

Australian Copyright Regimes and Political Economy of Music

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Abstract In this chapter I review the history of copyright in Australia through a singular and exemplary ruling of the Australian High Court made in 2012 and then relate that to the declining fortunes of Australian recorded music professionals. The case in point is Phonographic Performance Company [PPCA] of Australia Limited v Commonwealth of Australia [2012] HCA 8 (hereafter, HCA 8 2012). The case encapsulates the history of copyright law in Australia, with the judicial decision drawing substantive parts of its rationale from the Statute of Anne (8 Anne, c. 19, 1710), as well as copyright acts that regulated the Australian markets prior to 1968. More importantly the High Court decision serves to delineate some important political economic aspects of the recorded music professional in Australia and demonstrates Attali's (1985) assertion that copyright is the mechanism through which composers are, by statute, literally excluded from capitalistic engagement as 'productive labour'.

1 Context

The aim of this chapter is to map the history of copyright law in Australia against the changing political economic fortunes of its recorded music professionals. During the development of the work, the decision on the 1 % royalty cap for Australian commercial radio was handed down by the High Court of Australia (2012). Royalty caps regulate the amount that can be claimed by collection societies for performance royalties on musical works.

The 1 % cap on the broadcast of recorded performances was first legislated as part of the *Australian Copyright Act* (1968), the Commonwealth statute that has

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since governed intellectual property rights in Australia. It limits licensing claims for the broadcast of recorded works to 1 % of a commercial radio licensee's revenue. The basis of capping arrangements (from the perspective of radio) is that the Australian royalty collection societies (APRA, AMCOS, CAL, Screenrights, and PPCA) have historically been seen as monopolies, that broadcasters fall under a compulsory licensing arrangement, and that a cap is therefore necessary to protect the commercial radio industry from extortionate claims against their revenues by publishing and recording companies (Atkinson 2007). The body that coordinated the defense for commercial radio in the High Court case is the peak industry body, Commercial Radio Australia (CRA). Its public position on the cap and role of radio is that they are champions of local musicians, invest billions in airtime to promote artists, and defenders against the profiteering of 'multinational record companies':

As usual Copyright has been an area of challenge and focus for the entire industry with the simulcast case heard in the Federal Court in October 2010 and the 1% cap copyright case that went before the High Court in May 2011. We are currently waiting for judgement to be handed down in both cases, but have argued consistently that both of these issues are about increasing the profit margins of multinational record companies at the expense of local commercial and public radio stations. The commercial radio industry pays close to \$25 million a year in copyright fees and supports Australian artists in many ways to promote and sell their product. This all adds up to billions of dollars in airtime and promotion. (CRA 2012a)

The mainstay of commercial radio revenues in Australia is, of course, advertising (CRA 2012a)). In effect, the business model of commercial radio consists of the production of audiences for sale to advertisers (Smythe 1981: 25). For most commercial radio licensees, the raw material they use to build their audiences is music (APRA 2012). Of course there are a number of other ways in which to view the same business model: from a contemporary marketing theoretical perspective, the radio stations are "selling" a specific segment of the music catalogue (music as service) to a pre-existing 'market demographic' (for example, youth, adult, family, Christian, ethnic, etc.). In this view, the audience pays for the service by listening to advertisements and revenues from advertising subsidises the audience's free 'listening' to their music of choice. However, the marketing view obscures a number of facts: (1) that commercial radio does not sell anything to audiences; rather, it sells audiences to advertisers (Smythe 1981); (2) that in the production of its audiences, music is commercial radio's primary production factor – its raw material; (3) that the music broadcast on radio is chosen by commercial radio to produce the largest and best defined audience for sale to a specific class of advertisers; and (4) that it is quite plausible to argue (as with the explosion of youth culture in the 1950s and 1960s) that contemporary demographic and psychographic categories are, in large part, a function of the way radio and mass media more generally has segmented its "markets"(audiences) over the last five decades.

