

RECENT DEVELOPMENTS IN MUSIC LAW

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PARALLEL IMPORTING

A little over a year ago, amongst heated debate, the Federal Parliament passed the Copyright Amendment Acts (No. 1 & 2) which opened the gates to allow "parallel" importing. Prior to these amendments, only importers licensed by the copyright owner could import copyright material such as music CDs.

The owners of the copyright and their licensees could prevent others from importing such CDs under the old provisions of the Copyright Act. Further, the old provisions provided that use of the labeling or packaging associated with the CDs without the permission of the copyright owner would also be a breach of the Act.

The amending Acts remove the effect of these provisions so that they may not be used to stop others importing CDs (or other sound recordings) alongside (or parallel to) the licensed importers. In response to wide spread concerns about increases in counterfeit or pirated goods, certain restrictions were placed upon which goods may be imported.

A number of procedural changes have been implemented to provide for additional anti-piracy measures. For example, only goods that are manufactured

in certain countries with adequate copyright protection may be imported. Further, the maximum penalties for unauthorised commercial dealings in or possession of infringing copies have been increased to \$55,000 and/or five years imprisonment for individuals and \$275,000 for a company or body corporate. In addition, the current graduated system of penalties, for first and subsequent offences, is done away with, enabling the courts to impose penalties depending on the seriousness of the offence.

In civil actions related to the infringement of copyright by importation of pirated sound recordings, the Government has changed the onus of proof so that the importer must establish any defence that the sound recordings are legitimate and not pirated.

The amendments however had a loophole that allowed copyright owners to prevent parallel importation of CDs that contained additional copyright material such as film clips. These CDs are commonly used as limited edition promotional CDs that contain video clips and artist biographies in conjunction with the sound recording.

In August of this year the Senate Legal and Constitutional Committee recommended that the Copyright Amendment (Importation of Sound Recordings) Bill 1999 be passed without amendment. This Bill seeks to prevent copyright owners from restraining parallel importation of legitimate "enhanced CD" sound recordings, which they may currently do by asserting control over importation of the other copyright-protected subject matter that is included with the sound recording.

The Bill extends the parallel importation provisions for such CDs, as long as the sound recording is likely to be played on a machine that is not ordinarily used to show visual images. Therefore, DVDs and CD-ROMS will not be included, and so parallel importation restrictions will continue to apply to such items. The Committee reported on the Bill on 11 August 1999. The Government majority of the Committee recommended the Bill be passed without amendment.

DIGITAL AGENDA BILL

In the past decade there have been several technological and cultural developments which have led us rapidly into what has been coined the 'Information' or 'Digital Age'. The digitisation of creative products and the expansion of the Internet has provided new opportunities and challenges for the music industry.

One of the challenges concerns how existing intellectual property laws can meet these challenges and expectations of such a rapidly changing society.

In response, the Federal Government has proposed fundamental changes to the Copyright Act 1968 (the 'Act'). These changes have been proposed in what is known as the Digital Agenda Bill which has been open until recently for comment.

A New Right For Copyright Owners

It is generally accepted that the present suite of rights available to copyright owners under the present Act does not properly cover on-line services. Currently, copyright owners tend to rely on the existing broadcasting, cable diffusion and reproduction rights to cover any on-line uses. The Act was not drafted with such things as web browsing in mind and applying the present Act to on-line activities is fraught with difficulties. Browsing a web page under the present Act would constitute a prima facie breach of copyright as, when a page is viewed, a copy of that page (which may include copyright works) is automatically downloaded and thus reproduced.

The Digital Agenda Bill proposes two new rights, a technology-neutral “right of transmission to the public” and a “right of making available” to cover interactive uses. The Government has decided to combine these rights into one “right of

communication to the public” that includes both components. In this way, this new right seeks to ensure that no gaps in copyright protection will remain with regard to on-line uses.

Exceptions to Copyright

One of the other challenges to intellectual property laws is to maintain a balance between protecting the rights of creators of musical works and the wider interests of society in allowing those works to be used and adapted by others.

The Digital Agenda Bill provides for a number of new exceptions to the rights of owners, designed to ensure that the present balance between owners and users is maintained. These exceptions provide for special conditions in which cultural and educational institutions may copy material in their collections.

For example, such institutions will be able to use material in their collections for preservation and internal management purposes without obtaining permission from the copyright owner. The reforms would also remove the current requirement that the original must be destroyed where a copy is made for management purposes.

Liability For Internet Service Providers

At present, telecommunications carriers and carriage service providers (including ISPs such as Ozemail) are potentially liable for copyright infringements across their networks.

Under the proposed reforms, this liability will be eliminated. Only the person responsible for determining the content, of a website or electronic transmission, will be liable for copyright infringement.

Typically the person responsible for determining the content of on-line material would be, for example, a web-site proprietor (ie, not the ISP or carrier). This

addresses the problem in the *APRA v Telstra* case where Telstra was held liable for the playing of music-on-hold by its subscribers to their clients, even though Telstra exercised no control in determining the content of the music played.

APRA & the Australian Competition and Consumer Commission (ACCC)

In June this year the Australian Competition Tribunal has handed down its decision regarding alleged anti-competitive conduct by APRA. As part of the ongoing battle between the APRA and the Federation of Australian Commercial Television Stations (FACTS), FACTS made submissions to the ACCC to the effect that APRA had a monopoly on the supply of performing rights in music. According to FACTS this gave rise to anti-competitive conduct as APRA's administration system did not allow an APRA member to directly license a user.

APRA had suggested some amendments to their system to assuage FACTS' concerns and sought the authorisation of the ACCC of those amendments. The ACCC refused authorisation for certain aspects of APRA new operations including the arrangement under which composers and publishers assign their performing rights in musical works to APRA.

APRA appealed to the Australian Competition Tribunal. The Tribunal granted APRA an interim authorisation for its operations pending some minor alterations to APRA's rules. The Tribunal endorsed APRA's practices of obtaining assignments of copyright and the issue of blanket licences (one of the concerns of FACTS) noting that such practices were essential to APRA's operations.

The Tribunal however required that APRA introduce two new procedures: Firstly, an "opt out system" whereby APRA members may obtain a non-exclusive licence of their works back from APRA for use of the work within Australia. Secondly, a dispute resolution system for small disputes as an alternative to the current system of applications to the Copyright Tribunal which was thought to be, in many cases, prohibitive.

The Tribunal has adjourned the proceedings for a period of about nine months to enable APRA to incorporate these new procedures into its rights management system.