APRA AMCOS

25 February 2022

BY EMAIL

The Director
Content and Copyright Branch
Office for the Arts
Department of Infrastructure, Transport, Regional Development and Communications

GPO Box 594
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Dear Director

COPYRIGHT AMENDMENT (ACCESS REFORM) BILL 2021 EXPOSURE DRAFT

1. APRA AMCOS is grateful for the opportunity to make a submission to the Department of Infrastructure, Transport, Regional Development and Communications (**Department**) in response to the Copyright Amendment (Access Reform) Bill 2021 Exposure Draft (**Exposure Draft**) which contains proposed amendments to the Copyright Act 1968 (Cth) (**Act**) and the Exposure Draft Discussion Paper (**Discussion Paper**).

2. The Department is familiar with the operations of APRA AMCOS. Currently, APRA has more than 111,000 Australian and New Zealand members, comprising songwriters, composers, lyricists and music publishers, and reciprocal agreements with over 120 overseas similar copyright management organisations. The membership is diverse, ranging from unpublished writers to major music publishers. Licensee stakeholders range from sole traders to multinational content platforms across all industries. APRA owns the exclusive rights of performance and communication in millions of songs written by composers all across the world and therefore represents the majority of musical works and lyrics performed and communicated to the public in Australia and New Zealand.

3. AMCOS has around 24,000 members including music publishers, composers, and songwriters. Licensees include all major broadcasters and video on demand and music streaming services, as well as businesses such as background music suppliers. AMCOS controls the right to reproduce a vast number of musical works and lyrics in certain circumstances in Australia and New Zealand.

4. 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, copies of our previous submissions can be provided upon request.

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5. APRA AMCOS has observed with concern the consultative environment that has led up to the release of the Exposure Draft. Industries affected by copyright law are complex and diverse, and many inquiries into reform have resulted in protracted and polarising debates that have often led to further disharmony between stakeholder groups. Some parts of the Exposure Draft appear, with respect, to be the result of consultation with representatives of the administering bodies of educational institutions, rather than an industry-wide engagement process that includes copyright owners and users of copyright material such as teachers.

6. APRA AMCOS is concerned that the Exposure Draft does not reflect statements made by the Minister as to the policy and intention behind the reforms. In particular, APRA AMCOS was assured by the Minister that the intention was to propose only non-controversial amendments. From APRA AMCOS' perspective, this is plainly not the effect of the Exposure Draft.

7. APRA AMCOS is a member of the Australian Copyright Council and endorses the submissions made by the Council in response to the Exposure Draft. However, APRA AMCOS offers the following submissions to highlight the potential impact of the proposed reforms on our members.

EXECUTIVE SUMMARY

8. APRA AMCOS is not opposed to all the reforms contained in the Exposure Draft. However, we are strongly opposed to:

   - The repeal of sections 28 and 200 of the Act and the broadening of exceptions for educational institutions in the new sections 113MA, MB, MC (Schedule 4: Education); and
   - The amendments to section 106 of the Act.

9. APRA AMCOS is also concerned by the current drafting of:

   - The new sections 113KC, KD, KE, and KF (Schedule 3: Libraries and archives etc.); and
   - The new section 113FA (Schedule 2: Fair dealing for quotation).

10. We are opposed to these reforms for the following reasons:

    - The policy basis for reforms is unclear;
    - The reforms will cause real harm to music rightsholders; and
    - The reforms do not comply with Australia's international obligations.

Policy basis for reforms unclear

11. APRA AMCOS has concerns regarding many provisions of the Exposure Draft. It may be that the impact of the proposed changes is unintended, but in our view the Exposure Draft in many ways significantly disrupts the balance of interests between owners and users, and, with respect, contains ambiguities, overlaps, and contradictions. We address these issues in detail below.

12. In particular, in regard to access to APRA AMCOS' music and lyrics for educational use, the current exceptions and licences in the Act, together with current blanket music licensing arrangements with the education sector, provide all of the access requested by the sector during our (extensive) licensing negotiations with the sector. There appear to be no clear efficiencies or additional certainty arising from the proposed reforms that do not already flow from existing arrangements with the sector.

13. The proposed reforms in the Exposure Draft go well beyond prior indications from the Minister and the Department as to reforms based on policy grounds. APRA AMCOS believe that certain groups in the education sector have used the Covid-19 pandemic to allege access difficulties that have not in fact arisen. The operation of existing exceptions, statutory licences, and voluntary licences, provide all the access to music that is required by the sector, on reasonable terms.

14. The Department has stated that the objective of the proposed reforms is to provide a more flexible and adaptable framework that will better support the needs of Australians to access content in an increasingly digital environment. APRA AMCOS acknowledges the need for Australia's copyright arrangements to be subjected to ongoing consideration to ensure they continue to be relevant in the context of evolving delivery platforms and other technologies, and provide certainty to copyright owners, creators, and users. We submit that the Covid-19 pandemic has accelerated the need to protect copyright owners as schools, universities, cultural institutions, and governments move more services online.

Reforms will cause real harm

15. Given the above, the effect of the Exposure Draft will have little impact on access to music, but may well operate to reduce the costs of access to that music – with copyright owners expected to subsidise their own customer base. APRA AMCOS does not believe there are any significant access issues with respect to musical works as they are used by the education sector. We have asked the education sector, and the Department, to provide actual examples of instances where access to copyright material has been denied to participants in those sectors.

