



**Music Rights Australia's Submissions in response to
Copyright Amendment (Disability Access and Other Measures)
Bill 2016 Exposure Draft
February 2016**

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RESPECTING AND PROTECTING CREATIVITY

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Music Rights Australia thanks the Department of Communications and the Arts for the opportunity to comment on the *Copyright Amendment (Disability Access and Other Measures) Bill 2016*.

Music Rights Australia will only comment on Schedule 2 of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016* in its submission.

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 87,000 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

The Government has not established an evidentiary basis for the proposed changes. It has not conducted reasonable consultation with stakeholders who will be commercially impacted by the change, and has put its proposal forward in a piecemeal fashion.

This submission covers the following points:

- **Lack of evidentiary basis:** The Government has not established either the policy or the evidentiary basis for this change to the Safe Harbour Scheme (**SHS**)³. The Government must state the case for change and articulate the basis for the change from carriage service provider to service provider and explain the reason for introducing such a broad definition of service provider.
- **No proper consultation for stakeholders:** If the Government does intend to proceed with the *Copyright Amendment (Disability Access and Other Measures) Bill 2016 (Exposure Draft)*, MRA respectfully suggests Schedule 2 of the Exposure Draft (**Schedule 2**) should be removed to allow time for industry consultation and for a comprehensive review of the implications of this change. If the Government proceeds with the current Exposure Draft, MRA respectfully suggests the Bill should be referred to parliamentary committee to ensure there is appropriate review and consultation so that Schedule 2 does in fact “update and improve the operation of existing legislation”.

¹ See www.apraamcos.com.au.

² See www.aria.com.au.

³ Part V Div 2AA of Copyright Act 1968 ss 116AA-116AJ

- The Government should not act until it has considered the findings of the ongoing review of the US Safe Harbour Scheme which is being undertaken by the US Copyright Office⁴ and the European Commission's consideration of intermediary liability issues in *'Towards a modern, more European copyright framework'*⁵.
- **Other policy and technical considerations:** If the Government does choose to proceed with the proposal, there are a range policy and technical issues that need to be addressed:
 - Any change to the SHS must be considered in the context of its impact on the overall online intermediary liability regime, on the digital content markets and on the legitimate expectations of copyright owners that there will be no unjustified erosion of their rights and commercial interests. Overly broad or unclear safe harbours, like those proposed by the Government and applied in the US and the EU, have led to a detrimental market distortion that has resulted in a gap between the value some digital platforms extract from the use of content and what those services pay rights holders.
 - Any change to the SHS must be limited to entities whose activities are technical, automatic and passive in providing services to third parties.
 - The Government must amend sections 101 and 36 to ensure the necessary legal incentives are in place to create the framework in which all affected parties work together to create processes or establish standards to address infringing activity on service providers' networks. MRA respectfully directs the Government to its 2014 submission to the Government's 2014 Discussion Paper⁶ (the **2014 Discussion Paper**) in this regard. MRA's proposal can be found in Annexure 1 to this submission at pages 29 to 38 of the MRA 2014 submission.
 - The Government should ensure there is consistent terminology in the Copyright Act. Any changes it may make to the SHS should be mirrored in other sections of the Copyright Act to ensure that copyright owners are able to protect their rights in the online environment. In particular, section 115A should be amended. There would be no policy reason to limit the no fault remedy to the sub class of carriage service provider.
 - The Government should review the SHS within 18 months from the date the changes take effect.

⁴ U.S. Copyright Office, *Notices*, Federal Register Vol 80 No 251 (31 December 2015).

<<http://copyright.gov/fedreg/2015/80fr81862.pdf>>

⁵ COM/2015/0626, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20150626.do>

⁶ See <http://apraamcos.com.au/media/5953/mra-submission-on-copyright-infringement-discussion-paper-july-2014-7.pdf>

3. Lack of evidentiary basis supporting the change

3.1 The case for extending the safe harbours has not been made

Policy makers should assess proposals for legislation by reference to objective criteria and factual evidence. Despite safe harbours having the potential to have profound detrimental effects on the Australian digital market (as they have done elsewhere – see: Overly broad safe harbours cause market distortions below), the Government has failed to conduct a proper consultation regarding the amendments proposed in Schedule 2. Publishing an exposure draft and seeking comments in a very limited time frame falls far short of the level of consultation required for legislative change of this importance.

The Government has not produced any evidence to support the case for the changes proposed in Schedule 2. Rather, the Government appears to be proceeding on the unproven premise that extending the safe harbours is a pre-requisite for stimulating digital growth in Australia. This premise is false, as illustrated by a simple comparison of the digital content services available to Australian consumers and to consumers in countries with broader safe harbours (for example the US and EU member states).

The Government is proposing significant changes that will affect the livelihoods of individual creators and enterprises which produce content. It must set out evidence in support of its proposal which stands up to external scrutiny. It must also set out a clear evidence-based analysis of the impact of its proposal on rights holders.

MRA urges the Government to consult stakeholders and to establish whether or not there is an evidence based case for extending the safe harbours. The existing safe harbours have been in place since 2004. There is no need to rush through legislation on an expedited timeframe.

4. Online Copyright Infringement Discussion Paper 2014 ⁷

In 2014, the Government published the 2014 Online Copyright Infringement Discussion Paper (**2014 Discussion Paper**) which contained three proposals, one of which was the expansion of the SHS. The Government has never published its response to the submissions made to the 2014 Discussion Paper.

In particular, the Government has never responded to the many submissions advocating against changes to the SHS, nor has it articulated its policy for supporting the changes in Schedule 2 or given any prior indication it would move to amend the *Copyright Act 1968* (Cth) (**Copyright Act**) at this time.

A document titled Stakeholder Consultation: proposed reform to the Copyright Act 1968 Guiding questions- December 2015 ⁸ (**Guiding Questions document**) states:

“The proposed amendments expand the current ‘safe harbour’ provisions in the Act to cover a broader range of entities, including educational institutions and other online services (such as online search engines, bulletin boards and cloud services).”

No further information has been supplied as to why the Government proposes to make the changes contemplated in Schedule 2. Nor has the Government set out any questions in relation to the proposed changes in Schedule 2. The failure to invite discussion of this proposal is of great concern to MRA and its stakeholders. See: Detailed comments on Schedule 2: technical and policy Issues to be addressed, below.

In addition, the Government has not responded to the submissions made with respect to Proposal 1 in the 2014 Discussion Paper which set out a proposal to extend authorisation liability.

The Government did undertake a review of Proposal 3 in the 2014 Discussion Paper which dealt with injunctive relief. That process lead to the introduction of s115A of the Copyright Act.⁹ MRA participated in that review. It entailed extensive stakeholder consultation and a parliamentary committee enquiry in which the committee took submissions and heard evidence from a range of affected parties including: consumer advocacy groups; academics; service providers and their associations, as well as representatives from the creative industries. That review lead to improvements to the draft legislation and MRA commends the Government for engaging in that process.

MRA respectfully suggests that the issues dealt with in Schedule 2 require, at least, that level of consultation and debate to determine if changes to the SHS are warranted and if it is found that change is warranted that the Australian legislation reflects international best practice.

MRA believes the better course of action would be to remove Schedule 2 from the Exposure Draft so that the appropriate level of industry consultation can take place.

However, if the Government does not remove Schedule 2 from the Exposure Draft it should ensure the Bill is referred to the appropriate parliamentary committee so that all affected parties can participate in the development of this important legislation.

⁷ See <https://www.ag.gov.au/Consultations/Pages/Onlinecopyrightinfringementpublicconsultation.aspx>

⁸ See <https://www.communications.gov.au/file/13716/download?token=dds58McL>

⁹ 26 July 2015

5. Overly broad safe harbours such as those proposed in Schedule 2 are not fit for purpose and cause harmful market distortion

Even though 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 27 services in Australia)¹⁰, music rights holders have not benefitted fairly and proportionately from this increased consumption because overly broad safe harbours have had unintended consequences in distorting markets and affecting negatively the development of sustainable digital markets. Today some of the largest music services – such as SoundCloud or YouTube -- claim to benefit from safe harbours in Europe, the US, and elsewhere.

Uncertainty around the proper application of safe harbours has emboldened services that make available user-uploaded content to take an “act first, negotiate later” approach, building large music services without a licence, fundamentally distorting the negotiation process. If they do enter into licence negotiations (as opposed to carrying on business in the hope they will not be sued), the choice for rights holders is to:

1. accept the terms on offer and get some return for the use of their music;
2. rely on ineffective notice and takedown procedures provided in safe harbour legislation to try to prevent their content being distributed without a licence; or
3. sue the service under an uncertain legal framework and delay any chance of getting income from their music.

The fact that some digital content services claim the liability limitation privilege of safe harbours undermines free and fair negotiations between digital services and right owners. License negotiations are conducted in the “shadow of the law”, in a rigged market place, and result in artificially low rates, causing a value gap between the value extracted from music by online services claiming to fall under safe harbours (such as some user uploaded content services), and the revenues returned by these services to record companies and artists (see box below).

¹⁰ www.digitalcontentguide.com.au; www.pro-music.org

OVERLY BROAD SAFE HARBOURS CAUSE MARKET DISTORTIONS

YouTube launched in 2005 and has grown to be the world's most popular on demand music service with an estimated 740 million users.¹¹

Recording industry revenue from all non-subscription ad-supported services including YouTube (and others, although YouTube is by far the largest service in the non-subscription ad-supported market), was reported to be US\$ 641 million.

If all of that revenue was attributed to YouTube alone, and despite the fact that it offers users the full music video on demand, **YouTube's payments to music rights holders in 2014 would amount to less than US\$0.87 per user.**

YouTube is not an isolated case. A number of services, including structurally infringing services have claimed the benefit of the safe harbours, depriving right holders of the ability to capture adequate or, in many cases, any revenue from the online distribution of their content.

In contrast, the revenues distributed to right holders by services not claiming the benefit of safe harbours tell a very different story. **In 2014 Spotify's payments to music rights holders amounted to approximately US\$ 20.00 per user.**¹²

The stark difference between payments to rights holders by services that claim to benefit from safe harbours and by those that don't, but which both offer music on demand, illustrates the market distortion caused by overly broad safe harbours.

As the EU Commission put it in December 2015¹³ in its Communication *Towards a modern, more European copyright framework*:

"There is, however, growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users."

¹¹ Calculated on the basis of YouTube's own estimate of over 1 billion unique monthly users and IFPI/IPSOS study finding that 74 % of Internet users use it to watch music videos / listen to music.

¹² <https://www.spotifyartists.com/spotify-explained/>

¹³ COM/2015/0626, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20150626.do>

5.1 Uncertainty over the scope of the overly-broad intermediary liability regimes is also abused by pirate sites

Under the guise of a notice and takedown policy, pirate sites purport to be operating legally, knowing that rights holders will have to incur huge expenses in suing them to establish that the safe harbours do not apply and/or engage in mass notification programs which are not effective in preventing infringement. The problem is compounded by uncertainty over the scope of safe harbours, making litigation complex, lengthy, and costly.

Meanwhile, the sites continue to operate and profit from infringement. MegaUpload (mass-scale infringing site with 60 million users, estimated to have made US \$42m for its owner Kim Dotcom) is an example of an infringing site that has cynically claimed the benefit of safe harbours.

In the Kim Dotcom New Zealand District Court extradition judgment¹⁴, the court cites extracts from online conversations between the management of the MegaUpload service. These discussions reveal how the operators of MegaUpload sought to benefit from the protection of the DMCA safe harbours in the full knowledge of the infringing content on their service from which they generated substantial profits.

Paragraph 71: “but it’s good to stay off the radar by making the front end look like crap while all the piracy is going through direct links & embedded.” And ORTMANN added, “the important thing is that nobody must know that we have auditors letting this stuff through.” VAN DER KOLK responded, “yes that’s very true also.” ORTMANN replied, “if we had no auditors – full DMCA protection, but with tolerant auditors, that would go away.” And VAN DER KOLK replied, “yes true”.

5.2 Notice and takedown (the mechanism intended to protect rights holders as a quid pro quo for the granting liability limitations to service providers) is ineffective as a tool against piracy.

The recorded music industry’s international umbrella organisation IFPI acts as a notice provider on behalf of its members, which include ARIA’s members. Globally in 2015, IFPI and its national groups identified over 14.7 million infringing files and links for removal, indicating the scale of work required to operate a notice and takedown system on a global basis.

Furthermore, most service providers remove only the specific URL link notified in the takedown notice without taking any further action. This makes the process ineffective because (a) even if one URL link or one copy of an infringing file is removed, there are typically many thousands of other URL links to, or other copies of, the same infringing title which remain online; and (b) content or links once removed are often quickly re-posted and most service providers do not take any steps to prevent this.

¹⁴ Mr. Dotcom faces prosecution in the US.

According to IFPI:

- One Direction “Drag Me Down” appeared over 2,700 times¹⁵ on YouTube following the first notice, and over 20 times on the infringing service Zippyshare despite the right holder never having consented to the usage of the title on these services.
- Mark Ronson’s “Uptown Funk” appeared over 3,000 times on SoundCloud following the first notice and over 400 times on Zippyshare.

These factors leave rights holders to pursue a constant game of whack-a-mole, using substantial resources to locate every single URL that leads to a specific file, notify the service provider, and then repeat the process after they are re-posted.

5.3 Australia should implement a legal framework that reflects the current digital landscape

The intermediary liability regimes which were designed almost two decades ago are no longer fit for purpose for today’s online environment dominated by Web 2.0 services, such as participatory networks and User Upload Content services. These services are unrecognisable from the nascent online infrastructure providers that the safe harbour regimes sought to nurture. Overly broad safe harbours like those contemplated by Schedule 2 have distorted markets and prevented the creative industries from being able to capture fair and adequate revenues from the use of their content, inhibiting the growth and development of creative sectors. Meanwhile, some services that did not even exist two decades ago have developed, often on the back of providing access to creative content for free, into highly profitable global conglomerates. The balance in the online content market-place has been disrupted, and both the US and the EU are reviewing their online intermediary liability regimes (see: International developments below).

MRA respectfully submits that Australia should participate in the discussions about the future rather than the past to ensure that if changes are to be made to the SHS that they are made with the view of ensuring the SHS is amended “to update and improve the operation of existing legislation”, which the Government has indicated is the purpose of the Exposure Draft.¹⁶

¹⁵ These figures do not represent the number of downloads made from each listing.

¹⁶ See <https://www.communications.gov.au/file/13726/download?token=0Fg19Fuv>

6. Basis of limited liability schemes

6.1 Intermediary liability background

In the early days, the internet intermediary liability schemes were introduced because internet service providers (**ISPs**) were concerned about liability for copyright infringement for copies that were produced in their networks or services as a result of technical processes, and also for the infringements of third parties using their services.

Safe harbours were not intended to shield ISPs from liability where they themselves engaged in distribution of copyrighted material or where they intervene or participate in the communication and making available of copyright content. They were meant to ensure that innovation was not thwarted by the fear of copyright liability in certain cases where technologies or services were used by third parties.

The safe harbours for the activities of caching, storage and referencing (linking) were granted in return for ISPs taking steps to stop infringement when they receive a rights holder notice and in other circumstances where infringement is apparent.

6.2 Australian SHS

The SHS is consistent with Australia's international obligations and the current SHS reflects a deliberate policy choice by the Government to limit SHS to carriage service providers.

The SHS was first established in the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

In his Second Reading Speech, then Attorney-General, the Hon Daryl Williams MP stated¹⁷:

"Under the amendments, therefore, carriers and Internet Service Providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material. This is a key underlying principle in the Government's approach to regulating the new technological environment.

The reforms provide that a carrier or Internet Service Provider will not be taken to have authorised an infringement of copyright merely through the provision of facilities on which the infringement occurs.

Further, the bill provides an inclusive list of factors to assist in determining whether the authorisation of an infringement has occurred. This codification of authorisation principles provides greater certainty for all players in the digital environment."

¹⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 June 2000, 18377 (Daryl Williams).

Division 2AA of Part V of the Copyright Act was inserted as a result of the *US Free Trade Agreement Implementation Act 2004* (Cth) (**USFTA Act**). Section 116AA provides a clear statement of the purpose of the division, namely to "limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers", provided the carriage service provider satisfies certain conditions. The Explanatory Memorandum to the USFTA Act makes a very important point about sub-section 116AA (2) of the Copyright Act. It states that the Division does not affect the way the provisions of the Copyright Act relating to infringement should be applied. Rather, a copyright owner must still first establish that a carriage services provider is liable for copyright infringement, regardless of whether or not any measures required by the Division were implemented by the carriage service provider. In fact, the question of whether the safe harbour provisions apply in a particular situation does not come to be determined until it is shown that a carriage service provider is liable for copyright infringement. Debate relating to these provisions in the Senate focused on whether the steps which ISPs were required to take in order to take advantage of the safe harbour would place an unjustified burden (both in terms of monitoring and costs) on ISPs. The Government's position, however, was that the amendments were bringing Australia into line with international standards of copyright protection.

