



AUSTRALIAN RECORDING
INDUSTRY ASSOCIATION

**ARIA RESPONSE TO THE PRODUCTIVITY COMMISSION
DRAFT REPORT:
INTELLECTUAL PROPERTY ARRANGEMENTS**

June 2016

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Introduction

The Australian Recording Industry Association (**ARIA**) is the peak trade body for the recorded music industry in Australia. ARIA is a not for profit, national industry association that proactively represents the interests of its members. ARIA's members range from independent artists and small boutique labels to medium sized businesses and large companies with international affiliates. ARIA submitted a response to the Productivity Commission's Issues Paper on Intellectual Property Arrangements and we welcome the opportunity to now provide comments in relation to the Draft Report that has been published by the Productivity Commission.

It is evident that the Productivity Commission has prepared the Draft Report on the basis of a particular ideological premise. For example, the Productivity Commission has published infographics in relation to the review which uses terminology such as "Copy(not)right"¹ which suggests that copyright is in some way "broken". This approach to the relevant issues is flawed and does not take into consideration the practical application and importance of copyright within the Australian creative sectors.

The Productivity Commission proposed a framework to the Inquiry which was based upon the principles: *effectiveness, efficiency, adaptability* and *accountability* that is informed by robust evidence. However, in our view, that the Productivity Commission did not fulfil that commitment and has not provided any new evidence to support many of the recommendations.

The Productivity Commission seems to have approached the Inquiry from a viewpoint that Australia will never be a leading exporter of intellectual property and it seems to be concerned about implementing strategies that will drive down the prices of intellectual property and consequently undermine the existing markets. This seems to be in conflict with the Government's strategy of promoting Australia as an agile and innovative nation.

The Australian creative industries are vital in shaping and promoting Australia's cultural identity. A strong copyright framework that provides rewards and incentives to enable the creative industries to continue to produce their creative content in new and innovative ways is of immense importance. However, many of the recommendations set out in the Draft Report will negatively impact upon the creation and dissemination of Australian creative content through the dilution of copyright protection and the resulting diminishment of incentives to invest and create such content.

ARIA has consulted with other creative sectors groups in relation to the Draft Report and supports the submissions made by Music Rights Australia, Phonographic Performance Company of Australia Ltd, International Federation of the Phonographic Industry (**IFPI**), APRA AMCOS and the Australian Copyright Council.

The Draft Report is expansive and ARIA is limiting its comments to those matters that relate to copyright.

¹ The terminology also appears in the Draft Report for example at page 16

The Analytical Framework

DRAFT RECOMMENDATION 2.1

In formulating intellectual property policy, the Australian Government should be informed by a robust evidence base and have regard to the principles of:

- *effectiveness, which addresses the balance between providing protection to encourage additional innovation (which would not have otherwise occurred) and allowing ideas to be disseminated widely*
- *efficiency, which addresses the balance between returns to innovators and to the wider community*
- *adaptability, which addresses the balance between providing policy certainty and having a system that is agile in response to change*
- *accountability, which balances the cost of collecting and analysing policy-relevant information against the benefits of having transparent and evidence-based policy that considers community wellbeing.*

The Productivity Commission proposed a framework for the Inquiry based upon four principles: effectiveness, efficiency, adaptability and accountability. As ARIA noted in its response to the Issues Paper, ARIA was supportive of a review process which was underpinned by clear principles and an evidence based approach. However, the Productivity Commission’s recommendations in the Draft Report relating to copyright are seemingly at odds with this approach, and the Productivity Commission has provided scarce new evidence to support the recommendations and findings. In fact, it seems that the Productivity Commission excluded or did not consider the evidence provided by the creative industries and instead relied on theoretical views or arguments that are aligned with the Productivity Commission’s notion regarding “Copy(not)right”.

Copyright Term and Scope

DRAFT FINDING 4.1

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.

