).
- Performers were deemed ‘makers’ of sound recordings of their performances (see **Sound Recordings** below, under **Who Owns the Copyright?**).
- Performers were given new ‘moral rights’ in live performances (see below in **Performers’ Rights**).

The changes took effect on 1 January 2005.

## HOW DO YOU GET COPYRIGHT PROTECTION?

The Copyright Act provides **automatic** protection. No formalities are necessary, provided the person claiming copyright is a ‘qualified person’ (i.e. an Australian citizen, company or someone normally resident here). As soon as material that is capable of copyright protection is given ‘**material form**’, copyright exists in it, by law.

For example, to put a musical work (e.g. a melody) or a literary work (e.g. a lyric) into a ‘material form’, you need only write it down or record it in some way. So, if you make a recording of a song, you have reduced it to a material

form. There used to be much debate as to whether the ‘material form’ had to be ‘visible to the eye’ but the Copyright Act is now clear that the term covers any form of storage from which the work can be reproduced, including digital storage. (Remember that in the world of copyright, the ‘author’ is merely the generic term given to the person who put the work into a material form. It is not ‘authorship’ in the common sense of the word.)

To get copyright protection in Australia, you don’t have to put your name, the copyright symbol © and the year on your songs or demos, but there is still a good reason for doing so. To benefit from copyright protection overseas under the Universal Copyright Convention (UCC), every published copy of the work or recording has to bear a copyright symbol, the year of first publication and the owner, otherwise it doesn’t qualify.

The UCC is important because, until 1989, the United States was not a member of the Berne Convention. The UCC used to be the basis for copyright recognition in the United States of Australian compositions, records and films, etc. until the United States joined the Berne Convention. Putting the copyright symbol and the other details on the work met the United States’ requirements for copyright protection, without you having to register the copyright there. For Australians, putting the copyright symbol, owner’s name and the date is not necessary, although it can be useful simply to remind would-be users that the work is subject to copyright and that permission is required to reproduce and exploit it.

Many people are mystified by the ℗ symbol on records. The ℗ symbol stands for ‘Phonograph’ – old fashioned-speak for ‘sound recording’ (from the ancient Greek ‘phono’ meaning voice or sound, and ‘graph’ meaning writing). It comes from the Rome Convention (yet another international copyright treaty!), which came into force in 1964 and gave sound recordings copyright recognition in an international treaty. Again, to put people on notice that a sound recording is protected by copyright, all published copies of that sound recording should show the ℗ symbol, the year of first publication and the owner or the person who published the record itself (not always the same person).

The degree of protection given to sound recordings varies from country to country. For example, the United States does not recognise public performance or broadcast copyrights in sound recordings. So, generally speaking, Australia does not recognise those rights in records made in the United States or owned by United States companies.

The minimum term of copyright protection allowed under the Rome Convention is 14 years from when the recording is ‘fixed’, but most countries have adopted a longer term. In Australia, as a general rule, sound recordings are protected for 70 years from first publication.

If you are worried that someone is going to steal your song (which, let's face it, is statistically unlikely) the best idea is to keep a regular diary of your work, showing when you worked on a particular song, what it was called, when it was finished, to whom you played it and when. Copyright is automatic and it is free. All that the diary provides is some proof as to what you wrote and when you wrote it. It's just evidence that what you say is true.

So-called 'copyright registration services' do nothing to improve the validity of the copyright itself in Australia and are, at best, a marginal benefit to proving copyright ownership. Take up smoking seaweed instead. It'll do you as much good. Don't bother posting songs to yourself and leaving the envelopes unopened, unless you have some glandular urge to do so. You will soon need a larger apartment to store all the envelopes and the increased rental will outweigh any advantage. You can prove your copyright in easier ways.

## WHO OWNS THE COPYRIGHT?

### MUSICAL WORKS

It is important to distinguish between the musical work reproduced on a record, and the recording itself. Remember, there is only one owner of the song 'Blue Suede Shoes' but hundreds of recorded versions – each new recording has a different owner.

The general rule is that the 'author' of the song is the owner of copyright. The author of the music is of course the composer. The author of the lyrics is the lyricist.

The lyrics are protected as a 'literary work' and the melody as a 'musical work'. If their authors are different people, then separate permissions will have to be obtained from each one if you want to reproduce, or 'cover' the song. This is discussed in more detail in Chapter 11, **Composing and Writing with Others**.

Even if a composer is commissioned to write the music, he or she still retains the copyright unless the terms of the commission agreement state otherwise. However, where composers are actually employed to write songs (such as the 'Tin Pan Alley' composers earlier last century in New York), their employer owns the copyright. Avoid contracts that use words deeming the composer to be 'a servant for hire'. Some publishers still use contracts that use this phrase. This must always be struck out. If they refuse, demand superannuation, holiday pay and carer's leave!

### SOUND RECORDINGS

The Implementation Act provided performers with an ownership right in a sound recording of their live performance. Importantly, this provides performers with the ability to control the use and exploitation of the recordings

on which they perform. Prior to 1 January 2005, the owner of copyright in a sound recording was usually the person who made the arrangements and paid for the master recording to be completed.

However, as result of the Implementation Act, as of 1 January 2005, a ‘performer’ gained a share of ownership of the copyright in a sound recording of their live performance. The new provisions were retrospective, applying to all sound recordings of live performances that enjoyed copyright protection at 1 January 2005. (However, special treatment was given to those recordings made before the changes came into effect. See below under **Special Rules Applying to Sound Recordings Made Prior to 1 January 2005.**)

Now, unless there is an agreement to the contrary, ownership of copyright in a sound recording is shared by:

- the person who owns the recording at the time the recording is made (i.e. who has made the arrangements and paid for the master recording to be completed)
- each performer whose performance is captured on the recording

both now deemed ‘makers’ under the Copyright Act.

If there is more than one owner of the sound recording, the owners own the copyright as ‘tenants in common’ in equal shares. ‘Tenancy in common’ is an ancient legal concept, referring to a situation in which two or more people have distinct ownership rights in the same piece of property, and essentially, they can each deal with their bit as they like. So, each owner’s permission will be required to exercise (or to authorise a third party to exercise) rights in the sound recording. Having an ownership share in the copyright of the sound recording can improve the bargaining position of a performer, by giving him or her the right to control the use and exploitation of the recording.

Who is a ‘performer’ under the Copyright Act? A performer in a live performance is each person who contributes to the sounds of the performance. If the performance includes the performance of a musical work, the conductor is also deemed to be a performer. So all singers and musicians, including session musicians who perform on a recording will own a part of the copyright in the recording, unless they agree otherwise.

Prior to the Implementation Act, the owner of the sound recording was usually an established record company. Accordingly, it is usually reasonably simple to track down the owner of a pre-2005 recording. The new rules have made it harder to work out who owns what. You will need to ask not only ‘Who paid for the making of the recording?’ but also ‘Who performed on that recording?’ They will be the people to go to if you want permission to use or copy the recording.

The new rules are likely to have little practical effect as most recording contracts will continue to specify that the record company will own all the copyright in the recordings their artist makes (even though all the costs of

producing and manufacturing the record may be recovered from the artist's royalties – see Chapter 20, **Record Contracts**).

While it is understandable that the company should own the copyright until the costs are recouped, there is a good argument that once recoupment is achieved, the performer's share of copyright should be transferred back to the artist. After all, it will have been the artist's performance that 'made' the record, and the artist's royalties that, at the end of the day, paid for it. The performer's share of copyright can be seen as the artist's superannuation.

On the other hand, artists can disappear after a few years. Most have no arrangements for anyone else to grant licences in their place. If there is no one companies can contact for permission to re-release records, the master will probably languish in the vaults, even if there is demand for the recording.

Similar things happen with old recordings (i.e. recordings by groups that split up years ago, or artists who have gone 'bush' – or somewhere more permanent). In an attempt to counter this problem, the Implementation Act introduced an implicit consent for the owner of a sound recording to use or exploit the recording if a co-owner cannot be located after reasonable enquiries are made. However, the owner that uses or exploits the recording must retain in trust the co-owner's share of the profits for a period of four years. It is better for the recording to be administered by a record company, than to end up with it not being exploited at all.