The SHS was introduced to address the risk that carriage service providers (not service providers generally) might be held liable for copyright infringements committed using their networks. So much is clear from, for example:

- 1) Section 116AA(1), which provides that the purpose of Division 2AA of Part V of the Copyright Act is to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers; and
- 2) The activities which can attract safe harbour protection, which are expressly limited in sections 116AC to 116AF to conduct by carriage service providers:
 - a) A carriage service provider carries out a Category A activity by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.
 - b) A carriage service provider carries out a Category B activity by caching copyright material through an automatic process. The carriage service provider must not manually select the copyright material for caching.
 - c) A carriage service provider carries out a Category C activity by storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider.
 - d) A carriage service provider carries out a Category D activity by referring users to an online location using information location tools or technology.

Entities providing services that fall within the above four categories (that is, carriage service providers) are able to take advantage of the SHS.

The Government has advanced no reason why entities other than carriage service providers should be protected by the SHS. A shift in policy of this nature must be supported by compelling and objective

evidence. The Government must also consider the impact the change will have on rights holders. There is no evidence that those matters have been taken into consideration in the drafting of Schedule 2.

7. International developments

Intermediary liability regimes around the world, including in Australia, were intended to enable the internet to grow and function in a way that promotes innovation in both technological and creative industries. The current Australian SHS has served that purpose, and MRA is not aware of any credible evidence showing that the scope of the existing SHS has prevented innovation in Australia.

In the US and the EU, on the other hand, the policy objectives behind the intermediary liability regimes have not been fulfilled. Those safe harbours, which are broader than the Australian safe harbours, have caused harmful market distortions. They have provided on the one hand a pretext for brazenly infringing services to conduct their illegal trade, and on the other hand the opportunity for some online services to free-ride and engage with copyright material without entering into a market value licence or any licence at all for the use of those works.

At a time when the EU and U.S. intermediary liability regimes are under review, the amendment proposed in Schedule 2 would put Australia out of step with the international community.

As the EU Commission puts it in its 2015 Copyright Communication¹⁸:

“platforms can also consider that they are not engaging in copyright-relevant acts at all, or that their activities are of a merely technical, automatic and passive nature, allowing them to benefit from the liability exemption of the e-Commerce Directive.

This has prompted a growing debate on the scope of this exemption and its application to the fast-evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.”

As part of its flagship Digital Single Market initiative the European Commission is reviewing the European intermediary liability regime.

Meanwhile, in the US, in recognition of the problems caused by the US DMCA section 512¹⁹ safe harbour provisions, the US Copyright office has announced a study on the impact and effectiveness of the DMCA safe harbours²⁰. Introducing the study, the Copyright Office states:

“While Congress understood that it would be essential to address online infringement as the internet continued to grow, it may have been difficult to anticipate the online world as we now know it, where each day users upload hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement. The growth of the internet has highlighted issues concerning section 512 that appear ripe for study. Accordingly, as recommended by the Register of Copyrights, Maria A. Pallante, in testimony and requested by Ranking Member Conyers at an April 2015 House Judiciary Committee hearing, the Office is initiating a study to evaluate the impact and effectiveness of section 512 and has issued a Notice of Inquiry requesting public comment. Among other issues, the Office will consider the costs and

¹⁸ COM/2015/0626, available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20150626.do>

¹⁹ 17 U.S. Code § 512

²⁰ <http://copyright.gov/fedreg/2015/80fr81862.pdf>

burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public. The Office will also review how successfully section 512 addresses online infringement and protects against improper takedown notices.”

MRA respectfully submits that the interests of the Australian economy and consumers would be best served by Australia participating in the international discussions about how best to legislate for the future rather than adopting legislative programs that are under review in their home territories. Simply extending Australia’s safe harbours to reflect outdated laws in the US or Europe, which have failed for the reasons set out above, will put Australia out of step with international developments and hold back, rather than promote, Australian innovation.

8. Comments on Schedule 2: technical and policy issues to be addressed

The Government’s proposal to implement its policy consists of deleting the word “carriage” where it appears so that the SHS applies to service providers. This change raises a range of policy and technical issues that the Government must address before it can move ahead with the proposal.

The Guiding Questions document does not invite comment on these issues. In fact none of them are identified in the Guiding Questions document. It is concerning that the Government does not appear to have considered the implications of the changes it proposes.

All of these issues indicate that Schedule 2 requires significant review and would benefit from further industry consultation. It should not proceed as currently drafted. Schedule 2 could be removed from the Exposure Draft and this would allow the Government time to consult with the creative industries to address their concerns and to hear their proposals to update and improve the operation of the existing legislation.

This would also mean the Government could take advantage of the ongoing international reviews, so that if change is warranted, the Government can ensure the Australian SHS incorporates international best practice.

MRA looks forward to the opportunity to engage in that consultation process.

In the interest of beginning that engagement, MRA has identified areas of concern to its stakeholders and has suggested language to improve the definition of service provider. This suggestion is offered to address only one of the immediate problems which Schedule 2 presents for its stakeholders.

This suggestion does not represent the extent of MRA’s concerns with the proposal in Schedule 2, the current SHS or other aspects of the current legislation. However, we hope that by putting forward this suggestion we can begin a consultation process with the Government which will ensure the SHS is fit for purpose in the current and future digital environment.

The key areas of concern with the current draft can be summarised as follows:

1. *Technical approach of replacing “carriage service provider” by “service provider” not coherent*

Schedule 2 has serious shortcomings which prove that merely deleting “carriage service provider” and replacing it with “service provider” in Division 2AA of Part V of the Copyright Act is the wrong approach.

All the sections in Division 2AA must be reviewed and amended in order to ensure that the provisions apply to the new category of service provider which is being introduced. If this is not done, a new category of service providers will be protected from liability, but they may not have clear obligations to take down infringing content which is the *quid pro quo* of safe harbours. Schedule 2 is silent on any of these issues and there is nothing in the Guiding Questions document or any commentary to Schedule 2 which would indicate that the Government has considered these essential elements of the SHS.

This omission has serious implications for copyright owners and is another indication that Schedule 2 should be removed from the Exposure Draft to allow time for the Government to consult with industry to address these and the other issues raised in this submission.

2. *The importance of industry codes*

The Government has not changed the definition of industry code in s116AB.

Under the current proposal, the service providers which would get the benefit of the safe harbour protections would not fall within (a) (i) and (ii) of the definition as they would not be registered under Part 6 of the *Telecommunications Act 1966*. Nor would they fall within (b) of the definition as that code would be governed by Regulation 20B which still refers to carriage service provider.²¹

References to the industry code appear throughout s116AH and the industry code forms part of the conditions for each category of service provider. However, there is nothing in the Guiding Questions document or any commentary to Schedule 2 which covers the timeline for the development of the industry code or codes or amendments to Regulation 20B.

While MRA recognises these issues could be addressed through other legislative instruments, it is of concern that there is no indication that these issues form part of the Government’s plans. Nor has the Government indicated what role it will play in establishing the necessary legal framework for the industry code or codes to be put in place. (See: Scope of authorisation liability, below).

The cooperative codes contemplated in sections 101, 36 and the SHS have never come into operation, despite many years of discussion and negotiation. The Government must set out a clear and defined road map for the industry code or codes to be developed and put in place. Failure to address these issues will place copyright owners at a significant disadvantage and will further jeopardise their ability to protect their rights in the digital environment.

²¹ *Copyright Regulations 1969* (Cth) Reg 20B.

3. Scope of definition of “service provider”

Any change to the SHS must be considered in the context of its impact on the overall online intermediary liability regime, on the digital content markets and on the legitimate expectations of copyright owners that there will be no unjustified erosion of their rights and commercial interests. As noted above, overly broad or unclear safe harbours, like those proposed by the Government and applied in the US and the EU, have led to a detrimental market distortion that has resulted in a gap between the value some digital platforms extract from the use of content and what those services pay rights holders.

A key concern for MRA and its stakeholders is the newly introduced definition of “service provider” which does not reflect the policy upon which the current SHS scheme was developed.

The policy is clear. It deliberately distinguishes between:

- those who provide content (whether as a business or a non-profit) and who are in a position to moderate content on their site or network; and
- those who merely facilitate the communication of content.

The Government must address this issue and MRA proposes that it amend the definition so that it reflects the policy underlying safe harbours.

- The definition of **“service provider”** should only apply to **“merely technical, automatic and passive services”**.²² Services which have played an “active role” should be excluded from safe harbour protection.²³
- **“Active Role”** – the notion of “active role” should be addressed in the legislation by including certain activities that go beyond the usual activities of technical automatic and passive service providers (e.g. selecting content, presenting it in such a way so that it appears to be provided by the service provider, recommending content). It should be made clear that these activities go beyond the protected activities which are limited to the merely technical, automatic and passive services of transmission of content, hosting, caching and provision of references by using online location tools.

MRA suggests that the following definition would assist in achieving that policy.

service provider:

²² The distinction between “active” and “passive” services can be found in the EU E-Commerce Directive 2000/31/EC as applied by the CJEU in the cases Google France and L’Oréal EBay.

²³ See Court of Justice of the European Union, L’Oréal v EBay, C-324/09 paras 113, 123: *“That is not the case where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an **active role** of such a kind as to give it knowledge of, or control over, those data (Google France and Google, paragraphs 114 and 120).”*

*“In view of the foregoing, the answer to the ninth question is that Article 14(1) of Directive 2000/31 must be interpreted as applying to the operator of an online marketplace where that operator has not played an **active role** allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.”*

- (a) in relation to an activity mentioned in section 116AC – means a provider that without being the initiator or the recipient of an online communication provides merely technical, automatic and passive services of transmission, routing or connections for digital online communications between third parties without modification of their content between or among points specified by the user of material of the user’s choosing; and]*
- (b) in relation to an activity mentioned in section 116AD, 116AE or 116AF – means a provider or operator of merely technical, automatic and passive online services or network access.*
- (c) A service is not merely technical, automatic and passive for the purposes of paragraphs (a) and (b) if the service provider assumes an active role in relation to copyright material which it transmits, caches, stores or refers users to by using information location tools or technology.*

Factors to be taken into account in determining whether a service provider assumes an active role include:

- (i) the service provider modifying, selecting, promoting or recommending copyright material; or*
- (ii) the service provider presenting copyright material in such a way that it appears to be provided by the service provider.*

4. Implementing the government’s proposal would mean importing and perpetuating a number of issues and problems with the corresponding US law that have been raised in the context of the US review

As mentioned above, the US Copyright Office is currently undertaking a study on the US safe harbours set out in s512 DMCA. The study includes questions and concerns regarding the scope of the definition of a service providers, the limitations on injunctive relief, the lack of a “stay down obligation” and the lack of additional obligations imposed on service providers such as search engines requiring them to prevent their services being used in connection with copyright infringements.

If the Government decides to expand the scope of the SHS and introduce safe harbours for new categories of service providers, it must review the conditions on which safe harbours are given to ensure they remain fit for purpose in 2016²⁴.

Schedule 2 and the Guiding Questions document are silent on these issues. The Government’s failure to address these issues means Schedule 2 cannot achieve the Government’s goal “to update and improve the operation of existing legislation”. MRA urges the Government to remove Schedule 2 from the Exposure Draft so that the appropriate consultation and review of these conditions can take place.

²⁴ Subdivision D s116AH.

5. Scope of authorisation liability

The Exposure Draft is listed for introduction in the 2016 Autumn sittings. MRA notes that the Government has stated that the reason for the legislation is:

*“to update and improve the operations of existing legislation”*²⁵

If that is the Government’s intention then it must also amend sections 101 and 36 and address the issues which the Government identified with respect to Proposal 1 of the 2014 Discussion Paper.

Sections 36(1A) and 101(1A) were inserted into the Copyright Act by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (the **Digital Agenda Act**). According to its Explanatory Memorandum, the Digital Agenda Act was intended to codify the common law doctrine of authorisation liability, as expounded by the High Court in *University of New South Wales v Moorhouse* (1975)²⁶. Section 36(1A) and 101(1A) were “intended to provide a degree of legislative certainty about the steps that should be taken in order to avoid liability for authorising infringements”: Explanatory Memorandum, [56] and [124].

The express objects of the Digital Agenda Act were to amend the Copyright Act so as to:

- (a) ensure the efficient operation of relevant industries in the online environment by:
 - (i) promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors; and
 - (ii) providing a practical enforcement regime for copyright owners; and
 - (iii) promoting access to copyright material online; and
- (b) promote certainty for communication and information technology industries that are investing in and providing online access to copyright material; and
- (c) provide reasonable access and certainty for end users of copyright material online.

It is clear that the sections do not operate as they were intended to operate. MRA refers the Government to its submission to the 2014 Discussion Paper, a copy of which appears as Annexure 1 to this submission.

MRA believes that the proposals it put forward in its 2014 submission will improve copyright protection online through proportionate and efficient measures and ensure the sections function as intended.

In the 2014 Discussion Paper the Government correctly identified that:

1. sections 36(1) and 101(1) are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so;
2. Australia is obliged under its free trade agreements with the United States, Singapore and Korea (not yet ratified) to provide a legal incentive to ISPs to cooperate with rights holders to prevent infringement on their systems and networks;

²⁵ See https://www.dpmc.gov.au/sites/default/files/files/2016_autumn_public_list-Introduction.pdf

²⁶ 133 CLR 1.

3. the effect of the decision in the iiNet case is to limit severely the circumstances in which an ISP can be found liable for authorising an act by a subscriber that infringes copyright; and
4. extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia's international obligations.²⁷

MRA submits that the Government must now address the issues it identified with respect to section 101 and 36 and urges the Government to make the changes which MRA proposed in its 2014 submission. The proposed amendments are set out in Annexure 1 at pages 10 to 20 of the MRA 2014 submission.

9. Additional areas of concern

In addition to the problems mentioned above, there are a number of issues that should be examined and remedied as part of this review:

- **Review the definition of caching:** the definition of “caching” in the Copyright Act is broader than its counterpart in the US and EU. The definition should be amended to incorporate additional conditions: caching only applies to material that is made available by a person other than the service provider and transmitted to a person other than the service provider; and to be eligible the reproductions should be limited to those carried out through the technical process for the purpose of making the material available to users of the system who, after the material is transmitted, request access to the material.
- **Unfair burden of proof:** There are a number of provisions in the existing law which impose an unfair shift of the burden of proof to the detriment of rights holders (item 4 Category C No. 2A at the end, item 5 Category D No. 2A at the end; and in particular S116AI. These provisions result in rights holders being required to provide evidence in relation to matters that are only within the knowledge of service providers.
- **Consistent terminology:** If the term ‘carriage service provider’ is removed from the SHS, the Government must amend the Copyright Act to remove other references to carriage service provider which appear in the Copyright Act. For example, s115A. If the SHS were to be changed there would be no policy justification to limit the relief available to copyright owners under s115A to the sub class of carriage service provider. The Government deliberately drafted s115A to target only the “worst of the worst” illegal sites and copyright owners can only apply for relief against those “worst of the worst” sites if they are off shore sites and they have the primary purpose of infringing or facilitating the infringement of copyright. The intermediaries (currently only carriage service providers) are not liable for the activities of the off shore sites the subject of 115A orders, they are the means by which the orders are put into effect to block the illegal off shore sites. This remedy should be available to copyright owners across the breadth of digital services which are used by third parties to access these illegal off shore sites.

²⁷ MRA's 2014 submission in response to Online Copyright Infringement Discussion Paper p 10.

- **18 months review:** Any changes to the SHS should be reviewed within 18 months of the changes coming into force to ensure this significant shift in policy is meeting the Government's goal.

Annexure 1

Music Rights Australia's submissions in response to Online Copyright Infringement Discussion Paper

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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 70,000 songwriters and music publishers through their association with the Australasian Mechanical Copyright Owners' Society (**AMCOS**) and the Australian Performing Rights Association (**APRA**),¹ and more than 125 record labels — both independent and major — through the Australian Recording Industry Association (**ARIA**).²

¹ See www.apraamcos.com.au.

² See www.aria.com.au.

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2. Introduction

MRA thanks the Federal Government, including the Federal Attorney General and the Minister for Communications, for the opportunity to comment on the Online Copyright Infringement Discussion Paper (the **Discussion Paper**).

MRA also thanks the Government for its continued recognition of the damaging impact which online copyright infringement, in its various forms, has on the creative industries, and for taking the decision to address this issue.³

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; and
- IV. to streamline the process by which rights holders can seek relief from the courts to block access to websites providing infringing material.⁴

These goals, if achieved, would put in place a legal framework which would help Australia address current and emerging online infringement issues and result in a vibrant and responsive online marketplace for all parties.

To achieve these goals, the Government proposes:

1. extended authorisation liability — to address issues identified in *Roadshow Films Pty Ltd v iiNet Ltd (2012) 248 CLR 42* (the **iiNet case**);

³ See press release titled "Online Copyright Infringement Discussion Paper", issued 6 August 2014, available at <http://www.malcolmturnbull.com.au/media/online-copyright-infringement-discussion-paper> (last accessed 25 August 2014); Senator The Hon George Brandis QC, Attorney-General and Minister for the Arts, statement to the Senate at tabling of the Final Report of the ALRC Inquiry into Copyright and the Digital Economy, 13 February 2014; cover letter to the Discussion Paper.

⁴ Australian Government, *Online Copyright Infringement - Discussion Paper*, p 1.

