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Trade Agreements Study  
Productivity Commission  
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Dear Sirs

### **Bilateral and Regional Trade Agreements**

Thank you for the opportunity to comment on the importance of Australian bilateral and regional trade agreements (referred to as **trade agreements**).

#### **1. Who are we?**

Music Industry Piracy Investigations Pty Limited (**MIPI**) is the anti-piracy organisation for the Australian music industry. It is a joint venture between the Australian recorded music sector (represented by the Australian Recording Industry Association - **ARIA**)<sup>1</sup> and the Australian music publishers (represented by the Australasian Mechanical Copyright Owners' Society Limited, **AMCOS**).<sup>2</sup>

#### **2. Support for IP chapters in trade agreements**

Given the nature of our organisation, MIPI strongly supports trade agreements as mechanisms for strengthening intellectual property (**IP**) protection in Australia's trading partners. The IP chapters within the trade agreements encourage nations to accede to international standards and best practice through international harmonization.

Trade agreements also increase legal certainty in relation to IP protection and improve enforcement mechanisms. This is particularly important in territories where intellectual property laws have historically not been strong and/or effectively enforced.

For the purposes of this submission we have set out two relevant case studies, one relating to Indonesia and its physical piracy issues and the other to Korea, which faced extensive online digital piracy issues prior to the commencement of trade agreement negotiations. We believe that these case studies illustrate that trade agreements can be effective mechanisms to encourage Australia's trading partners to focus on IP issues with a view to improving domestic IP frameworks in line with international expectations.

#### **3. Case study - Indonesia**

In August 2007, Australia and Indonesia commenced a joint feasibility study to examine the merits of a bilateral free trade agreement (the **Indonesian FTA**). While ultimately the Australian government decided not to proceed with the trade agreement, in our submission to DFAT of 13 December 2007 we suggested that an Indonesian FTA may have enabled Australia and Indonesia to address a number of key IP issues

<sup>1</sup> For ARIA member list see <http://www.aria.com.au/pages/member-list-and-links.htm>

<sup>2</sup> For AMCOS member list see <http://www.apra-amcos.com.au/MusicCreators/MusicPublishers/AMCOSPublishers.aspx>

in Indonesia so as to enhance trade and investment opportunities for Australian businesses and corporations.

Ideally, this could have encompassed a number of areas to address the piracy issues raised below, including improvements to:

- a. Indonesian Copyright laws;
- b. Border protection measures; and
- c. Optical disc regulations.

These are discussed further below.

### Background – piracy in Indonesia

IP in Indonesia is a critical issue given that Indonesia is considered a "priority country" by the International Federation of the Phonographic Industry (*IFPI*) in light of its music piracy rates and the exportation of Indonesian pirate discs to Australia.<sup>3</sup> Priority country status is based on three criteria, namely: the importance of Indonesia's legitimate music market, local trends in piracy and the degree of action that the Indonesian government is taking to counter the problem. In 2006, the value of the legal music market in Indonesia was estimated at \$US70 million and the number of pirate discs sold exceeded 170 million. Physical piracy rates in Indonesia are approximately 88 per cent and the physical piracy value was estimated at \$US70 million.<sup>4</sup>

In particular, the IFPI Piracy Report states:<sup>5</sup>

Physical music piracy is endemic in Indonesia with rates at nearly 90 per cent. There are more than 40 CD plants in the country and nearly half of them are not even registered with the Ministry of Industry as required. At the same time, large numbers of illegally imported discs from Taiwan are in circulation in the country.

The government has shown it understands the problem at a conceptual level and is showing some promising signs of stepping-up enforcement. However, this has yet to translate into real changes on the ground...

Unfortunately, central government has barely begun to get a grip on the problem. Many of the agencies and departments that deal with the piracy problem fail to coordinate on their operations and initiatives.

The Ministry of Industry has been slow at monitoring pirate CD plants on the grounds and seems content to simply register and licence them – and only 24 plants are currently licensed.

The police however are stepping-up their anti-piracy activity in many areas. In late 2005 Jakarta police undertook raids against high-profile targets, such as the most notorious shopping malls and markets. In one day 800,000 discs were seized from two major malls.

In a concerted raid on street vendors in February 2006, the Polda Metro Jaya Police arrested more than 200 people on various copyright infringement charges and seized in excess of a quarter of a million discs of all formats.....

<sup>3</sup> IFPI, *The Recording Industry 2006 Piracy Report*, 2006, page 11 (the *IFPI Piracy Report*).

