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30 October 2006

The Chairman  
Standing Committee on Legal  
and Constitutional Affairs

Attention: Ms Jackie Morris, Acting Committee Secretary

**VIA EMAIL: [LegCon.Sen@aph.gov.au](mailto:LegCon.Sen@aph.gov.au)**

Dear Sir,

**COPYRIGHT AMENDMENT BILL 2006  
COMMENTS BY AUSTRALIAN RECORDING INDUSTRY ASSOCIATION**

**INTRODUCTION AND SUMMARY**

This submission is made by the Australian Recording Industry Association (**ARIA**) on behalf of its members. ARIA is the peak representative body for the Australian recorded music industry with members involved in the areas of record production, manufacturing and distribution. ARIA represents over 100 major and independent record labels that account for substantially all of the commercially released recorded music in Australia.

ARIA and its members welcome the opportunity to provide submissions on the Copyright Amendment Bill 2006 (the **Bill**). In summary, ARIA's submissions include:

- **Schedule 1 – Criminal Laws.** ARIA welcomes the introduction of an infringement notice regime. ARIA's submissions on Schedule 1 of the Bill focus on the general expansion of the knowledge requirements needed to prove a copyright crime. ARIA submits that the additional knowledge elements may create practical difficulties for prosecutors when proving copyright crime.
- **Schedule 4 – Civil Remedies and Commercial Scale Infringement Online.** ARIA welcomes changes to the Copyright Act 1968 (the **Act**) which expand the remedies available for commercial scale online infringements. However, ARIA submits that the drafting of the proposed s115 is too restrictive as it only applies to an infringement of the communication right. Similar relief should also be available in relation to infringements of other acts comprised in copyright which occur on a commercial scale in the digital environment.



- **Schedule 6 – Exceptions to Infringement of Copyright.** ARIA would like to reiterate that the record industry considers that there is no demonstrated need for format shifting and time shifting exceptions. However, ARIA notes that the Government’s policy in proposing the new exceptions is to legitimise a range of consumer behaviours. ARIA’s submissions on Schedule 6 of the Bill are, nonetheless, directed to ensuring that the proposed new exceptions are properly limited in order to minimise harm to new and existing business models in the recording industry. In particular, ARIA submits that the format shifting exception should be limited to physical media only. ARIA believes that there is no need for an exception that allows copying of digital media, as licensed digital content is already made available on contractual terms that permit consumers to make copies of digital content for personal use. ARIA can, therefore, see no policy basis for extending the exception to digital material, especially in light of the significant harm the format shifting exception poses to existing and future business models in the digital music market.
- **Schedule 7 – Maker of a Communication/ Schedule 8 Response to Digital Agenda Review.** A number of the proposed amendments to the Act contained in Schedule 7 and Schedule 8 of the Bill contain very broad exceptions to infringement for libraries, educational institutions and others. We are not aware of the policy basis for introducing these broad exceptions, nor are we aware of any problem with the existing law that requires these exceptions. Given the breadth of the exceptions and the uncertainty in the drafting, ARIA believes that there is a very real likelihood of increased litigation between rights holders and non-profit institutions as parties attempt to clarify the meaning of the proposed exceptions. ARIA is concerned that there is insufficient time for the Government to review and redraft the provisions in a manner which achieves the Government’s policy objectives, protects the interests of both rights holders and library and educational users, and complies with Australia’s international obligations. In the circumstances, ARIA submits that a number of the exceptions (in particular s200AB) should be excised from the Bill so that Government and stakeholders have time to properly consider the Government’s proposed exceptions.
- **Schedule 11 – Copyright Tribunal.** ARIA welcomes the proposed amendments to the Act which expand the jurisdiction of the Copyright Tribunal to all collectively administered licence schemes. ARIA submits that there are a number of drafting issues in the Bill which may have unintended consequences. For example, the proposed definition of “licensor” may exclude some established collecting societies from the jurisdiction of the Tribunal. ARIA is also concerned about the practical consequences stemming from the proposal to give the Tribunal power to make an order to substitute a licence scheme with a licence scheme proposed by another party (ss154, 155 and 156). This amendment may increase costs as the parties argue the merits of competing licence schemes. If the Tribunal is given power to substitute a licence scheme to an alternative licence scheme proposed by a party, ARIA submits that such an order should only be made if it is reasonable in the circumstances, having regard to the evidence before the Tribunal.
- **Schedule 12 – Technological Protection Measures.** In general ARIA welcomes the proposed amendments to the Act in Schedule 12 of the Bill, which implement the requirements of the Australian United States Free Trade Agreement (**AUSFTA**). ARIA is concerned, however, that some of the provisions relating to the prohibition on manufacturing a circumvention device (ss116AO, 132APD) are cast too narrowly to implement the AUSFTA, and are also narrower than existing law. ARIA is also worried that a number of the “defences’ (ss116AO(2), 116AP(2), 116APD(2)) may create opportunities for a defendant to structure operations in such a way as to avoid liability.



## **SCHEDULE 1 – CRIMINAL LAWS**

At the outset, ARIA welcomes the introduction of an infringement notice regime which will allow police to issue on the spot fines to offenders in appropriate cases. ARIA believes that this will provide copyright owners with a cost effective process for dealing with minor copyright crime.

ARIA is, however, concerned that police and prosecutors, given the option, may tend to favour charging offenders under the summary and strict liability offences, thereby avoiding the use of the indictable offences, which would amongst other things require a trial by jury. This is of particular concern to ARIA given the wide disparity between the penalties for the Indictable offences (\$60,500 and a maximum 5 years imprisonment), summary offences (\$13,200 and a maximum 2 years imprisonment) and the on-the-spot fines (\$1230). If police and prosecutors do tend to favor the charging of offenders under the summary and strict liability offences then the penalties that offenders will face in most instances will be **significantly less** than the current \$60,500 and a maximum 5 years.

