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ICMP SUBMISSION TO THE PRODUCTIVITY COMMISSION ISSUES PAPER – INTELLECTUAL PROPERTY ARRANGEMENTS

Brussels, 27th November 2015

ICMP (International Confederation of Music Publishers) is grateful for the opportunity to contribute to the Productivity Commission “Issues Paper” regarding Intellectual Property Arrangements in Australia.

INTRODUCTION

ICMP is the world trade association representing the interests of the music publishing community. Music publishers are the bridge between the creative process and the market; their role is to discover, nurture, develop and promote authors and composers. In addition to being rightsholders themselves, music publishers are the representatives of authors’ and composers’ rights. Our core business is licensing, through which we are able to ensure that the works of authors and composers find a commercial outlet. By granting licences and protecting copyrighted music, we can guarantee that artists’ creative output is rewarded.

As the global voice of music publishing, our members are engaged in numerous global commercial transactions. Australia constitutes an important market for our music publisher members and a major source of repertoire for the entire world, hence our interest in contributing to this consultation. Our member in Australia is the Australasian Music Publishers Association Limited (AMPAL) and in this submission we also echo their comments to the “Issues Paper”.

ICMP welcomes any initiative to review Australian’s Intellectual Property regime. We believe that it is important to keep pace with technological advancements. However, we would ask for caution when proposing any changes as these should not undermine the ability of composers, lyricists and performers to financially gain from their life's work and passion. It is our view that any discussion of Intellectual Property Rights (IPRs) in Australia should take into account the country's important musical heritage and other cultural content it has brought to the world. IPRs should remain a modern and effective tool to support creation and innovation.



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COMMENTS

A framework for assessing IP arrangements:

Do IP rights encourage genuinely innovative and creative output that would not have otherwise occurred? If not, how could they be designed to do so? Do IP rights avoid rewarding innovation that would have occurred anyway? What evidence and criteria should be used to determine this?

ICMP does not accept that copyright hinders innovation or creation. On the contrary, copyright is an effective tool that supports innovation and the creation of musical output that would otherwise not occur.

To what extent does the IP system actively disseminate innovation and creative output? Does it do so sufficiently and what evidence is there of this? How could the diffusion of knowledge-based assets be improved, without adversely impacting the incentive to create? What, if any, evidence is there that parties are acting strategically to limit dissemination?

Music publishers' core business is licensing, through which we are able to ensure that the works of the authors and composers find a commercial outlet and we guarantee that their creative output is rewarded by arranging contracts and protecting copyrighted music. The economic importance of the licensing of IPRs is crucial. Our members' business is based on these rights.

Music publishers have been able to develop business models that meet consumer demand under the current IP framework. However, it is becoming more and more challenging to compete with copyright-infringing websites.

Do IP rights provide rewards that are proportional to the effort to generate IP? What evidence is there to show this? How should effort be measured? Is proportionality a desirable feature of an IP system? Are there particular elements of the current IP system that give rise to any disproportionality?

Music publishers have fully adapted to the digital world by providing licenses to all kinds of digital services and making it possible for consumers to access millions of tracks online. The fact that music publishers, as contributors to the creative process, are providing a broad availability of music has greatly benefitted internet intermediaries such as content distributors, search engines, social networks and ISPs. However, while ways to access culture are continuously changing, the creation of content is constant and is what adds value to these platforms.

Nevertheless, despite the fact that music and creative content generates enormous profits for internet intermediaries, rightsholders are not in receipt of a fair remuneration for this exploitation of their work. More can be done therefore to allow composers, songwriters, artists and their business partners to be properly remunerated in the digital age and to better reap the benefits of the digital world. Currently, the share of revenues from digital channels varies greatly and digital revenues alone are not enough for an artist to make a living or for publishers to invest in new talents.