<sup>4</sup> Ibid, page 13.

<sup>5</sup> Ibid, page 14.



There is no doubt that Indonesia is a country wrestling with big problems... but there are signs that the authorities realize they need to clean up their act on IP.

As a result IFPI lists its key priorities in Indonesia as:<sup>6</sup>

- a. Improving the coordination between the various ministries and agencies involved in the fight against piracy;
- b. Increasing the role of the Ministry of Industry from mere registration to the enforcement of IP laws; and
- c. Working in conjunction with the industry when conducting raids on pirate optical disc plants to help secure evidence.

In 2007 the International IP Alliance (*IIPA*) recommended that Indonesia remain on the United States "301 Watch List", noting that US industry lost more than US\$ 205.2 million due to copyright piracy in Indonesia. They also stated that piracy rates in Indonesia remained among the highest in Asia and the world and noted significant exports of pirate discs to Australia, New Zealand, the United Kingdom and Europe. Piracy rates for 2006 were estimated to be 91 per cent.<sup>7</sup>

The 2007 Special 301 Report notes the following key concerns with Indonesia:

1. **Manufacturing over capacity** - There are 28 registered optical disc manufacturing plants and approximately 145 production lines in Indonesia. Total annual disc manufacturing capacity is conservatively estimated at 10,000 discs per machine, which equates to approximately 500 million discs per annum and up to 1 billion discs manufactured in Indonesia per annum. The legitimate Indonesian market is thought to be less than 15 million discs per year.
2. **Unauthorised preloading of mobile devices** - Music is being directly loaded onto handheld devices such as phones, memory sticks and recordable media particularly in retail malls in Indonesia. For example, in one retail mall, 80 stalls were offering such services.

### Consequences for Australian trade and commercial interests

The exceedingly high levels of music piracy in Indonesia have real and dire consequences for the Australian music industry both in respect to the physical market for CDs and the legitimate digital music market.

In 1998, the Australian *Copyright Act 1968* (Cth) was amended to allow for the importation of CDs from other jurisdictions, on the condition that those CDs had been legitimately manufactured in the country of origin. From 1998-2007, the Australian Bureau of Statistics suggests that close to 150 million CDs have been imported into Australia.<sup>8</sup> Of these approximately three million have originated directly from Indonesia. However, MIPI is of the view that this severely underestimates the total number of discs imported into Australia from Indonesia. This is because a large proportion of discs from Indonesia and other suspect territories are transshipped through other jurisdictions such as Singapore and even New Zealand in an effort to mask their origin.

MIPI has been aware of large numbers of counterfeit Indonesia CDs being imported into Australia. However, due to the high quality counterfeit nature of these discs, it is extremely difficult for importers, retailers and consumers to detect pirate Indonesian discs. Indonesian counterfeit discs are being sold in

<sup>6</sup> Ibid, page 14.

<sup>7</sup> IIPA, *2007 Special 301 Report*, 12 February 2007, (the *2007 Special 301 Report*) pages 276-289.

<sup>8</sup> This does not however include shipments of value less than \$1,000.

Australian retail stores and by individuals including on online auction sites such as eBay. For example in early 2006, MIPI assisted one of its record company stakeholders with investigations into a large scale of importation of pirate Indonesian CDs by an Australian importer. The high quality CDs were being distributed through a discount Australian music retailer.

While it is inherently difficult to estimate the financial impact of any black market, IP theft in Indonesia is of great concern and has a large financial impact on the Australian music industry.

## **A. Indonesian Copyright laws**

The Copyright Law of Indonesia<sup>9</sup> incorporates several core elements for the protection of sound recordings and musical works, including in digital formats. However there are a number of shortcomings that still need to be addressed to ensure that an effective level of IP protection is established in Indonesia.

In particular, amendments are essential to bring the Copyright Law of Indonesia in line with the WIPO Performances and Phonograms Treaty to which Indonesia became party in 2005. The lack of broadcasting and public performance rights in Indonesia practically means that Australian artists and songwriters lose revenue due to an inability to collect royalties for these important activities. We understand that a significant percentage of CD sales in Indonesia relate to foreign repertoire, suggesting that similarly there would be significant broadcast and public performance of foreign repertoire.