In order to address this concern ARIA would encourage removal of the strict liability offence equivalents for those offences which are by definition serious, in particular s132AD "Making infringing Copy Commercially" and 132AH "Importing Infringing Copy Commercially". In addition, ARIA would like to encourage the development of appropriate charging guidelines. The development of such guidelines would be essential for ensuring that offenders were charged under those offences commensurate with their activities.

Finally, while ARIA appreciates that the scope of the infringement notice regime will largely be dealt with in the Copyright Regulations, ARIA highlights the very important need for the police to have the power to also seize or confiscate infringing copies at the time of issuing the infringement notice. Otherwise there is a substantial risk that the infringer will continue to commit the offence or a related offence despite having received the notice.

### **Additional knowledge requirements**

There appears to have been a general expansion of the required factors within those offences that focus on the knowledge of the offender. This expansion does not appear to have a policy basis, and may unduly hamper enforcement of copyright related offences. Already under existing law, ARIA is concerned that some suspects have been able to escape conviction by taking the position that they did not know that certain items were infringing copies, even in circumstances where it is abundantly clear that the items were not obtained through legitimate channels of commerce. Unfortunately the proposed amendments, intended to be "bad news for pirates", may have the effect of compounding these difficulties.

For example, in s132AC3(d), we do not consider that there should be any requirement that the person be negligent as to the fact that the infringements occurred on a commercial scale. Whether the infringements occurred on a commercial scale is a question of objective fact to be determined by a court applying the relevant statutory test.

Another example is in s132AE(3)(b). In order for the prosecution to convict a person under this summary offence, it would have to prove that the offender was negligent as to the subsistence of copyright. This is a clear departure from the existing provisions, and imposes an inappropriate requirement because issues of subsistence are issues of law and not matters of factual knowledge. Furthermore, there is no requirement that the offender have knowledge of the subsistence of copyright or be negligent as to the subsistence of copyright in the corresponding indictable offence under s132AE(1) despite the fact that the indictable offence carries with it higher penalties. This same issue arises in many of the summary offence sections including ss132AF4(c), 132AF5(c), 132AL(4)(c) and 132AL(5)(c). Undoubtedly it will make each of these summary offences more difficult to prove against culpable suspects, including when



compared to the corresponding indictable offences. Accordingly, ARIA submits that the requirement that the accused “was negligent as to the subsistence of copyright” is removed.

Further, a number of sections introduce the notion of “intention” to do something. For example, s132AD requires that the person have an intention to make an article to sell or let for hire. Previous provisions relating to making an article were simply stated as making an article for sale or for hire, without the necessity to prove intention. The same can be said for other sections such as s132AH with respect to importing and s132AI with respect to distributing. The notion of “intention” has also replaced “purpose”, a more objective criteria in sections such as ss 132AH(1) and (3) and 132AI(1) and (4). Again, the concern is that these may unnecessarily make each of these offences more difficult to prove, in circumstances where liability is appropriate.

Section 132AK “Aggravated offence-work etc. converted to digital form” adds a requirement in addition to those set out in the current version of the provisions (s132(6AA)), namely that the defendant was reckless. It also appears that “recklessness” as a fault element is also now required under s132AL (6) “making or possessing device for making infringing copy” although to some extent this is unclear in the legislation. ARIA is not aware of the policy basis for this change and is presently of the view that such a change is unwarranted.

### **Standard for liability for infringements prejudicial to copyright owner**

ARIA does not consider it appropriate that s132AC “Commercial-scale infringement prejudicing copyright owner” should require the prosecution to prove both “substantial prejudicial impact on the owner of copyright” and “commercial scale”.

“Commercial scale” is the standard from the AUSFTA, which requires Australia to provide for criminal liability where infringements are on a commercial scale. The AUSFTA does not allow for the imposition of additional elements beyond commercial scale that would narrow the scope of the criminal offence. Also, the TRIPS agreement provides that – as a minimum – WTO member states have to provide criminal sanctions in respect of all offences committed at a “commercial scale”. This standard is understood internationally to cover all infringements that cause prejudice to copyright owners, i.e. are of a commercial scale due to the damage caused. They are clearly not to be limited to infringements involving large volumes of articles, or committed in the context of a commercial environment (for example, infringements relating to a small number of pre-release recordings may substantially prejudice sound recording right holders).

While we are confident that the concept of “commercial scale” is broad enough to cover all infringements that cause serious prejudice to the rights holder, we are convinced that the AUSFTA and the TRIPS Agreement do not allow for the introduction of additional qualifiers. The commitment under the AUSFTA to provide criminal remedies for infringements committed at a commercial scale was clearly included to broaden and strengthen criminal enforcement, not to limit the scope of the existing criminal offence in the Australian Copyright Act. For these reasons, we do not consider that s132AC should require the offence to be both at a commercial scale, and additionally prejudice the copyright owner.

We seek an amendment to the wording of s132AC so that all commercial scale infringements are covered, including infringements prejudicing the copyright owner. The suggested change is that s132AC(c) and (d) be deleted and amended with a new subclause (c): “the infringement or infringements occur at a commercial scale, which includes infringement prejudicing the copyright owner”.

### **Other miscellaneous issues**

- ARIA notes that there are no indictable and strict liability offences currently proposed for s132AM “Advertising supply of infringing copy”. ARIA appreciates that in practical terms it may well be



that advertising the supply of infringing copies would not usually be serious enough to warrant an indictable offence. That said, ARIA is of the view that this is an offence that should particularly attract strict liability. Furthermore, that there should be consistency in the legislation to ensure that all relevant offences can be used against a person whether they are charged with indictable, summary or strict liability offences.

- Section 132AQ “Removing or altering electronic rights management information”, arguably does not extend to circumstances in which an infringing copy of a work or other subject matter is made without “taking across” the associated electronic rights management information, which is tantamount to its removal. ARIA understands that this is how MP3 technology works. For completeness, ARIA thinks that this provision should be amended to cover these circumstances.