ARIA’s view is that it is more accurate to state that Australia’s copyright system has “adapted” or “changed” over time. Many of the changes to the *Copyright Act 1968 (Cth)* that have occurred over the past decades have not necessarily “expanded” copyright protection, but have also introduced numerous exceptions and limitations which have been of benefit to both copyright users and creators. For example the *Copyright Amendment Act 2006 (Cth)* saw the introduction of a private copying exception which allows consumers to make a copy of a legitimately acquired recording (either physical or digital) for private and domestic use on different devices. In addition, a “time shifting” exception was also introduced that allows consumers to record television and radio programs to view or listen to a program at a later time.

Most changes to Australia's copyright system have arisen as a result of government reviews and consideration in the context of our international obligations. Australia is a signatory to numerous international treaties which relate to copyright² which runs counter to the assertion that there is a lack of transparency in relation to the changes to Australia's copyright system.

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 Draft Report suggests that a more reasonable estimate of the copyright term is 15 to 25 years after creation. This statement demonstrates that the Productivity Commission has not fully considered the commercial realities of the application of copyright protection within the Australian creative industries.

The proposed 15 to 25 year term has been suggested without clear evidence from the Productivity Commission. The Draft Report cites Australian Bureau of Statistics (ABS) data which estimates that the average commercial life of music is between 2 and 5 years. It further states that around 70 per cent of musical originals provide a return in the first two years with the remaining 30 per cent providing a return fairly evenly over the next 3 years.³ From the music industry's perspective, there are several issues with this estimate. For example, a recording artist may spend several years making an album before it is commercially released and no regard is provided to this vital development period. Furthermore, in relation to music, the ABS report⁴, which the Productivity Commission uses as the basis of its estimate, states that:

Music general information about the life cycle of typical Australian music titles is obtained from the Australian Record Industry Association (ARIA). Indications point to an average life of two years and a maximum life of five years. However, detailed information is not obtained from ARIA's membership to verify the accuracy of these indications⁵. [emphasis added]

The list of references in the ABS Report refers to the ARIA Yearbook as being a source of information. The ARIA Yearbook has not been published since 1997 so any data is extremely outdated. In any event the ARIA Year Book does not contain specific information relating to the commercial life of a sound recording and it may be the case that the ABS has extrapolated their current estimates from this old data source.

A cursory review of the top 100 titles in the 2015 ARIA Catalogue Albums Charts⁶ clearly indicates that the 2 to 5 year commercial life proposition and the proposed 15 to 25 year copyright term for sound recordings are ill conceived and do not align with the current commercial landscape for sound recordings. Please refer to the diagram below for further context:

² These include the *Berne Convention for the Protection of Literary and Artistic Works*, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, the *Universal Copyright Convention*, the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, the *World Intellectual Property Organization Copyright Treaty* and the *World Intellectual Property Organization Performances and Phonograms Treaty*.

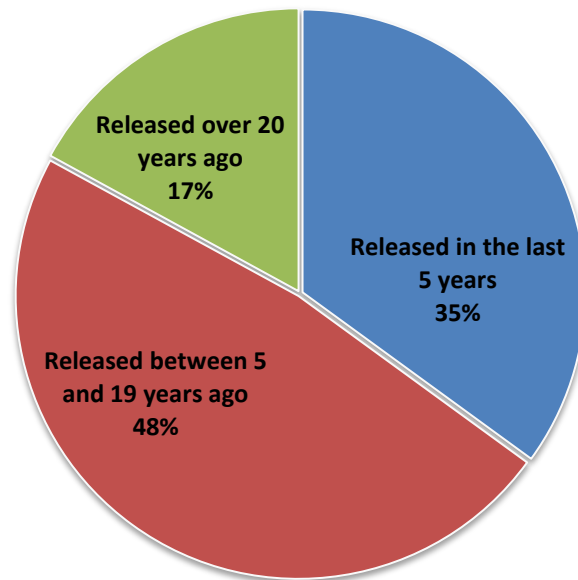
³ Draft Report at page 114

⁴ <http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/1A9681CB1164057CCA257F7D00177CBF?opendocument>

⁵ n4 at paragraph 14.98

⁶ The ARIA Charts track the popularity of recorded music in Australia. <http://www.ariacharts.com.au/>

**ARIA 2015 End of Year Catalogue Chart (top 100)
Unit Sales by Age of Release**



In fact, in the top 100 ARIA Albums Chart from 2015, best of releases from INXS, ABBA, the Eagles and Michael Jackson were still listed in the highest selling releases for 2015.⁷ One only needs to turn on the radio and listen to top rating commercial radio stations like WSFM and Smooth FM whose playlists comprise of recordings that are more than 15 years old.