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2. extended injunctive relief — to address illegal off-shore streaming sites like The Pirate Bay and Kickass Torrents; and
3. extended safe harbour scheme — to include "service providers" generally and not just carriage service providers.

MRA will respond to each proposal separately, but first it will provide evidence as to why the music industry believes that change is not only necessary, but long overdue. MRA will also provide some additional international context to the Government's proposals.

3. The Music Industry example⁵

The Government considers that the factors that contribute to online copyright infringement in Australia include:

1. the lack of availability and affordability of lawful content;
2. the ease with which consumers can access unlawful material; and
3. lack of consumer awareness of legitimate services.

a. Availability and affordability of lawful content

Australia is the sixth largest music market in the world for overall revenues and the seventh largest for digital sales.⁶ The ARIA wholesale figures for 2013 show that digital sales over took physical sales for the first time in Australia.⁷

"Globally, digital sales now account for 39 per cent of total industry global revenues and, in three of the world's top 10 markets, digital channels account for the majority of revenues."⁸ Clearly a vibrant digital economy and efficient digital marketplace is central to the music industry locally and globally.

There are over 30 licensed online music services in Australia. These services offer every genre of music across a variety of platforms and devices at a range of price points, including free on some streaming services with advertising. Worldwide there are over 500 licensed online music services.⁹

The music industry continues to invest in new talent, new technologies and new business models to make music available to music fans.

⁵ MRA directs the Government to the submission by APRA AMCOS, ARIA and PPCA for additional information on the music industry.

⁶ IFPI, *Recording Industry in Numbers*, p 90.

⁷ www.aria.com.au

⁸ IFPI, *Digital Music Report 2014*, p 6.

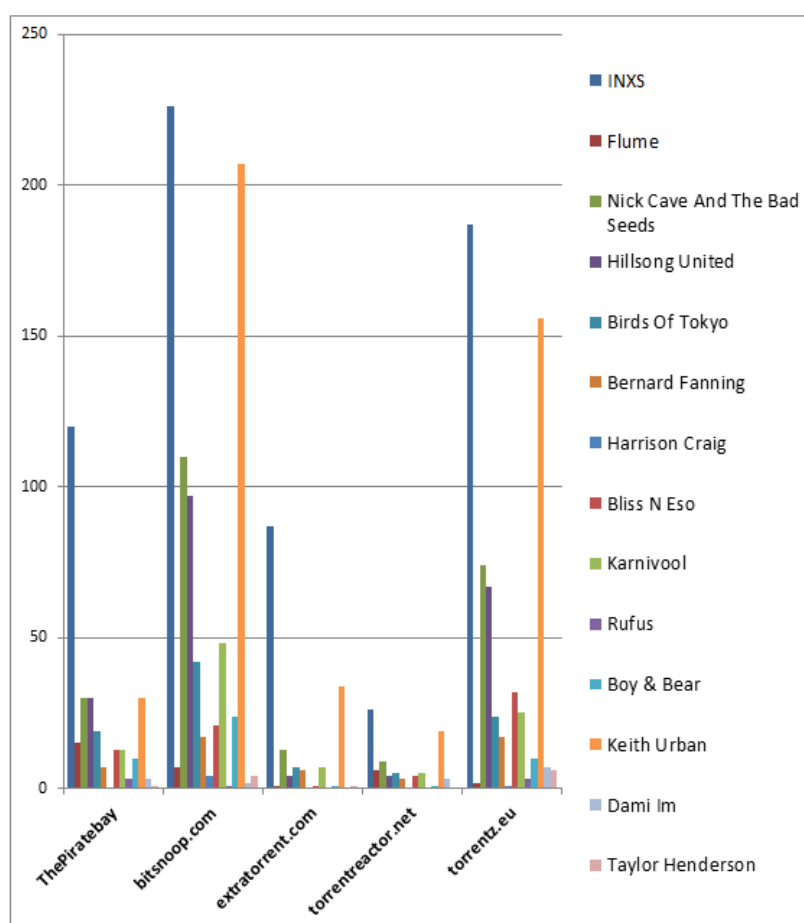
⁹ See, ProMusic www.promusic.org

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b. Ease of access to unlawful material

Despite the range of choices outlined above, according to the IFPI Digital Music Report 2014, approximately 26 per cent of Internet users worldwide regularly access unlicensed services.¹⁰

Licensed music is available where, when and how consumers wish to experience it, yet sites like The Pirate Bay and Kickass Torrents continue to operate and offer music for which they are not licensed. Those sites generate money for their operators from the advertising which appears on them. A recent study titled Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business,¹¹ by the Digital Citizens Alliance, found that the top 30 sites in the US which stream illegal content, or make it available for download, made on average USD4.4 million each year and in total the top 30 illegal sites made USD227 million. In March, MRA reviewed the top five sites identified in that study and, using the ARIA Australia No. One Albums for 2012–2013 as a guide, took a snapshot of those sites on one day and found the following artists' albums on each of the sites (the y axis represents the number of torrents available on the site with at least one seeder).



¹⁰ IFPI, *Digital Music Report 2014*, p 40.

¹¹ Digital Citizens Alliance, <http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=FollowTheProfit>.

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Every one of the No. One albums, and much of the particular artists' back catalogue, appeared on the five illegal sites. All of this music was readily available on a range of licensed online music services, including on free licensed services with advertising.

Despite a huge range of licensed online music services, easy access to illegal streaming and download services, including by use of P2P technologies, continues to impact the local and international music market.

Confidential Annexures

c. Consumer Awareness of legitimate services

Recently, a group of rights holders and their associations worked together to develop and launch the Digital Content Guide.¹² The Digital Content Guide is a free service designed to help consumers find online music sites and confirm the sites which they are using are licensed. Search results often serve up illegal and unlicensed sites before they list licensed online music services, as they may not distinguish between the illegal advertising funded services and licensed services. The Digital Content Guide helps consumers check if the services which their search queries have served up are licensed online music services which support the legitimate market.¹³

MRA's stakeholders, ARIA and APRA AMCOS invest considerable resources in a range initiatives, including seminars, industry and consumer events, and the development of online resources including websites and education programs, to inform their members and the general public about music licensing practices and creators' rights. MRA also operates a website which has practical fact sheets about music copyright and rights protection issues and has links to the ProMusic website and the Digital Content Guide.

Both ARIA and APRA AMCOS also fund the Music Matters campaign which is a music community based program designed to remind people about the value of music in their lives.¹⁴

A coalition of people and organisations working across the music sector, including the International Federation of Phonographic Industries (**IFPI**), has been producing the ProMusic service since May 2003.¹⁵ ProMusic is a free service which lists every licensed online music service by category around the world. IFPI also produces a range of publications, including the

¹² www.digitalcontentguide.com.au; <http://www.musicrights.com.au/news/digitalcontentguide/>

¹³ Since its launch in August the Digital Content Guide has had 10,000 visits which peaked just after the launch and this has now steadied to between 100-300 hits a day - Source Google Analytics

¹⁴ See www.whymusicmatters.com.au; www.youtube.com/MusicMattersANZ; <https://www.facebook.com/WhyMusicMattersANZ>.

¹⁵ Pro Music, <http://www.pro-music.org/about.php>.

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annual Digital Music Report, which reviews industry trends and issues.¹⁶ IFPI is also an active member in many of the initiatives discussed in the Other Approaches section of this submission.

The current Digital Music Report outlines the vast range of services which international music fans now have:

One of the key hallmarks of digital music today is the high level of consumer awareness and engagement in digital services. Record companies are licensing a diverse range of services, successfully meeting different consumer preferences. This is illustrated in research undertaken by Ipsos Media CT across ten leading music markets for this report. Now in its second year the research shows 61 per cent of internet users aged 16-64 engaged in some legitimate digital music activity in the past six months. Among younger consumers (16-24) this figure is higher at 77 per cent.

The research also finds that consumer satisfaction with digital services remains high. Three quarters of licensed services' customers (76 per cent) described them as "excellent", "very good" or "fairly good" while even the majority of those using unlicensed services (56 per cent) recognise "there are good services available for legally accessing digital music".¹⁷

It goes without saying that record labels, music publishers, musicians' management and distributors invest heavily in marketing and promotional activities to ensure that music fans know how to find the music they produce, license and sell.

d. The need for effective change

As the music industry's experience makes clear, pervasive online copyright infringement is not caused by a lack of availability and affordability of lawful content or a lack of consumer awareness of legitimate services. Other factors, including the ease with which consumers can access unlawful material, are more significant contributors to this problem.

Further, effective rights protection is an essential component of a legal infrastructure that encourages businesses to invest in new content and innovative business models to meet consumers' legitimate expectations. This is equally true in the physical as well as the online environment.

The legal environment in which that investment takes place should also support the industry by having efficient and effective measures so that creators, and those who invest in them, have the tools to ensure their work is respected and protected online from those who seek to exploit it without rewarding them.

¹⁶ IFPI, *Digital Music Report 2014* <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>.

¹⁷ IFPI, *Digital Music Report 2014* <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>, p 11.

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e. Process for effective change

To be effective, the framework for online rights protection must deliver certainty for rights holders, consumers and intermediaries. The Australian framework does not currently deliver that certainty and does not work to protect creative content online.

The Government must take the necessary steps to ensure that the parties cooperate by putting in place legal incentives which will bring the parties together to develop the effective and efficient processes which can address the issue of online copyright infringement. The co-operative self-regulatory industry code, which is contemplated by section 101 of the *Copyright Act 1968* (Cth) (**Copyright Act**), the safe harbour provisions and the accompanying Regulations, has not eventuated. It is unlikely that cooperation will occur unless the Government legislates to create legal incentives which encourage the parties to cooperate to develop flexible, practical solutions.

The Government must continue to lead this discussion and set the policy direction for these reforms. Legislative change, which would enable the parties to develop and deliver flexible solutions for online copyright protection, must be put in place if the parties are to achieve the goals set out in the Discussion Paper.

In the following discussion and commentary of the three proposals, MRA makes suggestions which it believes will achieve the Government's goals and importantly will deliver flexible, fair and workable approaches which will benefit intermediaries, rights holders and consumers.

MRA believes that the proposals contained in this submission will improve copyright protection online through proportionate and efficient measures which support the creative industries so they can continue to deliver creative content to consumers.

f. Suing individuals will not achieve goals

Before outlining the changes which MRA believes will deliver flexible, fair and workable approaches, MRA wishes to address an alternative approach which MRA believes would not be effective. There has been some suggestion that rights holders should enforce their rights in court directly against individual infringers, rather than against intermediaries.¹⁸ This was also contemplated by the 'Scheme to Address Online Copyright Infringement' proposed by the Communications Alliance on 1 December 2011.¹⁹

¹⁸ The Hon Malcolm Turnbull MP, Minister for Communications, quoted by Ben Grubb in 'Sue mum and dad pirates, Malcolm Turnbull tells film studios', *Sydney Morning Herald*, 1 August 2014, available at <http://www.smh.com.au/digital-life/digital-life-news/sue-mum-and-dad-pirates-malcolm-turnbull-tells-film-studios-20140801-zzbnj.html> (last accessed 25 August 2014).

¹⁹ Available at http://www.commsalliance.com.au/data/assets/pdf_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf (last accessed 25 August 2014).

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Court action against individuals is not the solution to online copyright infringement. The scale of infringements means that court action against each individual infringer is impractical and the number of cases would overwhelm the court system. Importantly such actions would not achieve the goals which the Government has identified in the Discussion Paper.

Even if rights holders were to try to make an example of a small number of individuals, it is unlikely that the damages awards would be sufficient to act as a deterrent. In the US, courts can award statutory damages to rights holders of up to \$30,000 per work or other subject matter infringed and this can increase to \$150,000 if the infringement is willful. By contrast, in Australia, even if a rights holder succeeds in court action against an individual, the rights holder's recovery would generally be limited to its actual damages caused by the individual's infringements (and potentially additional damages).. It is telling that, even in the US (where statutory damages are available), ISPs and rights holders have agreed a scheme which does not involve rights holders taking court action against individuals (more detail on the scheme in the US is provided in the next section of this response).

4. International context

MRA submits that there is no need for the Australian Government to depart significantly from international trends in addressing online copyright infringement. There is sufficient information and data from international examples for the Government and relevant parties to develop a solution which suits the Australian online environment.

However, before that exercise can be undertaken the Government must put in place the legal incentives so the parties can develop the framework to achieve the goals set out in this Discussion Paper.

Annexure 1 outlines the positions in the USA, the UK, France, Ireland, the EU generally and New Zealand, and the impact which the programs in those jurisdictions have had on online copyright infringement.²⁰

The Digital Music Report²¹ contains a summary of the impact of the international site blocking legislation:

In recent years courts in 10 EU countries have ordered ISPs to block users' access to specific services that structurally infringe copyright law . Courts and authorities in other countries including India, Indonesia, Malaysia, Mexico, South Korea and Turkey have made similar orders.

²⁰ MRA refers to APRA AMCOS' submissions which outlines additional international examples.

²¹ FPI, *Digital Music Report 2014* <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>, p 41.

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Website blocking measures implemented by ISPs have been effective. Between January 2012 and July 2013, European countries where blocking orders are in place show BitTorrent use decline by 11 percent, while European countries without such orders saw Bit Torrent use increase by 15 per cent (ComScore/Nielsen).

There have been some developments since the publication of the Digital Music Report. Most importantly, in March 2014 the Court of Justice of the European Union confirmed that website blocking is available under EU legislation and that it is in principle consistent with fundamental rights.²²

A recent article by Andrew Forbes, a UK lawyer, outlines how the UK legislation is working in practice.²³ An extract from the article appears below.

The music industry in the UK has acted under this law and has made a number of court applications requiring the main UK internet providers to prevent subscriber access to illegal websites. None of these sites could claim to give anything back to the writers, performers and industry off which they feed. Their whole business model is infringement. Evidence also shows that the sites profit from their activities by pocketing significant advertising revenue.

Unsurprisingly, the judiciary has had no difficulty in considering it appropriate to grant the blocking orders applied for. The court has recognised that internet providers themselves profit from providing access to these illegal sites and has required the internet providers to block them; with the internet providers paying their own legal costs and the costs of implementing the blocks.

The music industry, together with other creative industries, have been granted court orders requiring UK internet providers to block 41 illegal websites. Has the internet been broken by this activity? Far from it. Internet providers no longer oppose the court applications and the illegal websites choose not to intervene in them. On the whole, the websites themselves fail even to respond to correspondence from rights holders (and when they do, it's merely to offer some token attempt to take down a few titles). They seem to be happy to hide offshore, away from the reach of any forum of justice in which their activities will come under scrutiny.

Website blocking has had a major impact on use of illegal sites

The evidence in the UK is that the use of website blocking has had a major impact on use of illegal sites. Of course, there are always ways and means to evade the effect of the orders – but in reality most users are just not bothered enough to go down that road. It's much simpler to switch to something else which is easy and available. If that happens to be a legal service which has attractive features and is pitched at the right price, why not use that instead?

A key issue underpins all of this. It is the need to redress the balance between the limitless potential of the internet to allow users to experience music in new and user-friendly ways; and

²² *UPC Telekabel v Constantin Film (kino.com case)* (Case C-314/12) on 27 March 2014.

²³ Andrew Forbes, *The Music*, (July 30th 2014) 'Does Illegal Website Blocking Break the Internet', <http://themusic.com.au/opinion/music/2014/07/30/does-blocking-illegal-websites-break-the-internet/>.

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the economic interests of writers and performers and the industry which surrounds them. The law has a vital role to play in that process, by providing effective remedies to patrol the more lawless borders of the web.

That won't break the internet in any way — it is simply a part of growing up, of the web maturing into a place where consumers and creators can co-exist in harmony.

Turning now to the three proposals set out in the Discussion Paper, MRA's position is set out below.

5. Proposal 1

MRA believes the government has correctly identified that:

1. sections 36(1) and 101(1) are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so;
2. Australia is obliged under its free trade agreements with the United States, Singapore and Korea (not yet ratified) to provide a legal incentive to ISPs to cooperate with rights holders to prevent infringement on their systems and networks;²⁴
3. the effect of the decision in the iiNet case is to limit severely the circumstances in which an ISP can be found liable for authorising an act by a subscriber that infringes copyright; and
4. extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia's international obligations.

MRA also supports the goal to have the *Copyright Act* (particularly section 101 and the safe harbour provisions) function as intended. Annexure 2 outlines the relevant legislative history and the legislature's intent.

However, MRA believes that the draft language of Proposal 1:

- a) will not be effective in achieving its aim; and
- b) risks creating greater uncertainty in what is otherwise settled authorisation case law (contrary to its stated goal).

²⁴ For example, Art 27.11(29) of the Australian-US Free Trade Agreement (*USFTA*) requires the Government to provide incentives for ISPs to "cooperate with rights holders in deterring the unauthorised storage and transmission of copyrighted materials on their networks". See also Australia-Singapore Free Trade Agreement, Art 12(1); Australia- Korea Free Trade Agreement, Art 19.9(29).

Annexure 1

a. Proposal 1 will not necessarily achieve its aim

The Government proposes to amend sections 36(1A) and 101(1A), which currently provide:

In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in [[the copyright in a work,]²⁵ / [a copyright subsisting by virtue of this Part]²⁶] without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

The Government proposes to move existing paragraph (a), which requires the Court to take into account a person's power to prevent the doing of the act concerned, to a new section, which would provide that, in making an assessment of the "reasonable steps" element, a court must have regard to, inter alia: "(a) the extent (if any) of the person's power to prevent the doing of the act concerned".

