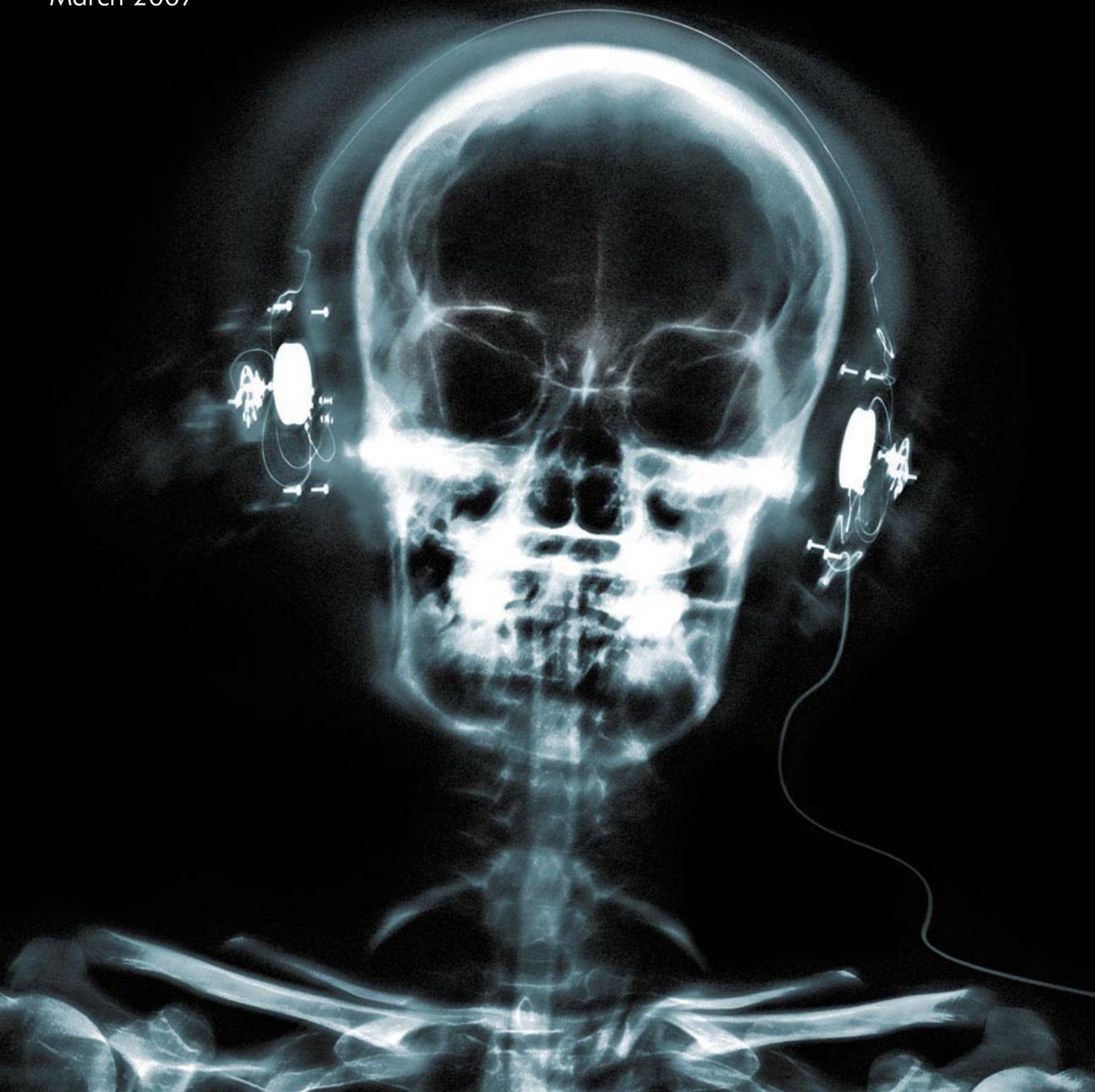


Technology, the Australian contemporary music industry, copyright law and the future.

by Ben O'Hara

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Key Issues

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

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

The copyright owner in the music or lyrics has a number of exclusive rights which are as follows:

- To reproduce or publish the work in a material form This allows the owner(s) of the copyright to reproduce a recorded or printed version of the work. This also means that the owner is the only person who can make a copy of the work on CD or cassettes and — thanks to recent Digital Agenda Amendments — the only person who can make digital copies of the work, or allow someone to do this on their behalf.
- To perform the work in public This right allows the songwriter to perform or cause their songs to be performed live. This, in turn, will generate a royalty.
- To communicate the work to the public This involves causing the work to be broadcast via the radio, television, mobile phones or via the internet. Again, thanks to the digital agenda amendments, the Copyright Act has moved away from technology-specific wording such as 'diffusion' or 'broadcast'.
- To translate or make adaptations to the work Granting permission to make other changes to the work is the sole right of the copyright owner. The copyright owner must also approve changes such as alterations to the lyrics or major modifications in the way the work is presented. The owners of the copyright in the actual sound recording have their own copyright protection. The rights of the copyright owner of the sound recording are as follows.
- To make copies of the master recording This is the right that makes it illegal to burn copies of CDs. Only the owner of the copyright in the sound recording is able to copy the recording.
- To cause the recording to be heard in public
- To rent out the master recording
- To communicate the master recording to the public

A closer inspection of these rights reveals why the recording industry is currently so challenged by the internet, CD-burning and digital downloading. The owner of the sound recording is usually the person who paid for that recording — commonly the record company and the performing artists. Record companies derive their income from the exploitation of master recordings, but new technology has created a situation in which it is difficult for them to control these recordings. The introduction of new technology has allowed anyone to make a copy, distribute that copy and anyone can communicate the master recording to the rest of the world via the internet. This is an enormous source of frustration for record companies. Copyright laws state that *they* as the owner of copyright have the right to exploit the communication of master recordings, yet millions of people are breaking those laws every day.

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

In recent years there have been a number of changes to the copyright act, which have all had the intention of strengthening the protection offered to the owners of copyright and the changes were made as an attempt to keep pace with the changing world and technology. The next section will briefly consider the major changes such as the digital agenda amendments, the USA/Australia Free Trade Agreement and the recently proposed 'Fair Use' laws. All of these changes introduced a number of effects on copyright law, there are too many to consider here, so I will concentrate on the changes that had the greatest effect on the music industry.

The digital agenda amendments came into effect on 4 March 2001 (Australian Copyright Council, Digital Agenda Amendments Information Sheet.) Key amendments highlighted by the Australian copyright council include 'a "broad-based technology-neutral" right of communication to the public, which both subsumes and extends the previous broadcast and cable rights.' Also introduced were 'provisions allowing copyright owners to take action in relation to tampering with electronic rights management information' and 'provisions dealing with the circumvention of technological protection measures.' None of these changes have really saved the music industry from the threats posed by new technology. The introduction of technology neutral wording, like changing 'broadcast' to 'communication', has allowed the industry to collect licences fees on internet radio and other online broadcast channels, but only from those who are willing to play by the music industry's rules. The majority of those who were flaunting copyright law before the amendments continued to do so afterwards.



On 16 August 2004, the Australian Government assented to the US Free Trade Agreement Implementation Act 2004 ("Implementation Act")(Simpson 2006). The Implementation Act does as its name suggests - implements the amendments necessary to the law in Australia as a result of the signing of the Australia-United States Free Trade Agreement. The Implementation Act introduced significant changes to the Copyright Act 1968 that directly impact on the music industry. New performer's rights were created and the duration of copyright protection was extended for most copyright material. The former length offered for protection was fifty years after the death of the creator. The implementation act extends this to seventy years. This alteration to the copyright act, while on the surface does little to protect copyright owners; it does have a significant impact considering that the 'Rock and Roll' was born in the mid to late 1950's. The birth place of today's music industry was about to become public domain so these changes were welcomed by the music industry. However the implementation act did little to offer further protection from digital downloading and CD burning, all it did do was ensure that the Disney corporation and those publishers who had rights in music by artist like Buddy Holly were able to continue to collect their income, business as usual.

In May 2006, the Australian Government announced they would introduce changes to the *Copyright Act* to include a provision for fair dealing. A close inspection of the media release from the Attorney-General's Department reveals that there are a number of proposed changes but the introduction of 'time shifting' and 'format shifting' are the most likely to impact on the music industry.