Commercial radio often presents itself as 'marketing' (selling) to the audiences it actually creates:

The combination of the Group's superior listener driven programming, high profile on-air personalities and dual capital city networks has enabled Austereo to capture a market share of 54.7 per cent of the lucrative under 40 demographic. (Village Roadshow 2001)

(...) radio continues to perform well in a very competitive media marketplace. The uptake of digital as an indicator of future success has also been pleasing with listening figures continuing to grow and consistently more products available for consumers. (CRA 2012a)

In some cases the industry presents itself as a passive medium that simply connects advertisers with existing 'consumer' demographics:

With radio, advertisers have the chance to sell wherever a consumer is listening. This could be in the kitchen, bedroom, bathroom, dining room, over the work bench, in the garden, at the beach or the football, in the car, in a shop, an office or a factory. The medium keeps up with the busy lifestyles of today's consumers. Radio gives advertisers the freedom to be as creative as they like, without the huge production costs and lead times. (CRA 2012c)

Yet I argue that these are fundamental and convenient confusions because the 'market' to which commercial radio sells, and from which it draws almost all of its revenue, is clearly the advertisers it charges for access to the audiences it creates. Advertising the value of radio advertising to advertisers is a core function of Commercial Radio Australia (CRA). When speaking to its actual market, commercial radio displays no confusion about its business whatsoever:

The eighth industry wide on-air Brand Campaign 'Smart Marketers use Radio' was comprised of marketing experts discussing marketing objectives, efficiency and effectiveness. The campaign aired four to five times a day with regular creative updates to maintain a fresh appeal for the listeners.

In the second half of 2010 the campaign went on air with the key message 'Radio Advertising, Australia's Listening' and featured 'That Radio Bloke', with the key message; Commercial Radio reaches over 16 million Australians in an average week. The campaign was on air until November 2010 across all metro commercial radio stations. (CRA 2012a)

By construing audiences as "markets" rather than products, CRA obscures the basis of its members' operations: the Commonwealth grant of an "exclusive use" license to use publicly owned electromagnetic spectrum for commercial purposes. Such licenses are, in essence and effect, a lease of real estate (Graham 2006). They provide commercial radio the use of publicly owned property to generate revenues, are exclusive, and occupy a specific geotechnical space. By casting its audience in the role of "market" (albeit it one that never makes a purchase) radio can convincingly describe itself as providing a public service, promoting artists, supporting the arts, and providing a free information service to listeners (CRA 2012a).

2 Platemakers, Common Good, and the One Percent Cap

An historical view of copyright law in Australia brings us inevitably to the Statute of Anne, a mercantile era law passed in 1710 that was premised on a common good associated with the relationship between publishing and public learning. The High

Court's decision on the 1 % cap was made in the context of the 1968 Act. Here is part of the High Court's response to the challenge:

(...) speaking generally the 1911 Act, like the Statute of Anne, took into account and balanced the interests of authors, entrepreneurs and the public. The public's interest lay in the dissemination of copyright works, including dissemination on reasonable terms. Any detailed consideration of the historical context of the Statute of Anne supports this construction of its intent and its provisions. (HCA 2012)

Anne is unambiguous on the public pedagogical function of copyright law. Its title declares it to be 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies (...)' (8 Anne, c 19). It is also clearly anti-monopolistic:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books (...) that [the statute] be enacted. (8 Anne, c 19)

The clear intention of Anne was to assert protections for authors against the market dominance of monopolies that had historically been held in Britain by the printing guilds (Ochoa and Rose 2002). Its rationale was the common good derived from the publication of new works and the public learning associated with that dissemination. An important underpinning assumption of the act is that monopolies stifle innovation (Ochoa and Rose 2002). That the High Court draws on Anne for its historical force is ironic. The bulk of copyrights in Australia (as elsewhere) are owned by an oligopoly of massive corporations. That fact is also noted by the High Court in its decision:

The second to fifth plaintiffs [Sony Music, Warner Music, EMI Music, and Universal Music PG] are the owners or exclusive licensees of copyright in numerous sound recordings, including sound recordings made prior to 1 May 1969. They collectively control (as owners or controllers) the majority of sound recordings which have been commercially released in Australia in the last 70 years. (HCA 2012)

So on one side of the 2012 decision there are massive global oligopolies in recorded music copyrights, and on the other, oligopolies in local, state, and national media properties. Australia is known for its intense level of media ownership concentration. CRA purports to represent 99 % of Australia's commercial radio businesses. Its constituency involves 260 commercial radio licensees but it notes that:

In recent times there has been a consolidation of radio station ownership. Commercial member radio stations are now owned by over 30 operators, with 80 per cent of the stations formed into 12 networks. (CRA 2012b)

