

**Copyright Society of Australia
Seminar
Sydney, 3 June 2009**

**Australia and the Future of Copyright:
proposals for new approaches**

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Introductory

**PART I: COPYRIGHT LAW IN AUSTRALIA: AN INTERNATIONAL
PERSPECTIVE**

- A. Legislative area: Copyright Act 1968 (Cth)**
1. General
 2. Particular features
 - (a) Provisions on moral rights (ss. 189-195AZR)
 - (b) The fair dealing provisions (ss. 40-42)
 - (c) Time, space and format shifting (ss. 43C, 47J, 109A, 110A, 111)
- B. Judicial area**
1. Court decisions (see Annex II, 1)
 2. WTO Dispute Settlement Body: Panel Report on United States Copyright Act, s.110(5) (see Annex II, 2)
- C. Academic area**
- D. Communication area: *worldlii* and *austlii***
- E. Organisational area (World Intellectual Property Organisation, Australian Copyright Council, Australian Copyright Society and collecting and other societies)**

**PART II: CURRENT ISSUES, DEVELOPMENTS AND DEBATES:
NATIONAL, REGIONAL AND INTERNATIONAL PERSPECTIVES**

Preliminary

1. **Old era approaches**
 - (a) Discriminatory protection
 - (b) Bordered regulation
 - (b) Earth bound discipline
2. **New era approaches**
 - (a) Non-discriminatory protection
 - (b) Bordered and borderless regulation
 - (c) Cosmic discipline

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3. **Basic concepts**

- (a) Justification for copyright
- (b) Accommodating interests of rightowners, disseminators and the public
 - (i) The author and the “content provider”
 - (ii) Rightowner/disseminator/public partnership

A. **Current issues** (see Annex III)

- 1. General
- 2. Peer-to-peer file sharing
- 3. Social networking
- 4. Orphan works and other orphan material
- 5. Licensing in the online environment

B. **Current developments and debates**

- 1. Balancing the interests of rightowners, disseminators and the public
- 2. Current proposals concerning use of protected material on the internet
- 3. Protection of information collections: comparative approaches
- 4. File sharing: Swedish *Pirate Bay* case
- 5. Performers’ term of protection: debate in Europe

PART III: SOME GENERAL CONSIDERATIONS

- A. **The importance of copyright**
- B. **The influence of the European Union**
- C. **The influence of the United States of America**
- D. **Australia’s road**

PART IV: PROPOSALS AND CONCLUSION

- A. **Global Internet licensing system** (See Annex IV)
- B. **Legislative scheme concerning orphan works and other orphan material** (see Annex V)
- C. **Formation of Asian Pacific Copyright Association** (see Annex VI)
- D. **Conclusion**

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ANNEXES (see over)

- ANNEX I: Regional and international instruments
- ANNEX II: References (Cases (selected), WTO Panel Report, Bibliography)
- ANNEX III: Current issues in national, regional and international copyright
- ANNEX IV: The GILA System for Global Internet Licensing: summary
- ANNEX V: Copyright Act 1968: proposed amendments concerning orphan works and other orphan material
- ANNEX VI: Asian Pacific Copyright Association (APCA): suggested structure and procedure

ANNEX I**Regional and international instruments****(A) Regional instruments**

1. North American Free Trade Association (Canada, Mexico, USA)
2. USA Free Trade Agreements (including US-Australia Free Trade Agreement 2004)
3. Cartagena Agreement (Bolivia, Colombia, Ecuador, Peru (Venezuela))
4. European Community legislation (including seven “Copyright Directives”)

(B) International instruments

1. Berne Convention for the Protection of Literary and Artistic Works 1986-1971 (Australia is Contracting Party)
2. Universal Copyright Convention 1971 (Australia is Contracting Party)
3. Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961 (Australia is Contracting Party)
4. TRIPS: Agreement on Trade Related Aspects of Intellectual Property, 1994 (Australia is Contracting Party)
5. WIPO (World Intellectual Property Organisation) Copyright Treaty 1996 (Australia is Contracting Party)
6. WIPO Performances and Phonograms Treaty, 1996 (Australia is Contracting Party)

