

# Technological developments in the music industry

Randall Harper examines the implications for copyright law and contracting in the music industry

of recent developments in technologies and argues the legislators should be more pro-active.

**W**ith the advent of digital technology, the past five years have seen vast and rapid developments both in the style of music being recorded and the manner in which it is distributed. The use of computer technology and digital recording methods has seen the emergence of new and exciting genres of music, the boundaries of which are limited only by the creativity and vision of our artists.

Even more dramatic have been the rapid developments communications technology systems. Twenty years ago, things like home banking computers and direct to residence entertainment systems were just dreams. However, modern communications technology has changed that and these developments are likely to have a profound effect on the structure and dynamics of the music industry as we know it today.

## Digital technology

**A**ll of these new technologies involve digital recording reproduction and transmission techniques. Compact disc has now become by far the dominant physical carrier, all but eliminating vinyl as a viable product. Digital audio tape (DAT) was touted some years ago as being the natural successor to CD due to the inherent flexibility of tape over disc formats, particularly for recording purposes. It has, however, now been virtually conceded that DAT is unlikely to evolve into a product for public consumption and will remain a professional product for studio use. In the short term the music industry sees digital compact cassette (DCC) as being the next major leap forward in product development.

While these technologies present great opportunities they also give rise to some problems. The challenges posed by CD and DCC technology revolve around the flexibility and more efficient re-recording opportunities that digital technology offers. CD and DCC constitute, effectively, a first generation master standard which means that any copy of an original CD or DCC will also be of the highest order in

terms of quality. This will undoubtedly lead to increased home taping.

Gone are the days when one needed to have a \$5,000 hi-fi system and use chrome tapes to replicate an acceptable reproduction quality from an analogue sound recording. Digital recording techniques mean that quality virtually equivalent to master standard can be achieved with the most inexpensive of home entertainment systems. In addition, digital tracking enables a home tapper to pick and choose what tracks they wish to record with great ease. Thus, the home taping problem is likely to escalate dramatically.

As the quality of CD recordings do not degrade as readily as vinyl recordings, we are also likely to see the emergence of record rental as a major challenge. During the past eighteen months there has been quite a large increase in the number of rental outlets operating throughout Australia. Given the Japanese experience, where there are currently some 6,000 record rental outlets, it is easy to see why the industry is so concerned. Unfortunately, the federal government has been very slow to react to the threat of record rental and even today is equivocating about legislative action.

## Pay for play

**I**n the short term we will see the introduction of DCC and a progressive shake-out of current product lines so that eventually we will just have CD and DCC as the only carriers. These carriers and technologies by their very nature will lead to many new and exciting marketing opportunities.

In the long term, however, I believe communications technologies will have a far greater impact on the music industry. Optical fibre cabling offers the ability to deliver music and other entertainment services in an extremely fast and efficient manner without any degradation of quality and theoretically with a virtually unlimited capacity.

The so-called 'black box', whereby a consumer will subscribe to an entertainment service provider by means of his home computer and the public telephone system may seem fanciful but

the reality is that the technology for such systems already exists. With the use of integrated computer technology it will also be possible for consumer to dial up a music provider, select the music required, and down-load that music onto a CD or DCC.

This may mean that record companies will act as entertainment service providers distributing their catalogue of recordings via communications technology and not via a physical medium such as a CD or DCC. Partnerships and mergers between record and communications companies can also be expected.

The recording process itself is likely to change as well. Traditionally artists record albums of music because that is the medium by which music is traditionally distributed. If however there are no physical carriers but rather music is distributed electronically will artists still record the obligatory 10 track 40 minute album?

## Copyright problems

**T**he revolution in technology will also require a revolution in copyright law and the manner in which creators of music go about protecting their rights. One of the most important developments in this regard is the concept of a blank tape royalty scheme.

Australia has been leading the way in the development of a blank tape royalty scheme although it is currently stalled due to a constitutional challenge. Moves to introduce similar schemes in the United States and United Kingdom have also been stalled at government level.

However, recently in the United States the music industry and hardware manufacturers negotiated a deal relating to the use of DCC technology for the distribution of music. Essentially the hardware manufacturers have agreed to the imposition of a blank tape royalty and a royalty on the sale of hardware in return for record companies making their software available to the technology. However the royalty at this time only applies to digital audio and video tape and players with digital capability. The scheme is currently before the USA

Congress and should see a speedy passage.

In addition, the hardware manufacturers have agreed to incorporate a serial copying code in their equipment. This effectively inhibits reproduction of a recording so that it is only possible to reproduce from an original version of the sound recording in question. It is not possible to take a copy and then copy from the copy.