16. APRA AMCOS is in regular contact, consultation, and negotiation with stakeholders including education, libraries, and archives. Our role is to facilitate access to copyright material in a way that provides for fair compensation for copyright owners. Contrary to the assumption implicit in the Exposure Draft, we have seen no evidence of issues with access to copyright material during the Covid-19 pandemic. While the Department's stated policy basis is that the proposed reforms are not intended to cause economic harm to creators, we submit that this will be the likely consequence of the Exposure Draft as currently drafted.

17. Many of the proposed education reforms would provide free access to material that is already provided for in remunerated commercial agreements between APRA AMCOS and licensees. The policy behind this approach is unclear. The proposed expansion of the existing free education exception will only serve to reduce remuneration otherwise payable to copyright owners for the use of their works by the education sector.

18. APRA AMCOS' members and its international affiliates face serious economic harm – at a time of great vulnerability – as a consequence of the proposed reforms. Indeed, there appears to be an assumption inherent in much of the copyright legislation reform discussion around increasing "access" to copyright material via online and digital channels, that increasing "access" for users necessarily requires a lessening of the rights of copyright owners in favour of the interests of those who consume and invest in technology. However, reforms aimed at facilitating and increasing "access" to copyright material in fact demand robust protections for creators to ensure that the rights of copyright owners are protected against technological developments that make it increasingly easy for their property to be accessed free of charge in circumstances where enforcement is practically impossible.

19. Too often, it is assumed that the rights of creators are a reasonable sacrifice in the interests of increasing access to copyright material to align with technological developments and an ever-increasing public appetite for on-demand digital content which is greatly enriching technology developers and investors. 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.

20. APRA AMCOS members have been demonstrably harmed by technological innovation increasing ease of access to their works. Their incomes have declined, piracy of their works has increased, 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' and overseas affiliates' rights are licensed wherever possible, to alleviate these harms – indeed, Australia is a world leader in licensing new music and audio-visual digital 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. In short, technological change is not a reason to diminish the rights of creators and there should be protections against such an outcome.

21. Even if there were limitations on access to copyright material for the education sector (which we submit there are not), APRA AMCOS is disappointed that the first response of government is to propose 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 encourage industry to develop licensing solutions, that would both facilitate the increasing of access in line with technological development and ensure that the rights of creators are acknowledged and remunerated.

22. Australian music creators have been some of the hardest hit by the pandemic, losing earnings from touring and live performances and with reduced opportunities to earn royalties from the public performance of their works as hotels, nightclubs, restaurants and gyms were all forced to close. Our members are still enduring the devastating impacts of the Covid-19 pandemic and we are disappointed that music creators and performing artists continue to be the ones asked to make concessions to those that use their content, even during the worst crisis to ever hit the music industry.

Noncompliance with Australia's international obligations

23. APRA AMCOS is concerned that if the Exposure Draft was to be enacted in its current form, Australia may not be in compliance with its international obligations as a party to the Berne Convention (**Berne**). The amendments and additions which expand the exceptions available to educational institutions and libraries are in violation of the three-step test for exceptions under Berne.

24. To comply with the Berne three-step test, any new or expanded exceptions to existing rights of copyright owners must first be a "special case". Despite the policy intent of the Exposure Draft reforms being to increase access to the wider community, these new and expanded free exceptions are just that – an unbounded expansion of access beyond the existing special cases of the classroom or a library. The shift to remote learning during the Covid-19 pandemic is not sufficiently novel to be a new "special case" which demands its own exceptions. The existing exceptions – for example under section 28 of the Act – can be simply clarified to include virtual classrooms.

25. Under the second limb of the Berne test, exceptions must not conflict with the way in which copyright owners normally exploit their works. The new and expanded exceptions provide schools and libraries with the ability to copy and communicate copyright works, to make copyright works available online, to transform hardcopy works into electronic copies, as well as make recordings incorporating copyright works and make those recordings available online for an undefined period of time. All of these actions directly conflict with the normal ways in which a copyright owner exploits their work for economic gain.

26. The proposed reforms also, as detailed in these submissions, greatly diminish the remuneration copyright owners current receive under statutory and voluntary licences, as well future revenue which will be decimated if bodies like schools and libraries can freely distribute copyright works online. As such, these new and expanded exceptions unreasonably prejudice the legitimate interests of copyright owners, and thus fail to pass the third limb of the Berne test.

EDUCATION

27. APRA AMCOS strongly supports the work of educational institutions in music education, and their use of music in education generally, and works closely with these 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.

28. The education sector currently accesses APRA AMCOS' copyright material via a combination of:

    a) the existing educational exceptions in the Act;

    b) statutory licences administered by Copyright Agency and Screenrights which cover certain specific uses of music; and

    c) voluntary blanket licences negotiated with the sector.

29. The statutory licence administered by Screenrights for TV and radio broadcasts covers the use of music contained in those broadcasts; and the statutory licence administered by Copyright Agency includes certain uses of print-based music (e.g. sheet music).

30. In addition to these statutory licences and the existing educational exceptions in the Act, APRA AMCOS, together with Australian Recording Industry Association Ltd and Phonographic Performance Company of Australia Ltd (the **Music Bodies**) currently grant a suite of voluntary licences to schools, universities, TAFEs and other education providers. These licences are commercially negotiated and are tailored to the requirements of each organisation. That is, the Music Bodies and the education sector already have a well-developed, non-legislative solution to provide the sector with access to the rights controlled by the Music Bodies in a way that fairly compensates and incentivises music creators.