### **SPECIAL RULES APPLYING TO SOUND RECORDINGS MADE PRIOR TO 1 JANUARY 2005**

So, how does the Copyright Act apply if you made a recording prior to 1 January 2005 and your recording contract provides that the record company owns copyright in the recordings you have made? The new rules apply to those recordings, with some important limitations (but only if those recordings enjoyed copyright protection at 1 January 2005).

The new rules provide that the original owner of all the copyright in the sound recording prior to 1 January 2005 (e.g. the record company) retains ownership of half of the copyright in the recording. The remaining half of the copyright is now owned by the performer(s) who performed on the recording (e.g. you). But no, unfortunately your new rights don't mean you can demand a bigger advance or a larger cut of the royalties. Although the Copyright Act gave the performers the new half-share, it also made it clear that the former owner of the entire copyright (e.g. the record company) could continue to use the copyright in the recording as if the new owners (the performers at the time) had granted it a licence to do so.

Further, the new owners of copyright in sound recordings have quite limited remedies for infringement. Damages and account of profits are not available. A scheme has also been introduced to compensate former owners

of copyright if the new owners' acquisition would be considered not to be on 'just terms'.

The table below sets out how recordings are treated, depending on whether they were made before and after 1 January 2005. Watch out though, as these treatments can be changed by agreement between the relevant owners.

<b>NOTE: ALL OF THESE TREATMENTS ARE SUBJECT TO ANY AGREEMENTS TO THE CONTRARY BY THE RELEVANT OWNER(S)</b>	
<b>RECORDINGS MADE BEFORE 1 JANUARY 2005</b>	<b>RECORDINGS MADE AFTER 1 JANUARY 2005</b>
<b>COPYRIGHT OWNERSHIP</b>	
<p>Whoever owned the copyright in the sound recording before 1 January 2005 continues to own copyright in the same proportion as they did originally, but now it is from a pool of 50%. Eligible* performers share the remaining 50% equally. For example, if the record company owned the entire copyright in the master made in 2004, after 1 January 2005 they own 50%. If there were five artists who performed on that recording, they would then own one fifth of the remaining 50% each (i.e. 10%).</p> <p>*If a performer was employed under a contract for service or apprenticeship then the employer (not the performer) owns that share of copyright.</p>	<p>The copyright will be shared <i>equally</i> and <i>separately</i> between the makers: each performer and whoever paid for the recording to be made (usually the record company)*. For example, if there are five artists performing and a record company has financed the recording, there will be six owners of copyright in the sound recording. Each performer and the record company will own about 16.66% of the copyright in the master.</p> <p>*Note that if the recording was 'commissioned', i.e. the performers all agreed, for payment, to make it for the commissioning person, then the commissioning person owns 100% of the copyright.</p>
<b>PERMISSIONS</b>	
<p>Performers (or their employers) who acquire copyright are deemed to have licensed the former owner of copyright to do any act of copyright (e.g. reproduction of the master) or any act in relation to copyright. This extends to the first owner's licensees and successors.</p> <p>Earlier permissions by performers to use the sound recordings are unaffected.</p>	<p>Permission will be required from all owners (i.e. all performers and the person who paid for the recording) to do any act of copyright (e.g. reproduction of the master).</p>

<b>COMPENSATION</b>	
Performers (or their employers) who acquire copyright may have to compensate the former owner if their acquisition would be considered not on ‘just terms.’	No equivalent provision.
<b>LIMITATIONS ON COPYRIGHT ACTIONS &amp; ENTITLEMENTS</b>	
Performers (or their employers) who, after 1 January 2005, acquire copyright in a pre-1 January 2005 sound recording have limited remedies available to them if their copyright is infringed (e.g. damages or account of profits are generally unavailable).	No equivalent provision.

## **PERFORMERS’ RIGHTS**

While the most important rights that the Implementation Act gave performers was a share of the copyright in the sound recordings upon which they performed (see above), it also gave performers some additional rights in their performances.

In particular, the Implementation Act made it illegal to make, or communicate, a ‘bootleg’, or unauthorised, recording of a performance. Essentially, after the Implementation Act came into force, it became an offence to make a recording of a performance without the performer’s consent, and while the Act didn’t give performers actual copyright in their performance, performers whose performances have been illegally recorded now had a range of remedies against such ‘bootleggers’.

The Implementation Act also placed some limitations on the new rights given to performers:

- Where a person commissions the making of a sound recording by another person, then, unless agreed otherwise the person who commissioned the recording is the sole owner of the copyright in the sound recording made under that agreement.
- If the live performance was recorded as part of the performer’s employment, the employer is the owner of copyright in the sound recording. (For example, where musicians are employed by a jingle-house or they are employed to play in a group.)
- If the sound recording was made for a particular purpose, the performer is deemed to have consented to the use of that recording for a particular purpose. (For example: session musicians who are hired to play on a record. However, it is still prudent to insist on

written consents so that the extent of the consent is clear. You do not want the session musician alleging that he only agreed to record a demo, not a record that was going to be commercially released.)

## **HOW LONG DOES COPYRIGHT LAST?**

### **MUSICAL WORKS AND LITERARY WORKS**

Prior to 1 January 2005, the general rule was that copyright in the musical composition and in the lyric lasted for 50 years from the end of the year in which the author died. However, as of 1 January 2005, the term of protection was extended to 70 years from the end of the year in which the author died. (The extended term applies only to those works in which copyright existed as of 1 January 2005. If the copyright in a musical or literary work expired prior to January 2005, it did not revive.)

If the work wasn't 'published' (say as sheet music), publicly performed, broadcast, or sold in the form of records, during the composer's lifetime, then the copyright period does not start running until the end of the calendar year in which the first of those events occurs (if ever!).

### **SOUND RECORDINGS**

The Implementation Act extended the copyright term for sound recordings from 50 to 70 years. The copyright period of 70 years starts to run from the end of the year in which the recording was first published. Basically this means the year of its release to the public, so if a master recording is made but, for whatever reason, a decision is made not to release the record, copyright will remain indefinitely because the 70-year period will never start to run.

Sound recordings that were in copyright when the Implementation Act came into force on 1 January 2005 therefore now enjoy another 20 years' copyright protection. (Of course, sound recordings whose copyright had expired by that date i.e. those first published prior to 1 January 1955, remained in the public domain: their 50-year copyright protection was not extended or revived.)

### **PUBLISHED EDITIONS**

There was no copyright in published editions before 1 May 1969. Editions published after that date enjoyed copyright protection for 25 years from the date of their first publication.

### **ANONYMOUS OR PSEUDONYMOUS WORKS**

From 1 January 2005, the copyright in anonymous works (or those made under a pseudonym) was extended from 50 to 70 years after the end of the calendar year in which the work was first published. However, if the composer's

identity is generally known, or could be ascertained by reasonable inquiry, the general rule applies. If the copyright in an anonymous or pseudonymous work expired prior to 1 January 2005, those rights were not revived by the extension of the copyright term. Once they're dead, they're dead.

## **WORKS OF JOINT AUTHORSHIP**

Again, publication is the key. Where the work has been published, the 70-year period runs from the end of the calendar year in which the last remaining author dies. However, where the work is first published after the author's death, the period runs for 70 years from the end of the calendar year in which the work was first published.

Where one or some (but not all) of the joint authors uses a pseudonym, the 70-year period runs from the end of the year in which the last author, whose identity has been revealed, dies.

Similarly, where all of the authors use pseudonyms, if at any time within 70 years of publication the identity of one of the authors is or could be discovered, the period runs from the end of the year in which the author whose identity has been revealed dies.

## **FILMS**

Films made before 1 May 1969 are not protected, though the individual frames can be protected as photographs. There are also provisions protecting films made before that date that were 'dramatic works'. Films made after that date are protected for 70 years from first publication. The expression 'film' includes video.

