Submission re *Copyright Amendment (Service Providers) Regulations 2018*

Joint Submission from the Australian Film & TV Bodies
June 29, 2018

The Australian Film & TV Bodies[1] welcome the opportunity to provide comments to the Department of Communications and the Arts regarding the exposure draft of the *Copyright Amendment (Service Providers) Regulations 2018* (the **Regulations**).

We are pleased to see that the Department is taking a proactive approach to developing and consulting on regulations to accompany the *Copyright Amendment (Service Providers) Bill 2017*. Appropriate regulations are important to the practical functioning of the amended safe harbour scheme.

Question 1: Are any additional amendments needed to the Regulations to facilitate service providers' compliance with the requirements in Division 2AA, Part V of the Act?

The Australian Film & TV Bodies are not aware of any additional amendments needed to the Regulations to facilitate service providers' compliance with the requirements in Division 2AA, Part V of the Act. In particular, the Australian Film & TV Bodies have no reason to believe that the non-CSP service providers will not be able to comply, or will not be able to comply easily, with the requirements and forms specified in Part 6 of the Regulations.

However, to the extent that one service provider may administer multiple entities, some amendments may be required to the forms of notices and counter-notices in Schedule 2, to account for the fact that the notice may in practice need to mention both the service provider and the specific entity that it administers that is relevant to the notification. See also the below recommendation in response to question 2.

Question 2: We seek views on the practical application of section 19 to service providers and whether additional clarification is needed for when a service provider administers a number of entities.

If multiple designated representatives cover various entities administered by the service provider, it is important that both the service provider and any entities administered by the service provider comply with s 19(2), i.e., publish a notice containing proper details of each of the relevant designated representatives. At present it is not clear that s 19(2) obliges entities administered by a service provider to publish the relevant details on their website. Clarifying this will promote the effective operation of the safe harbour regime by ensuring that rightsholders are able to effectively issue the notifications contemplated by s 116AH of the Act.

Question 3: Are any additional requirements necessary for the development of an industry code by the newly defined 'designated service providers'?

The Australian Film & TV Bodies commend the approach taken by the Department in providing for a process that allows an industry code to be developed under paragraph (b) of the definition of 'industry code' in section 116AB of the Act.

[1] Further details on members of the Australian Film & TV Bodies can be found in Appendix A.

As the consultation paper acknowledges, this removes the need to comply with paragraph (a)(ii) of the definition of 'industry code' (registration under Part 6 of the Telecommunications Act), which is not applicable to the newly defined 'designated service providers' (**DSPs**).

In addition, by creating a separate process to the development of an industry code by carriage service providers (**CSPs**) and contemplating the development of more than one code for different DSPs, or involving different classes of rightsholders, the new regulation 18A facilitates the development of an industry code in circumstances where agreement can be reached.

Generally speaking, regulation 18A is fit for purpose and contains appropriate requirements for the development of an industry code by DSPs. The Australian Film & TV Bodies suggest the following amendments that would improve the operation of regulation 18A in practice.

1. Regulation 18A(2); 'owners and exclusive licensees of copyright'

The Australian Film & TV Bodies support the inclusion of exclusive licensees as a relevant member of the classes of parties to be involved in reaching a consensus of rights owners. However, the proposed wording 'owners and exclusive licensees of copyright or a class of owners and exclusive licensees of copyright' has the potential, when interpreted literally, of requiring a consensus of both the owners and the exclusive licensees for any particular copyright subject matter.

This is excessively burdensome because it could be interpreted as requiring participation by foreign copyright owners in attempts to agree to the code. It is also unnecessary where the exclusive licensee controls all the relevant rights in Australia, including the relevant enforcement rights (e.g. where the owner and exclusive licensee are related or members of the same corporate group, in which case they can decide between themselves how their interests should be represented in the negotiations of an industry code).

We suggest that regulation 18A(2) should be amended so that references to 'owners and exclusive licensees of copyright' read 'owners or exclusive licensees of copyright (as the case may be)' to avoid this problem. The same comment applies to regulation 18.

