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Technology, Copyright Law and the Future: The Contemporary Australian Music Industry

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What effects have recent advances in technology had on the Australian music industry and how has the Australian Copyright Act changed to meet these new technological challenges? What other changes to the law would benefit the contemporary music industry?

The Australian *Copyright Act* 1968 was designed to protect and encourage the creators of artistic works. Its principal intention was to ensure that artists can profit from the exploitation of their works. In recent years the *Copyright Act* has failed to keep up with the changes in technology that have allowed consumers and “pirates” to easily circumvent copyright protection measures. To gain a complete understanding of the impact of technological advances on the Australian music industry that allow music consumers to share digital files, burn CDs, change the format of digital music files, and post music on websites, it is important to first recognize the exclusive rights that are afforded the owner of Australian copyright in a recorded piece of music.

Under Australian *Copyright Act* 1968, the copyright owner in the music or lyrics has a number of exclusive rights:

- To reproduce or publish the work in a material form. (Thanks to recent Digital Agenda Amendments of 2000, this includes digital copies of the work.)
- To perform the work in public.
- To communicate the work to the public. (This involves causing the work to be broadcast via radio, television, mobile phones, the internet, etc. Again, thanks to the Digital Agenda Amendments, the Copyright Act has moved away from technology-specific wording such as diffusion or broadcast.)
- To translate or make adaptations to the work.

The owners of the copyright in the sound recording have their own copyright protection:

- To make copies of the master recording.
- To cause the recording to be heard in public.
- To rent out the master recording.
- To communicate the master recording to the public.

A closer inspection of these rights reveals why the recording industry is currently so challenged by the internet, CD burning, and digital downloading. The owner of a sound recording is usually the person who pays to produce the recording and pays the performers who appear on the sound recording—typically the record company and the featured performing artists. Since performers' copyright was introduced to Australia in 2005 the standard practice of the major record companies has been to force performers to assign their ownership in the performance to the record companies as a clause in their contract. Shane Simpson, in his book *Music Business* (p. 160) states that, "The new rules are likely to have little practical effect as most recording contracts will continue to specify that the record company will own all of the copyright in the recordings that they make." Record companies derive their income from the exploitation of master recordings, but new technology has created a situation in which it is difficult for them to control these recordings. The introduction of new technology has allowed anyone to make a copy and distribute that copy, and anyone can communicate the master recording to the rest of the world via the internet. This is an enormous source of frustration for record companies. Copyright laws state that *they*, as the owners of copyright, have the right to exploit the communication of master recordings, yet millions of people are breaking those laws every day. These law breakers are their customers. The Australian music industry has been reluctant to take legal action against its customers preferring to pursue legal action against file-sharing networks and large-scale piracy activities.

In recent years there have been a number of changes to the *Copyright Act* in an attempt to keep pace with the changing world and technology, all of which have had the intention of strengthening the protection offered to the owners of copyright. The next section will consider briefly the major changes such as the digital agenda amendments, the U.S.A./Australia Free Trade Agreement and the recently introduced Fair Use laws. All of these

changes introduced a number of effects on Australian copyright law. There are too many to consider here, so I will concentrate on the changes that have had the greatest effect on the music industry.

The digital agenda amendments came into effect on 4 March 2001 (*Australian Copyright Council, Digital Agenda Amendments Information Sheet*). Key amendments highlighted by the Australian Copyright Council include “a ‘broad-based technology-neutral’ right of communication to the public, which both subsumes and extends the previous broadcast and cable rights.” Also introduced were “provisions allowing copyright owners to take action in relation to tampering with electronic rights management information” and “provisions dealing with the circumvention of technological protection measures.” None of these changes has really saved the music industry from the threats posed by new technology. The introduction of technology-neutral wording (like changing *broadcast* to *communication*), has allowed the industry to collect licence fees from internet radio and other online broadcast channels, but only from those who are willing to play by the music industry’s rules. The majority of those who were flaunting copyright law before the amendments continued to do so afterwards. Australia has been very slow in the adoption of internet and satellite radio. ZDnet Australia’s David Braue suggests that, “Digital radio’s progress in Australia has been glacial at best: trials began in 2003, but real, live digital radio services are expected to begin next year.” I believe that the slow uptake of this technology is largely due to the reluctance of local industry to challenge the *status quo* of traditional radio, and also the reluctance to force changes to the *Copyright Act* that would allow businesses to operate using a model that would see healthy commercial returns.