Whether or not Proposal 1 is implemented, the Court is still required to take into account the extent (if any) of the person's power to prevent the doing of the act concerned. Shifting this element from a standalone factor that must be taken into account to one of the factors that must be taken into account in determining if reasonable steps were taken will not alter the weight that will be given to it. ISPs could be expected to continue to argue that it is reasonable for them not to take steps to prevent infringements, on the premise that their power to prevent infringement is negligible or non-existent, or is not direct.

This is likely to result in another test case (similar to the iiNet case) in order to determine whether an ISP could be held liable for authorising online infringements committed by its subscribers. This would be expensive and time consuming for all parties involved, and its outcome would be by no means certain. Further, it is not clear that adopting Proposal 1 would change the outcome of a case like iiNet, should it be litigated again. Consistent with their position to date, ISPs could be expected to argue that their inability to control their users or, for

²⁵ For s 36(1A).

²⁶ For s 101(1A).

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example, the BitTorrent platform, would mean that there are no reasonable steps that they can take to prevent or avoid the primary copyright infringements of their users. Without a specific duty to prevent infringement, found in an industry code or the Regulations, the power to prevent infringement again becomes a major consideration.

Other elements of Proposal 1 are also problematic. The proposal would require the Court to have regard to:

- (b) "whether the person or entity was complying with any relevant industry schemes or commercial arrangements entered into by relevant parties". However, in the absence of authorisation liability, as the aim of the Discussion Paper recognises, ISPs have no incentive to agree to an industry scheme or commercial arrangement. If they do nothing, they will not be held liable.
- (c) "whether the person or entity complied with any prescribed measures in the Copyright Regulations 1969". However, referring to prescribed measures without introducing such measures does not change the current landscape.
- (d) "any other relevant factors". Given that the lists of factors currently in sections 36(1A) and 101(1A) are inclusive rather than exclusive, the Court already can (and does) take into account any other matters it considers relevant.

b. Proposal 1 would increase uncertainty

In its goal to cure the problem which the High Court's decision in the iiNet case crystallised, Proposal 1 might inadvertently put settled principles at risk and create uncertainty. The iiNet case is only one of a number of cases which have considered the important concept of authorisation liability. Proposal 1, if enacted, would call into question the relevance and precedential value of cases dating back to at least as early as the 1920s. Annexure 3 to this response sets out a summary of the relevant case law on authorisation.

The draft language in Proposal 1 could mean that matters which have been taken to have been settled, and upon which commercial entities, including ISPs and rights holders, have operated and structured their commercial arrangements for many years, may be open to reinterpretation and possible future litigation. MRA does not believe that it is the Government's intention to create this outcome.

Further, the concept of authorisation liability is not just relevant in an online environment; it has been applied in the past in circumstances as diverse as libraries, video player manufactures, entertainment venue operators and blank tape manufacturers.

Annexure 1

In attempting to address the inadvertent drafting issues in the current sections 36 and 101, and the practical problems which P2P and other technologies pose for rights holders, Proposal 1 has inadvertently overreached, because although the draft Proposal 1 appears intended to focus only on ISPs, it could be broader in practice. MRA suggests that a more targeted approach will achieve the Government's goals without triggering these unintended outcomes.

c. Alternative Proposal 1

MRA respectfully suggest that the Government's goals can be achieved effectively, and the failings which the iiNet case identified can be cured, in the following flexible way, which creates certainty for all parties.²⁷

New s36(3) and s101(5)^[23]

If there is no relevant industry scheme or commercial arrangement in effect, a carriage service provider:

- (a) with actual knowledge that one of its subscribers has done, and is likely to continue to do, in Australia an act comprised in [s36:[the copyright in a literary, dramatic, musical or artistic work]/s101:[a copyright subsisting by virtue of this Part]] without the licence of the owner of the copyright using the carriage service provider's services; and
- (b) which does not act to prevent the doing (or continuation) of the act concerned, will be taken to have authorized the doing of the act concerned.

Amendment to s36(1A)(c) and s101(1A)(c)

Delete 'codes of practice' and replace with 'scheme or commercial arrangement'.

New definitions in s36(4) and s101(6)

'**industry scheme**' means an industry scheme that meets any prescribed requirements and is developed in accordance with the regulations.

'**commercial arrangement**' means a binding legal agreement between a carriage service provider and a copyright owner regarding the steps the carriage service provider will take in response to a notice of an infringement occurring using the carriage service provider's services.

New Reg 20BA

For the definition of **industry scheme** in section 101(6) of the Act, an industry scheme is one that:

- (a) is developed by consultation between the Attorney General or his or her appointee and a range of copyright owners or copyright owner groups, carriage service providers and any other stakeholders that the Attorney General or his or her appointee considers should be consulted, and must be approved by the Attorney General; and
- (b) meets the following prescribed requirements: **[MRA submits that the US CCI program contains elements which could act as a guide for the elements of the prescribed requirements]**.

In this way, ISPs which have been placed on notice are incentivised to either:

- (a) act to prevent the doing (or continuation) of an infringing act using its services; or

²⁷ MRA notes that these suggestions would also extend to Service Providers if the Government's version of Proposal 3 were to be enacted.

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- (b) agree to a relevant industry scheme or commercial arrangement.

Carriage service providers would also still have the benefit of the safe harbour provisions to limit their exposure to damages.

The changes which MRA proposes are tailored to impact only the intermediaries which are the subject of Australia's international treaty obligations. Once these changes are in place, the parties will be in a position to agree the framework which the government has identified as the goal of the legislative amendments. This framework could be an industry scheme or separate commercial arrangement.

However, until such time as the necessary legal incentives are in place, it is unlikely that any efficient processes will be agreed. As already mentioned, in the absence of clear authorisation liability, ISPs have no incentive to agree to a reasonable industry scheme or commercial arrangement. If they do nothing, they will not be held liable.

The history of the amendments brought in following the Australia US Free Trade Agreement (**AUSFTA**) is a clear example that the current cooperative model, and the processes contemplated by the Government's draft Proposal 1, will not achieve the Government's stated goals. This history is included in Annexure 2.

MRA's draft Alternative Proposal 1 is one possible solution. However Music Rights Australia submits that, whatever solution the Government adopts to extend authorisation liability, it must actually create a legal incentive for ISPs to cooperate with rights holders. MRA believes that Alternative Proposal 1 could create an environment which does not reward those who decide not to participate in the development of solutions to address copyright infringement online, which is a concern with the Government's Proposal 1.

For example, if a particular ISP decided not to enter into either an industry scheme or a commercial arrangement and then failed to act in response to a notice to prevent its network being used to infringe a particular rights holder's copyright, it would be exposed to liability for authorising the infringing act about which it is on notice.

Conversely, those ISPs which do act in accordance with an industry code and satisfy the conditions set out in section 116AH would have the benefit of the safe harbour provisions. This would see sections 36 and 101 and the safe harbour provisions functioning as originally intended.

MRA also notes that Alternative Proposal 1 does not impose burdensome compliance or regulatory procedures on ISPs, as it gives them flexibility to develop processes which suit their existing technologies and business practices.

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d. The questions posed in the Discussion Paper

In answering the questions set out in the Discussion Paper, MRA has responded on the assumption that the necessary legal incentives will be in place so that the parties can create a framework in which practical steps can be taken by ISPs to address online copyright infringement.

It is clear that the current section 101 has never created the necessary legal incentives for ISPs to cooperate with rights holders²⁸ and MRA believes that the draft Proposal 1 will not change the present situation. Accordingly, there is currently little prospect that the parties will be able to reach the desired flexible, independent solution, particularly when maintenance of the status quo suits one of the key stakeholders.²⁹

The creative industry sector is committed to working with the Government and other stakeholders to develop a legal framework which ensures there are effective and flexible processes in place to protect copyright online. There are a number of proposals being put forward in this consultation process from differing representatives from the creative industries. Whilst these proposals may take differing approaches, they are put forward to achieve the same outcome – to ensure there is an effective legal framework and the necessary legal incentives for service providers and rights holders to work together to ensure the Copyright Act will continue to support creative content owners and those who invest in them to continue to invest in and produce creative content to meet consumers' legitimate expectations.

Whatever proposal the Government ultimately adopts, it must have the effect of incentivising service providers to work with copyright owners to put in place flexible solutions which deliver certainty to all the parties and which avoid unnecessary and costly litigation.

Question 1: What could constitute "reasonable steps" for ISPs to prevent or avoid copyright infringement?

Assuming the necessary legal incentives are in place, MRA suggests that the parties draw on the current international examples to explore this issue. MRA considers that the CCI and CAS³⁰ offer good examples of the range of reasonable steps which are available to ISPs. The parties in the US program have implemented appropriate processes to identify infringing activity, issue notices, verify IP addresses and issue Copyright Alerts through a structured process designed to educate consumers and change consumer behaviour. MRA also supports the development of a range of mitigation measures which ISPs can select from during the mitigation phase. MRA does

²⁸ See the history of the section outlined in Annexure 2.

²⁹ See the history of the section outlined in Annexure 2.

³⁰ See www.copyrightinformation.org.

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not consider termination of accounts to be a proportionate mitigation measure and does not recommend that it should be included in an Australian industry scheme.

Question 2: How should the costs of any "reasonable steps" be shared between industry participants?

MRA suggests that the CCI and CAS can inform this discussion. The parties in the US program have agreed to share costs. How costs could be allocated among the parties in Australia would depend on the particular framework which is developed and the particular parties involved. The precise discussions will be different depending on whether the parties are exploring the parameters and structures of an industry scheme or a commercial arrangement.

Question 3: Should the legislation provide further guidance on what would constitute "reasonable steps"?

MRA considers that any guidance in relation to these matters should be set out in Regulations which accompany the Copyright Act. This would allow the parties to review and, if necessary, amend the processes in an efficient way in the future.

Question 4: Should different ISPs be able to adopt different "reasonable steps" and, if so, what would be required within a legislative framework to accommodate this?

It is MRA's position that, within the parameters that any process should be designed to deter the unauthorised storage and transmission of copyright material on their network, it is for an ISP to determine what they should do, taking into consideration their technological capacity and business practices.

Questions 5: What rights should consumers have in response to any scheme or "reasonable steps" taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?

MRA suggests that CCI and CAS offer good examples of how consumer interests can be incorporated into these processes. For example, the review process under the CAS is administered by an independent third party. Consumers have the capacity to challenge the validity of Mitigation Alerts, and any previous Alerts, once they have reached the mitigation stage. There is a nominal fee of USD35 to submit an appeal, but there is a process for consumers to apply to have the fee waived. If the consumer's challenge is successful, the fee is refunded under this system.

Processes like these should be included in an industry scheme in Australia.

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6. Proposal 2

MRA welcomes the proposal to introduce a specific injunction power to block access to websites that contain infringing content. However, MRA is concerned that Proposal 2 imposes unnecessary evidentiary burdens and other restrictions on rights holders seeking to avail themselves of the remedy which are not seen in similar provisions overseas.

For example, neither the Irish and UK legislation nor the EU Directive (summarised in Annexure 1) limits the remedy to ISPs. The EU directive refers to intermediaries and the UK and Irish legislation reference service providers.³¹

MRA urges the Government to adopt the term "service provider" to make Proposal 2 consistent with the international position.

The goal of this type of relief is to block illegal streaming and downloading sites and disrupt their business models. As neither service providers generally, nor ISPs, would be liable for the infringing activity of the illegal sites, there is no reason to limit a court's power to grant the relief to a particular class of service provider. Limiting the remedy to ISPs will unnecessarily narrow the scope of the orders that a court could make based on the evidence before it.

Additionally, Proposal 2 appears to limit a Court's powers by directing the remedy to those websites "the dominant purpose of which is to infringe copyright". MRA submits that this limitation is not necessary.

The limitation to websites "the dominant purpose of which is to infringe copyright" could act as a barrier to rights holders which have legitimate matters to bring before the court. If the limitation is retained, infringing websites could fashion their illegal businesses and adjust their practices to avoid the reach of the injunction power. Similar limitations have proven to be insurmountable obstacles for rights holders in the past. A similar issue arose in the application of the definition of "technological protection measure" in section 10 of the Copyright Act in the *Sony v Stevens* proceedings.³²

The scope of the proposed power to grant an injunction is better suited to determination by a court, based on the case presented. Annexure 4 sets out the principles which courts have already developed in relation to the granting of injunctions.

³¹ See *Directive 2001/29/EC of the European Parliament and of the Council* at [59]; *Copyright Design and Patents Act 1988* (UK), ss97A, 191JA; *Copyright and Related Rights Act 2000* (Ireland), ss 40(5A) and 205(9A).

³² *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193; [2005] HCA 58; *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31; [2003] FCAFC 157; and *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2001) 116 FCR 490; [2001] FCA 1379.

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Courts have also already developed a mechanism, known as the usual undertaking as to damages, to deal with damages suffered by a party which is incorrectly subjected to an interlocutory injunction.

MRA submits that the Court's existing mechanism is preferable to the new and uncertain "indemnities" regime referred to in the context of Proposal 2. Indemnities are matters which a Court is better placed to determine based on the case before it. The reference to indemnities should be removed from Proposal 2.

Given that an injunction is an equitable remedy and the courts would apply equitable principles in determining an application under the relevant provision, there is no basis for concern that legitimate websites would be caught by the language in Alternative Proposal 2.

In particular many of these issues were considered by the Court of Justice of the European Union (**CJEU**) in its decision on copyright site blocking injunctions in *UPC Telekabel v Constantin Film* (kino.to case) (Case C-314/12) on 27 March 2014.

The CJEU judgment confirmed that kino.to (the **website**) directly infringed copyright and the Court confirmed that internet access providers are intermediaries and held that this finding is not undermined by a lack of a contractual relationship between the infringer (website) and the intermediary. Further the court held that site blocking injunctions do not infringe the freedom of business right as there is an obligation to implement proportionate measures and the ISP can determine the specific measures to be taken to achieve the result sought and is not required to make unbearable sacrifices. However it must do what is reasonable to effect the block within its capacity.

The CJEU found that site blocking injunctions do not infringe the freedom of information as an ISP's manner of meeting the requirement of the injunction must not affect lawful access to information and that site blocking measures do not need to be a "perfect fix", rather they should seriously discourage users from accessing the site while not impacting the ability to access to legal services. The verdict is final and binding on the courts of all 28 EU Member States.

a. The questions posed in the Discussion Paper

Question 6: What matters should the court consider when determining whether to grant an injunction to block access to a particular website?

Proposal 2 should not be drafted in a way that would limit the Court's discretion to make orders based on the merits of the case before it.

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Australia has the benefit of the UK, Irish and EU decisions which have considered the relevant legislation. The case law shows how courts have approached the scope of this type of injunction and how they have determined the allocation of costs. A summary of the key cases appears in Annexure 5.

A court is also better suited to determine the issue of costs based on the case presented before it, the nature of the orders it has been asked to make, and the impact which the orders will have on affected parties.

By contrast, at a practical level the process contemplated in the Discussion Paper could cause delay and add unnecessary complexity. Proposal 2 contemplates that "a rights holder may list a number of ISPs as respondents to an application for injunctive relief",³³ which has been the practice in other jurisdictions and that "Rights holders would be required to meet any reasonable costs associated with an ISP giving effect to an order...".³⁴ MRA is concerned that the inclusion of the requirement to meet the reasonable costs of each of the named ISPs would add administrative complexity to these matters which could act as a barrier to rights holders' legitimate claims for relief.

As currently drafted, Proposal 2 appears to require a rights holder to negotiate reasonable costs with each ISP named in the order and to enter into separate arrangements to address each ISP's claim. Proposal 2 does not appear to contemplate judicial oversight of this process. This could have the effect that each ISP could arbitrarily fix its price without any independent verification as to whether the costs claimed were in fact reasonable. This could potentially give ISPs the power to frustrate implementation of a court order by claiming unacceptably high costs which rights holders could not meet and therefore impede the implementation of the court's orders.

As previously discussed, these matters are ones to which the courts would normally apply established equitable principles and MRA believes that these issues are best determined by a court based on the evidence put before it. MRA urges the government to remove costs from Proposal 3 and to follow international precedent and permit the court to apply established equitable principles in relation to the issue of costs.

b. Alternative Proposal 2

MRA submits the following alternative proposal for the Government's consideration:

³³ Discussion Paper, p 6.

³⁴ Ibid.

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New s115A

- (1) Subject to this Act, the owner or exclusive licensee of copyright may bring an action to obtain an order under subsection (2) to prevent infringements of copyright from occurring online.
- (2) In an action brought under this section a court may grant an injunction, against a service provider, to require the service provider to take reasonable steps to disable access to infringing online services in order to prevent infringement on the service provider's services.
- (3) In considering whether to grant an injunction under subsection (2), the court shall have regard to the rights of any person likely to be affected by the grant of such an injunction and the court shall give such directions (including, where appropriate, a direction requiring a person be notified of the application) as the court considers appropriate in all of the circumstances.

Alternative Proposal 2 is drafted using the Irish and United Kingdom legislation as models.