Who said copyright was simple?

## **COPYRIGHT TRANSACTIONS**

The Copyright Act's rules about who owns copyright are all subject to variation by contract. The most common methods of varying the default rules are set out below.

### **THE ASSIGNMENT OF COPYRIGHT**

Assignment is essentially a transfer of ownership and rights. It is just like a sale of the rights. Thus, you should always beware of assigning your rights as it means losing ownership of them (and usually control as well). Under the Copyright Act, assignments of copyright are only effective if they are set out in writing and signed by or on behalf of the owner who's making the assignment.

It used to be common for record companies, and publishers dealing with copyright to adopt a rather heavy hand in this regard. They used their considerable power not only to acquire assignments of copyright but

also to get a free hand in the way in which they exploited those copyrights. Fortunately, the general approach has improved greatly. Most companies now will negotiate their deals so that the composer or artist retains at least a degree of control over how their works and recordings may be exploited. If nothing else, this helps maintain relations between publisher and composer or record company and artist, as the case may be.

Remember that when you assign your copyrights, you may expose yourself to Capital Gains Tax. You must do your tax planning before you have that big hit – not after! If you leave it until after you have the hit, your copyrights, once worth only a nominal amount, suddenly have a new taxable value.

### **LICENSING THE RIGHTS**

When a copyright owner grants a licence, he or she permits another to use the relevant rights of copyright, but still retains ownership, and thus a certain amount of control over those rights.

Licences allow the use to be limited to the real needs of the licensee. Licensing also means that you don't lose total control of your rights. Where possible, copyright owners should license, not assign! Exclusive licences must be in writing, signed by the 'licensor' (the one granting the licence) or their agent.

## BASIC TERMS

A copyright is a very flexible piece of property. Elements to consider in licensing and assignment contracts include:

1 Parties involved	Who is the contract between? Who is the grantor and who is the grantee? Although it may seem obvious, in an era of complex legal structures, it is sometimes not as easy as it seems.
2 Works involved	What work(s) are included in the transaction? Include an attachment or schedule showing what works are part of the deal.
3 Rights	What rights are being granted? What parts of the 'bundle of rights' are included in the agreement? Is it to include all of the rights of copyright or only some of them?
4 Duration	For how long are the rights to be granted? You can assign or license copyright for a set number of years.
5 Uses	What uses are you going to permit? You may be happy for your song to be used for a Holden commercial but not for a toilet cleanser commercial.
6 Exclusivity	The grant of rights may be exclusive or non-exclusive. Even where they are 'exclusive', the extent of that exclusivity can be limited. You can grant exclusive rights to different people for different uses in the same territory. For example you may grant an exclusive licence to use a song for car commercials yet still grant a film producer the right to include that song in a film.
7 Territory	You can license or assign someone the right to use your rights in a particular territory, but retain the rights in other territories.
8 Creative control	What changes to your work are you going to permit? What degree of control are you going to retain? Will these affect your royalties? Who can authorise changes?
9 Payment	How will the copyright owner be paid: With an up-front fee or by royalties or a mixture of both? This will be largely determined by the type of deal, and the relative bargaining power of the parties.
10 Obligations and guarantees	What obligations and guarantees are the parties offering each other?

11	Accounting and inspection	How can the copyright owner check that they are being paid the right amount?
12	Further grant of rights	Can the grantee license the rights to anyone else?
13	Enforcement	Who will protect the rights against infringements? Who will pay the legal costs? Who may 'settle' a dispute if it goes to court? How will damages and costs be split?
14	Termination	Are there circumstances in which the contract can be terminated? How is termination brought about? What happens afterwards?
15	Disputes	How will you settle disputes? Is there a mechanism in the contract that makes the parties undergo mediation or arbitration of a dispute that cannot be resolved by negotiation?

## IS ALL USE OF COPYRIGHT MATERIAL FORBIDDEN UNLESS YOU HAVE A LICENCE?

The Copyright Act provides for a number of situations in which reproducing a work will not amount to an infringement of copyright.

### FAIR DEALING

This exception to the usual rules of copyright covers the use of copyright materials (such as artistic, literary and musical works, and recordings and films), for the purposes of:

- research or study
- criticism or review (although sufficient acknowledgement must be made)
- parody or satire
- reporting news in a newspaper, magazine, film or television broadcast (although in the case of the print media, sufficient acknowledgement must be made).

To help you work out whether or not a dealing is 'fair', you usually have to consider such factors as:

- (a) the purpose and the character of the dealing
- (b) the nature of the work
- (c) (where you want copy it) the possibility of obtaining a legitimate copy of the work within a reasonable time at an ordinary price
- (d) the effect of the dealing on the value of or market for the work

- (e) where only a part of the work is copied, the amount and substantiality of the portion copied, taken in relation to the whole.

## PARODY & SATIRE

This ‘defence’ to copyright infringement came in with the *Copyright Amendment Act 2006*. Fair dealing for the purpose of parody and satire is of particular interest to musicians. Australia has a strong tradition of musical parody and satire (indeed, many cultures have).

However, a word of warning: this exception to the usual rules against copyright infringement has not yet been tested in the Australian courts, and so no one can say, with any certainty, precisely how the exception will apply. All that can be said is the dealing must be ‘fair’ (see above) and it must truly be for the purpose of parody or satire. The Copyright Act doesn’t define ‘parody’ or ‘satire’. Perhaps the framers of the legislation hoped the courts would sort it out. To date, they haven’t.

When courts have to interpret legislation, they can look at extrinsic material, such as notes on the legislation as it was being debated, reputable and authoritative dictionaries and cases decided in other countries, to help them decide what particular words mean.

The Supplementary Explanatory Memorandum to the Copyright Amendment Bill noted that parody, by its very nature, is likely to involve holding up the creator or performer to scorn. Meanwhile, the *Macquarie Dictionary* definition of ‘parody’ includes ‘a humorous or satirical imitation of a serious piece of literature or writing’; ‘the kind of literary composition represented by such imitations’; ‘a burlesque imitation of a musical composition’; and ‘a poor imitation; a travesty’. So, it seems from these sources that under the Copyright Act, a parody must include an element of comment or criticism upon the work or its author.

This is in line with a leading US parody case, *Campbell v. Acuff-Rose Music, Inc.*, also known as the *Pretty Woman* case, which was decided in 1994. The publisher of Roy Orbison’s 1954 hit *Oh, Pretty Woman* sued the 2 Live Crew for their parody of the original song. The parody appeared as *Pretty Woman* on the 2 Live Crew’s 1989 album *As Clean as They Wanna Be*. The court ruled that the 2 Live Crew’s version was a permissible parody and didn’t infringe US copyright law.

So, a prudent working definition of parody might currently be: a humorous imitation of another person’s work, designed to comment on the original work or its author.

The same Supplementary Explanatory Memorandum said satire, unlike parody, does not necessarily involve direct comment on the original material: it uses the original material to make a general point. The *Macquarie Dictionary* definition of ‘satire’ includes: ‘the use of irony, sarcasm, ridicule,

etc. in exposing, denouncing, or deriding vice, folly etc.’; and ‘a literary composition, in verse or prose, in which vices, abuses, follies etc. are held up to scorn, derision, or ridicule’; and ‘the species of literature constituted by such composition.’

The basic distinction between ‘parody’ and ‘satire’ is that, unlike parody, satire doesn’t necessarily imitate its target. The use of the original work might be collateral to the main satirical purpose: which is to make a comment. In the *Pretty Woman* case the court noted that parody ‘needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.’

Interestingly, only Australia protects satire as fair dealing in its Copyright Act. At the time of writing there is no other jurisdiction that recognises satire as a defence to copyright infringement, either in its domestic legislation or in the case law.

Take care, however: if the parody or use in satire goes too far (and unfortunately, no one currently knows how far ‘too far’ is), you might run into a moral rights infringement claim for a derogatory treatment of the original author’s work.