On 16 August 2004, the Australian Government assented to the *U.S. Free Trade Agreement Implementation Act 2004* (“*Implementation Act*”) (Simpson 2006). The *Implementation Act* does as its name suggests, it implements the amendments necessary to the law in Australia as a result of the signing of the Australia-United States Free Trade Agreement. The *Implementation Act* introduced significant changes to the *Copyright Act* 1968 that impact directly on the music industry. New performers’ rights were created and the duration of copyright protection was extended for most copyright material. The former offered protection for fifty years after the death of the creator. The *Implementation Act* extended this to seventy years. While on the surface this alteration to the *Copyright Act* does little to protect copyright owners it does have a significant impact considering

that the Rock and Roll industry was born in the mid to late 1950s. The birthplace of most of today's music industry was about to become public domain so these changes were welcomed by the music industry. However the *Implementation Act* did little to offer further protection from digital downloading and CD burning; all it did was ensure that the Walt Disney Company and those publishers who had rights in music by artists such as Buddy Holly were able to continue to collect their income—business as usual.

In May 2006 the Australian Government announced changes to the *Copyright Act* to include a provision for fair dealing. Fair dealing is a term that previously did not exist in the *Copyright Act*. A close inspection of the fair dealing provisions reveal a number of proposed changes but it is the introduction of “time shifting” and “format shifting” that have the greatest impact on the music industry. The fair dealing provisions appear to be similar to the U.S.A.'s Fair Use provisions.

Time Shifting is a concept that allows users to legally record television and radio programs to enjoy at a later time. The practice has been around for years; the public records TV shows and radio programs for later consumption. However, the broadcasts contain copyright protected materials. The changes to the act meant that the general public could now do these things without breaking the law. It should be noted that the proposed changes to the act state that one is allowed to view the time-shifted program only once and then must delete it. Furthermore it applies only to private users using the time shifting for personal use. The law has not been changed to allow unauthorized copies to be made for private use and copies may be time shifted only once. Time shifting via hard disk recording and via Foxtel's (the only cable pay TV network in Australia) IQ (similar to TiVo) has just started to become a common feature for Australian consumers.

Format shifting allows private users to change the format of copyright protected work for personal use. Again, there are limitations to this change. The user is allowed to change formats of a product such as music from a CD to an MP3 file or to an iPod. This may be done only if one owns the original copy and is merely changing the format to enjoy it in another type of media player or as a backup. Copying from one CD to another is not permitted, as this is not format shifting; nor is one allowed to load format-shifted product onto a website or share it with friends. One is still limited to making format changes for personal use reasons only.

Both of these changes bring the laws only a little closer to the reality of what most consumers do anyway. They will only have the effect of making it no longer illegal to do what some consumers have been doing for years. The fair dealing proposals raise an interesting question about the copy protection methods some record companies include on CDs. If it is no longer illegal to format shift CDs, is it fair for record companies to stop consumers from doing so?

Along with those fair dealing changes the Australian government has also strengthened the policing and punishment of copyright infringement. The music industry has welcomed these changes as recent cases of copyright infringement using the internet and other technologies have resulted in what the industry perceives as fairly soft punishments.

In 2003, Australia saw one of its most infamous copyright infringement cases go to court. Three students from the University of Sydney were accused of providing digital copies of songs on the internet without the express permission of the copyright owners or payment of royalties to the owners of the copyrights in the songs they offered. The students' website, MP3 WMA Land, operated for about two years until the Music Industry Piracy Investigation (MIPI) moved to shut it down. (MIPI is an organization committed to stopping music piracy in Australia and is jointly funded by the major record companies and publishing companies.)

According to James Pearce's article "Aust Music Pirates Sentenced" (2003), MIPI alleged that the students' website had facilitated over AUS\$60 million worth of illegal downloads of music to users all over the world. The defendants pleaded guilty and were given suspended jail sentences, ordered to attend community service and fined between \$1,000 and \$5,000 each. MIPI and the record companies were disappointed at the leniency of the sentences. Despite the extent of the infringement, the sentences were at the very bottom end of the scale for these kinds of offenses. Michael Speck from MIPI told ZDnet Australia that, "The court portrayed copyright infringement as a most serious crime but then chose not to jail these men. I wonder how much music you need to steal before you go to jail? Certainly if you'd gone into a shop and stolen this much music there'd be no question of jail."

MIPI felt that the sentences would do little to discourage others from setting up similar sites. The defendants suggested that they were not people who had set out to "break the back of the music industry" (Pearce 2003) and that they had seen very little, if any, monetary gain as a result

of their actions.