Subsection (1) creates a right of action separate from the right to bring an action "for an infringement of the copyright" under section 115 of the *Copyright Act*, to avoid it being classified as a form of relief only available in a traditional case of copyright infringement.

Subsection (2) of the proposed provision has been adapted from section 97A of the *Copyright, Designs and Patents Act 1988* (UK) and Article 8(3) of EU Directive 2001/29/EC.

Subsection (3) of the proposed provision has been adapted from section 40(5A)(b) of the *Copyright and Related Rights Act 2000* (Ireland).

7. Proposal 3

Proposal 3 would limit the remedies available for infringements of copyright committed or authorised by any person who engages in activities defined in sections 116AC to 116AF of the Copyright Act.

For example, such a person could not be ordered to pay:

- (a) damages or an account of profits; or
- (b) additional damages; or
- (c) other monetary relief,

so long as they meet the conditions set out in section 116AH.

We note that the Attorney General's department conducted an inquiry into expanding the scope of the safe harbour provisions in 2011. Annexure 6 contains the submission ARIA made in relation to the safe harbour review in 2011.

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In the light of the deficiencies in Proposal 1 which MRA has identified, particularly that Proposal 1 as drafted would not effectively make ISPs (let alone other service providers) liable for authorising copyright infringements committed using their services, MRA believes that it is not appropriate to extend safe harbour protection where none is needed.

a. The questions posed in the Discussion Paper

Question 7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

This question seems to assume that an expansion of the safe harbour scheme is necessary. Indeed, the Discussion Paper asserts, without supporting evidence, that persons other than carriage service providers should be captured by the safe harbour scheme. However, the correctness of this assertion is not at all clear.

The safe harbour scheme was introduced to address the risk that carriage service providers (not service providers generally) might be held liable for copyright infringements committed using their networks. So much is clear from, for example:

1. section 116AA(1), which provides that the purpose of Division 2AA of Part V of the *Copyright Act* is to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers; and
2. the activities which can attract safe harbour protection, which are expressly limited in sections 116AC to 116AF to conduct by carriage service providers:
 - (a) A carriage service provider carries out a Category A activity by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.
 - (b) A carriage service provider carries out a Category B activity by caching copyright material through an automatic process. The carriage service provider must not manually select the copyright material for caching.
 - (c) A carriage service provider carries out a Category C activity by storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider.
 - (d) A carriage service provider carries out a Category D activity by referring users to an online location using information location tools or technology.

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Contrary to the suggestion at page 7 of the Discussion Paper (which conveniently extracts only parts of sections 116AC to 116AF), all entities providing services that fall within the above four categories (that is, carriage service providers) are able to take advantage of the safe harbour scheme. The Government has advanced no reason why entities other than carriage service providers should be protected by the safe harbour scheme.

Further, it would not be appropriate to extend the protection of the safe harbour provisions to persons who would not otherwise be liable for copyright infringement. A person only needs to rely on the safe harbour provisions when a finding of liability for copyright infringement has been made. MRA is concerned that the Discussion Paper does not link the extended safe harbour scheme set out in Proposal 3 to the issue of the extended authorisation liability set out in Proposal 1.

This is despite the statement at page 7 of the Discussion Paper: “[w]here authorisation liability is established and safe harbour conditions are met, the only remedy available against ISPs is injunctive relief. If an ISP does not satisfy the safe harbour conditions, the ISP will also be exposed to monetary relief, including additional damages.”

If safe harbour protection is to be extended, then it should only be extended to persons who would otherwise be liable for copyright infringement; that is, to persons who would be liable in the light of any proposal that is enacted under Proposal 1. Any service provider which receives safe harbour protection under Proposal 3 must also face extended liability under Proposal 1.

MRA reiterates the issues set out in this submission with respect to Proposal 1 as they are also relevant to service providers generally. MRA suggests that Alternative Proposal 1 can easily be amended to ensure that extended authorisation liability will effectively include service providers generally without adding additional regulatory burden or costs to service providers and would create the necessary legal incentives so that those service providers cooperate with copyright owners to address copyright infringement on their services.

It would not be reasonable for the Government to propose to extend the safe harbour provisions to a new class, such as service providers, without including service providers in the extended liability provisions. To do so would be at odds with Australia’s international obligations and the stated goals of the Discussion Paper.

At this time no evidence has been advanced to justify a change in the current safer harbour provisions and on this basis MRA opposes Proposal 3. In addition, MRA opposes any change to the safe harbour provisions if the Government does not put in place legal incentives for service providers to work with copyright owners to address infringements committed using their services. The history of the provisions make it clear that, without clear legislative intervention,

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reliance on altruistic cooperation alone will not deliver the flexible solutions the Government has stated it wishes to have the parties put in place.

If the Government proceeds with Proposal 3, it should, in accordance with the goals set out in the Discussion Paper, put in place legal incentives so that service providers fall within the extended authorisation liability provisions and the extended injunctive relief to block infringing overseas websites. In this context, MRA makes the following observations about Proposal 3.

MRA urges the Government to adopt Alternative Proposals 1 and 2 if it decides to introduce Proposal 3. If that occurs, Alternative Proposal 1 would need to be amended to extend liability to all "service providers". In addition, MRA suggests that, given the ubiquitous nature of data storage in modern society, in the domestic, private and commercial settings, the Government should introduce a definition of "service provider" which reflects international trends and Australia's international obligations.

8. Building the Evidence Base

a. The questions posed in the Discussion Paper

Question 8: How can the impact of any measures to address online copyright infringement be measured?

In the absence of a framework around which the Government and the relevant parties could agree methodology and goals, it is not possible to answer this question with any degree of specificity.

The international examples show that there are a range of measurements which could be used and MRA suggests that similar measurements could be implemented to determine if any Australian scheme has had the desired impact. However, until a framework is in place and the goals set, it is difficult to determine how the measurements should operate and over what length of time the measurements should be taken.

Using international experience, MRA suggests that data of unlicensed use online as well as consumer awareness of the new program, licensed services, and the implications of using unlicensed services, could be helpful indicators. It is also important that measurements are taken before the establishment of any program and continue for a reasonable period.

9. Other approaches

The creative industries, online industries and intermediaries can and do take steps to address online copyright infringement over and above what would be required under the legislative changes set out in the Discussion Paper, but those steps cannot act as substitutes for a robust

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and effective legal framework which supports rights holders' choices about how their work will be distributed and made available to the public in the online environment.

The suggestions which MRA makes below are offered as additional initiatives which could be included in the Government's review of how online copyright infringement can be reduced. MRA does not put them forward as substitutes for the Alternative Proposals it has outlined in its submission.

Additionally, MRA urges the Government not to read any alternative suggestions made by other parties in response to question 9 as substitutes for what the Government has identified as key legislative changes which must be made to achieve the goals it has identified in the Discussion Paper.

One single factor does not create online copyright infringement, so to suggest that a single factor will reduce it would be to serve up platitudes such as: lack of access to content and price cause piracy and "follow the money"³⁵ To suggest that one thing can stop online copyright infringement is to misunderstand the scope of the issue.

MRA commends the Government for recognising that it must address the problem from both the supply side (through giving rights holders the ability to seek court orders to block illegal streaming and downloading sites) and the demand side (by recognising it must incentivise service providers to cooperate with copyright owners to address infringing conduct on their networks).

a. The questions posed in the Discussion Paper

Question 9: Are there alternative measures to reduce online copyright infringement measures that may be more effective?

b. Online Advertising Code — Brand safety initiative

MRA has been working to develop a local online advertising code which would complement work being done internationally. See Annexure 7 for examples of international advertising initiatives.

Since October 2013, MRA has worked with the Audited Media Association of Australia (**AMAA**) to raise awareness about how advertising dollars support illegal sites such as Kickass Torrents,

³⁵ Google submission 17 December 2013

http://www.communications.gov.au/_data/assets/pdf_file/0009/214983/Google.pdf;
<http://www.smh.com.au/federal-politics/political-news/telcos-back-internet-piracy-crackdown-20140830-10a8i9.html> "Telcos are strongly opposed to changing the Copyright Act to make it easier for rights holders to confront them for not doing enough to prevent illicit downloading. They prefer a "follow the money" approach...."

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Bitsnoop and The Pirate Bay. These sites only make money for those who operate them and nothing goes back to creative content owners.

MRA spoke at the AMAA Accountability in Ad Spend Conference in October 2013. At that conference it was agreed that AMAA and MRA should develop industry guidelines in the form of an industry code which would ensure that each section of the online advertising value chain had in place practical processes and guidelines to reduce the instances of brands placing their advertising on illegal streaming and downloading sites.

The code and principles were developed and a series of industry briefings and private meetings were held to obtain feedback and to ensure wide cross- industry support from the creative industries, advertisers and the online advertising community, including the ad platforms and ad networks.

However, despite agreement that there is a problem and that something has to be done, and that an industry based code is the preferred process to address the problem, there continues to be strong resistance to implementation of the code from those groups within the online advertising value chain which benefit from the status quo.

The role that advertising plays in funding illegal sites has been recognised world-wide and was the subject of a recent report Follow the Money: Financial Options to Assist in the Battle Against Online IP Piracy.³⁶

That report outlines the range of initiatives which are currently being implemented world-wide, including initiatives to engage with online advertising communities and payment providers, and the work being done by the City of London Police to disrupt illegal sites' business models.

The report specially looks at the work being done under Operation Creative which has been developed to stem the flow of revenue to infringing sites through the development of the infringing website list (**IWL**). The IWL is compiled by rights holders and industry bodies and is managed by the City of London Police. The music industry, through the British Recorded Music Industry (**BPI**) and IFPI, are participating in Operation Creative and are part of the group known as Operation Creative Partners.

The IWL is a portal for the digital advertising sector to get up to date information on sites which have been verified as offering infringing copyright material.

³⁶ <http://www.mikeweatherleym.com/2014/06/25/mike-publishes-report-on-tackling-advertising-revenue-from-illegal-websites/>

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It is MRA and AMAA's intention to leverage these international examples in the implementation of a pilot of the Australian online advertising code. However, there has been resistance to a trial from the online advertising community and Australian advertisers, both private and government, which have been approached because their brands have been found on illegal sites.

A trial of the online advertising code would support the legislative changes which are proposed in the Discussion Paper. If the Government were to implement its own trial of the online advertising code in one of the Federal departments which regularly conducts online advertising campaigns, this could set the standard for others to implement effective measures to reduce the instances of brand placement on illegal sites.

c. Education

Examples from around the world, some of which are discussed in Annexure 1, show that education plays an important role in the success of programs which are designed to reduce online copyright infringement. The CCI offers an excellent example of how a well-structured and collaborative communications strategy can influence the public's acceptance, as well as the efficiency and impact, of a program.

MRA recommends that the Government review the range of education programs which have been implemented internationally and that it establishes a cross industry education panel to develop targeted government and cross industry education strategies to ensure the public is informed about the important contribution which the creative industries make to the Australian economy and cultural life; the goals of the programs which are introduced and how the public can ensure they are not infringing the rights of creative content owners, and information about where they can find licensed creative content.

d. Digital Content Guide

Research has shown consumers want to get creative content from licensed services which support the creative industries. In December 2012, UMR Research showed that the majority of Australians believe creators should be paid for their work regardless of whether it is made available online or in physical form.³⁷

The Digital Content Guide is just one example of what can be done to help consumers find and use licensed sources for the creative content they want to experience. The Digital Content Guide helps consumers find licensed music, movies, TV shows, games, eBooks and sport. Consumers can find information about the different services and they can click through directly to explore them.

³⁷ <http://umr.com.au/>

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Consumers can also use the Digital Content Guide as a reference point to determine if the services they are using are licensed services. Search results rarely differentiate between illegal and licensed sites and the Digital Content Guide can assist consumers to determine if the site their search query has served up is offering licensed content.

There are currently over 100 services listed on the Digital Content Guide, including over 30 music services. It is free and can be used on mobile, tablet and desktop devices.

The Digital Content Guide was developed by a group of creative rights holders and creative content industry associations. The funding members are: APRA AMCOS; ARIA; ASA; Copyright Agency Ltd; Foxtel; News Corp Australia; and Village Roadshow. It is hosted and run by independent contractors.

e. Music Matters

APRA AMCOS and ARIA fund the Music Matters campaign. Attached as Annexure 8 is an information sheet which explains how this music-community managed campaign works. Music Matters' goal is to remind the public about the value of music in their lives. It does this through the animations it commissions, the People In Music sessions which are run on Energy Groove Radio, and through blogs and social media. The Music Matters Trust Mark also assists consumers to identify sources of licensed music.

f. City of London Police (UK)

The City of London Police established the Police Intellectual Property Crime Unit (**PIPCU**) which focuses on IP crimes. It is funded by the Intellectual Property Office, which is part of the Department of Business Innovation and Skills. Utilising the strict British anti-money laundering legislation, the PIPCU worked with rights holders and payment providers on an evidence based approach to proactively remove services from illegal websites. MRA encourages the Government to undertake a review of this initiative to determine whether a cooperative relationship between the Australian Federal Police and the City of London Police could be developed to leverage the work it has undertaken on this issue and also in the development of Operation Creative.

10. Regulation Impact Statement

a. The questions posed in the Discussion Paper

Question 10: What regulatory impacts will the proposals have on you or your organization?

If the Government implements changes like those set out in the Discussion Paper or Alternative Proposals 1 and 2, the music industry would invest considerable resources in monitoring and

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investigating online copyright infringing activity in order to develop the evidence which would satisfy the requirements of an industry scheme.

MRA suggests that Alternative Proposal 1 does not add significant compliance obligations to ISPs, as it represents obligations which ISPs currently have. Alternative Proposal 1 merely makes the section function as originally intended.

Proposal 2 places the onus on right holders to develop evidence which would satisfy a court to make orders to block off shore websites. Rights holders will have to invest considerable resources to bring these matters before the courts.

International case law indicates that courts have found that the implementation of these types of orders do not burden ISPs unduly and have apportioned costs accordingly (see the case summaries at Annexure 5).

Were the Government to implement Proposal 3, and service providers were to obtain the benefits which the safe harbour provisions offer, service providers should also have the same obligations as ISPs. These obligations are not onerous and are entirely within the scope of Australia's international obligations.

Question 11: Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?

MRA suggests that the Alternative Proposals put forward in this submission would only impact entities in their capacity as service providers and so any changes to the law would only affect them in that capacity and in no broader context.

This would be made clearer were the Government to adopt MRA's suggestion that it define the term service provider.

Additionally defining the term service provider in this way may overcome any concerns others assert could arise as a result of the changes proposed in the Discussion Paper.

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Annexure 1 — International context

Currently copyright owners work with ISPs on notification programs aimed at educating users about the value of creative rights and their protection. Such schemes exist in Chile, France, Ireland, New Zealand, United Kingdom, South Korea and the USA. Below we provide some details on the programs being operated in the US, France, New Zealand and the UK.

USA — Copyright Alert System

In February 2013, the United States began a new privately arranged graduated response scheme. The scheme was implemented by a Memorandum of Understanding (**MOU**) signed by copyright owners and five of the country's largest ISPs, with input from consumer advocacy groups (as outlined in Section 1 of the MOU).³⁸ This "Copyright Alert System" (**CAS**) is administered by the Centre for Copyright Information (**CCI**) which is governed by an executive committee made up of ISP and content industry representatives. Funding for CCI has been split between the Participating Content Owners Group and the Participating ISPs.

The MOU outlines that each Participating ISP's Copyright Alert Program shall follow the following format:³⁹

1. Initial Educational Step
2. Acknowledgement Step
3. Mitigation Measures Step
4. Post Mitigation Measures Step
5. Reset
6. Transmission of Copyright Alerts to Subscribers
7. Notification of Ability to Request Review.

The scheme has been nicknamed "6 Strikes", after the number of warnings an infringer will have received when a mitigation measure is imposed.

The warnings have three levels – Educational, Acknowledgment and Mitigation. Each participating ISP sends an account holder up to two Copyright Alerts during the Initial Educational Step; followed by two more Copyright Alerts during the Acknowledgement Step; then if required, one alert during the Mitigation Measures Step (a "Mitigation Measure Copyright Alert") which sets out the specific Mitigation Measure to be applied and informs the account holder that, unless the account holder has requested review under one of the dispute resolution mechanisms specified the ISP shall apply the selected Mitigation Measure after the expiration of a notice period. Finally, during the Post Mitigation Measures Step, the ISP will

³⁸ Centre for Copyright Information, Memorandum of Understanding, <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>, p 2.

³⁹ Ibid, pp 8–14.

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send one Mitigation Measure Copyright Alert and shall apply the specified Mitigation Measure and may, at the ISP's discretion, send additional Mitigation Measure Copyright Alerts and apply additional Mitigation Measures, subject to the account holder's right to challenge Copyright Alerts at this step.⁴⁰

Once the 6 alerts have been received by an account holder, the ISP's range of mitigation measures, which will depend on the particular service provider, may include:⁴¹

- temporary reduction in uploading and/or downloading speed;
- temporary step-down in the Subscriber's service tier to:
 - o the lowest tier of Internet access service above dial-up service that the Participating ISP makes widely available to residential customers in the Subscriber's community; or
 - o an alternative bandwidth throughput rate low enough to significantly impact a Subscriber's broadband Internet access service (e.g., 256–640 kbps);
- temporary redirection to a Landing Page until the Subscriber contacts the Participating ISP to discuss with it the Copyright Alerts;
- temporary restriction of the Subscriber's Internet access for some reasonable period of time as determined in the Participating ISP's discretion;
- temporary redirection to a Landing Page for completion of a meaningful educational instruction on copyright; or
- such other temporary Mitigation Measure as may be applied by the Participating ISP in its discretion that is designed to be comparable to those Mitigation Measures described above.