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ANNEX II

References

1. **Cases (selected)**

- Australasian Performing Right Assn. Ltd. (APRA) v. 3DB Broadcasting Co. Pty Ltd* [1929] V.L.R. 107; 35 A.L.R. 109
- Bulun Bulun and anor v R & T Textiles Pty Ltd* [1998] FCA 1082
- Gutnick v. Dow Jones & Co. Inc* [2001] V.S.C. 305; [2002] H.C.A. 56 (HC)
- IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (HC)
- Moorhouse v University of New South Wales* (1975) 133 C.L.R. 1; 49 A.L.J.R. 267; 6 A.L.R. 193; [1976] R.P.C. 151 (HC)
- Rank Film Prodn. Ltd v Dodds* [1983] 2 N.S.W.L.R. 553; 2 I.P.R. 113 (NSW SC, 1984) (cf. *Rafael Hoteles SL*, Case C306/05, [2007] E.C.D.R. 2 (European Ct. of Justice))
- Telstra Corp. Ltd v Australasian Performing Right Association Ltd* (1995) 31 I.P.R. 289 (Fed.Ct.); (1997) 71 A.L.J.R. 1312; 146 A.L.R. 649; [1997] HCA 41 (HC)
- Telstra Corp. Ltd v Desktop Marketing Systems Pty Ltd* [2001] FCA 814 (Fed.Ct.); [2002] FCAFC 112; [2002] 55 I.P.R. 1 (Full Fed. Ct, 2002)
- Universal Music Australia Pty Ltd v Cooper* [2006] FCAFC 187 (Full Court, Fed. Ct)
- Universal Music Australia Pty Ltd v. Sharman Licence Holdings Ltd* [2005] FCA 1242; [2006] FCA 1 (Fed. Ct)

2. **World Trade Organisation Dispute Settlement Body**

Panel Report on United States Copyright Act, s.110(5) (Hon. I. F. Sheppard, AO, Q.C., A.V. Guarion, C.L. Guada) 15 June 2000, ref WT/DS160/R: text available at www.wto.org/english/tratop_e/dispu_e/distab_e.htm, also in WTO Dispute Settlement Reports, (Cambridge University Press, 2008). See also *World Copyright Law* (reference below) para.10.14.

3. **Bibliography**

- Atkinson, Benedict: *The True History of Copyright: the Australian Experience 1905-2005*, (Sydney University Press, 2007)
- Fitzgerald, B., Gao, F., O'Brien, D., Shi, S.X., eds *Copyright Law, Digital Content and the Internet in the Asia-Pacific* (Sydney University Press, 2008)
- Lahore, James: *Intellectual Property in Australia: Copyright* (Sydney, Butterworths, looseleaf 1977 -)
- Sterling, J.A.L.: *World Copyright Law* (Sweet & Maxwell, 3rd ed. 2008). For detailed discussion of the material in Parts II, IIIA and IV above: Chapter 1 (Economic importance of copyright), Chapter 2 (Justification for copyright), Chapter 10 (Limitations and exceptions), Chapter 13 (Digital rights management, orphan material), Chapter 27 (Current issues)
- “The future of copyright: approaches for the new era” online at www.blaca.org.uk/meeting.htm;
- “Space Copyright Law: the new dimension” (also published in 54 *Jour. Copr. Soc’y* (2007) 348) online at <http://www.qmipri.org/research.html>

ANNEX III

Current issues in national, regional and international copyright

(The listing does not purport to be comprehensive.)

SECTION 1: GENERAL ISSUES

- (1) Diversities in national systems
- (2) Diversities in regional systems
- (3) Diversities in international systems
- (4) Application of principles of private international law
- (5) Balancing the interests of rightowners, disseminators and the public
- (6) Discriminatory protection
- (7) Facilities for developing countries
- (8) Creation and use of protected material in Space

SECTION 2: PARTICULAR ISSUES (OTHER THAN THOSE CONCERNING DIGITAL TECHNOLOGY AND THE INTERNET)

- (1) Variations between provisions of national laws concerning:
 - (a) Definition and term of protection of works of joint authorship
 - (b) Definition of place of broadcast
 - (c) Authorship of cinematographic works
 - (d) Ownership of rights in employees' works
 - (e) Scope and content of moral rights
 - (f) Limitations and exceptions
 - (g) Transformative use
 - (h) Rights management and licensing
 - (i) Orphan works and other orphan material
 - (j) Terms of protection
- (2) Lack of international consensus concerning:
 - (a) Protection of databases:
 - (b) Protection of audiovisual performances
 - (c) Protection of broadcasts
 - (d) Protection of traditional works

