

INQUIRY INTO INTELLECTUAL PROPERTY ARRANGEMENTS

SUBMISSIONS OF APRA AMCOS IN RESPONSE TO THE DRAFT REPORT OF THE PRODUCTIVITY COMMISSION

3 JUNE 2016

EXECUTIVE SUMMARY

1. APRA AMCOS is extremely concerned by the Draft Report. APRA AMCOS considers that the Draft Report's recommendations and findings appear to reflect a severe prejudice against creators. APRA AMCOS considers the Commission's approach to be myopic in terms of economic policy and disrespectful to the contributions of Australia's creators, close to 90,000 of whom APRA AMCOS represents.
2. *Draft recommendation 2.1* - APRA AMCOS is surprised by the various decisions to accept some evidence provided to the Commission, and to dismiss other evidence. These decisions could not have been made if an impartial approach had been taken to fact-finding.
3. *Draft finding 4.1* - APRA AMCOS rejects the finding that Australia's copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.
4. *Draft finding 4.2* - APRA AMCOS rejects the suggestion that the optimal term for copyright protection should be closer to 15 to 25 years after creation.
5. *Draft recommendation 4.1* - APRA AMCOS does not oppose amending the Copyright Act so the current terms of copyright protection apply to unpublished works.
6. *Draft recommendation 5.1* - APRA AMCOS considers that the Draft Report has failed to understand the important commercial bases on which geoblocking is justified.
7. *Draft recommendation 5.3* - APRA AMCOS is opposed to introducing a Fair Use regime into local Australian law.
8. *Draft recommendation 14.1* - APRA AMCOS submits that the Commission must view the section 51(3) exception as part of the balancing act between creative and consumer interests, and that its removal would require a wholesale recalibration of the system that is already in place.
9. *Draft recommendation 17.1* - APRA AMCOS considers that Australia has always played a leading role in promoting global cooperation in respect of intellectual property, and supports the suggestion that it should do so in the future.
10. *Draft recommendation 18.1* - APRA AMCOS opposes the recommendation to extend the Safe Harbour Scheme to cover the broader set of online service providers.
11. *Draft finding 18.1* - APRA AMCOS does not agree that the evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.
12. *Information request 5.2* - The Australian experience of the Code has been an overwhelmingly positive one for collecting societies, their members and their licensees.

APPROACH

13. Generally, the Draft Report proceeds on the basis of 5 false assumptions:
- (a) that there are critical problems with the fundamentals of Australia's copyright system that require wholesale attention;
 - (b) that the rights of users must necessarily be balanced evenly against the rights of creators;
 - (c) that being a net importer of copyright material at this point in time means that Australia should have a copyright regime more favourable to users than to creators;
 - (d) that copyright equates to preventing use; and
 - (e) that copyright intermediaries receive many of the benefits of copyright protection, which undermines copyright's ability to encourage creators.
14. These false assumptions inform much of the discussion, and should be addressed at the outset.

Are there critical problems with the fundamentals of Australia's copyright system that require wholesale attention?

15. The Draft Report proceeds on the basis that there are critical problems with the fundamentals of Australian copyright system that require wholesale attention. But to substantiate that, the Draft Report refers to examples that are anything but fundamental. The examples used are often anecdotal, fact-specific and narrow in application. For example, one person's experience with a music publisher (p102), or one organisation's experience with a radio serial from the mid 1940s (p115), or one company's experience with obtaining the necessary licences to reproduce a video game (p116) is not indicative of wider experiences, and should not be relevant to an inquiry that purports to consider Australia's IP arrangements broadly, at a "high-level" and "holistically" (Issues Paper, p1). Rather, as APRA AMCOS submitted previously, the Commission must look at the broader picture.
16. When looking at the broader picture, the Australian intellectual property system seems to be working effectively. As The Hon. Karen Andrews MP, Parliamentary Secretary to the Minister for Industry and Science, notes: "Australia has a world class IP system that is consistently ranked in the top tiers across the range of global measures." In the authoritative World Intellectual Property Organisation's Global Innovation Index for 2015, Australia maintains its 17th place overall Global Innovation Index rank and 10th place rank in the Input Sub-Index from 2014. It also maintains its top 10 rankings in three pillars: Human capital and research (9th), Infrastructure (4th), and Market sophistication (9th). It improves by three places in the Infrastructure pillar across two sub-pillars: ICTs (7th) and Ecological sustainability (27th). It also improves in Business sophistication by three places to 23rd, as a result of improvements made in two sub-pillars: Knowledge workers and Innovation linkages. In relation to innovation outputs, Australia also improved in Creative outputs by five places to 7th place, with improvements within all three sub-pillars (WIPO, Global Innovation Index 2015, p24.)

