Music Rights Australia's Submission in Response to the Australian Competition and Consumer Commission's Preliminary Report into Digital Platforms Inquiry

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Contents

RESPECTING AND PROTECTING ©REATIVITY

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Music Rights Australia thanks the Australian Competition and Consumer Commission (the **ACCC**) for the opportunity to make a submission in response to the Digital Platforms Inquiry Preliminary Report (the **Preliminary Report**).

1. About Music Rights Australia

Music Rights Australia (**MRA**) is an organisation that protects the creative interest of artists within the Australian music community. MRA represents over 100,000 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]

MRA appreciates that the music industry is outside the scope of the ACCC's Terms of Reference (**TOR**) as set out in the Introduction to the Preliminary Report[3]. MRA also appreciates that the ACCC has stated that music and video streaming services are out of scope of this current inquiry [4]. However, Recommendation 7 of the Preliminary Report would materially affect the music industry and copyright owners' capacity to protect their rights, were it to be adopted.

2. Recommendation 7

The ACCC has made the following key finding:

> "Digital platforms generate their revenue primarily from advertising, generally through collecting and harnessing user data and capturing user attention. User attention is at least as important as user data in monetising services".[5]

The ACCC has correctly identified that the digital platforms need user attention. The user attention is generated by the rich content which appears on them. Music is included in that content and on some platforms is the major form of content used to attract consumer attention[6]. While there has been a growth in licensed online services which cater to consumers' needs, there are also large amounts of unlicensed music which appear on the

[1] See www.apraamcos.com.au
[2] See www.aria.com.au
[3] Digital Platforms Inquiry – preliminary report p 19
[4] Digital Platforms Inquiry – preliminary report p 22
[5] Digital Platforms Inquiry – preliminary report p 24
[6] https://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf In 2017, 85% of visitors to YouTube used the site to listen to music – this equals an estimated 1.3 billion users.

digital platforms. This unlicensed use of music does not generate financial return to the music community.

However, the digital platforms benefit from the unlicensed content as it attracts user attention. In the case of music, this undermines the licenced music services which are available locally and internationally[7] and it also impacts every aspect of the music industry. Creators are unable to sustain meaningful careers if their capacity to earn is undercut and undermined over the long term by unlicensed use of their music[8].

MRA thanks the ACCC for acknowledging the difficulty faced by right holders in addressing this problem and the overview in the Preliminary Report does summarise some aspects of the problem, albeit through the lens of the TOR and experiences of the parties with whom the ACCC has consulted in this inquiry[9].

It is because the TOR is limited and the ACCC has consulted with only certain industry sectors which are the subject of this review that MRA believes the proposal in Recommendation 7 does not adequately consider the underlying copyright legislative framework or address the problems which a range of copyright owners face in the online space.

MRA is concerned the proposal to introduce a mandatory code administered by ACMA would not improve the rights protection environment and would result in a cumbersome, slow, expensive and not fit for purpose code which would not reflect the challenges of the current digital environment or its future.

Central to the concern about Recommendation 7 is its failure to address the underlying issues which impede effective and efficient removal of infringing material in the digital environment. MRA and others in the music community have long advocated for reform of sections 101 and 36 of the Copyright Act 1968 to correct this problem.[10]

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[7] www.musiccontentguide.com.au; www.promusic.org

[8] http://www.aria.com.au/documents/ARIA2017MusicIndustryFiguresShow10.5pcGrowth.pdf; http://apraamcos.com.au/media/YIR/2018/APRA_AMCOS_Year_in_Review_2018.pdf

[9] Digital Platforms Inquiry-preliminary Report page 152-158

[10] MRA submission on Service Providers Bill January 2018 https://www.aph.gov.au/DocumentStore.ashx?id=48098458-660b-46a6-a13f-aba961028198&subId=562911; MRA submission on Online Copyright Infringement 2014 http://www.musicrights.com.au/IgnitionSuite/uploads/docs/MRA%20Submission%20on%20Copyright%20Infringement%20Discussion%20Paper%20-%20July%202014.pdf

Copyright Act 1968 sections 101 and 36

The need for reform was identified by the High Court in the *iiNet* case[11]. This persistent problem was also identified in the *Online Copyright Infringement Discussion Paper 2014*[12].