### **SCHEDULE 3 – TECHNOLOGICALLY NEUTRAL DEFINITIONS**

ARIA considers that the revised definition of Article in ss38 and 103 is very positive. However, it considers that the revised definition should also apply to s133, to allow the deletion of files as well as the destruction of the media containing them. Although not covered by the Bill, the new definition of article should also extend to s116.

### **SCHEDULE 4 – CIVIL REMEDIES AND COMMERCIAL SCALE INFRINGEMENT ONLINE**

ARIA welcomes the changes envisaged by Schedule 4, however, ARIA is concerned that the wording of s115 is restricted to a “communication of the work or other subject matter to the public”. This definition would not cover other actions which should clearly be within its scope - for example a situation where the defendant made a copy of the sound recording online or had authorised the making of a copy of a sound recording online. For example in the Kaaza case, a situation of egregious infringement where heavy penalties were justified, Justice Wilcox held that Sharman had infringed the applicant’s copyright by *authorising* the making available *and copying* of sound recordings. Section 115 should be expanded to include all rights comprised in the copyright.

### **SCHEDULE 6 – EXCEPTIONS TO INFRINGEMENT OF COPYRIGHT**

#### **Policy objectives – format shifting amendments**

At the outset, ARIA reiterates (as set out in previous submissions to Government) that it does not consider that there is any practical problem that necessitates the introduction of a format shifting exception to the Act. The record industry has always recognised the difference between piracy and personal copying, and no consumer has ever been sued for making a personal copy of their own legitimately purchased CD. Further, there are risks associated with the proposed exception, if not properly understood and applied.

However, we do appreciate that the potential negative impact of the proposed exception has been reduced by the narrowness of its scope and the inclusion of appropriate limiting conditions. We still have significant concerns about the fact that the exception extends to permit copying from digital as well as physical sources, and we address those concerns below. We do not consider that there any necessity for this extension and it has serious consequences for new and emerging business models that offer digital music to consumers.

In any case, it is crucial for the limitations on the exception to be well-publicised and properly understood by consumers if this is now to become law. The exception must in no way be mistaken for a licence for individuals to distribute copies or to download from unauthorised sources. In principle we support the Government’s approach taken in the Q&A document of 14<sup>th</sup> May 2006, and we would welcome and support further measures to clarify for consumers, in simple language, the scope of permitted behaviour.





In the circumstances, ARIA's submissions to the Committee are directed to ensuring that the proposed format shifting exception is properly limited to minimise harm to the recording industry and reflects the stated policy goal of Government.

### **Section 109A – Copying sound recording in different format for private use**

*Source material for copying – should be limited to physical media*

ARIA notes that the Government's stated policy goal in proposing this exception is to permit consumers to use legitimately acquired *physical* music products in different formats and in connection with different types of devices, in order to legitimise ordinary consumer behaviour.

This goal was confirmed by the Government's May press release, which clearly stated that the exception would mean "*people can put their CD collection on onto iPods or MP3 players*" and in particular, would "*allow individuals to store their personal music collection recorded on CDs, audio tapes or vinyl records in the memory of an MP3 player or home entertainment personal computer.*"<sup>1</sup> This justification for the exception is further confirmed by the explanatory material accompanying the exposure draft of the Bill, which states the exception "may be desirable so that the owner can take advantage of a newer technology" or "use the copyright material in a different place".

Against that background, ARIA is very concerned that the format shifting exception appears to go beyond the goal outlined in the press release as it would permit copying from digital sources as well. (The explanatory material states that copying is permitted from "all formats (except 'podcasts' of radio and similar programs)" and that permitted source material includes "digital downloads" as well as CDs, tapes and vinyl records.)

No policy basis has been clearly articulated, either in the Government's press release, the explanatory material accompanying the exposure draft of the Bill, or the Explanatory Memorandum for extending the proposed exception to material already in electronic format.

There is no need for an exception in these cases. Digital material, if licensed,<sup>2</sup> is made available from digital music services on contractual terms that govern the extent of copying. Users that buy digital music from iTunes or BigPondmusic, for example, are already permitted to make a limited number of copies for different devices for personal use. Indeed, all of the licensed digital providers, to our understanding, allow more liberal copying than that proposed under the legislation. In this regard, the format shifting exception proposes a solution to an issue which is not, in fact, a problem for consumers.

The proposed extension to permit copying from digital content has serious adverse consequences for new and emerging business models that offer digital music to consumers. By including digital, the proposed exception cuts across existing markets and will discourage investment in further innovation.

It is important to note that due to innovation by the recording industry and its digital music partners, consumers are already able to lawfully take advantage of newer technologies and to use sound recordings in a different place (through the permissions given in connection with music purchased from legitimate services). These market developments would be inhibited by now imposing a legislative framework.

In fact, it appears that the recording industry is being disadvantaged as compared with other industries because of its early innovation in the area of digital services. In contrast to proposed s109A, the format

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1. See press release 14<sup>th</sup> May 2006, available at [http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media\\_Releases\\_2006\\_Second\\_Quarter\\_14\\_May\\_2006\\_-\\_Major\\_Copyright\\_Reforms\\_Strike\\_Balace\\_-\\_0882006](http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Second_Quarter_14_May_2006_-_Major_Copyright_Reforms_Strike_Balace_-_0882006)

2. If not licensed, digital material is not (and should not be) within the scope of the exception.



shift exceptions proposed for other material are explicitly limited to specified legacy sources. For example, the exception for film is limited to copying from video tape to electronic format (it appears not to permit copying from DVD – despite the widespread exploitation of the DVD format, nor from digital download – an emerging market for film).

