



Music Rights Australia’s Submission in Response to the Productivity
Commission Draft Report on Intellectual Property Arrangements

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RESPECTING AND PROTECTING CREATIVITY

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

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 85,000 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. Summary

MRA will only comment on a limited number of copyright issues raised in the Draft Report. MRA refers to the submissions of ARIA, APRA AMCOS and the Australian Copyright Council³ for more extensive comment on the Draft Report. In particular, MRA refers to the detailed submissions of ARIA, APRA AMCOS with respect to the issue of fair use and the commercial environment for music.

MRA is concerned that the recommendations contained in the Draft Report do not reflect the current online environment and will have a negative impact on the music industry and have the potential to undermine its financial contribution to the local economy and Australia's cultural life.

Copyright Protection

In summary, the Draft Report states that:

- IP arrangements need balance;
 - Government should be informed by a robust evidence-based approach in formulation of policy;
- and
- The Commission has had regard to the principles of effectiveness; efficiency; adaptability and accountability.

¹ See www.apraamcos.com.au.

² See www.aria.com.au.

³ See www.copyright.org.au

However, the Commission's recommendations with respect to changes to the Copyright Act 1968 (the **Copyright Act**), including changes to the Safe Harbours regime and observations about copyright enforcement generally, are based on a series of untested assumptions and assertions.

The Draft Report:

- Does not consider the current commercial landscape for music and other creative industries in its overview of the copyright environment.
- Asserts, without robust evidence in support, that the Copyright Act is weighted too heavily in favour of copyright owners to the detriment of users.
- Does not adequately consider the damaging impact which unchecked online copyright infringement has on local innovation, the development of new business models and the production of nationally and internationally acclaimed local creative content.
- Does not consider the issues which rights holders have continued to raise in a number of official enquiries about the ineffective operation of parts of the Copyright Act.

The Draft Report fails to take into account the concerns which rights holders have raised about the absence of effective and efficient mechanisms to ensure creators' rights are protected in the online environment.⁴

The Draft Report appears to conclude that rights protection is best dealt within the court system⁵ and that the problem of online copyright infringement will be solved by the "silver bullets" of price and availability.⁶

The Draft Report offers no credible evidence for these conclusions.

MRA urges the Commission to consider the example which the music industry offers in the preparation of its final report.

⁴ Music Rights Australia's *Submissions in Response to Online Copyright Infringement Discussion Paper* (September 2014). Music Rights Australia's *Submissions in Response to Copyright Amendment (Disability Access and Other Measures) Bill 2016 Exposure Draft* (February 2016).

⁵ Particularly in the *Federal Circuit Court of Australia* as per p 495 of the *Productivity Commission Intellectual Property Arrangements Draft Report* (April 2016).

⁶ Productivity Commission, *Intellectual Property Arrangements Draft Report* (April 2016), 177.

Music is used and enjoyed more than ever (the recording industry has licensed around 40 million tracks and more than 400 digital music services in some 200 countries worldwide, including 26 services in Australia): see www.promusic.org; and www.digitalcontentguide.com.au.

These licensed online music services are available to consumers across a range of devices and at price points which include free on some ad-supported services. However, the music industry continues to be undermined by unchecked unlicensed use online.

Access and price cannot be held up as **the** solution to this issue. The Commission's failure to make serious enquires into the range of possible strategies and solutions which could address the damaging impact which online piracy has on the creative sector has resulted in a seriously flawed Draft Report.

MRA urges the Commission to make more measured and considered recommendations which reflect the current licensing environment and the damaging impact which online infringement has on rights holders.

Safe Harbours and Industry Standards

The Draft Report fails to make recommendations to implement an effective and efficient copyright framework which would offer copyright owners, large and small and consumers access to non-litigious mechanisms which balance both consumer and right owners' interests.

The Draft Report is silent on the role which service providers should play in rights protection and there is no mention of the obligations they should have to prevent copyright infringement online.⁷ But worryingly the Draft Report recommends extending its overly broad fair use proposal to third parties that make use of material on behalf of users.⁸

The Commission's failure to consider the obligations service providers have to support the promotion of a safe and robust online environment is out of step with international trends and the current reviews which are underway in the United States⁹, EU¹⁰ and United Kingdom¹¹.