The Australian music industry had a similar level of success with MIPI vs. Stephen Cooper, the operator of a website called MP3s4free.net. Cooper's website did not offer illegal downloads directly, rather he offered links to other sites that contained illegal downloads. The court ordered Cooper to remove the links but only required him to pay costs (Deare 2005, "Judge: MP3 site, ISP breached copyright").

Another recent major copyright case is that between the Australian Record Industry Association (ARIA) and Sharman Networks. ARIA contended that Sharman, which owns the software Kazaa, was encouraging people to use file-sharing to obtain copyright-protected music. Sharman's defense was that the Kazaa software allows users to exchange files of all descriptions. It said it did not encourage the exchange of copyright-protected materials but there was no way to control what users chose to exchange on its networks. ARIA claimed that Sharman could stop the exchange of copyright-protected materials by either banning those kinds of files being exchanged or by disabling Kazaa's shareware program altogether. In late 2005 the judge ruled in favor of the record companies and required Kazaa to use pop-up windows to force users to upgrade their Kazaa systems to a new version that would include a copyright filter, which would disable the sharing of copyright protected works (Deare 2005, "Music industry claims Kazaa win"). This case is very important for copyright legislation worldwide because it tests the idea that it is illegal to provide software or a device that allows for the circumvention of copyright.

MIPI has publicly stated that it does not intend to pursue action against individual copyright infringers; rather it is more interested in chasing companies and large scale infringers. It is not looking to alter copyright law to allow for the occasional unpaid-for download, but it has indicated it won't aim to prosecute. It is lobbying the internet service providers to limit accounts of those people who are identified as "individual" copyright infringers. It seems that if MIPI (the Australian industry's own copyright police) and society at large is prepared to tolerate consumers breaking the law in this way, then the industry can hardly cry foul when the law is broken.

There are also a number of non-copyright law methods that the music industry has considered to help it combat the rise of technology. For several years, record companies have been trying to perfect a system which ensures that their CDs are playable on all sorts of CD players but

are not able to be copied or shared, and the music industry has long been a proponent of a blank media tax. Starting as far back as the introduction of cassette tapes, there has been talk of introducing a tax on blank media (such as blank CDs). The aim is to compensate the owners of copyright for the losses they have endured due to the widespread use of blank media for copying their recordings. The price of blank CDs (or other media) would increase and the extra money would go to those whose work is being copied. Marcus Breen, in his book *Rock Dogs: Politics and the Australian Music Industry*, argues that the blank media levy could never really work. He points out that Australia is a signatory to a number of international copyright conventions and that other signature countries:

could be expected to pay a fee for monies on Australian recordings made in their countries and Australia would pay a fee for monies collected here for recordings made of artists from those countries (Breen 2006, 149).

Breen argues that the blank media tax is not really a tax at all, rather it is a royalty and that international reciprocal agreements would need to be upheld, making it impossible for Australia to be the only one to introduce the levy.

Copyright has reached a historical crossroad. The relationship between copyright owners and technology has always been fraught with problems. The challenge for the owners of copyright is to manage successfully changes in technology which threaten their ability to exploit the copyright for profit and, at the same time, create new opportunities. The invention of the CD put a digital master copy of each CD in the hands of all music consumers. In the days of vinyl and cassettes there was no such issue, since every generation (or copy of a copy) reduced the quality of the recording. The record companies, however, have now placed their most precious asset in the hands of every consumer: an exact digital replica of the master recording. Copy protection technologies built into CDs and aggressive lawsuits against MP3 file-sharing websites demonstrate how the record labels are struggling to protect the master copies they have sold to millions of consumers.

Perhaps the Australian recording industry would be better served by embracing technological changes rather than fighting them. The music industry also needs to look at other methods to ensure that it profits from the

exploitation of copyright rather than just making minor changes to copyright law which are years behind the technological advances. The recent cases of copyright infringement in Australia show that the courts are reluctant to impose heavy punishments on those who do infringe copyright. In an interview in *Rolling Stone*, the founder of Apple, Steve Jobs, said:

If copyright dies, if patents die, if the protection of intellectual property is eroded, then people will stop investing. That hurts everyone. People need to have the incentive that if they invest and succeed, they can make a fair profit. Otherwise they'll stop investing. But on another level entirely, it's just wrong to steal. Or, let's put it another way: it is corrosive to one's character to steal. We want to provide a legal alternative. And we want to make it so compelling that all those people out there who really want to be honest, and really don't want to steal, but haven't had a choice if they wanted to get their music online, will now have a choice. And we think over time, most people stealing music will choose not to if a fair and reasonable alternative is presented to them. We are optimists. We always have been (Goodell 2003).