31. The proposed reforms, as currently drafted, would significantly adversely impact the commercial interests of our members. The education reforms in particular would likely undermine our members' ability to derive an income from the normal exploitation of their musical works and lyrics via commercially negotiated voluntary licences with the education sector. Such an erosion of our members' rights and their ability to make a living from them, especially at a point in time where other music revenue streams have been decimated by the pandemic, is of real concern.

32. APRA AMCOS receives over $13 million from its voluntary licences with the education sector each year, covering over 9200 schools, 39 universities, all major TAFEs and a range of private educational institutions. Licence fees are distributed to copyright owners after deduction of operational costs. This figure makes a considerable contribution to the livelihoods of the copyright owners who create and publish the music used by educators.

33. Music is an integral part of education in Australia, and APRA AMCOS has worked closely with educational institutions for many years to promote the benefits that music education delivers for students and the broader population. TAFEs and tertiary institutions teach specialist music courses and also use music in many other educational settings. The significant educational and social advantages that music brings to school students – in the classroom, in band programs, and in school performances, are well documented. In fact, many Australian music educators are APRA AMCOS members. APRA AMCOS is disappointed that the sector seeks to minimise the payment made to those who create the content that forms the basis of these courses and other programs and that enlivens the delivery of other educational material, by advocating for free exceptions.

34. The Exposure Draft overturns the existing rights regime in the educational context, and effectively subsumes and neutralises the rights of copyright owners into new provisions which vastly expand the free exceptions available to educational institutions.

35. We hope this is an unintended consequence of drafting, as in our view it does not reflect the policy intensions previously stated by the Department.

Section 28 and new sections 113MA, MB, MC

36. APRA AMCOS strongly opposes the repeal of section 28 of the Act and the inclusion of the new sections 113MA, MB, and MC related to copyright material copied or communicated during the course of educational instruction.

37. The rights controlled by APRA are already freely available to educational institutions for performances in the classroom, by means of section 28 of the Act. APRA AMCOS has no objection to any legislative confirmation that "classroom" in this context includes a virtual classroom. It should be noted that educational institutions commenced and continued online learning – including music classes – during the Covid-19 pandemic, with Music Bodies readily granting the required licences. Tertiary institutions have delivered online teaching programs for years.

38. The Exposure Draft repeals section 28 of the Act and replaces it with new provisions including section 113MA (Use of copyright material in the course of educational instruction), section 113MB (Use of works and broadcasts for educational purposes) and section 113MC (Proxy web caching by educational institutions). These provisions appear intended to meet the alleged problems associated with the shift to remote learning accelerated by the Covid-19 pandemic.

39. There is in fact no policy reason to extend the existing section 28 provisions. It is intended to cover live performances in a classroom, such as performing a play, reciting a poem, or singing a song. The existing exception covers the playing of audio recordings, and the showing of films. It also allows for communications of copyright material made merely to facilitate the performance, playing, or showing of the copyright material.

40. Section 28 is not the only provision in the Act which provides for an unremunerated exception for the delivery of copyright materials in a classroom setting. Section 200 of the Act (also proposed to be repealed) provides a free exception for a teacher or student copying the whole or part of a work in the course of educational instruction if the copying is not done using a machine to produce multiple copies. That is, the policy intention of the Act is that multiple copies (and, since the amendments of 2006, communications) of copyright works should be remunerated as part of the educational statutory licence. The education statutory licence in section 113P of the Act permits the copying and communication of copyright works, provided a remuneration notice is in force under section 113Q of the Act.

41. Further, APRA AMCOS grants licences to educational institutions for uses of works outside the statutory licence, including for example the filming of school events and the copying of music for school bands and orchestras. Thus, the act of copying of a work that is outside the very limited scope of section 200 is permitted by either statutory or voluntary licences, including for recorded classes.

42. The proposed new section 113MA assumes that the exceptions in sections 28 and 200 are intended to apply to all classroom use of copyright material. However, that is not the case. The policy position is that performances, and communications to facilitate those performances, should not require remuneration. Similarly, copies should be free but not if they are multiple copies (that is, not if they are copies distributed to the class). The policy is that all other use is to be remunerated. Similarly, the exception in section 200AAA relates to proxy caching specifically. This is not, with respect, the same as the proposed exception in section 113MA(2)(c), which would permit the provision of a copy of a work to all students "on a temporary basis".

43. In order to protect the economic interests of copyright holders, any use of copyright material, that is not covered by the limited exceptions for performance and associated communications under section 28, that involves making copies (beyond the scope of section 200), including making recorded lessons and communicating those recorded lessons online, or making a copy of a work to be shown online, should continue to be remunerated under the statutory licence or negotiated voluntary licences. This is a simple solution and does away with the need for a new section 113 entirely.

Specific problems with the drafting of 113MA, MB, MC

44. Should the Department proceed with repealing section 28 and enacting the new sections 113MA, MB, and MC, there are significant problems with the drafting of sections 113MA(2)(b),(c), and (d), including problematic changes to the language of section 28.

45. Proposed section 113MA expands what constitutes a "performance" to causing material to be seen or heard, and the proposed change is much broader than even the alleged policy imperative would suggest – it also covers copying for the purpose of performance, as well as the providing of access to pre-recorded educational content on-demand and various reproduction rights which are currently licensed by the Music Bodies to the education sector.

