

“Moving Towards Copyright Control On The Internet”

a paper for

Music Council of Australia

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by

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1. Introduction

- 1.1 This is a paper which necessarily is as academically rigorous as reading tealeaves. It is a paper which presents no answers and yet makes a range of assumptions that some will find fantastic and others will find merely whimsical. For some, the projections will be hopelessly optimistic and for others, without hope. That said, I have spent a lot of my professional time working in this area, both locally and internationally, considering the technological, legal, management and cultural implications of the digital media on music and while this paper may be seen as a glad bag of personal views, they are by no means uninformed.
- 1.2 The simple fact is that no one knows the answers and all too few people are even spending time and resources formulating the questions. For example, we have in this room a magnificent collection of many of the most influential people in Australian music. How many of the people in this room have spent real thinking time, considering the changing role of copyright; the effect of the new technologies on the economy of music; how the new technologies are changing the way we perform, conserve, distribute, market, promote, sell, study or enjoy, music? The question is rhetorical.

2. Does Copyright Have A Future?

- 2.1 We must dispel the modern myth that the Internet is some sort of law-free zone. The laws of the country apply to Internet just as any other form of communication such as mail or radio. The problem is that Internet is based on a digital system and it is difficult to regulate bits in any meaningful way using the existing legal framework. That said, I'm not sure that many of the problems thrown up by the Internet are so very different from those posed by other media: Defamation and obscenity are obvious examples. Similarly, I have heard it argued that the Internet is unique in that it is a medium that ignores national boundaries and thus national government control. Not so. Radio and TV broadcasts are everyday examples of media which have footprints that extend far beyond national boundaries and far beyond the possibility of local regulation.

- 2.2 Whenever a new reproduction or transmission technology comes along, you have to ask, "Can the existing formulations of the law cope with the effects of the new technology?" The Internet is no greater challenge to the copyright system than the photocopier. It is just the latest in a long line of challenges provided by technology.
- 2.3 In the case of the Internet it is clear that there will need to be changes made to the existing law. This is not impossibly difficult from the legal perspective. On the other hand, the political difficulties in enacting such laws are obvious. The political power of the competing commercial interests is readily demonstrated by the state of stasis that our previous government experienced even though it had the benefit of world-class expert advice.
- 2.4 Then there is the problem of proof. It is all very well to own a copyright and know that it has been breached by someone - but you have to be able to prove who carried out the unlawful act, when they did it, where they did it and, indeed, if they did it at all. At the end of the day, it is harder to base a case on bits than on atoms!
- 2.5 Perhaps the greatest problem is that, at the moment, there is no system of legally responsible gatekeepers. For some, this absence is what helps to make the Internet a marvellous, liberating form of expression and communication. However, systems of regulation only work when there is someone to whom you can point and say: "That's who's responsible! Fix it or it will cost you dearly!"
- 2.6 It is in this respect that it is particularly significant that APRA is currently arguing that Internet Service Providers should pay a copyright fee on behalf of those who use copyright material on the Net. The representatives of the providers are going apoplectic at this initiative but it is only an important early attempt to overcome the problem of sheeting home responsibility to commercial participants who are partly responsible for the unlawful uses of copyright material. (In saying this I recognise the arguments of the service providers who say that they merely provide a mechanism but do not themselves breach any copyright. Whilst correct, it has the flavour of the gun lobby argument that it is people, not guns, that kill people.) To say that either is wholly responsible or wholly without responsibility, is overly simplistic and overlooks the inherent complexities of relationship.
- 2.7 All of this assumes a continued existence of copyright. There are at least three indicators for such optimism:
- First, copyright has long been entrenched in Western Europe and in countries such as ours which have been legally, socially and economically sculpted by those influences. This predominantly Western intellectual construct has developed into a powerful international network of treaties and organisations and through the internationalisation of communications and commerce, it has influenced the world.
 - Secondly, the copyright-based industries are among the largest in our society. Intellectual property contributes billions of dollars to our corporate balance sheets every year and it is

improbable that these corporations are going to simply allow these billions to be wiped off their asset registers on the strength of a few articles in Wired Magazine or the IT pages of the local newspaper. In other words, commerce will demand an evolution not a revolution.

Am I overstating the importance of copyright? I don't think so. Consider the relationship between China and the United States. None of us want conflict between such giants. Yet the strength of the copyright industry lobby is such that the United States government was recently prepared to threaten trade sanctions against China if it failed to recognise the importance and value of these rights.

What developed as a mode of cultural remuneration for individual creators is now established as integral to the balance sheets of many of the most powerful companies on earth and as such, has become a fundamental part of the world economy.