A further anomaly is that the draft explicitly excludes podcasts from the scope of the exception. ARIA believes that it is even more important to protect the existing digital music market, which has already been exploited more fully than the market for podcasts. If the goal is to protect new and emerging markets, there is no principled basis for excluding podcasts but including digital music products.

In light of these factors, we urge the Committee to recommend narrowing the exception to copying from physical media to portable players/PCs only and explicitly exempt digital content from the format shifting exemption. It should also be made very clear to consumers that digital content is not within the scope of the exemption.

*“Record” should be made by or for copyright owner*

The Government’s stated policy objective is to legitimise consumer behaviour and allow consumers to make a copy of a music product for private domestic use. ARIA understands that the Government believes that such conduct would not prejudice rights holders because consumers only have the benefit of the exception in respect to legitimate copies paid for by consumers. Clearly this does (and should) include commercially released CDs that are purchased by a consumer. However, the definition of “record”, in conjunction with the drafting of proposed section 109A, extends to physical copies made by the consumer under licence. These physical copies should not be within the scope of the proposed exception for the reasons set out below.

All digital service providers of which ARIA is aware allow consumers to make a number of copies of sound recordings that they purchase. A consumer may build a library of purchased digital recordings and may be permitted under the terms of use to make a copy of the licensed digital recordings in a different format, for example a CD. The consumer does not need to rely on the format shifting exception to make the CD because the consumer has a contractual right to make such copies. As such, a CD made under licence in this manner is a “record” for the purposes of paragraph (a) and is not an infringing copy for the purpose of paragraph (c). ARIA is concerned that such a CD could then be given to third parties, who would, under the current drafting, be permitted to format shift the CD to different devices or formats. In this scenario, the third party did not purchase the original “record” and the rights holder receives no remuneration.

In light of the above, ARIA suggests that a new subparagraph (d) is inserted that clarifies that the exception in s109A(1) only applies in respect to “records” made by or for the owner of copyright in sound recordings embodied in the record.

*The term “format” is unclear and should not be used*

The term “format” is unclear and uncertain in this context. The term is used ambiguously in the explanatory material accompanying the exposure draft of the Bill. Sometimes “format” appears to have a broad meaning, encompassing the difference between a hard copy and an electronic copy, and other times appears to have a more specific meaning, for example “MP3 audio format” and “video tape” (see page 4).

The term is also commonly used to refer to different file formats for electronic recordings – for example, MP3 is one audio file format, WMA and AAC are other file formats. As drafted therefore, the exception is uncertain, and goes too far in that it may permit copying from one electronic “format” (eg WMA) to another (eg MP3), which we do not think is intended. As used in subsection (1)(d) and (e), the term would require a complex, technical comparison of two “formats” and a decision as to whether one is



“substantially identical” to another. There are no criteria by which to judge whether one format is substantially identical to another. The exception is intended to be applied by consumers, making decisions as to personal copying. However, most consumers would find this technical distinction impossible to apply.

This problem should be addressed by removing the term “format” and instead defining the permitted scope of copying by reference to devices owned by the consumer for playing music.

*The term “temporary copy” is used in a manner inconsistent with other jurisprudence*

The proposal permits the making of a “temporary copy” (for example on a PC) as an incidental part of the process of making a permitted format-shifted copy (for example on a portable player). ARIA agrees that, in light of the way in which CD ripping applications operate in practice, it is necessary to address the status of interim copies made on a PC. However, the use of the term “temporary copy” and “necessary part of the technical process”, in subsection (7) is inconsistent with the way in which those terms are used elsewhere in the Act and in case law, and would generate uncertainty.

The concepts of “temporary copy” and “necessary part of the technical process” are used elsewhere in the Act and have different meanings there. For example, s116AH which describes the caching practices of ISPs, and s111B which creates an exception for temporary copies made as a necessary part of a technical process. Both of these provisions were framed to cover unintended, interim, ephemeral copies made as part of a technical process.

However, where a copy is made on a PC in order to transfer to a portable player, the PC copy is quite deliberately made by the consumer, and is not ephemeral (such as, for example, a temporary copy made in RAM during the course of viewing or listening to a recording that is not downloaded). It is also usually retained, and has its own features (eg it is included in a music library and can be ordered into playlists).

For these reasons we do not believe that the concepts of “temporary copy” and “necessary part of the technical process” are an appropriate or effective way to address the extent of permitted copying. ARIA submits that the extent of permitted copying should be defined with reference to different devices owned by the consumer for playing music.

*Further dealings in copy*

It is critically important that all subsequent dealings with the main copy, beyond the private and domestic use permitted, should render it an infringing copy, and we appreciate this is the intention behind subsection (3). However, the list in paragraphs (a) to (d) of subsection (3) omits to mention other uses of the format-shifted copy that would otherwise infringe copyright, such as communication to the public, and playing in public. The omission of these dealings, in conjunction with the specific inclusion of the dealings in (a) to (d), creates uncertainty, and therefore it is critical for them to be explicitly listed.

*Recordings protected by TPMs*

Any format shift exception should explicitly exclude from its scope copying from material that is protected by a TPM. Such copying is not permitted by the Bill in its current form, since, under Schedule 12, such copying would breach the prohibition on circumventing TPMs, and there is currently no exception to enable circumvention for private copying of sound recordings. However, an exception to the TPM prohibition to enable private copying could be proposed in future, pursuant to the proposed ad hoc exceptions process (draft s 116AK(9)).

The proposed extension of the exception to include copying from digital means that an explicit carve-out for material protected by TPMs is critically important. While TPMs are used in connection with CDs by





only some record companies on some releases, digital music services rely heavily on TPMs in order to define the product being offered (eg to distinguish between a promotional streaming, and a download, and to manage the number of private copies made to PC and portable music player).

The proposed process for ad hoc exceptions would enable anyone to propose such an exception at any time. In our view, that cumbersome process should be avoided by simply including language in s109A specifying that it does not apply where TPMs are applied to the sound recording.