46. Proposed section 113MA would also allow copying or communication of the material, where that copying and communication facilitates (no longer "*merely* facilitates") an act that causes the material to be seen or heard; or facilitates the performance of the material. This is a new, free, exception that permits use that is currently licensed and therefore remunerated.

47. The omission of the "made merely to facilitate" language in respect of allowing a copying or communication of copyright materials is highly problematic. This is a much broader concept, where a copying or communication need only play a role in facilitating any copyright materials to be seen or heard in the course of educational instruction, compared to the limitation in section 28 that the copying or communication be "made merely" i.e., with the sole purpose of, facilitating a performance or in the case of a sound recording or film, a causing to be seen and heard.

48. APRA AMCOS submits that there are issues with each of the uses as drafted in these provisions that are likely to result in harmful, unintended consequences to our members.

49. Firstly, the new section 113MA is extending a narrow classroom exception to cover departments of education and other administering bodies. We query why the language from the statutory licence ("body administering the educational instruction") has been transplanted to the new section 113MA(2) without any explanation as to the intention of doing so.

50. In section 113MA(2), it is unclear based on the subsequent list of uses in the provision whether this section is intended to be confined to uses that occur contemporaneously with instruction and performance during a lesson, or if activities undertaken in preparation for, or access provided following the end of, a lesson would be considered "in the course of giving or receiving the educational instruction". Based on the list of uses it would appear to be the latter.

51. ***Case Study****: As it is currently drafted under s113MA, a university lecturer could pre-record audio-visual educational content using popular music and upload that to the university learning management system. Students could in turn be provided access to the content for the semester. APRA AMCOS supports the integration of music into university courses; however, this is something currently covered under APRA AMCOS' licence with universities. If enacted, APRA AMCOS presumes educational institutions would then quickly move to seek a reduction in licence fees paid to the Music Bodies and our members and international affiliates would suffer financially as a result.*

52. The use in section 113MA(2)(b)(i) is a performance of copyright material – this is covered by the existing section 28 and does not need a new provision.

53. In section 113MA(2)(b)(ii), the use is an act "that causes the material to be seen or heard". It appears this an attempt to import the language from section 28(4) of the Act, that is, wording more fitting to the nature of copyright in subject-matter other than works. Without any reference to performance (as section 28(4) of the Act), or any distinction between this subsection's application to *work* or *subject-matter*, this can be interpreted as applying to *any* act comprised in copyright that will result in material being seen or heard. A literal interpretation of the wording is incredibly broad.

54. In section 113MA(2)(b)(iii), the use is the copying or communication of the material where the use facilitates the performance of the material, and in subsection (iv), causing to be seen or heard. In summary, the act of copying has been added to these exceptions. The Act has existing exceptions for the temporary copying for technical reasons as part of a communication (section 43A of the Act), and in 2006, section 28 of the Act was amended to cover 'technical' communications to facilitate performances for educational purposes. The technical copying and communication use required for performance in the classroom are already covered as exceptions in the Act; copying beyond this is already covered by statutory and voluntary licences. The only conclusion that can be drawn is that these new provisions are intended to take functionality and thus value out of statutory and voluntary licence schemes.

55. Proposed section 113MA(2)(b)(iv) would permit, for example, the copying or communication of sheet music for a class of students, with no limitation. This use is already covered by statutory and voluntary licences and would likely cause a significant decline in revenue under these licences and in any future sales of print music to the education sector.

56. In 113MA(2)(b)(v) the drafting reads "the use is the making of an audio recording, or an audio-visual recording, of the whole or a part of the material, and the use facilitates the performance of the material". Oddly, this subsection takes wording specifically from the voluntary licences administered by APRA AMCOS. The making of audio and audio-visual recordings for performance is plainly the remit of a voluntary licence scheme.

57. In 113MA(2)(c), the use is the making of an audio recording, or an audio visual recording, of the whole or a part of the material – the recording is made available on a temporary basis to persons taking part in the giving or receiving of the educational instruction. This would imply the exception extends beyond a real-time remote lesson – that is, to allow for producing educational content, and providing on-demand access. There is no question that we support the ability of teachers to provide catch-up material to students who miss a real-time lesson, or to pre-record content, however the use is squarely covered by an existing licence. Allowing that use to be covered by free exception undermines a legitimate market.

58. In 113MA(2)(d) the use is making the material available online, whether at the premises of the educational institution or on the internet, provided the body administering the educational institution takes reasonable steps to limit access to the material to persons taking part in the giving or receiving of the educational instruction. Making material available online, again, would imply this is covering activities far beyond delivery of a real-time remote lesson. Providing online access to content comprising music, beyond a lesson, is covered by voluntary licences.

59. In summary, the new provisions provide free exceptions for all copies and communications of all forms of copyright material in the course of giving educational instruction (not even limited to the physical or virtual classroom). It is difficult to understand what rights the drafters imagine copyright owners have left.

60. In case there is any doubt, proposed section 113MA(3) provides that no other provision of the Act (i.e., the statutory licence) limits this new, broad, free exception for education.

61. Section 28 is a narrow exception directed towards performance in class and during educational instruction. It was never intended to create a free exception for the delivery of educational materials, whether in class or otherwise – that is the remit of the statutory and voluntary licences. These proposed reforms, with respect, appear to address a

request for reduction in remuneration paid to copyright owners rather than a need for increased access for educational institutions.

