



Music Rights Australia wishes to thank the committee for this opportunity to comment on the Copyright Legislation Amendment *Fair Go for Fair Use* Bill 2013 (the **Bill**).

## **Executive summary**

Music Rights Australia and its stakeholders believe copyright is the currency of creativity. Copyright plays a vital role in the local and international cultural landscape. It enables creators and the businesses which invest in them, to monetise demand for their creations and secure returns that can be reinvested into new projects and new talent, to benefit Australian artists, international artists and those who invest in them.

Knowing what rights are capable of protection and how that protection can be effected is vital to this cycle of investment.

In its policy document *The Greens Standing Up for What Matters*, (**Greens policy document**) the Greens Party reaffirms its support for Australian artists and their work<sup>1</sup>. However, the Bill does not address the serious issue of rights protection in the online environment. Were some of the proposed amendments to be adopted they would further erode rights holders' ability to protect their works under the Copyright Act 1968 (the **Act**). The Bill is at odds with the stated goals of the Greens policy document, the National Cultural Policy Creative Australia<sup>2</sup> and the goals expressed in the Explanatory Memorandum to the Bill as it does not support artists' rights and undermines their ability to earn a sustainable living from their creative content online.

The decision to not include any amendments to address the damaging impact which unchecked unauthorised use online has on content creators and owners and its impact on the growth of the digital economy is a serious concern to Music Rights Australia.

Additionally, the inclusion of the new section 251 (Fair Use), will add unnecessary confusion for rights holders and consumers of copyright material as it is unclear how this section will be read in relation to the other existing sections of the Act, particularly the existing fair dealing exceptions.

The Bill covers issues which are currently the subject of complex and extensive reviews by other groups, including: the House of Representatives Standing Committee on Infrastructure and Communications; the Attorney General's Department and the Australian Law Reform Commission. It is inappropriate to decide these matters when these enquiries are still considering the complex questions and extensive evidence before them.

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<sup>1</sup>" The Australian Greens are committed to supporting and promoting Australian artists and their work, and particularly encouraging young and emerging artists as they establish their careers." p 50

<sup>2</sup> Creative Australia – National Cultural policy page 16 " Artists also need to know their work will be respected and that there are adequate protections in place to allow them to be rewarded for their creative output into the future."

## 1. MRA and its stakeholders

Music Rights Australia is a joint venture between the Australian recorded music sector ( represented by the Australian Recording Industry Association – ARIA ) and the Australian songwriters, composers and music publishers ( represented by the Australasian Performing Right Association Ltd - APRA and the Australasian Mechanical Copyright Owners' Society Limited – AMCOS ) representing more than 70,000 songwriters, composers music publishers and record labels. Music Rights Australia aims to ensure that the works created by its music industry stakeholders are respected, appropriately rewarded and protected. It also seeks to improve the awareness of intellectual property rights among music fans and the wider Australian community.

## 2. Rights holders ignored

The music sector has not only embraced digital technologies and the opportunities they offer it to reach new and wider audiences, but it has also embraced the flexibility these technologies give consumers to access the music they want. There are more than 30 licensed digital music services available to Australian consumers<sup>3</sup>. Music Rights Australia believes that the ongoing growth of digital music services can be accelerated if more positive steps are taken to implement effective and efficient protection measures for content owners and legitimate digital content providers.

The issue of unauthorised use of copyright material online has a significant impact on Australian creators' ability to earn a living.

The International Federation of Phonographic Industries (**IFPI**) estimates that 25 per cent – one in four – Internet users world- wide access unauthorised services on a monthly basis and over half (57%) of these users are using P2P networks, with BitTorrent sites leading the field<sup>4</sup>. Use of unauthorised services continues to rise in Australia despite the growing number of legitimate services that the industry has licensed. This growth is also above and beyond the increase in internet users. Piracy remains the biggest competitor to legitimate services such as iTunes, Spotify, JBHIFI and Pandora.