MRA stated in its response to the Discussion Paper:

> *MRA supports the Government's stated goals:*
>
> *I. to provide protections for copyrighted material in line with Australia's international obligations, including bilateral free trade agreements with countries such as the United States and Singapore, and multilateral treaties made under the World Intellectual Property Organization and the World Trade Organization;*
>
> *II. to provide a legal framework that facilitates industry cooperation, to provide an incentive for market participants to work together to address online copyright infringement, and to provide a framework within which rights holders, ISPs and consumer representatives can develop flexible, fair and workable approaches to reducing online copyright infringement;*
>
> *III. to provide certainty as to legal liability;* [13]

The Discussion Paper proposed:

> "*extended authorisation liability — to address issues identified in Roadshow Films Pty Ltd v iiNet Ltd (2012) 248 CLR 42 (the **iiNet case**); "*[14]

Nothing has been done to address this underlying problem. The solution proposed in the Discussion Paper was never implemented nor has there been any response to alternative proposals put forward by MRA and others to address this issue.

A result of this failure to act is that the problem of establishing liability online remains the underlying impediment to market- driven technological solutions for the removal of unlicensed copyright material on digital platforms. Until digital platforms are under clear obligations to remove infringing material from their platforms there will be no incentive for the parties to come together to developed effective, efficient and technology- based solutions which reflect the current and future digital environment.

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[11] *Roadshow Films Pty Ltd v iiNet Ltd (2012) 248 CLR 42*

[12] https://apo.org.au/sites/default/files/resource-files/2014/07/apo-nid40630-1167461.pdf

[13] MRA submission to the Online Copyright Infringement Discussion paper 2014 at p

[14] Online Copyright Infringement Discussion Paper p1

Notice and Takedown an analogue solution for a digital environment

MRA is also concerned that the proposal for a mandatory code contemplates the introduction of a notice and takedown regime. The Notice and Takedown process under the US Digital Millennium Copyright Act (**DMCA**) was a compromise solution developed at a time when the internet was in its infancy. That world *no longer* exists. Evidence shows it has been inadequate in the past[15], it will most certainly be so in the future. Any program designed to address the serious impact of online infringement should not implement an analogue solution such as the DMCA Notice and Takedown procedures.

A one size fits all solution like a US style Notice and Takedown regime will not be effective or efficient. For example, a US style notice and takedown regime would be ineffective to stop an illegal stream of a live concert on a social digital platform.

One approach could be to implement efficient technology solutions through the adoption of industry standards. These industry standards could be established inter- party or through industry agreements.

Such industry standards would reflect the digital environment now and into the future. They would also accommodate the range of digital platforms identified by the ACCC at page 23 of the Preliminary Report.

These standards will only be developed and implemented if the issue of liability is made certain. It is only then that the digital platforms will be incentivised to collaborate to develop solutions for online infringement which are effective, efficient and technology based.

MRA requests the ACCC remove Recommendation 7 from the final report. Additionally, MRA requests the ACCC makes a new recommendation that the issues identified in the *iiNet* case and the Online Copyright Infringement Discussion Paper 2014 form the basis for Government review of the Australian authorisation provisions of the Copyright Act 1968.

In this way the ACCC can best address its stated purpose, 'to encourage the development of timely and effective procedures for the take-down of copyright infringing content of Australian rights holders on digital platforms and increase the enforceability of copyright protections online.'

[15] U.S. Copyright Office, *Notices,* Federal Register Vol 80 No 251 (31 December 2015). http://copyright.gov/fedreg/2015/80fr81862.pdf; Statement of Maria Schneider before the US House of Representatives Committee on the Judiciary Subcommittee on Court, Intellectual Property and the Internet Hearing on Section 512 of Title 17 March 2014

Should the ACCC have any questions about the MRA submission, please contact Vanessa Hutley at vhutley@musicrights.com.au.