⁷ Music Rights Australia's *Submissions in Response to Online Copyright Infringement Discussion Paper* (September 2014).

⁸ Productivity Commission, *Intellectual Property Arrangements* Draft Report (April 2016), 31.

⁹ U.S. Copyright Office, *Section 512 Study: Notice and Request for Public Comment*, (31 December 2015) available at: <<http://copyright.gov/fedreg/2015/80fr81862.pdf>>.

¹⁰ European Commission, *Towards a modern, more European copyright framework* (December 2015) available at: <<http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20150626.do>>.

Local rights holders have offered a range of suggestions to improve the current copyright framework including, but not limited to:

- Amending the authorisation sections of the Copyright Act to ensure they function as they were intended to function.
- The introduction of an industry code or industry standards to address online infringement.
- A complete review of the current safe harbour scheme which would take advantage of the international reviews which are currently being undertaken in the US, EU and the UK. The review would result in a safe harbour scheme fit for purpose in the current online environment.
- Expanding the current no-fault remedy under section 115A to include service providers generally so that the damaging impact that off shore online locations, which have the primary purpose of infringing or facilitating the infringement of copyright, have on copyright owners can be dealt with more effectively.
- The adoption of industry standards by advertisers and online platforms to address the placement of advertising on illegal sites.
- A coordinated consumer education campaign about the importance of copyright to our economy and national identity which includes information about the sources of legitimate content.

The narrow focus and unrealistic approach towards rights protection adopted in the Draft Report and the Commission's failure to consider the damaging impact which copyright infringement has on the creative sector and the economy as a whole, is in stark contrast to the recent announcement by the UK Intellectual Property Office titled "*Protecting creativity, supporting innovation: IP enforcement 2020*" (the **UK Report**).

The UK Report states that "...effective, proportionate and accessible enforcement of IP rights [is] a priority ..."¹²

The UK Government sets out a roadmap to make "the online world a place of legitimate activity for UK business and consumers"¹³.

¹¹ Intellectual Property Office, *Protecting creativity, supporting innovation: IP enforcement 2020* (10 May 2016) available at: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/522847/IP-Enforcement-Strategy.pdf>.

¹² Intellectual Property Office, *Protecting creativity, supporting innovation: IP enforcement 2020* (10 May 2016), 2.

The proposal includes: “

- Reviewing notice and takedown procedures to improve and streamline the process and consider the scope of introducing a Code of Practice for intermediaries.
- Pushing within Europe for clarification of the current EU rules around platform liability and improving the current system to allow rights holders to more effectively protect and legitimately exploit their copyright.”¹⁴

The UK Report goes on to acknowledge that:

“The availability of legal sources of content is important in changing consumer behaviour because, after price, the availability is often cited as the reason for consuming infringing content. In recent years there has been significant growth in the development and rollout of comprehensive legal services, including those offered by Deezer, Netflix and Spotify.”¹⁵

The Australian online music landscape has experienced similar changes. There are currently 26 licensed online music services. However the wide range of services has not solved the problem of wide spread and unchecked use of unlicensed music online.

MRA urges the Commission to review the UK Report and the extensive evidence in the US review and to amend the Draft Report to include a set of recommendations designed to address this serious problem.

Additionally, the types of programmatic solutions which rights holders have suggested do not rely on litigation and can give small and medium sized businesses and individuals efficient access to measures which can address infringement of their creative content. Litigation, in any forum, is often beyond the resources of most rights holders.

For convenience MRA has annexed the submission it made to the Online Copyright Discussion Paper 2014 and its recent submission to the Exposure Draft of the Copyright Amendment (Disability Access and Other Measures) Bill 2016.

Should the Commission have any questions about the MRA submission, please contact Vanessa Hutley
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¹³ Intellectual Property Office, *Protecting creativity, supporting innovation: IP enforcement 2020* (10 May 2016), 20.

¹⁴ Ibid.

¹⁵ Ibid.