If that is not done, at the very least we would request assistance in clarifying this matter, both for consumers and in the Explanatory Memorandum accompanying the legislation when enacted. The Explanatory Memorandum should state clearly and explicitly that the exception does not permit circumvention of TPMs, and that this is dealt with under a separate procedure.

### **Section 111 – Recording broadcasts for playing at a more convenient time**

ARIA submits that any time shifting exception is appropriately limited so as not to permit activities that would undermine legitimate markets. Such activities would include retaining recordings beyond the time needed to watch or listen to them, in order to create a library; permitting recording from broadcasts that are made available on demand (such broadcasts are licensed differently and, by definition, no time shifting exception is needed for content available on demand);

Against that background, our comments and submissions for changes in relation to the proposed s111 are as follows:

- The words “cinematograph film or sound recording” in subsection (1) should be replaced with the single word “record”. The terms “cinematograph film” and “sound recording” have a very specific meaning in the Act to designate subject-matter in which copyright subsists. A consumer who makes a record of a broadcast does not create copyright subject-matter, and using the terms in this context causes confusion with the copyright source from which a recording is made.
- The words “film or recording” in subsection (2) should be deleted and replaced with the words “record” for the same reasons as set out above.
- It is important to ensure that a time shifting exception cannot be relied upon to justify other uses of recordings beyond the time shifting purpose. Subsection (3) achieves this only partly, since it omits a number of uses that are outside the scope of time shifting. In particular, subsection (3) should be extended to include communication to the public, making available and public performance of the recording.<sup>3</sup>
- Subsection 248A(1) should be amended in the same way as proposed for s111.

## **SCHEDULE 7 – MAKER OF COMMUNICATION**

### **Section 28A – Communication in the course of educational instruction**

ARIA understands that the policy objective behind the proposed s 28A is to extend the existing exception in s28 of the Act which permits sound recordings to be publicly performed in the classroom, to the electronic transmission of sound recordings in the class room.

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<sup>3</sup> With regard to making available, this result was apparently intended by the Government. The 14<sup>th</sup> May Q&A stated: “Q. Can I share a recording over the internet? A. No. Uploading the recording to the internet to share with others would continue to be subject to civil and criminal liability.”



ARIA is concerned that the drafting of the proposed s28A extends the exemption to general exercises of the communication right. The proposed s28A would presumably permit an educational institution to make available sound recordings on the Internet and on University intranets “in the course of enabling” the sound recording to be heard by students. The proposed section would permit a copy of a sound recording to be uploaded onto a university server to allow students access to the copy. While it is clearly not the intention of the legislation, the section as currently drafted could also be used by educational institutions to establish a reference database of sound recordings for communication to students in the course of educational instruction.

ARIA is very concerned that extending the exception to include a communication by making available, would adversely affect rights holders’ legitimate interests as the exception is at odds with existing commercialising and exploitation practises. As such, ARIA believes that the exception is contrary to Australia’s international copyright obligations.

ARIA submits that the exception in s28A should be limited to the transmission of sound recordings only.

### **SCHEDULE 8 – RESPONSES TO DIGITAL AGENDA REVIEW**

The new exemptions proposed in Schedule 8 raise very serious issues. ARIA is concerned that there is insufficient time for the Government to review and redraft the provisions in a manner which achieves the Government’s policy objectives, protects the interests of both rights holders and library and educational users, and complies with Australia’s international obligations. In the circumstances, ARIA suggests that the proposed s200AB should be excised from the Bill so that these issues can be more fully considered by Government and stakeholders next year.

If this is not done, we urge the Government and the Senate to address the following issues.

#### **Section 200AB – Use of copyright material for certain purposes**

*Broad, undefined exceptions would create uncertainty and increased litigation against non-profit institutions*

This section includes two very broad and undefined exceptions to copyright infringement for libraries and educational institutions.

We understand that it is the legislation’s policy objective to provide a narrow exemption for libraries and educational institutions which would apply when it is not possible for a library or educational institution to obtain copyright material from rights holders through ordinary commercial channels (for example, because the copyright owner cannot be located or the work is out of print or unavailable). We understand that the exemptions are not intended to conflict with rights holders’ legitimate commercial interests and existing licensing practises.

ARIA submits that the proposed exemptions do not achieve this aim and would create serious problems if enacted. ARIA is not aware of any legislative precedent in Australia for such broad exceptions. From the day these exceptions come into force, all existing arrangements with regard to libraries and educational institutions would be thrown into doubt.

The relationship of these broad exceptions with the existing, specific and carefully crafted regime for both types of institutions is unclear and not clarified in the Bill or Explanatory Memorandum. Part VB of the existing Copyright Act, for example, sets out a statutory licence regime for certain uses by educational institutions. Section 200AB potentially cuts across all of these arrangements.



With no real guidance being given in the legislation, inevitably, these issues will need to be resolved through costly litigation. Outcomes of this litigation will be uncertain, since there is no existing precedent, and this litigation will likely stretch the resources of non-profit institutions and their users.

#### *No overseas precedent*

To our knowledge, there is no precedent for exceptions of this breadth and uncertainty in Europe, the US or New Zealand. In particular, these exceptions are broader and less certain than the US law, which includes a fair use defence, in a number of respects:

- In the US, courts apply established criteria to a use of copyright material in order to decide whether it is a fair use. These criteria are: (i) the nature of the work being copied; (ii) the purpose and character of the use; (iii) the amount and substantiality of the portion copied; and (iv) the effect that the use has on the copyright owner's legitimate markets. These four criteria are considerably easier for a court to apply than the criteria set out in the proposed s200AB, and also provide guidance to users.
- In the US there is a long history of a fair use defence and considerable judicial interpretation of the four factors and their application. There is no such body of law in Australia.
- In the US, despite the fair use defence, uses by libraries/archives and educational institutions are limited in certain important ways. Section 108 of the US Copyright Act contains detailed provisions that limit the uses by libraries and archives that are permissible. The same is true in the US of educational institutions. Section 110 of the US Copyright Act sets out detailed provisions that apply to use of copyright material in the course of educational instruction. These detailed provisions provide guidance to these institutions and to their users. The Bill, by contrast, provides no guidance whatsoever.