The unintended irony of the High Court decision can be understood as good law only if, as Attali (1985: 98) argues, a music recording has been seen historically as a special kind of writing by lawmakers. That appears to be the case in the current

decision which reasserts the validity of separating compositional copyrights from those that subsist in recorded works. The decision refers to the Australian copyright Act of 1911 (which was replaced by the 1968 Act), noting that ‘the 1911 Act granted a copyright to record manufacturers, which was expressly conflated with the copyright of authors and composers of original musical works’ (HCA 2012). Following the Westminster Act of 1956, which ‘distinguished between copyright in works, including musical works, and copyright in subject matter other than works’ and ‘which included separate identification of the nature of copyright in sound recordings’, the 1968 act clearly distinguishes between the rights pertaining to composition and those that pertain to recording (HCA 2012). The net result of this was to give the corporate “person” making the recording a separate but similar status to that of the person who composed the work. The central analogy drawn in the decision in respect of record duplication is the notion of the “plate maker”, a technical concept that has its origins in printed media.

The High Court sidesteps impacts upon composers, performers, and individual (i.e. non-corporate) record producers that may extend from its decision. The underpinning argument associated with the identification of platemakers as authors is one based on capital outlays. It is a hidden syllogism that owes its force to liberal economic constructions. The decision cites the following passage in the 1911 Act:

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from **the making of the original plate** from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work. (Imperial Copyright Act, 1911, cited in HCA 2012, my emphasis)

Besides being construed as a kind of mechanical authorship, the plate maker’s right draws its special place in copyright from the common good aspect of Anne. The unspoken economic argument that underpins that part of the decision runs like this: there is significant capital investment involved in the plant and equipment required to make an original recording and its subsequent copies. It is in the common good that these services continue because they contribute to public learning. They cannot continue without statutory copyright protection that allows them to profit from their authorship and protects the property aspect of the ‘plate’. As I show below, privileging the plate maker in current circumstances ignores the dramatically lowered cost of producing and disseminating recorded musical works brought about by the widespread availability of digital production technologies and the fact that every digital recording is now the equivalent of a plate in terms of its potential to generate high fidelity copies.

3 Creative Serfdom and the Compulsory License

A major difference between the 1911 Act and the 1968 Act, and a central object of PPCA's case against the Commonwealth and its co-defendants, is the 1968 introduction of a compulsory broadcast license and an associated fee-based blanket protection against copyright infringement. While the Imperial Act of 1911 included a blanket compulsory recording license for published works, it also provided the right for any copyright controller to refuse public performance of a work, regardless of whether it was recorded or not. This resulted in a need for broadcasters to seek and negotiate individual rights for every recorded work. It was this discretionary power, held by both composers and record manufacturers that broadcasters spent the following decades trying to undo.

APRA was formed in 1926 to provide a blanket licensing system of copyrights to broadcasters and a collection services for composers. However the right still existed for any author (including a record manufacturer) to refuse or withdraw the right to broadcast any work. This right caused havoc for broadcasters in 1931 when Australian record manufacturers withdrew the right to broadcast any music whatsoever because the record companies, at the height of the Great Depression, believed that airplay had killed off record sales (Atkinson 2007, chap. 6). It was during the ensuing copyright wars that the framing of copyright collection societies as voracious monopolies became entrenched in the construction of national and international copyright legislation ever since (Atkinson 2007; cf. Attorney General 2005).

Atkinson (2007: 169) summarises the Government's views on the dispute as follows: "APRA, a virtual monopolist backed by the law, had too much negotiating power. Thus the problem [the Federal Government] tried to solve was how to ameliorate the bargaining position of the commercial users of music". But the case put forward by the record manufacturers was compelling:

Not only did the radio stations seem to satisfy popular demand for music, they also broadcast so often that listeners, so the record companies said, grew sick of hearing the same song and would not purchase records. Although the associated manufacturers ruled the field, they could point, as proof of their argument, to an 80 per cent fall in sales between 1927 and 1931. (Atkinson 2007: 172)

Negotiations between broadcasters and manufacturers followed the airplay ban and the manufacturers settled with the broadcasters on cumbersome terms:

They required the B. Class stations to discontinue request items, announce the maker of there cord and full particulars of the record, state that copyright was reserved, broadcast only records of the associated manufacturers, limit the number of times a record was broadcast, limit broadcasts of records issued prior to the ban to once a week, and pay a broadcast fee. (Atkinson 2007: 176).

