4 July 2018

BY EMAIL

The Director
Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

Dear Director

COPYRIGHT MODERNISATION CONSULTATION PAPER

1. APRA AMCOS is grateful for the opportunity to make a submission to the Department of Communications and the Arts (**Department**) in response to the Copyright Modernisation Consultation Paper (**Paper**).

2. The Department is familiar with the operations of APRA AMCOS. We have more than 95,000 members and 145,000 licensees. The membership is diverse, ranging from unpublished writers to major music publishers. Licensee stakeholders range from sole traders to multinational content platforms.

3. APRA AMCOS has participated fully and openly in all reviews of copyright legislation in Australia. We have expended considerable resources in gathering evidence, considering issues, preparing submissions, and appearing before the reviewing bodies when required. We do not propose to reiterate all of the matters set out in previous submissions, but our views have not changed in any substantive sense. In respect of the most recent inquiries, our previous submissions can be reviewed on our website: https://apraamcos.com.au/about/supporting-the-industry/advocacy-and-public-policy

4. APRA AMCOS has respectfully observed with interest the consultative environment that surrounded the passage of the *Copyright Amendment (Disability Access and Other Measures) Act* 2017. Industries affected by copyright law are complex and diverse, and it is regrettable that some inquiries into reform have resulted in protracted, heated and polarising debates that have often led to further disharmony between stakeholder groups. It is to be hoped that with respect to this current review all parties will be able to engage productively with suggestions for reasonable and balanced reform, rather than to simply restate entrenched positions. It is in this spirit that APRA AMCOS makes these submissions.

APRA AMCOS

5. There appears to be an assumption inherent in much of the discussion around modernisation of copyright legislation, that "modernisation" necessarily requires a lessening of the rights of copyright owners, in favour of the interests of those who consume and invest in technology. However, APRA AMCOS would urge a consideration of whether, rather, "modernisation" might involve ensuring that the rights of copyright owners are protected against the onslaught of technological developments that make it increasingly simple for their property to be accessed and their rights taken free of charge in circumstances where enforcement is practically impossible.

6. Too often, it is assumed that the rights of creators are a reasonable sacrifice in the interests of technological development. APRA AMCOS sees no reason why technological innovators whose businesses rely on creative content, should not be required to reach agreement with the owners of that content, as they do in respect of every other input cost. There is no reason why the first means by which technological innovation is to be encouraged, should be at the expense of creators or to diminish the rights of creators to benefit from the exploitation of their product, simply because technology enables easy access to and dissemination of the product. The copyright industries are particularly well adapted to facilitating the large scale use of creative products, having many years ago responded to technological innovation by forming collective licensing bodies for this very purpose.

7. Creators, including APRA AMCOS members, have been demonstrably harmed by technological innovation. Their incomes have declined, piracy of their works has dramatically increased, demand for their works has lessened because of the proliferation of new forms of entertainment, and their works have been devalued generally by the availability of free access to content. Some of these outcomes are simply a product of development, and copyright owners like all others must be able to accommodate change. APRA AMCOS has always sought to adapt to the changing commercial environment by ensuring that its members' rights are licensed wherever possible, to alleviate these harms – indeed, Australia is a world leader in licensing new music and audio-visual services. However, what creators do not need is to have their rights eroded, effectively denying them the opportunity to participate in new markets as they develop.

8. Even if it were to be accepted that some technological developments necessitate reform of the copyright laws, APRA AMCOS does not see why the first and only proposal for such reform is to enact free exceptions. Proper consideration should also be given, for example, to whether a better solution might be to bring certain uses within existing statutory licences, or to create new licensing regimes, that

would both facilitate technological development and ensure that the rights of creators are acknowledged and remunerated.

9. Numerous references have been made to the business of Redbubble in recent discussions regarding modernisation and technological development. Redbubble does not currently sell music, although rights owned by music creators and investors are affected by the Redbubble business. Redbubble is simply a shop that uses technology to store and deliver the products it sells. Its use of technology may (or may not) be innovative, but APRA AMCOS sees no reason why its liability in any sense should be more or less than if it were operating in a physical marketplace. Its ability to know what its products are, and the risks inherent in their sale, can be no less than the ability of the owner of a department store, or a market, or a nightclub that hosts an open-mic event, to know and be responsible for the legality of the products from which it seeks to make a commercial gain. The mere fact that technology is involved in the commercial process cannot be a reason to absolve the operator from responsibility.

10. Australian copyright law is clear. If a person does or authorises the doing of an act comprised in the copyright without the licence of the owner of the copyright, then absent an exception that will be an infringing act. The law is clear as to the factors that affect whether or not an authorisation has occurred. It is also an infringement to trade in or import infringing items, with knowledge. Damages are limited if an infringement is innocent. These laws are as appropriate to the digital environment as they are to the physical one. The mere fact that technology makes infringement easier is not a compelling reason to diminish the rights of copyright owners – indeed, APRA AMCOS submits these are circumstances in which their rights should be more strenuously defended.

