

AUSTRALIAN LAW REFORM
COMMISSION ISSUES PAPER:
**COPYRIGHT IN THE
DIGITAL ECONOMY**

**APRA|AMCOS
SUBMISSION**

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AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED ABN 42 000 016 099
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS SOCIETY LIMITED ABN 78 001 678 861



COPYRIGHT AND THE DIGITAL ECONOMY
APRA|AMCOS SUBMISSIONS

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EXECUTIVE SUMMARY

In this submission, APRA|AMCOS say:

- evidence shows that the impact of copyright protection is overwhelmingly a positive one for creators and investors in the digital economy
- evidence shows that copyright material is an essential part of the digital economy, and of the Australian economy generally
- copyright creators are entitled to participate in the markets that rely on their works
- a strong voluntary licensing regime is the best way to ensure that owners', as well as users', interests are protected
- significant evidence exists that shows copyright creators are licensing the majority of businesses that use their works online
- there is no evidence to suggest that copyright has a 'chilling' effect on innovation. The available evidence supports the opposite conclusion: copyright is an essential pre-condition to innovation
- exceptions to copyright owners' rights must comply with Australia's international treaty obligations
- the distinction between 'non-commercial' and 'commercial' is problematic. In particular, the fact that 'user generated content' may have superficially non-commercial characteristics should not be allowed to overshadow the fact that its dissemination takes place in overwhelmingly commercial contexts
- a better framework for an examination of copyright exceptions is the already established 'private and domestic' use vs 'public' use dichotomy

OVERVIEW

Australia's emerging digital economy and the Australian music industry

1. There are probably no parties more qualified to provide evidence about the impact of copyright on digital technology in Australia than APRA and AMCOS, which speak on behalf of Australian songwriters and music publishers. Together, APRA|AMCOS represent more Australian copyright owners than any other organisation, with more than 74,000 members. Our membership is diverse, ranging from unpublished songwriters to major multi-national music publishers.¹
2. The music industry has been profoundly affected by the digital revolution. Copyright owners have had to address the issue of endemic online piracy, while at the same time reinventing their businesses in line with new delivery mechanisms. Australian consumers of music now have unprecedented access to vast amounts and a diverse range of copyright music, in more flexible formats than ever. Digital music presents enormous opportunities for copyright owners as well as consumers, and Australians' consumption of music is enthusiastic.
3. In the 12 months ending 30 June 2012, APRA|AMCOS processed reports of the download of more than 225 million musical works. This is a huge number of works, but it is dwarfed by the number of works accessed on streaming music services. **[CONFIDENTIAL]**
4. In around 2004, legal digital download services commenced operation in Australia. Apple iTunes launched in Australia in 2005. Legal download services are now responsible for the sale of more than 225 million licensed tracks in Australia each year. APRA|AMCOS estimate that annual industry revenue from those sales now exceeds \$200,000,000.

¹ Information about APRA|AMCOS is set out in Schedule 1.

5. Spotify launched in Australia in May 2012. In 2011 and 2012, at least ten other music streaming services commenced operations in Australia, including overseas services Rdio and Pandora, and locally developed music services JB Hi Fi and Samsung Music Hub. The impact of these services on the Australian digital download market is uncertain.
6. Music Rights Australia has produced evidence based on Nielsen data that shows that piracy continues to grow in Australia, with peer-to-peer file sharing accounting for the majority of the problem.² In this fragile environment, the music industry is licensing new delivery mechanisms, and revenues for copyright owners are gradually increasing. The introduction of exceptions to the rights of copyright owners in the current digital environment will impede these licensing activities, and prevent the formation of proper markets for the wide dissemination of music.
7. The size of the market potentially at risk is significant. APRA|AMCOS license more than 30 digital music services, ranging from Apple and Google through to tiny start up niche service providers. APRA|AMCOS collected \$35.6 million from digital music services in Australia for the 12 months to the end of June 2012.
8. APRA|AMCOS also license all traditional (free to air and subscription) broadcasters in Australia, many of which use significant amounts of music on their online platforms. APRA|AMCOS license the digital businesses operated by broadcasters. APRA|AMCOS collected \$88.5 million from broadcasters in Australia, including for their online music use, for the 12 months to the end of June 2012.

A response to the Issues Paper's general introductory comments

9. APRA|AMCOS are concerned that references to the "constant debate" about whether copyright law acts as an incentive to production of new material³ are a distraction from what should be the focus of this Inquiry. Considerations as to the economic theory of inventions manifest themselves as policy considerations prior to the legislative decision to give statutory protection to intellectual property.

² See submission made by Music Rights Australia.

³ Australian Law Reform Commission, *Copyright and Digital Economy: Issues Paper 42* (August 2012), [7].

Copyright encourages creativity.⁴ Exceptions should only be enacted where there is an overriding social benefit that justifies a limitation on the property rights of the copyright owner. Anecdotes about how creators are not motivated by economic considerations⁵ have been used to suggest that creators are economically irrational and therefore should not participate in markets for their works. This is wrong⁶. Copyright is a grant of property rights that enables authors to commercialise their products and maintain the integrity of their creative output.

10. Digital technology, particularly the internet, presents enormous opportunities for creators to participate in the digital economy. APRA|AMCOS believe that a modern, moderate approach to copyright reform should be taken by all participants in the digital economy, recognising that creative content is the driver that sustains many digital industries and that delivery platforms are essential for creators to participate in that economy.
11. The idea that copyright infringement might credibly be seen as “cultural heroism”⁷ has, we submit, no place in a review of this kind. APRA|AMCOS has observed no evidence of growing disrespect for the idea that a creator has, and should have, copyright in his or her creation. Similarly, we have seen no evidence of a widespread failure to understand that having copyright means being entitled to receive payment for use. Those concepts are part of APRA|AMCOS’s everyday dealings with more than 80,000 businesses in this country that use music, most of them small business. The problem has been, and remains, that it is relatively easy in this country for people to access unlicensed music files online without any evident risk of sanction or penalty. Absent any disincentive to access free, unlicensed music, many people will do just that – not because of any feeling of “cultural heroism” but because they know that they can get what they want for free.

⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

⁵ William Patry, *How to Fix Copyright* (Oxford University Press, New York, 2011), p15-16.

⁶ See also S Ricketson and C Cresswell., *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, Lawbook Co, para 1.45.

⁷ Australian Law Reform Commission, *Copyright and Digital Economy: Issues Paper 42* (August 2012), [7].

12. The purpose of granting rights of property in the products of creative labour is to reward and encourage creativity. Copyright is a balance between the rights of creator and user. The public benefits by having access to the products of creativity, and in some circumstances this access is guaranteed by statute. APRA|AMCOS agree that allocative efficiency is not the primary goal of copyright protection⁸ – it is a by-product of its operation. Neither is its goal that of promoting public education⁹. Copyright achieves allocative efficiency by creating the basis for a payment for use system, rather than forcing an estimated value of future use at the time of creation.
13. APRA|AMCOS agree that William Patry has contributed greatly to the discourse on copyright, but it is important that his work not be viewed in isolation, and even more important that it not be taken out of context. Patry writes in a US context, with US idiosyncrasies. After the material referred to in paragraph 11 of the Issues Paper, Patry goes on to say that incentives are absent because copyright revenues do not flow through to creators.¹⁰ If the issue is about revenue going through to authors, the Commission should not be looking to liberalise the system, but rather to strengthen the rights of creators. In any event, collective licensing by APRA|AMCOS ensures that money is distributed to authors, including because APRA has a requirement that at least 50% of performing right income is distributed directly to writers. APRA|AMCOS are extremely efficient, with APRA's costs (including the cost of managing AMCOS) comprising 12.82% of revenue.
14. Similarly, the suggestion that copyright infringement might credibly be regarded as an appropriate response to “large, powerful and greedy multinational companies”¹¹ is not a constructive proposition to put forward in a review of this nature. APRA|AMCOS represent more than 74,000 local members, over 73,000 of whom are individual songwriters. Of those songwriters, around 88% are not represented by a music publishing company. APRA|AMCOS have 543 Australian music publisher members. In revenue terms, approximately 46% of APRA|AMCOS distributions to publishers are paid to non major publishers. In the

⁸ Australian Law Reform Commission, *Copyright and Digital Economy: Issues Paper 42* (August 2012), [9].

⁹ *Contra* Australian Law Reform Commission, *Copyright and Digital Economy: Issues Paper 42* (August 2012), [9].

¹⁰ *Ibid.*, p29-32.

¹¹ Australian Law Reform Commission, *Copyright and Digital Economy: Issues Paper 42* (August 2012), [7].

last APRA|AMCOS quarterly distribution, payment was made to more than 244,600 separate rightsholders representing more than 726,000 unique songs. In 2005 these figures were 129,585 and 337,000 respectively – the increase is entirely the result of the digital economy.

15. APRA|AMCOS urge caution in responding to the generalised proposition that copyright impedes innovation. This depends on whose perspective is taken in relation to any given transaction that involves the use of copyright material. From a licensee's perspective the transaction (or the "innovation") involves a cost in paying for copyright material. For most innovators that cost would be regarded as an essential cost of doing business rather than an impediment. From the licensor's perspective the transaction (ie, the "innovation") probably wouldn't occur at all without the existence of copyright and therefore might rightly be regarded as facilitating rather than impeding the innovation. Moreover, some analysis is required of the kind of "innovation" that we as a nation – and as an economy – want to encourage.
16. For example, the theoretical requirement of having to obtain permission for those making bedroom mash-ups of commercial recordings may well be an impediment to those bedroom innovators. The significance of their innovations to Australian cultural life or the Australian economy are, however, questionable. But when a creator makes a decision to invest in a music-based educational kit with export potential based on calculations of projected royalty income and therefore financial viability, that in our submission is important and valuable innovation – of the kind that ought to be of greatest interest to those formulating relevant policy responses. Australia has a sophisticated licensing regime that permits a large number of new businesses to operate using copyright material. To the extent that not all such businesses survive, there is no evidence that this is related to anything other than the operation of normal competitive market forces. Australia does not have a particularly high incidence of copyright litigation,¹² nor are the damages for infringement awarded by Australian courts high by world standards. APRA|AMCOS believe that in some important respects, the solutions posed by the Issues Paper are solutions for which there is no problem.

¹²APRA|AMCOS note the information provided by Copyright Agency in Annexure 2 to its submission.

The importance of the communication right

17. It is critical to remember that the response of the worldwide copyright community to the rapid growth of the internet was to require the enactment of laws granting exclusive rights of making available and communication to the public.¹³ Accordingly, on ratifying those treaties and after expert consultation,¹⁴ the Australian legislature introduced a technology-neutral broad-based right of communication to the public, which became one of the exclusive bundle of rights granted to copyright owners.¹⁵ This valuable right is not an accident of technology, and its exploitation is not an unintended consequence of the legislative changes made by the *Digital Agenda Act*. It was a deliberate, worldwide response to the development of a new method of delivery that has revolutionised the copyright industries and the markets in which they operate.

Commercial/non-commercial

18. References are made throughout the Issues Paper to the commercial/non-commercial dichotomy. APRA|AMCOS agree that this is superficially attractive, but submit it is ultimately unhelpful.
19. First, there are significant difficulties associated with the definition of 'commercial' and 'non-commercial.' Clearly, 'commercial' is not the same as 'for profit'.¹⁶ Public broadcasters, charities, collecting societies and educational institutions are all 'not for profit', but there can be no serious suggestion that their activities are not commercial in character. It may be more difficult to determine whether activities undertaken by an individual are 'non-commercial'. APRA|AMCOS have many songwriter members who are required to supplement their income from songwriting with income from other sources – but their songwriting activities are conducted with predominantly commercial intentions.

¹³ WIPO Copyright Treaty 1996; WIPO Performances and Phonograms Treaty 1996.

¹⁴ *Highways to Change*, Report of the Copyright Convergence Group 1994.

¹⁵ See, eg, Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 [2000], which described the Bill as "the Government's main initiative in addressing the challenges for copyright posed by rapid developments in communications technologies" and states that "the centrepiece of the Bill is a new technology-neutral right of communication to the public." Almost identical language was used in the second reading speeches to the senate, Commonwealth, *Parliamentary Debates*, Senate, 14 August 2000, 16245-16247 (Ian Campbell); and to the House of Representatives, Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1999, 9748-9749 (Daryl Williams).

¹⁶ See the submissions made by the Australian Copyright Council on this point, also s115(5).

20. Secondly, even if 'non-commercial' can be appropriately defined, it may be impossible to ascertain the purpose of the maker of the content. A maker may well have a commercial purpose in making a film of him or herself singing, in that he or she desires to become a recording artist – and the recording serves as a means to that end.

21. There are numerous examples of uploaded user generated content performances being used as promotional material by performers looking to gain the attention of the music industry. Esmee Denters sang such covers as *Unwritten* by Natasha Bedingfield and posted them onto YouTube, where she was noticed by Justin Timberlake who signed the performer to his label shortly after. The Arctic Monkeys are said to have been discovered on the internet, through a MySpace fan page. Alyssa Bernal caught the attention of R&B superstar Pharrell Williams by singing Jason Mraz's *I'm Yours*, and is now signed to Pharrell's label Star Trak. Australia's Cody Simpson sang the same song, which drew the attention of Atlantic Records. Justin Bieber was discovered on YouTube, singing Chris Brown's *With You*. Marie Digby began her career with a cover of Rihanna's *Umbrella*, which has gained over 20 million views on YouTube. Her other uploaded performances, including covers of Britney Spears, Maroon 5, Lady Gaga, Usher and Beyonce works, have combined to take her total views to over 120 million and her subscribers to over 290,000. Greyson Chance was discovered by Ellen DeGeneres playing Lady Gaga's *Paparazzi*, and is signed to her label. Ysabella Brave was signed by Warner Bros' Codeless label after being discovered performing Norah Jones' *Don't Know Why*. Jermaine Dupri, founder of So So Def Recordings discovered Dondria (aka Phatfffat) singing Mary J. Blige's *I'm Going Down* before signing her to record her own album, which reached #14 of Billboard Hot R&B/Hip-Hop Songs. Charice was discovered on YouTube singing such covers as *Billie Jean*, before being invited onto *Oprah* and *Ellen*, being cast as Sunshine Corazon on *Glee* and releasing her Top 40 single *Pyramid*. Perhaps this trend went full circle when Universal discovered Avery through her YouTube performances of Justin Bieber's *Baby* and *Pray*. The list is, and will continue to get, much longer, while budding performers hope to be, and A&R teams at record labels scout social media for, the next Justin Bieber. What this trend suggests, though, is that it is impossible to characterise these performances, which give rise to high-profile and successful musical acts, as 'non-commercial'.