Broadcasters also continued to do battle with APRA over its fees and conditions. Atkinson points to the May 26 report on APRA delivered to the Federal government by the Association for the Development of Wireless in Australia (ADWA) (Atkinson 2007, chap. 4). The government's ear was finely tuned to hearing

criticism against APRA because it had especially targeted the publicly funded A-Class licensees and had, variously,

(...) claimed up to 21 percent of the broadcasters' net revenue in license fees, withdrawn consent for the playing of popular works, prevented the broadcast of more than two numbers from an opera in a single radio program, restricted to four the number of times per week that popular items could be played, claimed twice for the same performance and claimed fees for the performance of works out of copyright. (Atkinson 2007: 132).

It is in this context of ongoing industrial warfare against APRA and the record manufacturers that the broadcasters first recommended a legislated broadcast royalty cap: "Australia should advocate, at the 1928 Rome Conference to revise the Berne Convention (...) to permit members to limit the amount of royalty payable by broadcasters" (Atkinson 2007: 134).

The development of the 1968 Act, which continues to govern copyright in Australia today, took decades. According to Atkinson (2007, chap. 11), only at rare and exceptional times during those decades did debate turn towards the effects of the legislation upon composers and other artists. Labor Party figures, Gilbert Duthie and Rex Connor, were notable in their efforts to promote the rights of artists and composers while decrying the new legislation for its almost singular concern with balancing the rights of corporate parties: publishers, broadcasters, record manufacturers, and collection agencies, with some thought being given to the library and education sectors and none to the consuming public (Atkinson 2007: 316–319).

Section 109 of the 1968 Act gives broadcasters a blanket protection against copyright infringement. That protection works in conjunction with section 152 which sets the 1 % limit for commercial broadcasters based on annual revenue or, for the national broadcaster, the ABC, one half of 1 % multiplied by the most recent population statistics as determined by the national bureau of statistics (Australian Copyright Act, 1968, sect 109).

Despite the 2012 High Court decision reaffirming and relying on the 'public learning' motive of copyright, it is clear that the development of this act is essentially corporatist in nature, with the sole emphasis being on balancing the rights of large-scale monopolies in the copyright owning, using, and collecting businesses. The Act goes some way to defining the corporate intent of its effects, referring to the rights of qualified individuals, meaning "certain individuals and 'a body corporate incorporated under a law of the Commonwealth or of a State'" (HCA 2012).

Following the passing of the 1968 Act, the broadcasters' rights included a blanket exemption against copyright infringement in return for a maximum 1 % share of broadcast revenues for recorded music and a publishing royalty payable to APRA of between 0.5 % and 3.76 % of revenues (Attorney General 2005). For composers and performers of music, the Act established the Australian Copyright Tribunal to mediate disputes and stipulated Ministerial discretion in the establishment of collecting societies, including APRA, PPCA, and AMCOS, as monopolies with the sole right of collection for, respectively, publishing royalties, performance

royalties for recorded works, and mechanical royalties. Other organisations that make up the Australian collecting societies landscape include the Australian Recording Industry Association (ARIA), which licenses its members' music videos; Screenrights Australia, which licenses "use and retransmission of TV and radio programs", including underlying musical works; and Copyright Australia Limited (CAL), which licenses reprints of musical scores (Simpson and Munro 2012: 495).

The national monopoly system of remuneration for copying and broadcasting musical works, alongside the associated compulsory license for broadcasters and their blanket exemption against infringement, places individual producers of music in an unusual political economic position, especially at a time in which recording technologies are freely available and the potential to produce infinite numbers of high-fidelity copies is commonplace.