SECTION 3: ISSUES CONCERNING DIGITAL TECHNOLOGY AND THE INTERNET

- (1) Challenges to traditional concepts
- (2) Challenges to definition and application of rights
- (3) Challenges to exercise of rights
- (4) Challenges to enforcement of rights
- (5) Peer-to-peer file sharing
- (6) User-generated content
- (7) Content aggregation
- (8) Virtual worlds
- (9) Online libraries
- (10) Liability of internet service providers
- (11) Time, space and format shifting
- (12) Protection of technological measures and rights management information

ANNEX IV

The GILA System for Global Internet Licensing: summary

(For fuller description of the System see J.A.L. Sterling “The GILA System for Global Internet Licensing”, online at <http://www.qmipri.org/research.htm>.)

Part A: General

1. Introductory

Administration of licences for the reproduction, communication to the public and distribution of copies of protected material (including authors’ works, performances, sound and film recordings and broadcasts) is in general conducted on a national basis, with reciprocal agreements between administering societies. However, online communication is basically global, and a general licensing system should be available which enables website operators and others to obtain globally effective licensing for the online communication of protected material.

2. Key issue

The challenge is to establish a general licensing system which enables prospective users to obtain permissions covering the online availability of protected material throughout the world, such system to be structured so as to afford a practical and effective means of recognising rights in protected material on the one hand, and on the other hand giving the public an effective means of prompt obtaining of the necessary licences on reasonable terms. The key issue is how to achieve this in a way that will provide legitimation for all forms of use of protected material on the internet, including file-sharing and social networking.

3. Resolution

A central licensing agency should be established to provide global licensing of online use of protected material.

4. Proposal

It is proposed that collecting societies establish a central licensing agency (GILA) empowered to issue global internet licences for the uploading and transmission of protected material throughout the world.

Part B: System operation

A. Main features of the system

1. Establishment of a central internet licensing agency by existing collecting societies, the agency to administer the licensing of use of protected material on demand on the internet (“the internet right”), without territorial restriction.
2. The structure of the system: the rightowner or rightowner’s representative globally mandates a collecting society (which then accordingly mandates GILA) or GILA directly with the administration of the internet right for the material concerned.

3. Material mandated to GILA forms part of the GILA repertoire. Every item in the GILA repertoire has a GILA Identification Number GIN.
4. The GILA home site contains details of all items of the GILA repertoire and of the various categories of available licence.
5. The prospective user applies online for the required licence. If a global licence is required, this is issued by GILA. If a territorial licence is required, the applicant is referred to the relevant rightowner or rightowner's representative or collecting society, where this information is available to GILA.
6. Royalties paid to GILA are distributed to the rightowner, rightowner's representative or collecting society concerned.
7. Structure, administrative procedures and licence conditions conform to competition rules.

B. The licence system in practice

Licences regarding hosting, file storage, file sharing and social networking involving sound recordings or films are taken as examples.

1. Website operator, storer, social networking site operator (e.g. YouTube) and internet connection suppliers (ISPs) apply to GILA for a GILA Internet Licence and are issued with the appropriate licence, with conditions, including payment terms where applicable.
2. An internet user wishing to share files or upload items to a social networking site applies for a GILA File Sharer or File Uploader Licence to cover specific recordings. The licence is issued with conditions, including payment terms where applicable. The File Uploader Licence may be issued through the social networking site operator.

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ANNEX V

**Copyright Act 1968: proposed amendments concerning
orphan works and other orphan material**

PART A: GENERAL

1. Introductory

The modern era demands effective and practical means for obtaining licences for the use of all protected material (including authors' works, performances, sound and film recordings and broadcasts). However, the owners of the rights in protected material may be unknown or untraceable (such material constituting "orphan material").

In the Copyright Act 1968, there are a number of provisions on limitations and exceptions to copyright, pseudonymous and anonymous works, certain unknown or unlocateable sound recording copyright owners (s.113C) etc., but these provisions do not cover all possible cases where use is intended to be made of orphan material.

2. Key issue

The key issue is how to achieve the establishment of the conditions of legitimate use of all categories of orphan material from the inception of such use.

