

STAKEHOLDER CONSULTATION: PROPOSED REFORM OF THE *COPYRIGHT ACT 1968***SUBMISSIONS OF APRA AMCOS
IN RELATION TO THE
*COPYRIGHT AMENDMENT (DISABILITY ACCESS AND OTHER MEASURES) BILL 2016*****12 FEBRUARY 2016****Introduction**

1. APRA AMCOS is grateful for the opportunity to contribute to the stakeholder consultation in relation to the exposure draft of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016 (Exposure Draft)*.
2. APRA is the collecting society in Australia in respect of the public performance and communication rights of composers and music publishers. AMCOS is the collecting society in Australia in respect of reproduction of music in certain formats, including on CD, DVD, online, for use as production music and for radio/TV programs. Together, APRA and AMCOS control the copyright for such purposes in almost all commercially available musical works, by virtue of assignments from their local members and affiliations with similar overseas societies. Since 1997, the two organisations have been administered in tandem, and these submissions represent the united view of both.
3. APRA AMCOS represents more Australian copyright owners than any other party. APRA AMCOS have more than 87,000 members and 107,000 licensees. They have a diverse membership, ranging from unpublished writers to major music publishers.
4. The Exposure Draft proposes to amend several unrelated aspects of the Act, and APRA AMCOS will deal with each separately. It will come as no surprise to the Government that the aspect of the Bill with which APRA AMCOS is most concerned is Schedule 2 relating to Safe Harbours. We feel strongly that the manner in which these amendments have been proposed is unfortunate. It appears as if reforms proposed for the sake of advancing the private commercial interests have been tacked on to the back of a draft Bill fashioning itself as primarily designed to alleviate the suffering of people with disabilities. This objection will be taken up further below.

Disability access

5. APRA AMCOS commends the Government for taking measures to ease the difficulties that individuals with impaired abilities to receive visual or audio content face in their day-to-day lives. APRA AMCOS is aware that rights holders have in any event elected voluntarily to waive royalties to which they might be entitled in such instances, and notes the comment by Copyright Agency Limited, the declared collecting society for the statutory licence, in its submissions to the ALRC in 2013 (sub 287) that it does not collect remuneration for uses of copyright material under Part VB, Div 3. APRA AMCOS would be pleased, if possible, to assist the Government in bringing this initiative to fruition.
6. APRA AMCOS is itself a proud and generous supporter of institutions that support people with disabilities, in particular we note its support of Nordoff-Robbins Music Therapy Australia, which uses music as a tool for communication, change, transformation and healing.
7. APRA AMCOS notes that the motivation behind this amendment should be to increase the availability of content to people with disabilities, which means both to increase

supply and to ease access. However, we do have some concerns that the Exposure Draft might be focussing too much on the latter and not enough on the former. The factors set out in proposed section 113E(2) borrow from the factors set out in the fair dealing provisions for the purpose of research of study (ss40 and 103C), but omit factor (c), being “the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price”. It is noteworthy, given on 10 December 2015, when the Marrakesh Treaty was ratified, that Australia’s instrument of ratification contained only one reservation: namely, in relation to “works which can be obtained in an accessible format commercially under reasonable terms for the beneficiary person.” It is APRA AMCOS’s experience that such a factor is important for ensuring that supply is not adversely affected by the proposal. This is because in most cases suppliers need to be able to commercialise their products in order to continue supplying. If competitors are able to free-ride on their labour, that may have an unintentional adverse impact on supply. In our submission, the omitted factor should be included.

8. Further, proposed section 113F(b) should place the word “reasonably” prior to “satisfied”, such that the institution, or the person acting on behalf of the institution, must be *reasonably* satisfied that the material (or a relevant part of the material) cannot be obtained in the format that the persons with a disability require, and within a reasonable time at an ordinary commercial price. Mere subjective satisfaction leaves the clause open to abuse for obvious reasons.