During the first 10 months of operation, the CAS sent out over 1.3 million alerts to account holders, with over 70% of these occurring during the initial education stage and less than 3% sent at the final mitigation stage. This is notable, as the CAS is ultimately aimed at "educating internet users, modifying attitudes and changing behavior by helping account holders to understand the importance of copyright protection and the risks inherent in using P2P programs to obtain or share digital content".⁴² The CCI has stated that the premise of the CAS is that the majority of consumers will be inclined to change their behaviours and take corrective

⁴⁰ Ibid, p 8.

⁴¹ Ibid, p 8.

⁴² Centre for Copyright Information, 'The Copyright Alert System: Phase 1 and Beyond' (May 28, 2014).

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action if their alleged copyright infringement is brought to their attention, with 79% of respondents in a recent survey believing that if they receive an alert, that would be “somewhat” or “very influential” toward getting them to stop infringing behavior.⁴³ Notably, CCI has reported that 57% of users surveyed stated that they would stop engaging in copyright infringement immediately upon receiving an alert.

The MOU also outlines an Independent Review Program,⁴⁴ managed by the American Arbitration Association (**AAA**), which provides a non-exclusive avenue of appeal for Subscribers who wish to challenge a Mitigation Measure. The grounds for independent review are:⁴⁵

- i. Misidentification of Account
- ii. Unauthorized Use of Account
- iii. Authorization
- iv. Fair Use
- v. Misidentification of File
- vi. Work Published Before 1923

In May 2014, the CCI reported that, from over 1.3 million alerts generated through 2013, only 265 account holders filed review requests with AAA. Notably, of those reviews, not a single one was identified as an invalid notice. Of the successful challenges, the majority were based on the account holder making a satisfactory case that someone other than the account holder was using the account to engage in infringing behaviour.

New Zealand — Copyright (Infringing File Sharing) Amendment Act 2011

The New Zealand scheme, brought in by the *Copyright (Infringing File Sharing) Amendment Act 2011*, relies on rights owners to alert ISPs that their copyright has been infringed via the ISP's connections. The ISPs must then identify the account holder who is alleged to have infringed copyright and consequently send them infringement warning notices.

The *Copyright (Infringing File Sharing) Amendment Act 2011* amended the *Copyright Act 1994* to provide that an ISP does not infringe the copyright in a work, or authorise an infringement, merely because the ISP knows of the infringement as a result of information received from rights holders (under sections 122B to 122U), so long as the ISP complies with all of its

⁴³ Ibid, p 6.

⁴⁴ Centre for Copyright Information, Memorandum of Understanding, <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf>, p 26.

⁴⁵ Ibid.

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obligations under those sections, and under any regulations made under section 234(eb) to (eh).

Under section 122U, the ISP may charge a rights owner for performing the functions required of it under section 122 of the Act. At present, rights holders are being charged NZ\$25 per notice. This amount has been viewed as prohibitive, and as a result there are a number of copyright holders, including the NZ Screen Association, Free-to-Air and Subscription TV which have abstained from sending out warning notices under the provisions.

If an account holder receives three consecutive notices (detection notice, a warning notice, and an enforcement notice)⁴⁶ within a defined period, issued by the same rights holder, the enforcement provisions found in section 122I will then come into play. These provisions include an application to a Tribunal to order an account holder to pay a sum to the rights holder which must not exceed \$15,000.

To date, there have been 18 finalised cases in the Copyright Tribunal where repeat infringers were ordered to pay fines of a few hundred NZ\$.

Research has found there has been a reduction of approximately 19% in overall unauthorised use from its high point in August 2011 through to May 2014.⁴⁷ New Zealand's creative content groups, such as Recorded Music NZ, contend that the high cost involved in sending notices, as well as issues surrounding the actual receipt of the notices,⁴⁸ has had a negative impact on the intended educational focus of the scheme. Recorded Music NZ believes that if the cost of sending a notice were reduced, more rights holders might utilise section 122, which would in turn help to raise awareness of rights protection by alerting more account holders to their unlawful activity and directing more account holders to licensed services.

France

In 2009, the HADOPI⁴⁹ law was passed by the French Parliament. Under the French system, the HADOPI administrative authority sends warning notices to infringers who have been identified by rights holders and whose identity has been matched against information held by the relevant ISP.

The system also allows for matters to be referred to a court and for a single judge to impose a range for sanctions on the infringing party who has been the subject of at least two previous infringement notices. The HADOPI is Government funded.

⁴⁶ *Copyright (Infringing File Sharing) Amendment Act 2011*, s 122B(3).

⁴⁷ IFPI Digital Music Report page 42.

⁴⁸ Notices sent to email addresses not home addresses.

⁴⁹ HADOPI is an acronym for "Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet" or "Law promoting the distribution and protection of creative works on the internet".

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Under the HADOPI system, when a rights holder submits a notice to the HADOPI administrative authority for alleged copyright infringement, the HADOPI authority then undertakes a verification procedure and has the information matched against the information held by the relevant ISP.

If the information in the infringement notice is verified, a notice is then sent by HADOPI to the infringer by mail. If the same person is the subject of a further valid notice of infringement within a six month period, the HADOPI authority will send a second warning notice, by registered mail. If the account is identified for a third time within one year, it is within HADOPI's discretion to escalate the matter to the court.

Over time, the HADOPI authority has released several reports, the most recent in July 2014. A translated summary of the some of the July report's findings appears below.

According to the July report there have been:

- 3,249,481 first notices;
- 333,723 second notices;
- 1502 third notices;
- 116 files have been transferred to court;
- the number of notices almost doubled in the past year; and
- since HADOPI started in October 2010, 8.9% of all internet subscribers have received a first notice.

Based on a telephone survey of 1059 participants conducted in July 2014:

- 47 survey participants had received a first notice. Thirty three (70%) of those who had received a first notice stated that they had reduced copyright infringements since they received the notice.
- Eight of nine (88%) survey participants who had received a second notice, said they had reduced copyright infringements.
- 73% of those having received a notice had not migrated to other piracy forms (38 out of 52);
- 23% of those having received a notice changed to a legal service/site; and

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- 45% of the survey participants who had not received a notice knew somebody who had received a notice and had reduced illegal consumption.

The HADOPI program has been effective in contributing to a reduction in the use of unlicensed P2P networks, which has declined by 27 per cent in France since September 2010.⁵⁰

In January 2012, an independent academic study "The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France", by Brett Danaher, was released. The report analysed the impact of the HADOPI law in France and its impact on consumer behaviour.⁵¹

The study found that public awareness of the HADOPI law caused sales of songs through iTunes in France to increase by 22.5% above the sales increase of a control group of five European countries. In addition, there was a 25% increase in album unit sales through iTunes above the change in the control group. This effect took place over a 26 month period from the point of maximum awareness of the law, in April 2009.

The effect of the HADOPI law was greater for more heavily pirated genres like rap, and smaller for less pirated genres like jazz, suggesting that the increase in sales is likely caused by a reduction in piracy.

The study found that the increase in sales was observed even before the law's final passage. This is consistent with the idea that increasing the public knowledge of the law, the illegality of infringing conduct, and potential penalties, can be sufficient to change consumer behaviour.

United Kingdom

In July 2014, representatives from both the creative industries and major internet service providers in the UK, launched a voluntary industry program called "Creative Content UK" with the support of the UK government. The program will have two components:

- First, a major multimedia education awareness campaign will be launched before spring 2015, which aims to create wider appreciation of the value and benefits of entertainment content and copyright.
- Secondly, a subscriber alerts program will be implemented (but no implementation date has yet been set) under which participating internet service providers will alert and advise subscribers when their accounts are believed to have been used to infringe copyright.

⁵⁰ IFPI, *Digital Music Report 2014*, <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>, p 42.

⁵¹ Danaher, Brett and Smith, Michael D. and Telang, Rahul and Chen, Siwen, 'The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France' (2012) *Wellesley College - Department of Economics*, <http://ssrn.com/abstract=1989240>.

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EU

Article 8(3) of EU Directive 2001/29/EC provides that Member States shall ensure that rights holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

This provision is implemented in most EU member states. It is also implemented in Ireland and the UK as follows:

- The *European Union (Copyright and Related Rights) Regulations 2012* in Ireland inserted sections 40(5A) and 205(9A) into the *Copyright and Related Rights Act 2000* and provided that:
 - o copyright owners may apply to the High Court for an injunction against an intermediary to whom Article 8(3) of the Directive applies; and
 - o in considering an application for an injunction, the court shall have due regard to the rights of any person likely to be affected by virtue of the grant of any such injunction and the court shall give such directions (including, where appropriate, a direction requiring a person be notified of the application) as the court considers appropriate in all of the circumstances).
- The *Copyright and Related Rights Regulations 2003* in the UK inserted section 97A into the *Copyright, Designs and Patents Act 1988* (Cth) and provided that:
 - o the High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright;
 - o in determining whether a service provider has actual knowledge for the purpose of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to —
 - (a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) of the *Electronic Commerce (EC Directive) Regulations 2002*; and
 - (b) the extent to which any notice includes —
 - (i) the full name and address of the sender of the notice;
 - (ii) details of the infringement in question; and

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- o a 'service provider' is defined in regulation 2 of the *Electronic Commerce (EC Directive) Regulations 2002*, being any person providing information society services.

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Annexure 2 — History of legislative amendments

Sections 36(1A) and 101(1A)

Sections 36(1A) and 101(1A) were inserted into the *Copyright Act* by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) (the **Digital Agenda Act**). According to its Explanatory Memorandum, the Digital Agenda Act was intended to codify the common law doctrine of authorisation liability, as expounded by the High Court in *University of New South Wales v Moorhouse* (1975) 133 CLR 1. Section 36(1A) and 101(1A) were "intended to provide a degree of legislative certainty about the steps that should be taken in order to avoid liability for authorising infringements": Explanatory Memorandum, [56] and [124].

The express objects of the Digital Agenda Act were to amend the *Copyright Act* so as to:

- (a) ensure the efficient operation of relevant industries in the online environment by:
 - (i) promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors; and
 - (ii) providing a practical enforcement regime for copyright owners; and
 - (iii) promoting access to copyright material online; and
- (b) promote certainty for communication and information technology industries that are investing in and providing online access to copyright material; and
- (c) provide reasonable access and certainty for end users of copyright material online...

Safe harbour provisions

Division 2AA of Part V of the *Copyright Act* was inserted as a result of the *US Free Trade Agreement Implementation Act 2004* (Cth) (**USFTA Act**). Section 116AA provides a clear statement of the purpose of the division, namely to "limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers", provided the carriage service provider satisfies certain conditions. The Explanatory Memorandum to the USFTA Act makes a very important point about sub-section 116AA(2) of the Copyright Act. It states that the Division does not affect the way the provisions of the Copyright Act relating to infringement should be applied. Rather, a copyright owner must still first establish that a carriage services provider is liable for copyright infringement, regardless of whether or not any measures required by the Division were implemented by the carriage service provider. In fact, the question of whether the safe harbour provisions apply in a particular situation does not come to be determined until it is shown that a carriage service provider is liable for copyright infringement. Debate relating to these provisions in the Senate focused on whether the steps which ISPs were required to

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take in order to take advantage of the safe harbour would place an unjustified burden (both in terms of monitor and costs) on ISPs. The Government's position, however, was that the amendments were bringing Australia into line with international standards of copyright protection.

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Annexure 3 — Proposal 1 would render case law uncertain

Proposal 1 would change the law on authorisation liability in all contexts, not just for ISPs. This would render uncertain the effect of a long line of case law regarding authorisation liability. In Australia's precedential legal system, case law provides market participants with relative certainty and clarity about their legal rights and obligations. The legislature may of course overturn legal precedent, but it should only do so deliberately and after due consideration. This Annexure considers the line of cases regarding authorisation liability which would be rendered uncertain by Proposal 1.

Evans v E Hulton & Co Ltd

The starting point for consideration of liability for authorisation of copyright infringement is traditionally the decision in *Evans v E Hulton & Co Ltd* [1923-28] MacG Cop Cas 51, where Tomlin J relied on the Oxford English Dictionary definition of "authorise" in connection with the authorisation of acts, defining the concept as "[t]o give formal approval to; to sanction; to approve; to countenance".

Falcon v Famous Players Film Co Ltd

In *Falcon v Famous Players Film Co Ltd* [1926] 2 KB 474, two interpretations of *Evans* were provided. Bankes LJ considered that "authorise" is to be understood in its ordinary dictionary sense of "sanction, approve, and countenance". Atkin LJ took a different approach, stating that "authorise" means to grant or purport to grant to a third person the right to do the act complained of.

CBS Songs Ltd v Amstrad Consumer Electronics

The approach of Atkin LJ was applied in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013, where it was found that the defendants (sellers of hi-fi systems which included facilities for tape recording) did not "sanction, approve or countenance" infringing use of these systems. The Court went on to say that, by the sale of the products, the defendants "conferred on the purchaser the power to copy but did not grant or purport to grant the right to copy".

Adelaide Corporation v Australasian Performing Right Association Ltd

In *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481, Higgins J considered that, for authorisation of infringement to be made out, there must be a direct power to prevent a specific act, such as a specific infringement of copyright, and not a power which would indirectly achieve that result only by putting an end to a relationship. The comments were based on the statement by Atkin LJ in *Berton v Alliance Economic Investment Co Ltd* [1922] 1 KB 742 that "permit", in the context of a covenant in a lease, could mean "to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it", although "sympathy" or even "assistance" with an act was not equivalent to permitting it to occur.

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University of New South Wales v Moorhouse

The landmark case of *University of New South Wales v Moorhouse* (1975) 133 CLR 1 reverted to defining authorisation by reference to the dictionary definition of "sanction, approve, countenance". Jacobs J found that an implied invitation to infringe could constitute authorisation despite the absence of knowledge of any actual act of infringement. Gibbs J quoted from *Adelaide Corporation*, finding that a person cannot be said to authorise an infringement of copyright unless the person has some power to prevent it. Gibbs J concluded that a person who controls a means by which infringement can occur, and omits to take reasonable steps to limit the use of the means to legitimate purposes, would authorise any infringement that resulted from its use.

Australasian Performing Right Association v Jain

Evidence of the respondent's power to control what music was played on the premises and to determine whether a licence from the appellant would be applied for was significant in establishing authorisation in the case of *Australasian Performing Right Association v Jain* (1990) 26 FCR 53. It revealed a deliberate course of action in which the respondent ignored the appellant's rights.

Australian Tape Manufacturers Association Ltd v The Commonwealth

In *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, Mason CJ, Brennan, Deane and Gaudron JJ said that selling a blank tape does not constitute an authorisation by the vendor to infringe copyright, largely because the vendor has no control over the ultimate use of the blank tape. There are legitimate uses for blank tapes and even if the vendor suspects that the tapes could be used for infringing purposes, the vendor cannot authorise the infringement where it does not control the use of the tapes.

Cooper v Universal Music Australia Pty Ltd

Cooper v Universal Music Australia Pty Ltd (2006) 156 FCR 380 involved a website providing hyperlinks to free MP3 files of music stored on a remote website. Cooper was found to have authorised the copyright infringement by users of his website who clicked through the hyperlinks because he made the copyright material available to the outside world and took no steps to prevent infringement. Cooper had under his control the means by which an infringement of copyright could be committed and the power not to facilitate the doing of the infringing acts. This led to a finding of authorisation of infringement.

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd

The same reasoning was applied in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289, where authorisation of infringement resulted from the fact that Sharman had done more than merely facilitate infringement, by providing a peer-to-peer file

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sharing system. Sharman could have prevented distribution of infringing material through appropriate filtering technology but instead encouraged people to infringe copyright.

Roadshow Films Pty Ltd v iiNet Limited

In *Roadshow Films Pty Ltd v iiNet Limited* (2012) 248 CLR 42, the appellants argued that the "control" referred to in *Moorhouse* equated to the "power to prevent" in section 101(1A)(a) and that iiNet's technical and contractual relationship with its customers gave it the indirect power to control the use of its services — that is, to prevent continuing primary infringements (through warnings, suspension of services and termination of contractual relations). That led to the submission that, once iiNet had received credible information of past infringements sufficient to raise a reasonable suspicion that such acts of infringement were continuing, failure to enforce the terms of the its customer agreement, which provided for warnings, suspension and termination of accounts if the terms were breached, amounted, at the very least, to "countenancing" the primary infringements.

Conversely, iiNet relied on the language of section 101(1A) and emphasised that each of those factors is a matter of degree, and that a court must consider the extent to which each factor exists before determining whether a person's inactivity or indifference, exhibited by acts of commission or omission, has reached a degree from which authorisation may be inferred. In particular, iiNet relied on the fact that it had no direct control over its customers' acts (only the ability to suspend or terminate their Internet access completely).