3. Resolution of the key issue

Legitimation of online and offline use of orphan material should, if submitted, be effected by legislative provisions giving the necessary coverage for intended use. It is submitted that eight essential conditions need to be fulfilled in order to provide effective and comprehensive coverage of licensing of use of orphan material, namely:

<u>Condition 1:</u>	Legislative solution
<u>Condition 2:</u>	Conformity to existing legislative structure
<u>Condition 3:</u>	Conformity to international and regional instruments
<u>Condition 4:</u>	Recognition of economic and moral rights
<u>Condition 5:</u>	Provision of remuneration
<u>Condition 6:</u>	Comprehensive coverage of rights
<u>Condition 7:</u>	Operational practicability
<u>Condition 8:</u>	Control of licence terms

In practical terms, two cases need to be distinguished: (1) cases where there is a collecting society which administers the right in respect of which permission is needed for the use of orphan material, and (2) cases where there is no collecting society administering the right concerned.

Existing national systems regarding licensing of use of orphan material include (1) the Scandinavian Extended Collective Licensing (ECL) system, under which national legislation permits accredited collecting societies to license use of non-members' works on approved terms, (2) the Canadian Tribunal application system (Canadian Copyright Act, section 77), and (3) the compulsory licence system (covering published works) under article 67 of the Japanese Copyright Law.² The proposal here made provides comprehensive coverage of both

² For general summary of the problems involved in licensing of orphan material and of the Scandinavian and Canadian systems, see J.A.L. Sterling *World Copyright Law* (3rd ed., Sweet & Maxwell, 2008) paras 12.24, 12.32-12.37. For detailed description of the systems of Scandinavia, Canada and Japan, and of proposals considered in Australia and elsewhere, with comprehensive

cases outlined above and combines the features of the Scandinavian and Canadian systems to provide as rapid and comprehensive means as possible for the licensing of the use of orphan material.³

4. **Proposal**

The national copyright law should provide that a collecting society managing the relevant right may license, under defined terms, the use of orphan material where the relevant owner is (following reasonable enquiry) unknown or untraceable. If no collecting society administers the right involved, the prospective user should be able to obtain the necessary licence through application to the respective judicial entity (e.g. Copyright Tribunal).

The amendments to the Copyright Act 1968 suggested in Part B below concern a system for the legitimation of the use of orphan material, based on (a) administration through a collecting society, or (b) where no relevant collecting society exists, consent obtained through application to the Copyright Tribunal. It is submitted that this proposal conforms to the eight essential conditions listed under 3 above, and as regards Condition 2, the Copyright Act 1968 provides the legislative structure for administration of orphan material by collecting societies (in defined cases and under approved rules). It is emphasised that the proposals are for a basis of discussion, and there may be other forms of amendment to achieve application of these two principles.

PART B: PROPOSED AMENDMENTS

Insert new provisions in the Copyright Act 1968 as follows:

(“Protected material” means any subject matter or performance in which copyright or performer’s right of action exists by virtue of the Act, “declared collecting society” means a body declared to be a collecting society in accordance with the provisions of the Act, and “Copyright Tribunal” means the Copyright Tribunal of Australia.)

Provision 1. Provision that where an owner of a right granted by the Act has not transferred management of such right to a declared collecting society and where the identity or whereabouts of such owner cannot be ascertained by reasonable enquiry, a declared collecting society which manages rights of the same category shall be deemed to be mandated to manage such right in accordance with a licence scheme approved by the Copyright Tribunal and a use covered by a licence validly issued by such society under such scheme as so mandated shall be treated as licensed by such owner.

analysis of the issues involved, see Ian MacDonald “Some thoughts on orphan works”, 24/3 *Copyright Reporter* 152 (October 2006), also available online. See also M. Rimmer “Finders keepers: copyright law and orphan works” (online at <http://www.digital.org.au/alcc/slides/OrphanworksMRimmer.ppt>). For details of US proposals see the US Copyright Office Register’s Report on Orphan Works, January 2006, at <http://www.copyright.gov/orphan>. The US proposals submitted to Congress (lapsed Bills S2913, HR5889) under which claims of persons suing for unauthorised use of orphan material would be subject to limited damages, did not, it is submitted, provide solutions comprehensively recognising the interests of the rightholders and users, since remedies under these proposals were limited by statute in advance, and on initial use the user would be an infringer. No statutory system for dealing with the licensing of orphan material has yet been adopted in the UK: see British Copyright Council proposal at http://www.britishcopyright.org/pdfs/policy/2009_001.pdf.