22. Thirdly, even if the maker of the reproduction initially has a non-commercial purpose in making the reproduction, subsequent commercial purposes may develop (a person who did not intend to be ‘discovered’ as an artist may yet become commercially successful; a home movie may be very successfully ‘monetised’).
23. Finally, APRA|AMCOS strongly reject any suggestion that the activities of social networking sites could be described as non-commercial, regardless of the purpose of the maker of the content. This is discussed by Lawrence Lessig in *Remix*: “But what happens when a commercial entity wants to use this amateur creativity? What happens when YouTube begins to serve it? Or NBC wants to broadcast it? In these cases, the non-commercial line has been crossed, and the artists plainly ought to be paid....There are plenty of models within copyright law for assuring that payment. Collecting societies have long provided private solutions to these complex rights problems...”¹⁷
24. APRA|AMCOS submit that a more useful distinction, and one that is consistent with the Act, is the distinction between ‘private and domestic’, and ‘public’. This is consistent with the regime of the Act, which defines “private and domestic use” as “private and domestic use on or off domestic premises.”¹⁸ For example, the performing and communication rights have a mandatory public element,¹⁹ there are exceptions and exemptions for copying for “private and domestic use,”²⁰ and the copyright in photographs commissioned for a “private or domestic purpose” belongs to the commissioning party.²¹ APRA|AMCOS submit that any exceptions ultimately adopted should use this framework, which would permit people to make relevant copies of musical works for private, domestic purposes.

Matters outside the scope of this Inquiry

25. APRA|AMCOS note that certain matters are outside the scope of this Inquiry. Nevertheless, at various places throughout this submission reference is made to those matters. The reform of copyright law that is the subject of this Inquiry cannot

¹⁷ *Lessig, Remix*, p256.

¹⁸ s10.

¹⁹ s31(1)(a)(iii) & (iv).

²⁰ ss 43C, 109A, 110AA, 111, 248A.

²¹ s35(5).

be approached in isolation. To do so will be detrimental to the process and result in the kinds of flaws that are the object of many of the questions contained in the Issues Paper. In particular, APRA|AMCOS find it difficult to comply with the admonition to avoid matters the subject of the Safe Harbour review, matters that are closely connected with many of the issues raised in the Issues Paper.

26. It is simply not possible to assess whether further exceptions are required without understanding the extent of unauthorised conduct presently occurring in the digital environment. Copyright owners face significant challenges enforcing their rights in this environment, and the absence of a mandatory ISP Code of Practice following the *iiNet* decision is a serious obstacle to enforcement. Broadening exceptions to copyright in a context where there is no meaningful regulation of the ISP industry is likely to inhibit investment in talent and copyright-producing businesses. APRA|AMCOS endorse the submissions in this regard made by Music Rights Australia. It is difficult to see how this Inquiry can properly consider exceptions in a digital environment without taking this into account, and APRA|AMCOS suggest this should be expressly noted in the Discussion Paper.

International obligations

27. When considering the permissible exceptions to the exclusive rights of copyright owners, the relevant international agreements include the Berne Convention, the Rome Convention and the TRIPS Agreement.
28. Australia has been a party to the Berne Convention since 1928 (and prior to that as part of the British Empire). The main purpose of the Berne Convention is to protect the rights of authors in respect of literary and artistic works. There are limitations imposed by the Convention in relation to the exercise of rights where fair use is concerned and provisions for compulsory licences have been made. Membership of the Berne Convention is now almost universal.
29. Australia's international treaty obligations must be the starting point for any consideration of copyright law and policy. In particular, the Berne Convention provides the template against which standards of protection, and exceptions to those standards, are to be measured.²²

²² *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* prepared for the

30. Article 9(2) of the Berne Convention expounds the so called three-step test that has come to be regarded as the international yardstick for exceptions to exclusive copyright rights.²³ Australia has been bound by the Article since 1 March 1978.
31. Articles 9(1) and 9(2) provide:
- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.*
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*
32. The separate steps of the test in Article 9(2) note that reproductions:
- (a) may be permitted in certain special cases (narrow in scope);
 - (b) must not conflict with the normal exploitation of the work (having regard to both existing and potential uses of the work); and
 - (c) must not unreasonably prejudice the legitimate interests of the author (including economic and moral rights interests).
33. Any proposed exception must satisfy this test. APRA|AMCOS do not consider that the approach taken in section 200AB is an adequate way of dealing with this issue.
34. Abandoning the requirements of the Berne Convention risks placing Australia as an international pariah in an intellectual property system that is increasingly globalised.

The US system

35. A number of the questions in the Issues Paper suggest changes to the Act that incorporate various elements of the US legislation. APRA|AMCOS submit that the US copyright law needs to be viewed as a whole, and that to 'cherry pick' from the legislation is not good policy. There are a number of differences between the US and the Australian copyright frameworks that must be considered. While it would be inappropriate to ignore the US landscape when considering possibilities for reform in Australia, it is likewise inappropriate to assume that both jurisdictions operate in identical conditions. Comparisons may be made, but it would be methodologically incomplete to compare one area of law in each jurisdiction without a holistic appreciation for the entire bodies of copyright law in each country.
36. The US joined the Berne convention as a powerful developed country with a wealth of copyright interests. It already had an entrenched fair use doctrine. The position of Australia – already a member of Berne – is quite different. It would be unacceptable for Australia to introduce new law that is inconsistent with its treaty obligations.
37. In the US, there is significantly more scope for copyright owners to recover damages from infringers, particularly because statutory damages are available for infringement. Copyright owners may elect, at any time before final judgment, to receive an award of statutory damages, which can be granted in any amount between US\$750 and US\$150,000 for every infringed work.²⁴ This system reproves the infringer and his or her infringing conduct, and thereby deters future infringing conduct, in ways that the Australian law does not. The US system for damages also makes it commercially viable for copyright owners to enforce their rights in ways where the Australian law often does not.
38. Moreover, copyright owners in Australia face far greater obstacles in enforcing their rights against infringers than those in the US due to the respective operations of each jurisdiction's safe harbour laws. In particular, under the US *Digital Millennium Copyright Act (DMCA)*, online service providers are only eligible to be protected from the consequences of their customers' actions if the online service

²⁴ 17 U.S.C § 504.

provider has adopted and reasonably implemented a policy that provides for the termination of its subscribers' accounts in appropriate circumstances.²⁵ In contrast, and one that is especially stark considering the Australian safe harbour laws were enacted so to bring our law in line with US law, carriage service providers in Australia need only comply with the relevant provisions of an industry code if one is in force.²⁶ That is, while the US protections are contingent on compliance with an industry code, the Australian protections only require compliance if a code has been agreed. One might speculate why, despite the amendments being made in 2006, an industry code is yet to be finalised; however, it is clear that copyright owners in Australia cannot act as potently to prevent online infringements as can copyright owners in the US, whether against the infringing customer or the infringing internet service provider. In those circumstances, there is no justification for extending the Australian provisions beyond carriage service providers. APRA|AMCOS also understand that the safe harbour provisions of the DMCA are currently the subject of a call for review.

39. Finally, we note that jurisprudence from the US in relation to the *US Copyright Act* section 107 is:

- (a) at the most, merely persuasive in Australian courts; and
- (b) made against the backdrop of the US Constitutional tenet of free speech, which is not part of the Australian legal system. In addition, the US jurisprudence contains many principles that simply are not part of Australian law.

²⁵ 17 U.S.C § 512(i)(1)(A).

²⁶ *Copyright Act 1968* (Cth), s116AH.

The Inquiry

Question 1. *The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:*

- (a) *affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;*
- (b) *affects the introduction of new or innovative business models;*
- (c) *imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or*
- (d) *places Australia at a competitive disadvantage internationally.*

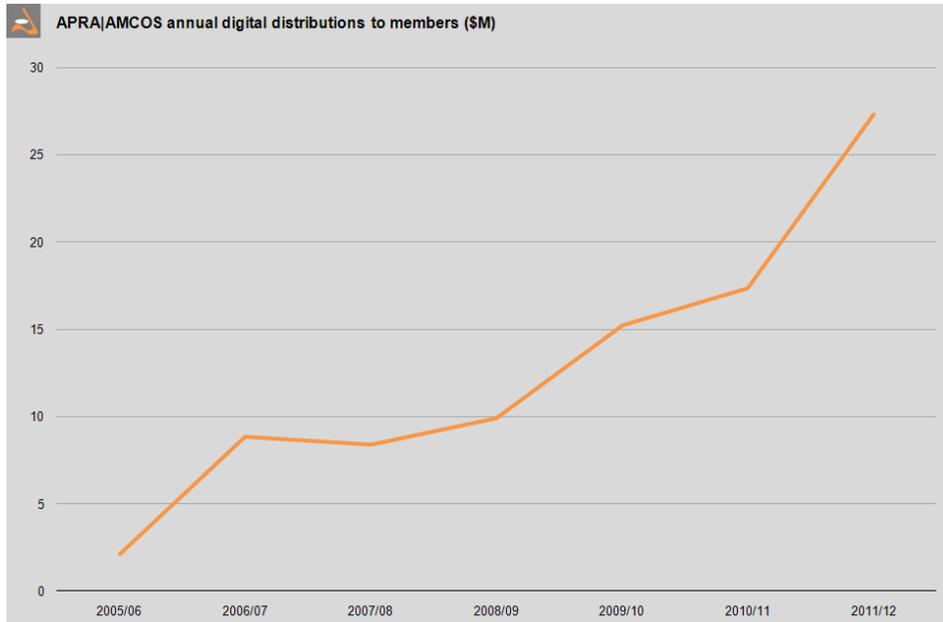
40. This question, like much of the material in the Issues Paper, seems to proceed on the assumption that copyright law has a 'chilling' effect on the digital economy. APRA|AMCOS are in possession of a great deal of evidence regarding the digital use of music and submit that all of the evidence suggests the opposite. We are pleased to be given the opportunity to share this evidence with the Inquiry.
41. APRA|AMCOS submit that theoretical economic studies of the copyright and related industries are of little value. In particular, studies that are based on assumptions and hypotheses can be manipulated to achieve the desired outcome. The only way to assess the impact of copyright law on the digital economy is by examining the available evidence. Similarly, the need for any additional exceptions must be established by evidence – not hypothetical examples. Copyright law ensures that Australian creators can participate meaningfully in the digital economy. In 2012, PricewaterhouseCoopers published its report on the *Economic Contribution of Australia's Copyright Industries*.²⁷ In 2010/2011, 8% of the Australian Workforce was employed in an industry reliant on copyright, and copyright industries comprised 6.6% of GDP.²⁸ APRA|AMCOS endorse the

²⁷ The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11.

²⁸ Ibid p23, p15.

comments made by Dr George Barker in his response to the Lateral Economics reports commissioned by the Australian Digital Alliance.²⁹

42. In the year ending June 2012, APRA|AMCOS's digital and online revenue was \$35.6 million, an increase of 17.9% on the previous year.³⁰ Total revenue for that period was \$257.4 million. For the same period, APRA|AMCOS's total royalty distributions were \$236.9 million.³¹
43. **Table 1** below shows the growth in APRA|AMCOS members' annual digital earnings from the beginning of July 2005 to the end of June 2012.



44. ARIA's published data³² clearly shows the decline in physical product revenue and sales. It can be seen that the digital market for music is replacing the physical product market in terms of products sold. APRA|AMCOS anticipate that the revenue from digital sales is close to exceeding physical product revenue.

²⁹ *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore* Dr George R Barker, Centre for Law and Economics Ltd November 2012.

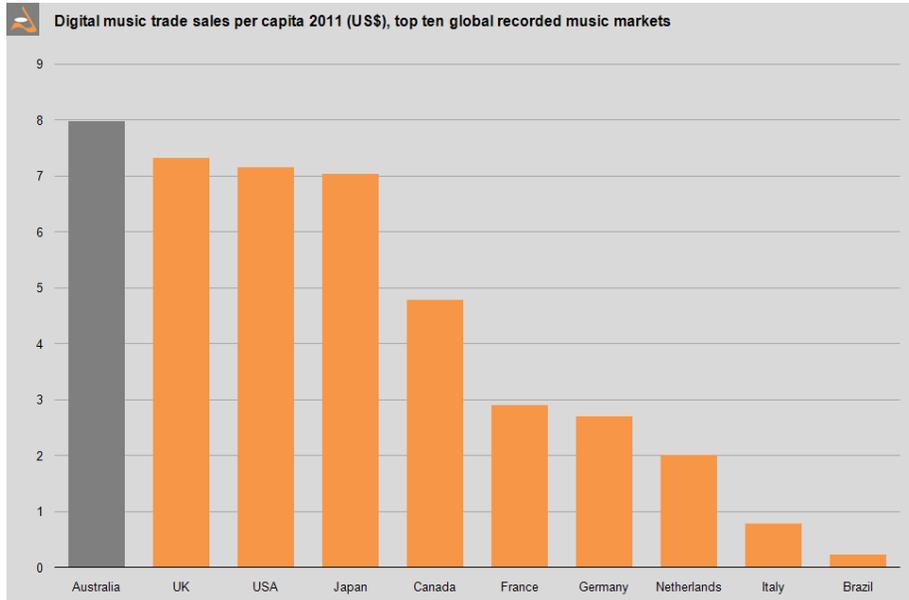
³⁰ APRA|AMCOS 2012 Year in Review.

³¹ APRA|AMCOS 2012 Year in Review.

³² www.aria.com.au/pages/statistics.htm.