In order to achieve further compliance with treaty requirements and ensure that the Copyright Law of Indonesia implements modern copyright standards and effective enforcement of IP, the following amendments could be recommended as part of the Indonesian FTA negotiations:

- a. The catalogue of rights granted to owners should be updated to include a communication to the public right and a right to control distribution of copies;
- b. Protection for technological measures should be updated to include a prohibition against the making or dealing in circumvention devices;
- c. Protection for rights management information should be clarified;
- d. The potential liability for Internet Service Providers for infringements occurring over their networks should be clarified and a "notice and take-down" mechanism for removal of infringing content hosted on networks should be introduced; and
- e. The exception from liability for "own needs" should be narrowed.

Finally in terms of enforcement, one key issue that could be raised in the context of the Indonesian FTA negotiations is landlord liability for copyright infringement carried out by tenants. This issue remains unclear in Indonesia and is growing concern for IP enforcement given the degree to which copyright infringers are operating in complexes such as large shopping malls.<sup>10</sup>

## **B. Border protections measures**

Indonesia is currently without customs regulations, despite having amended the relevant legislation in 2006.<sup>11</sup> The Indonesian FTA may have provided a platform for Australia to assist Indonesia in the determining appropriate standards for customs and border protection for IP.

<sup>9</sup> Law of the Republic of Indonesia, Number 19 Year 2002 Regarding Copyright (Copyright Law) effective 29 July, 2003.

<sup>10</sup> Ridwan Max Sijabat, *Govt Revising Law on IP Rights*, Jakarta Post, 23 November 2006, page 9 as referred to in the 2007 Special 301 Report at page 287, footnote 26.

<sup>11</sup> Law No. 17 of 2006 which amended Law No. 10 of 1995 on border and customs regulations.



### C. Optical disc regulations

As noted above, evidence suggests that Indonesia is an exporter of pirate music discs including to countries like Australia. While the Indonesian government has signed optical disc regulations which allow for the government to inspect, seize suspected pirate goods and tools and implements used to produce them, and to prosecute plant owners,<sup>12</sup> they could ideally be augmented to:

- a. Incorporate a centralized licensing of blank media;
- b. Address illegal activity relating solely to stampers and masters;
- c. Prohibit the export of pirate discs, equipment or raw material;
- d. Expressly prohibit unlawful uses or manipulation of source identification codes for discs;
- e. Allow for forcible entry into optical disc manufacturing premises where appropriate;
- f. Require the government to maintain records of permits or raids conducted;
- g. Expressly provide for plant closures in appropriate circumstances; and
- h. Impose corporate liability on individuals.

### Summary - Indonesia

Indonesia is a jurisdiction with music piracy rates above 90 per cent and large manufacturing over capacity for optical discs. There are also disturbing trends with respect to unauthorized pre-loading of mobile devices with illegal music files. In this context, we believe that the Indonesian FTA provided a unique opportunity for Australia to assist Indonesia in addressing some of the challenges it faces in respect of IP protection and enforcement, including in areas of copyright legislation, border protection measures and optical disc regulation.

### 4. Case study – Korea

On 5 March 2009, Australia and Korea agreed to launch bilateral FTA negotiations (the **Australia-Korea FTA**). This followed a joint non-government study into the feasibility of a free trade agreement between Australia and the Republic of Korea released in April 2008 (the **Feasibility Study**).<sup>13</sup> As set out in our joint ARIA MIPI submission of 30 January 2009, the Australian Korean FTA presents a unique opportunity to reinforce efforts to address several key copyright issues in the Republic of Korea.

*At the outset, it is important to note that substantial amendments to copyright legislation have occurred in Korea since the commencement of the Australia Korea FTA discussions in 2009. This reinforces the importance of trade agreement discussions in ensuring that respective legal systems adequately respect and enforce creators' rights.*

### Public performance

Unlike Australian Law, the Korean Copyright Act does not confer a public performance right for sound recordings. The lack of public performance rights in Korea practically means that Australian artists and songwriters lose revenue due to an inability to collect royalties for this important activity. We understand that a significant percentage of legitimate music sales in Korea relate to foreign repertoire, suggesting that similarly there would be significant public performance of foreign repertoire.

<sup>12</sup> Government Regulation Number 29 of 2004 Concerning High Technology Protection Facilities for Optical Discs, signed by outgoing President Megawati Soekarnoputri on 5 October 2004.

<sup>13</sup> Available at <http://www.dfat.gov.au/geo/rok/fta/rok-au-study-report.pdf>.

## Online piracy issues

The Recording Industry 2006 Piracy Report<sup>14</sup> relevantly states:

Internet piracy is rife in South Korea and is severely hampering the development of the legitimate music market....