Educational statutory licence

9. APRA AMCOS agree with the reforms proposed in relation to the educational statutory licence. AMCOS is a member of Copyright Agency Limited, which administers the statutory licence, and supports its submissions to this enquiry on this subject.
10. The only item that APRA AMCOS wishes to address is that the language – possibly accidental – in the proposal restricts more than one “works collecting society” being declared simultaneously. Currently, in relation to most of the statutory licences in the Act, the legislation provides for a collecting society to be declared for all relevant copyright owners or specified classes of relevant copyright owners (see eg, s135ZZB regarding the Part VB statutory licence, s135ZZT regarding the Part VC statutory licence and s135ZZZO regarding the Part VD statutory licence). The latter opportunity – that is, for the Minister to declare more than one body to administer the statutory licence, such that one may administer the statutory licence for certain classes of copyright owners while another administers the statutory licence for the remainder – could allow for a more efficient administration. For example, where one body has more expertise in one class of relevant copyright owners than another, it might apply for declaration in respect of that class.
11. To be clear, the limitation to which reference is made is not solely resident in proposed section 113V(4), but throughout the whole proposed statutory licence. The motivation underpinning subsection (4) is sensible; there should never be two bodies declared in the same sphere of activity. But it is desirable for the Minister to have some flexibility in respect of declaring more than one body to administer the licence, if she or he deems it appropriate in the circumstances, so long as the respective declared bodies administer the statutory licence for distinct classes of owners. For example, APRA AMCOS has particular expertise in the administration of licences of rights controlled by the owners of copyright in musical works.
12. APRA AMCOS endorses the Copyright Agency Ltd’s proposed amendments to the Bill in relation to this issue.

Preservation copies

13. APRA AMCOS has no concerns about the section of the Exposure Draft that deals with libraries, archives and key cultural institutions making copies of copyright material for the sole purpose of preserving their respective collections.

Terms of protection for unpublished works

14. APRA AMCOS has no concerns about the section of the Exposure Draft that aligns the terms of protection for unpublished works with those for published works.

Safe harbour for search engines, universities and libraries

15. The most contentious proposal in the Exposure Draft is the wide expansion of the safe harbour provisions. As mentioned before, APRA AMCOS has serious concerns about the manner in which consultation about this amendment has been sought. Surely, given the long succession of enquiries that have raised this very issue, and the extent to which industry is divided on it, the Exposure Draft should be more transparent about its intention to make such a wide-ranging amendment.
16. The expansion of the safe harbour scheme has been on the agenda for some time:
 - (a) the Attorney General's Department produced a discussion paper in 2005 titled *Part V Div 2AA of the Copyright Act 1968 Limitation on Remedies Available Against Carriage Service Providers: Does The Scheme Need To Be Expanded?*;
 - (b) the Department of Broadband Communications and the Digital Economy raised the issue in their 2009 Report *Australia's Digital Economy: Future Directions*;
 - (c) the Attorney General's Department then held another enquiry in 2011 titled *Revising the Scope of the Copyright Safe Harbour Scheme*; and
 - (d) the Attorney General's Department held a further round of consultation in connection with its 2014 Discussion Paper *Online Copyright Infringement*.
17. Expansion of the safe harbour scheme has always divided the online and copyright industries. Given this, it is unreasonable to present an amendment to the public by inserting it in a 1-page schedule to a Bill purporting to deal primarily with access to copyright material by people with disabilities. All the more so when the schedule contains nothing more than a proposal to change the word "carriage service provider" to "service provider", and insert a definition of the new term. Similarly, the Government's commentary on this aspect of the Exposure Draft in the document titled *Stakeholder Consultation: Proposed Reform of the Copyright Act 1968 – Guiding Questions (December 2015)* (**Stakeholder Consultation Document**) contains but one two-sentence paragraph on the subject. It describes the amendment, and provides scarce context or explanation for why it is proposed. Unlike the other proposals, no guiding questions are asked about expanding safe harbour. Respectfully, APRA AMCOS questions the extent to which the drafters genuinely hoped for stakeholder consultation on this contentious topic. None of this is to criticise the merits of the amendment – such criticism will follow – the purpose of this is to express the following: if the Government genuinely considers this proposed amendment to be desirable, then it should be transparent about its reasons, and stakeholders should have access to the evidence that guides the Government's judgment. Respectfully, good law need not be made covertly.

18. But this is not good law. It is a poorly timed, and, for no detectably principled reason, shifts the balance inherent in the Act away from the creators in favour of the online sector.

Poor timing

19. It is poorly timed because there is a range of developments in the area, both locally and internationally, which warrant attention before making such significant changes to the safe harbour scheme.