Balancing users' rights against creators' rights

17. Essentially the Commission's argument regarding balance can be summarised as follows: the creator should be rewarded by a grant of property in the creation, only to the extent that is required to incentivise the creation. In the words of the Draft Report: "An effective and efficient copyright system sets term at a level that encourages creation without unduly constraining access to creative works" (p113.) Any more protection than that which is necessary to incentivise creation is detrimental to consumer welfare (for consumers have to purchase access to something that would have been created at a lower price).
18. This argument is misguided, because it assumes that consumer needs in respect of pricing and distribution are not already factored into a rights-holder's calculations. Rights-holders are rational economic actors, prices are set on the basis of what consumers are willing to pay. That is, market forces already provide for an equitable (if not equal) dynamic between supplier and customer. APRA AMCOS accepts that it is in the public interest to legislate for some exceptions to copyright. But the notion of balance can create a false equation. For example, our view is that a creator has considerably more investment in his or her creation than a consumer has in consuming it.
19. Moreover, there is an inherent tension in the Draft Report's notion of balance and the Draft Report's comments on geoblocking. The Australian Copyright Act can only grant Australian rights. Any notion of balance, as the Draft Report conceives of it, raises the needs of consumers, which differ from jurisdiction to jurisdiction. For example, what a consumer is willing to pay in one country will differ from what a consumer is willing to pay in another. To promote "balance" one must have a nuanced view as to which jurisdiction one trades in, especially because the grant of rights is relevant only to one jurisdiction. The ability to do that, however, is undermined by encouraging consumers to circumvent geoblocks. If a rights-holder were to decide to operate in Australia, it would consider the expenses involved in doing so as well as the potential revenue (that is, the value of the Australian rights granted to it by the Australian Copyright Act). The rights-holder will want to ensure, before proceeding, that the risk involved in investing in Australian operations would be less than or equal to the return that could be generated by doing so. Naturally, the expenses of operating in Australia will differ from those of operating in different jurisdictions. To determine what revenue needs to be generated in the Australian market to recoup costs, the rights-holder would need to fix a price for the Australian market. But if Australians may circumvent geoblocks in the manner recommended, and thereby access the rights-holder's content at prices fixed for a market with lesser costs involved, the rights-holder is unable to recoup its losses. One might say that the rights-holder should factor in geoblock circumvention into its price; that the rights-holder should consider that Australians will purchase the product at the cheapest price available from a different jurisdiction. But that is to say that the "balance" promoted by the Draft Report is no longer between an Australian rights-holder and Australian consumers, but an Australian rights-holder and consumers based in the cheapest country in the world. The point is this: the Copyright Act cannot simultaneously enshrine consumer rights to circumvent geoblocks and purport to be a balancing act between the needs of Australian rights-holders and Australian consumers.

Being a net importer of copyright products means that Australia should have a copyright regime more favourable to consumers than to creators

20. As a matter of fact, the statistics will change depending on what branch of the copyright industries is being considered. The ratio of Australian to foreign product will change in respect of music (where Australians consume a great deal of local products,

and export local products very successfully) to films and software programs (where Australians consume mostly foreign products, and export less successfully). The fact that Australia is a net importer tells us part of the story, but not all of it. Developing policy for the entire copyright industries, on the basis of this particular fact, is lacking in nuance.

21. For example, regard must be had to external factors, such as the quid pro quo involved in bilateral treaties. Australia may make concessions in one area of trade that result in benefits in other areas. In fact, on the basis that Australia agrees to any treaty to which it is a party, it may be presumed that Australia calculates the overall outcome of the treaty to be beneficial to its national interests. It is near-sighted to expect that each component of any treaty will be favourable to Australia's national interests.
22. It is also near-sighted to expect that what is in the national interest at any given point in time will always remain so. Australia should not only cater to the circumstances at hand, but also implement policies to improving those circumstances. Australia should become a net exporter in copyright materials. APRA AMCOS considers that incentivising creation may be one of the ways by which Australia will encourage its creative sectors to lead a transition from being a net importer to a net exporter of copyright content. Such an approach is entirely consistent with the Government's stated objective of transitioning the Australian economy to one which is driven by innovation and creativity.
23. APRA AMCOS is confident that Australia is already heading in that direction, certainly in respect of music. The international revenue generated by the overseas use of Australian music increased by 28% year on year in the 12 months to 30 June 2015 and we are forecasting double digit growth again in the 12 months to 30 June 2016. The following graph charts the rise in Australian music exports over the last 10 years. It shows the annual Australian dollar amounts that APRA collected from overseas copyright collecting societies for the commercial use of Australian and New Zealand music in overseas territories in each of the relevant years.

APRA International Revenue 10 year comparison



24. In any event, a consumer does not decide to buy this or that song simply because it is cheaper than the one sold next to it, nor does a consumer choose which film to watch or book to read or artwork to admire on the basis that each is the same as all competitors

and price is the only differential. Personal preferences are essential to the market for works – one buys the songs from the artist to which one likes to listen, and one buys the book from the author one likes to read. The market for works is personal. That is, the products imported are not comparable to the ones exported.

Copyright means preventing use

25. The Draft Report operates on the basis that copyright protection is about preventing use. No doubt, copyright can have that effect from time to time. But that is not the purpose of copyright, and for the most part that is not the general experience of copyright. In practice, copyright is not about preventing use; it is about commercialising it. Copyright is not about withholding access to a work; it is about licensing it for use by the consumer.
26. When viewed through that prism, many of the criticisms made in the Draft Report of copyright become unsustainable. For example, it is said of transformative uses such as mash-ups: “It is accordingly hard to see why this form of creative expression is not permissible” (p112.) That point assumes that copyright law forbids “creative expression” through mash-ups. APRA AMCOS can attest that nothing is further from the truth. All that copyright law requires is that a person who produces a mash-up, and thereby derives a benefit from another’s work, shares royalties with the other creator, proportionate to each creator’s contribution.