45. Australia's existing copyright laws have not inhibited digital music market growth in Australia. Table 2 below shows that Australia has the highest per-capita spend on digital music services of the world's top ten recorded music markets.³³

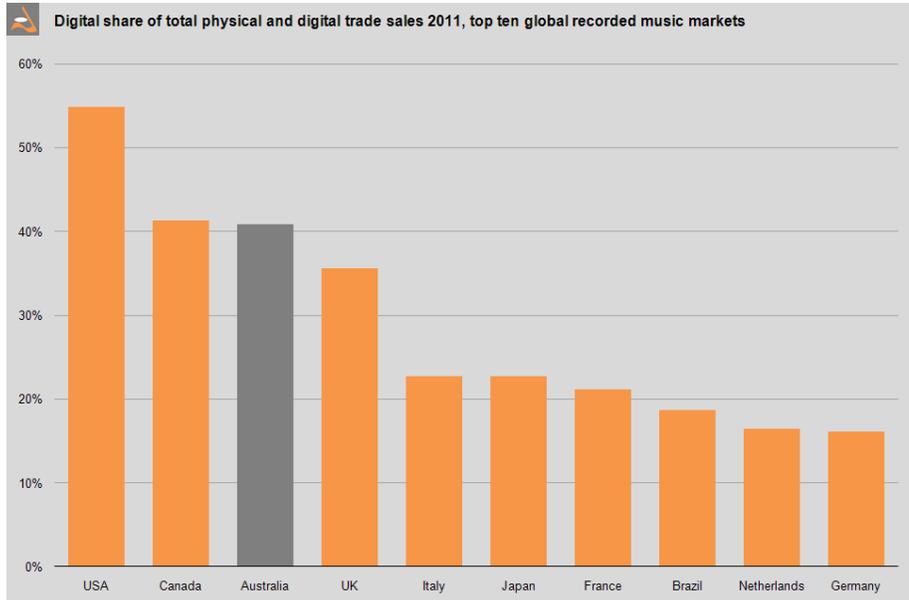
Table 2



46. Australia is also at the global forefront of the move from physical to digital music.
47. Of the top ten markets, only the US and Canada saw a larger share of total physical and digital trade sales generated from digital services during 2011, with Australia's digital share just below that of Canada at around 41%. Notably, this share of digital trade sales exceeds that seen in the larger recorded music markets of the UK, Japan, Germany and France, as shown in Table 3 below.

³³ Trade sales as reported in the International Federation of the Phonographic Industry's (IFPI) Recording Industry in Numbers (RIN) 2012 report, population data as per 2011 World Bank figures.

Table 3



48. Digital market growth has been consistently stronger in Australia than any other top ten music market in the last five years.
49. As shown in Table 4 below, Australia is the only country in the top ten global recorded music markets to have delivered annual digital sales growth of at least 30% (in local currency terms) every year for the last five years.

Table 4

Minimum digital music trade sales annual growth
2006-2011 (LCU terms)

Australia	32%
UK	20%
Germany	19%
Netherlands	18%
Canada	14%
Italy	1%
USA	1%
Brazil	-1%
France	-2%
Japan	-16%

50. Australia is seen internationally as an early adopter of digital music services, now consistently targeted by innovative international digital music players as part of early-stage international expansion plans.
51. Australia's leading digital music market position has been developed on the back of strong competition, both from new local offerings and international expansions. Simple and efficient licensing procedures and stability of copyright laws have provided the foundation for such competition. A robust copyright regime is often a prerequisite for an international service provider to launch in foreign territories. As the owners of the Pandora service recently stated in their SEC filing:

"Further, in jurisdictions where copyright protection has been insufficient to protect against widespread music piracy, achieving market acceptance of our service may prove difficult as we would need to convince listeners to stream our service when they could otherwise download the same music for free. As a result of these obstacles, we may find it impossible or prohibitively expensive to enter foreign markets, or entry into foreign markets could be delayed, which could hinder our ability to grow our business."³⁴

52. There are currently around 30 licensed digital services available in Australia³⁵, including traditional download, subscription-based and advertising-supported services. Of these licensed services around half are Australian.
53. Although the number of licensed offerings available in each market generally reflects the size and rank of that country's recorded music market, Australia boasts more digital offerings per capita than any other top ten market except the Netherlands. The total number of digital offerings available in Australia is similar to that of Canada, Italy and the Netherlands and is greater than that of Japan, the region's largest recorded music market³⁶.
54. Australia has developed its leading position in the world digital music market even though iTunes, the industry's key driver of digital music takeup globally, launched in Australia 2.5 years later than its home market (US), 16 months later than the

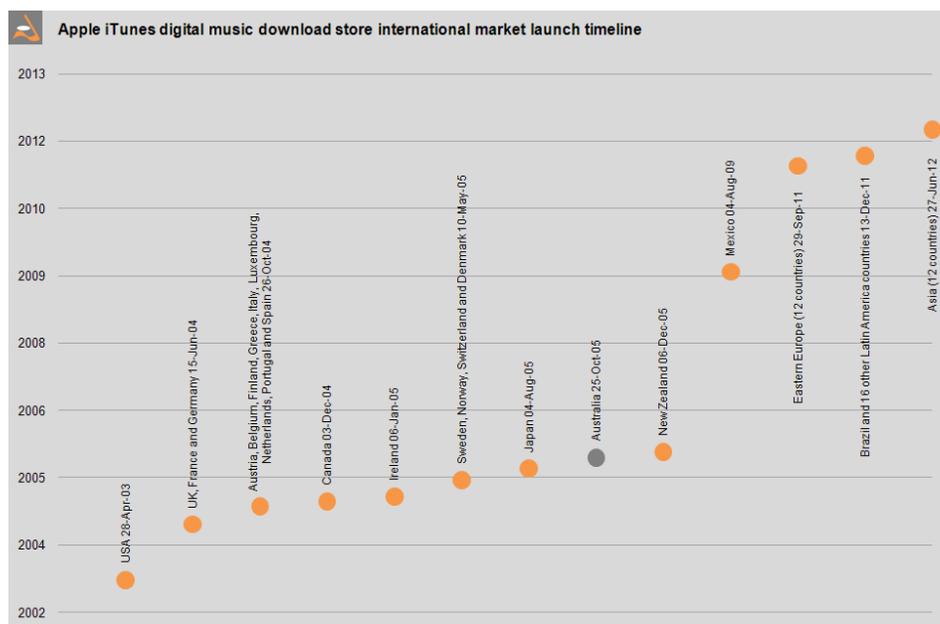
³⁴ Pandora SEC filing p.29.

³⁵ <http://www.pro-music.org/legal-music-services-australasia.php>.

³⁶ Ibid.

UK, Germany and France and 10 months later than Canada. The launch dates of the initial iTunes service were based on Apple's regional approach to service rollout, with Australia the second market launched in Asia – just three months after the world's second largest music market, Japan (see **Table 5 below**).

Table 5



55. Australia is now considered a key market for international expansion, and increasingly is one of the first markets international players commercially launch outside their home region. This is evident in the development to date of the next phase of the digital market: subscription and streaming services. Seen by many as the future of digital music, the aggressive rollout of these services in Australia provides an illustrative example of Australia's position as an attractive and fertile digital music market.
56. As of October 2012, almost all major international streaming providers had launched in Australia, with 10 services available from providers with more than only one country of operation – equal top of the top ten markets with the US and

more than in Germany and the UK with 9 and 8 respectively, as shown in Table 6 below.³⁷

Table 6

International streaming providers: origin and service availability¹
Top ten global recorded music markets

	iTunes (download service)	Spotify	Deezer	Rdio	MOG	WMP	KKBox	Sonora	Rhapsody/Napster	rara	Xbox Music (Microsoft)	Samsung Music Hub	Music Unlimited (Sony)	Simly	Pandora ³	Guvvera	Total (streaming)
Australia	Δ	Δ	Δ	Δ	Δ					Δ	Δ	Δ	Δ		Δ	Δ	10
USA	Δ	Δ	Δ	Δ	Δ				Δ	Δ	Δ	Δ	Δ		Δ	Δ	10
Germany	Δ	Δ	Δ	Δ		Δ			Δ	Δ	Δ	Δ	Δ	Δ			9
UK	Δ	Δ	Δ	Δ					Δ	Δ	Δ	Δ	Δ				8
France	Δ	Δ	Δ	Δ						Δ	Δ	Δ	Δ				6
Canada	Δ		Δ	Δ						Δ	Δ		Δ				5
Italy	Δ	Δ								Δ		Δ	Δ				4
Netherlands	Δ	Δ	Δ			Δ				Δ							4
Brazil	Δ			Δ				Δ		Δ							3
Japan	Δ						Δ						Δ				2

Δ Service available in country
 Δ Service available in country + country of origin

International streaming providers: market launch phase number²
Top ten global recorded music markets

	iTunes (download service)	Spotify	Deezer	Rdio	MOG	WMP	KKBox	Sonora	Rhapsody/Napster	rara	Xbox Music (Microsoft)	Samsung Music Hub	Music Unlimited (Sony)	Simly	Pandora ³	Guvvera	
Australia	8	7	5	4	2				3	1	1	4	2	1	1	1	
USA	1	3	1	1				1	2	1	3	2	1	1	1	1	
Germany	2	6	4	3	5			2	1	2	3	1					
UK	2	1	2	5				2	1	1	2	1					
France	2	1	1	5					1	2	3						
Canada	4	5	1						3	1	5						
Italy	3	4							1	1	2	3					
Netherlands	3	2	3		6				1								
Brazil	12		2					1	4								
Japan	7						4						6				

¹ includes streaming providers available in more than one country
² where markets are launched simultaneously they are all given the same market launch number
³ Pandora excludes UK market, which was discontinued by the provider in 2008

³⁷ APRA|AMCOS also note the information provided by ARIA regarding the launch dates in Australia of all digital music services.

57. Generally, services launch in Europe and North America first, but Australia is usually the next phase. Some services use Australia as a test market – for example, Samsung's Music Hub was developed in Australia and first launched here ahead of both US and Europe. Australia was also a first-launch market for Microsoft's Xbox Music and Sony Entertainment's Music Unlimited. Guvera, the innovative Australian ad-supported free streaming service that was ranked #8 of 2010's top music start-ups by Billboard Magazine, also first launched in Australia before expanding to the US.
58. Spotify has launched in Australia, and is yet to launch in the much bigger Asian market of Japan. The US-based streaming innovator Rdio, created by the founders of Skype, also launched in Australia before other larger music markets including the UK, France and Japan.
59. Australia's reputation as an efficient, stable and copyright-friendly digital music market is also evidenced by being one of only three countries to currently commercially offer the world's largest Internet radio service, Pandora. Other than its home market of the US – where the service now has more than 50 million subscribers – the service is only licensed internationally in Australia and New Zealand (in both countries by APRA|AMCOS).
60. Alongside Canada and the UK, Australia was the first international market to receive iTunes Match, Apple's latest cloud-based digital music offering. The service was launched in Australia in December 2011, just one month after it debuted in the US in November 2011 – and prior to other Western European markets including Germany, France and the Netherlands. Other Asian markets did not launch until June 2012, when it was launched in 12 markets (notably, the service is still not available in Japan).
61. The information provided above suggests that rather than Australia's copyright laws providing a disincentive to innovation, Australia is a very popular launch country for new online music services.
62. APRA|AMCOS are keenly aware of the importance of the development of innovative ways to disseminate music. We offer blanket licences to all digital music services, providing certainty of repertoire and minimum transactions costs. In most cases licence fees are based on percentages of revenue derived from use

of the music. We also offer simplified licence schemes for online services with low revenues, mostly on a fixed annual fee basis. The success of online music services relies to a large extent on having access to the broadest selection of music possible. APRA|AMCOS's blanket licences facilitate access to more than 10 million works, and in excess of 26 million recordings.³⁸

63. APRA|AMCOS are not aware of any digital service being unable to launch in this territory because of Australia's copyright regime. Apple is an example of an innovative digital business that has not needed or sought to rely on exceptions to infringement. APRA|AMCOS have direct experience of Apple as a licensee, and observe it to be a model corporate citizen with regard to its copyright obligations. When APRA|AMCOS could not reach agreement with Apple and other digital music services on the terms of a licence scheme for download services, an interim licence was granted pending the outcome of Copyright Tribunal proceedings.³⁹ APRA|AMCOS note that similar proceedings were also conducted in the United Kingdom, Canada and the United States.
64. As far as APRA|AMCOS are aware, Australia's copyright regime is also not the reason for any delayed entry into this market. Netflix, a movie streaming service that has not launched in Australia, said in its 2012 SEC filing:

In September 2010, we began international operations by offering our streaming service in Canada. In September 2011, we expanded our streaming service to Latin America and the Caribbean. In January 2012, we launched our streaming service in the UK and Ireland. We anticipate significant contribution losses in the International streaming segment in 2012. Until we reach our goal of global profitability, we do not intend to launch additional international markets.⁴⁰

We could be subject to economic, political, regulatory and other risks arising from our international operations.

We offer an unlimited streaming plan in Canada, Latin America and beginning in early 2012 we expanded our streaming service offering to the UK and Ireland. Operating in international markets requires significant resources and management attention and will subject us to regulatory, economic and political risks that are different from and incremental to those in the United States. In addition to the risks that we face in the United

³⁸ <http://www.apple.com/pr/library/2012/09/12Apple-Unveils-New-iTunes.html>.

³⁹ Reference by Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners' Society Limited [2009] A CopyT 2.

⁴⁰ p 23.

States our international operations involve risks that could adversely affect our business, including:

- *the need to adapt our content and user interfaces for specific cultural and language differences, including licensing a certain portion of our content library before we have developed a full appreciation for its performance within a given territory;*
- *difficulties and costs associated with staffing and managing foreign operations;*
- *management distraction;*
- *political or social unrest and economic instability;*
- *compliance with U.S. laws such as the Foreign Corrupt Practices Act, and local laws prohibiting corrupt payments to government officials;*
- *difficulties in understanding and complying with local laws, regulations and customs in foreign jurisdictions;*
- *unexpected changes in regulatory requirements;*
- *less favorable foreign intellectual property laws;*
- *adverse tax consequences;*
- *fluctuations in currency exchange rates, which could impact revenues and expenses of our international operations and expose us to foreign currency exchange rate risk;*
- *profit repatriation and other restrictions on the transfer of funds;*
- *differing processing systems as well as consumer use and acceptance of electronic payment methods, such as credit and debit cards;*
- *new and different sources of competition;*
- *low usage of Internet connected consumer electronic devices;*
- *different and more stringent user protection, data protection, privacy and other laws; and*
- *availability of reliable broadband connectivity and wide area networks in targeted areas for expansion*

*Our failure to manage any of these risks successfully could harm our future international operations and our overall business, and results of our operations.*⁴¹

⁴¹ p 20.

