



Music Rights Australia's Submission in Response to the Productivity
Commission Issues Paper on Intellectual Property Arrangements

November 2015

Music Rights Australia thanks the Productivity Commission (the **Commission**) for the opportunity to make a submission in response to the Productivity Commission's Issues Paper on Intellectual Property Arrangements.

1. About Music Rights Australia

Music Rights Australia (**MRA**) is an organisation that protects the creative interests of artists within the Australian music community. MRA represents over 70,000 songwriters and music publishers through their association with the Australasian Mechanical Copyright Owners' Society (**AMCOS**) and the Australasian Performing Right Association (**APRA**)¹, and more than 125 record labels - both independent and major - through the Australian Recording Industry Association (**ARIA**)².

2. Introduction

Intellectual Property (IP) covers a variety of rights protections and each should be looked at and considered separately. MRA will comment only on copyright issues and only on limited matters raised in the Issues Paper.

MRA refers to the submissions of ARIA, APRA AMCOS and the Australian Copyright Council.

A robust and effective copyright framework is an essential foundation for the creative industries' growth and prosperity.

It should allow:

- A legitimate expectation that copyright owners can choose where, when and how their creative output will be made available to the public; and
- A legitimate expectation on the part of copyright owners that when those choices are not respected that there are effective, efficient processes to prevent that unauthorised exploitation of their work.

¹ See www.apraamcos.com.au.

² See www.aria.com.au.

3. Section I

At page 28 of the Issues paper the Commission has asked:

“Are IP rights too easy or hard to enforce in Australia and if so why?”³

MRA respectfully submits that the question should not only be one of ease or difficulty but also of clarity of rights and articulation of exceptions and defenses such that commercial discussions can lead to efficient and effective resolution of issues between the parties.

With respect MRA suggests that the preferable questions to ask in relation to copyright are:

- a. Do copyright owners have reasonable certainty about their rights and how they can be effectively protected if their copyright is infringed?*
- and
- b. If an allegation of copyright infringement is made can the person against whom the allegation is directed have reasonable certainty about what defenses or exceptions they can rely upon to respond to the claims?*

Often the answers to these questions are not questions of enforcement in the courts or other avenues of formal arbitration, but that issues are resolved in commercial discussions and on mutually acceptable commercial terms.

It is precisely because the *Copyright Act 1968* (Cth) (the **Act**) affords the parties relative certainty about their positions that commercial outcomes are achieved to the mutual benefit of the parties without resort to expensive and time consuming litigation.

Those matters which cannot be resolved commercially may result in civil litigation. However, it is MRA’s experience that this is the exception rather than the rule.

In the circumstances when such discussions are unsuccessful the question then becomes:

- a. Do the parties have access to effective civil procedures to resolve claims of alleged copyright infringement?*

³ Productivity Commission, *Issues Paper on Intellectual Property Arrangements*, October 2015, p 28.

The Federal Court of Australia and Federal Circuit Court have jurisdiction to hear copyright matters. However, the Federal Circuit Court does not have jurisdiction to hear section 115A matters.

The Act sets out the remedies available to copyright owners. It also outlines some specific circumstances where certain remedies will not be available to copyright owners. All remedies are subject to the court's discretion based on the specific matters which are brought before it.

4. Section II

The Commission has asked at page 21:

*“To be efficient and effective in the modern era, what (if any) changes should be made to Australia’s copyright regime?”*⁴

MRA made a submission to the recent Online Copyright Infringement discussion paper.⁵ In that submission MRA stated:

“MRA believes the government has correctly identified that:

- 1. Sections 36(1) and 101(1) are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so;*
- 2. Australia is obliged under its free trade agreements with the United States, Singapore and Korea (not yet ratified) to provide a legal incentive to ISPs to cooperate with rights holders to prevent infringement on their systems and networks;*
- 3. The effect of the decision in the iiNet case is to limit severely the circumstances in which an ISP can be found liable for authorising an act by a subscriber that infringes copyright; and*
- 4. Extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia’s international obligations.”*

The Government chose not to address the authorisation provisions or the Safe Harbour provisions in the *Copyright Amendment (Online Infringement Bill) 2015 (Cth)*.⁶

⁴ Productivity Commission, *Issues Paper on Intellectual Property Arrangements*, October 2015, p 21.

⁵ MRA Submission, *Online Copyright Infringement Discussion Paper*, April 2014, p 10.

It remains MRA's position that to be effective, the framework for online rights protection must deliver certainty for rights holders, consumers and intermediaries.

The Australian framework does not currently deliver that certainty and does not work to protect creative content online.

Were the Government to consider revisiting either of these outstanding issues, it must make detailed consideration of appropriate levels of response that might be required from the different businesses that participate in online markets.

The existing Safe Harbour System already covers passive technical carriage service providers, when they engage in activities specified in the Act and provides commercial and legal certainty for crucial online infrastructure providers.

The existing Safe Harbor System currently provides for protection from monetary damages and criminal liability with respect to specific technical online activities undertaken by ISPs.

The policy behind the Safe Harbour Scheme is clear. It distinguishes between:

- Those who provide content (whether as a business or a non-profit) and who are in a position to moderate content on their site or network; and
- Those who merely facilitate the communication of content.

This is the correct balance.

This policy objective should continue to apply to ensure that only passive intermediaries which do not obtain financial benefit from the infringing activity and which are obliged to take reasonable steps to prevent the infringing activity are capable of obtaining the limited immunities the Safe Harbour Scheme affords them.

Additionally, were the Government to consider amending the Safe Harbour System this would require amendment to the authorization provisions.

⁶ Productivity Commission, *Issues Paper on Intellectual Property Arrangements*, October 2015.

5. Section 115A

MRA welcomed the introduction of section 115A. This effective, targeted and efficient no-fault solution offers an excellent example of an evidence-based solution designed to solve a long standing problem. Section 115A delivers an efficient mechanism to address the damage which illegal off-shore sites pose to the creative industries and does not over reach to solve the problem.

In the second reading speech to the Copyright Amendment (Online Infringement) Bill 2015 on 16 June 2015, the then Minister for Communications the Right Honorable Malcolm Turnbull said: ⁷

“There is no silver bullet to deal with internet piracy, but the Copyright Amendment (Online Infringement) Bill 2015 provides an important part of the solution to the problem of online copyright infringement. It is vital copyright owners have an efficient mechanism to disrupt the steady supply of infringing content to Australian internet users from overseas websites. The bill will provide an enhanced, streamlined mechanism – without the need to establish fault on the part of that provider. Specifically the bill will introduce a new provision that allows a carriage service provider to disable access to infringing online locations located outside Australia.”

6. Enforcing Rights Overseas

Litigation in another jurisdiction can pose challenges whatever the subject matter. Distance, specific national legislation and court procedures can add complexity to the conduct of matters. Copyright enforcement is no different. However, Australia is a signatory to a range of major international IP treaties and continues to ensure robust IP chapters are included in all its bi- lateral and multi- lateral trade agreements. These will continue to assist Australian copyright owners who wish to have their rights recognised and protected in other jurisdictions.

Should the Commission require further information please do not hesitate to contact Vanessa Hutley General Manager MRA at vhutley@musicrights.com.au .

⁷ Commonwealth, *Parliamentary Debates*, Senate, 16 June 2015, p 81 (Malcolm Turnbull).

