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**Digital Agenda Review  
Technology and Rights**

**Submission by the  
International Disc Duplicating Association  
(IDDA)**

**on  
Expanding the Statutory Copying Privileges  
to  
Registered Authorised Organisations  
(RAO)**

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## Overview

- 1.1 Major technological change particularly relating to digital distribution of information, music and video requires major changes in both legal and economic ideas. Although changes have been made to the Commonwealth *Copyright Act 1968* (**the Act**) came into effect in March 2001 as well as amendments by the *Copyright Amendment (Digital Agenda) Act 2000* (**Digital Agenda Act**), these changes do not address the core problems facing some industries, particularly the music industry.
- 1.2 The Commonwealth Government committed to reviewing the legislation within 3 years of its commencement that is, March 2004, giving Australia an opportunity to respond to change to technological and economic forces.
- 1.3 The core issue raised by this submission by the International Disc Duplication Association Incorporated, hereafter referred to as the IDDA, is that the present legislation is too restrictive as to obtaining the rights to distribute and copy copyright material, limiting both the ability of copyright holders to maximise their returns and the ability of the public to access this material.
- 1.4 Division 2 of Part VA of the Act provides for the statutory licence scheme for the copying or communication of broadcasts by educational institutions. The making of a copy and each communication is remunerable under that licence.
- 1.5 The IDDA proposal is that future changes to the Act should extend and widen the statutory copying privileges presently allowed to educational institutions to **Registered Reproduction Organisations**, which are strictly supervised commercial and other organisations, who will be responsible for paying rights holders at commercial rates.
- 1.6 The IDDA proposal is rather advanced in some quarters of the music industry, so the IDDA suggests that the regulations governing this proposal be rather onerous, so that any who wish to become a **Registered Reproduction Organisation**, will need to satisfy strict criteria, giving an element of control to existing interests. These criteria can be changed as needed.
- 1.7 There is a large unsatisfied demand for the legal availability of customised discs and downloaded music, ie discs with a selection of music tracks chosen by the customer.
- 1.8 The IDDA is an International Organisation that advocates matters of interest to the compact disc duplicating industry, with over 120 members throughout the world. For information on the IDDA please refer to the website <http://www.discdupe.org/i/> .

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## 2 The Proposal

### 135\*\*\* Single and Multiple reproduction and communication of works that are in analogue, electronic or digital form by Registered Reproduction Organisations

- 2.1 Reproductions that are made by a **Registered Reproduction Organisation** will not be considered as infringing the copyright in a literary, dramatic or musical work, provided that the **Registered Reproduction Organisation** makes payment to the relevant collection agency at agreed commercial rates.
- 2.2 The **Registered Reproduction Organisation** must have a current certificate of registration from the relevant collecting society; and
- 2.3 The **Registered Reproduction Organisation** is able to convince the relevant collecting society that shall make, or cause to be made, a record of the making of each such licensed copy that is carried out by it, or on its behalf, while the certificate is in force, being a record containing such particulars as are prescribed; and
- 2.4 The **Registered Reproduction Organisation** is able to satisfy the relevant collecting society that timely and accurate report will be submitted of each and every reproduction or communication made; and
- 2.5 The **Registered Reproduction Organisation** is able to demonstrate to the relevant collecting agency that it will be able to pay the license fees when due.
- 2.6 The **Registered Reproduction Organisation** shall retain that record of the making of a licensed copy for the prescribed retention period after the making of the copy to which it relates, which record may be kept in writing in accordance with the prescribed form, or in any other manner prescribed; and
- 2.7 The **Registered Reproduction Organisation** shall send copies of all such records to the collecting society in accordance with the regulations.
- 2.8 These regulations should be drafted in consultation with the relevant collection agencies and representatives of the rights holders.