Consumers are now able to access music in more ways than ever before. They may buy music in physical CD or vinyl formats, but technological advancements over the past years through the launch of download stores, music streaming subscription services, video streaming service or advertising-supported streaming services means that sound recordings that may have previously had a ‘shelf life’ are now able to be accessed online without any constraints relating to stock levels and manufacturing.

This means that the commercial life of a sound recording cannot be deemed to be limited. Even if “very few works continue to be profitable so long after their creation”⁸, creators of music and those who invest in them, should not have their ability to make a living and recoup their investment curtailed through a reduction in the copyright term.

Moreover, Australia is a party to numerous international treaties and trade agreements. As noted in the Draft Report, Australia has no unilateral capacity to alter copyright terms but can negotiate internationally to lower the copyright term.⁹ It would be unfounded if Australia was to follow this course

⁷ 2015 ARIA End of Year Albums Chart: <http://www.ariacharts.com.au/annual-charts/2015/albums-chart> (last accessed 3 June 2016)

⁸ Draft Report at page 113

⁹ *ibid* at page 117

of action and pursue a copyright term that is less than what is in place internationally and that derogates from what is prescribed in our international treaties and trade agreements.

DRAFT RECOMMENDATION 4.1

The Australian Government should amend the Copyright Act 1968 (Cth) so the current terms of copyright protection apply to unpublished works.

As ARIA noted in its response to the Exposure Draft for the *Copyright Amendment (Disability Access and Other Measures) Bill 2016*, ARIA recognises that it is important that public and government libraries are able to make copies of copyright material for archival and preservation purposes.

ARIA would be willing to consider changes to the Copyright Act so that the current terms of copyright protection apply to unpublished works. However, any consideration of such an amendment would need to ensure that it applies to the *current* terms of copyright protection.

Copyright accessibility: licensing and exceptions

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.

The Productivity Commission cites the “Australia Tax” as a reason for its recommendation that circumvention of geoblocking should not be considered as an infringement.

From the perspective of the music industry, the basis for this recommendation, and the recommendation itself, are problematic as they fail to take into consideration and or to properly compare the various access and pricing models that are in place for music within Australia.

The IT Pricing Enquiry was held in 2013 and given the pace at which technology advances, the findings are not reflective of the current licensing models. The usual price in Australia for a monthly subscription to a music streaming service is AU\$11.99. According to IFPI, this is less than the typical monthly cost of these services in the United States (US\$9.99) and Western Europe (GBP £9.99 and EUR 9.99 respectively).

However, it should also be noted that whilst these prices refer to subscription streaming services, there are numerous free music streaming services that are available to consumers. Spotify, Pandora, YouTube, iHeart Radio and Guvera all have service offerings which allow consumers to access millions of songs for free. With music service offerings such as this, it is inaccurate to cite the circumvention of geoblocking as a reason to address a market failure that is not occurring.

The Productivity Commission has also failed to consider that geoblocking is often implemented because the copyright is owned and licensed on a per territory basis. For example, a record company may administer the recording rights for an artist in Australia but another record company may administer those same rights in the United Kingdom. From a recording industry perspective, this is often in the best interests of an artist who wants to have ‘people on the ground’ with local knowledge to promote and market their recordings. The Productivity Commission has not commented on the contractual and other legal issues that would arise from content being made available in territories for which a content provider does not have the requisite rights.

Therefore the implementation of this recommendation will have a negative impact on the Australian creative industries because the Productivity Commission has failed to consider the commercial implications for rights holders. The recommendation is effectively a ‘race to the bottom’ relating only to pricing and has the potential of forcing Australia to become an importer of content rather than producing content domestically that is reflective of Australian voices and culture.