Therefore an attempt to justify s200AB on the basis of the US fair use defence would not be a fair comparison.

#### *Three-step test inappropriate for judicial interpretation and provides no guidance to users*

Australia's international obligations require it not to enact copyright exceptions that fall outside the parameters set by the three-step test under Article 13 of the TRIPS Agreement.<sup>4</sup> The proposed s200AB(1) codifies the three step test. However, the three-step test was not intended to substitute for exceptions in national law. The test is a tool for national Governments and policy makers in considering exceptions, and a tool for international bodies such as WIPO and WTO responsible for administering international treaties. In those jurisdictions where the three-step test has been incorporated into national or regional legislation the test has been used as a final check on the scope of exceptions that include other well-defined parameters.

Section 200AB, by contrast, requires not only judges to interpret the three steps, but also users - libraries and educational institutions. In our view, this is impractical. The only relevant precedent for interpretation of the three step test is at the level of international trade law. Section 200AB then, as well as potentially subjecting libraries and educational institutions to costly litigation, will also create a situation where they have little option but to take expert legal advice on the meaning of these three steps.

#### *Parody and satire*

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<sup>4</sup> The three step test states that Governments must ensure that copyright exceptions apply only in certain special cases that do not conflict with the normal exploitation of copyright material and where the use does not unreasonably prejudice the legitimate interests of the copyright owner or licensee.



A similarly broad exception has been proposed for uses for the purpose of parody or satire. Many of the problems outlined above also apply to this exception – it provides no guidance whatsoever to a user who wishes to make a use for parody or satire, and instead leaves the courts and litigants with the substantial burden of resolving the issue.

#### *Relationship with other exceptions requires clarification*

We cannot find any reference in this draft legislation to the existing provisions of the Act that deal with similar matters but in a different way. For example, Part VB of the Act which sets out an extensive statutory licensing scheme for uses by educational institutions is not referred to. If these broad exceptions are to be enacted, it is critical to clarify the relationship with existing law. Otherwise, it will be unclear whether users are limited by the scope of the specific exceptions in existing law, or whether they can simply purport to rely upon the new broader defence, and undermine the specific conditions in existing exceptions.

#### *Drafting problems*

If, despite these serious problems, the exceptions are included in the Bill, there are some drafting problems that require correction:

- We suggest removing both the definition of “special case” and sub-clause 200AB(1)(a), and in their place, providing a non-exhaustive list of circumstances in which the exemptions would apply. For example, for orphan works where the rights holder is unable to be located, or because a rights holder is unable to provide a copy of the work or other subject matter.
- Subsection (2)(b) should be amended to ensure that the exception covers only those activities that are within the scope of the type of services usually provided by a library or archives. The present wording would allow all types of activities beyond what libraries usually do. Therefore the words in parentheses should be the scope of the exception.
- The words “is not made partly for the purpose of the body obtaining a commercial advantage” are awkward and unclear. We suggest simply deleting “partly”.

#### **Section 200AAA – Caching on server for educational purposes**

ARIA has a number of concerns with the proposed s200AAA. There is no clarification of the relationship of this exception to s200AB and to existing statutory licence schemes. Without such clarification, statutory licences and the conditions outlined in this exception could be undermined by an institution choosing to rely upon the 200AB defence instead.

Proposed s200AAA arguably permits an educational institution to store unlimited numbers of copyright material on a server and make the material available to students for the duration of a course, with minimum restrictions and without remunerating rights holders. Unlike the proposed s200AB, the caching exception is not expressly subject to the three step test. The effect of the exception, however, could significantly impact rights holders’ legitimate commercial interests and licensing arrangements.

Section 200AAA as currently drafted would also allow educational institutions to cache copyright materials from the Internet and communicate such materials without an obligation to update the materials in the event that the original materials change. The treatment of cached copies in the proposed s200AAA is therefore very different to the regime implemented under s116AH of the Act for ISPs.



ARIA submits that s200AAA should be amended so that:

- the exception should only apply in limited circumstances where an educational institution is unable to obtain a licence (for example, because the rights holder cannot be located or because the work/other subject is not available). A limitation of this kind would protect the legitimate interests of the copyright owner and existing licences;
- there is a clear limit on the period during which cached copyright materials may be stored by educational institutions; and
- educational institutions are obliged to update the cached materials when the original material changes.

Subsection (1)(a)(ii) should also be amended to include a condition that the server be set up not only so it is intended to limit access, but that it actually is reasonably effective to prevent access. Although the exception only applies if students/staff access the material, it is important to create an incentive for the institution to take proper steps to ensure that the material is not accessible by a third party.

## **SCHEDULE 11 – COPYRIGHT TRIBUNAL**

### **Jurisdiction of the Copyright Tribunal**

ARIA welcomes the proposal to expand the range of licences that may be subject to an application to the Copyright Tribunal and supports the policy objective to expand the jurisdiction of the Copyright Tribunal to cover all collectively administered licences.

*Not all collecting societies may be covered by the definition*

ARIA is concerned, however, that the drafting of the definition of “licensor” is unclear and may exclude established collecting societies.