62. For the rights the Music Bodies represent, the vast majority of communication and reproduction rights required to deliver online learning, to the extent they are not covered by the existing section 28, are either currently licensed under the voluntary licences negotiated with the education sector or are available to be licensed via the Music Bodies.

63. The Exposure Draft, if enacted, thus will significantly undermine the existing voluntary licences in place, some of which are currently being renegotiated.

64. Prior to the Department's announcement in August 2020, we were unaware of any significant issues in relation to access to music by the education sector that would necessitate any broad changes to the Act. With the requirement to shift rapidly to online learning in March 2020 due to Covid-19, APRA AMCOS worked closely with the National Copyright Unit (**NCU**) to ensure the scope of the schools' music licences were suitable to facilitate remote teaching, with no increase to the licence fees paid.

65. For example, when the NCU was in the process of publishing its Covid-19 copyright guidelines, APRA AMCOS pro-actively sought to administer additional rights from the music creators we represent in order to offer schools a blanket licence to create digital copies of sheet music and share those copies with staff and students online. In consideration of the extraordinary circumstances, these rights were granted to schools under a temporary gratis licence until 31 May 2020 and then extended to 31 December 2020 as the impact of Covid-19 continued to affect the school sector.

66. In 2021 the Music Bodies were able to expand the scope of the voluntary licences granted to schools to provide additional cover and accommodate remote teaching practices (**Interim Licence**). This Interim Licence expanded on the cover of previous voluntary licences (with no increase to licence fees, despite a considerable increase in rights). The Interim Licence was put in place to allow more time for the Music Bodies to work with the NCU and Schools Copyright Advisory Group (**CAG**) to finalise the terms of a longer three-year agreement (**Proposed Licence**) to commence in 2022. The intention of the Proposed Licence is to be technology neutral and to comprehensively cover, and future-proof against, new and emerging teaching practices. At the request of the education sector, the Proposed Licence also provided the necessary rights for a number of additional uses not previously covered (for example, activities for School Purposes, expanded from 'educational purpose'; the digital copying and scanning of sheet music; removal of copy limits for sheet music; and the sharing of recorded content on social media).

67. Where APRA AMCOS has been notified of an educational use not contemplated by our licence, we have been accommodating and, in many instances, provided additional cover at no additional cost.

68. Without concrete examples of any specific access issues faced by the education sector, we can only conclude that the proposed legislative changes to education exceptions in the Act are intended to significantly reduce the amount that the sector, particularly education departments and private schools, pays for copyright content including music. The Department is yet to articulate why a broad range of uses covered by a voluntary commercial licence and subject to remuneration should now be made the subject of free exception.

69. APRA AMCOS is disappointed that the Department, which is also responsible for the Arts and advocating for our music creator members, is proposing free exceptions in place of rights which are currently remunerated under commercially negotiated licences.

70. The Music Bodies have continued to negotiate in good faith the terms of a three-year music licence with the NCU and CAG. The proposed introduction of new free exceptions has significantly undermined our commercial position. Of great concern is that the Exposure Draft appears to use similar language to that in the Proposed Licence being

negotiated (Proposed Licence: "Recording in the course of making: audio and/or audio-visual recordings"; Exposure Draft: "[T]he use is the making of an audio recording, or an audio visual recording"). APRA AMCOS is concerned that the NCU – who have been party to commercial negotiations – have contributed to the Exposure Draft.

71. Rights holder groups have been advised by the Department to wait until an Exposure Draft is released so that we might be afforded the opportunity to consult. The concerns raised in our previous submissions have been largely ignored.

72. We encourage the Department to consult with teachers and teachers' associations directly to obtain an accurate view of the practical operation of licences already in place. Rather than focus on "what-ifs" to seed uncertainty, it would be more appropriate if all parties worked constructively to provide clarity, assurance and support to copyright users, as has been the case for many years.

73. As they stand, the scope of the proposed education reforms is deeply concerning and, in our estimation, will result in the loss of millions of dollars in royalty income for songwriters and composers, many of whom are not only members of APRA AMCOS but are also teachers and educators.

74. As stated above, the Exposure Draft gives priority to the new exception provisions over the statutory licences already contained in the Act. This will lead to the education sector also seeking to renegotiate licence fees given the expansion of free exceptions which are not limited by the statutory licence.

75. Many of the proposed amendments would directly affect rights which are currently the subject of a commercial negotiation with the NCU in relation to the Music Bodies' voluntary licence arrangements for schools. APRA AMCOS is concerned that some of the changes advocated for by the NCU appear to be driven by commercial objectives rather than concerns regarding the educational sector's access to content.

76. Put simply, we are opposed to any free exception for reproduction or communication other than as contained in the current section 28. Existing section 28 covers the needs of educators in virtual classes and remote teaching. Beyond an express inclusion of the elements of remote teaching – which might include defining a class to include a virtual class through a live remote connection or expanding the definition of person taking part in the giving or receiving of the educational instruction to include parents or carers involved in remote schooling – APRA AMCOS sees no need for reform to section 28.

77. To the extent that educational institutions are concerned with the costs of access to copyright material, APRA AMCOS 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.