³ For a parallel proposal in the context of UK law, with detailed description of the operation of the system, see J.A.L. Sterling “Orphan works and other orphan material: proposed amendments to UK Copyright, Designs and Patents Act 1988: the “legitimated use” system” online at <http://www.qmipri.org/research.html>.

Provision 2. Provision (a) that the Copyright Tribunal may on the application of a person wishing to use an item of protected material give consent to such use in a case where the identity or whereabouts of the person entitled to exercise the right to authorise such use cannot be ascertained by reasonable enquiry and where no declared collecting society is mandated in accordance with Provision 1 in respect of management of rights of the category concerned and (b) that such consent has effect as consent of the person entitled to exercise the right to authorise the use concerned.

Provision 3. Provision that no civil or criminal liability under the Act will result from issuing of or acting in accordance with a licence granted under Provision 1, or acting in accordance with consent given under Provision 2.

Provision 4. Provision that a rightowner to whom Provisions 1 or 2 apply has the same rights and obligations resulting from any relevant agreement between the licensee and the licensing body as have rightowners who have transferred management of their rights to that licensing body.

Additional Provisions Provisions concerning relevant functions and powers of the Copyright Tribunal, conditions to apply to licence schemes, claims by relevant rightowners and period within which such claims must be made etc.

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ANNEX VI

Asian Pacific Copyright Association (APCA): suggested structure and procedure

The following is suggested as a basis for discussion in planning the structure and procedure of APCA.

- A. General**
 - 1. Constitution and objective
 - 2. Membership
 - 3. Organs and Officers
 - a. General Assembly
 - b. Officers
 - c. National Groups
 - d. Regional Council
 - e. Executive Committee
 - f. Secretariat
 - 4. Meetings
 - 5. Finance
 - 6. Areas of activity
- B. Planning Committee**

A. General1. Constitution and objective

An association with the objective of promoting, through legislation, dialogue and education, the maintenance and development of copyright and related rights in the Asian and Pacific Region (i.e. that region embracing the countries and territories located in or bordering on the Pacific Ocean west of the International Date Line, including Russia, China, Korean peninsula, Taiwan, Vietnam, Cambodia, Thailand, Malaysia, Singapore, Indonesia, Brunei, East Timor, Japan, Philippines, Australia, New Zealand, Papua New Guinea and Pacific island States, e.g. Fiji).

2. Membership

Membership of the Association to be open to any person or organisation located in the Asian Pacific Region, and interested in the objective of APCA. Associate membership to be open to interested persons or organisations located outside the area (e.g. in Canada, U.S.A.)

3. Organs and Officers

- a. General Assembly of members of the Association.
- b. Officers: President, Vice Presidents, Secretary General: elected by General Assembly.
- c. National Groups consisting of members of the Association located in the respective countries.
- d. Regional Council consisting of the Officers and of delegates of the National Groups, one delegate per country.
- e. Executive Committee consisting of the Officers and of persons appointed by the Regional Council.
- f. Secretariat of the Association, headed by the Secretary General.

4. Meetings

Meetings of the General Assembly, the Regional Council, the Executive Committee and National Groups to take place in accordance with the respective rules of those bodies.

5. Finance

The funds of the Association to be constituted by membership fees, donations and subventions, and administered by the Secretariat.

6. Areas of activity

The areas of activity of the Association to include the following items, as determined and developed by the organs of the Association:

- a. APCA website to include Association documents and material on current issues, national, regional and international developments, etc.
- b. Establishment of common positions of countries of the Asian Pacific Region regarding representations on specific issues in regional and international conferences and initiatives on copyright and related rights.
- c. Research in copyright and related rights laws of the Asian Pacific Region including preparation of "Asian Pacific Copyright Guide" and other material on copyright and related rights.
- d. Participation in international discussions and negotiations concerning copyright and related rights.

B. Planning Committee

A Planning Committee to be established to initiate the steps necessary for carrying forward the proposal for formation of the Association, and the ways and means to accomplish this. Two or more prospective National Groups to found and adopt the constitution of the Association.

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