Many internet intermediaries are hiding behind safe harbour rules and are profiting from works while not contributing to their creation. The limited liability regime is no longer fit for purpose with



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several services that are currently profiting from safe harbour provisions not existing at the time of their adoption. Similarly, the exemption for certain types of intermediaries, is being abused by services that are not purely hosting content but by operators whose activity consists of the widespread and unlicensed sharing of copyrighted content.

Furthermore several internet intermediaries have achieved great market power, which they have acquired on the back of providing access to creative content, and are using their size and popularity as leverage when negotiating with rightsholders.

What are the relative costs and return to society for public, private and not for profit creators of IP? Does the public provision of IP act as a complement or substitute to other IP being generated? Are there any government programs or policies that prevent, raise or lower the costs of generating IP?

Music publishers invest time and money on songwriters and composers. The relative costs to society are therefore only the costs of accessing their IP, not the creation. However, the return to society in terms of creation of musical compositions and cultural diversity is precious and irreplaceable.

Are there sufficient safeguards to ensure that IP rights do not lead to unduly restrictive market power? Are there ways (including examples employed overseas) to improve the dissemination of IP while preserving incentives to generate IP? Could such methods be adopted or adapted within the Australian IP system?

ICMP believes that creators should have the right to control how their works are used.

How well has Australia's IP system adapted to changes in the economic, commercial and technological environment and how well placed is it to adapt to such changes in the future? What factors may make it harder for the IP system to adapt to change? What policy options are there to remedy any difficulties, and why might they be preferable?

As noted above, music publishers have been able to develop business models that meet consumer demand under the current IP framework.

Are there other ways of ensuring the IP system will be efficient, effective and robust through time, in light of structural economic changes and the importance/pervasiveness of IP? Is a principles-based approach preferable to a prescriptive approach in this regard? Are there particular parts of the IP system that should be principles-based or prescriptive?

We refer to AMPAL's submission to answer to this Question.

What additional challenges does technological change and new methods of diffusion, including digitisation, present for the adaptability of the IP system? How should such challenges be approached?

We refer to AMPAL's submission to answer to this Question.



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Ideally, what sort of information is needed to evaluate the IP system? In their absence, what alternative data or proxies are available?

We refer to AMPAL's submission to answer to this Question.

Improving arrangements for specific forms of IP:

To what extent does copyright encourage additional creative works, and does the current law remain 'fit for purpose'? Does the 'one size fits all' approach to copyright risk poorly targeting the creation of additional works the system is designed to incentivise?

The system of copyright has successfully protected and encouraged development of cultural expressions for the benefit of cultural development worldwide. While we believe that copyright should remain a modern and effective tool to support creation and innovation, to enable access to quality content across the borders and to foster investment in our economy and cultural diversity, we also believe that copyright should not be weakened so that others can develop and benefit from new commercial services.

Strong copyright laws are needed to provide a positive environment that rewards authors and composers. Without an effective copyright and IPR enforcement framework, the ability of authors and composers to receive proper remuneration from their works – and thus to make a living – would be diminished. Their incentive to create new works and invest in innovation would be removed entirely.

Are the protections afforded under copyright proportional to the efforts of creators? Are there options for a 'graduated' approach to copyright that better targets the creation of additional works?

Yes, the protections afforded under copyright are proportional to the efforts of creators. If a true diffusion of culture is to take place, music rights (copyright) of authors and composers must be protected: The right to be compensated for the use of creative works; the right to license works and control how they are used; the right to withhold permission for uses of works on artistic, economic or philosophical grounds; the right to legally protect works from all forms of theft and unauthorised use; the right to choose when and where creative works are used for free; the right to develop, document and distribute works through new media channels; the right to profit from performances, whether direct, live renditions or indirect recordings, broadcasts, digital streams; the right to legislative protection.

All these rights have been universally recognised. On a philosophical level, natural law confers these rights on the basis of fairness: Authors and composers invest time - often a lifetime - energy, creative passion and sometimes money into creating music, and therefore deserve financial reward. There is also a utilitarian rationale: Without music rights, society at large would be poorer, with artistic creativity restricted and cultural diversity diminished.