20. First, it is well known that the safe harbour scheme in Australia requires, at section 116AH, that the carriage service provider comply with an industry code *if there is one in force*. The safe harbour scheme came into effect on 1 January 2005, now more than 11 years ago. In the intervening years, despite each and every one of the enquiries listed above, and despite the high-profile hearings into the liability of ISPs for authorisation of users' infringement, there is still no industry code. APRA AMCOS is optimistic about the progress that has been made, but the delay thus far is truly unacceptable. No doubt one of the chief reasons for delay in developing an industry code is that there is no incentive for CSPs to agree to one, and it would create a further layer of regulation on CSPs that would simply not exist prior to (or, without) its creation. Regulation 20B of the *Copyright Regulations* specifies the requirements that must be met by an industry code, including that it "must be developed through an open voluntary process by a broad consensus of copyright owners and carriage service providers." If a broad consensus among copyright owners and CSPs has been unachievable thus far, what awaits an industry code that requires a consensus of those parties as well as many other (undefined) service providers? Will a code need to be "re"-negotiated to include the consensus of educational institutions, search engines, bulletin boards and so on?

21. Secondly, the future of this area of copyright law is uncertain, given the ALRC's recommendations with respect to extending defences to some of the activities that entitle one to Safe Harbour protection. APRA AMCOS believes that an holistic approach to amending this area of copyright law should be taken, and respectfully query whether discussion should await a final indication from the government about the immediate future of the recommendations made by the ALRC.

22. Thirdly, the safe harbour scheme in Australia was based largely on the American counterpart. The current proposed expansion appears to be based on mirroring the US version more closely. So it would be useful to consider the American experience of its scheme prior to reproducing it here. By Notice of Inquiry dated 31 December 2015, the US Copyright Office launched a far-reaching public study to evaluate the impact and effectiveness of the safe harbor provisions contained in the US Copyright Act. The Notice is extremely detailed, and the enquiry will address 30 specific questions about the effectiveness of the scheme. Respectfully, in APRA AMCOS's view, it makes little sense to implement such a momentous change to Australia's safe harbour scheme in order to align it with US law, when the US is itself beginning an enormous review of the effectiveness of its scheme.

Poor policy

23. The Australian legislature first dealt with the issue of liability for copyright infringement by carriage service providers in the *Copyright Amendment (Digital Agenda) Act 2000*. In doing so, it deliberately distinguished between content providers and carriage service providers.

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

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.

25. The factors to which the legislation referred included the extent (if any) of the person's power to prevent the infringement; the nature of any relationship between the service provider and the infringer; and whether the service provider took any reasonable steps to prevent the infringement (eg, compliance with an industry code of practice). These factors were largely derived from Australian case law, notably *UNSW v Moorhouse* (1975) 133 CLR 1. Thus the amendments to the authorisation provisions of the Act must also be considered as part of the context in which online service providers and copyright owners operate in the digital environment.

26. In his Second Reading Speech introducing the *Digital Agenda Act* Mr Williams observed:

Typically, the person responsible for determining the content of copyright material online would be a website proprietor, not a carrier or Internet Service Provider.

27. While this observation clearly preceded the proliferation of user-generated content on websites, APRA AMCOS submits that the distinction between carriage service providers and providers of content remains valid.

28. In particular, it is very clear that the intended beneficiaries of the Safe Harbour provisions of the Act (and, indeed, of section 39B which relates to the authorisation provisions) are persons who *provide facilities* for online services, not the persons who provide the online services themselves. In common with other users of copyright material, online *service providers* have the protection of the authorisation provisions of section 36(1A) (inserted in 2000 as described above, with section 39B as part of the Digital Agenda amendments), and the 'innocent infringement' provisions in section 115(3). Were the Safe Harbour protections to be extended to online service providers as well as the providers of facilities, it would have a serious impact on the effect of the authorisation provisions and section 115(3) in the context of online service providers. It would also create a two-tiered system of protection, with online businesses treated dramatically differently to other market participants. This is likely to result in confusion and higher compliance costs for copyright users, particularly those participating in both online and traditional media, and for copyright owners.

29. In APRA AMCOS' submission there is a clear distinction between someone who does no more than provide the facilities for a communication and someone who is in the business of providing content. APRA AMCOS submits that the Safe Harbour Scheme should retain the distinction. In APRA AMCOS' submission, entities who are in the

business of providing content exercise a different level of control over the material on their site or network. For this reason, entities such as social networking and video sharing sites should not be included in the Safe Harbour Scheme.