The proposed definition of “licensor” is expressed to mean a person who grants rights as an owner, exclusive licensee or on “behalf of others”. It is not clear whether the words “on behalf of others” will be interpreted to apply only to collecting societies who act as an agent of a copyright owner. If this is the case, then a collecting society who obtains rights under a non-exclusive licence may be excluded from the Copyright Tribunal. This would have serious consequences for the Australian recording industry as the Phonographic Performance Company of Australia Ltd (**PPCA**) obtains its rights under non-exclusive input licences from over 500 record labels. PPCA grants blanket public performance and broadcast licences to a range of users, including, clubs, fitness centres, restaurants and broadcasters. In doing so, it does not purport to grant such licences on behalf of the various labels, rather the licence is granted in its own right.

The uncertain drafting of the definition of “licensor” potentially jeopardises the ability of PPCA and its licensees to use the Copyright Tribunal to resolve issues relating to licence schemes administered by PPCA. Certainly, it creates a risk that a party seeking to avoid the jurisdiction of the Tribunal could argue for a strict interpretation of the provision, and challenge the status of a licensor, such as PPCA, who was quite clearly intended to fall within the Tribunal’s jurisdiction as a major collecting society.

*Definition of licensor could include digital service providers and content aggregators*

ARIA is concerned that the proposed definition of “licensor” may capture a range of persons who are not collecting societies. A number of organisations offer licences “relating to a substantial number of” of works and other subject matter that are made by different persons. Record companies typically grant





licences relating to a “substantial number” of sound recordings made by different persons. In the digital music market, a number of business models have emerged in which intermediaries (known as “content aggregators”) obtain rights from a range of different rights holders in relation to a substantial number of sound recordings. For example, an aggregator such as iTunes will obtain licences from rights holders and then grant consumers the right to copy the recordings. Content aggregators may also sub-license sound recordings to digital service providers ISPs or mobile operators, who then distribute the content, under licence, to consumers. The proposed definition of “licensor” arguably captures a far wider range of participants in the digital content distribution chain than was ever intended (including record companies, content aggregators, digital service providers, ISPs and mobile operators) as each grants licences relating to a substantial number of sound recordings made by different persons.

The rationale for establishing the Copyright Tribunal was to counterbalance the perceived monopoly or potential monopoly positions of collecting societies and to provide an arena for disputes in respect to the collective administration of rights. ARIA believes that it is clearly not the Government’s objective to subject the normal commercial transactions (including for example the licensing activities of digital service providers, record companies and content aggregators) to the jurisdiction of the Copyright Tribunal. Certainly the Copyright Law Review Committee report on the Jurisdiction and Procedures of the Copyright Tribunal did not suggest that any such expansion of the Tribunal’s role was envisaged. Clearly if this view were accepted, such a vast potential broadening of the Tribunal’s jurisdiction would also have dramatic cost consequences for the Government in terms of the costs of Tribunal hearings, which sometimes involve three Tribunal members, including Federal Court judges, sitting in Tribunal hearings that run for weeks.<sup>5</sup> Extending the scope of the Tribunal’s jurisdiction so broadly would require the appointment of many more members to the Tribunal, including judicial members given the critical role they play in Tribunal proceedings.

In the circumstances, ARIA urges the Committee to recommend amending the definition of “licensor” so that the jurisdiction of the Copyright Tribunal only applies, as it properly should, to licences administered by a collecting society. ARIA notes that this is entirely consistent with the recommendations of the Copyright Law Review Committee report on the Jurisdiction and Procedures of the Copyright Tribunal, which Government intends to implement in Schedule 11 of the Bill. In ARIA’s view, this was in fact the intention of the legislation, despite this unintended consequence.

#### *Drafting suggestion*

To avoid these concerns, ARIA proposes the following definition:

*“licensor” means, in relation to a class of works or other subject matter, a person or body of persons, whether incorporated or not, who administers licences collectively.*

#### **Substituting licence schemes**

The draft legislation proposes amendments to ss154, 155 and 156, which provide that in addition to “confirming” or “varying” a scheme which is before it, the Copyright Tribunal will also have the power to “substitute” for the original scheme “another scheme proposed by one of the parties”.<sup>6</sup>

ARIA does not consider that these amendments are necessary or appropriate. The CLRC Report noted that discussion of whether a power to substitute an alternative licence scheme for one under

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<sup>5</sup> PPCA is currently engaged in Tribunal proceedings which have involved three Tribunal members including a Federal Court judge sitting in hearings for 12 days, with extensive further time involved in reviewing the extensive material filed by the eight parties involved.

<sup>6</sup> Section 154(4), 155(5), and 156(4).



consideration was required arose from the decision of Sheppard J in *Re Reference by APRA: Re ABC*.<sup>7</sup> In that decision, His Honour took the view that the Tribunal's power to vary a scheme was limited to making variations that amend or alter the scheme, but that the power to vary the scheme did not extend to substituting an entirely different scheme to that referred.

In ARIA's view, on a reading of the legislation in context, it is arguable that the Tribunal already has sufficient powers in that it can already confirm or vary a scheme, "as it considers reasonable in the circumstances", and the current provisions do not explicitly incorporate any constraints on the Tribunal's power to vary a scheme.

In ARIA's view, the proposed amendments will undermine the processes of the Tribunal, by implicitly encouraging every party to any proceeding who has any objections to the scheme at issue in those proceedings, to develop and put forward a competing scheme of their own to the Tribunal. This will inevitably complicate and lengthen proceedings which are already lengthy and expensive. Further, it will detract focus from the scheme under consideration, and diffuse and confuse the analytical path of the Tribunal and the parties. Each party will need to lead evidence and make submissions in support of the particular scheme they are propounding, and the Tribunal would find itself having to hear evidence and rule on multiple different schemes in the one proceedings. The amendment could affect the nature of licence scheme proceedings, intrinsically altering them and creating contests between the different schemes put forward by the various parties, rather than an examination and assessment of a scheme under consideration. As hearings become much longer, costs would increase commensurately. In its current form, the competing schemes do not even need to be reasonable, nor do they need to have a basis in the evidence led in the reference.