65. While the development of innovative business models is important in the digital economy, it is also important that such businesses not be allowed to free ride on the content that they deliver. Where there are licensing arrangements available, there is no reason to suggest that copyright owners are in any way impeding the commencement of new businesses, other than by charging a price in the form of licence fees for a component of the service. The cost of doing business anywhere includes the cost of acquisition of the necessary products or rights, and there is no reason why online businesses should not incur those costs. In the case of APRA|AMCOS, that price is constrained by the Copyright Tribunal – which acts as a regulator of the price in a real sense, and also acts as a constraint against the setting of unreasonable prices by reason of the expense, time and risk of proceedings.
66. The presence of collective licensors such as APRA|AMCOS enables digital music rights to be licensed efficiently, which is of great benefit to licensees as well as to copyright owners. APRA|AMCOS have invested significant resources in the development and maintenance of digital copyright management systems that are the linchpin of copyright licensing for many industries. These investments in technology have been made with a view to providing efficient licensing solutions and international copyright infrastructures. **Schedule 2** details the technology projects APRA|AMCOS are currently undertaking.
67. APRA|AMCOS, like most content owners, share the ambition to attract investment in digital technology to Australia. APRA|AMCOS have witnessed first hand how technological advancements benefit copyright owners, and not only because more companies selling digital works means more licence fees. Copyright owners and technological development exist in a symbiotic relationship. In its response to calls for evidence for the Hargreaves Report, UK Music wrote: “The future prospects of both the creative content sectors and the digital technology sectors are closely intertwined because they are mutually dependent on one another. Demand for high quality, investment-heavy creative works has consistently driven innovation and growth in the tech sector. Without the manufacturing of and investment in innovative, high quality creative works, then the commercial viability of a digital service is significantly lessened.”⁴² British Recorded Music Industry concurs: “The

⁴² UK Music, paragraph [45].

relationship between music and technology is in many ways a symbiotic one: the combination of technology and high quality content benefits consumers, content and technology industries.”⁴³

68. APRA|AMCOS endorse British Recorded Music Industry’s qualification: “However, this only works provided that it is on a *sustainable* footing. Sustainability requires that growth in the technology sector feed back sufficient returns into creative businesses to incentivise continuing investment in the UK into the creation of compelling content, which in turn drives the use of technology services.”⁴⁴ APRA|AMCOS also share the view of UK Music that: “Given this symbiotic relationship, a growth strategy aimed at increasing the number of internet start-up businesses, which simultaneously undermines the creative content industries, will not succeed. Growth of the digital technology sector and growth of the creative content sector must be pursued in tandem and in harmony.”⁴⁵
69. APRA|AMCOS also note that, just as in Britain,⁴⁶ any review of whether copyright law imposes a barrier to entry for local start-up internet companies should be mindful of other difficulties facing small start-ups trying to gain traction in a market dominated by a small number of very large global companies, alongside other difficulties accessing sources of finance and the availability of skilled labour⁴⁷. APRA|AMCOS note the findings of Professor Ian Hargreaves, who, when commissioned by British Prime Minister David Cameron to consider whether “the current intellectual property framework might not be sufficiently well designed to promote innovation and growth in the UK economy,”⁴⁸ contemplated what differentiated Britain from the US. Hargreaves inspected some features of US copyright law, such as fair use, and asked whether if British copyright law were identical to its US counterpart, it would be a similarly fertile breeding-ground of technological breakthroughs, advancements and entrepreneurship.

⁴³ British Recorded Music Industry, p18.

⁴⁴ Ibid.

⁴⁵ UK Music, [35].

⁴⁶ UK Music, [37].

⁴⁷ Ibid.

⁴⁸ Professor Ian Hargreaves, Digital Opportunity: A Review of Intellectual Property and Growth (May 2011), p1.

70. He wrote: “Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law. In practice, it is difficult to distinguish between the importance of different elements in successful industrial clusters of the Silicon Valley type. This does not mean that IP issues are unimportant for the success of innovative, high technology businesses. The Review’s judgment is that they are of growing importance and that they merit serious attention from the UK Government.”⁴⁹
71. In a similar vein, APRA|AMCOS submit that efforts to attract investment and development of technological companies to Australia should not focus on our local copyright laws, especially without compelling evidence of copyright laws preventing the promotion and development of technology in Australia. A more productive task would be to investigate what broader cultural and economic impediments exist, which prevent a similar industry here from thriving as it does in the US. Moreover, the attraction of investment in digital technology would benefit the entire national economy. It should therefore be at the government’s, that is the general public’s, expense and subsidy – and not those of just copyright owners.

Guiding principles for reform

Question 2. *What guiding principles would best inform the ALRC’s approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?*

72. APRA|AMCOS submit that the first consideration for Australia’s current policymakers should be whether a proposed change is consistent with Australia’s international obligations. In particular, any exception must satisfy the three step test, set out in detail above.

⁴⁹ Ibid, page 45.

73. Consideration of proposed amendments to laws already enacted in accordance with those obligations should then identify the problem to be addressed: the harm that is said to be caused by the law in question. APRA|AMCOS submit that laws should not be changed to address hypothetical or theoretical problems.
74. APRA|AMCOS are of the view that as far as possible, copyright law should not be reactive. Reactive copyright laws result in a piecemeal approach to legislative reform that has the effect of entrenching responses to particular technologies that are frozen in time.
75. APRA|AMCOS note the UK Intellectual Property Office's *Good Evidence for Policy* document, which sets out guidance as to the standard of evidence for submissions to the Hargreaves Report. Although that document related to the UK, APRA|AMCOS endorse the standards set therein for the purposes of these submissions and all submissions made to the ALRC by other parties. Accordingly, APRA|AMCOS have endeavoured for these submissions to meet the three stated criteria: that they be clear, verifiable and able to be peer-reviewed.⁵⁰
76. In relation to the principles identified in the Issues Paper, APRA|AMCOS comment as follows:

Promoting the digital economy

77. APRA|AMCOS agree that the digital economy should be promoted, but do not accept that this is the primary principle underlying copyright reform. However, access to copyright material is not the only aspect of the digital economy that needs to be considered. The purpose of copyright law is to provide incentive for creation of works for the benefit of society as a whole, and it is essential that any reform process takes account of that fact. Without the promotion and protection of creators' rights, the content to which access is sought is likely to diminish.
78. APRA|AMCOS agree with and wholeheartedly support the Australian Government's goal of promoting the digital economy and the opportunities for innovation leading to national economic and cultural development created by the emergence of new digital technologies. There will be many ways to judge Australia's success in this pursuit, but APRA|AMCOS submit that a key marker

⁵⁰ Intellectual Property Office, *Good Evidence for Policy*, accessible online at www.ipo.gov.uk/consult-2011-copyright-evidence.pdf.

ought to be the extent to which Australian content industries are able to successfully operate in the online environment such that they remain viable and in a position to contribute to the continued growth of Australia's digital economy. Within the digital economy where APRA|AMCOS operate, APRA|AMCOS support and encourage the growth of legitimate music services and have a range of licences available to let businesses use their music. APRA|AMCOS have a strong track record in negotiating specific agreements for innovative new media services.

79. To maximise the potential contribution of Australia's content industries to the digital economy there are a number of significant challenges that will need to be overcome. The ease with which digital content can be distributed and copied dramatically increases the scope for unlicensed and illegal copying and distribution. These challenges are too great to be dealt with by the content industries on their own. Success will require sharing responsibility for overcoming these challenges across the value chain (including content creators, distributors and consumers) and will require involvement from both industry and government.⁵¹ These challenges comprise a significant barrier to the continued investment in and provision of online content offerings.
80. In the event that Australia is able to successfully address these challenges, the opportunities for the content industries to make a major contribution to the growth and development of Australia's digital economy are significant. The recent study by PricewaterhouseCoopers into the economic value of copyright industries to Australia found that "copyright is a key piece of infrastructure that supports the industries which comprise a modern economy."⁵² In the most recent year for which data is available (2010-11), Australia's copyright industries employed 906,591 people, around 8% of the Australian workforce; generated economic value of \$93.2 billion, the equivalent of 6.6% of GDP; and, generated over \$7 billion in exports, equal to 2.9% of total exports.⁵³ Although these figures demonstrate how copyright supports the industries that comprise a modern economy, these figures are deflated by certain features of the digital economy that have undermined certain copyright industries – most obviously, music and books.

⁵¹ See also, International Federation of the Phonographic Industry, *Digital Music Report 2012: Expanding Choice, Going Global*.

⁵² PriceWaterhouseCoopers, *The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11: prepared for the Australian Copyright Council (2012)*, p4.

⁵³ Ibid.

Encouraging innovation and competition

81. There is no evidence that innovative businesses are being discouraged from entering, or participating in, any market as a result of Australia's copyright laws. As far as the music industry is concerned, the evidence suggests the contrary. We refer to the evidence we have provided in response to Question 1 of the Issues Paper in this regard.
82. APRA|AMCOS also endorse the submissions made by ARIA in relation to this principle.
83. In particular, collective licensing ensures that all companies wishing to participate in the Australian digital economy do so on equal terms insofar as copyright is concerned. APRA|AMCOS echo the statement of PRS for Music in its response to the Digital Copyright Exchange Feasibility Study: "Collective licensing provides benefits to rightsholders and to users by overcoming the complexity and cost of rights clearance in a many-to-many market."⁵⁴ Collective licensing is "pro-competitive because it allows new services to enter the market on a level playing field and compete with each other to provide the best service for consumers using a variety of business models both old and new."⁵⁵
84. Table 5 above shows the number of online music services operating today. It is unreasonable to expect that the same number of services would start in Australia as in a country with a far bigger population, such as the United States.

Recognising rights holders and international obligations

85. APRA|AMCOS strongly endorse this principle. International treaties occupy the highest place in the hierarchy of laws, especially in such a global industry burdened by global problems, and must be paramount in the minds of policymakers. Those international treaties have at their heart the protection of creators' rights – in recognition of the fact that creators' rights ensure cultural and creative products continue to be produced.

⁵⁴ PRS for Music, Response to the Digital Copyright Exchange Feasibility Study (10 February 2012) p15.

⁵⁵ Ibid, p16.

Promoting fair access to and wide dissemination of content

86. The starting point in any discussion about access and dissemination of copyright material should not be that consumers are entitled to use and exploit the products or property of another person who has privately invested in them. Just because the products may be beneficial to society does not mean that they must, by way of obligation, be donated to the public. This would be contrary to how other forms of property are treated and would discriminate against creators. APRA|AMCOS submit that this principle misconceives who should have rights and who should have obligations over works by interchanging consumers for creators. None of this is to say that APRA|AMCOS object to certain restrictions of copyright like the limited term, or fair dealing exceptions – it is only to correctly frame the discussion as one sensitive to the notion of property.
87. The principle of fairness⁵⁶ pervades copyright legislation. Fair access does not necessarily mean free access. The Act provides exceptions for “fair dealings,”⁵⁷ it requires remuneration under statutory licences to be “equitable,”⁵⁸ and terms under licence schemes to be “reasonable.”⁵⁹
88. There are already extensive exceptions to the rights of copyright owners contained in the Act. The whole focus of this Inquiry, guided by the principles referred to here, must be:
- (a) whether the legitimate interests of users suggest further exceptions to the exclusive rights of copyright owners might be required; and if so,
 - (b) whether those further exceptions are fair to copyright owners.
89. APRA|AMCOS submit that the principle of fair access does not include permitting new business models to free ride on copyright material.

⁵⁶ OED fairness “free from bias, fraud or injustice; equitable, legitimate”.

⁵⁷ eg: S40, S41, S41A, S42, S43.

⁵⁸ eg: Part VA, Part VB.

⁵⁹ eg: S154.

Responding to technological change

90. APRA|AMCOS agree that an ability to respond to technological change should be a principle guiding copyright law reform, but do not agree that the laws themselves should be reactive to technological change in every instance. The introduction of the communication right is an example of an appropriate response to technological development. Laws should implement policy in response to broad developments, not specific technologies or business models. For example, references to videotape⁶⁰ have become outdated, whereas the private copying laws addressing the general principle of private and domestic use⁶¹ have not.
91. APRA|AMCOS agree that the language of exceptions to copyright infringement should not be confined to particular technologies. Exceptions must conform to the provisions of the Berne Convention, and should mandate rules that reflect the relevant policies developed in proper consultation with all stakeholders.
92. APRA|AMCOS submit that being responsive to technological change is a different proposition to making exceptions for particular business models, which is not an appropriate principle for reform. This is discussed further below in response to Question 6.

Acknowledging new ways of using copyright material

93. APRA|AMCOS agree that the behaviour of consumers is a relevant consideration in policy formulation. However, this is obviously not always (and nor should it be) a paramount concern of government, which is charged with setting policy that will achieve optimal social benefits that may not always be reflected in consumer behaviour.
94. When considering consumer behaviour, it is also important to consider the context in which that behaviour is occurring. If consumers are engaging in widespread infringement because of a legislative environment that does not give creators adequate protection, that consumer behaviour should not be used as evidence that the infringements should be permitted. The government must use laws to shape consumer behaviour.

⁶⁰ S110AA.

⁶¹ S109A.

95. The mere fact that there are new ways of using copyright materials does not mean that all of those ways should be legitimised. APRA|AMCOS welcome the fact that the Issues Paper does not suggest that technology that facilitates piracy should be accommodated in the Act. There is no doubt that it is easier to use copyright material without a licence in a digital environment. All copyright policy accepts that it is unreasonable to do so in an analogue environment – and we submit that ease of digital use is not a policy reason to distinguish between analogue and digital.
96. Indeed, it is arguable that the ease of multiple and systemic infringement in a digital context means that it is less fair to permit exceptions for digital uses than for analogue uses.