## USE OF AN INSUBSTANTIAL PORTION

To be an infringement, the use must be a reproduction of a ‘substantial’ portion of the work. Of course, what is ‘substantial’ is a question of fact and degree in every case.

There are no simple rules of thumb you can use, although you may hear glib and reassuring little phrases such as ‘You can use up to 14 bars of music’, or ‘It’s OK if you change a note here or there’. None of these are true. It will vary in each case. George Harrison of The Beatles had to pay millions to the composer of *He’s So Fine* because a court found that he had (unconsciously) used that melody in writing his big hit, *My Sweet Lord*. In a major computer case, a defendant was found to have infringed copyright because a piece of software used a series of numbers in its calculations that was copied from another company’s software. More recently, the Federal Court ruled that the reproduction of two bars of the melody of *Kookaburra Sits in the Old Gum Tree* within the 1980s hit *Down Under* infringed copyright: the two bars contained a substantial part of the first song’s copyright-protected melody.

Anyone who suggests there is some magic rule that lets you use grabs of copyright material for free, is woefully misinformed or no friend of yours.

## HOME COPYING & ‘TIME SHIFTING’

Virtually all Australian households contain privately made reproductions of musical recordings and TV broadcasts. Over the years, making such recordings has become one of the most publicly recognised examples of community-sanctioned unlawful behaviour. It seems that virtually everybody does it, and no one (except copyright lawyers!) feels particularly guilty about it and nobody can do anything about it.

Any law is only as powerful as the determination of the community to observe it. In the case of home recordings, the intrusion of a court official into the lounge room of every home in Australia would be practically, politically, financially, commercially and morally unthinkable, even though home taping is illegal and cheats writers, performers and the industry generally.

After discussion (for nearly a decade) about reform, in the 1980s the legislature decided to make home audio taping legal, in return for a copyright royalty on blank tapes.

The cynical might say that it was a tax to ease our consciences. To some extent that was true, but it was intended to do much more: it was intended to introduce a mechanism by which the copyright owners (who are presently being cheated of their rightful income) could receive some, if not their due, compensation. Several European countries have enacted similar legislation.

The legislation was passed, but immediately challenged by the blank tape manufacturers, who feared that the imposition of a levy would reduce sales. The High Court heard the matter in late 1992, and ruled the legislation was unconstitutional. No replacement legislation was attempted, probably because the evolution of technology has made the issue less significant: the CD won the battle over the cassette tape. The industry never got a blank CD levy. Now the CD has declined due to the ascendancy of digital MP3 files (try levying an MP3!).

In 2006, as part of changes to copyright brought in by the Copyright Amendment Act that year, the legislature both assuaged consciences and recognised reality by making it legal to make a copy of a legitimately-bought sound recording, provided that copy is solely for private or domestic use. If the copy is used for virtually any other purpose it becomes an illegal copy (e.g. if you sell it, offer to sell it, play it in public or broadcast it). As part of the same amendment, the Copyright Act also allowed ‘time-shifting’ of broadcasts by recording them to replay ‘at a more convenient time’ (again this is limited to private or domestic use).

## PROTECTION OF NON-COPYRIGHT RIGHTS OF PERFORMERS AND THEIR PERFORMANCE

Throughout the history of copyright in Australia, the performance itself – that primary focus of the music, theatre, dance and film industries – has had little or no protection, except for that provided by the law of contract and (occasionally) defamation and passing off. The problem was the Copyright Act's fixation with 'fixation' (to turn a phrase). It is well known that copyright provides no protection for ideas. It protects the material form in which those ideas are expressed. This simple proposition has been an enormous stumbling block to the introduction of performers' protection because the performance is, by definition, live, temporary and ephemeral. To fix it in a material form, one must destroy those inherent features that make it a 'performance'.

Copyright has been largely based upon traditional notions of property and property ownership. Prior to the Implementation Act, it was an unpleasant irony that the maker of a bootleg recording of a performance enjoyed copyright ownership of (and protection for) that sound recording, yet the poor performer had no right to determine whether or not the performance was recorded at all, what would be recorded, how, when and by whom the recording would be made, let alone receive remuneration from sales of the recording.

In 1989 the Copyright Act was amended to remedy this state of affairs. This amendment did not create a new kind of copyright. An Australian performer has a right to take action (including getting injunctions) against any 'unauthorised use' of their performance. In effect, the new law created a 'neighbouring right' (that is, a right that is derived from, or is related to, the work that is performed, recorded or broadcast, but is not itself a copyright. It's not really as hard as it first sounds).

No one may make an 'unauthorised' use of a performance during the 20-year protection period without the permission of the performer. 'Unauthorised use' is exhaustively defined and was extended by the Implementation Act to include 'the communication of the performance to the public without the authority of the performer'.

The Implementation Act has introduced provisions to prevent performers doubling up on their damages by receiving compensation for both infringement of copyright in a sound recording and infringement of the performer's neighbouring 'non-copyright' rights (arising from the one event). If a performer has already been granted damages in an action for infringement of copyright, those damages will be taken into account by the court in assessing damages for infringement of the performer's neighbouring rights.

It is essential that everyone who performs on a record signs a properly drafted ‘**Performer’s Consent**’ form (a very short example is set out below). This should be an absolutely standard, no exception, practice. All of the artists, the session musicians and the producer, must sign off.

#### **PERFORMER’S CONSENT**

*All performers, without exception, must sign this form before recording of their performance commences.*

**RECORDING:** *(give actual working title of track or album as the case may be)*

**FEATURED ARTIST:**

**RECORD COMPANY:**

**PRODUCER:**

*I confirm that I have been retained to perform on this Recording so that records (in any format) embodying my performance may be released to the public for any purpose and that my fee (if any) is the sole remuneration due to me. Once any fee payable is paid, I will have no further claim in relation to the Recording or for my services.*

*I also confirm that the Recording may be included with visual images and any copies of the Recording may be retained indefinitely.*

*Any copyright I may otherwise have in the Recording is assigned to [NAME OF RECORD COMPANY, PRODUCER, ARTIST AS CASE MAY BE]*

Name:    Signature:    Date:

## **PERFORMERS’ COPYRIGHT**

As mentioned above, even though a performer may get a copyright share as a ‘maker’ of a sound recording of his or her performance, there is no copyright in a performance itself. The copyright only subsists in the embodiment of the performance – the recording, the video, the film.

In 1992, the Labor government established an industry advisory group called the Music Industry Advisory Council (MIAC). One of its functions was to advise government on the introduction of legislation to protect performers. In 1994 it published a useful report (*Performers’ Copyright*) that set out the pros and cons of performers’ copyright. The interest groups were clearly divided along the lines of self-interest: unions for; record companies and broadcasters against.

In 1995, the Liberal government commissioned an independent report. (Sherman and Bently, *Performers Rights: Options for Reform.*) Although the Implementation Act significantly strengthened and extended the rights of performers in Australia – there is still no copyright in the performance itself.

## MORAL RIGHTS

While Australia's obligations to implement a moral rights framework have existed under the Berne Convention since 1935, it was not until December 2000 that moral rights became law in Australia. They relate only to musical, literary, artistic and dramatic works (not recordings).

The introduction of these new rights was the result of over 20 years of often heated lobbying and negotiation with governments of both persuasions. Changing the status quo of a copyright regime was no easy task. Many copyright users resisted the introduction of moral rights. The film industry, for example, argued that the rights would interfere with the smooth production, sale and distribution of films. They successfully lobbied the government to provide their industry with certain indulgences in the way moral rights would operate. The differential treatment obtained by the film industry is an important reminder about the strengths of collective political lobbying.

The Implementation Act introduced moral rights for performers in both live performances and recordings of performances. The new performers' moral rights took effect when the *WIPO Performances and Phonograms Treaty* (1996) came into force in Australia. The rights apply only to performances that take place after the commencement of the Treaty.

The Copyright Act provides authors and performers with three moral rights:

- right of attribution
- right not to be falsely attributed
- right of integrity.