Perhaps the future of the music industry lies in the acceptance of technological change and copyright law's inability to keep pace. If the industry can accept that paradigm then it has a chance to move forward in new and exciting ways, as has already been pioneered by Jobs, Apple, and iTunes.

What are the ways forward for the music industry? In the past twelve months or so it has certainly made all the right noises to indicate a desire to embrace technology. It is releasing music in an increasing number of formats. Just a few years ago consumers were offered only a couple of formats: the CD album and the CD single. These remain (although ARIA sales figures at www.aria.com.au suggest the single is on its way out), but they have been joined by the digital download, the ringtone (real tone, monophonic, and polyphonic), the Super Audio CD, and the Enhanced CD, just to name a few. Is this really embracing the future of technology and copyright, or is it just an old dog doing old tricks but with a new toy? There is a war to be waged. The war is between the copyright owners who

want to use copyright law as their main weapon, and, on the other side, society at large who wants to use creative freedom and technology as its main weapons.

If the music industry wants to use copyright law as its main weapon, it should consider how it employs it. The final part of this paper will explore a number of ideas, taken from various places around the world, which the Australian creative industries could employ in their fight.

Recording artist Prince recently showed cleverly how to use the existing systems of copyright to great advantage. Prince has for many years been at the forefront of technological advances, being one of the first performers to offer music for sale in an online environment. Prince is fortunate enough to have had a career spanning twenty years and his many hits have given him a fan base willing to follow him into new technologically-uncharted waters. He was one of the first artists to release enhanced CD-ROM albums and his NPG Music club took the fan club from snail mail to email.

In the middle of 2007, realizing that the record company business model—selling one CD at a time to consumers—was no longer working, Prince hatched a novel plan. He licensed one recording from his new album to *The Mail on Sunday* newspaper, which subsequently gave away copies of the CD free with each newspaper purchase—effectively making the CD a premium. Prince turned the tables on the existing music industry model by selling just one copy of the CD, but at a huge price. It is an interesting approach. If consumers want music for free and they are going to use technology to get it anyway, why not find ways to ensure that the music needs to be sold only once, rather than thinking that in order to be successful the record needs to have millions of sales. Prince was accused by record company executives of devaluing music.

The Entertainment Retailers Association said the giveaway “beggars belief.” “It would be an insult to all those record stores who have supported Prince throughout his career,” ERA co-chairman Paul Quirk told a music conference. “It would be yet another example of the damaging covermount culture which is destroying any perception of value around recorded music.

“The Artist Formerly Known as Prince should know that with behaviour like this he will soon be the Artist Formerly Available in Record Stores. And I say that to all the other artists who may be tempted to dally with the *Mail on Sunday*” (Allen 2007).

Shortly after the *Mail* giveaway Prince announced a series of twenty-one London concerts, which sold out in twenty minutes, including a weeks’ worth of shows at the Millennium Dome. The tour was estimated to have netted around twenty million pounds, plus whatever the undisclosed fee from the *Mail* was—all of this without having a hit song. Furthermore, Prince immediately trumped the filesharers by releasing his own copy of the CD on the net and told consumers to go ahead and download all they wanted. They were going to do it anyway, and he already had sealed his one big sale. The way forward for the Australian creative industries is to make one big sale to the internet or mobile phone service providers, whether via an all-you-can-eat or an *à la carte* model.

Mashups, sampling, YouTube, blogging, and all forms of user generated content are a challenge to existing copyright laws. It is often stated that copyright exists to encourage creative people to go forth and create. The current laws limit that creativity for those who embrace the technologies mentioned above as the vehicles for their creation. Hip-hop music has always been about the sample, it has always been about showing what one can do with someone else’s ideas and make them one’s own. Does this mean that all hip-hop artists are copyright criminals? In the current environment, the answer is yes. The hip-hop world will continue to create and will continue to break copyright laws. The practicality of clearing every sample on every track is impossible for most artists—especially when one considers that many hip-hop artists are sampling something that is a sample of something else in the first place. It is virtually impossible for any creative artist in this genre to be creative while remaining within the copyright laws.

Pittsburgh based hip-hop/mashup artist Girl Talk states in an interview in the film *Good Copy Bad Copy* that he would be happy to pay royalties for every sample he uses but:

to actually license the sample would cost millions of dollars which I can’t afford. If sampling would be this

form of music where you'd have to give all your money away, that would still be cool. It would still be this new way to make music...but in a theoretical world, if I could clear all of the samples on the album, and I had a million dollars to be able to do it, it would still take fifty years to go through the legal hassle and that's just absurd (Girl Talk from Johnsen, Christensen, and Moltke 2007).