Copyright intermediaries receive many of the benefits of copyright protection, which undermines copyright’s ability to encourage creators

27. On numerous occasions, there are references made to “intermediaries” within the copyright industries, who are undeserving of protection as they are not creators. For example, see page 102: “Evidence suggests much of the returns from copyright protected works are earned by intermediaries, rather than authors, musicians and the like. The stereotype of the ‘struggling artist’ has some degree of truth to it, and evidence suggests many involved in creative endeavours work multiple jobs and receive financial support from their families (Throsby and Zednik 2010).” Intermediaries are described in the Draft Report as including publishers, record companies, film studios, broadcasters and copyright collecting societies (p16).
28. To dismiss such entities as mere intermediaries undeserving of copyright protection is to misunderstand the nature of the copyright industries. The copyright industries rely on authors of works, but those authors sometimes choose to share risk with other parties within the industry. Not all do, of course; many writers of literary or musical works choose to operate without sharing the risk with others. That is a matter for them. They do so on the basis that sharing the risk means sharing the reward, and they are willing to retain a greater shareholding in their creations. Not all creators are in the same position, or have the same appetite for risk. Those creators will choose to share risk, even if it means sharing the reward. That is likewise a matter for them. No doubt there will be instances where one party has more power than another in a negotiation; but that is true in any investment dynamic. An entrepreneur with a clever commercial concept, but little resources, may willingly (even if reluctantly) elect to share the risk and reward with an investor. There is nothing peculiar – and certainly nothing untoward – about involving “intermediaries” in the creative process.
29. In fact, the investment provided by so called “intermediaries” is often what makes the difference between a creator being able to make a living from his or her creative product, and not. It is the advances provided by publishers and the income collected and distributed by copyright collecting societies that keeps the production of Australian

music as a commercial proposition. Nothing stands to be gained from altering the current state of copyright law to change that dynamic.

DRAFT RECOMMENDATIONS, FINDINGS AND INFORMATION REQUESTS

Draft recommendation 2.1 – Evidence based approach and guiding principles

Evidence-based approach

30. APRA AMCOS agrees with the recommendation that the Government be informed by a robust evidence base. However, APRA AMCOS gave the Commission abundant evidence, which was apparently ignored without cause or explanation. APRA AMCOS represents close to 90,000 creators in Australia, and deals every day with the commercial realities of copyright licensing, particularly in relation to new disruptive digital technologies the likes of which the Productivity Commission appears keen to encourage. APRA AMCOS's repertoire may be one of the most valuable copyright portfolios in the country, and APRA AMCOS is at the forefront of collective licensing globally. Yet the Draft Report overwhelmingly ignored APRA AMCOS's submissions, statistics and evidence. Its submissions were quoted once in the entire Draft Report (about moral rights, an issue of no direct consequence to APRA AMCOS's operations), in contrast to, for example, the 12 times the Australian Digital Alliance was cited in the Draft Report. A comprehensive report prepared by PricewaterhouseCoopers, which was commissioned by APRA AMCOS, Copyright Agency, Foxtel, News Corp Australia, PPCA and Screenrights, was presented to the Productivity Commission and dismissed outright, including because the Australian Digital Alliance did not accept some of the findings (p150-1). The Draft Report even seems receptive to the nonsensical statistics and assertions provided by the Association of Liquor Licensees Melbourne Inc (p133-4) ("Australian businesses commenced paying significantly more, up to 10 times more, for copyright than similar businesses in USA, UK, Canada and European countries") which have no basis in reality and have already been considered and rejected by a number of bodies, including the ACCC and the Copyright Collecting Societies' Code Reviewer. This is all to say that APRA AMCOS supports the notion of developing policy on the basis of evidence; but cannot support the current approach of excluding all evidence that does not accord with the Productivity Commission's apparent prejudices about the copyright industries, and admitting all evidence that does regardless of its source or method.

Guiding principles

31. APRA AMCOS has little difficulty with being guided by the four principles espoused by the Productivity Commission, being effectiveness, efficiency, adaptability and accountability. But APRA AMCOS cautions against taking the view that intellectual property laws alone are responsible for conduct that does not meet the standards of those principles. Where a rights-holder acts in a way that is contrary to public policy, it is almost always the case that the best way to protect consumer welfare will be to enforce Australia's competition and/or consumer laws – not to reduce the rights given to individual creators by way of intellectual property statutes.
32. Reducing the scope of intellectual property rights given to creators, rather than taking action against specific bad actors for their undesirable trade practices, harms all creators and their investors. APRA AMCOS urges any law reform not to treat creators and innovators who act desirably as collateral damage. Creators and their investors are the lifeblood of the digital economy.