These rights are owned by the authors of musical, literary, artistic and dramatic works as well as films (that is, directors, producers and screenwriters) and performers in live or recorded performances. The precise application of the rights varies depending on what kind of work has been created. They cannot be assigned; they are personal. However, when an author or performer dies, his or her legal personal representative (such as the executor of his or her estate) can exercise the rights.

## THE RIGHT OF ATTRIBUTION

### (a) *Musical and Literary Works*

This gives the author of a work the right to be credited as author. This means that the author (i.e. the composer or the lyricist) has the right to be identified clearly and reasonably prominently with the work when it is reproduced, published, publicly performed or communicated to the public. The right also applies to adaptations of the work. If the author makes it known what form he or she wants the identification to take, this should be done if it is ‘reasonable in the circumstances.’ Yes, it’s vague, but the concept of ‘reasonableness’ is always contextual.

### (b) *Live Performances and Recordings of Performances*

This gives a performer in a live or recorded performance the right to be credited as a performer in their performance. Identification of the performer is required when:

- communicating a live performance to the public
- staging (making arrangements necessary for) a live performance in public
- a recording of a performance, or a substantial part of a performance, is copied (from the master or otherwise) or communicated to the public.

Performers should be credited in a clear and reasonably prominent or audible way. Notably, if you are a member of a band, using the band’s name is sufficient identification. Performers and bands should now be credited on the recording (and any recording that includes a substantial part of the recording) in a manner that enables someone buying the recording to notice the credit. As with literary and musical works, if the performer makes it known what form the identification should take, this should be done if it is reasonable in the circumstances.

## THE RIGHT NOT TO BE FALSELY ATTRIBUTED

### (a) *Musical and literary works*

This right is not as important in the music industry as in the visual arts. However, it may be relevant to successful recording artists that insist on getting a share of the copyright in works composed by others in return for putting the track on their album. This is a common practice really designed to procure a share of the actual composer’s mechanical income. The artist gets attributed as a co-writer when he or she had nothing to do with creation of the work – merely its exploitation.

### (b) *Live performances and recordings of performances*

If the performance is in public or communicated to the public it is an act of false attribution if the stager of the performance states or falsely

implies to an audience, immediately before, during or immediately after a performance, that:

- a particular person is, was or will be performing  
or
- a particular group is, was or will be presenting the performance.

Acts of false attribution in respect of a recorded performance are:

- inserting or affixing a person's (or group's) name (or authorising others to do so), falsely implying that person (or group) performs on the recording
- dealing with a recording knowing that a person (or group) named in or on the recording is not the performer on the recording or communicating the recording to the public  
or
- dealing with a recording of a performance as if it were an unaltered copy knowing that the recording has been altered by a person other than the performer in the recording.

## THE RIGHT OF INTEGRITY

This is the right not to have a work subjected to 'derogatory treatment'. 'Derogatory treatment' is any way of dealing with the work that results in the distortion, mutilation or alteration to the work (or anything else to it that is prejudicial to honour or reputation). The right is similar for performances, but a derogatory treatment of a performance relates only to what is prejudicial to the performer's reputation, not 'honour' too.

In the music industry, this concept was already in the case law prior to the arrival of the moral rights legislation. It operates to a somewhat limited extent, but the courts ruled that artists who do covers cannot avail themselves of the statutory mechanical licence if their version is a 'debasement' of the original. (See the discussion of the *Carmina Burana* case in Chapter 9, **Music Publishing**.)

This right certainly gives another weapon to an artist objecting to a sample of his or her work. It is particularly important because authors and performers retain their moral rights whether or not they are still the owners of the copyright.

It may affect the rearranging, remixing, and sampling of work. It could also be used to prevent the use of a work or recording in association with 'premiums', advertisements and other licensed uses. In other words, the right of integrity protects against those who would damage the creator's reputation or honour (or just reputation, for performers) by changes they make to it and also, against those who would seek to use the work or recording in a context that would be damaging.

## DURATION

### *(a) Musical and Literary Works*

Moral rights in music, lyrics and artistic works last for the full period of copyright: 70 years from the author's death. Composers will have to take particular care to appoint an executor in their will who will take appropriate care of their work after they die. This may mean appointing one executor to take care of the ordinary duties of divvying out the ordinary assets and another who will take care of the musical/copyright assets.

### *(b) Recordings of Performances*

A performer's right of attribution of 'performership' in a recorded performance and right not to have that performership falsely attributed, continues for the full period of copyright in the recording: 70 years from the end of the year in which the recording is first published. However, a performer's right of integrity of performership in respect of a recorded performance only continues until he or she dies.

## REMEDIES FOR INFRINGEMENTS

If your moral rights have been infringed, you may seek a wide variety of remedies from the courts. These include: an injunction to stop further infringements, an order to pay damages for financial loss suffered as a result of the infringement, a declaration that your moral rights have been infringed and an order that the defendant make a public apology. When the court considers what remedies are appropriate it takes into account all the circumstances. These include whether the defendant was aware of your moral rights, the likely effect of any damage to the work or recording or your honour or reputation and how many other people have seen the infringement.

Such remedies can be far reaching. For example, if a lyricist's moral rights have been infringed by someone putting out a record with the author's lyrics reworked in a derogatory way, the worldwide distribution of that record could be stopped. Before charging down to see your lawyer with a handful of moral rights abuses, bear in mind the availability of such remedies are tempered by various defences.

## DEFENCES TO INFRINGEMENTS

First, if you **consent** to the event that would otherwise be an infringement of moral rights, there is no infringement. The consent must be in writing. Most consents for artistic, literary and musical works must be for specific events or types of events. For example, one might consent to 'using a 30-second excerpt of the music for advertising'. Consents for 'all uses of the music in any way' would be too broad to be valid.

A performer's consent can relate to all or any acts or omissions occurring before or after the consent is given. The consent may also be given in relation to a specified performance or performances of a particular description.

Although waivers are recognised in other countries, **waiving** moral rights does not provide a defence under the Australian Copyright Act. (A waiver indicates that the consent given is non-specific – even though it may be legally effective in many cases.) However, if a work is a film or is to be included in a film a slightly different set of rules apply. In film, the consent does not have to be in relation to specific events or types of events. In film deals, the consents can be very broad and 'waiver' language is often used.

If any consent is obtained by misleading statements (such as 'just sign it, it doesn't mean anything') or duress (such as 'if you don't sign we'll take your house'), the consent will be ineffective.

Second, it is not an infringement of moral rights if the act (or the failure to act) was **reasonable** in all the circumstances. The Copyright Act provides a shopping list of things for judges to consider when ascertaining whether something was reasonable. These are very broad and include:

- whether there are any industry standards or agreements
- the context and manner in which the work or performance was used
- if the work had more than one author, what the other authors thought about the infringement
- if the performance involved more than one performer, what the other performers thought about the infringement.

Bear in mind that it is not necessarily 'reasonable' to do something that would infringe someone's moral rights, just because doing so is permissible under some other part of the Copyright Act, e.g. making a parody of a song, or using it satirically (see **Fair Dealing** above).

## **NO CAUSE FOR ALARM**

Even before the introduction of moral rights, many of the Majors included terms in their recording and publishing contracts by which artists and composers had to waive their moral rights. This was absurd. After all, companies should be striving to protect the reputation of their writers and artists and not be acting contrary to them. The rationale is that they don't want to be exposed to such a claim by mistake. Well-run companies should not do things that damage the reputation or honour of the artists or writers, and they should not fail to give due credit. If it happens by accident, fixing the error and making an apology should be the automatic response.

There are many protections built into the legislation to ensure that the rights are not used capriciously. The remedies are all discretionary and take into account the circumstances of the breach, the extent of the damage caused and the action taken to remedy the problem.

No one should be threatened by this legislation provided they act in a manner that respects the role of the author or the performer in the creative process. This should already happen. Moral rights confer little more than an obligation to treat the creative person with a reasonable degree of respect. It may be hard to believe that this does not always happen in the music business.

