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*Technology, copyright law and the future: the  
Australian contemporary music industry*

**This is Working Paper  
No 54 (April 2008)**

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## **Technology, copyright law and the future: the Australian contemporary music industry.**

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

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

Under Australian *Copyright Act* 1968, the copyright owner in the music or lyrics has a number of exclusive rights which are as follows.

- To reproduce or publish the work in a material form

Thanks to recent Digital Agenda Amendments of 2000, this includes digital copies of the work.

- To perform the work in public
- To communicate the work to the public

This involves causing the work to be broadcast via the radio, television, mobile phones or via the internet. Again, thanks to the digital agenda amendments, the *Copyright Act* has moved away from technology-specific wording such as ‘diffusion’ or ‘broadcast’.

- To translate or make adaptations to the work

The owners of the copyright in the actual sound recording have their own copyright protection. These are as follows.

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

A closer inspection of these rights reveals why the recording industry is currently so challenged by the internet, CD-burning and digital downloading. The owner of the sound recording is usually the person who paid for that recording (and the performers who appear on the sound recording), commonly the record company and the performing artists. (Since performers’ copyright was introduced in 2005 the standard practice of

record companies has been to force performers to assign their ownership in the performance as a clause in their artists' contract.) Record companies derive their income from the exploitation of master recordings, but new technology has created a situation in which it is difficult for them to control these recordings. The introduction of new technology has allowed anyone to make a copy and distribute that copy, and anyone can communicate the master recording to the rest of the world via the internet. This is an enormous source of frustration for record companies. Copyright laws state that *they* as the owners of copyright have the right to exploit the communication of master recordings, yet millions of people are breaking those laws every day. These law breakers are their customers, and the music industry (especially in Australia) has been reluctant to take legal action against their customers.

If the record companies had moved sooner to include digital rights management information on the discs that they were selling, they might have had a better chance of meeting the challenge by means other than litigation.

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

consider here, so I will concentrate on the changes that had the greatest effect on the music industry.

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

On 16 August 2004, the Australian Government assented to the *US Free Trade Agreement Implementation Act 2004 ("Implementation Act")* (Simpson 2006). The

*Implementation Act* does as its name suggests - implements the amendments necessary to the law in Australia as a result of the signing of the Australia-United States Free Trade Agreement. The *Implementation Act* introduced significant changes to the *Copyright Act* 1968 that directly impact on the music industry. New performers' rights were created and the duration of copyright protection was extended for most copyright material. The former offered protection for fifty years after the death of the creator. The implementation act extended this to seventy years. , While on the surface this alteration to the *Copyright Act* does little to protect copyright owners it does have a significant impact considering that the 'Rock and Roll' industry was born in the mid to late 1950s. The birthplace of today's music industry was about to become public domain so these changes were welcomed by the music industry. However the *Implementation Act* did little to offer further protection from digital downloading and CD burning: all it did do was ensure that the Disney corporation and those publishers who had rights in music by artist such as Buddy Holly were able to continue to collect their income; business as usual.

In May 2006, the Australian Government announced changes to the *Copyright Act* to include a provision for fair dealing. Fair dealing was a term that previously did not exist in the *Copyright Act*. A close inspection of the fair dealing provisions reveal a number of proposed changes but the introduction of 'time shifting ' and 'format shifting' have the greatest impact on the music industry.

Time Shifting is a concept that allows users to legally record television and radio programs to enjoy at a later time. This practice has been around for years with the public

taping TV shows and watching them later or taping radio programs that contain copyright protected materials. The changes to the law meant that the general public could now do these things without breaking the law. However, the proposed changes to the Act state that you are only allowed to view your 'time shifted' program once and you are then required to delete it and it applied only to private users who are using the time shifting for personal use. The law has not been changed to allow unauthorised copies to be made for private use, copies can be time shifted only once. Time shifting via hard disk recording and via Foxtel's (the only cable pay TV network in Australia) IQ (similar to Teevo) has just started to become a common feature for Australian consumers. Around 1 in 3 Foxtel subscribers have access to the IQ function.