If there were a concern that the Tribunal needed additional powers to vary a scheme, even to the point of substituting a new scheme, then in ARIA's view, the preferable course would be to clarify the scope of the Tribunal's powers to vary a scheme, or even (although ARIA does not see it as necessary or appropriate) to give the Tribunal an express power to substitute a scheme of the Tribunal's own volition. The Tribunal is uniquely in a position, having heard all of the evidence on a reference, to consider the most equitable outcome and devise a scheme to reflect that outcome, whereas opposing parties in a reference, such as licensees, could only be expected to propose alternative schemes which promote the benefits of their own members or clients, rather than putting forward any genuinely independent scheme of the kind the Tribunal itself might devise. Competing schemes put forward by opposing parties will also in all likelihood be devised and promoted to the Tribunal in the absence of any experience of the applicant's processes or commercial relationships, forcing the applicant to additional expense in countering proposals from any party to a reference, which could range from the viable to the ill-informed.

For all these reasons, ARIA strongly opposes the proposed provisions with respect to the Tribunal's powers to substitute a scheme with one put forward by another party. Contesting parties already have ample opportunity to put their views about any scheme to the Tribunal in the course of a reference, and to call on the Tribunal to exercise its own power to vary a scheme. The current provisions work well, and should be retained in their current form.

If the provisions are to proceed in any form, then they should be revised to give the Tribunal an express power to vary a licence scheme in accordance with variations proposed by another party. That approach retains the capacity for other parties in a reference to propose variations to the primary scheme, but stops short of creating a situation where an entire reference could be hijacked with multiple competing schemes being proposed.

If despite ARIA's submission, the Tribunal is given power to substitute a licence scheme to an alternative scheme proposed by the parties, ARIA submits that there should be some clarification that the Tribunal

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<sup>7</sup> (1986) 5 IPR 449.



may only make an order to substitute a licence scheme with another if it is reasonable in the circumstances, having regard to the evidence before the Tribunal.

## **SCHEDULE 12 – TECHNOLOGICAL PROTECTION MEASURES**

In our view Schedule 12, with a few exceptions, implements the requirements of the AUSFTA and provides a robust framework of legal protection for TPMs, while addressing the concerns of users.

We do, however, have a number of additional submissions, discussed below.

### **Manufacturing etc a circumvention device - Section 116AO and Section 132APD**

Some of the “preparatory acts” listed in subsection (1)(a) of section 116AO are cast too narrowly, and are even narrower than existing law.

Sub-paragraphs (i) and (ii) prohibit manufacturing or importing of a device only “with the intention of providing it to another person”. This is too narrow to implement the AUSFTA and is narrower than existing law. The sub-paragraphs appear to require not only evidence of an intention (broader than existing law which requires “purpose”), but also evidence that the intention relates to provision to a person (which could even be interpreted as a particular person).

These sub-paragraphs should be expanded to include manufacturing and importing of devices “for the purpose of” all of the other prohibited acts, ie offering to the public, exposing for sale or hire, distribution and making available online. The references to “another person” do not appear to be necessary, and should be deleted. Distribution, offering, etc necessarily involve a person or persons other than the person doing the act. These amendments would simply preserve the effect of existing law, as well as implementing the AUSFTA.

Sub-paragraphs (iii) to (vi) do not cover the full range of prohibited acts and appear not to have been fully thought through. For example, the difference between distribution to another person in (iii) and provision to another person in (v) is not clear. In addition, “communication” to another person of a circumvention device does not even appear to be possible (we assume making available online is what is intended).

It is critical that the range of acts in subsection (1)(a) is extended, at least to reflect existing law – ie offering to the public, exposing for sale or hire, distribution, and making available online.

Section 132APD, setting out criminal offences for manufacturing etc, suffer from the same defect and should be amended in the same way.

### **Exceptions for no promotion, advertising, etc – Section 116AO(2), 116AP(2), 116APD(2)**

The prohibitions on preparatory acts and circumvention are each limited by a defence, available to a person who claims that (1) the device is a circumvention device only due to the manner in which it has been promoted/marketed; and (2) the person did not do or cause that promotion/marketing to be done.

These “defences” create an opportunity for defendants to structure their operations in a way to avoid liability, and should be removed. For example, one party (A) could advertise and promote a circumvention device for the purposes of circumvention on its website. It could then link to the website of another party (B), who makes the device available and is well aware that it is marketed by (A) in this manner, but (B) could escape liability because (B) does not itself promote/market or cause (A) to do so. Other examples are possible – providers of devices could knowingly run businesses based on advertising and marketing by others.



To avoid this result, ARIA submits that subsection (2) of each of section 116AO, 116AP and 116APD should be deleted.

ARIA notes that in order to establish liability, it is still necessary to show, for civil liability, that the party knew or ought reasonably to know that the device was a circumvention device (ie that it was being marketed in this way); and for criminal liability, that the party undertook the acts with the intention of obtaining a profit or commercial advantage. If proven, these elements are more than sufficient to establish culpable action on the part of the liable party.

### **Regulations in relation to TPMs**

The heading for proposed new subsection (2) for section 249 should read "Regulations in relation to access control technological protection measures" since it is clearly limited to these measures.

We do not see the need to allow for regulations to be made at any time, in response to ad hoc submissions from members of the public. As was demonstrated by the recent TPM review, dealing with and responding to these submissions imposes a substantial burden on rights holders and on Government. We recommend that the ability to make regulations be limited to a procedure undertaken at regular intervals. Every four years is one option, if this is not thought to be often enough, every two years is another option that should address the needs of users while reducing the potential burden on rights holders and government.

Thank you for the opportunity to make these submissions. We are happy to expand or clarify any aspect of our submissions, including appearing in any public hearings if that would be of any benefit to the Committee.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Stephen Peach". The signature is fluid and cursive, with the first name "Stephen" being more prominent than the last name "Peach".

**Stephen Peach**  
Chief Executive Officer