- The third reason for optimism is history: The phonograph didn't kill the live performance industry as it was prophesied (although thankfully it probably did kill off the music box)! The tape recorder didn't kill the record business! Television didn't kill the cinema! All developments in the law of copyright are technology-driven and all significant changes in the copyright industries are similarly technology-driven.

2.8 It is not the future existence of copyright but rather the future design of copyright that should be the concern of bodies such as the Music Council of Australia. Given that:

- copyright is now inextricably a part of the cultural expression in which it is embodied; and
- copyright has now become an important factor in the national and world economy;

we must all become activists when we see that there is a technological revolution occurring which, necessarily, is going to affect every aspect of music. Indeed, the question is not, "What are these changes going to be?" but rather, "Given my role and position in the community of music, what are my responsibilities in this environment of change?"

3. The Internet And On-line Services Will Drive Change In Music

3.1 A moment of reflection will reveal that digital technologies have influenced, if not completely changed, the way we study, perform, record, market, distribute and enjoy music.

3.2 Simultaneous with the digital revolution, or perhaps it is merely a part of it, we also have the impact of fibre optics, broadband, convergence, multimedia and interactivity. Each of these technologies is influencing and enabling the others.

3.3 I think that it is always useful for us to remember that most of these technologies were not invented as part of some considered social or cultural strategy. They are largely an accidental by-product of the scientific method which demands that the researcher reject all questions of cultural value and influence.

The companies develop and market the technologies. We adopt and we adapt. The impact of these technologies on copyright is but one example of the way that we are forced to adapt.

- 3.4 Technology and culture are not enemies, they are inextricable; but we have a duty to consider the impact of technological developments on culture in general and, in particular, its effect on the rights owners who are and will always be, vital to the provision of content and thus vital to the cultural richness of our community.
- 3.5 Our challenge, just one of many, is to ensure that the laws of copyright adapt to the new technological environment in a way that feeds and encourages creative activity rather than in a way that inhibits or overwhelms it.
- 3.6 This brings me to the effect of the Internet and on-line service on the music industry. Fibre optics will allow quality inter-activity; it will allow what is now called the television to become the Central Information Appliance (CIA), an inter-active machine which will be a gateway for many of our media, entertainment, communication and information needs. It will certainly provide our access to on-line services and the Internet. Internet download speeds are expected to be one hundred times faster than presently available. This in turn will allow the Internet to develop a degree of functionality and design that is presently not possible. Time frame? Three, maybe five, years. What are we doing as an industry to plan for this?
- 3.7 Fibre-optic cable and the CIA also creates a new and reasonable expectation as to which delivery mode(s) for music will become dominant: Disks and tapes will no longer be the primary sound carrier. They will be used when camping and fishing but rarely in the home.
- 3.8 The Internet and on-line services will provide a more efficient and cost effective mechanism, one that will also permit listeners a virtually unlimited choice of material.
- 3.9 Whilst the advantages of this are obvious, it is going to have a drastic effect on the industry and all of us who depend on copyright to make a living from music. Many of the present sources of income for copyright creators will wither. Composers and publishers will no longer be able to rely on the payment of mechanical royalties, recording artists and their companies will not be able to rely on the income based on the sale of records. Each of the participants will primarily rely on a division of the income derived from some species of transmission right (however that may be named and defined.) Mechanical income and record royalties will have about the same significance as sheet music royalties have in a music publishing deal: just further examples of technology changing what used to be a dominant delivery mode (and thus a dominant income stream) into a secondary one.
- 3.10 Perhaps the greatest challenge is going to be faced by the record companies. They are going to have to completely redefine the way that they do business. They will become production and promotion houses. Their present pressing and distribution functions will virtually disappear.

- 3.11 Their promotion staff are going to be focussing, not on how to sell records, but on how to persuade the public to select their artists' product from the extensive menu of choice and to visit their own cyber-record shops.
- 3.12 One of the major determinants of a record company's commercial success will be its ability to attract Net surfers to the company's Home Page and to its own pay-for-play services.
- 3.13 We will see a number of strategic alliances formed (both formal and informal): For example, record companies or on-line service providers will enter joint-ventures with existing radio networks so that each cross-promotes the delivery of services of the other or, through conventional advertising, on-line service providers will use existing broadcasters as a tool for attracting the public to their fibre-optic diffusion services.
- 3.14 In all of this, the income collection mechanism is going to be all-important. Reasons of efficiency and equity demand that collective administration of copyright will be essential. The role of the copyright collecting societies will become even more important than they are today.
- 3.15 The Societies themselves are going to have to be at the forefront of IT research, development and implementation. They are going to be responsible for the design, administration and supervision of the process by which uses are identified, royalties are collected and by which rights owners are identified and remunerated. No individual rights owners will have the resources to effectively administer their own rights.
- 3.16 The digital age may be one in which everyone has the ability to be a content provider but only those who administer their rights collectively will be able to maximise their commercial benefit. This is one of the great ironies of the Digital Revolution: The mechanisms of freedom of expression will be anarchic, but the income mechanisms will be largely collectivised.