Format shifting allows private users to change the format of copyright protected work for personal use. Again there are limitations to this proposed change. The user is allowed to change formats of a product like music from a CD for example to an MP3 file or to an iPod. This can be done only if you own the original copy and you are merely changing the format so that you can enjoy it in another type of media player or as a backup. You are not permitted to copy a CD to a CD as this is not format shifting. Nor are you allowed to load your format shifted product onto a website or share it with friends. You are still limited to making format changes for personal use reasons only.

Both of these changes only bring the laws a little closer to the reality of what most consumers do on a daily basis anyway. They will only have the effect of making it no longer illegal to do some activities that consumers have been doing for years.

The fair use proposals raise some interesting questions about copy protection that some record companies include on their CDs. If it is no longer illegal to format shift CDs is it fair for the record companies to stop consumers from doing so?

Along with those fair use changes the Government has also proposed to strengthen the policing and punishment of copyright infringement. The music industry has welcomed these changes as recent cases of copyright infringement using the internet and other technologies have resulted in what the industry perceives as fairly soft punishments.

In 2003, Australia saw one of its biggest copyright infringement cases go to court. Three students from the University of Sydney were accused of providing digital copies of songs on the internet without the express permission of the copyright owners, nor payment of royalties to the owners of the copyright in the songs that they offered. The students' website, *MP3 WMA Land*, operated for about two years until the Music Industry Piracy Investigation (MIPI), moved to shut down the website. (MIPI is an organisation committed to stopping music piracy in Australia and is jointly funded by the major record companies and publishing companies.)

According to James Pearce's article 'Aust Music Pirates Sentenced' (2003), MIPI alleged that the students' website had facilitated over \$60 million worth of illegal downloads of music to users all over the world. The defendants pleaded guilty and were given suspended jail sentences, ordered to attend community service and fined between \$1000

and \$5000 each. MIPI and the record companies were disappointed at the leniency of the sentences. Despite the possible size of the infringement by these three students, the sentences were at the very bottom end of the scale for these kinds of offences. Michael Speck from MIPI told ZDnet Australia that "The court portrayed copyright infringement as a most serious crime but then chose not to jail these men. I wonder how much music you need to steal before you go to jail? Certainly if you'd gone into a shop and stolen this much music there'd be no question of jail."

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

The music industry had a similar level of success with MIPI vs. Stephen Cooper, the operator of a Web site called MP3s4free.net. Cooper's website did not offer illegal downloads directly, rather he offered links to other sights that contained illegal downloads. The court ordered Cooper to remove the links but only required Cooper to pay costs.

Another major recent copyright case is that between ARIA and Sharman Networks. ARIA contended that Sharman, which owns the software Kazaa, was encouraging people to use file-sharing to obtain copyright-protected music. Sharman's defense was that the Kazaa software allows users to exchange files of all descriptions. They said that they do

not encourage the exchange of copyright-protected materials but there was no way they could control what users chose to exchange on their networks. ARIA claimed that Sharman could stop the exchange of copyright-protected materials by either banning those kinds of files being exchanged or by disabling Kazaa's shareware program altogether. In late 2005 the judge ruled in favour of the record companies and required Kazaa to use pop-up windows to force users to upgrade their Kazaa systems to a new version that would include a copyright filter, which would disable the sharing of copyright protected works.

This case is very important for copyright legislation worldwide because it tests the idea that it is illegal to provide software or a device that allows for the circumvention of copyright. Although it is not the first case that deals with this issue, it is the latest, and so will have legal ramifications all over the world.

MIPI have publically stated that they do not intend to pursue action against individual copyright infringers; rather they are more interested in chasing companies and large scale infringers. They are not looking to alter copyright law to allow for the occasional unpaid for download, but they have indicated that they won't aim to prosecute. They are lobbying the Internet Service Providers to limit accounts of those people who are identified as 'individual' copyright infringers.

It seems that if MIPI (the industry's own copyright police) and society at large is prepared to tolerate consumers breaking the law in this way, then the industry can hardly cry foul when the law is broken.