Reducing the complexity of copyright law

97. APRA|AMCOS do not accept that a principle underlying legislative reform should be comprehensibility of the text of a statute. Laws are managed and interpreted by sophisticated people in complex circumstances, and legislative language carries with it centuries of jurisprudence. APRA|AMCOS acknowledge that the Act is complex, and that from an academic viewpoint simplicity would be attractive. However, in practice some complexities are necessary to deal with the real life situations governed by the Act.
98. However, APRA|AMCOS agree that the principles of the Act should be accessible to the copyright community at large. To that end, APRA|AMCOS urge against piecemeal amendments in response to particular stakeholders whose interests may be temporal and whose opinions may not reflect the policy underlying the copyright regime. Detrimental structural complexities of this kind are likely to arise as a result of the inability of this Inquiry to deal with the matters referred to in paragraph 19 of the Issues Paper.
99. APRA|AMCOS believe that simplicity should be a goal of consumer relationships, and work hard to achieve straightforward licensing solutions whose complexity is commensurate with the sophistication of the licensee and the dollar value of the licence. We dedicate significant resources to the development of educational materials, and take care to ensure that licences and material for licensees are easy to understand. We also contribute to the activities of the Australian Copyright Council, in providing accessible advice and information to members of the

copyright community. APRA|AMCOS believe that the continued education of members of the public regarding copyright law plays a vital part in the reduction of the perception of the complexity of copyright law.

Promoting an adaptive, efficient and flexible framework

100. APRA|AMCOS agree that this is an important principle for reform, but simplicity and the ability to adapt should not be achieved at the expense of certainty.
101. APRA|AMCOS note that in some crucial aspects the regulatory framework is not as efficient as the legislation intended. For example, when the legislature made amendments to the Act to protect carriage service providers from liability for infringement,⁶² it did so in the expectation that an industry code of practice regulating ISP conduct would be put in place. That has not occurred. It is clear from the High Court's decision in *Roadshow v iiNet*⁶³ that the provisions of the Act, in the absence of such a Code, are inadequate to protect the interests of copyright owners whose copyright is being infringed by means of file sharing software online.

Caching, indexing and other internet functions

Question 3. *What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?*

102. It is obvious from the examples given in the Issues Paper⁶⁴ that there are many different purposes for which caching and indexing may be undertaken. APRA|AMCOS are not aware of any evidence that demonstrates these functions are being impeded by Australian copyright law in practice.
103. APRA|AMCOS license digital music services for all communications and technical reproductions, including by affiliates to accommodate multi-company operations. Some of these licensed activities might be described as caching and, for the reasons given in our response to Question 4, we submit that these activities should not be the subject of an exception.

⁶² s39B, s116AH.

⁶³ *Roadshow Films Pty Limited v iiNet Limited* [2012] HCA 15.

⁶⁴ Para 49.

Question 4. *Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?*

104. APRA|AMCOS are not sure of the problem that is sought to be addressed here. The Issues Paper refers extensively to an article by Kimberlee Weatherall,⁶⁵ however that paper does not provide any examples of companies that have been prevented from engaging in a business activity that involves caching or indexing. Rather, the paper explores the theoretical possibility that the existing exceptions might not extend to all hypothetical examples of caching and indexing.
105. APRA|AMCOS would not support any exceptions that permitted activities currently licensed by APRA|AMCOS, because they are unnecessary. For example, we would not support any exception that permitted the caching of downloads 'tethered' to subscription services, nor of material located behind a paywall.
106. If there is evidence that an extension of the caching exceptions is warranted, APRA|AMCOS submit it would be appropriate to consider the exception through the prism of the safe harbour provisions, ensuring that any entity that was able to take advantage of the exception was also constrained by an appropriate mandatory code of practice for the use of the cached material. APRA|AMCOS note that the review of the safe harbour provisions is outside the scope of this Inquiry.

Cloud computing

Question 5. *Is Australian copyright law impeding the development or delivery of cloud computing services?*

⁶⁵ K Weatherall, *Internet Intermediaries and Copyright: An Australian Agenda for Reform*, April 2011.

107. As APRA|AMCOS understand it, 'cloud' computing involves the offering of storage space on external servers. The stored content is then provided to customers. There are various models currently in use which in our experience generally fall into two categories:
- (a) subscription services where users are allowed access to vast libraries of copyright material (for example, Spotify streams licensed content to its subscribers); and
 - (b) digital locker services (for example, Apple offers its customers access by streaming and download to matched content of the customer that it stores on its servers).
108. Each of the models described above is a commercial service that relies on the reproduction and communication of copyright material to generate income. Many such services accordingly require licences from copyright owners. APRA|AMCOS do not regard this as an instance of copyright law unduly impeding the development or delivery of cloud computing services. It is true that cloud computing can require copyright licences, however this is a cost of doing business in that market, no different to the cost of storage, power or web development.
109. APRA|AMCOS has not refused to license any cloud computing service, nor is it aware of any business that has been unable to obtain a relevant licence to conduct its business.
110. An important example of a licensed cloud computing service operating in Australia is Apple iCloud and its accompanying iMatch service. The iCloud service is a virtual cloud locker that allows users to stream and/or re-download all of their music previously acquired from the iTunes store and stored in their iTunes library onto multiple devices. The iMatch service scans the metadata for each track in a subscriber's iTunes library and matches all identified tracks to the corresponding tracks in the iTunes store (currently around 26million tracks). Unmatched tracks are uploaded to the iTunes server and made available only to the subscriber.
111. **[CONFIDENTIAL]**

Question 6. *Should exceptions in the Copyright Act 1968 (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?*

112. The ability to store copyright material on remote servers, and to communicate it to the public, is not particularly new technology. Many companies use the technology in businesses that operate within the law. APRA|AMCOS do not believe that laws should be amended to facilitate particular business models.
113. The first category of cloud computing service referred to in answer to Question 5 (such as Spotify) involves clearly commercial services funded by advertising or subscription fees where users are permitted to access copies of copyright material on a commercial basis. APRA|AMCOS license such businesses and submit that no exception is required for this type of service.
114. With regard to the second category of cloud computing service discussed in answer to Question 5 (digital lockers), it has been suggested that copies made in the context of such services are private copies which ought to be permitted without remuneration to copyright owners either by way of an extension of the format shifting exception or the introduction of a new private copying exception. APRA|AMCOS oppose both of these proposals for the reasons set out in response to Question 7.
115. The Issues Paper refers⁶⁶ to the *Optus TV Now* case.⁶⁷ APRA|AMCOS do not accept that this was an instance of copyright “impeding the development” of a business. There is no evidence that Optus sought a licence to commercially exploit copyright material – it certainly did not seek a licence from APRA|AMCOS to use the underlying works. The case was an example of a company seeking to commercially exploit a free exception in the Act for private copying, and the Full

⁶⁶ para 65.

⁶⁷ *National Rugby League Investments Pty Limited v Singtel Optus Pty Limited* [2012] FCAFC 59.

Federal Court found that the facts of the case did not fall within the exception. There is no policy reason why a company should be entitled to take advantage of such an exception.⁶⁸ This was a corporation acting in competition with other companies that had paid copyright owners extensive amounts for their exclusive rights, trying to use private and domestic copying exceptions to gain a competitive advantage. To make exceptions that would permit free riding in instances such as this is more likely to have a 'chilling' effect on investment in activities that are the subject of valuable broadcast rights, such as sport.

Copying for private use

Question 7. *Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?*

116. APRA|AMCOS consider that the existing exceptions in the Act for private and domestic copying are appropriate. The concerns expressed in the Issues Paper at paragraph 96 are untested, other than in the *Optus* case which for the reasons set out in our response to Question 6 is not an example of the exception being unfairly narrow.
117. APRA|AMCOS have submitted in response to previous reviews that any private copying exceptions should be subject to a levy, as is the case in other jurisdictions. In particular, levies are an appropriate solution when it is not possible to monitor or control the amount of copying that is taking place.
118. As a free exception, APRA|AMCOS submit that it is entirely appropriate that the exception remain limited to private and domestic uses on devices owned by the person making the copy. Extending the existing format shifting exception to digital locker services is also problematic because such services inevitably blur the distinction between private and public copies. For example, cloud services that enable users to store copyright content on servers hosted by a locker service provider and access it at a time that suits them allows for easy widespread

⁶⁸ Brian Kelvin De Garis and Matthew Moore v Neville Jeffress Pidler Pty Limited [1990] FCA 352.

sharing on the internet via links published on third party sites, such that the copies are no longer private.

119. Certainly, there is no policy reason why commercial entities should be able to take advantage of the benefit of an exception intended to be confined to domestic circumstances. Nor is there any policy reason to grant exceptions to digital lockers and other online storage services, because it is possible to license such service providers. Already APRA|AMCOS, as well as foreign collecting societies such as PRS for Music,⁶⁹ license companies selling such products.
120. In addition, APRA|AMCOS note that the making of copies beyond the exceptions set out in the Act is already the subject of contractual terms in the existing market. For example, iTunes licenses the making of a specified number of copies of downloaded music, onto various devices. These terms are the subject of licensing arrangements between copyright owners and online service providers, and it is neither appropriate nor necessary to interfere in this market. AMCOS and ARIA also offer a joint licence for the reproduction of musical works and sound recordings in home videos for private and domestic purposes.
121. APRA|AMCOS agree with the suggestion in the Issues Paper⁷⁰ that the existing market referred to above means that an extension to the exception is unnecessary and unfair to copyright owners and those entities that have entered into appropriate licensing arrangements.

Question 8. *The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?*

⁶⁹ PRS for Music, Response to the Consultation on Copyright (21 March 2012) p30-36.

⁷⁰ at para 78.

122. For the reasons stated above, APRA|AMCOS see no reason to amend the format shifting exceptions. APRA|AMCOS otherwise endorse the submissions made by the Australian Copyright Council in response to this question.

Question 9. *The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:*

- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and*
- (b) should the exception apply to content made available using the internet or internet protocol television?*

123. For the reasons stated above, APRA|AMCOS see no reason to amend the time shifting exceptions. APRA|AMCOS consider that unremunerated time and format shifting, particularly format shifting, do cause damage to copyright owners, and that this damage would have to be appropriately addressed by the introduction of a blank media levy.
124. The *Optus* case is not an instance of the law failing to keep up with developments in technology. The technology used by Optus was not new. Rather, it was a new business model that (wrongly) relied on the belief that individuals had the ability to 'outsource' narrow private copying exceptions under the Act. There is no imperative for copyright owners to keep up with new business models – rather, businesses must ensure that they operate within the legal framework – including the copyright law.
125. APRA|AMCOS otherwise endorse the submissions made by the Australian Copyright Council in response to this question.

Question 10. *Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?*

126. APRA|AMCOS are not aware of this being a real problem in the market for owners of copies of recorded music, and are concerned that an extension of the existing exception has the potential to interfere in markets that are already established. For example, APRA|AMCOS are aware that music acquired through the Apple iTunes Store is effectively backed-up by Apple. Back-up is an essential element of most cloud services.
127. Under APRA|AMCOS subscription service licences, users are permitted to hold a 'tethered download' (a download that remains on the user's device during the currency of the subscription). It would be important to ensure that any exception did not extend to the back-up of such a tethered download, such that the terms of the contract between the user and the subscription service provider could be circumvented. Such a change would have a 'chilling' effect on innovation and may lead to the exit from the Australian market of Spotify, Rdio and others.
128. The justification for the computer software exception is the expense of software, its susceptibility to damage or corruption and the related business expenses that the user incurs if software is damaged or destroyed. These factors are completely absent in the case of music where digital suppliers provide back-up services under contract.
129. In these circumstances, APRA|AMCOS do not support any further exception for the purpose of making a back-up copy.

Online use for social, private or domestic purposes

Question 11. *How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?*

130. APRA|AMCOS submit there is a clear and significant distinction between private and domestic use, and online social use, of copyright materials. It would be a serious error to afford the same treatment to online social uses of copyright material, as is already afforded to private and domestic uses under the Act. These uses should not be regarded as comparable in any way.
131. It is acknowledged that issues relating to social media content are not straightforward. Some user generated content is undoubtedly made for private and domestic purposes. However, social media sites are by no means limited to providing access to user generated content. They also contain content that is created and uploaded for commercial purposes,⁷¹ and content the creator of which may have had no commercial or public aspirations that may later become highly commercialised. The types of music use that APRA|AMCOS have observed on social media websites include commercial programming of audio and audio visual material (such as record label channels featuring professionally produced music videos), videos recorded from live performances or from a broadcast, home videos, home recorded artist performances and home recorded amateur performances. Material can be posted on a site, or can appear on a site (such as Facebook) via embedded links to other sites (such as YouTube and Spotify).
132. In any event, regardless of the initial intentions of the uploader of the content, the social media services themselves are highly public and commercial. For example, at the time of its IPO Facebook was valued at US\$104 billion, and is still worth many tens of billions of dollars. Its advertising revenue for the third quarter of 2012 alone was US\$1.09 billion, and after Google it is the second most visited site. As of September 2012, Facebook had 1 billion users in September 2012. YouTube was sold to Google in 2006, a little more than a year after the first video was uploaded, for US\$1.65 billion. The third most visited site in the world (after Google and Facebook), it is suspected to be worth many times more than that now. . Google is the seventh most valuable public company in the world. Twitter was reportedly valued at US\$8.5billion earlier this month, and is the eighth most visited site globally.

⁷¹ As at 13 November 2012, 28 of the top 30 most viewed videos on YouTube worldwide were professionally produced music videos. See: http://www.youtube.com/charts/videos_views?gl=US&t=a.

133. Social networking sites such as YouTube, Facebook and Twitter are inherently public vehicles to communicate content. Content on YouTube is made available to the public at large. Content on Facebook is 'shared' with as many people as an individual determines. There are other, private ways of sharing material with private groups. People who use such sites for content sharing are not engaging in private, domestic behaviour.