Despite the growth of authorised online services, the Australian industry continues to experience significant losses due to unauthorised use of music either through the use of peer- to -peer (**P2P**) technologies to download illegal music or through illegal streaming sites. The recent *PwC Outlook Australian Entertainment and Media Report 2013- 2017* reported that in the first half of 2012 Australians illegally downloaded 192 million songs<sup>5</sup>.

At page 50 of the Greens policy document the party stated: "The Greens' performing and visual arts policies focus on providing support for artists, encouraging innovation in the arts and taking the arts to the community."

However, the Bill does not address the serious issue of rights protection in the online environment and were some of the proposed amendments to be adopted they would erode rights holders' ability

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<sup>3</sup> See Annexure A and [www.promusic.org](http://www.promusic.org)

<sup>4</sup> Digital Music Report 2012 Expanding Choice Going Global p 16

<sup>5</sup> <http://pwc.com.au/media-centre/2013/em-outlook-jul13.htm>

to protect their works online and therefore impact their ability to be rewarded for their creative output.

The absence of any amendments to address the damaging impact which unchecked unauthorised use online has on content owners and its impact on the growth of the digital economy is a serious concern to Music Rights Australia.

### ***Protection***

According to the IFPI Digital Music Report 2012, the biggest factor undermining the growth of digital music businesses is widespread piracy. Without a comprehensive platform for rights protection, it is extremely difficult for any business model to compete and for new models to emerge. The widespread availability of unlicensed content has greatly damaged the ability of authorised services to compete and grow audiences. The Arts Council of Australia study titled *Do You Really Expect to Get Paid?* (an economic study of professional artists, including musicians and composers) found that sixty per cent of all artists believe new technologies are likely or very likely to improve their income, with the ability to reach new audiences (26 %) and to promote their work (20%) being the most common new opportunities cited.

The study also noted that artists had increased their understanding of how intellectual property could be a means of providing remuneration to creators and stated:

“From the viewpoint of individual artists, if they are to gain full economic benefit to which their creative endeavour entitles them, their intellectual property in their work must be adequately protected against unauthorised exploitation and appropriation.”<sup>6</sup>

As we have already stated the music industry has embraced the digital economy. However, the industry continues to be negatively impacted, locally and globally, by unauthorised use of its creative content through P2P technologies, unauthorised streaming sites and rogue sites which offer only pirated material.

The failure of the Bill to address rights protection will create an unacceptable imbalance in favour of those who would seek to benefit from taking creative content without appropriately rewarding rights holders.

The music industry has partnered with other industries through the Australian Content Industry Group (ACIG is made up of representatives of the music, books, games, software and visual arts industries) to try to achieve a solution to address the present and emerging issues online.

Over the last three years, ACIG members have engaged in discussions with the Attorney General’s Department, ISPs and consumer groups to try to address the unauthorised use of creative content on line.

ACIG’s goal continues to be the development of an efficient, equitable and proportionate system through cooperation with ISPs, Government and consumer groups. However, since the High Court’s

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<sup>6</sup> Throsby and Zednik *Do you really expect to be paid?* 10 August 2010 [www.australiacouncil.gov.au](http://www.australiacouncil.gov.au)

decision in the *iiNet* case<sup>7</sup>, it is apparent that this goal can only be achieved through amendments to the legislation.

The High Court found that iiNet had not authorised the copyright infringing activities of its customers who used the BitTorrent P2P file sharing software to download copyright material, and was not required to take action to stop its customers using P2P technologies to access infringing content. As the law stands today, the only solution content owners have to protect their rights is to sue individual consumers who use BitTorrent technologies to access unauthorised content.

Music Rights Australia does not believe this is an adequate solution and Australian music copyright owners have been reluctant to take that option and have, through their participation in the ACIG and other industry groups, continued to seek a collaborative solution which addresses the significant losses they face from unlicensed use of content online.

Music Rights Australia believes a code, implemented through legislation and binding all ISPs<sup>8</sup>, which requires them to take meaningful steps to address unauthorised use on their networks, will go some way to address these issues. A code will also create a new flexible model which takes into consideration the needs of rights holders, ISPs and consumers. Additionally, it will avoid unnecessary and costly litigation against ISPs and consumers and mean the court system will not be burdened by increasing numbers of cases.