There are also a number of non copyright law methods that the music industry has considered to help it combat the rise of technology. For several years, record companies have been trying to perfect a system so that their CDs are playable on all sorts of CD players but are not able to be copied or shared, and the music industry has long been a proponent of a blank media tax. Starting as far back as the introduction of cassette tapes, there has been talk of introducing a tax on blank media (such as blank CDs). The aim is to compensate the owners of copyright for the losses they have endured due to the widespread use of blank media for copying their recordings. The price of blank CDs (or other media) would increase and the extra money would go to those whose work is being copied. Marcus Breen, in his book *Rock Dogs, Politics and the Australian Music Industry* argues that the blank media levy could never really work. He points out that Australia is a signatory to a number of international copyright conventions and that other signature countries:

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

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

Copyright has reached a historical crossroad. The relationship between copyright owners and technology has always been one fraught with problems. The challenge for the owners of copyright is to successfully manage changes in technology which threaten their ability to exploit the copyright for profit and, at the same time, create new opportunities. The invention of the CD put a digital master copy of each CD released in the hands of all music consumers. In the days of vinyl and cassettes, there was not such an issue, since every generation (or copy of a copy) reduced the quality of the recording. The record companies, however, have now placed their most precious asset in the hands of every consumer — an exact digital replica of the master recording. Copy protection technologies built into CDs and aggressive lawsuits against MP3 file-sharing websites demonstrate how the record labels are struggling to protect these master copies that they have sold to millions of consumers.

Perhaps the Australian recording industry would be better served to embrace technological changes rather than to fight them. The music industry also needs to look at other methods to ensure that they profit from the exploitation of copyright rather than just making minor changes to copyright law which are years behind the technological advances anyway. The recent cases of copyright infringement in Australia show that the courts are reluctant to impose heavy punishments on those who do infringe copyright as well. In an interview in *Rolling Stone*, the founder of the Apple Computer company, Steve Jobs, said:

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

( Jeff Goodell, 'Steve Jobs: The *Rolling Stone* Interview', *Rolling Stone*)

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

What are the ways forward for the music industry? In the past twelve or so months they have certainly made all the right noises that indicate a desire to embrace technology.

They are releasing music on more and more formats. Just a few years ago you would get only a couple of formats, the CD album and the CD single. Now the record companies are keen to remind us that there are more ways to get your favorite song. The CD album and the CD single remain (although ARIA sales figures suggest that the single is on its way out.) but you can also get the digital download, the ringtone (Real tone, Monophonic or Polyphonic) the Super Audio CD, the Enhanced CD just to name a few. Is this really embracing the future of technology and copyright, or is it just an old dog doing old tricks but with a new toy? There is a war to be waged. The war is between the copyright

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

If the music industry wants to use copyright law as its main weapon, it should consider how it employs it. The last part of this paper will explore a couple of ideas that the local creative industries could employ in their fight.

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

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

than thinking that in order to be successful the record needs to have millions of sales.

Prince was accused by the record company executives of 'devaluing music.'

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

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

(Katie Allen. Music Industry Attacks Sunday Newspapers Free Price CD).

Shortly after the *Mail* giveaway Prince announced a series of 21 London concerts, which sold out in twenty minutes, including a weeks' worth of shows at the Millennium Dome. The tour was estimated to have netted around 20 Million pounds, plus whatever the undisclosed fee from the Mail was. All of this without having a hit song. Furthermore Prince immediately trumped the file sharers by releasing his own copy of the CD on the net and told consumers to go ahead and download all they wanted. They were going to anyway, and he already had sealed his one big sale. The way forward for the Australian creative industries is to make their one big sale to the internet or mobile phone service providers, whether via an all you can eat or a la carte model.