Time Shifting is a concept that allows users to legally record television and radio programs to enjoy at a later time. This practice has been around for years with the public taping TV shows and watching them later or taping radio programs that contain copyright protected materials. The changes to the law mean that the general public can do these things without breaking the law. However, the proposed changes to the act state that you are only allowed

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to view your 'time shifted' program once and you are then required to delete it and it is only applied to private users who are using the time shifting for personal use. The law has not been changed to allow unauthorised copies to be made for private use, copies can just be time shifted once

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

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

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

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

In 2003, Australia saw one of its biggest copyright infringement cases go to court. Three students from the University of Sydney were accused of providing digital copies of songs on the internet without the express permission of the copyright owners, nor payment of royalties to the owners of the copyright in the songs that they offered. The students' website, *MP3 WMA Land*, operated for about two years until the Music Industry Piracy Investigation

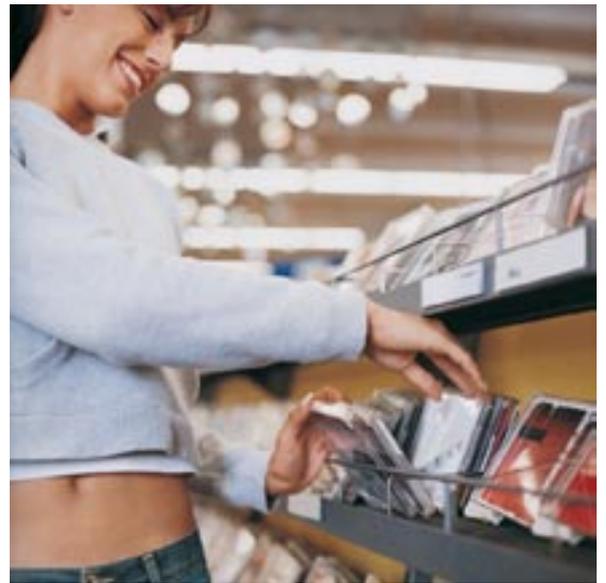
(MIPI), moved to shut down the website. (MIPI is an organisation committed to stopping music piracy in Australia and is jointly funded by the major record companies and publishing companies.)



According to James Pearce's article 'Aust Music Pirates Sentenced' (2003), MIPI alleged that the students' website had facilitated over \$60 million worth of illegal downloads of music to users all over the world. The defendants pleaded guilty and were given suspended jail sentences, ordered to attend community service and each fined between \$1000 and \$5000. MIPI and the record companies were disappointed at the leniency of the sentences. Despite the possible size of the infringement

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

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



The music Industry had a similar level of success with MIPI vs.

Stephen Cooper, the operator of a Web site called MP3s4free.net. Coopers website did not offer illegal downloads directly, rather he offered links to other sights that contained illegal downloads. The court ordered Cooper to remove the links but only required Cooper to pay costs.

Another major recent copyright case is that between ARIA and Sharman Networks. ARIA contended that Sharman, which owns the software Kazaa, was encouraging people to use file-sharing to obtain copyright-protected music. Sharman’s defence was that the Kazaa software allows users to exchange files of all descriptions. They said that they don’t encourage the exchange of copyright-protected materials and that was is no way they could control what users chose to exchange on their networks. ARIA claimed that Sharman could stop the exchange of copyright-protected materials by either banning those kinds of files being exchanged or by disabling Kazaa’s shareware program altogether. In late 2005 the judge ruled in favour of the record companies and required Kazaa to use pop-up windows to force users to upgrade their Kazaa systems to a new version that would include a copyright filter, which would disable the sharing of copyright protected works.

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

There are also a number of non copyright law methods that the music industry has considered it help it combat the rise of technology, for several years, record companies have been trying to perfect a system so that their CDs are playable on all sorts of CD players but are not able to be copied or shared and the music industry has long been a proponent of a blank media tax. Starting as far back as the introduction of cassette tapes, there has been talk of introducing a tax on blank media (such as blank CDs). The aim is to compensate the owners of copyright for the losses they have endured due to the widespread use of blank media for copying their recordings. The price of blank CDs (or other media) would go up and the extra money would go to those whose work is being copied. Marcus



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Breen, in his book 'Rock Dogs, Politics and the Australian Music Industry' argues that the blank media levy could never really work. He points out that Australia is a signatory to a number of international copyright conventions and that other signature countries;

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

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

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

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

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

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

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

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