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ICMP SUBMISSION TO THE PRODUCTIVITY COMMISSION DRAFT REPORT – INTELLECTUAL PROPERTY ARRANGEMENTS

Brussels, 3 June 2016

ICMP (International Confederation of Music Publishers) is grateful for the opportunity to contribute to the Productivity Commission's "Draft Report" regarding Intellectual Property Arrangements in Australia.

INTRODUCTION

As already explained in our submission on the Issues Paper, 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 fully support their comments and echo their position on the "Draft Report". In addition, ICMP would like to make the following comments on specific findings and recommendations of the Productivity Commission (the Commission).

COMMENTS

ICMP is disappointed with the Commission's approach towards both copyright and rightsholders. We are astonished that in an official document from what is supposed to be an impartial Commission assessing the need to modernise copyright rules, there are terms such as "copy(not)right" and "creators" in inverted commas. This makes us wonder whether the outcome of this assessment was determined from the outset, leaving rightsholders, whose lives depend on robust and efficient copyright rules, unprotected and with a far from certain future.

Moreover, ICMP is surprised that the Commission is focusing on issues of international scope such as term of protection of copyright and moral rights, given that these items are matters of international policy to which Australia is bound as a signatory to international treaties.



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Finally, in relation to the Commission’s statement that “much of the returns from copyright protected works are earned by intermediaries”, ICMP argues that music publishers make an economic and creative investment that is worth protecting. We would like to explain why this is true: music publishers, who are the link between the creative process and the market, play a significant part in developing culture and innovation. Publishers take great financial risks and invest heavily in creators who often don’t possess the means to finance their work. Publishers rely on legal certainty to incentivise and underpin ongoing investments in emerging talent and creative works.

Music publishers seek out music and composers and songwriters, support composers and songwriters in the creative process, promote their catalogues across a variety of platforms, manage the business exploitation of the catalogues (including the registration of works and the collection of all due royalties) and protect and enhance the value of their works.

To be more precise the music publisher becomes involved in the creative process by seeking out the songwriters and composers of today and, more importantly, of tomorrow. Music publishers will nurture talent helping the songwriter and composer in his or her musical development. It takes 30 years to mature an opera composer, for example. They will also give direction to his or her career, place him or her with other co-writers to develop his or her talent, find artists to perform his or her songs or find opportunities for the author to write specific musical works as requested by performers or record producers.

From a business perspective, music publishers make an investment in songwriters and composers by giving them advances, producing demos, having dedicated staff in charge of registering their works with collective management organisations, licensing all forms of exploitations, collecting and distributing royalties, protecting copyright, and publishing their sheet music in print form or licensing through digital services. Publishers are also making multi-million dollars’ investments in systems aimed at ever more accurate and transparent tracking, collection and reporting, in addition to developing online song search promotional tools.

SPECIFIC COMMENTS:

DRAFT FINDING 4.2: “While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death”

The term of protection for copyright is provided by the Australia–United States Free Trade Agreement in 2005, and international standards are also set in the Agreement on Trade Related Aspects of Intellectual Property Rights, and the Berne Convention, to which Australia is bound. The current term of protection (70 p.m.a.) is still very much appropriate in the digital environment, and is the term of protection in the majority of the countries in the world. 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



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protected by copyright it is vital that the copyright can 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.

As already stated in our submission on the Issues Paper, 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. Experience tells us that in the case of music, shorter terms have often made it difficult to recoup on those investments. It has also often proven insufficient to allow creators or their descendants to legitimately benefit from the exploitation of their works. As mentioned above, it takes 30 years to mature an opera composer and other song writers and composers any years to hone their skills. In addition, the current term has a positive impact on consumer choice and cultural diversity. In the long run, this is because it ensures the availability of resources to fund and develop new talent. In the short to medium term, the current term provides music companies with an incentive to digitise and market their old catalogues.

[DRAFT RECOMMENDATION 5.1: The Australian Government should implement the recommendation made in the House of Representatives Committee report At What Cost? IT pricing and the Australia tax to amend the Copyright Act 1968 \(Cth\) to make clear that it is not an infringement for consumers to circumvent geoblocking technology.](#)

[The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.](#)

First of all, it should be noted that as rightsholders in the B2B business, music publishers do not geo-block. Music publishers' core business is licensing, through which we are able to ensure that the works of authors and composers find a commercial outlet and we also guarantee that their creative output is rewarded by granting licences for fair compensation and protecting copyrighted music.

It is in the interest of the authors and composers that music publishers represent to ensure that their repertoire is present as widely as possible worldwide, and to exploit this repertoire as broadly as possible. Indeed, music publishers are granting multi-territorial licenses on a daily basis and for many thousands of products every year. Music repertoire is broadly and legally available throughout the world. The music industry has been able to prove that portability is provided by online services when travelling or residing abroad, including downloading MP3 on any device, synchronising through cloud storage and streaming.