## SAMPLING

One of the most contentious and yet widespread practices that technology has endowed upon the music industry is ‘sampling’. It is now common in rock, jazz, rap and dance music. Many of the most popular contemporary artists, such as Janet Jackson (Joni Mitchell’s *Big Yellow Taxi*); the Beastie Boys, Oasis (*Hello*, thanks to Gary Glitter and Mike Leander); Puff Daddy; The Verve (*Bittersweet Symphony* using strings provided by the Rolling Stones); Vanilla Ice (*Ice Ice Baby* using a melody from the Bowie/Queen *Under Pressure*); MC Hammer (using Rick James’ *Super Freak* in *U Can’t Touch This*). On and on it goes (see [whosampled.com](http://whosampled.com) for a compendious and fascinating database of sampling incidents).

Unfortunately, the term is inconsistently used. Sometimes people use it to mean merely taking a sound, such as making a MIDI file of a snare drum hit, and using that in a recording. Sometimes, people use the expression ‘sampling’ when referring to the copying of whole phrases from other recordings. This particular activity undoubtedly amounts to ‘substantial reproduction’ – a phrase well known to copyright lawyers!

The usual case of sampling is when a musician or the producer takes a sound or series of sounds from its original context and makes a new use of it. For example, the producer of a dance record may take a riff from a BB King guitar solo recorded in the 1960s and the drum track from a James Brown album recorded in the early 1970s and use computer technology to combine these with the performance of the present-day recording artist.

Sampling can involve the breach of three different sets of rights: the copyright in the composition, the copyright in the sound recording and perhaps the breach of the performer’s right to control the use of his or her performance. Under the moral rights legislation, sampling is also a potential breach of the moral rights of the composers whose works are sampled.

The use of pre-existing material in an entirely new social, political and intellectual context is a feature of many forms of modern (or so-called ‘post-modern’) art practice. The arts world usually refers to this practice as ‘deconstruction’ or ‘re-contextualisation’. In the visual arts, it is described as ‘appropriation’ (what a quaint euphemism for ‘copied!’). In the music business it is called ‘sampling’. A copyright lawyer, however, will most likely describe the same conduct when applied to recordings as any or all of the following:

- a breach of copyright in the sound recording from which the sound bite is taken
- a breach of the copyright of the underlying musical work
- an unauthorised use of the artist's performance
- or
- a possible breach of moral rights.

Bringing a legal action on the basis of breach of copyright in the sound recording used to be difficult, because it was not always easy to identify the sampled performance and prove that it was indeed a reproduction of the earlier recorded performance, rather than a 'sound-alike performance' (in which a later artist is imitating the original). Nowadays there is no such problem. A simple electronic matching process allows easy identification of most sampled material. Once that is done, it is 'game, set and match' to the owner.

The real reason that few owners have been prepared to undertake the expense of copyright litigation against unlawful sampling and reuse of an earlier recording, is simply that it is rarely cost-effective. However, try sampling The Beatles, AC/DC or The Eagles and see how fast the record company moves! The weight of the artist will be sufficient to force the company into action, merely to keep the artist happy. An early example was when a producer of dance music took a Susan Vega track and added a backing music-bed, her record company, A&M, quickly jumped on them and the matter was settled by A&M licensing the original recording to the producer in return for most of the income earned by the record's sales.

Similarly when Negativland sampled U2's *I Still Haven't Found What I'm Looking For*, U2 sued. Although the case settled, Negativland agreed to recall the record and hand all copies over to U2's record company for destruction. Also, in *Grand Upright Music Ltd v. Warner Bros Records*, Gilbert O'Sullivan successfully sued rap artist Biz Markie for sampling *Alone Again Naturally* and in Australia, Larrikin Music successfully sued EMI Music Publishing over the melodic sample of *Kookaburra Sits in the Old Gum Tree* that the Court agreed was contained in the hit version of Men at Work's *Down Under*.

As to the breach of the copyright in the musical work, there must be a very real doubt as to whether sampling is covered by the statutory mechanical licence or indeed any formal industry agreement. So long as the sample is of a 'substantial' portion of the work, there is a breach of copyright. 'Substantial portion' is really just another way of saying the 'essence', so it is clear that many samples do fit within this description. After all, capturing the essence of the earlier work and re-contextualising it is part of the very purpose of sampling. It makes no difference whether the material sampled is extensive or small: the issue is whether the sample captures the essence of the earlier work.

Again, however, the expense of legal action is great and the return quite small. Most publishers would agree to grant a licence for a sample, particularly

if they were asked during production of the sample rather than after release of the record! Usually, they charge a modest one-time flat fee rather than a percentage of mechanicals, but this depends upon the song in question. Some composers are very much against the practice and will force their publishers to refuse to license the use of their songs in others' works. In most cases, it is the artists who are most angered by the reuse of their talents without permission or reward and it is they who will press the recording or publishing companies to bring proceedings.

Throughout the world, the process of sampling has become so commonplace that record companies are now no longer discussing the legality or otherwise of the process but rather, discussing:

- to whom should the licence fee be paid?
- how much should the licence fee be?
- should that fee be recoupable from the earnings of the artist or be met by the record company?

### **WHO PAYS AND GETS PAID FOR THE SAMPLE?**

If you are sampling a record and a song that are in copyright, you have to get permission of both the owner of the rights in the sound recording (usually the record company and the performers) and the owner of the rights in the composition (usually the publishing company). If you ask, you might get permission for free but usually there will be a fee.

The fee is usually calculated in cents rather than percentages of the selling price. The latter generates such complicated royalty accounting statements that most sampled artists prefer to use the simpler, set-fee method. Small bites may be licensed for \$100 to \$10 000 per bite or 1¢ to 4¢ per record manufactured. The actual figure depends on the fame of the sampled performer, whether or not the original recording was a hit, how long ago it was released and all the other commercial factors that usually determine the value of a licence. The fee is calculated on the number of units to be manufactured (or anticipated downloads) and is often payable up-front.

Sometimes, where the sampling artist is also the principal composer of the track into which the sample is going to be inserted, the record company giving permission for the use of the sample demands all or part of the composer's mechanical royalties from the track. It is rumoured that Fatboy Slim's sampling bill on one record was 250% of mechanical royalties. The price of borrowing originality certainly comes high.

The fee to the publisher is generally calculated either as a percentage of the standard mechanical royalty payable under the statutory licence scheme or as a flat fee. Common figures seem to be anywhere between 15% to 50% of the mechanical royalty, again depending on the commercial circumstances of the licence.

It is all well and good to talk merrily of paying cents here and percentages there, but who is actually paying this money? The record companies argue that these payments are in the nature of recording costs and therefore (assuming that the recording costs are recoupable under the recording contract) should be recouped from the artist's share of income.

The artists argue that this allows companies faced with the bother of clearing sampled performances to take the risk of not obtaining clearances and merely relying on the artist's warranty (and indemnity) in the recording contract that he or she has the necessary rights. Then, in the event that a claim is made, the company simply settles the matter using the artist's royalties.

Musicians and record producers who use sampling techniques should ensure that, before they start to record, they work out who will be responsible for the clearance costs and provide the record company with a listing of all samples to be used, detailing where they have been taken from and the use to be made of each sample (both as to nature and length of use).

Record companies are very concerned by the risks that their artists run when they use unauthorised samples. Sampled artists are almost always financially powerful and their record company will not hesitate to sue. Accordingly, most record contracts now contain a clause requiring the artist to inform the company of any samples used, to obtain all necessary consents and to pay any associated costs.

One other aspect of the sampling controversy highlights the industrial nature of the problems underlying their use and re-contextualisation of performances. A few years ago, a very successful Australian rock band incurred the wrath of the Musicians' Union by lifting from its own record the performance of the backing vocalists who had been hired to perform on the record. By doing so, whenever that band played live, they could achieve the sound of the backing vocalists with the flick of a switch. Backing vocalists argued that it was wrong for bands to use and reuse their voices, without further payment. Nowadays the answer is easy. The band would have to have a release or contract with the backing vocalist to use and reuse their performances in that way.