Draft finding 4.1 – Expansions of copyright

33. APRA AMCOS rejects the suggestion that Australia’s copyright system has expanded over time, often with no transparent, evidence-based policy analysis demonstrating the need for, or quantum of, new rights.
34. First, there have been expansions of protection, but also contractions, which have been overlooked by the Draft Report. It is true that there is a new site-blocking remedy at section 115A of the Copyright Act, and in the last two decades, the Copyright Act was amended to include, among other things, a communication right, moral rights and an extended term. But there have been significant contractions too. A cursory scan of Division 3 of Part III of the Act, which contains the exceptions to copyright law, demonstrates that there have been numerous additions to the defences available to users. There was an exception to authorisation for carriage service providers in section 39B (2000), a new fair dealing exception created for parody and satire under s41A (2006), there were new defences added for temporary reproductions as part of a technical process of use under section 43B (2006), reproductions in different form for private use under section 43C (2006), the wide ranging exception in section 200AB (2006), dealings with medicine under section 44BA (2011), and for dealing with works for the purpose of providing healthcare records under sections 44BB and 104C (2015).
35. There have been other expansions (and other contractions); but the three expansions that seem to occupy the Draft Report’s attention are the extension of term following the AUSFTA, the “introduction” of a communication right, and the “introduction” of moral rights.
36. In respect of the extended term of copyright, APRA AMCOS reiterates that it is inherently flawed to seek out an evidence-based policy analysis in respect of each aspect of international trade. The extension was agreed to in consideration for the benefits obtained in other areas of trade. That said, APRA AMCOS considers the arguments about term to be confused. On the one hand, the argument put forward by the Draft Report is that works cease to have value after a particular period of time (“Indeed, evidence suggests the vast majority of works do not make commercial returns beyond their first couple of years on the market” p114). On the other hand, it is suggested that the extension of term from 50 to 70 years in 2006 came at great cost to Australians (“These costs can be significant... For example, it is estimate that the obligations in the AUSFTA to extend copyright life plus 50 years to life plus 70 years, resulted in Australian users paying an additional \$88 million per year...” p114). Either works cease to have value (and therefore the longer term is a burden to consumers that provides no corresponding benefit to creators) or they continue to have value (and therefore the public misses out). Try as it might, the Draft Report cannot have it both ways.
37. In respect of the “introduction” of a communication right, APRA AMCOS note that the communication right was not an expansion. It was a merger of two pre-existing rights, the diffusion and broadcasting rights. It is simply incorrect to think of it as an expansion; it was nothing more than an update of the technology neutral king usually lauded by these sorts of inquiries. APRA AMCOS notes the comment in the Draft Report: “Some see this [ie, the new communication right] as an adverse outcome, arguing that the right of communication further tilts the copyright balance in favour of rights holders as the added exceptions are relatively limited compared to the breadth of the right... They consider that broad-based copyrights over online presentation and transmission of creative works unduly restrict the flow of digital information...” (p108). This criticism is painfully abstract. In practice, as commerce is undertaken online, rights-holders need to be able to control distribution. If communicating a work

online were not the exclusive right of the rights-holder, then the rights-holder would not be able to commercialise works online at all.

38. In respect of the “introduction” of moral rights, it is important to note that many (although certainly not all) of the new rights were always available to authors by way of other causes of action (now repealed). Moreover, the introduction of the rights that were actually new was necessary under international treaty obligations. There are specific obligations under the Berne Convention that necessitated the introduction of Part IX of the Act in 2000, and there are specific obligations in the WIPO Performances and Phonograms Treaty and the AUSFTA that relate to moral rights for performers. Finally, the provisions in Part IX of the Act provided new rights, but they are distinct in nature from the rights granted under Parts III and IV of the Act. Only individuals can have moral rights. They protect the integrity of authorship in a manner not necessarily achieved by traditional copyright, and they cannot be conveyed. For a Draft Report so apparently concerned with the manner with which intermediaries have taken advantage of authors, it is strange that the enactment of specific rights that remain with the author and cannot be sold or waived would be criticised as lacking in transparency or need.

Draft finding 4.2 – Reduced term of copyright

39. APRA AMCOS rejects the suggestion that the optimal term for copyright protection should be closer to 15 to 25 years after creation.
40. APRA AMCOS considers the finding to be perhaps the most radical made by a public body in respect of copyright law in Australian history. In those circumstances, it is remarkable that the Draft Report on page 116 and 117 has a section under a heading *How long is long enough?* that comprises just 9 sentences, and which summarises just two studies (one American and one German), and on that basis arrives at the recommendation that 15 to 25 years is an appropriate term for Australian copyright to subsist.
41. Even a cursory review of the ongoing popularity and commercial consumption of the back-catalogues of successful artists from the 1960s and 1970s demonstrates that the commercial life of a musical work or sound recording extends far beyond the 15 to 25 year period estimated by the Commission. The launch of music subscription services such as Spotify have only served to strengthen this argument. APRA AMCOS recently analysed all of the music streamed on all paid subscription streaming service in Australia in calendar year 2014. Two thirds of all music streamed was back-catalogue, as opposed to new and recent releases.
42. In any event, APRA AMCOS repeats its comments above, in respect of extending the term. APRA AMCOS cannot emphasise strongly enough that any discussion about term is linked to broader trade considerations, and Australia cannot act unilaterally on this point. In that case, whatever questionable economic foundations the finding rests upon, the discussion is moot.
43. APRA AMCOS further notes that the entry of a work into the public domain does not necessarily make that work free for public consumption; it just shifts the revenue away from creators to distributors. Consumers will still purchase a book, and watch an old movie on television; the book publisher and retailer and the television station still generate revenue from public domain content, only the creator does not.
44. APRA AMCOS also submits that the issue of Orphan Works should not be conflated with an extended term. APRA AMCOS is open-minded to sensible reforms to enable

the use without authorisation of Orphan Works where reasonable attempts to locate an author have failed. The problems referred to in the Draft Report, for example those faced by the BBC in relation to its “million hours of broadcasts in its archives that cannot be used because no one knows who holds the rights” (p115), or the National Film and Sound Archive in relation to a radio serial it wanted to put online (p115), can occur whether the work was written 100 years ago or yesterday. The issue is not timing *per se*, it is rather about not knowing who owns the rights. APRA AMCOS considers that practical commercial and legal protections already exist for such uses. For example, where works genuinely cannot be traced to their author, there is an overwhelming likelihood that either no claim could be brought for infringement because the work is actually in the public domain, or no author will bring a claim for infringement because the author has either abandoned any proprietary connection to the work, or the author (or the author’s heirs) are not aware of their interest in the work. Even if one were to bring such a claim, the person alleged to have infringed the rights in the work could avail him or herself of the protection in section 115(3) of the Act that states that where a defendant is not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, the plaintiff is not entitled to damages (but is entitled to an account of profits). Moreover, retroactive licences are available, such that a person could agree to a licence for past, unauthorised, uses once a rights-holder appears.