Not only does the Bill not contain any amendments to the Act which would allow a code to be implemented but it is completely silent about any measures which would permit rights holders to take steps to protect their creative content online.

It is evident from international examples that programs which have a combination of education, consumer notices and proportionate sanctions, work effectively and have a positive impact on consumer behaviour and the uptake of legitimate sources of content. Music Rights Australia does not necessarily advocate one international example over another. However, we do believe that any solution designed to address this serious problem should include the following minimum and reasonable elements:

- Coordinated consumer education campaigns designed to raise awareness of the sources of genuine and authorised content;
- a series of education notices which ISPs send to their customers to alert them to the consequences of their use of P2P technologies to access unauthorised content;
- mitigation measures designed to deter the infringing behaviour of those who continue to ignore their legal obligations after several notices. However in the case of P2P technologies, we do not advocate disconnection from the internet;
- a right of review for those consumers who believe they have received notices incorrectly;
- legislation to ensure all ISPs are required to participate in the code ; and
- legislation to assist rights holders to obtain orders against rogue sites and unauthorised streaming of creative content.

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<sup>7</sup> *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16

<sup>8</sup> ACIG's proposal is made using the existing definition of Carriage Service Provider in the Act.

Measures to address P2P piracy are operating in many countries, for example: France; New Zealand; Ireland; South Korea; Chile and the US and initial studies have shown a positive impact on consumer behavior and sales.

### ***Addressing Rogue Sites***

We also know that limiting access to rogue sites can also be effective to protect rights holders' interests and to assist in consumer protection. The Pirate Bay and other rogue sites have been blocked by ISPs in several countries including the United Kingdom and in other non EU jurisdictions.

Recital 59 of the EU Copyright Directive 2001/29/EC recognises that in the digital environment, the services of online intermediaries, such as ISPs, may be used by third parties to carry out copyright infringing activities, and that in many cases those intermediaries are best placed to bring such infringing activities to an end. Accordingly, and without prejudice to any other sanctions and remedies available to copyright owners, article 8(3) of the Copyright Directive provides that the courts in EU member states should have the power to grant injunctions against intermediaries, to require them to stop or prevent an infringement.

Evidence shows that these website blocks have had an impact on piracy as usage of the blocked sites has decreased after implementation of the blocks. The courts in each case assessed the harm to copyright owners and any impact on the ISP in implementing the blocks, and concluded that blocking a site was a reasonable and proportionate response.

Australia does not currently have a process which would allow rights holders to obtain similar orders. Music Rights Australia believes this needs to be addressed so rights holders can ensure their intellectual property is adequately protected and also to ensure that consumers are not taken advantage of by the broad range of online rogue groups involved in the distribution or making available of infringing materials.

We note the Bill is silent on any measures which would support creative content owners taking steps to protect their creative content against those who operate sites which only deal in illegal content which undermine legitimate online services offerings.

### ***Evidence of damage to content owners from unauthorized use on line***

Online copyright infringement is a serious issue in Australia and internationally. The situation was also addressed in the CCI Digital Futures Report- The Internet in Australia 2012<sup>9</sup> which found that 44.33% of users said the main reason they used file sharing services was because they were free and when asked if the ability to download music from the internet influenced their purchase of music, 24.3% said that they bought less music as a result of this.

In addition to that study, the majority of academic and empirical studies show that the level of piracy negatively impacts the demand for legitimate content:

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<sup>9</sup> Ewing and Thomas *The Internet in Australia 2012* [www.cci.edu.au](http://www.cci.edu.au); [www.apo.org.au](http://www.apo.org.au)

- A recent study titled *Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales*<sup>10</sup> found that the majority of the literature which studied the music industry showed that piracy harmed media sales. For motion picture sales the peer-reviewed literature, which focused on recently released titles, strongly suggested that digital piracy resulted in a decrease in sales of motion picture content. Generally the study found that all papers in peer reviewed journals (bar one), spanning both music and motion picture sales, found evidence of statistically significant harm to sales of recently released content as a result of unauthorised file sharing.