Under the 1968 Act, as soon as a new recording is made in Australia it becomes a limited property right for any and all Australian broadcasters. While the broadcast attracts a royalty, the payment for it is automatically collected by a national system of monopolies whose function it is to redistribute those payments to copyright owners and controllers, neither of which are copyright originators, at least where the bulk of royalty distributions are concerned (HCA 2012). The products of the composer, once rendered mechanically reproducible, become a by-product of Commonwealth legislation: "copyright does not subsist otherwise than by virtue of this Act" (Australian Copyright Act, 1968). That sentence has two functions. First, it vacates the 1911 Act. Second, it reasserts a very old position that has been in contention since the framing of Anne: that there is no such thing as common-law copyright. Ochoa and Rose (2002) report the London booksellers' long running argument against limiting the term of copyright that had the following form:

Labor, they maintained, gave authors a natural right of property in their works, a right that lasted forever just like a right in a parcel of land or a house; and this right passed undiminished to the booksellers when they purchased literary works from authors. The Statute of Anne merely provided supplemental remedies to an underlying common-law right that was perpetual (...) (Ochoa and Rose 2002: 683)

This argument was finally put to the House of Lords after three decades in *Donaldson v Beckett* (1774) and defeated (2002: 683). However, the judgement was close and "the most widely cited report of the case indicates that while seven of the eleven judges believed there was a common-law copyright that survived publication, a bare majority of six believed the common-law right had been divested by the Statute of Anne" (Ochoa and Rose 2002: 683). Nevertheless, since Anne, copyright is routinely assumed at law only to have existed by virtue of Statute and has no recognised common-law basis. The HCA 2012 decision reiterates that position:

It was settled in *Donaldson v Beckett* that copyright in published works depended upon statute, not the common law, and that the Statute of Anne limited the exclusive right of an author or owner of the copyright to multiply copies of an original published work so as to balance that right against the public interest in freedom to have access to, and to exploit,

such works. It can be noted that the American copyright tradition exemplified in *Wheaton v Peters* follows *Donaldson v Beckett*. (HCA 2012, para. 95)

Note that in this reading, the ‘public learning’ motive of copyright is replaced with “freedom to have access to, and to exploit, such works”. This is a clear discursive shift away from a ‘public learning’ view of the public good because the right to exploit is never the public’s, according to the Act; it is the right of copyright controlling businesses. Also, it is worth noting that the ‘public learning’ aspect of copyright can no longer be vested solely in the corporate sector, nor even in the record producing (‘plate-making’) sector: the means of public dissemination at the time of the 1911 Act framing involved mass production and sale of recordings and printed scores. However, with the advent of radio, the task of dissemination was most efficiently done by broadcasters. Today, with globally connected digital media, the test of most efficient means of public learning necessarily falls to that giant media complex.

As far as recompense for labour goes, the composer is in a unique position in political economy (Attali 1985: 98–101). Far from being able to participate in Capital as a worker whose labour is bought in return for wages (“a fair day’s work for a fair day’s pay” as the Unionist’s slogan goes), the composer forgoes wages in return for a share in the value of the usage of their copyrights. This share is not only limited by national legislation, the composer’s work is only recognised as being his or her own by virtue of the same statute through which the composer’s remuneration is determined. In both senses, the composer is a creature whose political economic stature is wholly determined by the state. This extends further for musicians more generally, whether as composers or performers. Regardless of where musicians perform, what they perform, or in which context their work is done, they enter into a complex web of national and international rights dominated by monopolies on all sides.

It is of note that current estimates of musicians’ average annual earnings in Australia range between \$12,000 and \$15,000, well below the national poverty line (cf. APRA 2011; Deloitte Access Economics 2011). No small part of this generally impoverished state can be slated to what can only be described as a kind of serfdom in which the composing musician is entirely beholden to State and Statute for legitimacy of their property rights and for the determination of just remuneration for usage of that property. In no other sector of the economy are returns to an originator of new products capped at a percentage of the turnover of an entire industrial sector that uses the originators’ products as a primary factor of production.

4 The International Context of Australian Copyright Law

To make sense of the way copyright law has been formulated in Australia it is necessary to understand that the country is historically, as Atkinson (2007, chap. 10) notes, a copyright *using* market. Australia's early copyright laws were written by Imperial Britain in order to protect British rights. That tradition continued into the 1968 Act with US and British companies dominating negotiations on the side of the record companies. The status of Australia as a 'net importer' of copyrights, a situation decried by the framers of the 1911 Act, was either neglected or not understood by the framers of the 1968 Act (Atkinson 2007). The 1968 Act can be seen as being made, at least in large measure, on behalf of foreign interests, namely the foreign dominated record companies who, at the time of the Act's framing, were responsible for 80 % of all recorded music broadcast in Australia (Atkinson 2007: 325).