The Australian domestic market will be completely undercut by local consumers accessing content offshore. The long term effects will be the weakening of Australian business models. This will have an adverse impact on investment and innovation as investors and content creators will not have an incentive to produce and invest in Australian content and business models. This will damage the competitiveness of Australia in the digital economy.

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.

The new exception should contain a clause outlining that the objective of the exception is to ensure Australia’s copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement. The Copyright Act should also make clear that the exception does not preclude use of copyright material by third parties on behalf of users.

The exception should be open ended, and assessment of whether a use of copyright material is fair should be based on a list of factors, including:

- ***the effect of the use on the market for the copyright protected work at the time of the use***
- ***the amount, substantiality or proportion of the work used, and the degree of transformation applied to the work***
- ***the commercial availability of the work at the time of the infringement***

the purpose and character of the use, including whether the use is commercial or private use.

The Copyright Act should also specify a non–exhaustive list of illustrative exceptions, drawing on those proposed by the Australian Law Reform Commission.

The accompanying Explanatory Memorandum should provide guidance on the application of the above factors.

ARIA does not support the introduction of a fair use exception and does not believe that the Productivity Commission has offered any compelling or new evidence which would warrant the implementation of fair use in Australia. ARIA supports the comments that have been made by the Australian Copyright Council in relation to this draft recommendation although we wish to make the following additional comments:

- Fair use removes impediments to industry development¹⁰:

It is inaccurate to suggest that fair use is the factor that has stimulated innovation and technological development in the United States. For example, this issue was considered in detail as a part of the expansive Hargreaves Review in the United Kingdom¹¹. In this report, Professor Hargreaves dismissed the proposition that the adoption of fair use would quickly stimulate innovation. It was noted that other contributing factors such as attitudes towards business risk and investor culture were more significant:

*Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.*¹²

Supporters of the introduction of fair use are often multinational corporations that seek to develop or expand their operations through the use of and access to content that has been created by others - without compensation. From the music industry's perspective, licensing models are in place to facilitate the development or expansion of these enterprises and fair use should not undermine these commercial practices. It is reasonable for content creators to have an expectation that the results of their creative endeavours will not be used without their permission, and that they will be able to negotiate the terms on upon which their work will be used. It should be at the discretion of the content owner if they want to make their creative output available for free or for a negotiated fee. A case has not been made as to why an entity should not be required to pay for the use of another's creative output in the same way in which they would be required to pay for any other business cost.

- Fair use is inherently uncertain¹³:

Despite the evidence provided to the Inquiry, the Productivity Commission has stated that "*legal uncertainty is not a compelling reason to eschew a fair use exception in Australia, nor is legal certainty desirable in and of itself*".¹⁴

This recommendation is seemingly at odds with the Productivity Commission's Terms of Reference which state that: "*In undertaking the inquiry, the Commission should recommend changes to the current system that would improve the overall wellbeing of Australian society, which take account of Australia's*

¹⁰ Draft Report at page 145

¹¹ See <https://www.gov.uk/government/publications/digital-opportunity-review-of-intellectual-property-and-growth>

¹² *ibid* at paragraph 5.17

¹³ Draft Report at page 145

¹⁴ Draft Report at page 147

*international trade obligations, including changes that would: provide greater certainty [emphasis added] to individuals and businesses as to whether they are likely to infringe the intellectual property rights of others”.*¹⁵

Table 5.2 as set out in the Draft Report¹⁶ which is sourced in part from material provided by Google and educational institutions in and of itself reflects the uncertainty of the application of fair use where some of the illustrative scenarios are noted as “potentially” fair use in the US. We refer the Productivity Commission to the submission made by Copyright Agency Limited in relation to Table 5.2 of the Draft Report which reflects that many of the suggested activities are already licensed within Australia either through statutory licences or voluntary licences.

The uncertainty that is inherent in the application of fair use will inevitably lead to higher costs for individuals who are users of copyright materials as they would need to seek legal advice in relation to proposed uses. In turn there would be costs incurred by content owners who would need to litigate more often to enforce their rights. Legal proceedings are often protracted by nature and can take some time to run their course, which increases the period of uncertainty in which the parties would be operating. This is not a desirable outcome – especially for small businesses or artists who cannot afford to sustain such costs against often well-resourced multinational enterprises or endure the period of time it would take to resolve the matter through the court system. In addition, even once the proceedings are finalised, the decision would largely be specific to the specific circumstances of that matter.