The fact that electronic transmission knows no borders will also present major problems requiring a radical rethink about territorial divisibility of copyright.

### Reactive not pro-active

**T**he current *Copyright Act* was enacted in 1968 drawing largely from the 1911 Act. Consequently, much of the language and many of the concepts enunciated and embodied in the Act evolved from the very beginning of copyright and fail to deal adequately with changes in the way copyright material is exploited. In particular, technological developments are simply not catered for by the current Act. Consequently, our copyright law is reactive to technological change, rather than being pro-active.

For example, under current copyright law (in relation to sound recordings) copyright is said to be the right to reproduce a sound recording, broadcast a sound recording and publicly perform a sound recording. There is no diffusion right afforded sound recordings, therefore it does not constitute a breach of copyright to transmit a sound recording down a telephone line. Similarly, there is no record rental right so that it is not an infringement to exploit a sound recording by means of rental. By defining copyright rights in exhaustive terms such as these, and in particular by reference to a specific act or technology, problems will always exist. Copyright law must get away from this and start talking in terms of protecting the exploitation of copyright material.

Why does it matter that the use is either a reproduction, broadcast or public performance? Surely if a sound recording is being commercially exploited then the copyright owner should be remunerated accordingly and/or have the right to control that exploitation.

The music industry recognises that copyright infringement will continue to pose major problems and has begun developing a system whereby original sound recordings can be identified by means of a unique number encoded in the digital code of the sound recording. The code constitutes digits that identify country of source, company, and the

recording in much the same way that bar codes are structured. The code system is being developed by the International Federation of Phonographic Industry (IFPI) and is known as the International Standard Recording Code (ISRC). The system enables copies of a recording to be identified quite readily and when fully introduced will be of enormous benefit in enforcing copyright rights.

### Tracking use

**H**owever, the main benefit of the ISRC does not lie with copyright protection, but rather in offering a way in which the legitimate use of sound recordings can be tracked for the purposes of remunerating copyright owners. If the 'black box' does evolve, or indeed if record rental is legitimised, the ISRC will enable each and every use made of a particular recording to be tracked and identified. There will no doubt be many marketing uses to which such statistics could be put, but most importantly it will enable not only the record company and publisher to be remunerated for the use but will provide an effective system by which to calculate and pay the appropriate royalty to their artists and songwriters.

Details of each access to a recording would be collected by the service provider or on 'smart cards' which the consumer would require for access to the service. The statistics would then be collated and analysed for the necessary and appropriate royalty computations.

The ISRC system has now been fully developed by IFPI and is ready for implementation. Indeed I understand that all major companies are now using the code and it is now about to be implemented in Australia by the Australian Record Industry Association for Australian companies and recordings.

### Contracts

**B**y and large recording contracts are structured around an artist rendering their exclusive recording services to the record company to produce albums and for the record company to have a right to exploit those albums in any manner appropriate. In exchange the record company pays the artist a royalty based on the sale of records. Most recording contracts will incorporate a clause dealing with sundry or ancillary income, broadcasting and public performance royalties but usually this is couched in very general terms and therefore presents some problems.

We are already seeing an increase in the amount of broadcasting and public

performance income and, if the blank tape royalty scheme ultimately becomes operational, substantial income streams from this source will also be realised. Additionally, if the government enacts record rental and diffusion rights we are likely to see further large revenue flows from such rights. Consequently, sundry income clauses or royalty provisions dealing with such matters can no longer be simply left as an after-thought. Music companies will have to make provision in their contracts for appropriate remuneration to their artists. Moreover, record companies will need to begin developing accounting systems to cope with their obligations to remunerate their artists for these other uses.

### Distribution of income

**T**he major problem is to determine how income should be distributed. For example, public performance and broadcasting income is usually paid to record companies in a lump sum based on market share of record sales. Is this appropriate given that record sales are not necessarily indicative of broadcast and public performance activity? Should a record company be able to adopt a method of distributing such income to its artists which is at odds with the method adopted to account to the record company in the first place. Blank tape royalties may be distributed on a different basis and record rental a different basis again. The manner in which this income is treated will have to become much more sophisticated if the distribution is to be equitable.

We are experiencing a revolution in communications and computer technology which is likely to have a profound effect on the manner in which the music industry is structured with a consequential impact on copyright law and deal making. It will require the industry to be more forward thinking, pragmatic and lateral when addressing these developments if it is to fully realise the opportunities arising.

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