Question 12. *Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?*

134. Firstly, APRA|AMCOS observe that although the Issues Paper refers to exceptions for making user generated content,⁷² this question relates far more broadly to online uses for particular purposes. In our submission, formulating the question in this way gives rise to a number of complicated issues.
135. There are (broadly) two uses to be considered in respect of music on social media sites. First, a person makes a copy of the work and uploads it to the service. Secondly, the service communicates the work by making it available to end users of the service.
136. The making of the user generated content, to the extent that it contains musical works written by a person other than the 'user', may or may not constitute an infringement of copyright. In particular, the use may fall within one of the existing fair dealing defences, or within a time or format shifting exception. It is this user whose actions may be able to be characterised as 'private', 'domestic' or 'non-commercial'.
137. If the question is whether there should be an exception for the making of user generated content, some of the issues are discussed above in our general comments in relation to the inherent definitional problems with the term "non-

⁷² para 102, citing Weatherall, and 106 -108, citing Samuelson.

commercial”. While APRA|AMCOS believe that such uses do cause damage, they accept that the primary economic damage is caused when the copies are released to the public. In addition, for the reasons discussed below, in order for proper commercial licensing arrangements to be entered into, it is necessary that the original making would, absent a licence, constitute an infringement of copyright.

138. APRA|AMCOS do not believe that online uses of copyright material for social purposes can be regarded as comparable to private and domestic uses of copyright material. It is not an infringement of the copyright in a work to make it available online other than to the public. Accordingly, private or domestic online sharing of a work is already freely permitted.
139. The real question, therefore, is whether public, social⁷³ online uses of works should be more freely permitted. Private and domestic performances and communications of music do not constitute an infringement of the copyright in musical works.⁷⁴ However, ‘sharing’ copyright material online with ‘friends’ on a social networking site constitutes a communication to the public. APRA|AMCOS can see no policy reason whatsoever for making an exception for social uses of copyright material, whether online or otherwise.
140. A large amount of copyright material including music is used for the purposes of entertainment in a social context, and music is typically consumed in social circumstances. Television, cinema, fitness classes, restaurants, nightclubs and live music performances can all be used for social purposes. All are required to obtain appropriate licences from the relevant copyright owners. No operator of any such service has ever suggested in any serious forum that it should not be required to pay licence fees for the use of music because of the social purposes to which the music is put. APRA|AMCOS cannot see any reason why the operators of online social forums should be placed in a more advantageous position than the operators of traditional social platforms.

⁷³ OED: ‘marked or characterized by mutual intercourse, friendliness or geniality; enjoyed, taken, spent etc, in company with others.

⁷⁴ the relevant rights are the rights to perform in public and to communicate to the public s 31(1)(a)(iii) and (iv).

141. This question seems to have emanated from the academic perception that there are a large number of individuals infringing copyright on social media websites, which brings the copyright law into disrepute. In fact this is not the case. Copyright owners have entered into sensible commercial arrangements with the operators of many such sites, with the effect that much user generated content comes under the umbrella of a licence.

There is an existing market for licensing social media sites

142. APRA|AMCOS note the submission by the Australian Copyright Council states there may be an argument for establishing a licensing scheme for the communication of copyright material on social media sites on a license it or lose it basis, such as is found in section 45 of the *Copyright Act 1994* (NZ). APRA|AMCOS do not consider this to be necessary or desirable.

143. APRA|AMCOS submit that there is an existing market for the licensing of copyright material on social media sites, and accordingly that no exception should be granted.

144. APRA|AMCOS are not aware of any evidence of copyright laws preventing the use of music on social media platforms. Rather, the evidence is that copyright owners have entered into appropriate commercial licensing regimes with the operators of such platforms, ensuring that copyright owners are compensated for this use of their music.

145. YouTube is the obvious example. Many major music publishers, record companies, collecting societies and broadcasters have arrangements with YouTube for the communication and download of copyright material on the service. **[CONFIDENTIAL]**

146. APRA|AMCOS are aware that other copyright owners, including record companies and broadcasters, have licensed content to YouTube.⁷⁵ APRA|AMCOS are aware of at least an agreement between YouTube and the Harry Fox Agency in the US, pursuant to which music publishers grant rights to YouTube to authorise end users to make reproductions of musical works in the form of user generated content. This is clear evidence of an existing market to license user generated content, and for copyright owners to receive payment for the use of their music online.

147. The increasing amount of monetised content on YouTube suggests that copyright owners are granting direct licences for much user generated content.

[CONFIDENTIAL]

The ability on the part of the copyright owner to block, monetise or track⁷⁶ is also dependant on the copyright owner's underlying rights.

148. Moreover, a critical factor in copyright owners' ability to license the use of copyright material on YouTube is that the original making of user generated content may constitute an infringement of copyright. If the making of the user generated content were not an infringement of copyright (or moral rights in the case of individual songwriters), there would be no basis on which to issue a take down notice. **[CONFIDENTIAL]**

149. The vast range of material available is readily observed. There is clear evidence that copyright owners have responded to the development of social media platforms, by entering into sensible commercial licensing arrangements that permit the use of copyright material on those sites. It cannot be suggested that access to music is in any way a practical problem for social media sites.

⁷⁵ The Football Association Premier League Limited & Ors v YouTube Inc & Ors, Case No 07 Civ 3582 (LLS) Class Plaintiffs' Statement of Uncontroverted Material Facts in Support of their Motion for Summary Judgment paras 31, 243.

⁷⁶ Issues Paper para 101.

150. In conclusion, APRA|AMCOS do not accept that an exception should extend to the online use by the platform itself, even if the underlying reproduction is for non-commercial purposes.⁷⁷ This – the communication by the operator of the social media platform – is, of course, a second and separate use of the copyright material. It takes place in a highly commercial context, and is the subject of valuable and developed licensing arrangements throughout the world. There is no justification for the operator of the social media platform being able to absorb any ‘non-commercial’ glow that might surround the maker of the original reproduction.
151. Even if all makers of user generated content were non-commercial and social, which they are not, the relevant purpose is that of the public, commercial service that communicates the content. Such services utilise the ability to communicate copyright material (a right expressly granted by the legislature in response to the development of internet technology), to operate sophisticated, rapidly growing, highly profitable entertainment portals that compete with all other entertainment media for the eyeballs of its audience and for advertisers.
152. APRA|AMCOS submit that it would be unnecessary and inconsistent with international obligations to create an exception in circumstances where the parameters of the exception are likely to be complex, there are many licences in place and no infringers are being prosecuted. To remove copyright owners’ rights in user generated content would be to interfere in existing markets, and to deny any notion of paternity in copyright works in an online context.

Question 13. *How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

153. APRA|AMCOS do not accept that there should be any exception for online use of copyright materials for social purposes, and notes that online use of copyright

⁷⁷ para 110.

materials for private or domestic purposes (ie, other than in or to the public) is not an infringement of the relevant copyright.

154. The term 'non-commercial' is notoriously difficult to define (see the comments above in our Overview), and in APRA|AMCOS's submission its use would lead to a confusing and difficult legislative framework.
155. It would be a Berne Convention requirement of any exception that the excepted use did not conflict with the normal exploitation of the copyright material and did not unreasonably prejudice the legitimate interests of the owner of the copyright. APRA|AMCOS note that online uses of copyright material on social media platforms are already the subject of detailed licensing arrangements.

Transformative use

Question 14. *How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?*

156. APRA|AMCOS are in possession of a large amount of material regarding the ways in which copyright musical works are being used online, and can draw conclusions about underlying uses from that data.
157. APRA|AMCOS do not accept the implication that 'commercial purposes', 'creating cultural works' and 'individual self expression' are mutually exclusive. Many creative artists engage in commercial businesses while expressing themselves through cultural works. APRA|AMCOS submit that the vast majority of commercially available music is representative of each of these categories.
158. As the Issues Paper notes⁷⁸ some transformative uses (in the sense in which that term is used in the Issues Paper) are obviously commercial. Commercially released music (by which APRA|AMCOS presume the Inquiry to mean music produced by a record company) that contains samples of existing tracks, and

⁷⁸ Paras 112 – 113.

commercially released mash ups, are examples. APRA|AMCOS also submit that not all sampling of music constitutes a transformative use.

159. 'Sampling', 'mash up' and 'remix' are all terms that are understood within the music industry, but APRA|AMCOS are concerned the terms may not be as well understood by the wider public. In APRA|AMCOS's experience, the terms can relate to works and sound recordings, or works alone. A sample is a part of a work reproduced within another work. A mash up is a composite work comprising samples of other works. A remix generally would apply only to sound recordings (of musical works), and is a combination of altered sound recordings.
160. APRA|AMCOS reject the suggestion that music containing samples that is not 'commercially released' is therefore 'non-commercial', and that user generated content falls into this category. As is canvassed above, whatever the intentions of the maker of user generated content, once it is released to the public online it enters the commercial arena.

Question 15. *Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?*

161. APRA|AMCOS note the submissions of the Australian Copyright Council in relation to this question, in particular that there may be a limited case for some creative, non-commercial uses of copyright material to be permitted and also that certain productive or transformative uses of copyright by individuals may amount to a special case. APRA|AMCOS do not agree with this proposition.
162. APRA|AMCOS strongly oppose the introduction of a new exception for transformative use, including because many transformative uses are already allowed by the parody and satire fair dealing exception.
163. In APRA|AMCOS's submission, even if there were to be a transformative use exception, it could only possibly apply to the original use. All subsequent uses are, by definition, not themselves transformative. Thus the communication of a work

that includes a transformative use of another work is itself not a transformative use and could not be the subject of the exception.

164. In particular, records made for retail sale in accordance with the statutory mechanical licence⁷⁹ containing the work (and the sample) would attract payment under the arrangements for the administration of that licence, as would digital downloads. Indeed, the statutory mechanical licence already provides considerable leeway for the making of cover recordings of musical works once they have been published.
165. APRA|AMCOS note the Australian Copyright Council's submission that there may be an argument for establishing a licensing scheme for the communication of copyright material created pursuant to a transformative use exception on a license it or lose it basis such as is found in section 45 of the *Copyright Act 1994* (NZ). APRA|AMCOS do not consider this to be necessary or desirable.
166. There is also a well established market for licensing transformative uses of musical works. The licensing of sampling (including mash ups) is a significant part of music publishers' (and composers') income. For example, Madonna Ciccone licensed *Gimme Gimme Gimme* (Ulvaeus/Andersson) for use in her work *Hung Up*.
167. APRA|AMCOS note that, regardless of the possibly 'non-commercial' intentions of the maker of a user generated 'transformative work', once such a work is made available online it enters the same market as the original works that have been sampled. It competes with other works, and its presence has the capacity to interfere with other markets, such as the market for licensing the use of works in advertising.
168. APRA|AMCOS's licences and distribution rules contain detailed and longstanding provisions relating to the reporting of samples and medleys, indicating the extent to which this is a developed market.
169. If the copyright in musical works were to be subject to an exception that allowed transformative uses – for whatever purpose – the whole concept of paternity in a work would be lost. This would erode existing commercial markets and

⁷⁹ Part III Div 6.

significantly interfere with the value of copyright rights. We also anticipate that such an exception would result in an increased amount of litigation involving the definitions of 'transformative' and 'non-commercial', and involving infringement of authors' moral rights.

170. APRA|AMCOS are of course aware of the jurisprudence regarding transformative use in the US. However, whether a use is transformative is only an *element* of the fair use defence under US legislation – this is not at all the same as excepting all transformative uses. We also note that the US law has a longstanding and complex system of statutory damages that are in general far higher than damages awarded by Australian courts. We submit that the availability of such damages acts as a constraint against members of the public engaging in widespread acts of transformative use that may be infringing.
171. The recently enacted Canadian provisions relating to non-commercial user generated content are unprecedented in breadth, and the impact of their operation on the market is yet to be determined. However, as section 29.2 of the *Modernization of Copyright Act* is limited to non-commercial uses, it is difficult to imagine how the dissemination of such content on a highly commercial platform such as YouTube could possibly satisfy the non-commercial requirement of the section. Surely, any attempt to monetise such content would render the exception void.
172. Of course, as is noted in the Issues Paper,⁸⁰ some 'transformative uses' may be protected by existing fair dealing exceptions. Indeed, the existing fair dealing exceptions may permit many uses that would not be considered to be transformative (in particular, those for the purposes of criticism or review). In addition, many items of user generated content would not amount to transformative use⁸¹, nor cultural product⁸², by any standard.
173. Reference is made to the *Kookaburra* case as an example of a use of a musical work that did not fall within any of the existing fair dealing exceptions, but (presumably the Issues Paper is suggesting) might have amounted to a

⁸⁰ para 119.

⁸¹ para 98.

⁸² para 98.

transformative use. All parties to those proceedings other than the Third Respondent (who is a member of a US collecting society) are APRA|AMCOS members.

174. The *Kookaburra* case generated an enormous amount of vitriol, and has led to calls for amendment to the copyright legislation. It must be recognised, however, that the facts of that case were extremely unusual, including because the two musical works in suit were held in extraordinarily high esteem and affection by the Australian public. One of the works had no living author or author's successors, and was also extremely short. There was a long delay in commencing proceedings. However, a number of other high profile works have been the subject of copyright infringement proceedings, without the same level of public reaction. For example, UK band The Verve reproduced part of the Richards/Jagger work *The Last Time* in the work *Bittersweet Symphony*. The resulting legal dispute ended with the songwriting co-credit being given to Richards/Jagger. Vanilla Ice recorded the song *Ice Ice Baby* which incorporated part of the Bowie/Deacon/May/Mercury/Taylor work *Under Pressure*, resulting in the latter writers being credited as co-authors of *Ice Ice Baby*.
175. Even if there were to be a transformative use exception for non-commercial purposes, the *Kookaburra* case would have had the same outcome. To change the decision in *Kookaburra*, it would be necessary to enact an exception for all transformative use. This would undermine the highly commercial, established business of licensing samples, mash-ups and remixes and significantly impede a copyright owner's control over his or her product. This is a quintessential instance where the response to a single, peculiar case should not be the enactment of an exception that would change the result of the case if it were to be run again.

Question 16. *How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?*

176. APRA|AMCOS oppose any exception for transformative use. If there were to be such an exception, it should only apply to private or domestic use, and should not extend to subsequent, public uses.
177. It would not be appropriate for 'any use of a publicly available work' to be considered transformative. At the very least, there would need to be a requirement that the new work was a work in which copyright subsists, and that the moral rights provisions of the Act would continue to apply.