The practice of ‘sampling’ and ‘mashups’ was discussed in the Draft Report in Chapter 4¹⁷ in the context of transformative uses of existing content and that “fair use” could enable transformative uses where reasonable. It is important to note that there are existing and longstanding models in place in relation to licensing the use of samples and mashups. It is appropriate that the creators of the original material have the choice to license their material in this way or to allow their music to be sampled without compensation. The choice should be theirs about how and where their music is used and should not be restricted by a fair use exception.

ARIA also does not support the introduction of any changes which would permit third parties to take advantage of a fair use or any exception which would allow the use of copyright materials by third parties on behalf of users. There is no reason why these third parties should be able to profit from the exploitation of rights that are owned by an entity or exclusively licensed by another and have the benefit of an exception to allow them to access for free what is legitimately licensed by others.

¹⁵ Draft Report at page v paragraph 2(c)

¹⁶ Draft Report at page 143

¹⁷ Draft Report at pages 109 to 112

Competition Policy

DRAFT RECOMMENDATION 14.1

The Australian Government should repeal s. 51(3) of the Competition and Consumer Act 2010 (Cth) (Competition and Consumer Act).

The Australian Competition and Consumer Commission should issue guidance on the application of part IV of the Competition and Consumer Act to intellectual property.

ARIA refers the Productivity Commission to the submission that was made by ARIA to the Competition Policy Review.¹⁸

Compliance and enforcement

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).

ARIA does not support the expansion of the safe harbor scheme as recommended by the Productivity Commission. There is a lack of new evidence to support such an extension.

ARIA fully supports the detailed comments made by Music Rights Australia in respect of this. ARIA also supports the submission to the Draft Report made by IFPI, particularly in relation to the growing ‘value gap’ that is causing market distortions compounded by the misapplication of ‘safe harbour’ provisions.

As ARIA has noted in previous submissions in relation to the safe harbour scheme, Australian policy development on this issue is predicated on a distinction between those entities that provide facilities for online services, and those that *actually* provide the content services themselves. This distinction should remain as a feature of any safe harbour policy as entities that provide the content services exercise a different level of control to those entities that merely provide the facilities for the content services. Consequently, content sharing sites and social networking providers should not be provided with the protection of the safe harbour scheme. The expansion of the safe harbor scheme to include a broader set of online service providers is not conducive to enhancing innovation. It will disrupt the commercial environment which enables content owners and creators to enter into commercial arrangements for the use of their content. Not only will it diminish incentives for content providers to enter into agreements for the licensing of the services it will also diminish incentives for the creation of new content as the opportunity for reward will be impeded.

ARIA is supportive of a holistic approach to the review of the safe harbour scheme but such review should encompass more than an extension to cover a broader set of online service providers. Any proposed extension for example, would require consideration of amendments to sections 101 and 36 of

¹⁸ ARIA submissions available at: <http://competitionpolicyreview.gov.au/files/2014/06/ARIA.pdf> and <http://competitionpolicyreview.gov.au/files/2014/12/ARIA.pdf>

the Copyright Act and the obligations that any proposed “online service provider” must comply with in order to take advantage of the limited liability protections provided by the scheme.

ARIA acknowledges that an effective safe harbour scheme is an important element of an innovative and thriving digital economy and that reviews are necessary as the market evolves. However, as noted in the submission by Music Rights Australia, the safe harbour provisions are the subject of review in the United States, the European Union and the United Kingdom and the outcomes of these reviews should be considered before Australia makes any preemptive changes to the Australian scheme.

DRAFT FINDING 18.1

The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.

It is simplistic to state that timely and cost effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement. This does not reflect the music industry’s experience. While the Productivity Commission’s premise is seemingly attractive from a theoretical standpoint, the ‘real world’ market activity clearly demonstrates that it is invalid.