4. Influences On The Future Shape And Exploitation Of Music Copyright

- 4.1 There are many matters which will influence what music copyright will look like and how we exploit it in the music industry. I will introduce just seven. Each of them deserves amplification at another time.
- (a) Copyright Management
- (i) One of the most important issues is how best to manage copyright material in the digital environment. It is now extraordinarily cheap and easy to store, repurpose, manipulate and distort, and distribute.
- (ii) These are characteristics that can greatly enhance the commercial value of the copyrights and this is reflected in the macro view of corporations which are acquiring content through takeovers or strategic alliances and in the micro view which sees the release of a record and video featuring a long dead Nat King Cole singing with his much alive daughter thanks to the miracles of digital technology (and our ability to suspend belief). It sees Forrest Gump talking with President Kennedy. It allows a newspaper to change the eyes of a mass murderer.
- (iii) On the other side of the coin, distortion and manipulation is an important moral rights issue for the authors of content. It is also important for the companies whose business is

the administration, exploitation and control of that content. The use of copyright without remuneration obviously affects the rights owner's ability to make income from their work but the distortion and manipulation of one's work can not only deprive the rights owner of income in respect of that reuse, but also derogate the value of the original. As a lawyer whose clients include both the talent and major corporations, I can say that copyright control and supervision is not just an issue for the creators, it is an issue in the boardrooms.

(b) Promoting Controlled Copyright Access

- (i) The cost of getting lawful access to copyright material is considerable. The traditional forms of licensing take time, skill and money. Multimedia and the other inter-active technologies require us to look for new ways of granting access. The granting of statutory licences (such as the mechanical licence administered by AMCOS) is one way that the community ensures access but generally, compulsory licences are an unwarranted interference with the right to control one's own valuable property. There are other approaches that should be investigated and encouraged:
- (ii) Copyright clearing houses will be one of the key businesses in the future. They will undertake, for a fee, the clearance activities that individual owners and potential users would find uneconomic. These already operate in the film industry and we will see them proliferate in the music and multimedia industries too.
- (iii) We will also see an even greater role for copyright collecting societies. But more of these later.

(c) Policing

- (i) It is no secret that one of the great threats to copyright and the commercial value of copyright material is that posed by the Internet. We have all read about the difficulties of identifying who is involved, where it is being done, what country's laws apply, what activity is unlawful and so on.
- (ii) A considerable amount of work is being done on "copyright tagging" and developing "unique identifiers" so that the owners of digital material will be able to identify their property wherever it is and however it has been modified or distorted. This will overcome many of the problems of identification.
- (iii) Moreover, this technology, together with the development of "intelligent agents" or "bots" which are capable of trolling around cyberspace identifying these tags, will help us track the copyright material across the Internet wherever it may be. Unlikely? I think not.
- (iv) This is not to say that all copyrights will be protected, because of course, not all-copyright material will be tagged. But remember that the bulk of the copyright-based industry is dominated by some of the largest companies in the world. They will tag and search and enforce, and thereby the major part of the world's intellectual property industry will be subject to continuing control.

(d) Collection Of Income For Internet Use

- (i) I have already mentioned APRA's efforts get Internet Service Providers to play a role in obtaining payments for the use of copyright on the Internet. Whether this is the way to go or not, it is too early to tell. The importance of APRA's action has been that it has highlighted the problem and forced many of the key players to realise that the Internet is

not copyright neutral and that there is a problem that both industry and government must face. (I include Government not just because of its overall social policy and law-making responsibilities but because it is also one of the greatest intellectual property owners in Australia as well as one of the greatest users of the Internet.)