## **PARALLEL IMPORTING**

The international trading system for copyright material (such as records, films, books, compositions, artworks and so on) has traditionally been divided into geographic territories. The company that owns the world rights may choose which company should represent its product in each particular country. In Australia, the local rights holder has been protected by giving it exclusivity within the territory. Parallel importing challenges this exclusivity.

‘Parallel importing’ describes a situation when someone else, not the local rights holder, imports a legitimate product and makes it available in the market ‘in parallel’ with the goods of the local exclusive rights holder. Parallel imports are not pirated goods. They are genuine goods sold in the country of export with the permission of the rights holder, but imported by a reseller without the authority of the local rights holder in the country of importation.

The Copyright Act contains certain restrictions on parallel importing for some products (notably, not sound recordings, see below).

For example, under parallel importing restrictions, if Simpsons Music USA owns the world rights in a work and grants an exclusive licence to Simpsons Music (Australia) to manufacture and distribute its sheet music in Australia, no competitor could buy the sheet music in the USA, import it, and go into competition against Simpsons Music in the local market.

## **IMPORTING SOUND RECORDINGS**

The fight waged against the abolition of protection against parallel importation of sound recordings was probably the most public and bitter political fight ever waged between the Federal Government and the Australian music industry.

To understand what the fight was about, it is essential to remember that the copyright business is based on the territoriality of the exclusive rights of copyright. If you have the rights for the territory, you can stop your competition from importing and selling the same goods on your home turf. The whole economy of the world record industry is based on the granting of exclusive territories. The local industry could not perceive a future in which retailers could buy their stock from the cheapest legitimate source anywhere in the world. That said, the government could smell voter approval in forcing the lowering of the price of CDs. The Prices Surveillance Authority argued that allowing copyright owners to control importation reduced competition and thus resulted in higher CD prices. The government agreed.

In 1998, notwithstanding the public controversy, the Federal Government amended the Copyright Act and opened the gates to allow ‘parallel’ importing of records. This made it possible for retailers to import their stock direct from overseas and bypass the local distributors.

One of the record companies’ main concerns was that if parallel imports were allowed, it would be impossible to stop the import of pirate CDs. In response, a number of procedural changes were implemented to provide anti-piracy measures. For example, only goods that are manufactured in certain countries with adequate copyright protection may be imported. Mechanical royalties must have been paid in the country of manufacture. Further, the maximum penalties for unauthorised commercial dealings in or possession of infringing copies were increased. And if importers were

sued, the onus of proof was put on them show that the sound recordings are legitimate and not pirated.

### HOW PARALLEL IMPORT OF SOUND RECORDINGS WORKS

Copyright in a sound recording will not be infringed by importing into Australia a ‘non-infringing’ copy of a sound recording. Under the Copyright Act an imported sound recording will be a ‘non-infringing copy’ only if:

1. *the copy is made by, or with the consent of:*
  - (i) *the owner of the copyright in the sound recording in the country in which the copy was made (‘the copy country’)*
  - (ii) *the owner of the copyright in the country in which the original sound recording was made, (if the copy country does not provide copyright protection for sound recordings)*

*or*

  - (iii) *the maker of the sound recording, if there is no copyright protection provided for sound recordings in either the copy country or the country in which the sound recording was originally made*
2. *the making of a copy does not infringe copyright in the copy country*
3. *the copy country is a party to the Berne Convention, a member of the WTO, and complies with TRIPS with respect to copyright in literary, dramatic and musical works.*

All three components must be proved.

It didn’t take the lawyers long to find a way around the legislation. The amendments only related to the copyright in the music and lyrics and the sound recording in which they were embodied. It didn’t cover the copyright in the packaging. Nor did it cover film material. So record companies started putting music video clips on CDs (calling them ‘enhanced CDs’). For a while, this strategy worked (albeit in a way that was as cumbersome and expensive as any loophole fashioned by lawyers through which their clients have to fit). Most loopholes are easily plugged if the government has the willpower and on this issue, it had plenty. It took the government 18 months to get legislation through the Senate, but the new millennium also saw a new era. Full parallel importing of records was permitted.

### COMPETITION POLICY

All of these changes have been part of various Federal Governments’ attempts to subject copyright to the principles of competition policy. There have been two very significant developments in this regard: the *Ergas Report*; and legal action taken by the Australian Competition and Consumer Commission (ACCC) against the majors claiming they had misused their market power

and had engaged in ‘exclusive dealing’ (i.e illegally imposing restrictions on record retailer’s freedom to choose where they brought their stock from).

#### ERGAS REPORT – COPYRIGHT AND COMPETITION

One of the most important reports of recent times in Australia is the *Ergas Report*. An independent Intellectual Property and Competition Review Committee was set up in 1999 by the Federal Government, chaired by Professor Henry Ergas to investigate areas of conflict between intellectual property legislation and competition law as was embodied in the then Trade Practices Act (now the *Competition and Consumer Act 2010*). The *Ergas Report* was the opening shot in a war that had been threatened for years but until then had never really got above the status of a skirmish: the cult of the anti-monopolists versus the religion of exclusive rights.

The copyright regime’s system of exclusive rights has long aroused allegations of monopolistic and anti-competitive behaviour of copyright owners. Let’s face it, monopoly is the very essence of exclusive rights.

The *Trade Practices Act 1974* was the first major intervention in intellectual property by non-IP legislation. Basically, the legislation specifically provided that the exclusive rights of copyright could not be used in a manner that amounted to a misuse of market power or retail price maintenance but provided a number of exceptions that benefited copyright owners. The *Ergas Report* acknowledged that the intellectual property rights system promotes innovation and that this is a key form of competition, but nevertheless concluded that there are a number of areas of conflict between intellectual property rights laws and competition policy.

Some of the submissions to the Committee supporting the removal of parallel import restrictions included the argument that the Copyright Act was not an appropriate mechanism for addressing issues such as piracy, censorship or product safety, in answer to fears of cheap, low quality copyright goods flooding the markets in the absence of import restrictions. E-commerce businesses argued that parallel import restrictions were hampering the development of the e-commerce industry in Australia, as businesses were forced to buy products through the exclusive Australian distributor rather than sourcing them more cheaply offshore. Many argued that the globalisation of trade and the development of the internet were making the restrictions redundant.

In its submissions to the Committee, unsurprisingly, the ACCC argued that copyright should be treated like all other forms of property and should not receive special treatment under the Trade Practices Act. It further argued that the parallel import restrictions were unjustified because they extend copyright protection into the sphere of distribution, as opposed to just that of production, which was the original legislative intention.

The ACCC also emphasised that restrictions on parallel imports ‘do nothing to protect domestic industry, they simply provide the domestic rights holder with an exclusive right to import. Whether they choose to invest and manufacture domestically are separate decisions which will be influenced by factors such as the likely international returns from investing in local R&D and the costs of local versus offshore manufacturing.’

In contrast, the Ergas Committee recognised that copyright has important features to differentiate it from other property or assets. Notably, these include the fact that ‘contractual arrangements are likely to be especially important in the efficient development and exploitation of intellectual property, as these arrangements allow for gains to be realised by specialisation in the various functions and stages involved in the innovation process.’

Notwithstanding their approval of special treatment for copyright, most committee members were of the view that removing all parallel import restrictions would ‘not undermine the efficacy of copyright as a stimulus to creativity’ and that it would give the small economy of Australia the opportunity ‘to benefit from the intense competition, low prices and wide product availability associated with large, integrated markets’ such as the European Union and the USA. It recommended the removal of parallel import protection (with a 12-month transitional window for books). Mr John Stonier’s dissenting opinion is very powerful. He attacked the arguments of the majority and scored powerful blows. To take just two examples:

The majority pointed out that the European Union has done away with parallel importing and suggested that this had not deleteriously affected the intellectual capital of those countries. Stonier pointed out that while the European Union had done away with parallel import restrictions between its members – it still maintained them against outsiders. Another point worth drawing from Stonier’s dissent is that parallel importing restricts only intra-brand competition – not inter-brand competition. Thus the only advantage that may be gained from removal of the laws is one of cost reduction – a consequence that he seriously questioned.