That fact has multiple implications. First, the Act must be understood as having been developed with the interests of foreign copyright owners in mind, at least as far as production is concerned. Second, because of that, the Australian composer is placed at a disadvantage, especially if they find themselves outside the care of major recording and publishing companies. Third, among the international treaties to which Australia is a signatory is the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) which first extended copyright to the makers of records and other mechanical forms of reproduction. One of the most heated and ongoing arguments in Australian music is around the notion of Australian content in broadcasts (see, for example, Mason 2005). While there are percentages stipulated by media law for all terrestrial broadcasters, there are ongoing battles between CRA and various music lobby groups with CRA continually pushing to reduce the level of mandated Australian content (CRA 2012a). While CRA puts forward numerous reasons as to why it fights to reduce the quota, including lack of demand and lack of quality, Atkinson argues that it is a simple financial equation: the bulk of our copyright use as a country, at least as far as music goes, comes from the US. The US is not a signatory to the Rome Convention. Therefore it is simply cheaper for CRA members because they save 1 % of the costs charged to play material on air when that material is from the US (Atkinson 2007, chap. 9).

The hostility of CRA stations towards Australian music was briefly broken down in 1970 when the major labels banned supply of free airplay copies to radio. The commercial broadcasters responded by banning play of UK and Australian records made by the major labels. This had the result of giving a new crop of local artists recorded by small labels success through opportunities for airplay that they would otherwise have not had (Milesago 2012). The ban was short-lived and was over by the end of 1970.

5 Political Economy of Music and the “Unproductive” Producer

I define political economy here as the study of how values of all kinds are produced, distributed, exchanged, and consumed (the economic); how power is produced, distributed, exchanged, and exercised (the political); and, empirically, how these aspects of social relations and everyday life are organized and enacted. Political economy of music is therefore concerned with understanding how music figures in political economic formations more generally (cf. Graham and Luke 2011).

Besides Attali (1985), there have been almost no attempts to understand how the music industry operates as a political economic system. This, in part, is due to the historically marginal role music has played as an economic force (Marx 1844/1975), with Marx, for example, suggesting that in *Capital*, musicians typically performed as unproductive workers who did not and could not typically add to *Capital* through wage-based extraction of surplus value (Marx 1844/1975).

That remains the case in current circumstances, which leads to a paradox. Over the last 30 years, cheap digital technologies have facilitated an utter explosion in the number of records produced both in Australia and worldwide (Graham 2005, 2012). Throughout the 1970s and early 1980s, recording facilities were expensive and relatively rare, costing around A\$2,000 per day. The prohibitive cost was merely part of a larger complex of barriers. Throughout the early development of twentieth century broadcast political economy, commercial music threw up technical and price barriers to production, distribution, promotion, and exchange that kept most people from outside the major corporations away from the serious business of producing commercial music. At the end of the 1970s, a number of changes in the legislative, technical, and commercial fields were gathering momentum and began to impact upon the structure of commercial music in Australia. The first of these, and most apparent to professional musicians of the day, was the sudden drop in the cost of production technologies. Here we see the inverse economic logic of the music sector at work (Graham 2005): unlike other fields, production barriers were the first to fall rather than the last.

The first herald of things to come for music production was the cheap supply of multi-track recording (four-track on cassette tape) technologies aimed at consumer and semi-professional users, with Tascam introducing the Portastudio 144 in 1979. At around the same time, in 1982, the MIDI standard was established, which provided the capacity for synthesizers, drum machines, and music sequencers to be synchronised using a common communications protocol, thus paving the way for powerful home studios based on affordable synthesizers, drum machines, and midi-to-tape synchronisation devices.

Combined, these early technological developments facilitated the establishment of a large number of home music production facilities and an increasing number of skilled number of music producers, which in turn radically changed the structures of entry into the recorded music business. Suddenly, rather than having to rely on advances from publishing or record companies, the skilled musician or composer could develop ‘demo’ quality recordings at home.

By 1985 the technological push into production technologies brought the cost of broadcast quality recording to under A\$ 100,000. Developments in MIDI and its interaction with SMPTE, the entrance of Teac/Tascam half-inch 8 track recorders, Fostex's B series 16 track recorders, and the appearance of devices which could be used as cheap, high quality two track master recorders such as Hi Fi VHS decks combined to give logarithmic improvements to the quality of 'home' recording.