45. APRA AMCOS also objects to the Draft Report using the Orphan Works difficulty as grounds for reducing the term of copyright, while also seeking separately the enable use of Orphan Works under a specific Fair Use regime (p156-8). If the Orphan Works difficulty can be resolved under a different regime, then it should cease to be relevant to the discussion about term.

Draft recommendation 4.1 – Perpetual term for unpublished works

46. APRA AMCOS does not oppose amending the Copyright Act so the current terms of copyright protection apply to unpublished works. However, APRA AMCOS’ position would be quite different were the term of copyright in a work to expire during the author’s lifetime.

Draft recommendation 5.1 - Geoblocking

47. APRA AMCOS considers that the Draft Report has failed to understand the important commercial bases on which geoblocking is justified. It is true that price discrimination, where it occurs, can appear to take advantage of the relative wealth of Australian consumers and the relative lack of competition in the market. On occasion, the practice is unjustified and can even justify the scrutiny of the competition regulator. However, the Commission is not even-handed in its approach to the issue in the Draft Report.
48. There are many valid reasons why a company will want to offer different terms and charge different prices from jurisdiction to jurisdiction:
- (a) content is often funded by advertising, product placement and sponsorship, which all must target local audiences and tastes;
 - (b) funding is dependent on an ability to demonstrate international income streams;
 - (c) there are different costs involved in operating in different jurisdictions;
 - (d) there are different tariffs and taxes, which can lead to price differences;

- (e) currency fluctuations mean that, if consumers are purchasing from a different jurisdiction, a company's revenue would be unpredictable; and
 - (f) price discrimination enables a company to increase its sales to low-income countries whose consumers would not be able to afford a global price. Without price discrimination (which may at times have a negative impact on Australia) it is likely that the developing world would be deprived of modern content.
49. Fundamentally, controlling the jurisdiction in which a consumer accesses content is beneficial to rewarding the creator. Collecting societies remain the most reliable means for creators to be paid for ongoing uses, and the distribution of royalties is made possible by knowing in which jurisdiction the product was consumed.
50. Circumventing geoblocking will also discourage the proliferation of local content providers and local subsidiaries of international content providers, all of which are precisely the kinds of innovative businesses the Government seeks to encourage.
51. On a broader policy level, circumventing geoblocks has the potential consequences of marginalising minority languages and cultures, and discouraging investment in local content creation. Further, Australia stands to lose out on tax revenue if Australians are purchasing products under the guise of being based in a different jurisdiction.

Draft recommendation 5.3 – Fair Use

52. APRA AMCOS is opposed to introducing a Fair Use regime into local Australian law. APRA AMCOS considers this question to have been dealt with in great detail in the context of the ALRC's report on Copyright and the Digital Economy. APRA AMCOS does not share the view espoused by the ALRC, but can see little value in the Productivity Commission rehashing the debates that took place in that forum.
53. In the context of this inquiry, APRA AMCOS does caution against the assumption that there is any connection between fair dealing or fair use, and innovation and productivity. Innovation and productivity do not require free use of copyright material. There is no public policy reason why any property owner should have his or her rights removed so that a third party can use those rights to build an innovative product. There may be a public policy reason why owners of large numbers of published copyrights should not be able to prevent others from using those copyrights (indeed, collecting societies are not able to refuse licences, for precisely this reason). However, it is utterly reasonable that an innovator should pay a market rate to use copyright (or any other) material.
54. In addition, the Commission should not be misled into believing that all third party uses of copyright material must by definition be innovative. As APRA AMCOS submitted to the ALRC, most so-called user-generated content is not innovative: it is derivative at best. Innovators who complain about the stifling effect of copyright are generally those who seek not to pay for the creative work of copyright owners.
55. APRA AMCOS rejects the suggestion that any uncertainty caused by a flexible Fair Use system will be remedied by the wholesale importation of American jurisprudence into the Australian system. The American and Australian systems are notably different in many respects, and one cannot (and should not) rely on American precedent to make decisions about Australian copyright law. The Fair Use regime in American copyright law is undoubtedly more favourable to consumers than the Fair Dealing regime in Australian copyright law; but many aspects of American copyright law are significantly less favourable to consumers than their equivalents in Australian copyright law,

including the American use of statutory damages as relief for infringement. Deferring to another jurisdiction is inappropriate, given clear differences between jurisdictions, economies and industries. And deferring to another jurisdiction in respect of certain aspects of its jurisprudence, and not others, is likely to distort the administration of justice in Australia.

Draft recommendation 14.1 – Section 51(3) of the CCA

56. APRA AMCOS shares the views articulated by the Australian Copyright Council in relation to this draft recommendation regarding the repeal of section 51(3) of the *Competition and Consumer Act*, and adds only the following. The draft recommendation appears to be motivated by the view that intellectual property rights-holders should not be treated as different from other service providers, as though there were an inbuilt statutory exceptionalism for holders of IP rights. This is simply not the case.
57. There is, in Australia, a complex system of balancing exclusive intellectual property rights against consumer interests. Any debate about the section 51(3) exception must not consider that section in isolation. For example, it is essential to factor into this discussion the Copyright Tribunal, a specialist Tribunal established under the *Copyright Act* to prevent rights-holders such as APRA AMCOS from abusing their position. A licensee or person desiring a licence has a statutory right to apply to the Tribunal for a determination of reasonable terms on which a licence should be granted. The Tribunal is specifically required to take into consideration antitrust considerations. In proceedings concerning voluntary licences and licence schemes, the Tribunal must, if requested by a party to the proceedings, consider relevant guidelines (if any) made by the ACCC. The Tribunal may also make the ACCC a party to the proceedings (if the ACCC asks to be made a party and the Tribunal is satisfied that it would be appropriate to do so). When the Tribunal has made an order in relation to a licence scheme, a person who complies with the terms is in effect deemed to have the necessary licence. Accordingly, collecting societies cannot unreasonably refuse a licence or unreasonably impose its terms.
58. The Copyright Tribunal is a genuine fetter on any possible anticompetitive urges a rights-holder might have, and the Copyright Act provides consumers with rights to access copyright material in a manner not afforded to consumers of other species of property. APRA AMCOS submits that the Commission must view the section 51(3) exception as part of the balancing act between creative and consumer interests, and that its removal would require a wholesale recalibration of the system that is already place. Its removal would tip the balance inequitably against the interests of Australia's creative community.

