

If Video Killed the Radio Star... What's the Internet Doing to the Corpse?

In this article, Nick Abrahams and Rob Brown look at recent Australian developments in regard to the licensing of music transmitted via the internet.

Last year alone, it is reported that over \$4 million of pirated music was accessed on the internet.

The internet is the ideal distribution channel for music - frictionless conveyance of IP at virtually no incidental cost. Unfortunately for the owners of the music copyrights consumers have found the benefits before the copyright owners have found the business models to control and exploit distribution. Consequently, copyright owners have waged a war on the companies seeking to profit from their IP and it looks like the battle lines have been extended to include not only peer-to-peer software providers (like Grokster and Napster) but also consumers who flagrantly disregard the laws of copyright. This article examines the nature of copyright in songs, music licensing in Australia and the problems associated with music licensing regimes and the internet.

COPYRIGHT IN SONGS

The Works

The protection offered by the *Copyright Act 1968 (Cth)* ("Copyright Act") ordinarily consists of what are sometimes referred to as the "songwriter's copyright" and the "performer's copyright". The former is made up of the lyrics and the music as literary and musical works respectively (section 31, Copyright Act). The latter is made up of the sound recording of the particular literary and musical work (section 85, Copyright Act). Generally the songwriter's copyright is owned by the writer of the music and lyrics but assigned to a music publishing company. The performer's copyright is generally owned by the record label which produces the recording.

To take one example, The Presidents of the United States of America recorded a cover of the Buggles' song "Video Killed the Radio Star" in the late 1990's. The lyrics are a literary work, the score a musical work, and both the Buggles' and The Presidents of the United States of America's versions as recorded are sound

recordings. The owner of the sound recording in the later version is the music company Sony Music, and the literary and musical work is owned jointly by music publishers, Warner Chappell (50%) and Universal Music (50%). Universal Music owns the sound recording of the original Buggles' version of the song.

The Rights

Permission needs to be obtained from the relevant copyright owners to do anything in relation to the work or sound recording that is exclusively reserved to the copyright owner, subject to certain exceptions. Copyright in relation to literary and musical works, and sound recordings, under sections 31 and 85 of the Copyright Act respectively, consists of the exclusive right to:

- (1) reproduce the work in material form or make a copy of the work ("**reproduction right**");
- (2) perform the work or cause the work to be heard in public ("**performance right**"); and
- (3) communicate the work to the public ("**communication right**").

As well as the more obvious reproduction where a direct copy is made, under section 21 of the Copyright Act, the lyrics and score are reproduced if a sound recording is made of the work. The literary and musical work and sound recording would also be reproduced if converted into or from a digital or other electronic machine-readable form.

Section 27(2) of the Copyright Act provides that "communication" of a work or sound recording does not constitute "performance" or "causing... sounds to be heard", so that where the communication right is being exercised, the performance right does not apply. Accordingly, where one is considering online licensing, it is only necessary to consider the communication and reproduction rights.

The communication right is a technology neutral right of communication to the public. Communication is defined, under

section 10 of the Copyright Act, to mean "electronically transmit" or "make available online". The right will include active communication (eg webcasting) and passive communication (eg downloading of audio files on request). "To the public" is defined to mean the public within or outside Australia, potentially catching both foreign websites providing access to songs to Australians, as well as Australian websites providing access to songs to foreigners, although it will not catch wholly foreign activities.

The Infringements

In determining whether there has been an infringement of copyright it is necessary to ascertain where the activity which constitutes the infringement has taken place. Sections 36 and 101, in relation to literary and musical works, and sound recordings, respectively, provide that copyright is infringed by a person who, not being the owner of the copyright, does in Australia, or authorises the doing in Australia of an act comprised in the copyright. Consequently, it will be necessary to ascertain whether an act constituting an infringement has occurred in Australia. Obviously, determining whether an act occurs in Australia is particularly problematic in relation to the internet where many acts are cross-jurisdictional depending on the location of the host server, proxy servers and the user's computer.

In considering whether there has been an authorisation of an act comprised in the copyright, sections 36(1A) and 101(1A) list a number of factors to be taken into account. These include:

- (1) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (2) the nature of any relationship existing between the person and the person who did the act concerned; and
- (3) whether the person took any reasonable steps to prevent or avoid the doing of the act, including

whether the person complied with any relevant industry codes of practice.