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### 3 Operational Matters

- 3.1 A **Registered Reproduction Organisation** will be able to reproduce copyrighted material either online or digitally, such as on CD or DVD. The IDDA has a particular interest in enabling its members to reproduce onto disc, and realises that for the changes to be fair and effective, online reproduction would also be legitimised. It is presently possible for a disc duplicating organisation to produce a customised CD with any selection of songs, including a printed disc label, customised case inlay for a few dollars. Add a compulsory license fee of about 20c per track, postage or retailers margin, and the entire product can be sold for under \$20.00, even allowing for a retailer margin.
- 3.2 One of the justifications for the illegal downloading and personal burning through peer to peer networks is the dearth of customised music, ie. A selection of tracks decided by the customer. The customer is forced to buy a full disc of several tracks, even though they really only want one or two of the tracks.
- 3.3 A **Registered Reproduction Organisation** will need to satisfy the various stakeholders that it will keep proper records, be able to pay the copyright holders, be able to maintain high quality standards, and offer an efficient and timely service.
- 3.4 Commercial rates for music track will need to be negotiated between the stakeholders, the collection agency and the **Registered Reproduction Organisations**, and in the event agreement can not be reached the matter will be dealt with by the Copyright Tribunal.
- 3.5 Radio stations and other communication organisations have the right to broadcast music without in each case obtaining the permission of the rights holders. They account to the rights holders through a collection agency. This proposal is really an extension of this system.

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## 4 Advantages of an expanded Statutory License System

- 4.1 Very few people would agree that the present system, under threat from peer to peer networks and other file-sharing systems, home CD and DVD burners, the Internet and sharing MP3 files, can and will survive without major changes to both the present music publishing system and the legal system.
- 4.2 The IDDA Proposal can be adapted to include the traditional music retailers, who can participate in the proposed wider distribution model.
- 4.3 Technological Protection Measures all have the same basic weakness, namely what one person can build, another can, with sufficient time and ingenuity bypass. Technological Protection Measures have many purposes, from delaying unauthorised reproduction to emphasising copyright ownership, but cannot be relied upon to protect digital rights.
- 4.4 Legal restraint requires first the ability to find, then apprehend the unauthorised users, followed by suitable punishment, both of which are almost prohibitively expensive to pursue, except to show as examples.
- 4.5 There is a popular belief that the present copyright law favours the powerful at the expense of the public, who have no alternative legal sources of some material at reasonable prices, and therefore legitimising and trivialising unauthorised copying in their minds. A satirical look at the copyright confusion which is also an indication of how the can be found at [http://www.nytimes.com/imagepages/2003/09/16/arts/20030916\\_POPLIFE\\_IMAGE.html?8hpib](http://www.nytimes.com/imagepages/2003/09/16/arts/20030916_POPLIFE_IMAGE.html?8hpib).
- 4.6 The greatest problem facing any organisation that wishes to reproduce copyright material is obtaining permission from all the stakeholders or copyright owners of that material. For example for even the music publisher to give permission to an organisation to make copies of a song will require contacting the artist(s), producer(s), writer(s) and others, a very expensive and time consuming operation. In many cases due to time and cost restraints if and when all the permissions have been obtained, the project is abandoned. This means that the copyright holders as well as the public lose. A compulsory or statutory license will solve this problem.

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## 5 Answers to objections to the Proposal

### The IDDA Proposal is not within the review criteria.

- 5.1 When introducing the Copyright Amendment (Digital Agenda) Bill 1999 (**the Bill**) into the House of Representatives on 2 September 1999 the Attorney-General, the Hon Daryl Williams AM QC MP, proposed that the operation of the legislation be reviewed within 3 years of commencement. The Attorney-General said:

The amendments provided by this Bill are at the cutting edge of online copyright reform, and clearly place Australia among the leaders in international developments in this area. As a result, in certain areas of the Bill we are entering uncharted waters. New technologies are changing rapidly and we wish to ensure that an appropriate balance is maintained between the rights of copyright owners and the rights of copyright users under the Copyright Act.

The IDDA Proposal is definitely at the cutting edge of online copyright reform, and would clearly place Australia among the leaders in international developments in this area. By strict supervisory regulations for a **Registered Reproduction Organisation** it should be possible to fend off objections to the IDDA Proposal that could arise from the rights of copyright owners and the rights of copyright owners, as well as satisfy the demands of international agreements.