### **3. Other enquiries**

All of the issues covered in the Bill are under consideration in one of the following enquiries.

1. Attorney General's Department's review of Technological Protection Measure; Exceptions Made Under the Copyright Act 1968;
2. Attorney-General's Department's review of access control technological protection measures (TPMs) made under the Copyright Act 1968;
3. House Standing Committee on Infrastructure and Communications Inquiry into IT Pricing, report tabled on 29 July 2013; and
4. Australian Law Reform Commission Review of Copyright in the Digital Economy

All of these Australian enquiries are currently reviewing material from a range of stakeholders on the issues raised in the Bill.

Music Rights Australia submits it is inappropriate to cut short these enquiries by introducing this Bill, particularly when the full range of evidence before the various enquiries has not been fully considered and debated.

### **4. Confusion and Complexity**

Music Rights Australia is concerned that the amendments contained in the Bill will create unnecessary confusion and complexity for rights holders and the consumers of creative content.

How would the new section 251 operate?

- a) There is no consideration given to how this section will be read in relation to other exceptions in the Act.
- b) Other than section 200AB, which is repealed in the Bill, are all the current exceptions in the Act still operative? If the answer to that question was yes: what would be the effect of the words in section 251 (1): "Notwithstanding the provision of any other sections in this Act,..." ?
- c) Would rights holders be required to first consider any use by a content consumer against the current fair dealing exceptions and then review the use against the wording of the new section 251?

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<sup>10</sup> Michael D Smith/Rahul Telang August 2012 <http://ssrn.com/abstract2132153>

- d) Would section 251 cover the field? What then would be the purpose and effect of the current fair dealing exceptions as a defense for infringement?
- e) How would Australian precedent be applied to the existing fair dealing exceptions and the new fair use exception?

The answer to any one of these questions would entail costly and lengthy litigation for rights holders and creative- content consumers.

Neither rights holders nor creative- content consumers should be asked to operate in such an unclear environment.

## **5. Conclusion**

The Bill fails to address the serious issue of rights protection in the online environment. The exceptions it does introduce would further seriously dilute rights holders' ability to protect their creative content online.

The Bill covers matters which are currently the subject of extensive review and debate and should not interfere with those processes.

The Bill would create confusion and require rights holders to undertake expensive litigation in order to determine the impact of the amendments it contains. This lack of clarity is unacceptable for both rights holders and consumers of creative content.

The Bill is at odds with the stated goals of the Greens policy document and the goals expressed in the Explanatory Memorandum to the Bill<sup>11</sup> as it does not support artists' rights and undermines their ability to earn a sustainable living from their creative content online.

Music Rights Australia looks forward to working constructively with the Greens party and other members of the Australian Government to ensure Australia's legislative framework is amended to ensure support for artists and those who invest in them.

Vanessa Hutley

General Manager

Music Rights Australia

## **Music Rights Australia - Annexure A**

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<sup>11</sup> Statement of Compatibility with Human rights point 1.5

<b>Download stores</b>	
Bandit.fm	Mobile Active
BigPond Music	MOG
Cartell Download	Music Unlimited
Dada	Nokia Music
DanceMusicHub	Optus Music Store
Deezer	The In Song
FishPond	Third Mile
Getmusic	Ticketek Music
Google Play	The Insong
Guvera	Virgin Mobile
iTunes	X Box Music
Liveband.com.au	ZDigital

<b>Subscription services</b>	
BBM Music	Pandora
Deezer	rara.com
Guvera	Rdio
JB Hi Fi	Samsung Music Hub
MOG	Songl
Music Unlimited	Spotify

<b>Ad-supported services</b>	
Deezer	Spotify
Guvera	VEVO
IHEART RADIO	VISZONE
Pandora	Xbox Music
Songl	YouTube