11. Further, APRA AMCOS does not accept the implicit approach that "modernisation" is the same as simplification. Copyright laws can be complex, but the copyright industries that they regulate are also complex. Collective licensing in particular delivers a practical simplicity for the majority of transactions that a consumer is likely to have with copyright material. In the same way, the laws of contract and trade practices are complex, but the act of buying a loaf of bread is not. Simplicity of *law* is not necessarily an advantage to the consumer.

12. APRA AMCOS is a member of the Australian Copyright Council and endorses the submissions made by the Council in response to the Department's models for further consultation. APRA AMCOS is also a stakeholder of Music Rights Australia and endorses the submission by MRA in this consultation.

13. APRA AMCOS responds as follows:

Government use

14. The need for reform of copyright laws in favour of governments is unclear. APRA AMCOS notes that the government use provisions of the Act were drafted at a time when widespread quasi commercial use of copyright material by governments was not the primary concern behind the provisions. Now, governments operate public spaces where music is used as entertainment, government departments are large users of music on hold, governments operate websites that contain music and they produce CDs and DVDs.

15. Under the current Act, governments are entitled to do anything at all with copyright material provided it is for the services of the relevant government. Governments also have broad powers to authorise third parties to do any such acts on their behalf. The only constraint on this power is that the government must pay equitable remuneration as agreed or as determined by the Copyright Tribunal of Australia.

16. APRA AMCOS has agreements with a range of State and Territory government departments, and with the Commonwealth, administering the relevant government's use of music under section 183 of the Act. Those agreements cover activities such as background music in the workplace, the making of commemorative records and DVDs, and the use of music by police and military bands.

17. There is no ability on the part of a copyright owner to enforce its copyright against a government by means of infringement proceedings and the consequent remedies that are available against every other user of copyright material. It is difficult to see why any government in Australia needs to be the beneficiary of more flexible access provisions.

18. It appears that the model for discussion is an unremunerated exception not subject to the fairness test. As such, this would be a further major derogation from the rights of copyright owners, who are already unable to control the use of their work product for the services of government.

19. If the model is that all other government uses of copyright material would be subject to the usual provisions of the Act, and the free exceptions were to be limited to libraries, courts, and the publication of letters to government, APRA AMCOS would welcome the opportunity to consult further on the repeal of Part VII of the Act. If the repeal of Part VII is not contemplated, APRA AMCOS does not see why the modelled reform is necessary. The only effect would be to reduce copyright owners' income.

20. The Act already contains a free exception for the purposes of judicial proceedings, and reporting those proceedings, that is not subject to a fairness test (ss43, 104). APRA AMCOS is not aware of a serious argument that this exception does not extend to tribunal proceedings and proceedings before royal commissions, and does not understand why governments would require a different exception than the one that already applies. If the exception does not apply to all relevant proceedings, and it is determined that it should, then APRA AMCOS submits the amendments should be made within sections 43 and 104.

21. APRA AMCOS submits that particularly where governments charge members of the public for access to copyright material (often using the services of commercial third parties) it would be inappropriate for the government to in effect profit from the provision of copyright material where the copyright owner does not share in that revenue stream.

22. Further to that point, it should be noted that many government activities involving copyright material are quasi commercial, and in those circumstances there is no public policy reason why governments should have free access to copyright material.

23. APRA AMCOS would welcome the opportunity to consult further on a more detailed model.

Quotation

24. To be clear, APRA AMCOS continues to strongly oppose the introduction of a US style fair use exception. For the reasons previously articulated by APRA AMCOS in numerous submissions as referenced in paragraph 3 above, APRA AMCOS believes that if there is a demonstrated need for new free exceptions to infringement on the basis of "fairness," those exceptions should take the form of a new fair dealing exception rather than a general fair use exception.

25. In assessing whether there is a need for such a new fair dealing exception, APRA AMCOS would expect the Department to have been presented with evidence of demonstrated, rather than hypothetical, examples of where copyright legislation was leading to unfair outcomes for particular users of copyright material. APRA AMCOS is not aware of any such evidence.

26. APRA AMCOS says that *purpose* is a fundamental element of any fair dealing exception. Specifically, the exceptions should protect uses that are for particular purposes that the government has determined warrant a free exception. That is the basis of each of the existing fair dealing exceptions.

27. Of course, "quotation" is not in and of itself a "purpose" – it is itself something that is done in relation to copyright material. It is difficult to imagine the public policy basis for an exception that permits a quotation in any circumstances, provided it is "fair," without that exception becoming a *de facto* fair use exception. APRA AMCOS strongly opposes such an approach.