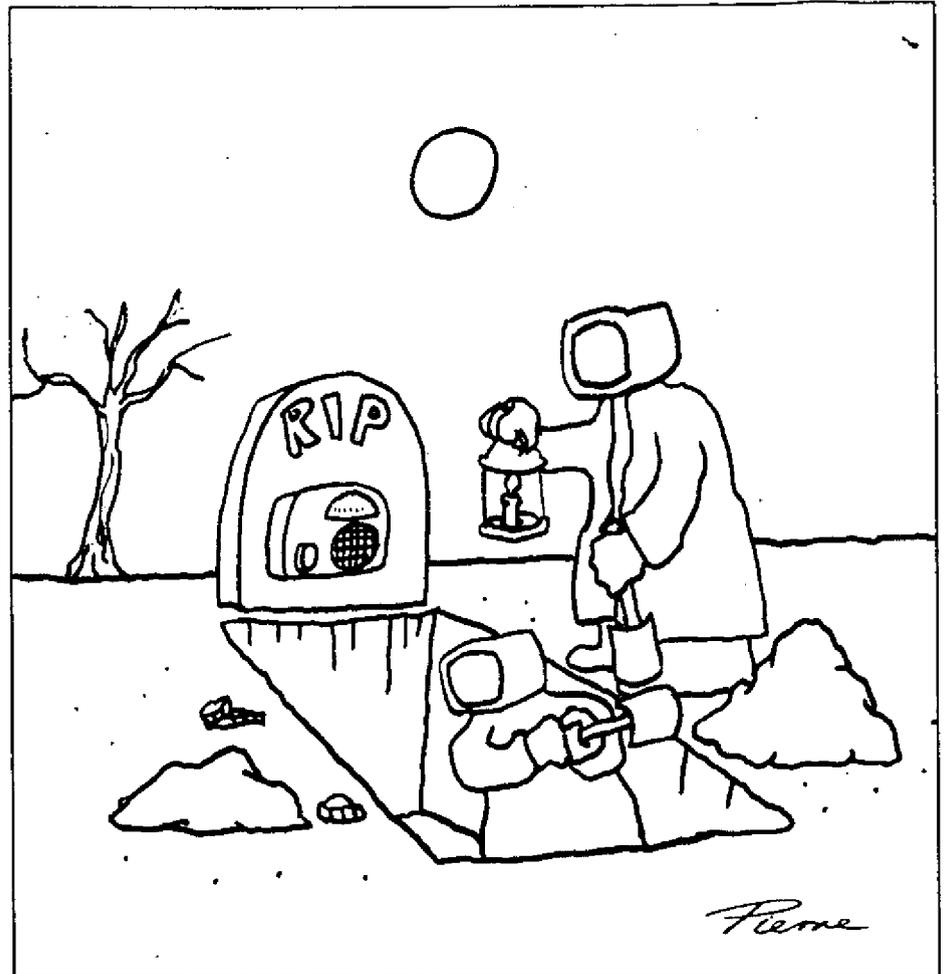
Despite the above provisions, the authorisation issue remains important for content providers and content conduits, who must consider what their users are able to do and whether they have the power to stop their users infringing copyright.

MUSIC LICENSING AND THE INTERNET

The internet allows songs to be copied by individuals and organisations into digital form, authorised or otherwise, and then accessed by any internet user via file share, download or stream (where no reproducible copy is stored on the end-user's personal computer). In a bid to stop the pirating of music via the internet recording companies commenced proceedings against software companies such as Grokster and Napster which developed file swapping software. The recent failure of one such high profile case in the United States against Grokster and Streamcast has resulted in some indications from recording companies that they intend to target individuals next. While this seems a drastic step, it should be said that the recording companies are not taking a purely defensive approach to licensing music on the internet. The difficult issue is that a business model for licensing music on the internet is not only technically difficult but is also legally complex.

The licensing of music on the internet is made legally complex as a result of the multiple copyrights contained in each song. For example, if a company was going to make the Buggles version of "Video Killed the Radio Star" available via the internet, they need the permission of the owners of the literary and musical works (Warner Chappell and Universal Music) and also the owner of the sound recording (Universal Music). To clear the rights for every song individually would be an administrative nightmare, so copyright permission and royalties are dealt with by collecting societies.

Traditionally, collecting societies have given permission and collected copyright royalties on behalf of copyright owners for both offline and online use. In Australia, the relevant collection societies for the licensing of copyright are the Australasian Mechanical Copyright Owners Society Limited ("AMCOS"); the Australasian Performing Right Association Limited ("APRA") and the Phonographic Performance Company of Australia ("PPCA"). APRA licenses the



right to perform/communicate musical and literary works to the public and AMCOS licenses the right to reproduce musical and literary works. Any complication that arises from this distinction is ameliorated by the fact that APRA acts as an agent for AMCOS and actually grants licences that are specific to an activity, such as operating a radio station or playing music in a pub, which cover the performance/communication and reproduction rights to both the musical and literary works contained in a song. The PPCA represents the owners of copyright in the sound recordings and licenses the performance/communication right in the sound recording.

Internet Licences

APRA/AMCOS have developed a large number of licence types to cover the different types of ways that songs are used on the internet. The licences cover, amongst other things, the following types of internet based song use by websites:

- preview clips of songs;
- looped background music;
- on-demand clips and works; and
- streamed radio services.

APRA/AMCOS have also indicated that

they are willing to arrange licences for copyright use not currently covered by one of their licences. At this time PPCA has not developed blanket licences for the communication and reproduction of copyright in sound recordings on the internet. Consequently, it is necessary for the user to obtain a specific licence directly from the owner of each sound recording made available on the internet.

Website operators wanting to use music on their sites will therefore need a blanket licence from APRA/AMCOS for all songs used and an individual licence for each song from the owner of the sound recording (generally the record labels directly).

CONCLUSION

While it may take some time, we can be certain that the music industry will weather this storm as it has weathered so many others in the past (blank tapes, pirate CDs etc.) and will emerge with a workable business model balancing user experience with economic benefits.

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MUSIC RIGHTS IN AUSTRALIA