The government accepted the recommendation of the majority and in 2003 amended the Copyright Act to allow the parallel importation of a greater range of material than had earlier been allowed. Restrictions on book imports had been relaxed during the 1990s but now lots of other material could be imported: periodicals, printed music, and software products including computer-based games. (As a result, provided that they have been lawfully purchased in the country of origin, digital downloads no longer breached the parallel import rules.)

## THE EFFECT OF PARALLEL IMPORTING

The industry's early fears were not realised. The fall in the Australian dollar meant that the advantage of importing records was instantly reduced. Also, the retailers did not really pass on all of the savings to their customers. Further, the retailers concentrated on Top 20 records rather than specialist lines and back catalogue. Accordingly, while the prices of the former dropped a little, the rest of the repertoire didn't become any cheaper.

The record companies negotiated new deals with major retailers to dissuade them from importing. After all, a cheap wholesale price is only one of the considerations for a record shop: defective records or unsold stock cannot be returned and some of the imported records had poor quality and mistake-riddled artwork.

Australian music publishers felt just as endangered by parallel imports as their record company colleagues. They were understandably determined to prevent imports on which mechanical royalties have not been paid. They remain at the forefront of the war against those who threaten the Australian music industry by the import of pirate records.

For detailed discussion of the impact of parallel importing on the industry, see *Australian Competition and Consumer Commission v. Universal Music Australia & Ors* [2001] FCA 1800.

## LICENCE SCHEMES AND OPEN LICENCES

There have long been established licensing schemes that can allow you to use other peoples' copyright material, based on a system of licence contracts. Chief among them in Australia are the schemes administered by the various collecting societies (see Chapter 26, **Collecting Societies**).

The concept that a creator can allow use and sharing of his or her creative works is a key principle of copyright theory. It's not just about holding tightly onto a bundle of exclusive rights.

In principle, at least, one of the delights of copyright is that because you control copyright in your work, you can allow others to use your work, on any legal basis that you choose. So, for example, if you haven't assigned away any of your exclusive rights of copyright, you are able to post a track on a website for all to freely copy, or to remix, or add new lyrics, as the case may be. Of course, the extent to which you can do this does depend on whatever contractual obligations you may already be under. For example, if you are a member of a collecting society, you may have already appointed that society to administer some of your rights of copyright, e.g. when you join APRA, you assign to APRA all the performance and communication copyright in all your songs. Or, if you're signed to a music publisher or to a record company, you may be prevented by contract from giving away or licensing your work and recordings.

Nowadays, there are lots of people who see copyright as a problem. As creators, they just want their material to be used. They aren't looking for their copyright to generate income, and they don't want people who like their material to be obliged to get permission to use it.

This sense of copyright 'getting in the way' – and a wish to work in an 'open source' environment – started with people writing computer code, but has since moved into academia, music, art, photography and text.

The most well-known and widely-adopted of these 'open licensing' systems are the licences promoted by Creative Commons, which describes itself as 'a world wide project that encourages copyright owners to allow others to share, reuse and remix their material'.

The licences CC promotes are made up of four basic components:

- *Attribution* – this means that people using the work have to attribute the person, people or organisation that created the material.
- *Non-commercial* – this restricts people from using the material for a 'commercial' purpose (defined in the licences to mean 'primarily intended for or directed towards commercial advantage or private monetary compensation').
- *Share Alike* – meaning that someone using the material has to license his or her own material under similar conditions. For example, if you license a recording under a CC licence with this element, people incorporating it into a film soundtrack would need to license their film under similar conditions.
- *No Derivative Work* – this only gives a permission to use the work 'as is' (the licences define a 'derivative work' to include, for example, making a translation, arranging music, making a recording, and using music in a film soundtrack).

The six Australian CC licences, then, are:

- Attribution
- Attribution-Share Alike
- Attribution-No Derivative Works
- Attribution-Non-commercial
- Attribution-Non-commercial-Share Alike
- Attribution-Non-commercial-No Derivatives.

The licences are generally indicated by symbols and by brief word-descriptions of the full licence conditions. There is also computer code that can be embedded with digital files so people can find CC-licensed material.

The full licence terms and conditions are usually only found on the Creative Commons websites. For more information on the Australian licences, see [www.creativecommons.org.au](http://www.creativecommons.org.au).

## SHOULD YOU PUT A CC LICENCE ON YOUR WORK?

There's no right or wrong answer here – and ultimately, only **you** can make this decision, based on your circumstances (such as your existing contractual obligations, as discussed above). But there are a number of things you'll need to think about beforehand.

First, you can only apply the licences if you own all the rights in the material or, if you don't, if any and all other copyright owners have agreed. This sounds obvious but to check this box you'll need to look at:

- whether you wrote or recorded the piece with anyone else – these people might own or co-own copyright (e.g. in the lyrics, in the music itself or in a particular arrangement, or in the recording)
- whether you have a publisher or a record company you might need to talk with (if they own relevant rights, you'll need their agreement)
- whether you're an APRA member (if you are, you'll need to organise the transfer of the relevant rights back to you).

Second, you need to consider whether you can live with not being able to revoke the licence if you change your mind. All of the CC licences are irrevocable. There might be some legal quibbles as to how effective such a statement really is, but in practice, so long as people can get access to copies of your work with the CC notice on it, you'll have a hard time getting them to stop relying on the licence.

Third, think about how applying a CC licence may affect commercial licensing opportunities for your work down the track. Will this matter to you and if so, to what extent will the 'Non-commercial' licences work for you? For example, if you put a suite of terrific songs under an irrevocable CC licence, and a publisher approaches you with a deal to acquire those songs on tempting terms, you probably can't do the deal.

This brings us to the last point – think about your strategy for allowing some uses of your material for free. There's nothing wrong with giving your material away, but what are you aiming for? What's your plan? And how does the CC licence help you get there?

At the end of the day, as with any other licence, make sure you read the fine print carefully and think about how it'll work for you in practice.

And if in doubt, get advice.

It pays to bear in mind that there's nothing in the CC licence scheme that you couldn't do anyway in the exercise of your rights of copyright under the Act – provided you properly draft the relevant licence terms. On one view, the CC scheme is just a set of precedents for various types of licence. They're densely drafted and somewhat complex, so it would be a mistake to think that using the CC scheme is the only, or best, way that you can let people use your material. On the other hand CC is well organised, and it articulates

an important voice in the debate about how copyright will cope, or should operate, in the digital economy.

For an interesting discussion of the comparison between CC licences and APRA's scheme of licences, for example, see the paper *Creative Commons* published by [www.apra-amcos.com.au/downloads/file/.../CC\\_Creative-Commons.pdf](http://www.apra-amcos.com.au/downloads/file/.../CC_Creative-Commons.pdf).

## CONCLUSION

The rights of copyright feed, house and clothe both composers and recording musicians and they provide the profit incentive for record and publishing companies to promote and invest in those musicians and their work. The rights are valuable and they are complex.

## FURTHER INFORMATION

If you need comprehensive information about copyright law, policy and practice, the Commonwealth Attorney-General's Department website contains a wide range of material [www.ag.gov.au/www/agd/agd.nsf/Page/Copyright](http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright).

The Australian Copyright Council has published a number of helpful information sheets on its website [www.copyright.org.au](http://www.copyright.org.au).

The Copyright Advisory Group's Smartcopying website also contains a great deal of helpful and concise material, particularly for the education sector [www.smartcopying.edu.au/scw/go](http://www.smartcopying.edu.au/scw/go).

You can access the *Copyright Act* (1968) online at [www.austlii.edu.au/au/legis/cth](http://www.austlii.edu.au/au/legis/cth).