Section 106

78. APRA AMCOS endorses the joint submissions made by ARIA and PPCA in respect of the proposed amendments to section 106 of the Act and further states:

79. Section 106 of the Act provides that where a sound recording is caused to be heard in public (a) at premises where persons reside or sleep, as part of the amenities provided exclusively for residents or inmates of the premises or for those residents or inmates and their guests; or (b) as part of the activities of, or for the benefit of, a registered charity; the act of causing the recording to be so heard does not constitute an infringement of the copyright in the recording.

80. The new section 106(1)(b) in the Exposure Draft retains the broad exception for a registered charity, but adds at subsection (c) an exception for an educational institution; a library; or an archive; that operates as a not-for-profit entity.

81. The new section 106(d) in the Exposure Draft adds an exception for a club, society, or other organization that is a not-for-profit entity involved in advancing of religion, education or social welfare (but is not a registered charity).

82. The amendment of section 106 in 2012 has allowed private and independent schools, many of which are registered charities, a free exception for causing sound recordings to be heard in public, while public schools have not had the benefit of such an exception. While the public policy concern with this is immediately apparent, APRA AMCOS does not support a widening of the free exception to cover the non-curricular activities of all educational institutions.

83. APRA AMCOS recognises that the objective of the new drafting may have been to remedy this perceived unintended consequence. However, in attempting to remedy the situation, the newly drafted section 106 results in a drastic expansion of the exception related to causing sound recordings to be heard in public. As currently drafted, the new section 106 would provide a free exception to all schools to cause sound recordings to be heard in public in non-curricular settings, as well as to any registered charity and any other organisation that purports to run on a not-for-profit basis. This will cause significant economic harm to creators and this should not be the outcome of an attempt to remedy an unwanted consequence of unequal rights between private and public schools.

84. The proposed amendments to section 106 are effectively a free licence to play sound recordings in public that extends to an enormous number of organisations including schools, libraries, and archives – not to mention any organisation that is able to register itself as a charity. This stands to have dire consequences for the compensation that creators are currently paid under a remunerated licence.

85. Rather than expand this section, APRA AMCOS submits that section 106 should be narrowly drafted to exactly mirror the corresponding provision covering works, section 46. Such a change would bring Australia in line with the United Kingdom and avoid the complex scenario where a significantly different provision applies to musical works and sound recordings. We are concerned that the Department appears not to have considered recent developments to the equivalent provisions in other leading jurisdictions, and the proposed reform is based entirely on the submissions of the schools sector.

86. Mirroring the two sections, 46 and 106, would do away with any issues with unequal rights to play sound recordings without a licence between public and private schools, and relocate this educational use of sound recordings to its rightful place – under a remunerated licence.

87. The new section 106(2)(c) and (d) provide that the exception will not apply where a school, library, or other organisation that charges admission to the place where a sound recording is heard and then do not use those admission proceeds for the purposes of the school, library, or organisation. This creates the situation where the only way a copyright owner could be remunerated for a use that generated revenue for one of these bodies that was then used for another purpose, would be to effectively trace the internal movement of money within the school, library, or organisation. This is plainly unworkable and a redrafting of section 106 to mirror section 46 would do away with this problematic provision as well.

88. Overall, the question remains: Why should schools, whether they be charities, or government schools, be covered by a free exception to play sound recordings for non-educational uses (concerts/school bell etc.)? They pay for other goods and services, yet the Discussion Paper sets out no reasoning for allowing schools, public or otherwise, to play sound recordings in non-curricular settings for free.

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

LIBRARIES AND ARCHIVES

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

91. 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.

92. 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.

93. The Exposure Draft includes a broad exception to infringement for the digitisation and making available on the internet of copyright material acquired by a library or archives in hardcopy form, as long as the library or archives officer is satisfied that a digital copy cannot be acquired (by the library) at a reasonable cost within a reasonable time.

94. These provisions in the Exposure Draft almost take a cavalier approach to the fundamentally transformative act of digitising hardcopy materials. The Exposure Draft Discussion Paper (**Discussion Paper**) refers to making material available online for browsing as being analogous to the borrowing of physical items, through digital technological means. This drastically underplays the commercial effect on a creator's market in making their work available on the internet where it previously was not available. For a library or archive to convert a hardcopy work to an online file that can be supplied to a member of the public upon request including supply by way of communication to a member of the public for private and domestic use, is to effectively become, among other things, a free streaming service.

95. While the Exposure Draft provides for the taking of reasonable steps to ensure that the copyright materials are not infringed by those to whom the materials are communicated; there is no specific requirement for Technological Protection Measures (**TPMs**) to be put in place by a library or archives to ensure that the copyright material they supply to a member of the public is "view only" and cannot be downloaded or communicated to others.

96. For creators, the ramifications of this free exception for libraries and archives making material available online are enormous and potentially very destructive. By allowing libraries and archives to take hardcopy works and make them available online as a digital product, with no protective measures beyond undefined reasonable steps to ensure the user does not infringe the copyright material, the proposed exception effectively empowers libraries and archives to, upon a cursory search for an available digital version of the hardcopy work, convert that work and make it available on the internet, thus becoming a quasi-streaming service offering exactly those works that creators have not yet made available online, whether by choice or by access to technological capability.

97. The digitisation of existing copyright works is an active and ongoing undertaking for copyright owners, and to allow libraries and archives to effectively subsume this process with very limited requirements to acknowledge what is available in the market, is to take away the right of copyright owners to control the digitisation and making available online of their work. Copyright reforms ostensibly aimed at increasing access to works should not be formulated in reference to a specific moment in the evolution of technology, nor broaden exceptions to infringement so as to accelerate that evolution, especially when this causes economic harm to the creators without whom the works would not exist.