With exceptionally high rates of broadband and mobile wireless penetration, South Korea has become one of the worlds most advanced digital markets, with high levels of online and mobile music sales but considerably higher levels of internet piracy.

There are hundreds of websites offering unauthorised music files for download to computers or mobile devices and numerous illegal file sharing services. There is also widespread use of music on blog sites and other streaming services.

Internet based piracy is the most prevalent form of piracy in Korea. According to information from the Copyright Protection Center in Korea, the illegal distribution of music can be found on web-storages, community portal sites, online community forums, individual blog sites and P2P sites.

Korean websites offering unauthorised music files and illegal file sharing services based in Korea can be accessed by Australian consumers and no doubt help facilitate copyright infringement of sound recordings and musical works in Australia, adversely affecting the Australian music industry.

Independent Australian research<sup>15</sup> suggests that **18 per cent of the Australian population** (approximately 2.8 million people) illegally downloaded music regularly on the internet over a recent 12 month period. Those engaged in file sharing have dramatically increased the volume of music being illegally obtained from previous studies, downloading an average of 30 songs per month. This equates to over **1 billion songs being illegally traded per year** by Australians alone, compared to a legitimate digital market of 19 million. In addition, the research indicates that 57 per cent of those who download via a peer-to-peer service 'rarely' or 'never' then purchase the CD from a retailer, and that 26 per cent of illegal file sharers state they have bought less music (including CDs and digital downloads) as a direct consequence of their use of file sharing networks.

## Role of the Australia Korea FTA

In our view, the Australia Korea FTA presented a unique opportunity for the copyright issues discussed above to be addressed. In particular, in 2009 we suggested that the following amendments could be recommended as part of the Australia Korean FTA negotiations:

1. Public performance rights: The introduction of a public performance right for producers is considered essential. Korea has declared that the 'communication to the public' remuneration right under the Korean Copyright Act will only apply to broadcasting (leaving public performance outside the scope of the right), and that reciprocity will apply. We would urge that at the very least, the Australia-Korea FTA include reciprocal provisions regarding the public performance right for producers.
2. ISP safe harbour provisions: the Safe Harbour provisions in the Korean Copyright Act do not clearly state that they only apply to monetary damages and therefore could be misinterpreted as providing a blanket exemption from all liability of internet service providers (**ISPs**) for copyright

<sup>14</sup> IFPI, *The Recording Industry 2006 Piracy Report*, 2006, pages 11 and 15 (the *IFPI Piracy Report*).

<sup>15</sup> Quantum Market Research commissioned by ARIA, February 2007.



infringement on their networks. In line with Australian law, the relevant provisions in Korea should clarify that the safe harbours limit monetary relief only but injunctive relief remains available.

3. ISP standard of knowledge: the knowledge standard for ISPs under the Korean Copyright Act should not only include situations where the ISP has actual knowledge, but also when it is aware of facts or circumstances from which infringement is apparent.
4. ISP definition: the definition of "online service provider" under the Korean Copyright Act should not only cover those providers that provide services online, but also internet access providers irrespective of whether or not they provide web-based services.
5. Temporary copies: at present, the Korean Copyright Act does not expressly protect temporary copies, creating a large deficiency in the protection of producers against unauthorised electronic copies of their works.

#### **Summary - Korea**

Prior to the Australia Korea FTA negotiations, the Republic of Korea had significant digital piracy issues. Given the international nature of the internet, websites and file sharing networks in Korea could be easily accessed by Australian consumers thus contributing to online intellectual property theft within Australia. Korean copyright laws were substantially amended in 2009 during the course of the Australia-Korea FTA evidencing that such trade agreements enable Australia to work with other territories regarding IP protection issues.

#### **5. Conclusion**

Unfortunately the fact remains that many of Australia's key trading partners have significant physical and/or digital piracy issues. Given Australia's liberal parallel import laws and the international nature of the internet, pirate discs, pirate websites and file sharing networks in other territories can be easily accessed by Australian consumers thus contributing to intellectual property theft within Australia. In this context, MIPI submits that trade agreements provide a unique opportunity for Australia to assist our key trading partners in addressing some of the challenges they face in respect of IP protection. Augmented protection of IP in Australia's trading partners will afford greater business confidence and consequently improve trade for Australian companies and organisations.

If you need further information, please do not hesitate to contact me.

Yours sincerely

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