- (e) Change In The Way We Do Business
 - (i) Irrespective of technological or legal developments, the ways in which we do business will change.
 - (ii) We are already seeing the large corporations putting their toes into the cyber pool. Why do you think that mainstream publishers, record companies, newspapers, film studios etc are experimenting with the Internet? Its because they know that it is not going away and that unless they embrace it, get comfortable with it, learn how to make it work for them, learn how to dominate it, they will lose market share. There will be lots of casualties for, at the moment, the real cyber-market is tiny in comparison to their atom-based market. Until a large proportion of the community feels more comfortable shopping at their computer than shopping in stores, and until that community feels comfortable about the security of their financial transactions, the market is going to be 99% hype and 1% wish. In other words, until the psychology of the public changes, there won't be a market.
- (f) The Role Of Brand Recognition
 - (i) This leads me to one way in which the significant players will create an intellectual property-based Internet commerce: brand recognition. One of the ways that the public will gain the reassurance and comfort that I mentioned a moment ago, is through brand recognition.
 - (ii) Attraction: Given the cacophony on the Internet, one of the most valuable tools any copyright owner will have is a brand, which will attract the market to its web site. "Creepy crawlies" and "bots" may be your best friend but if you are looking to buy something particular, you are likely to prefer to go straight to where you know you'll find it. If you wanted to buy a particular Phillip Glass album, would you be more likely to buy it through the Sony Music homepage or from a no-name company using a post box out of Finland? If you want to buy a Mickey Mouse T-shirt you will be heading off to the Disney page without much further thought.
 - (iii) Trust: Quite simply, people will be more likely to use an unfamiliar medium for commerce if they are dealing with people or things that they trust. That is what brand recognition is all about.
- (g) The Role Of Collecting Societies
 - (i) And what does this all have to do with collecting societies? Everything! Collecting societies generally benefit both the owners of the primary property and those who would make secondary use of that property. Through the economies of scale they promote lawful access to the rights by making the process easy and promote the creation of new works through collecting that, which would otherwise be uneconomic to collect, administer and distribute.
 - (ii) In my view, it is the collecting societies who will be the traffic police of cyber world. They will have an enforcement role but also a facilitation role. This is not to say that some of the major corporations will not provide this function for themselves, as they sometimes

choose to do in the atom-based market place. The size of the Majors can mean that they create their own internal economies of scale.

- (iii) Why will collecting societies become even more important? Because, as I have already suggested, CDs are not going to be the primary sound carrier of music into the home. It will be on-line. We will have access to virtually all the recorded repertoire and will be able to order anything we want to hear for, say, half a cent per track. That tiny sum would not be worth collecting unless there was a collecting society at work. But there will be! That half a cent will be notionally divided between the telephony company, the service provider, the owner of the copyright in the recording, the artist, the music publisher, the composer, and the collecting society (to meet its costs). The interface between the public benefits of copyright, the commercial transaction, the technology and the aesthetic pleasure will be seamless.

5. CONCLUSION

- 5.1 To conclude, copyright must continue to play an essential role in any modern developed sophisticated society. At the end of the day, the rights of copyright are an award for innovation, creativity and risk taking. This recognises that both the culture and the economy of our community is dependant on encouraging and fostering these characteristics.
- 5.2 Perhaps the essential characteristic of the digital age is the internationalisation of data flow. One of the great challenges for every government in the world is how they are going to remain relevant to the control of intellectual property and the encouragement of the economic and cultural functions inherent in such rights.
- 5.3 No single section of the community is capable of solving this enormous issue. Indeed, there will be no single answer. What answers there are, will not arrive overnight; nor will they be delivered to us in a dream. First we must ensure that there is a debate and that this debate is well informed and balanced; that the needs and concerns of all relevant parties are heard.
- 5.4 This process was started by the previous Government by commissioning a number of Reports which produced a rich body of background information and a wide range of recommendations for change. It was a terrific start to the process but it wilted, for whatever reasons, when implementation was due. Much is now overdue.
- 5.5 Perhaps one of the priorities of the Music Council of Australia is that it be active in assisting Government to understand the extent of the problems we face and to help Government formulate the policies which will help meet those challenges.
- 5.6 If Government does not believe that it has a role in this process, let even the most tone deaf economic theorist hear that in 1992/93 the total output of the Australian music industry was \$1.591 billion dollars, that its value added/contribution to GDP was \$602 million; that it was responsible for exports of goods and services of \$206 million (See: "Economic Profile of the Australian Music Industry, A Statistical Update" Economic Studies Unit, Price Waterhouse). The music industry is big business. It is important to

Australia's cultural vitality and also its economy. It is also an industry is the throws of rapid change - change which will affect us all and a change in which we, (both industry and Government), must be active participants.

- 5.7 These are some of the issues that must be rethought if we are to deal with our cultural, economic and technological future - a future that is already becoming our present.