30. In APRA AMCOS' submission, extending the Safe Harbour Scheme to content providers will categorically disturb the balance inherent in the Act. First it will subvert the policy behind the Scheme, which distinguishes between content providers and those who merely facilitate the communication of content. Secondly and more tangibly, it will reduce the incentives for such entities to enter into commercial agreements with copyright owners.
31. During the 12 month period from 1 July 2014 to 30 June 2015, APRA AMCOS administered over 250 licences relating to various online services, including digital music and video retail and subscription services, video sharing and user-generated content services, online content portals, on-demand streaming services, simulcasters, webcasters and podcasters. The aggregate value of these licences for that period was \$48m, which suggests that there is accepted industry recognition of the clear commercial difference between those who facilitate access and those who provide content.
32. APRA AMCOS does not understand Australia's existing Safe Harbour Scheme to be inconsistent with Australia's obligations under its international treaty obligations. In APRA AMCOS' submission, the fact that the scope of the Australian Scheme may be more restrictive than is possible while remaining consistent with Australia's obligations under the AUSFTA and TPP is not in itself a reason for reform.
33. APRA AMCOS is unaware of any evidence suggesting that the limitation of the Australian Scheme to "carriage service providers" is having a chilling effect on the online activities of other types of service providers. Indeed, there has been a significant increase in such activity since the Scheme came into operation on 1 January 2005. As noted above, there is an existing market for the provision of copyright licences to such businesses.
34. This should not be surprising given that those who do no more than provide the facilities for making a communication of an a sound recording, film or broadcast are able to take advantage of the defence in section 112E.
35. Furthermore, the Safe Harbour Scheme only operates in relation to copyright. Service providers must still consider a range of other laws when managing their online presence. For example, a search engine or social media bulletin board can be held liable for defamatory comments made by users, once on notice: *Trkulja v Yahoo!*; *Trkulja v Google*; *Duffy v Google*, etc. This and other regulatory regimes will also influence how service providers do business online. It is therefore questionable whether amendments to the Safe Harbour Scheme will give service providers much relief (if it is decided that any is required) in relation to their liability online.
36. APRA AMCOS also submits that any expansion of the scope of the Safe Harbour Scheme cannot responsibly be achieved by the mere broadening of the categories of online businesses that will receive the protection of the Scheme. A proper review of the Scheme must also involve a detailed consideration of the appropriate levels of response that might be required from the different types of business that participate in the online markets, as evidenced by the current provisions that recognise different response levels for different activities. Such businesses are diverse, increasing in number, and difficult to define. For example, the businesses might include online auction sites, website hosts, user generated content sites, and search engines. In many cases, a single entity may provide more than one of these services, and the nature of the service itself may be

difficult to categorise. The appropriateness of the response for each type of business is likely to be different in each case, leading to an unwieldy and confusing law. Such would be a perverse outcome of an attempt to simplify the Act.

Alternative approach

37. Given the scarcity of explanation surrounding this proposal, APRA AMCOS is unable to assist Government, in the manner it would ordinarily like, to achieve its aims; we are genuinely struggling to understand what Government is hoping to achieve with this proposal.
38. However, if the Government is minded to proceed with the Exposure Draft despite APRA AMCOS's concerns, APRA AMCOS makes the following suggestions:
 - (a) any amendment take place following consideration of the American review of the US safe harbor scheme;
 - (b) the industry code requirement be fixed. APRA AMCOS consider that the authorisation provisions in sections 36(3) and 101(5) should be amended such that service providers will be taken to have authorised infringements of copyright that take place by way of their service, once on notice, if they do not reasonably act to prevent the infringements. Such an amendment would provide service providers with the apparently necessary incentive of developing a Code, and would at least rebalance the Act so that creators and service providers are treated equitably if an agreement is not forthcoming. In this respect, APRA AMCOS adopts the suggestions made Music Rights Australia in its submissions to this enquiry; and
 - (c) the proposed definition of service provider be altered, such that it does not extend to the provision of services that are more than merely technical, automatic and passive. In this respect APRA AMCOS adopts the suggestions made by Music Rights Australia in its submissions to this enquiry.

Conclusion

39. APRA AMCOS is grateful for the opportunity to comment on the Exposure Draft. APRA AMCOS remains available to assist in any aspect of this enquiry.

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