98. While the Discussion Paper states that the reforms will not displace the acquisition by libraries and archives of commercial products where they are available, in a scenario where a creator has in fact taken steps to make their work available online on a digital platform, the potential economic harm of this exception is abundantly clear. If users have a choice to access a creator's work via a purchase or subscription streaming service or for free via a library or

archives, the market for that creator's work will be severely impacted. There appears to be no provision in the Exposure Draft for the scenario where an officer of a library or archives looks for an electronic version of a hardcopy work already held in the collection, discovers that the work is only available electronically via a paid streaming service with strict TPMs (and thus unable to be obtained as an electronic copy by the officer), and proceeds to digitise the hardcopy work and make it available online under the exception. This would directly undermine the market for the creator's work on paid streaming platforms which have taken a sensible and commercial approach to protecting content via TPMs.

99. There will be little to no ongoing incentive for the publication of new works, or the republication of existing works, if libraries make the works freely available to the world at large for no more than the price of a single copy. This is plainly and inescapably in conflict with Australia's obligations under Berne – it would be a direct attack on a creator's market and their usual manner of exploitation of their work, and it is extremely prejudicial to creators.

100. APRA AMCOS further submits that there are significant problems in the drafting of the new section 113KC (Making material available online).

101. Section 113KC(1) provides for an exception for an authorised officer of a library or archives making copyright material available online whether at the premises of the library or archives, or on the internet.

102. The inclusion of the words "on the internet" is unnecessary and overly broad for the purposes of this section. If the drafting were simply "making copyright material available online, including at the premises of the library or archives", this would be sufficient to cover a library portal platform that can be accessed remotely with appropriate safeguards, rather than opening up the provision to making material available "on the internet".

103. Section 113KC(1)(a) provides that the exception applies where the copyright material was acquired, in electronic form, as part of the collection of the library or archives." The meaning of "acquired in electronic form" is unclear. There is no specification as to the means of acquisition or any commercial element therein.

104. There is no commercial availability test in section 113KC(1)(a). A library purchasing a single copy of an e-book would satisfy the requirements of section 113KC(1)(a) with the only limiting provision being section 113KC(1)(b) which requires the library or archives to take "reasonable steps to ensure that a person who accesses the copyright material does not infringe copyright in the copyright material." Here, the drafting vaguely requires "reasonable steps" in respect of the measures that could make the difference between a creator's work being mass-distributed online after a library purchased one electronic copy; and the creator's work being available online in a limited and protected form. There is no certainty around what these reasonable steps might involve – in the ever-evolving realm of online content protections (compare NFTs on the blockchain), this level of vagueness is unacceptable and out of step with the times.

105. Section 113KC(2) is even more problematic. Here, under subsections (a) to (c), a library officer can rely on the exception to make an electronic copy of copyright material and to make that electronic copy available online, where the library has acquired (at any time and in any manner) copyright material in hardcopy form as part of the collection of the library. Subsection (d) purports to apply a commercial availability test, where the library officer must undertake a "reasonable investigation" into whether an electronic copy of the copyright material "cannot be obtained within a reasonable time at an ordinary commercial price."

106. This drafting does not indicate to whom the electronic copy might be available – is it the library or the person requesting to borrow or access the copyright material? APRA AMCOS considers this to be a relevant consideration which needs to be expressly addressed in the drafting, as the purchasing power and access of an institution is vastly different to, for example, a member of the public in a remote area who might be seeking to access the copyright material.

107. In terms of measures should be undertaken by a library or archives to seek to limit wider access to copyright material when made available online, APRA AMCOS endorses the submissions made by the Australian Copyright Council in respect of these questions.

FAIR DEALING FOR QUOTATION

108. APRA AMCOS strongly opposes the introduction of a US style fair use exception. For the reasons previously articulated by APRA AMCOS in numerous submissions, 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. The breadth of the current proposals in many respects amounts to a fair use exception by another name.

109. 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.

110. APRA AMCOS's position is that the fair dealing exception for non-commercial quotation contained in the Exposure Draft is not needed in its current form.

111. Notwithstanding this, 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.

112. 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 legislature has determined warrant a free exception. That is the basis of each of the existing fair dealing exceptions.

113. 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 and submits that it is inconsistent with the basis of existing fair dealing exceptions.

114. APRA AMCOS is concerned that the arguments in support of such an exception are largely hypothetical and we note the Discussion Paper provides hypothetical scenarios in two key settings: academic research and theses, and documentary making. We are much more concerned by the latter given that the licensing of music in documentary films (particularly music documentaries) is of significant value to our members.

115. 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 existing fair dealing purposes for which quotation can already be undertaken, and it is difficult to imagine what specific additional purposes might be required.

116. In the instance that a fair dealing provision for non-commercial quotation is to be included, there are significant problems with the drafting in section 113FA (Fair dealing for quotation).

117. Section 113FA(1)(a)(vii) provides for an exception for a dealing by "a person or organisation for the purpose of research", subject to Section 113FA(1)(b). Subsection (b)(i) provides for an exception where the quotation is for a

non-commercial purpose. The definition of "non-commercial" is highly problematic and opens up serious ambiguities as to what might be deemed a "non-commercial" purpose. This requires more detailed elaboration in the drafting.