### The IDDA Proposal will not be of benefit to rights holders.

- 5.2 The objectives of the Digital Agenda Act were to:
- ensure the efficient operation of copyright industries in the online environment through promoting financial rewards for creators and investors, providing a practical enforcement regime, and providing access to copyright material online;

The IDDA Proposal would definitely promote financial rewards for creator and investors, providing a practical easily enforceable regime, and increasing access to copyright material online.

- updating, and appropriately extending to the digital environment, the exceptions to the exclusive rights of copyright owners (including educational and other statutory licences);
- the introduction of new enforcement measures;

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## **The IDDA Proposal will not reduce piracy, and even make it harder to enforce digital rights.**

- 5.3 By only allowing reproduction by a **Registered Reproduction Organisation** it will be easier to find and prosecute unregistered reproduction organisations, as well as gaining public support for prosecuting unregistered reproduction organisations as the public would not perceive such prosecutions at protecting the “big boys”.

The main purpose of the Government’s review of the digital agenda reforms is to assess whether these objectives have been achieved. This requires analysis of whether the elements of the reforms implemented to achieve those objectives are working well, or whether further changes are needed to ensure the objectives are met.

The .. purpose and focus of the review is to consider whether the objectives of the Digital Agenda Act are being met, from legal, economic and technical perspectives.

This paper also looks at the operation of the amendments made by the Digital Agenda Act and whether these amendments have managed to keep pace with recent technological developments which is an overarching objective of the reforms.

The Digital Agenda Act was part of the Government’s strategic framework for the development of the information economy in Australia. It forms the Government’s main initiative in addressing the challenges for copyright posed by rapid developments in communications technologies. The reforms were identified as an important part of establishing a legal framework to encourage online activity and the growth of the information economy.

On one hand, creators and owners of copyright material were concerned to ensure that they retain effective means of redress or remuneration in relation to use of their copyright material on the Internet.

The central aim of the Digital Agenda Act is to ensure that copyright law continues to promote creative endeavour whilst allowing reasonable access to copyright material on the Internet and through new communications technologies.

As part of its review, Phillips Fox must consider the operation and effect (including legal, technological and economic effects) of key aspects of the reforms and whether the policy objectives underpinning the reforms have been achieved. One of these objectives is to ensure that an appropriate balance between the rights of copyright owners and users is maintained.

In no way could the present system be considered as a success, either from the perspective of the music publishers facing falling sales and profits, the artists who could lose the promotional and marketing power of the failing publishers, as well as losing out to unauthorised reproduction, or the users who are limited in the availability of customised albums or selected music, or who risk criminal sanctions from using peer to peer sharing or customised home made CDs.



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## Who gains economically?

- 5.4 Before any party is given an exclusive entitlement to a particular market or activity, it is necessary to consider all the various interests involved in order to determine the best and most economically efficient allocation of rights.

The distribution model of the 20<sup>th</sup> Century where 75% of the worlds' music was distributed by 5 major companies is changing. According to the Sydney Morning Herald in an article by journalist Kirsty Needham, titled "Last blast for the music moguls", on Saturday 13 September 2003, Forrester Research analyst Josh Bernhof predicts the major labels will end up simply promoting bands and wholesaling music to internet companies, while record stores will "close by the hundreds".

This scenario is probable without changes to the legal situation, such as the IDDA Proposal. Under the IDDA Proposal the major labels will continue as they have done, except the actual replication (which some majors are already doing, by Warner selling off their CD manufacturing and distributing business in July this year). The IDDA Proposal merely allows other manufacturing and distribution models to enter the market, with the income from the digital rights flowing back to the major and minor labels, and other rights holders, who will be able to continue much as before, but with some changes to their distribution plan.

## The IDDA Proposal will not help the major labels.

- 5.5 Conflict between different interests is not a new issue for regulation generally, or intellectual property rights regimes particularly. However, new technology has brought the issue to the forefront again by highlighting what the economist Richard Posner has described as "the essential dilemma in crafting a sensible, efficient regime"<sup>1</sup>, namely:

- Creating strong exclusive rights in new technologies may enable the owners of those rights to obtain profits that are out of proportion to their investment, or to inhibit distribution and access and impede further development; but
- Denying protection or imposing a weak regime may discourage further (or any) investment in those new technologies, or in the creation of new distribution channels.