Draft recommendation 17.1 – Australia's leadership role on international stage

59. APRA AMCOS does not understand the basis of the recommendation that Australia should "revive" its role in supporting opportunities to promote global cooperation on intellectual property on intellectual property policy among intellectual property offices through WIPO and the WTO to avoid duplication and reduce transaction costs.
60. APRA AMCOS considers that Australia has always played a leading role in promoting global cooperation in respect of intellectual property, and supports the suggestion that it should do so in the future.
61. APRA AMCOS is itself a part of an international framework of collecting societies that cooperate to commercialise each other's membership's repertoire of works in virtually

every country in the world. APRA AMCOS has been involved in a number of cutting edge projects with other societies around the world to promote global cooperation and reduce duplication and transaction costs, including the Copyright Hub.

62. However, APRA AMCOS considers the recommendation that Australia work together with other countries in WIPO and the WTO to promote cooperation in intellectual property to be strangely located, given that the Draft Report also recommends that Australia work toward limiting the term of copyright to 15-25 years. It is difficult for a rogue operator to promote cooperation.

Draft recommendation 18.1 – Extended safe harbours

63. APRA AMCOS opposes the recommendation to extend the Safe Harbour Scheme to cover the broader set of online service providers.
64. The recommendation is poorly timed because there is a range of developments in the area, both locally and internationally, which warrant attention before making such vast changes to the safe harbour scheme. It is also poor policy.

Poor timing

65. First, it is well known that the safe harbour scheme in Australia requires, at section 116AH, that the carriage service provider comply with an industry code *if there is one in force*. The safe harbour scheme came into effect on 1 January 2005, now more than 11 years ago. In the intervening years, despite five inquiries into the safe harbour scheme being undertaken, and despite the high-profile hearings into the liability of ISPs for authorisation of users' infringement, there is still no industry code. APRA AMCOS considers the delay thus far is truly unacceptable. No doubt one of the chief reasons for delay in developing an industry code is that there is no incentive for ISPs to agree to one, and it would create a further layer of regulation on ISPs that would simply not exist prior to (or, without) its creation. Regulation 20B of the *Copyright Regulations* specifies the requirements that must be met by an industry code, including that it "must be developed through an open voluntary process by a broad consensus of copyright owners and carriage service providers." If a broad consensus among copyright owners and ISPs has been unachievable thus far, what awaits an industry code that requires a consensus of those parties as well as many other (undefined) service providers? Will a code need to be "re"-negotiated to include the consensus of educational institutions, search engines, bulletin boards and so on?
66. Secondly, the future of this area of copyright law is uncertain, given the ALRC's recommendations with respect to extending defences to some of the activities that entitle one to Safe Harbour protection. APRA AMCOS believes that an holistic approach to amending this area of copyright law should be taken, and respectfully query whether discussion should await a final indication from the government about the immediate future of the recommendations made by the ALRC.
67. Thirdly, the safe harbour scheme in Australia was based largely on the American counterpart. The current proposed expansion appears to be based on mirroring the US version more closely. So it would be useful to consider the American experience of its scheme prior to reproducing it here. By Notice of Inquiry dated 31 December 2015, the US Copyright Office launched a far-reaching public study to evaluate the impact and effectiveness of the safe harbor provisions contained in the US Copyright Act. The Notice is extremely detailed, and the enquiry will address 30 specific questions about the effectiveness of the scheme. Respectfully, in APRA AMCOS's view, it makes little sense to implement such a momentous change to Australia's safe harbour scheme in

order to align it with US law, when the US is itself undergoing an enormous review of the effectiveness of its scheme.

Poor policy

68. The Australian legislature first dealt with the issue of liability for copyright infringement by carriage service providers in the *Copyright Amendment (Digital Agenda) Act 2000*. In doing so, it deliberately distinguished between content providers and carriage service providers.
69. In his Second Reading Speech, the then Attorney-General, the Hon Daryl Williams MP stated:
- Under the amendments, therefore, carriers and Internet Service Providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material. This is a key underlying principle in the government's approach to regulating the new technological environment.
- The reforms provide that a carrier or Internet Service Provider will not be taken to have authorised an infringement of copyright merely through the provision of facilities on which the infringement occurs.
- Further, the bill provides an inclusive list of factors to assist in determining whether the authorisation of an infringement has occurred. This codification of authorisation principles provides greater certainty for all players in the digital environment.
70. The factors to which the legislation referred included the extent (if any) of the person's power to prevent the infringement; the nature of any relationship between the service provider and the infringer; and whether the service provider took any reasonable steps to prevent the infringement (eg, compliance with an industry code of practice). These factors were largely derived from Australian case law, notably *UNSW v Moorhouse* (1975) 133 CLR 1. Thus the amendments to the authorisation provisions of the Act must also be considered as part of the context in which online service providers and copyright owners operate in the digital environment.
71. In his Second Reading Speech introducing the *Digital Agenda Act* Mr Williams observed:
- Typically, the person responsible for determining the content of copyright material online would be a website proprietor, not a carrier or Internet Service Provider.
72. While this observation clearly preceded the proliferation of user-generated content on websites, APRA AMCOS submits that the distinction between carriage service providers and providers of content remains valid.
73. In particular, it is very clear that the intended beneficiaries of the Safe Harbour provisions of the Act (and, indeed, of section 39B which relates to the authorisation provisions) are persons who *provide facilities* for online services, not the persons who provide the online services themselves. In common with other users of copyright material, online *service providers* have the protection of the authorisation provisions of section 36(1A) (inserted in 2000 as described above, with section 39B as part of the Digital Agenda amendments), and the 'innocent infringement' provisions in section 115(3). Were the Safe Harbour protections to be extended to online service providers as well as the providers of facilities, it would have a serious impact on the effect of the authorisation provisions and section 115(3) in the context of online service providers. It