118. Subsection (b)(ii) deals with commercial purposes, but introduces a completely novel, and frankly unworkable concept whereby if the quotation is for a commercial purpose in relation to a product or service, but the quotation is "immaterial" to the value of the product or service, the fair dealing exception applies.

119. Section 113FA(5) provides examples of what would be deemed a "quotation": (a) a quotation for the purpose of explanation; (b) a quotation for the purpose of illustration; (c) a quotation for the purpose of authority; and (d) a quotation for the purpose of homage. This last example is very problematic.

120. With well-established economically remunerated practices of sampling and interpolation, for example, to introduce the idea of a fair dealing exception for the broad concept of "homage" is dangerous and unnecessary. It is also highly subjective and likely to be the subject of expensive and complex litigation. APRA AMCOS's position is that the provision must expressly and narrowly specify the purpose for the non-commercial quotation, for example "to illustrate or support an argument or point of view".

121. Likewise, the proposed provision should be drafted to carefully define "quotation" through indicative examples in the Explanatory Memorandum (for example, student theses; or excerpts in PowerPoint presentations).

122. The provision should also require a sufficient acknowledgement (as defined in the Act) of the quotations, as in the fair dealing exception for criticism or review.

123. The exception should only apply to an excerpt of the work – not the whole work.

124. The Discussion Paper states that for this exception the fair dealing factors to have regard to are the "four standard fairness factors": the purpose and character of the use; the nature of the copyright material; the effect of the use upon the potential market for, or value of, the material, and the amount and substantiality of the material used. APRA AMCOS submits that the provision must also include the fifth fair dealing factor: the possibility of obtaining the work within a reasonable time at an ordinary commercial price. This would go some way to elevating our concerns with respect to documentary making.

125. APRA AMCOS is particularly concerned that the quotation exception contained in the Exposure Draft will 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.

126. While the Discussion Paper states that the quotation exception would not apply to the sampling, mashup and remixing of copyright material to make a brand-new product, the Exposure Draft contains no express provision excluding these types of uses from being provided for under the exception. The provision should contain an express exclusion of licensed uses, statutory and non-statutory, which would explicitly include music samples.

127. APRA AMCOS is also concerned by the inclusion in the exception of quotations made for a commercial purpose in relation to a product or service, but the quotation is "immaterial" to the value of the product or service. There are three significant problems with this provision.

128. First, the list of entities who can rely on the exception does not include any commercial publishers, filmmakers, or other commercial content creators. Therefore, there is no need for a provision dealing with quotation for a commercial purpose.

129. Second, the test of immateriality to the value of the commercial product or service is vague, nebulous, and ambiguous. There is no guidance as to whether immateriality is a qualitative or quantitative test, nor does the Exposure Draft contain any factors to have regard to in assessing immateriality.

130. Finally, the definition of "commercial" and "non-commercial" is problematic. "Commercial" is not narrowly defined in Act, and can refer to, for example, a price; the scale of volume and value of articles in an infringement; or to the obtaining of a commercial advantage or profit. The distinction between a commercial and non-commercial purpose is entirely unclear and is drafted without reference to any other section of the Act. This gives rise to considerable ambiguity around what could be deemed a "commercial" and "non-commercial" project.

131. The Discussion Paper makes reference to, for example, documentary makers, but is silent as to what would constitute a commercial or non-commercial documentary, and thus it is unclear whether this hypothetical documentary maker could rely on the free exemption for a non-commercial purpose, or the immateriality based exception for a commercial purpose. This lack of clarity can easily be remedied by removing any reference to commercial purposes from the provision, which will also do away with the ambiguity around "immateriality".

132. A significant number of APRA AMCOS members rely on the income generated by the inclusion of music in documentaries. It is unclear why any exception should be granted to filmmakers where activities are commercial in nature even if their output is not always profitable.

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

USE OF COPYRIGHT MATERIAL BY THE COMMONWEALTH OR A STATE

134. 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 and governments produce a range of digital content containing music, some of which is subsequently shared online.

135. 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.

136. APRA AMCOS has remuneration 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 music in the workplace, music at public spaces and events, the making of commemorative recordings, and the use of music by police and military bands.

137. 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.

138. It appears that the model proposed in the Exposure Draft 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.

139. 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.

140. 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 (sections 43 and 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.

141. 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.

142. 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.

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

ORPHAN WORKS

144. The world's repertoire of musical works and lyrics 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 APRA AMCOS as the licensor rather than on the end user.

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

146. The Exposure Draft contains provisions for a limitation on remedies for infringement in respect of orphan works and former orphan works where a reasonably diligent search has been conducted to ascertain the identity of the copyright owner.

147. Removing any liability for past use is particularly worrying when the measure proposed contemplates that searches may be undertaken 'within a reasonable time before, or as soon as practicable after, use'.

148. APRA AMCOS opposes the proposal that there be no liability for past use of former orphan works and submits that where a copyright owner is identified as the owner of an orphan work, reasonable compensation for past use should be available, as well as the ability to enjoin future use if the copyright owner does not wish to enter into a licence agreement for future use of the former orphan work.

149. 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.

Thank you for the opportunity to respond to the Exposure Draft and Discussion Paper.

If we can provide further information, or be of assistance in any other way, please do not hesitate to contact Jonathan Carter, Head of Legal & Corporate Services at APRA AMCOS.