In 1987, sales of vinyl records were superseded by cassette tape sales of recorded music. For the first time since the earliest days of recording technologies, the dominant medium of dissemination was recordable in the home. It had taken recorded cassette tape sales 24 years to reach their brief zenith, along with a familiar and related set of 'piracy' concerns emanating from the majors that resulted in a copying levy being applied to the retail price of recordable cassettes. Audio quality would have one more brief triumph in the marketplace with the sudden rise of compact discs (CDs) as the most popular medium in about 1990. Around the same time, sampling technologies also dramatically dropped in price. Digital sampling opened the entire recorded catalogue to 'remix', sparking new definitions of copyright and revealing many issues in the ownership and authorship of past recorded works that had gone largely unconsidered by legislation (O'Brien and Fitzgerald 2006).

Alongside these changes in the technical landscape, the developed world led a charge into free-market ideology, beginning in 1979 with Thatcher and followed closely by Reagan in 1981. In Australia this move had its fullest effects for commercial music with the *Australian Broadcasting Act* of 1992. Like other former British colonies such as Canada, Australia had in place until 1992 a cultural protection system that specified the re-recording of foreign-produced advertisement soundtracks to replace soundtracks with locally performed music and voiceovers. These and other laws changed in favour of free trade and anti-protectionist policy, greatly affecting the structure of the Australian music industry. Simultaneously, the 'gentrification' of inner cities and the rise of public insurance costs led to fire and noise regulations that had the effect of closing innumerable music venues (Johnson and Homan 2003).

Combined with legislation allowing poker machines into hotels and clubs throughout the country, these large and small policy movements had the effect of making an already difficult existence practically unlivable, and many formerly full-time musicians had to find alternative employment (Johnson and Homan 2003). Overall, the effects on music industry and business in Australian capital cities were devastating. Just as the means to produce broadcast quality music came within reach of almost every professional musician, large parts of the profession disappeared (ABS 1997, 2009, 2011; Johnson and Homan 2003). The decline of broadcast political economy can be characterised as one of a diminishing full-time workforce, reduced budgets for soundtracks in film and television, increased use of 'stock' library music in advertising, increasing competition and price pressure from new entrants using cheaper technologies, closure of venues, and the consequent general implausibility of professional musicianship in the prior patterns of broadcast political economy.

Here are some key statistics according to the Australian Bureau of Statistics (ABS) that demonstrate a simultaneous decline in employment in the Australian recorded music industries and a rise in productive activities since 1995:

In 2001, over 17,000 people in Australia had a music occupation as their main job. Of these, almost half (48%) were music teachers, 38% were instrumental musicians ($n = 6,460$ PG) and 8% were singers ($n = 1,360$ PG). Over three-fifths (62%) of these people had an annual income of less than \$30,000 a year. (Australian Bureau of Statistics 2007)

In 2006, the national census lists 29 musicians and 11 composers being employed full time in the recorded music industry (ABS 2010). In 1995, there were:

(...) about 500 organisations in Australia involved mainly in recorded music in 1995–96, with 54% ($n = 270$ PG) being sound recording studios, 28% record companies and distributors, and 13% being music publishers. These organisations employed almost 4,000 people and generated income of around \$1,000 million. (ABS 2007)

By 2006, according to the latest available figures from ABS, there were 855 recording studios, 561 of which were non-employing and 294 that employed people:

Music royalties paid by Australians to individuals and organisations in overseas countries totalled over \$200 million in 2005–06—by comparison, music royalties paid to Australians from overseas countries were only about a quarter of this amount. (ABS 2007)

These figures indicate an almost threefold increase in the number of commercially active production facilities (recording studios) alongside a similarly large drop in the value of national output and an almost total decimation of full time employment in recorded music. This is not, of course, solely the function of copyright law. On the live music front, fire, poker machine, noise, anti-smoking, and drink driving regulations have all played a part in the decline of opportunities for musicians (Johnson and Homan 2003). The Australian Broadcasting Services Act put great pressure on the Australian commercial music business with the almost instant effect of put great pressure on Australian commercial music with the almost instant effect of reducing demand for recorded music in advertising and other commercial activities that were formerly associated with cultural imports. The proliferation of new and cheap recording technologies not only drove down the value of recorded music, it required musicians to take on a whole new range of skills.