would also create a two-tiered system of protection, with online businesses treated dramatically differently to other market participants. This is likely to result in confusion and higher compliance costs for copyright users, particularly those participating in both online and traditional media, and for copyright owners.

74. In APRA AMCOS' submission there is a clear distinction between someone who does no more than provide the facilities for a communication and someone who is in the business of providing content. APRA AMCOS submits that the Safe Harbour Scheme should retain the distinction. In APRA AMCOS' submission, entities who are in the business of providing content exercise a different level of control over the material on their site or network. For this reason, entities such as social networking and video sharing sites should not be included in the Safe Harbour Scheme.
75. In APRA AMCOS' submission, extending the Safe Harbour Scheme to content providers will categorically disturb any notion of balance inherent in the Act. First it will subvert the policy behind the Scheme, which distinguishes between content providers and those who merely facilitate the communication of content. Secondly and more tangibly, it will reduce the incentives for such entities to enter into commercial agreements with copyright owners.
76. APRA AMCOS does not understand Australia's existing Safe Harbour Scheme to be inconsistent with Australia's obligations under its international treaty obligations. In APRA AMCOS' submission, the fact that the scope of the Australian Scheme may be more restrictive than is possible while remaining consistent with Australia's obligations under the AUSFTA and TPP is not in itself a reason for reform.
77. APRA AMCOS is unaware of any evidence suggesting that the limitation of the Australian Scheme to "carriage service providers" is having a chilling effect on the online activities of other types of service providers. Indeed, there has been a significant increase in such activity since the Scheme came into operation on 1 January 2005. As noted above, there is an existing market for the provision of copyright licences to such businesses.
78. This should not be surprising given that those who do no more than provide the facilities for making a communication of an a sound recording, film or broadcast are able to take advantage of the defence in section 112E.
79. Furthermore, the Safe Harbour Scheme only operates in relation to copyright. Service providers must still consider a range of other laws when managing their online presence. For example, a search engine or social media bulletin board can be held liable for defamatory comments made by users, once on notice: *Trkulja v Yahoo!*; *Trkulja v Google*; *Duffy v Google*, etc. This and other regulatory regimes will also influence how service providers do business online. It is therefore questionable whether amendments to the Safe Harbour Scheme will give service providers much relief (if it is decided that any is required) in relation to their liability online.
80. APRA AMCOS also submits that any expansion of the scope of the Safe Harbour Scheme cannot responsibly be achieved by the mere broadening of the categories of online businesses that will receive the protection of the Scheme. A proper review of the Scheme must also involve a detailed consideration of the appropriate levels of response that might be required from the different types of business that participate in the online markets, as evidenced by the current provisions that recognise different response levels for different activities. Such businesses are diverse, increasing in number, and difficult to define. For example, the businesses might include online auction sites, website hosts, user generated content sites, and search engines. In many cases, a single entity may

provide more than one of these services, and the nature of the service itself may be difficult to categorise. The appropriateness of the response for each type of business is likely to be different in each case, leading to an unwieldy and confusing law. This would be a perverse outcome given the current ambition in copyright law reform to simplify the Act.

Draft finding 18.1 – Timely and cost-effective access

81. APRA AMCOS does not agree with the Draft Finding that the evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.
82. Contrary to what is suggested, copyright infringement is not induced by a lack of availability or an unreasonable price point. It is rather occasioned by some, but clearly not all, consumers' unwillingness to pay for that which they can readily obtain free of charge. No content creators – in fact, no business – is able to compete with free, where a considerable section of the Australian population perceives there to be no disincentive to consuming pirated content. The perceived and real ability for consumers to infringe with impunity stems from a lack of leverage held by content creators. The defect in the market is in the fact that the only real leverage the content creators have is a moral-educative one, which simply is not sufficiently compelling to many infringers.
83. The evidence strongly supports this view. Reasonable people can have reasonable disagreements about television and film offerings in Australia. But the evidence in relation to the music industry is incontrovertible. In Australia, consumers have access to about 20 different digital music service providers that are licensed, and which offer virtually the world's repertoire of musical works either at no cost (but are ad-funded) or at very little cost. For example, Apple Music, Spotify, Deezer, Google Play Music All Access, Guvera, Rdio and Xbox Music offer their premium plan at a little over \$10 per month. All of those services, and others such as Vevo, iHeartRadio and Pandora, offer free options which, in some cases, are ad-supported. On the basis that a consumer can choose between any of these options (not to mention the wide range of download and physical product offerings also available), one would think that there would be no need for online piracy of music. But this is not the case. Based on data from comScore and Nielsen, available in the IFPI *Digital Music Report 2015*, it is estimated that 20% of fixed-line internet users worldwide regularly access services offering copyright infringing music. IFPI estimates that in 2014, there were 4 billion music downloads via BitTorrent alone, the vast majority of which are infringing.