The 20<sup>th</sup> Century concept that only the copyright owners have the automatic right to produce, reproduce, market and benefit from the digital rights of their artists is a major flaw in current copyright law. The IDDA Proposal will allow the major labels of change their distribution model to one where they can concentrate on finding and promoting talent, and then collecting and administrating license fees.

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<sup>1</sup> Posner, Richard, "The Law of Economic and Intellectual Property", *Daedalus*, Spring 2002, p. 5.

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## **The IDDA Proposal will diminish the value of the property to existing users.**

5.6 Additionally, in contrast to most forms of property, allowing more users access to existing intellectual property does not usually diminish the value of that property to existing users. Economists refer to this cost of adding another user as the ‘marginal cost’. For many digital materials, the marginal cost is very low or even negative.

Allowing other organisations to reproduce and distribute copyrighted material will give greater distribution, with more return to rights holders. There are many examples of companies that have held their intellectual property rights too closely, (such as Sony who with a superior Betamax lost the market battle with VHS). By expanding their distribution, rights holders will benefit.

## **The IDDA Proposal will not reduce costs to consumers.**

5.7 However, when intervening in the market to create and maintain sufficient incentives, care must be taken to discourage, or at least minimise, what economists call “rent seeking”. “Rent seeking” occurs where people with a particular interest seek economic intervention by the government that is biased toward their special interests. The cost of the intervention is often greater than the benefit to society, which can lead to market distortions, reduced innovation and greater costs to users.

The apparent so called “rent seeking” attitude of the major labels who have sought intervention by the government to help maintain an unsustainable status quo at the expense of society cannot continue.

## **The IDDA Proposal will not increase incentives to create intellectual property.**

5.8 Accordingly, this review will consider the extent to which the reforms implemented in the Digital Agenda Act:

- significantly increase or reduce incentives to create intellectual property;
- encourage or discourage rent seeking, or otherwise create or offset additional social costs;
- enhance or jeopardise the operation of the underlying technical processes that are integral to the operation of the Internet and the growth of the information economy;
- promote the widespread use of the materials and increase markets; and
- hasten the flow of materials into the public domain, “as cheap raw material for future creators of intellectual property”.

By allowing wider reproduction rights to authorised supervised organisations, the government will best achieve the above goals.

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## The IDDA Proposal will create international problems.

5.9 Australia is a signatory to various international agreements which prescribe minimum levels of protection for copyright materials. Those agreements include the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971); the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS, 1994); and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 1961);

Australia's interest in ensuring that its intellectual property regime remains compatible with that of its major trading partners; and

that other legislation relies upon copyright concepts as presently defined; in particular, other intellectual property regimes (for example Designs and Circuit Layouts) and the taxation system;

The likely consequences of abandoning without good reason earlier judicial interpretations of the text of relevant legislation; and

The likely consequences of introducing a large number of transitional provisions.

By strict supervisory regulations for a **Registered Reproduction Organisation** it should be possible to fend off objections to the IDDA Proposal that could arise from international agreements. A **Registered Reproduction Organisation** should be considered as authorised to make legitimate copies under the proposed amendments to the act.

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## Appendix A – Glossary of terms

**Registered Reproduction Organisation (RRO)** means an organisation that has been granted a license under the terms of this act to reproduce licensed material and to account to a relevant collecting society in terms of this act.

**agreed notice** means a remuneration notice specifying that the amount of equitable remuneration payable to the collecting society by the administering body giving the notice is to be assessed on the basis of an agreed system.

**collecting society** means the body that is, for the time being, declared to be the collecting society under section 135P.

**records notice** means a remuneration notice specifying that the amount of equitable remuneration payable to the collecting society by the administering body giving the notice is to be assessed on the basis of a records system.

**relevant copyright owner** means the owner of the copyright in a work, a sound recording or a cinematograph film.

**remuneration notice** means a notice referred to in subsection 135G(1).

**rules**, in relation to the collecting society, means the provisions of the memorandum and articles of association of the society.