28. However, APRA AMCOS is not opposed to the idea of a fair dealing exception that permits quotation of publicly available works for certain specified purposes. APRA AMCOS considers that the relevant UK provision is circular and difficult to understand, and accordingly notes the need for careful drafting.

29. Each of the existing fair dealing exceptions effectively permits quotation of a substantial part of the relevant original material. Accordingly, APRA AMCOS submits that the better way to approach this issue would be to determine the additional purposes for which a quotation fair dealing exception might be needed. By definition those purposes would need to be different to the fair dealing purposes for which quotation can already be undertaken, and it is difficult to imagine what specific additional purposes might be required. Accordingly, APRA AMCOS is concerned that the arguments in support of such an exception are largely hypothetical.

30. One example that has been given in the course of roundtable discussions is the situation in which a person might rely on the fair dealing exception for research and study to use quotations in a doctoral thesis. If the thesis is later to be published, it is said that the original exception would no longer apply. APRA AMCOS would welcome the opportunity to consider specific examples where publication of research has been prevented, for the purposes of consultation on a relevant further fair dealing exception.

31. APRA AMCOS endorses the discussion of definition and purpose in the context of quotation at paragraphs 17 – 18 of the Australian Copyright Council's submission, and would likewise welcome the opportunity to consult further regarding additional purposes for which a fair dealing exception might be appropriate.

32. APRA AMCOS would be particularly concerned to ensure that a quotation exception could not be relied on to undermine commercial markets for copyright material. It is, for example, common for parts of musical works to be sampled in new works, and there is a well established market for the trade of such rights.

33. APRA AMCOS agrees that if a new exception for quotation for a particular purpose were to be introduced, it would be essential that all of the fairness factors would apply, and that sufficient acknowledgement of the authors of the original work be made.

Educational use

34. APRA AMCOS have membership arrangements as appropriate with the declared societies Copyright Agency and Screenrights, and also have direct licensing arrangements with educational institutions and their administering bodies. We endorse the submissions made by both societies.

35. Educational institutions enjoy comprehensive rights to use copyright material, and have access to a range of additional and alternative licensing solutions. Accordingly, APRA AMCOS does not see a demonstrated need for further reform at this stage. The rights controlled by APRA are already freely available to educational institutions for use in the classroom, by means of section 28 of the Act. APRA AMCOS has not seen evidence of any need for further free access to those rights.

36. The model for discussion, "illustration for instruction," would appear to fall squarely within the kind of uses already covered by section 28, the educational statutory licences, and section 200AB of the Act. APRA AMCOS notes that the statutory licences were extensively simplified in late 2017, and accordingly believes that it is simply too soon to tell whether further reform is necessary or appropriate. Section 200AB provides further flexibility for educational institutions to use copyright material. It is difficult to see how in those circumstances a further free exception is required.

37. APRA AMCOS strongly supports the work of educational institutions in music education, and their use of music in education generally, and seeks to work closely with institutions and their administering bodies to ensure that licence arrangements provide the flexibility and access that they require, while ensuring that copyright owners are compensated for uses of their works by educational institutions. If specific examples of difficulties with access are brought to our attention, we will always try to accommodate the needs of educators.

38. To the extent that educational institutions are concerned with the costs of access to copyright material, APRA AMCOS firmly believes that the appropriate forum is the Copyright Tribunal. Legislated free exceptions should not be the method by which educational institutions reduce their operating costs.

Incidental or technical use

39. APRA AMCOS endorses the submissions of Music Rights Australia in relation to this issue. In addition, we say as follows:

40. APRA AMCOS is most concerned that a fair dealing exception for technical or incidental use would be a *de facto* safe harbour regime without even the

protections offered under that system. APRA AMCOS has made extensive submissions in relation to safe harbours for content platforms, and reiterates them here.

41. APRA AMCOS notes that many examples given to support the need for such an exception are in fact examples of commercial businesses seeking to profit from the unlicensed or infringing use of copyright material. It cannot be the reasonable expectation that a company such as Redbubble would have its liability for infringing material sold via its website, removed by means of an exception for technical or incidental use. The reproduction and communication of copyright material by online shops is neither technical nor incidental – it is the basis on which their entire businesses operate.

42. APRA AMCOS is also concerned that an exception for technical and incidental use is sought, and would be used, to reduce licence fees under licence agreements that already comprehensively license all reproductions and communications required to operate particular services. The licensing transactions costs would also increase, as parties would need to determine which reproductions and communications were to be excluded from the licensing arrangements, in order to determine value and to enforce contractual arrangements. The practical example of this is the putative licensee who claims that a percentage of the copies that will be made in a transaction will in fact be incidental copies, and that the licence fee should be reduced by a commensurate percentage. A licensor will be required to consider and specify each copy that is to be licensed and paid for in the licence agreement. This leaves both parties subject to uncertainty – the licensor will have to monitor the transaction for infringement in spite of the fact that there is a licence, and the licensee will be vulnerable to proceedings for infringement if some of the copies turn out in the event not to be technical or incidental.