We are therefore concerned by the Commission's ambition to allow consumers to circumvent geoblocking. The Commission needs to take into serious account the well-functioning licensing models in place which have allowed a broad availability of creative works to consumers continue to be able to exist. We call upon the Commission to recognise, that when limitations exist to cross-border services, they are the result of each service's operational needs and intention to meet consumer demand by adapting to local markets.



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We therefore respectfully ask the Commission for caution against recommending any legislative interventions which will lead to consumers to be able to circumvent geoblocking. This intervention risks eliminating a long-established system of licensing mechanisms. In order to avoid legal approaches that could potentially hinder the effective functioning of the licensing market, there is a need to provide for harmonised legal protection against circumvention of geoblocking and against provision of devices and products or services to this effect.

DRAFT RECOMMENDATION 5.3: The Australian Government should amend the Copyright Act 1968 (Cth) (Copyright Act) to replace the current fair dealing exceptions with a broad exception for fair use.

As noted in our submission to the “Issues Paper”, 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.

The introduction of a broad “fair use” exception in Australia 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.

In ICMP’s view, any broadening / changes to the existing exceptions and limitations regime should only be made after a thorough assessment of the impact of each exception on the market. To date, we do not see evidence of any “alleged” market failures to support any change.

The “fair use” doctrine is based on decades of litigation and case law. Introducing such a system in Australia would lead to greater legal uncertainty.

DRAFT RECOMMENDATION 18.1: The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the Copyright Act 1968 (Cth).

ICMP disagrees that a broader set of online service providers was intended in the Copyright Act 1968 and we refer to our submission on the exposure draft of the *Copyright Amendment (Disability Accedes & Other Measures) Bill* in February 2016.

ICMP firmly disagrees that *any* “service provider” should fall within safe harbor exceptions. In our view, any service engaged in the active participation or intervention in a communication by one or more third parties should not fall behind safe harbours. Acts which constitute active participation or intervention include adapting, presenting, selecting, organising, promoting, aggregating or



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curating the works being communicated or made available, or expanding the circle of people who may access those works. In our view, this should apply irrespectively of whether the works have been or are being communicated or made available to the same members of the public already. Whether the activity is undertaken for financial gain may also be taken into account.

As mentioned in our February submission, (online) service providers are greatly benefitting from the broad availability of music and creative content in general. However, despite the fact that creative content generates enormous profits for them, rightsholders do not necessarily receive fair remuneration for this exploitation of their work. Indeed, some highly profitable online platforms, such as search engines and social networks, do not remunerate rightsholders adequately for copyright-protected content online and hide behind safe harbour rules and profit from works while not contributing to the costs of their creation. Therefore, extending the exemption of liability from ISPs to any “service provider” would add to the exploitation of rightsholders by these online services, which are not merely hosting content but knowingly providing access and sharing unlicensed copyrighted content. The proposed expansion would worsen a situation which is already unbalanced and is resulting in less income for creators. It would also make it even more difficult for rightsholders to take action against these entities.

We refer to the “transfer of value” from rightsholders to some online services which concerns the issue of digital revenues and the need for rightsholders to receive a fair share of the revenues generated by the dissemination of protected content online. When negotiating with rightsholders, some highly profitable online services hide behind safe harbour rules to avoid licensing, when in fact they are intervening in the presentation and monetising through stealth (e.g. data mining, malware) or boldly through advertising, or both. Other services use their size and popularity as leverage in their negotiations with rightsholders. In particular, when negotiating with rightsholders, some online services (1) maintain that they do not carry out any copyright relevant act; (2) hide behind the safe harbour provisions; (3) argue that they don’t offer any service of a commercial nature, when in fact generating revenue is not a requirement for establishing the existence of a copyright relevant act.

It is important to note that in the EU, the executive body (European Commission) published a Communication on online platforms on 25 May¹. In the Communication, the European Commission recognises the fact that online services are increasingly taking centre stage and that with this position comes responsible behaviour towards rightsholders. The European Commission states that new forms of online content distribution have emerged that may make copyright-protected content uploaded by end-users widely available. While these services are attracting a growing audience and gain economic benefits from the content distribution, there is an increasing concern as to whether the value generated by some of these new forms of online content distribution is fairly shared between distributors and rightsholders. The European Commission intends to address this through sector-specific regulation in the area of copyright. The European Commission will also aim to address the issue of fair remuneration of creators in their relations with other parties using

¹ EC COM (2016) 288/2 - Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe



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their content, including online platforms. Also, in the context of the evaluation and modernisation of the enforcement of intellectual property rights the European Commission will assess the role intermediaries can play in the protection of intellectual property rights and will consider amending the specific legal framework for enforcement.

At a time when two important international actors – the European Union and the United States - are reviewing their copyright laws to better deal with safe harbour provisions, we would ask the Australian Government to exercise caution when expanding the scope of the current safe harbour rules as this heads in a very different direction to the path envisaged in the EU and the US and would lead to significant inconsistencies further down the line.

For further information, please contact:

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