Information request 5.1 – Exceptions for digital material

84. The request is premised on the notion that the exceptions in the Act treat digital material differently from analogue material. This is not the case.

Information request 5.2 – The Code of Conduct

85. The Australian experience of the Copyright Collecting Societies' Code of Conduct has been an overwhelmingly positive one for collecting societies, their members and their licensees. The Code addresses a number of aspects of the relationship between societies, members and licensees, setting minimum standards for the societies' conduct. For a society, an essential element of complying with those standards is maintaining detailed records of its operations, for the sake of independent external review, which is then annually published by the code reviewer. The reviewer's reports survey every single complaint made against each collecting society, and comment on whether the complaints reveal a breach of the Code by the society. The code reviewer is an

independent expert; since the Code's implementation, the reviewer has been a retired federal court judge. The Code requires each society to report to the reviewer on its own compliance, including:

- (a) its training of employees and agents to ensure that they are aware of, and at all times comply with, the Code, and in particular that they are aware of the procedures of handling complaints resolving disputes and are able to explain those procedures to members, licensees and the general public;
- (b) the activities it has undertaken to promote awareness among members, licensees and the general public about the importance of copyright; the role and function of collecting societies in administering copyright generally; and, the role and functions of the particular society; and
- (c) the number of complaints it has received and how those complaints have been resolved.

86. Additionally, the reviewer is empowered to call for submissions from members, licensees and the general public on the level of compliance by collecting societies with their obligations under the Code. Each year, the reviewer has ensured that wide advertisement of the review, and of the opportunity to make submissions, has taken place. The reviewer visits the premises of each society to interview senior executives concerning the policies, activities and records of the society.
87. In the 2005 report, the code reviewer noted: "The willingness of societies to engage annually in this quite arduous process [demonstrates] a commitment to the objectives of the Code." In 2006, the reviewer made the following comment, typical of his findings in each of the annual reports: "The Code appears to have a broad influence over and beyond its effect on particular actions. The very fact that it has been kept before the staff of the societies, not merely through induction courses, but in regular conferences and daily practice, on their websites, and as the subject of specific records, tends over time to create and reinforce attitudes consistent with the aims of the Code. It will, of course only continue to have this effect while the societies remain committed to it. That they have shown themselves committed to it during the period under review is the most important and promising conclusion of this report." As was noted in 2008: "The records of the societies and the information obtained confirmed the conclusion that their Code of Conduct has become an important part of their corporate culture." In 2009, the reviewer observed that the Code's "influence is pervasive."
88. The reviewer has consistently pointed out the numerous benefits of the Code having such an embedded position in the policies and day-to-day procedures of the societies, noting that: "Where failures occur, as they will in any large organisation, they are dealt with in accordance with the Code, which both tends to ameliorate the harmful effect of a particular inappropriate action and tends also to lessen the prospect of any repetition." (Triennial Review, 2008). Moreover, the reviewer has witnessed that: "Where a complaint did reveal a defect in a system or practice, [on many documented] occasions, APRA took positive action in response to the complaint by amending a system or form, or taking some other step to avoid a recurrence of the problem. In many cases, too, even when no fault was attributable to APRA, a prompt apology was proffered. It cannot be overemphasised that the Code is designed to use complaints as insights into improvements that may be desirable, and also to ensure that the relations of the collecting societies with members, licensees and others are harmonious." (2006). A significant exposition of the Code's effectiveness in creating such a harmony between the societies and their members and licensees is in the dramatic reduction of complaints received.

89. Part of the review process, apart from the annual reports of the compliance with the Code by the independent expert, is a triennial review of the Code itself. In 2008, the code reviewer reflected on the dramatic decrease in complaints and offered the following explanation: “In the annual report for the year ended 30 June 2005, it was pointed out that the number of general licensing complaints against APRA had dropped over the period since the adoption of the Code “to exactly one third of the number of general licensing complaints recorded for the initial year.” Subsequent annual reports have demonstrated that this great improvement was no mere statistical aberration. Although it was probably not due solely to the Code, nevertheless the conclusion drawn by the code reviewer as a result of the annual reviews is that the Code’s contribution was very substantial.”

Conclusion

Thank you for the opportunity to make these submissions. APRA AMCOS is willing to elaborate on or clarify any of the submissions above if need be, prior to the Commission its finalising the Report.

About APRA AMCOS

APRA is the collecting society in Australia in respect of the public performance and communication rights of songwriters and music publishers. This covers the performances of music in more than 126,000 businesses across Australia and New Zealand, including retail shops, nightclubs, restaurants and festivals, among many other settings, as well as the communication of musical works online, such as in download and streaming services like Apple iTunes and Spotify, and on commercial television and radio. AMCOS is the collecting society in Australia in respect of reproduction of music in certain formats. This covers the reproduction of songs and compositions on CD, DVD, online, for use as production music, and for radio and some television programs. Together, APRA and AMCOS control the copyright for such purposes in almost all commercially available musical works, by virtue of assignments from its local members and affiliations with similar overseas societies. Since 1997, the two organisations have been administered in tandem, and these submissions represent the united view of both.

APRA has approximately 90,000 members and AMCOS has more than 15,000 members. Together, they represent an extremely diverse membership, ranging from unpublished writers to major music publishers.

Since 2000, APRA has operated under the terms of authorisations granted initially by the Australian Competition Tribunal, and subsequently by the ACCC. APRA most recently renewed its authorisations in 2014, and is authorised for a period of five years.