Mash ups, sampling, YouTube, Blogging and all forms of user generated content are a challenge for existing copyright laws. It is often stated that copyright is there to encourage creative people and artists to go forth and create. The current laws limit that creativity for those who embrace the technologies listed above as the vehicles for their creation. Hip-Hop music has always been about the sample, it has always been about showing what you can do with someone else's ideas to make them your own. Does this mean that all Hip-Hop artists are copyright criminals? In the current environment, the answer is yes. The Hip-Hop world will continue to create and will continue to break copyright laws. The practicality of clearing every sample on every track is just beyond impossible for most of these artists. Especially when you consider that most of them are sampling something that has sampled something else in the first place. It is virtually impossible for any creative artist in this genre to be creative thanks to copyright laws. To add to the issue is the fact that most Hip-Hop artists are happy to be sampled (it is their record companies and publishers that take issue.) Is this not simply the folk music tradition of passing on ideas from one generation to the next? Each will put their own twist on the ideas constantly mutating the original work. Creative commons is all about allowing that idea to be passed along. Those who release their music under one of the creative commons licenses say – 'I am happy for you to use this music in a way that you want to. Take it and use it to create something new' or they are saying 'take it and distribute/ display it, I don't mind'. It is interesting to note that it is not the artists who usually take issue with the creative commons ideas; it is the power brokers in the record companies. Perhaps a greater understanding, acceptance and in fact promotion of the creative commons system will ultimately achieve what copyright is supposed to be there

for. If we are to encourage creative people and artists to go forth and create, why should that be limited to the art form that you choose or by the tools that you choose to create with.

Nigeria has one of the largest movie industries in the world; its output is more than double that of the USA and is larger than India's. Nigeria's copyright laws look very similar to that of any member country of the Berne convention but the way they are enacted is unique. What Nigeria does have is an enormous population (possibly 150 million) and a desire for the local community to see themselves on the screen to feel a connection to a local identity. The Nigerian film making community acknowledges that they have fairly low production values and most of their output is to video and digital video, but it is the connection with the local community that makes the industry strong: not heavy handed copyright laws. There is a culture of respect for Nigerian films rather than a culture of respect for copyright. Foreign films are pirated but the locally produced films are sold so cheaply that the pirates don't have any opportunity to make a profit from them anyway. The situation in Nigeria points to an argument that the Australian cultural industries could consider. Is it possible to promote respect for copyright at least within the local industry? Could we work on convincing consumers that while it is illegal to pirate any DVD it is immoral to pirate the locally produced DVD of 'Kenny' for example? If appealing to the consumers' adherence to the law is not working perhaps it is possible to try a moral point of view. An often used defense by the average consumer who is downloading a few songs here and there is that 'the record companies put out so much rubbish, and I only want this one song...why should I buy an overpriced album to

get it.’ Perhaps the lowering of price Nigerian style and making a local connection with the audience might make some impact.

The music and creative industries worldwide are at a cross road. Technology and society are moving in ways that traditional copyright protection cannot continue to sustain.

“User generated content” are the buzz words: “respect for copyright” are not. New generations of creative artists want to stand on the shoulders of the giants who have gone before them, where in the past this meant copying they style of the masters, today technology allows us to actually use the original work in a new context. This is simply a new reality that the creative industries and the music industry in particular have to accept. New creative artists see this as the complete opposite of showing a lack of respect. They consider it a great complement to have their work used and they consider that they are doing other artists a favor by ‘exposing their work’ to a new audience. This is the new reality that the music industry finds itself in.

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

legally. This is a business model that is unsustainable for most of the creative industries. Historically speaking making major changes to copyright law is a long and laborious task, but it is one that we should start considering today. The principles of how copyright protection works have served the creative industries well for over one hundred years, but a time for a major remodeling has come. Technology has allowed every consumer to become a pirate, but even more importantly every consumer now has the opportunity to become a creator. Copyright is there to encourage creative people and artists to go forth and create. It offers protection for the creative artist to enforce their rights to be paid for their work and protect the integrity of their work. In 2008 the ways in which those rights are applied need to change. Society wants more freedom to do more with the work of others. Perhaps we owe it to society to let the next generation of creative artists stand on the shoulders of those who have gone before them, without breaking the law.

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