To complicate the issue is the fact that most hip-hop artists are happy to be sampled (it is their record companies and publishers who take issue). Is this not simply the folk music tradition of passing on ideas from one generation to the next? Each will put its own twist on the ideas, constantly mutating the original work. Creative Commons is all about allowing that idea to be passed along. Those who release music under one of the Creative Commons licenses say, "I am happy for you to use this music in a way that you want to. Take it and use it to create something new," or they are saying, "take it and distribute/display it, I don't mind." It is interesting to note that it is not the artists who usually take issue with the Creative Commons ideas; it is the power brokers in the record companies. Perhaps a greater understanding, acceptance, and in fact, promotion of the Creative Commons system will ultimately achieve what copyright protection is supposed to be. If we are to encourage creative people and artists to go forth and create, why should that be limited to the art form one chooses, or by the tools with which one chooses to create?

Nigeria has one of the largest movie industries in the world; its output is more than double that of the U.S.A. and is larger than India's. Nigeria's copyright laws look very similar to that of any member country of the Berne convention but the way they are enacted is unique. Nigeria has an enormous population, estimated by the United Nations to be around 125 million (*Encyclopedia of Nations*), and, as evidenced by the huge output of local Nigerian film product, a desire by the local community to see themselves on the screen to feel a connection to a local identity. The Nigerian filmmaking community acknowledges that it has fairly low production values and most of its output is to video and digital video, but it is the connection with the local community that makes the industry strong—not heavy-handed copyright laws. There is a culture of respect for Nigerian films rather than a culture of respect for copyright. Johnsen, Christensen, and Moltke's documentary *Good Copy, Bad Copy* suggests that foreign

films are pirated but the locally produced films are sold so cheaply that pirates don't have any opportunity to make a profit from them anyway. The situation in Nigeria points to an argument that the Australian cultural industries could consider. Is it possible to promote respect for copyright, at least within the local industry? Could the Australian cultural industries work on convincing consumers that while it is illegal to pirate any DVD, it is immoral to pirate the locally-produced product? If appealing to the consumers' adherence to the law is not working perhaps it is possible to approach the problem from a moral point of view. An often used defense by the average consumer who is downloading a few songs here and there is that, "The record companies put out so much rubbish, and I only want this one song... why should I buy an overpriced album to get it." Perhaps the lowering of price, Nigerian style, and making a local connection with the audience could have some impact.

This brings us back to the previously mentioned cross-road faced by the music and creative industries worldwide. Technology and society are moving in ways that traditional copyright protection cannot continue to sustain. *User generated content* are the buzz words—*respect for copyright* are not. New generations of creative artists want to stand on the shoulders of the giants who have gone before them. In the past this meant copying the style of the masters; today technology allows us to actually use the original work in a new context. This is simply a new reality that the creative industries and the music industry in particular have to accept. New creative artists see this as the complete opposite of showing a lack of respect. They consider it a great compliment to have their works used and they believe they are doing other artists a favor by exposing their work to a new audience. This is the new reality in which the music industry finds itself.

I believe the evidence presented in this paper suggests that Australian copyright laws in 2008 and beyond require a major overhaul, but more importantly the creative industries require an overhaul of their business models. The music industry has been the first to feel the effects of this new system but all of the creative industries will surely follow. Books, art, photography, computer games, and the film industries will all face similar challenges in the coming years. (These challenges have already begun for a number of those industries). Consumers are becoming more and more engaged with the art, to the point that they want and demand some creative input into how the art is presented. The current system simply does not al-

low that to be done legally. This is a business model that is unsustainable for most of the creative industries. Historically, making major changes to copyright law is a long and laborious task, but it is one that we should start considering today. The principles of copyright protection have served the creative industries well for over one hundred years, but a time for a major remodeling has come. Technology has allowed every consumer to become a pirate, but even more importantly every consumer now has the opportunity to become a creator. Copyright is there to encourage creative people and artists to go forth and create. It offers protection for creative artists to enforce their rights, get paid for the use of their works, and protect the integrity of their works. In the twenty-first century the ways in which those rights are applied need to change. Society demands more freedom to do more with the work of others. Perhaps we owe it to society to let the next generation of creative artists stand on the shoulders of those who have gone before them, without breaking the law.

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