6 The 2012 Decision and Some Conclusions

PPCA challenged the 1 % cap on the grounds that it was unconstitutional. It claimed that the 1968 Act exceeded the grasp of the Australian Constitution by acquiring new property rights without “just terms” (HCA 2012). However, just terms were never addressed in the decision because of that part of the 1968 Act which extinguished the Imperial Act of 1911: “copyright does not subsist otherwise than

by virtue of this Act". Having decided that all copyrights prior to 1968 had been extinguished, the question of just terms never arose (HCA 2012).

The High Court followed the key assumptions of Anne to the letter, just as the 1968 Act did and the 1911 Act before it. The irony of doing so eluded the Court which reasserted Anne as the basis of copyright in Australia 300 years after the legislation had been passed, along with the idea that originators of new copyright have no common law right to the fruits of their own labour. The Statute of Anne was drafted to protect authors from the power of the printing and publishing monopolies that had developed over centuries in Britain. That aim was lost in the final drafting of the 1968 Act. The rationale for copyright in Anne was the common good of public learning that was assumed to flow from the availability of new books and for authors to draw revenues from publishing. For music, the introduction of the recorded medium put distributive power in the hands of the record manufacturer. Radio quickly supplanted the record manufacturer as the most efficient distributor of new musical content, thus shifting the emphasis on 'public learning' away from record manufacturers and towards the broadcaster. The legislative upshot is that broadcasters were seen to require protection as the assumed custodians of public dissemination. In Australia, as elsewhere in the developed world, both recorded music and broadcast media became the subject of vast monopolies during the course of the mid twentieth – early twenty-first centuries, with concentrations of ownership increasing yearly.

Paradoxically, despite adverse legislative conditions for recorded music professionals almost everywhere, production of music has increased exponentially, with an estimated 97 million songs listed in the Gracenote data base by 2011 (Resnikoff 2011). Public access to these has also increased logarithmically through the proliferation of internet technologies and social media. These two facts not only challenge the idea that copyright is necessary to promote the production and dissemination of new ideas and sources of cultural expression; combined with rapidly declining incomes, they entirely challenge the notion that copyright has the effect of protecting composers against the might of industrial monopolies (see also, Atkinson 2007, chap. 1). In other words, the aims of the Statute of Anne, which is an enduring basis of contemporary Australian copyright law, are no longer met in current conditions. Instead, the livelihood of composers seems steadily to be disappearing, at least according to official statistics, while monopoly is supported by copyright at every level.

All of these points to a radical rethink of how copyrights can be framed to support Australian composers and Australian cultural production more generally. Given the continuing power of broadcast media and the mass proliferation of new works, national collecting societies are utterly essential to the future of composition in Australia. Whether or not the question of 'just terms' where the various Australian royalty caps are concerned will be addressed any time soon remains to be seen. Though a more important question is likely to be how such revenues are distributed in the support of local music composition and production.

The question of a common law right to own and exploit one's own creations may yet again be addressed, but perhaps next time it will not be publishers leading the

charge. The legislative recognition of a common law copyright would fundamentally change the nature of composers' negotiations with broadcasters, ISPs, publishers, recording companies, and film makers, especially where remuneration and copyright periods are concerned. The idea that anything other than a blanket license could function in mass societies is nearly impossible to justify or even imagine. However the terms on which such licenses are given are quite possibly open to a challenge on the basis of restraint of trade, just terms, and price-fixing issues.

The future of Australian recorded music professionals is unclear and there seems no clear or easy path to creating a legislative environment in which that class of professionals can thrive in any great numbers. Of course, legislation is by no means the only answer to the problems faced by Australian music producers. Education, properly organised publicity, and a widespread refusal to work for nothing would be a healthy start on the part of music professionals.

The various paradoxes and ironies of the HCA 2012 decision that I have highlighted here suggest that the current Australian copyright regime has a very limited life. Australian music producers are protected to the extent that they are a) part of one or more of the monopolies involved in the history of Australian copyright; and b) close enough to the centre of the recording industries that they can acquire a steady flow of paid work. This is not to suggest throwing the baby out with the bathwater. It is, however, essential for the cultural and economic health of the nation to increase the ability to Australian musicians to earn a living, and to the extent that copyright legislation is responsible, it must inevitably be changed.

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