In addition, one must not forget that cultural and creative content comes not only from creators but also from their business partners. Music publishers stand at the intersection of the creative process and the market. As noted above, we discover, nurture, develop and promote composers



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and ensure their work finds a commercial outlet. Music publishers protect the interests of artists and guarantee their creative output is rewarded by arranging contracts and protecting copyrighted music. Music publishers spend money and time in bringing authors and composers to the market. Obviously they are only able to invest if they can get compensated for their rights. Developing talent is an expensive business. In order to continue to be able to invest in new markets and to promote new emerging talent, a secure legal framework needs to be in place.

Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?

The existing copyright framework has/continues to enable the development of diverse and numerous licensing models. The current copyright system has proven to be effective in this regard and rightsholders have been able to meet consumers' demand. In the Pro Music website, ICMP and other organisations working across the music sector show where licensed music services around the world can be found. At the time of writing, there are more than 500 licensed music services worldwide that enable consumers to download, stream or access music legally. In the Australian music sector, there are 30 legal music services available covering download services, subscription services and advertising supporting services¹.

Copyright collecting agencies that comply with high standards of representation, accountability, governance and efficiency make it easier for service providers to obtain the necessary licences for music to be distributed online. They also ensure that revenue is correctly collected and fairly distributed to rightsholders for the benefit of authors, composers and publishers, users and also the collecting agencies themselves.

Are moral rights necessary, or do they duplicate protections already provided elsewhere (such as in prohibitions on misleading and deceptive conduct)? What is the economic impact of providing moral rights?

The protection of moral rights has been internationally recognised in Article 6bis of the Berne Convention to which Australia is bound. With the development of new technologies and user generated content, the protection of moral rights of authors and composers has become more and more important. While new technologies have a profound influence on the ways protected works are created, produced and exploited, we do not think that copyright laws should be softened to adapt to new technologies. On the contrary, as noted in our answers to previous questions, now more than ever a strong copyright framework is needed. In addition, we consider that the international system for copyright protection as embodied in the Berne Convention and in the WIPO Treaties provides us with a well-functioning framework for adjusting national and regional copyright laws to the demands of the new technologies. This is equally true for moral and economic rights. No watering down of these rights is needed nor desirable.

¹ <http://www.pro-music.org/about.php>



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What have been the impacts of the recent changes to Australia’s copyright regime? Is there evidence to suggest Australia’s copyright system is now efficient and effective?

ICMP welcomes the introduction of the Copyright Amendment (Online Infringement) Act 2015 (Cth) into Australian law. This law will allow rightsholders to seek injunctions to force ISPs to block overseas infringing websites.

What should be considered when assessing prospective changes to copyright, and what data can be drawn on to make such an assessment?

We firmly believe that any change in the current copyright framework should be accompanied by solid evidence of existing problems.

For those stakeholders that argue that copyright is hindering innovation, it should be noted that cultural and creative content drives demand for electronics and digital devices, for example. Consumers increasingly expect to access cultural content on every available distribution channel and their desire for smarter devices grows. Cultural content has a direct impact on the sales of electronic devices used to enjoy them. Cultural content is also the key driver of the demand for high-bandwidth telecoms services.

As mentioned in our answers to previous questions, copyright should not be weakened so that others can develop and benefit from new commercial services.

How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?

As noted above, the existing copyright framework has/continues to enable the development of diverse and numerous licensing models and has proven to be effective to meet consumers’ demand while respecting rightsholders’ rights and ensuring income for them.

Potential new exceptions to limit the exclusive right of copyright owners need to be backed up by sufficient evidence of any “alleged” market failures.

Concerning the possibility to introduce a “fair use” in Australia, ICMP would like to note that this doctrine is based on litigation. Following such a doctrine would lead to tremendous legal uncertainty for consumers. Consumers’ access to creative content is provided through negotiated solutions between rightsholders and users, such as licensing (either directly negotiated by rightsholders or via copyright collecting agencies). In our view, negotiations between rightsholders and users are more flexible and achieved more quickly, and provide more certainty to consumers than any sort of “fair use” doctrine inserted in Australian legislation.

Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?

The rationale behind the exceptions and limitations regime is to allow people to use copyrighted works for a specific purpose as long as it complies with the internationally recognised principle of



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the Three Step Test. ICMP believes that the Three Step Test for exceptions and limitations to copyright protection provides sufficient flexibility to adapt to technological developments and provide access solutions in the digital environment.

ICMP considers licensing and voluntary solutions, as facilitated by the Three Step Test, to be the optimal tools to improve accessibility to copyright works in a digital environment and to honour exceptions in a targeted effective way. ICMP also believes that the Three Step Test should not be re-interpreted to broaden the scope of the exceptions and limitations to copyright.

When considering the need to add or remove exceptions and limitations from the existing list, a distinction should be made between what is in the public interest and what is free riding. Calls from certain stakeholders to expand the scope of the exceptions and limitations to copyright often hide the intention to weaken the copyright framework so that they can develop new commercial services at the cost of the creative and economical efforts of rightsholders. It should not be forgotten that with technological developments, piracy has increased significantly. Therefore, any exceptions and limitations must take into account the further increased risks that rightsholders face, particularly in the absence of adequate collaboration with Internet Service Providers (ISPs) who often hide behind existing limitations of liability and data protection rules.

In ICMP's view, any changes to the existing exceptions and limitations regime should only be made after taking due consideration of the following factors (1) assessment of the impact of each exception on the market; (2) whether the proposed policy is supported by robust economic evidence; and (3) whether the potential changes are compatible with international copyright law and the Three Step Test.

The current copyright framework in Australia provides with sufficient exceptions and ensures legal certainty to users and consumers. Introducing a "fair use" exception would remove this certainty.

To be efficient and effective in the modern era, what (if any) changes should be made to Australia's copyright regime?

We refer to AMPAL's submission to answer to this Question.

Broader intellectual property landscape:

Are IP rights too easy or hard to enforce in Australia, and if so, why?

ICMP believes that as the process of distribution of creative content undergoes continuous transformation thanks to technological developments and changing consumer demand, so should policies aimed at dealing with the challenges of such developments.

While we music publishers have been able to adapt to different consumer uses and to technological developments, we are not able to deal with the challenge that emerges from these technological developments, chiefly in the form of internet piracy. Rightsholders have serious difficulties in enforcing IPRs in Australia, due to the litigation costs, procedural requirements, and difficulties to determine an infringer's identity. We therefore respectfully call upon the Australian Government



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to ensure that online copyright infringement is comprehensively addressed so that composers, lyricists and performers can financially gain from their life's work and passion.

Which features of the current enforcement system work well, and which could be improved?

As noted above, ICMP welcomes the introduction of the Copyright Amendment (Online Infringement) Act 2015 (Cth) into Australian law. We also welcome the Copyright Notice Scheme Code which we believe is a step in the right direction towards better cooperation between ISPs and rightsholders. We consider, however, that some of the measures in the Code are too burdensome for rightsholders to send notices to ISPs, and when they do, rightsholders don't even have the certainty that their illegal content will be removed. We particularly regret that there is no mention to of the general duty of care obliging service providers to conduct some degree of monitoring using filtering techniques.

Is the role expected of ISPs a practical option?

Cooperation with ISPs is crucial to ensure effective IPR enforcement. ISPs are the gatekeepers of the Internet. The vast majority of these ISPs are large companies and businesses, while rightsholders tend to be SMEs and individuals (publishers, authors, composers, etc.). It is therefore unrealistic to suppose SMEs and individuals could possibly have the resources to deal with all unlicensed uses of their copyrighted content across all providers. It is only common sense that large businesses, particularly those dependent on rightsholders' content for survival, should be more vigilant and take greater responsibilities for the illegal content on their services than SMEs, simply because they are better "equipped" than SMEs and composers to prevent illegal activities on their sites, due to their size and turnover and because they have created a business based on other people's rights. ISPs should be obliged to a duty of care and to a certain level of monitoring using filtering techniques. It is through the efforts of ISPs and other intermediaries, working with rightsholders, that effective solutions can be found.