Question 17. *Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?*

178. APRA|AMCOS oppose any exception for transformative use. It is unclear whether it is being suggested that (a) and (b) above are alternatives, or that both would be prerequisites for a transformative use exception to apply. If the former, APRA|AMCOS strongly oppose any transformative use exception that could apply to commercial works. While APRA|AMCOS repeat their submissions about the confusing and unhelpful nature of the term 'non-commercial', a transformative use exception that applied to commercial works would amount to a complete derogation from the copyright owner's control over his or her product. It is difficult to see how this could possibly comply with Australia's international obligations, and why it is necessary when there are already established markets for the licensing of such material.
179. As discussed above, the distinction between commercial and non-commercial is unhelpful and problematic. A better distinction is between private/domestic and public.
180. It would be a Berne Convention requirement of any exception that the excepted use did not conflict with the normal exploitation of the copyright material and did not unreasonably prejudice the legitimate interests of the owner of the copyright. APRA|AMCOS note that online uses of copyright material on social media

platforms are already the subject of detailed licensing arrangements, as are sampling and mash ups.

Question 18. *The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?*

181. Australia has international obligations to protect the moral rights of creators.
182. APRA|AMCOS oppose any amendment to the moral rights provisions of the Act. Moral rights can only be exercised by individuals, and are in any event subject to a reasonableness test. Particularly in the digital environment, where it is clear that users can easily deal with works in ways that have the potential to cause harm to an author's reputation, it is important that authors' moral rights are protected.
183. APRA|AMCOS otherwise endorse the submissions of the Australian Copyright Council in relation to this question.

Libraries, archives and digitisation

Question 19. *What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?*

184. APRA|AMCOS do not have direct arrangements with the libraries and archives sector, and are not in a position to respond to this question.

Question 20. *Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?*

185. APRA|AMCOS endorse the Australian Copyright Council's call for a set of agreed industry guidelines for the practical application of section 200AB.

Question 21. *Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?*

186. APRA|AMCOS do not believe this is a significant issue at present for the owners of the copyright in musical works, but would not endorse an amendment that permitted the communication to the public of musical works by libraries and archives, which would have the potential to interfere with existing licensed markets for the dissemination of musical works.
187. APRA|AMCOS also would not support an amendment that permitted mass digitisation projects undertaken by private libraries, or of materials that are commercially available in electronic form.
188. APRA|AMCOS otherwise endorse the submissions of the Australian Copyright Council in relation to this question.

Question 22. *What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?*

189. APRA|AMCOS endorse the submissions of the Australian Copyright Council in relation to this question.

Orphan works

Question 23. *How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?*

190. APRA|AMCOS have a comprehensive database of works they control, and also have access to similar international databases of musical works. Generally, APRA|AMCOS licences are blanket licences of all the works controlled by them.
191. APRA|AMCOS have an online works search facility that allows any member of the public to search musical works by title. The search results show the works that have the relevant title, the authors of those works, and in many cases the artists associated with performing the works. AMCOS also offers a research facility whereby, for a small fee, AMCOS will provide author and publisher information in relation to specified musical works.
192. Accordingly, APRA|AMCOS do not believe this is a significant issue at present for the owners of the copyright in musical works.

Question 24. *Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?*

193. APRA|AMCOS are broadly in support of a collective licensing scheme for orphan works, and in particular support the EC Directive on orphan works.⁸³
194. APRA|AMCOS also consider the Brennan/Fraser orphan works proposal to be sound, but do not agree that the proposed exception should extend to intermediaries or service providers.⁸⁴
195. It would be essential that any collective licensing scheme for orphan works not permit mass digitisation.
196. APRA|AMCOS otherwise endorse the submissions of the Australian Copyright Council in relation to this question.

⁸³ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, accessible at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:299:0005:0012:EN:PDF>.

⁸⁴ D Brennan and M Fraser, *The Use of Subject Matter with Missing Owners – Australian Copyright Policy Options* (2012).

Data and text mining

Question 25. *Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?*

197. APRA|AMCOS endorse the submissions of the Australian Copyright Council in relation to this question.

Question 26. *Should the Copyright Act 1968 (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?*

198. APRA|AMCOS endorse the submissions of the Australian Copyright Council in relation to this question.

Question 27. *Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?*

199. APRA|AMCOS are not in a position to propose any alternative solutions in response to this question.

Educational institutions

Question 28. *Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?*

200. APRA|AMCOS are members of Screenrights, and participate in the Part VA educational statutory licence through that society.
201. APRA|AMCOS do not license educational institutions for these uses outside the terms of the statutory licence, and endorse the submissions made by Screenrights in response to this question.

Question 29. *Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?*

202. AMCOS is a member of Copyright Agency, and participates in the Part VB educational statutory licences through that society.
203. APRA|AMCOS also license educational institutions through voluntary licence schemes that permit uses of works controlled by APRA|AMCOS beyond the boundaries of the statutory licences, including as joint licensors with ARIA and PPCA. APRA|AMCOS believe that voluntary licences such as these should be encouraged by the Act.
204. The copying and communication limits under the Part VB statutory licence are more applicable to literary works than to musical works, and accordingly a market has developed for additional licensing of educational institutions in respect of musical works. Many performances in educational institutions already have the

benefit of section 28, but licences are required for performances falling outside the scope of that section. Educational institutions require licences to make multiple copies of whole musical works in digital and paper form, and APRA|AMCOS have provided these licences (including with ARIA and PPCA for sound recordings and certain audio visual recordings of musical works). APRA|AMCOS submit that musical works should not be included in the Part VB statutory licence, so that educational institutions do not have to deal with two licensors for the same works.

205. APRA|AMCOS note that Part VI Division 3 Subdivision H of the Act provide that collecting societies and interested parties can apply to the Copyright Tribunal of Australia in relation to licence schemes, and that the ACCC has certain rights in relation to such applications.

Question 30. *Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the Copyright Act 1968 (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?*

206. APRA|AMCOS submit that the educational statutory licences in parts VA and VB of the Act already contain extensive permissions for the use of copyright material, and do not require extension. As submitted above, APRA|AMCOS consider that music should not be included in the Part VB statutory licence.
207. Voluntary licensing arrangements between APRA|AMCOS and educational institutions demonstrate that there is an existing market for licensing beyond the limits of the statutory licences. APRA|AMCOS have agreements with educational institutions (including as joint licensors with ARIA and PPCA) under which the institutions can copy, perform and communicate musical works outside the limits of the statutory licence and free exceptions. For example, schools can make recordings of commercially available music, can make copies of print music, and can store and communicate libraries of sound recordings. The licences also permit the making of video recordings of students' musical performances.

208. APRA|AMCOS otherwise endorse the submissions of the Australian Copyright Council in relation to this question.

Question 31. *Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?*

209. APRA|AMCOS endorse the Australian Copyright Council's call for a set of agreed industry guidelines for the practical application of section 200AB and in relation to the Parts VA and VB statutory licences.

Crown use of copyright material

Question 32. *Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?*

210. APRA|AMCOS have voluntary licensing arrangements with all State and Federal government departments, covering uses of musical works for the purposes of the State. These arrangements operate in a satisfactory manner and APRA|AMCOS have no reason to believe that the section 183 licence is not appropriate in the digital environment.
211. APRA|AMCOS would not support any amendment that would require them to be declared for government exercise of rights licensed by APRA|AMCOS, but would not otherwise oppose amendments that would ensure similar treatment of reproduction and communication rights.
212. APRA|AMCOS do not support the proposal made by Screenrights and Copyright Agency that the Crown use provisions be extended to local governments. APRA|AMCOS license the use of music controlled by them in local councils. In the

12 months to 30 June 2012, APRA|AMCOS received more than \$328,000 in licence fees from local councils. Music use is variable and extensive, and APRA|AMCOS believe that the uses cannot properly be described as being for the purposes of the State. The exception contained in section 183 is extremely broad, and APRA|AMCOS do not see any justification to extending it to the widespread use of music by the hundreds of local councils throughout Australia.

Question 33. *How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?*

213. APRA|AMCOS endorse the Australian Copyright Council's submissions in response to this question.

Question 34. *Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?*

214. APRA|AMCOS endorse the submissions of the Australian Copyright Council in response to this question.

Retransmission of free-to-air broadcasts

Question 35. *Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?*

215. APRA is a member of Screenrights, and participates in the Part VC retransmission statutory licence through that society.

216. APRA's licences with broadcasters exclude the rights licensed by Screenrights, and APRA|AMCOS endorse Screenrights' submissions in response to this question.

Question 36 *Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?*

217. APRA|AMCOS note the submission of Screenrights in response to this question.

218. APRA|AMCOS already license the operators of various internet sites that communicate musical works embodied in broadcast material, and believe that voluntary licensing is the most efficient and preferable model for licensing musical works and should be encouraged where possible.

Question 37. *Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?*

219. APRA|AMCOS consider that this issue is complex and does need to be clarified, to the extent required to take account of technological developments while remaining consistent with the intention of the original drafters.

Question 38. *Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?*

220. APRA|AMCOS endorse the submissions made by the Australian Copyright Council in this regard.

Question 39. *What implications for copyright law reform arise from recommendations of the Convergence Review?*

221. APRA|AMCOS endorse the submissions made by ARIA in response to this question.

Statutory licences in the digital environment

Question 40. *What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?*

222. The digital economy presents opportunities for all types of licensing, and in particular maximises the potential for access and for efficient collective licensing. The music industry has developed reporting and metadata protocols with digital service providers that enable copyright owners to identify works reproduced and communicated on licensed services and to distribute licence fees accordingly.
223. APRA|AMCOS have witnessed the transition from paper records of ownership to an integrated copyright management system and clearance facility via which members, licensees and APRA|AMCOS manage their ownership information and reporting requirements, including under the statutory mechanical licence.
224. Technology has also enabled APRA|AMCOS to transition from twice yearly to quarterly accounting, and from quarterly to monthly invoicing.
225. **Schedule 2** sets out the technology projects into which APRA|AMCOS have invested and continue to invest considerable resources.
226. APRA|AMCOS submit that the evidence shows that collective licensing solutions provide vastly more certain and industry appropriate solutions to the needs of digital music users than do exceptions. Reliance on exceptions is costly, including

because it requires legal resources and has uncertain results. Collective licensing reduces transactions costs, removes the need to make decisions about whether an exception applies, and also means that users do not have to identify and locate individual copyright owners. The blanket licence provided by collecting societies, combined with the practically comprehensive worldwide repertoire, is certain and efficient. Collective licences can respond to the needs of the market, making them a much more flexible solution to real problems than legislative change.

Question 41. *How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment - to better facilitate access to copyright material and to give rights holders fair remuneration?*

227. APRA|AMCOS consider that the digital economy provides optimal conditions for direct licensing between copyright owners and users, and for accurate reporting of use of copyright material under statutory licences and consequent distribution to copyright owners.
228. Where voluntary licensing arrangements are in place, APRA|AMCOS submit no new statutory licences should be introduced. Statutory licences are intended to correct market distortions or failures that arise when technology enables mass use of copyright material by certain groups that should not, for reasons of public policy, be prevented from doing such acts. Where there is an existing market, there is no need for interference at all.

Question 42. *Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?*

229. APRA|AMCOS note the submissions of the Australian Copyright Council in response to this question, in particular the Council's suggestion that for user generated content a statutory or extended collective licence might be able to be introduced, perhaps based on the license it or lose it model such as exists in the

UK and New Zealand. APRA|AMCOS do not agree with that suggestion in this regard.

230. APRA|AMCOS do not see a need for any additional statutory licences.
231. In particular, digital technology means that with appropriate collective licensing, statutory licences for music are unnecessary – the digital download and streaming of musical works are all licensed in Australia without the assistance of any statutory licensing provisions.

Question 43. *Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?*

232. APRA|AMCOS see no reason to remove any of the statutory licences currently in operation.
233. The voluntary arrangements for the sale of music online in effect modernise but reflect the terms of the statutory mechanical licence. Even for physical product, AMCOS has entered into arrangements that better reflect the current market conditions for the sale of records.
234. APRA|AMCOS agree that digital technology enables more efficient licensing generally, and submit (as noted above) that the concept of a single declared society for statutory licences might be more fairly replaced by the concept of a number of societies representing the rights of particular types of copyright owners.

Question 44. *Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?*

235. No. The current exceptions in the Act are clear, and address the areas in which social policy suggests that free uses should be allowed.

236. APRA|AMCOS endorse the submissions made by the Australian Copyright Council in response to this question.

Fair dealing exceptions

Question 45. *The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:*

- (a) research or study;*
- (b) criticism or review;*
- (c) parody or satire;*
- (d) reporting news; and*
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.*

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

237. APRA|AMCOS submit that there is nothing peculiar to the digital environment that affects the operation of the fair dealing exceptions. Those who advocate more, or more flexible, exceptions have done so in the analogue environment also. The fair dealing exceptions were the subject of a detailed Inquiry in 2006, and those who again advocate amendment should be required to produce evidence of changed circumstances.
238. To the extent that the exceptions suffer from any of the flaws claimed this must also be true of their operation outside the digital environment. For the Inquiry to find otherwise would be to suggest that a digital use is fairer than an analogue use. Just because it is easier to deal with copyright works in a digital format does not make the use any fairer.
239. APRA|AMCOS support the existing fair dealing exceptions contained in the Act. The fair dealing exceptions allow members of the public to access and use works protected by copyright, with no payment to the copyright owner. As such, they are absolute exceptions to the rights of the copyright owner. In each case, there is a

strong public interest for copyright works to be freely available in the circumstances set out in the Act. Without the fair dealing exceptions, there exists the potential for copyright owners to prevent access to copyright material, and in the circumstances set out in sections 40 to 43 of the Act, this would be contrary to the interests of society as a whole, as well as contrary to the interests of particular users.