43. APRA AMCOS notes the intention that the exception would apply to text and data mining for non-commercial purposes. It is our view that if text and data mining are to be dealt with under copyright legislation, careful consideration needs to be given to the acts involved, which in many instances will be neither technical or incidental. Further difficulties arise with the reference to “non-commercial” uses, which are increasingly difficult to identify and define in an environment where even individuals are using social media in a variety of ways to generate income. In particular, it must be accepted that social media platforms cannot be described as non-commercial, noting how platform operators use the third party content that is part of the social media experience to drive vast revenues by numerous methods.

44. We are also hesitant to endorse an approach that would rely so heavily on clarifications contained in Explanatory Memoranda, which are unlikely to be required unless the legislation is found to be ambiguous.

45. APRA AMCOS would welcome the opportunity to be involved in the Department's external reference group to further consult in this area.

Contracting out of exceptions

46. As a matter of practice, APRA AMCOS does not require any of its more than 145,000 licensees to contract out of any statutory exceptions. In effect, this means that the risk of relying on an exception rather than a licence is borne by the licensee, which is appropriate.

47. Although we have considerable sympathy for some of the circumstances articulated during the roundtable discussions on this subject, we are hesitant to endorse an approach that would interfere with parties' ability to reach commercial arrangements in circumstances the range of which cannot be contemplated at the time of drafting legislation. The Act should not seek to limit parties' right to contract freely in this regard.

48. APRA AMCOS also notes that general trade and consumer laws applies to copyright contracts, and that in particular laws prohibiting unfair contractual terms would operate to void at least some of the types of contractual provisions complained of. The proliferation of non-disclosure agreements in commercial dealings would also need to be considered in the operation of any law that might be used as a way of avoiding contractual obligations under such agreements.

49. Generally, when APRA AMCOS songwriter and composer members are contracting individually, they are the weaker party. APRA AMCOS has no confidence that a prohibition on contracting out of fair dealing exceptions will not be used as a means to further drive down licence fees. We also note that the legislative prohibition on waiver of most moral rights has in no way altered the effective contractual position taken by those organisations that acquire the services of our members.

50. As a starting point, APRA AMCOS believes that if an exception were to be expressly legislatively prohibited from exclusion by contract, the relevant subject matter would have to be publicly available. That is, if a person is granted particular access to copyright or related materials (for example, to unpublished works, or to an interview subject, or to a sporting or other performance event), then it is not unreasonable for contractual terms to constrain the licensee's dealing with the subject matter until the material is made public. However, once the material legally becomes publicly available, it would be unreasonable for the terms of a contract to

prevent the licensee from dealing with the subject matter in the same way as the rest of the world.

51. APRA AMCOS also says that if fair dealing exceptions were to be unable to be excluded by contract, that would make the introduction of new fair dealing exceptions a matter for the most careful and considered examination, given the highly privileged place those exceptions would hold in the law. And, as we have stated elsewhere in these submissions, clarification regarding an aspect of the operation of a new law should not be relegated to the Explanatory Memorandum – particularly not when, as here, the relevant clarification would relate to those most sensitive of rights, the moral rights of an author.

Libraries and archives

52. APRA AMCOS respects and supports the work of libraries and archives, and their central place in the cultural fabric of Australia.

53. Libraries and archives have extensive rights under the existing legislation. If those provisions were shown to be unworkable, APRA AMCOS would support their considered and reasonable simplification.

54. APRA AMCOS reiterates its comments made above, that an exception to infringement should not automatically be the starting point for a consideration of how better to serve the interests of particular stakeholders. This is particularly the case given the range of activities undertaken by libraries and archives throughout Australia, and the range of types of institution covered by those descriptors.

55. APRA AMCOS endorses the submissions made by the Australian Copyright Council in respect of these questions.

Access to orphan works

56. The world's repertoire of musical works is relatively well identified and catalogued, such that the orphan works issues faced by other creators are not faced to the same extent by APRA AMCOS members. The extensive collective licensing of musical works in educational institutions, streaming and download services, and other content platforms, means that the issue of identifying rightsholders falls to the licensor rather than on the end user.

57. APRA AMCOS again states its view that a free exception need not be the first solution to an identified problem.

58. APRA AMCOS is sympathetic to the needs of cultural institutions, and endorses the submissions made by the Australian Copyright Council in answer to these questions. Subject to those submissions, we support the model put forward.

Thank you for the opportunity to respond to the Paper. If we can provide further information, or be of assistance in any other way, please do not hesitate to contact me.

Yours sincerely

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