As noted in ARIA’s previous submission to the Productivity Commission, the experience of the music industry is that price and access in and of themselves do not reduce online copyright infringement. The music industry has invested heavily in and has licensed innovative digital business models to ensure that recorded music is available to consumers at various price points (ranging from free services to those offered for a monthly subscription fee) and at the same time throughout the world. As noted by the Hon Malcolm Turnbull MP, now Prime Minister:

*“...it seems to me that the music industry has recovered some ground by making their content available relatively cheaply and conveniently through many platforms including iTunes, iTunes Radio, Spotify (my favourite), Pandora etc. There are now more than 30 legitimate online music services available in Australia yet piracy remains a significant issue for the industry and many artists would argue that all this plethora of cheap and convenient availability has done is drive down artists’ returns”.*¹⁹

At a high level, the music industry has addressed these two factors as follows:

| | |
|------------------------------|---|
| Cost effective access | Australian consumers can now access millions of songs from a licensed music streaming service via their smartphone for free ²⁰ or by paying less than AU\$12 per month ²¹ . |
|------------------------------|---|

¹⁹ See *Copyright, the Internet and Piracy* Hon Malcolm Turnbull MP, Minister for Communications 4 August 2014 at <http://www.malcolmturnbull.com.au/media/copyright-the-internet-and-piracy> (last accessed 3 June 2016)

²⁰ Spotify offers a free service <https://www.spotify.com/au/> and there are other providers such as iHeart Radio (<http://www.iheartradio.com.au>) which offer free access. See the Digital Content Guide for other services: <http://digitalcontentguide.com.au/music/> (last accessed 3 June 2016)

²¹ See for example, Apple Music where individual membership costs AU\$11.99 a month and Apple also offers student membership for AU\$5.99 per month or a free 3 month trial: <http://www.apple.com/au/music/membership/> (last accessed 3 June 2016) and Spotify where premium access costs AU\$11.99 per month and Spotify offers a trial period for the service for 3 months at a cost of AU\$0.99: <https://www.spotify.com/au/> (last accessed 3 June 2016)

| | |
|-------------------|--|
| Timeliness | <p>The music industry makes music available on a timely basis through the adoption of new business practices. Staggered release dates are not common practice in Australia, with local distributors releasing products as soon as they became available.</p> <p>In relation to music from overseas, in July 2015, the record industry harmonised release dates for new music within 45 countries, including Australia via the “New Music Fridays” initiative²² whereby consumers are able to access new music on the same day worldwide rather than having to wait for the music to be released in their country.</p> |
|-------------------|--|

Despite addressing both factors, online copyright infringement still remains a significant concern for the music industry. As ARIA previously advised to the Productivity Commission, the International Federation of the Phonographic Industry (IFPI) estimates that 20% of fixed line internet users worldwide regularly access services offering copyright infringing music, and that in 2014 there were over 4 billion downloads via Bit Torrent, the vast majority of which was infringing.²³ Simply making content available on a timely basis does not solve this pervasive problem. Education and changes to consumer behaviour are important components, as is an effective and efficient copyright framework, in addressing the pervasiveness of copyright infringement.

Request for further information

INFORMATION REQUEST 5.2

Is the code of conduct for copyright collecting societies sufficient to ensure they operate transparently, efficiently and at best practice?

ARIA is not a collecting society but we support the submissions made by PPCA and APRA AMCOS in relation to this request for information.

INFORMATION REQUEST 16.1

What institutional and governance settings would best ensure that IP policy benefits from a policy champion and is guided by an overarching policy objective and an economy wide perspective?

Would vesting IP policy responsibility in a single department further these goals, and if so, which department would be best placed to balance the interests of rights holders and users, including follow-on innovators?

Are there any complementary or alternative measures that would help facilitate more integrated and evidence-based IP policy-making?

ARIA makes no comment on this question at this time.

²² See <http://www.ifpi.org/news/New-Music-Fridays-go-live>

²³ International Federation of the Phonographic Industry (IFPI) Report “Digital Music Report 2015” at p38, see <http://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf>

ARIA once again would like to thank the Productivity Commission for the opportunity to provide comment on the Draft Report. We would welcome the opportunity to discuss these important issues with the Productivity Commission in due course.

Yours sincerely,

Dan Rosen
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