240. There is a significant body of jurisprudence in Australia regarding the fair dealing exceptions. This has involved detailed consideration of the appropriate balance between the interests of copyright owners and users at all levels of the courts.⁸⁵
241. The fair dealing exceptions follow the structure of the Act, which is logical and easy to understand. They have a relationship with the statutory licences, which may be affected by changes to the fair dealing exceptions. There is no evidence to suggest that the practical application of the fair dealing exceptions interferes with legal proceedings, generally inhibits the reporting of news, fetters criticism or review of works, or prevents the conduct of research or study. In fact, there has been remarkably little copyright litigation in Australia over the last five years, with the overwhelming majority not related to the fair dealing exceptions.⁸⁶
242. APRA|AMCOS note that many of the criticisms of the existing fair dealing exceptions are made in an academic context, and are not evidence based. For example, at a seminar on 13 November 2012, Professor Robert Burrell used an example of a YouTube clip of a work performed by the US artist 'Weird Al' Yankovic, attempting to illustrate the complexity and rigidity of the existing exceptions. Professor Burrell claimed that while the existing clip was made in reliance on the US fair use exception (and in Australia might have been able to be made under the parody and satire exception), it could not be shown to the seminar audience because of the lack of an available fair dealing exception for that purpose. In fact, Weird Al Yankovic routinely obtains permission to make his

⁸⁵ For example, *TCN Channel Nine Pty Limited v Network Ten Limited* (includes corrigendum dated 12 September 2001) [2001] FCA 108 (20 February 2001); *Re: Brian Kelvin De Garis and Matthew Moore And: Neville Jeffress Pidler Pty Limited* No. G1319 of 1988 FED No. 352 Copyright 18 IPR 292 (1991) 20 IPR 605 (1990) 37 FCR 99; *Copyright Agency Ltd v Charles Sturt University* (No 2) [2001] FCA 1145 (24 August 2001); *Copyright Agency Ltd v University of Adelaide* [2000] FCA 1894 (21 December 2000).

⁸⁶ See Annexure 2 to Copyright Agency's submission.

recordings⁸⁷ and so does not rely on the fair use exception; the seminar performance would have been permitted under an APRA Music in the Workplace licence. With respect, this is typical of an academic analysis of the way the Act might work, that bears no resemblance to the way it is applied in practice.

243. Accordingly, APRA|AMCOS supports the retention of the fair dealing exceptions in a form that reflects their present nature and scope.

Question 46. *How could the fair dealing exceptions be usefully simplified?*

244. APRA|AMCOS endorse the submissions of the Australian Copyright Council in response to this question.

Question 47. *Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?*

245. APRA|AMCOS submit there is no evidence that such an exception is required. Most incidents of quotation would occur in the context of the existing exceptions. If such an exception were extended to musical works – as is suggested by the example given in the Issues Paper of the *Kookaburra* proceedings⁸⁸ – this would interfere in the significant sampling markets described above in response to Question 15.⁸⁹
246. APRA|AMCOS reiterate their comments above in response to Question 15 regarding the problematic nature of enacting exceptions to deal with the unusual fact situation of *Kookaburra*.

⁸⁷ “Weird AI” Yankovic: Frequently Asked Questions, accessible at <http://www.weirdal.com/faq.htm>.

⁸⁸ para 266 – 277.

⁸⁹ Issues Paper footnote 329.

Other free-use exceptions

Question 48. *What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?*

247. APRA|AMCOS submit that there is nothing peculiar to the digital environment that affects the operation of the exceptions in the Act.
248. APRA|AMCOS consider that collective licensing presents far more opportunities for flexibility to deal with technological developments than do legislative exceptions. The evidence is that the music industry has responded to the technological developments in the storage and delivery of music by offering appropriate licences that enable all participants in the digital economy to achieve their business goals.

Question 49. *Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?*

249. While the statutory licences are derogations from the rights of copyright owners, APRA|AMCOS consider that the relevant markets have developed around those licences such that for the most part the licences can be accommodated by largely voluntary arrangements.
250. Accordingly, other than the removal of musical works from the Part VB statutory licence, APRA|AMCOS do not submit that any exceptions or statutory licences should be removed from the Act.

Question 50. *Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?*

251. No. The parody/satire exception was introduced after a comprehensive review of the fair dealing provisions in 2006. APRA|AMCOS submit there is no evidence of any need for an additional fair dealing exception at this time.

Question 51. *How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?*

252. APRA|AMCOS submit there is no evidence of need for simplification or restructure. The exceptions in the Act were reviewed comprehensively in 2006, and no simplification or restructure was recommended.

Fair use

Question 52. *Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?*

253. APRA|AMCOS oppose the expansion of the current specific fair dealing exceptions to an open-ended exception, including because there is no demonstrated problem with the fair dealing exceptions in their current form in the digital environment.
254. These issues have been reviewed extensively as recently as 2006. It needs to be demonstrated that the digital environment has evolved in such a way that the considerations taken into account at that time are no longer relevant.
255. APRA|AMCOS believe that a broad, flexible exception would be contrary to the requirements of the Berne Convention. A broad-based fair use exception to copyright owners' rights does not, in the submission of APRA|AMCOS, comply with the first limb of the three step test. It is too broad to be described as being confined to certain special cases – the cases are uncertain by definition.

256. In addition, APRA|AMCOS oppose the inclusion of a fair use exception for the following reasons:
- (a) an open-ended fair exception would not offer the same level of certainty as the current specific fair dealing exceptions;
 - (b) an open fair use exception is likely to lead to higher transaction costs for owners and users as a result of an increased need for legal advice and litigation;
 - (c) APRA|AMCOS believe an open-ended exception is inconsistent with Australia's obligations under the *Berne Convention*;
 - (d) an open-ended exception is not necessary for the proper operation of the Act;
 - (e) an open-ended exception would result in the balance between the interests of copyright owners and the interests of copyright users being too heavily in favour of users; and
 - (f) an open-ended exception would constitute an abrogation of parliament's role in determining important public matters.
257. A general exception to infringement would be a departure from comparative legislation in a number of common law countries (United Kingdom: *Copyright, Designs and Patents Act 1988*, for example sections 29 and 30; New Zealand: *Copyright Act 1994*, section 42, part 3).
258. The current specific exceptions offer a level of certainty that would not be replicated if Australia were to adopt an open-ended fair use exception. The uncertainty engendered by an open fair use exception is likely, as in the US, to give rise to considerable litigation that would defeat the purpose of adopting such an exception. It is likely that fair use would be raised as a defence to many allegations of copyright infringement, adding significantly to costs of legal advice and to the costs of litigation.

259. Litigation would also be significantly protracted by claims of fair use. At least while the provisions were new, many cases would likely be pursued into the appeal courts.
260. Even if the United States jurisprudence in relation to the fair use provisions was able to be followed, or if a similar approach were to be taken by Australian courts, a fair use style exception may not deliver the perceived benefits to users. There would seem to be little public benefit in significantly amending the law, with the consequent increases in transaction costs, if the intended result were not to be delivered.
261. Carving out of copyright protection a broad exception that may reduce returns to copyright owners fails to strike an appropriate balance between public interest and copyright protection.
262. A broad fair use exception would not comply with Australia's international obligations. APRA|AMCOS do not consider that an appropriate workaround for this problem is that utilised in section 200AB, which sets out the requirements of the three step test. APRA|AMCOS do not believe that it is appropriate (or consistent with treaty obligations) for parliament to delegate the decision about whether an act done in reliance on a law, complies with an international treaty obligation.
263. APRA|AMCOS otherwise endorse the Australian Copyright Council's submissions in response to this question.

Question 53. *Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?*

264. If such an exception were to be introduced, APRA|AMCOS submit it would be most efficient to replace the existing fair dealing and other free exceptions (but not statutory licences) with the new, single exception, containing reference to the current exceptions in order to maintain the relevance of the jurisprudence.

Contracting out

Question 54. *Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?*

265. APRA|AMCOS cannot comment on this without seeing the extent and nature of the proposed exceptions. There may be circumstances where such contractual provisions might be appropriate – for example, contracting parties might agree not to claim that a particular use was a fair dealing.
266. APRA|AMCOS believe that as a general statement, parties should have the maximum flexibility to negotiate contractual terms, provided there are appropriate protections, such as those found in competition and consumer law, against an imbalance of bargaining power.

Question 55. *Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?*

267. APRA|AMCOS believe that as a matter of law it is not possible to contract out of the existing fair dealing exceptions or statutory licences in the Act. The licences derogate at source from the rights of the copyright owner – the copyright owner is not in a position to limit rights that it does not control.
268. APRA|AMCOS licences do not as a matter of fact seek to limit the exercise by the licensee of any rights under the Act.
269. APRA|AMCOS cannot comment on how the Act should be amended to take account of as yet not proposed exceptions.
270. APRA|AMCOS share the view of PRS for Music, the BCC and UK Music in the United Kingdom that the prevention of contracting out of copyright exceptions would actually create greater complexity and uncertainty and lead to a reduction in

innovation and choice for the consumer.⁹⁰ “It is quite within the means of business to negotiate around the exceptions to which they are entitled in a contractual licensing negotiation for uses they will have to pay for, without additional protection of the law.... [Contracts between businesses] are negotiated by willing parties. There is no logic in having the legislation interpose itself between the parties and restricting their freedom and flexibility to contract.”⁹¹ There are two ideals at play here and both are equally important to licensors and licensees: reliability and flexibility. With respect to the former, digital start-ups depend on the certainty of supply of content, subscription agreement, digital rights management and contracts with input licensors.⁹² In this framework of contracts, there would be considerable insecurity for all the parties involved in building new business models if there were a point in the chain where contracts were potentially exposed to challenge for contracting out of a copyright exception.⁹³

⁹⁰ PRS for Music, Response to the Consultation on Copyright 21 March 2012, p54.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

SCHEDULE 1

APRA|AMCOS

Australasian Performing Right Association (APRA) is a performing right collection society established in 1926 to administer the public performance and communication rights (often referred to collectively as performing rights) of its songwriter, composer and music publisher members. APRA represents over 74,000 music creators in Australia and New Zealand alone. In addition to representing the interests of its Australasian members, APRA represents the vast majority of the world's music creators through its reciprocal agreements with similar performing right societies throughout the world.

APRA administers licences with more than 80,000 businesses which include businesses as diverse as cafes, restaurants, hotels and clubs to retailers, fitness centres, cinemas, radio and television broadcasters, digital service providers (DSPs) and internet service providers (ISPs).

APRA is a member of CISAC, the International Confederation of Societies of Authors and Composers. As a result of the national treatment principle enshrined in the Berne Convention, to which Australia is a signatory, foreign right owners are treated in the same way as nationals, effectively providing reciprocal rights management amongst collecting societies in approximately 133 countries.

In addition, APRA manages the reproduction rights business of its sister collecting society, Australasian Mechanical Copyright Owners Society (AMCOS). AMCOS represents virtually all music publishers in Australia and New Zealand and, through reciprocal arrangements, the vast majority of the world's composers, writers and music publishers. On behalf of its members, AMCOS grants licences for certain reproductions of musical works. This involves collecting royalties from digital service providers, independent record companies, film-makers, educational institutions and others who record or reproduce music in some form.

APRA|AMCOS are recognised as key organisations within the Australasian music industry. We are actively involved in supporting and promoting music related creative communities and widely regarded by our members as their voice on issues relating to their rights.

APRA and AMCOS's joint objective is to secure the fairest and highest level of payments for our members, provide the strongest defence possible of their rights and the best customer service for both our members and our licensees.

SCHEDULE 2

Technology projects

APRA|AMCOS have consistently invested in IT systems development in order to stay at the forefront of service for their members and licensees.

Copyright Management System

Our current operating platform, Copyright Management System (CMS), is widely respected within the industry. By virtue of a network of reciprocal agreements with sister collecting societies, CMS is capable of managing the rights and data of over 70,000 domestic and hundreds of thousands of overseas writers and publishers.

APRA|AMCOS continues to invest in technology; as CEO Brett Cottle comments in 'Year in Review 2012':

Over coming years APRA and AMCOS will be involved in extensive work and expense in the area of system development. The Boards of the two societies have identified a number of strategic imperatives related to the integrated use of music recognition technology, the migration of client transactions to digital platforms and mobile applications, the re-engineering of our licensing systems to produce dramatically improved customer experience, the integrated use of Business Planning and Analytics tools and an active involvement of the Global Repertoire Database as key medium term goals for the two organizations. Each of these projects will involve significant but measured investment, the future benefits of which will be important for members and licensees alike.

Common Information System

APRA|AMCOS is directly linked to an international network of databases – the Common Information System (CIS) – which has been developed to allow seamless and accurate digital exchange of data between collecting societies and their members. The CIS is comprised of the following components:

MWI (Musical Works Information): a network of individual societies' works databases ('nodes') accessible via a single interface. There are 89 collecting societies contributing, giving global society access to over 44 million musical works;

AVI (AudioVisual Index): the AVI allows easy identification of the source of cue sheet information around the world in relation to almost 3 million film and TV

productions;

IPI (Interested Party Identifier) database: the IPI provides online access to detailed information about more than 5 million writers and composers of music.

APRA has integrated use of CIS to its systems and business processes, ensuring we utilise all available digital data to protect our members' rights and pay royalties accurately and quickly.

Global Repertoire Database

APRA is also a founding member of the Global Repertoire Database (GRD). The GRD will be a single, comprehensive, authoritative and multi-territory representation of the global ownership and control of musical works. The GRD will save considerable cost and effort currently expended in the duplication of data processing. Not only is the project intended to make the collection of copyright in musical works more efficient and reliable, it will also allow back-office savings to be re-invested in frontline services, increasing the licensed usage of music and benefitting creators and rights-holders.⁹⁴ As Mark Isherwood wrote in the Hooper Report: "Such a resource would maximise stakeholder trust in licensing solutions, deliver administrative efficiency through standardisation and interoperability and provide for a level of accuracy, comprehensiveness and automation fit for the 21st Century. Ultimately, the global repertoire database should improve datasets for all forms of licensing."⁹⁵

The project combines the resources of many large players in the global copyright community, including other collecting societies (APRA is joined by 12 other Societies including GEMA, PRS for Music, SACEM, ASCAP and BMI), music publishers (including Sony/EMI Music Publishing and Universal Music Publishing), music service providers (including iTunes, Google and Omniphone) and associations (CISAC, ECSA and ICMP). The database will be openly available to songwriters, publishers, licensors and licensees, and will be maintained and administered in a more effective manner than is currently done in some national archives around the world.

⁹⁴ Global Repertoire Database, accessible at <http://www.globalrepertoiredatabase.com/>.

⁹⁵ Intellectual Property Office, *Copyright Works: Streamlining copyright licensing for the digital age; an independent report by Richard Hooper CBE and Dr Ros Lynch* (July 2012) p45.