French CJ, Crennan and Kiefel JJ concluded that iiNet did not have any technical power to prevent infringement by its subscribers. Their Honours also did not consider iiNet's contractual power to be a sufficient "power to prevent" infringement because it could only prevent infringement indirectly by terminating the contractual relationship it had with its customers. In their Honours' view, another factor pointing to iiNet's lack of power to prevent infringement was the fact that users could engage another ISP for access to the internet should iiNet terminate its agreement with that user. Thereby, the infringement would still continue and iiNet would have proven itself powerless to stop it. This formed part of their Honours' reasoning when considering what reasonable steps iiNet could have taken to prevent or avoid the infringement. It was held that iiNet's inactivity did not give rise to an inference of authorisation (by countenancing or otherwise) of any primary acts of infringement by its customers. Rather, the true inference to be drawn was that iiNet was unwilling to act because of its assessment of the risks of taking steps based only on the information in the AFACT notices.

Gummow and Hayne JJ considered that "to authorise" is to clothe with authority, particularly legal authority, thereby giving a right to act; that act then may be said to have been authorised. Their Honours considered it wrong to focus only on the element of "countenancing"

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infringement, leaving out the concepts of sanctioning and approving. Their Honours re-emphasised the concept of a purported grant of power to infringe based on the relationship between the primary and secondary infringer. The focus was again on the power (or lack thereof) of iiNet to prevent the infringement, which was limited by the nature of its commercial relationship with its customers — iiNet could not control the choice of its subscribers and other users to utilise the BitTorrent software, nor could iiNet modify the BitTorrent software or take down the appellants' films which were made available online. Terminating a customer's access to the Internet would not necessarily prevent future infringement, and would also have the effect of preventing legitimate use of Internet services. Their Honours considered that the link between iiNet's "indifference" and authorisation was bit made out. Further, their Honours did not consider it appropriate to impose a positive duty of care on iiNet to monitor the activities of its subscribers and take action against potential infringers of copyright on behalf of copyright owners.

Conclusion

The above case history shows that the power to prevent has consistently been considered an important element of liability for authorisation of copyright infringement. Where a respondent is found to have a large degree of control over the actions of the primary infringer, they were generally considered to have authorised the infringement. On the contrary, where no control was or could be exercised over the actions of the primary infringer, there was no authorisation.

If the intention of Proposal 1 is to lessen the weight to be placed on the power to prevent as a factor in determining authorisation liability, this would raise questions about the applicability of a long line of authority which considered the power to prevent as one of the most important factors. This would affect not only ISP liability for authorisation of copyright infringement, but also authorisation liability in general. All precedent on authorisation liability could become essentially irrelevant if the courts were required to take a different approach to considering the power to prevent.

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Annexure 4 — Court practice in relation to injunctions

Principles underlying the grant of final injunctions

The grant of an injunction is an equitable remedy that is within the discretion of the Court to grant in circumstances where the injunction is sought for the protection or enforcement of a recognised legal or equitable right: Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (4th ed).

Injunctions are also specifically provided for in the Copyright Act which states, at s115(2), that: "...the relief that a court may grant in an action for an infringement of copyright includes an injunction".

The grant of injunctive relief under the Copyright Act, and in equity generally, is discretionary.

1. Equitable principles

It is well established that in deciding whether to grant a discretionary equitable remedy the Courts may consider whether the person seeking the relief comes to equity with "clean hands"; that is, whether the person seeking an equitable remedy has acted properly: *Official Trustee in Bankruptcy v Tooheys Ltd* (1993) 29 NSWLR 641.

A person seeking a discretionary equitable remedy must pursue their claim diligently and expeditiously: *H P Bulmer Ltd v J Bollinger* [1978] RPC 79 at 136; applied in *Masterton Homes (NSW) Pty Ltd v LED Builders Pty Ltd* (1996) 33 IPR 417. Mere delay in itself has never been regarded as a bar to equitable relief (except in the case of interlocutory injunctions), but undue delay or acquiescence can prejudice a claim.

Equity dictates that a person who is seeking an equitable remedy must fulfil his or her own legal and equitable obligations arising out of the subject matter of the dispute. Thus the award of equitable remedies is subject to the principle that a person who is seeking equity must "do equity": *Langman v Handover* (1929) 43 CLR 334.

2. Adequacy of damages

In addition to the general principles of equity, the threshold question relevant to the exercise of the discretion to grant an injunction is whether damages would be an inadequate remedy: *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992. If damages would be an adequate remedy a Court will not grant an injunction. In cases of copyright infringement damages may be an insufficient remedy due to factors such as the loss that is suffered by the rights being impossible to quantify due to the possibility of repeated infringements or that the damages for each infringement would be insignificant.

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3. Purpose

To obtain a final injunction in a copyright infringement case, the applicant must prove that the copyright infringement is likely to continue, and that there is at least a probability of damage. Thus, in *Aristocrat Technologies Australia Pty Ltd v Vidtech Gaming Services Pty Ltd* (2006) 68 IPR 229 the Court refused to grant a final injunction in circumstances where the infringer had given an undertaking which would prevent further damage from occurring.

4. Undertaking as to damages for interlocutory injunctions

A court will not (except in very rare circumstances) grant an interlocutory injunction unless the party seeking that relief gives what is referred to as the "usual undertaking as to damage". This is essentially an undertaking to meet any damages found to have been suffered by the party against whom the order is sought as a result of the injunction if it proves later that the injunction should not have been granted. The High Court in *European Bank Limited v Robb Evans of Robb Evans & Associates* [2010] HCA 6 noted that the undertaking is given to the Court as part of the requirement that a party seeking an equitable remedy must "do equity".

Federal Court Practice Note CM 14 establishes the terms of the undertaking in the Federal Court:

The 'usual undertaking as to damages' if given to the Federal Court in relation to any interlocutory order made by it or any interlocutory undertaking given to it, is an undertaking:

- (a) to submit to such order (if any) as the Court may consider to be just for the payment of compensation, to be assessed by the Court or as it may direct, to any person, whether or not a party, adversely affected by the operation of the interlocutory order or undertaking or any continuation (with or without variation) thereof; and
- (b) to pay the compensation referred to in (a) to the person there referred to.

The kinds of damages which are typically payable under the undertaking were summarised by Aickin J in *Ansett Transport Industries (Operations) Pty Ltd v Halton, Interstate Parcel Express Co (Aust) Pty Ltd And Air Express Ltd* (1979) 25 ALR 639: "the view that the damages should be those which flow directly from the injunction and which could have been foreseen when the injunction was granted, is one which will be just and equitable in the circumstances of most cases...".

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Annexure 5 — Key website blocking cases

UK

The relevant law is section 97A of the *Copyright, Designs and Patents Act 1988*, which implemented Article 8(3) of EU Directive 2001/29/EC. It requires the 'service provider' to have actual knowledge of another person using their service to infringe copyright.

EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 379 (Ch)

- This is a decision of the High Court of England and Wales concerning the application by a number of record companies against a number of internet service providers which together share 94% of the UK market, to block access by their subscribers to three peer-to-peer file-sharing websites called KAT, H33T and Fenopy.
- It was found that the defendants did have actual knowledge, as a result of:
 - o weekly notifications having been provided to the defendants of infringing activities;
 - o the claimants having written to the defendants specifically drawing to their attention the use by their subscribers of their respective services to infringe copyright through access to each of the websites; and
 - o the defendants having been served with the claimants' evidence in support of the application.
- While the defendants did not advance any reasons as to why the Court should exercise its discretion to refuse the order, the onus remains on the claimants to satisfy the Court that it is appropriate to make such orders and that the orders are proportionate.
- In considering proportionality (the balance between the enforcement of intellectual property rights and the rights to freedom of expression), the Court considered:
 - o the cost of complying with a blocking order (the costs would be more modest if the defendants were made to use technical measures which they already have available); and
 - o the ease of circumvention, noting that a blocking order may be justified even if it only prevents access by a minority of users — efficacy of the order depends on the precise form of the order and there is evidence indicating blocking orders are reasonably effective.

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Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc [2011] EWHC 1981 (Ch)

- This is a decision of the High Court of England and Wales concerning the application by a number of film studios for an injunction requiring British Telecommunications (**BT**), the largest internet service provider in the UK, to block access by its subscribers to a website located at www.newzbin.com.
- While it could not be shown that BT had actual knowledge of a particular infringement of a particular copyright work by a particular individual, it was found to have actual knowledge of persons using its service to infringe copyright, in that it knew that:
 - o the users and operators of the Newzbin website infringe copyright on a large scale and in particular infringe the copyrights of the applicants in large numbers of their films and TV programs;
 - o the users of the website include BT subscribers; and
 - o those users use BT's service to receive infringing copies of copyright works made available to them by the Newzbin website.
- The contention that even if the order sought was made it would be ineffective was rejected, notwithstanding that it was common ground that it would be possible for BT subscribers to circumvent the blocking, for the following reasons:
 - o circumvention will likely require many users to acquire additional expertise beyond what they presently possess;
 - o circumvention measures are likely to lead to slower performance and lower quality downloads;
 - o as the cost differential between using lawful and unlawful services narrow, it becomes more likely that at least some users will be prepared to pay a little extra to use the lawful service; and
 - o the order would be justified even if it only prevented access by a minority of users.

Annexure 1

Ireland

The relevant law is section 40(5A) of the *Copyright and Related Rights Act 2000*, which implemented Article 8(3) of EU Directive 2001/29/EC.

EMI Records (Ireland) Ltd & Ors v UPC Communications Ireland Ltd & Ors [2013] IEHC 274

- This is a decision of the High Court of Ireland concerning the application by a number of recording companies for an injunction requiring the defendant internet service providers to block access by their subscribers to the website known as The Pirate Bay.
- None of the parties argued that it would be inappropriate to make an order blocking The Pirate Bay website.
- Each party was directed to bear their own costs, with the Court noting that while none of the defendants are wrongdoers, they are the conduit through which the wrongful activity conducted by The Pirate bay has been effected.

EU

C-314/12, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH

- This is a decision of the Court of Justice of the EU concerning the interpretation of Article 8(3) of EU Directive 2001/29/EC, in the context of an order made by an Austrian court under the Austrian national law which implemented the Directive. The order required UPC, an internet service provider, to block access of its customers to a website (kino.to) that made available to the public some of the films of the copyright owners without their consent.
- The Court found that the word "intermediary", as used in Article 8(3) of the Directive, covers any person who carries a third party's infringement of a protected work or other subject-matter in a network. Therefore, an internet service provider, such as UPC, which allows its customers to access protected subject-matter made available to the public on the internet by a third party is such an intermediary.
- In determining whether to grant an injunction on the basis of Article 8(3), the Court is required to strike a balance between copyright and related rights, the freedom to conduct a business and the freedom of information of internet users. The Court found that measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information.

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- The Court found that the measures taken when implementing the injunction must be sufficiently effective to ensure genuine protection of the copyright, that is, they must have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the provider from accessing the unlawfully provided subject-

Annexure 1

Annexure 6 — ARIA's submissions to safe harbour review



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Thank you for the opportunity to comment on the Consultation Paper.

Summary

The Australian music industry is committed to innovation, which is being increasingly applied to the emerging digital economy, in line with the Australian Government's vision.⁵²

The Australian Recording Industry Association ("**ARIA**") submits, however, that a blanket expansion of the existing Safe Harbour Scheme (the "**Scheme**") under the *Copyright Act 1968* (Cth) (the "**Act**") to include all providers of Internet access and online services is unnecessary. There is no evidence that the exclusion of such service providers from the Scheme has hampered their development in Australia. Expansion of the Scheme could lead to adverse, albeit unintended, consequences for rights holders. For example, international experience suggests that pirate and illegitimate service providers will seek to rely on an expanded Scheme to shield businesses built deliberately on the dissemination of infringing content. Given that expansion of the Scheme is unnecessary, it is not worth the risk.

To the extent that the proposed expansion of the Scheme is intended to harmonise Australian law with the law in the US, Singapore and South Korea, such harmonisation cannot be achieved just by expanding the Scheme to include providers of Internet access and online services. There are other significant differences between the law in the US, Singapore and South Korea and the law in Australia. If the Government does decide to extend the Scheme to include providers of Internet access and online services, it will be critical to ensure that the extended Scheme only covers neutral and legal service providers that act responsibly. As long as infringing content continues to be available to consumers without sanction or restriction, then there will be little or no incentive for many consumers to make the transition to legitimate services, no matter how compelling they are. The basis of the Scheme has always been the trade-off of legal security for responsible conduct. Those who gain the considerable benefits that an expanded Scheme must also be obliged to act responsibly to help curb copyright infringements committed using their services, to ensure that the delicate balance of the Scheme is not adversely weighted against copyright owners. In particular, the Government should require, at the very least, that the Scheme's beneficiaries establish and implement effective sanctions to address repeat offenders which should be incorporated in a code which reflects the relationship between the entity and its users/subscribers.

⁵² Australian Government, *Australia's Digital Economy: Future Directions*, 2009.



The Government must also continue its efforts to work with industry to assist in the development of a code with carriage service providers ("**CSPs**") (and, if the Scheme is extended, other service providers) that will address, through a graduated response mechanism, the serious impact that illegal file sharing has on the creative industries. This code must be implemented as a matter of urgency and, whether voluntary or otherwise, must be in place before any steps are taken to broaden the Scheme.

Schedule 1 to these submissions contains background information about ARIA and the music industry. Schedule 2 provides additional details about the threat posed by unchecked online copyright infringement.

Broadening the Scheme Is Unnecessary

ARIA and its member companies recognise the benefits of, and have embraced the innovation associated with, a digital economy. ARIA has no issue with true user-generated content and its dissemination through online services. ARIA is, however, very concerned at the appropriation of the term "user-generated" to cover the unauthorised copying and distribution by users of third party copyright material. For user-generated content which incorporates copyright material, it is preferable that a licence is obtained for the use of that material, as, for example, YouTube is doing.

In 2009, ARIA commented that, in respect of legitimate providers of Internet access and online services:

...it is far from clear that the development of these services in Australia is impeded in any way by the fact that the safe harbour scheme does not apply to them... The fact that the current safe harbour scheme does not apply to such services does not seem to have hampered their overall development or growth. These facts alone should be sufficient to negate the need for any consideration at this time of the extension of the safe harbour provisions to these providers.

Two years later, these services have grown further and there is still no available evidence showing that lack of access to the Scheme has impeded their development.

If the Scheme is expanded to cover all providers of Internet access and online services, there is a significant risk that pirate and illegitimate Internet based services would seek to rely on the Scheme and would receive unjustified (and unintended) exemptions from liability. ARIA and its anti-piracy arm Music Industry Piracy Investigations Ltd (**MIPI**), together with ARIA's member companies, invest considerable resources and money every year into dealing with Internet piracy. ARIA and MIPI have dealt with a range of illegitimate services based in Australia. It is often the case that defendants attempt to avoid liability by structuring their operations in a decentralised manner and argue that they are providing neutral services and should not be held responsible for the actions of others. Even if these operators can eventually be held liable by a final court decision, expanding the Scheme would give them additional procedural advantages and additional defences that would render enforcement action difficult and expensive. This has particularly been the experience in the US, where unlicensed P2P services frequently claim to be entitled to a safe harbour.

Given the dangers of expanding the Scheme, clear and substantial evidence of a real need should be required before considering such a change. It is ARIA's view that it is still not appropriate to give



providers of Internet access and online services a special exemption from liability for copyright infringement.

Harmonisation Requires Additional Reforms

We note that the Government has indicated that it wishes to harmonise Australian law with its international counterparts. If the Government chooses to broaden the range of service providers protected by the Scheme in pursuit of this aim, it will be important to include other beneficial aspects of US copyright law (Title 17 of the United States Code or "**Title 17**"), including some of the provisions inserted into Title 17 by the Digital Millennium Copyright Act.

For example, Title 17 contains important provisions that are intended to assist copyright owners in enforcement efforts against online infringers that are not present in Australian law. First, Title 17 contains an -information subpoena- procedure that enables copyright owners to subpoena Internet service providers ("**ISPs**") to obtain information identifying users that have infringed copyright, in order to take action against these users (Title 17, § 512(h)). There is no equivalent provision in the Australian Scheme, meaning that Australian copyright owners must commence court action against an ISP in order to obtain identifying information which is a costly and time consuming undertaking for the copyright owner and the court system. Second, Title 17 expressly preserves copyright owners' ability to obtain urgent ex parte relief against ISPs for the purpose of preservation of evidence which would include Anton Piller type relief or other relief that does not have a material adverse effect on the ISP's operation (Title 17, § 512(j)(3)). The combined effect of these two differences between US and Australian law, especially if the scope of the Australian Scheme is expanded, would be to hamper the ability of copyright owners to obtain orders for disclosures and preservation in urgent circumstances, especially in the absence of any industry code or termination policy for repeat offenders.

There are other important differences between the Australian Scheme and the safe harbour scheme in Title 17, including provisions that are directed at the specific circumstances of CSPs and do not, appropriately, apply more generally to providers of internet access and online service providers. For example, s 116A1 of the Act provides that, if a CSP points to evidence that suggests that it has complied with a condition of the Scheme (that is, a condition of the CSP being covered by the Scheme), the court must presume that the CSP has complied with the condition, unless there is evidence to the contrary. This section provides an unusual privilege to a group of entities by virtue of their status. There is no justification at a policy level to extend this special presumption to all providers of Internet access and online services.