Notice and action procedures are only useful when they are accompanied by a system that ensures a "stay down". Furthermore, notification of illegal content by rightsholders is only effective if notification procedures are not too cumbersome and if ISPs are encouraged to react immediately.

Australia needs effective rules that impose clear obligations for ISPs and other intermediaries to cooperate in the IPR enforcement. This should be supported by sanctions for non-compliance.

What improvements could Australia adopt from overseas approaches?

In the European Union, the European Commission launched an Action Plan on IPR Enforcement in July 2014. The EU Action Plan focuses on the fight against commercial scale IP-infringements because they do the most harm to the economy. It sets out new enforcement policy tools, one of which is the so-called "Follow the Money" approach which aims to deprive commercial scale infringers of their revenue flows. The "Follow the Money" initiative will establish stakeholder dialogues with advertising service providers, payment services and shippers, with the objective of helping to reduce the profits of commercial scale IP infringements in the online environment and



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keep IP-infringing products off the Internet. This initiative seeks to facilitate the development of further voluntary Memoranda of Understanding among the above-mentioned stakeholders.

In parallel with the Action Plan, the EC came up with a Strategy on Protection and Enforcement of IPRs in Third Countries. The reasoning behind this Strategy is the technological changes that have taken place in the past decade, and the increasing levels of IPR infringements. Trade in products and services has become increasingly globalised. The Strategy aims at taking a smarter approach in using the available trade policy tools available to protect and enforce IP. Such tools range from trade agreements, legislative action and dispute settlement, to IPR Dialogues, Helpdesks and technical assistance. Better engagement and cooperation, and improving interaction with all actors; improving outreach and awareness, including providing and promoting awareness of appropriate IP-related technical assistance programmes; better data collection; enhancing networking and coordination between EU and third countries; and continuing multilateral efforts to improve the international IPR framework, including by encouraging further ratification of existing treaties.

Other issues

Term of protection of copyright – ICMP considers the current term of protection (70 p.m.a.) is still very much appropriate in the digital environment.

Music publishers spend a lot of time and money bringing writers to the market. They provide significant advanced payments to these artists before these artists make any profit. Obviously they are only able to invest if they can get compensated for their rights. Creative industries are long term industries that need significant investments to exist and develop. In an increasingly aging society, life plus 70 is an appropriate term of protection. Anything shorter than that has often proven to be too short to recoup on those investments. It has also often proven insufficient to allow creators and their descendants to legitimately benefit from the exploitation of their works.

In addition, the term of protection of 70 p.m.a. for authors is in line with the term of protection of the majority of the countries in the world. Inconsistency in the term of protection would make it difficult to achieve an appropriate level of efficiency in the management and the enforcement of IPRs on an international scale. A reduction of the term of protection in Australia would place Australian authors at a clear disadvantage vis à vis their main trading partners.

Music is a form of art that is appreciated all over the world and not just in its country of origin. For music to be adequately protected by copyright, it is vital that copyright be managed and enforced effectively in every country in which the music is exploited. Consistency in the rules of copyright is even more important in the online world, which is not limited by geographic borders.

Cultural Diversity - Music is an integral part of our cultural heritage and is considered to be capable of representing a specific society as one of the paramount expressions of its culture. By its very nature, music can easily transcend national borders. However, if a true diffusion of culture is to take place, investment and promotion are essential. Music publishers have a long tradition of



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promoting cultural diversity, are particularly supportive of local culture and have effective means of transferring the songs they represent to a larger cultural community. Music publishers most notably have contributed to diversity by taking memorable melodies and recasting them in other languages to provide accessibility to broader markets.

For further information, please contact:
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