In addition, Title 17 provides for the award of statutory damages of up to US\$30,000 per work infringed and, if a plaintiff can show willful infringement, an award of statutory damages of up to US\$150,000 per work infringed (Title 17, § 504(c)). These provisions provide a significant disincentive to infringement, whereas the Australian Act requires plaintiffs to prove actual damage which can be very difficult and costly.

ARIA believes that, in considering any expansion of the scope of the Scheme, additional reforms must also be considered. Otherwise, expanding the scope of the Scheme to apply to entities other than CSPs



could dramatically alter the balance previously struck by the Australian Government in implementing the AUSFTA and would not achieve the balance struck in the US by Title 17 and in other jurisdictions.

In addition, if the Government's goal is to harmonise Australian law with its counterparts in other countries, consideration must be given to the impact that the absence of an industry code has in Australia, given that the relevant industries in many jurisdictions, including the US and Ireland, have entered agreements that supplement the relevant legislation.

Concerns with Existing Scheme

ARIA notes that the Consultation Paper states: –In 2006, the *Copyright Act 1968* was amended to provide a scheme offering legal incentives for [CSPs] to cooperate with copyright owners in deterring copyright infringement on their networks.¶

It remains the case that these incentives have not resulted in the cooperation that was envisaged by the amendments. Despite the considerable benefits that the Scheme gives to CSPs there is still no industry code, nor has there been agreement on any provisions for a repeat infringer policy with copyright owners within the industry.

While it is true that the present notice and take down procedures are working in the environment of specific hosted content, the Scheme does not effectively address the major threat posed by online piracy, including illegal P2P file sharing and websites dedicated to hosting or linking to infringing material.

Attempts by copyright owners over the years to address these issues through cooperative arrangements with ISPs and others have been unsuccessful. For example, ARIA, as a member of the Australian Content Industries Group ("ACIG"), has since mid 2010, and previously through its own lobbying, called for the development of an industry code to address the damaging impact that online copyright infringement has on the creative industries. The development and implementation of an industry code, which would include the adoption by CSPs of a graduated response mechanism to address illegal file sharing, must be developed as a matter of urgency.

If the Government decides to change the scope of the Scheme to cover a broader range of service providers we would urge the Government to condition inclusion in the Scheme on the implementation of at least a specified minimum repeat infringer policy, which should be included in an industry code which reflects the nature of the service provided and the relationship between the entity providing the service and its subscribers or users.

ARIA, as a member of ACIG, has participated in recent industry workshops with ISPs and in industry roundtables convened by the Attorney General's Department. We urge the Government to continue to commit resources to assist industry to develop an industry code before any changes to the Scheme are made. In the absence of such a voluntary code being developed, the Government should continue to review the options open to it to ensure that the delicate balance and cooperation envisaged under the Scheme becomes a reality and that the present benefits available to CSPs are not unfairly exploited by a wider group at the expense of the creative industries.



On 25 August 2011, the Australian Government's House of Representatives, Standing Committee on Infrastructure and Communications released its paper entitled "Broadening the Debate: Inquiry into the role and potential of the National Broadband Network". Recommendation 12 states: "That the Government facilitate discussions between representatives of key content industries and [ISPs] to work towards an agreed framework for minimising online copyright theft." ARIA urges the Government to continue this process and ensure that the ongoing discussions are brought to a positive conclusion before any changes are made to the Act. Without the implementation of a code, which would include effective graduated mechanisms to address continued illegal file sharing online, all the parties — copyright owners, service providers and consumers — will continue to operate in an environment of uncertainty.

Conclusion

There is no evidence that the Scheme needs to be expanded and ARIA does not support any expansion of the Scheme.

ARIA urges the Government to continue its efforts to assist industry in the creation of a code to address the present and growing illegal activity on the internet.

If, contrary to ARIA's submissions, the Government is minded to consider expansion of the current Scheme, we submit that such an expansion should be based on specific exceptions tailored to the specific factual circumstances of providers of Internet access and online services, and accompanied at a minimum by the additional reforms outlined above. In particular, a code of conduct for graduated response must be in place before any expansion of the Scheme.

We thank you again for the opportunity to comment on this issue and we look forward to further discussions in relation to it.

Dan Rosen
ARIA CEO

22 November 2011



Schedule 1: Background Information

Background to ARIA

ARIA is the peak trade body for the Australian recorded music sector. We currently have over 100 members ranging from the local affiliates of the four multi-national recording labels to significant Australian independent labels through to a range of small to medium Australian recording labels. ARIA is also affiliated with the International Federation of the Phonographic Industry ("**IFPI**"), the international organisation representing the recorded music sector worldwide. IFPI collates information from around the world and it is able to provide a well-informed international perspective on many of the matters raised in the consultation paper.

ARIA is also a stakeholder (along with Australasian Mechanical Copyright Owners' Society, AMCOS, representing the music publishers and songwriters) in Music Industry Piracy Investigations Pty Ltd (**MIPI**). As its name suggests, MIPI undertakes anti-piracy activities on behalf of the music industry broadly. Significantly, in the context of this paper, those activities include a significant number of educational initiatives designed to promote respect for creativity and copyright and educate the public on the financial harm done to the music industry through, relevantly, unchecked illegal file sharing of music.

Music Industry

The IFPI Report entitled *Investing in Music*⁵³ highlights that labels invest about 30 per cent of their sales revenues in developing and marketing artists. Of this, an estimated 16 per cent is spent on artist and repertoire work (**A&R**). This far exceeds the research and development investment of many other industries.⁵⁴ As a result, Australia has a vibrant and diverse music scene, with many of our artists being recognised internationally.

Innovative business models have also transformed the music industry, enabling it to operate in the digital economy, to deliver diversified products to Australian consumers and to enter new online markets. The recent IFPI – Recording Industry in Numbers report illustrates that while global recorded music revenues declined in the past six years, digital sales grew strongly in many territories including Australia, with digital channels now accounting for 30 per cent of all trade revenues to record companies worldwide. However, it must be remembered that the important growth in digital sales has not made up for the devastating impact of piracy on physical revenues; nor will the growth in digital sales be able to make up for those losses until effective steps are taken to control the unfair competition from piracy.

The *Strategic Contemporary Music Industry Plan* (the **Plan**) released by the Australian Government recognises that Australia's diverse and vibrant contemporary music industry contributes significantly to our culture and economy. In particular, there are more than 60,000 businesses across retail, recording and live sectors and the industry collectively: "contributes about \$2 billion to the economy and generates thousands of jobs across the contemporary music sectors."

⁵³ IFPI, *Investing in Music*, 2010 – available at http://www.ifpi.org/content/library/investing_in_music.pdf.

⁵⁴ ABS, *Innovation in Australia Business* (catalogue number 8158.0) available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/06B08353E0EABA96CA25712A00161216>.



The Plan recognises that the overall sustainability and viability of the contemporary music sector is important to the Australian economy as a whole and highlights that building business capacity and innovation is a key priority.

There are now more than 12 million tracks available from over 400 legal music services worldwide — they range from download stores such as iTunes to streaming subscription services such as via Bandit.fm. In February 2010, AAPT launched —Music to Your EarsII, a 24/7 unlimited broadband bundle that enables Australian customers to stream over 1 million songs and download \$50 worth of music per month.⁵⁵ This is also Guvera, an Australian ad supported download music service.⁵⁶

Schedule 2: The Threat

As the recently released Sphere Report into *The Impact of Internet Piracy on the Australian Economy*⁵⁷ confirmed, the negative impact of Internet piracy on the Australian economy in 2010 was significant:

1. The annual value of lost retail revenue to Australian core content industries was \$900 million.
2. Over 8,000 jobs were lost in the core content industries sector as a result of Internet piracy.
3. The annual impact of Internet piracy to Commonwealth Government revenues was \$190 million.

By 2016, the Sphere Report estimates:

1. The value of annual lost retail to the Australian core content industries sector will be \$5.2 billion — a loss of \$18 billion over the period 2010-2016.
2. A further 40,000 jobs could be lost in the core content industries sector as a result of Internet piracy.
3. The annual impact of Internet piracy to Commonwealth Government revenues will be \$1.1 billion — a loss of \$3.7 billion over the period 2010-2016.

With an estimated 95 percent of music downloads on the internet being illegal,⁵⁸ it comes as little surprise that the incentive for the Australian music industry to invest in new artists, particularly Australian artists, and new business models to deliver legitimate content to Australian consumers, is severely undermined in circumstances where major and independent labels cannot capture the gains generated from their investments.

The digital landscape presents many exciting new opportunities for the development of compelling commercial music models, for labels — large and small — and for artists, songwriters and other participants in the value chain. However as is acknowledged in *Australia's Digital Economy: Future Directions* paper and in the Plan:⁵⁹

⁵⁵ See <http://www.aapt-broadband.com.au/unlimited-broadband-music-downloads/home?gclid=CKX94P3c36ACFQa0bwodXAfgCg>.

⁵⁶ www.guvera.com.

⁵⁷ The Sphere Report is based on the highly regarded report by the independent Paris-based firm TERA Consultants delivered to the International Chamber of Commerce on the economic impact of internet piracy in the European Union (EU) in March 2010. The report is available at http://www.bsa.org/country/Research%20and%20Statistics.aspx?sc_lang=en-AU.

⁵⁸ IFPI, *Digital Music Report 2009* – available at http://www.ifpi.org/content/section_resources/dmr2009.html.

⁵⁹ Page 20.



...the internet and related technologies have also enabled illegal file sharing, file distribution from unlicensed internet sites and illegal copying. These are ongoing threats to the music industry.

In circumstances where free illegal alternatives remain available without effective sanctions (or even the prospect of effective sanctions) innovative digital distribution models for music may not be successfully cultivated and cannot achieve their full potential.

In short, we consider that a necessary pre-condition for transition to the digital economy is active cooperation between all stakeholders (either implicitly or explicitly) in furtherance of the overall objective of market development (and, of course, competition). That cooperation ranges from effective notice and takedown procedures for all those who offer services on line, an effective mechanism to address illegal P2P file sharing which incorporates a graduated response mechanism and also a mechanism which will allow copyright owners and service providers to address new and emerging threats in the digital environment.

ISPs are a substantial stakeholder in the digital economy and its development. The rollout of the NBN to over 90% of Australian homes means that local content industries are poised to play even greater roles in national productivity, but for these businesses to flourish the NBN must be a pipeline for legitimate businesses. While the online content industries will act as driver for the NBN take up, the NBN will continue to fuel online piracy by making it exponentially easier and more efficient to download and distribute pirated material.

Annexure 7 — Examples of Online Advertising Initiatives

US

- In May 2012, the leading advertising industry trade bodies in the US published a statement of best practice that encourages brand owners and media agencies to contractually require all businesses in the supply chain to take steps to prevent ads appearing on infringing sites, and quickly remove any placed in error.
- IAB Quality Assurance Guidelines 2.0 — this is a self-regulatory ad industry initiative that prohibits the placement of ads on infringing sites by certifying member ad industry organisations.
- In July 2013 the US Intellectual Property Enforcement Coordinator (IPEC) and the Interactive Advertising Bureau (IAB) announced their support for an initiative aimed at reducing the flow of ad revenue to operators of sites engaged in significant piracy and counterfeiting. The initiative, undertaken by several advertising networks in the US, including AOL, Google, Microsoft and Yahoo!, involves ad networks committing to a set of best practices to address the problem of placing advertising on pirate sites. The impact of this initiative may be limited because it is limited to ad networks only and there is no sanction for non-compliance.
- In April 2014, four members of the US Congress wrote to the Association of National Advertisers, the Interactive Advertising Bureau and the American Association of Advertising Agencies regarding the availability of technical solutions which could assist legitimate companies in preventing their advertisements from appearing on illegal sites. In May 2014, these four members of Congress wrote to ad networks asking them to start blacklisting “piracy sites” and to refuse to serve ads on these sites.

UK

- The Good Practice Principles for Trading on Digital Display Advertising were drafted by the Digital Trading Standards Group (DTSG). The aim of the principles is to reduce the risk of “misplacement of display advertising on digital media properties, uphold brand safety and protect the integrity of digital advertising. The work of the DTSG also reflects a common goal: that digital display advertising should not support inappropriate or illegal content or services”.⁶⁰

⁶⁰ See <http://www.jicwebs.org/digital-trading-standards-group-good-practice-principles/good-practice-principles>.

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- As previously discussed, Mike Weatherly MP, the Intellectual Property Adviser to the Prime Minister, launched a “follow the money” initiative aimed at, among other things, inappropriate advertisement placement and the PIPCU has implemented initiatives to address advertising placement on illegal sites.

Italy

- In June 2014, the advertising industry in Italy signed a memorandum of understanding with rights holders aimed at tackling digital piracy. The agreement unites local anti-piracy group FPM, the Interactive Advertising Bureau (IAB) Italy and the Federation for the Protection of Audiovisual and Multimedia Content (FAPAV). Communications Regulator AGCOM has voiced its support for the project. It lays the foundation for a self-regulatory mechanism that aims to block advertising on illegal sites. Rights holders will report infringing sites to a joint committee which will then inform advertisers that a site is operating illegally and ask them to withdraw advertising from it.

Spain — Sinde law

- The Sinde law came into effect on 1 March 2012 and the Spanish Ministry of Culture issued an amendment bill in March 2013 which provides that in the absence of voluntary removal of infringing content by targeted sites and services, the Intellectual Property Commission (IPC) may formally request the necessary collaboration of providers of electronic payment and advertising services, and require them to suspend the service they provide to the infringing site or service.

Annexure 1

Annexure 8 — Music Matters Information Sheet



Music Matters Campaign – General Information



Background of the Campaign

The Music Matters education campaign is an initiative that began in 2010 in the UK with huge success. It is essentially a collective of people across the music community, including artists, songwriters, managers, labels, publishers and stores formed to remind listeners of the value and significance of music.

Allowing the music to speak for itself, Music Matters brings together a growing collection of short animated films about inspirational artists who have dedicated their lives to music and helped shape our cultural landscape as well as creating an opportunity for fans to share their own stories.

The campaign officially launched in Australia and New Zealand on 10 August 2011. You can check out our website at: <http://anz.whymusicmatters.org/>

What is the Music Matters Message:

- Music Matters is designed to remind the public of the hard work that goes into producing the music that listeners love – to remind people that Music Matters.
- Reminding people that by supporting legitimate sources of music – by going to gigs, buying music online or in store or by accessing via legitimate streaming services – they are supporting the artists they know and love.
- Music Matters wants to help in changing music lover's behavior by focusing on how easy it is to obtain legitimate content and showcasing the many avenues to do so.
- Music Matters wants to help people to understand why it's so important to support music.

Supporters in Australia

The campaign is supported in Australia and New Zealand across the music community. This includes:

- Range of talented grass-roots animators that are involved in the creation of animations for the Music Matters campaign
- Artists involved in the Music Matters animations including: The Rubens, Kevin Mitchell, Eskimo Joe, The Audreys, Graeme Connors, Oh Mercy, Ash Grunwald in Australia. Jamie McDell and



- Tommy III in New Zealand and in the UK it includes: [Nick Cave](#), [Sigur Ross](#), [Kate Bush](#), [Elbow](#), [Fron Choir](#), [The Jam](#), Thin Lizzy, Iron Maiden, Bernard Butler and The Beatles
- Artists and managers including through the AMM (Australian Music Managers)
- Songwriters through APRA | AMCOS
- Australian independent record labels through AIR (Australian Independent Record Labels Association)
- Over 125 Australian record labels through ARIA (The Australian Recording Industry Association)
- Australian performing artists through the PCCA (Phonographic Performance Company of Australia)
- NZ record labels through Recorded Music NZ
- Music publishers through AMPAL (Australian Music Publishers Association)
- Community broadcasters through AMRAP (The Australian Music Radio Airplay Project)
- Many Australian music retailers both online and bricks & mortar including through AMRA (Australian Music Retailers) that display the MUSIC MATTERS trust mark

Music Matters is being project managed by an Australian/ NZ steering committee made-up of members from ARIA, AIR, APRA/AMCOS, AMPAL, AAM, AMRA, labels and music publishers.

The Trust Mark

We think music fans would like to know that the site that they are using is supporting the artists, musicians, songwriters and everyone involved in creating the music. The Music Matters Trustmark below (to be displayed by supporting stores) will act as such a guide for music fans.



Supporters Mark

We have also created the Music Matters Supporter Mark below. This mark can be used by anyone who is a supporter of the Music Matters campaign and not a music retailer. You can also use our Music Matters Internet banner/ email signature.





Short Films

At the core of this campaign is a series of animations, each focusing on one specific artist, telling their story - the reason MUSIC MATTERS to them or their fans. The films are emotional, thought-provoking and as a whole express the passion, blood, sweat and tears that goes into making music.

The MUSIC MATTERS animations are available <http://www.youtube.com/user/musicmattersANZ> and you can embed them in your website or post them to your Facebook page to get maximum exposure!

Thank you for listening

Annexure 1

Confidential Annexures