2. Regulation 18A(3); 'an industry code may contain any or all of the following'

There appears to be an inconsistency between 18A(3) which applies to the new class of DSPs and states that an industry code '***may*** contain' certain elements, and 18(b) which applies to CSPs and states that an industry code '***must*** contain' certain elements. Further to that, the same inconsistency appears to exist between the Consultation paper[2] which states that 'the following requirements will ***need to be fulfilled***' and 'the code ***must*** contain specific provisions in relation to…'. As such, the Consultation Paper does not give any reasons why a code for DSPs '***may***' include these specific inclusions as opposed to '***must***' contain them. We are not aware of any reasons why such a differentiated approach would have merit, and as such we

[2] Exposure Draft Consultation Paper, page 9.

recommend the Department take a consistent approach and replace the word 'may' by 'must' in clause 18A(3).

3. Regulation 18A(3)(b)(iv): 'substantial costs'

Section 18A(3)(b)(iv) currently provides that an industry code may contain a provision to the effect that standard technical measures are measures that:

> 'do not impose **substantial** costs on the designated service providers or **substantial** burdens on their systems or networks' [emphasis added].

If there is substantial copyright infringement occurring on a DSP's system, then removing that infringement may result in substantial costs. In such circumstances, substantial costs could be wholly appropriate and necessary to achieve the safe harbour scheme's purpose. To avoid this potential issue, we would suggest that the word 'substantial' be replaced with 'disproportionate'.

4. Regulation 18A(4)(b) ('a provision setting out when the code takes effect and when it will cease to have effect')

This should include the rider '(if applicable)' at the end, to cover a situation where an agreed code does not have a fixed end date.

Question 4: Does the proposed designated service provider code scheme provide sufficient flexibility for designated service providers to work with copyright owners to develop a workable code?

The Australian Film & TV Bodies consider that the proposed scheme set out in regulations 18 and 18A does provide sufficient flexibility for designated service providers to work with copyright owners to develop a workable code.

However, there remains the problem that, to date, no industry code has been agreed, and stakeholders are well aware that ongoing deadlock remains a significant risk. While the possibility for multiple codes to be developed is useful and an improvement on the current regime, there is still a risk that the most important stakeholders will not reach agreement on an industry code. If this occurred, it would significantly undermine the policy improvements and objectives of the current consultation and reform process. This potential for deadlock could be overcome by providing a default code under the Regulations if agreement cannot be reached, as discussed further below.

Overcoming the current deadlock on an industry code: Fall-back mechanism needed to advance the process

The Regulations, as proposed, do not consider any steps which would lead to the development of industry codes if 'broad consensus' cannot be reached. Under the current scheme which only involves copyright owners and CSPs, an industry code has never been agreed on, let alone implemented, despite the obvious need for one. Copyright owners and CSPs have not

reached 'broad consensus' in significant part because the current safe harbour scheme does not provide sufficient incentives for them to do so given the decision of the High Court in *iiNet*.[3] As such, during the last attempt to create an industry code for a graduated response scheme, CSPs had no incentive to agree to any requests from rightsholders to implement technical measures that would have meaningfully contributed to the reduction of copyright infringement on their platforms. This situation remains unchanged since talks ended in deadlock in 2015.

As part of reforming the safe harbour scheme, the Government should create an effective incentive mechanism to bring all stakeholders to the table and incentivise agreement on an industry code.

Draft section 18 should be further amended to provide a 'fall-back mechanism' through which the Government can mandate a code with minimum standard technical measures to comply with if a code that meets the requirements of section 18(a) and (b) cannot be agreed by relevant rights owners and CSPs. As currently drafted, a relatively minor or trivial disagreement between the relevant parties could prevent an industry code from coming into force, even where agreement has been reached on a range of other (or most) relevant technical measures. The absence of such a fall-back mechanism has not only contributed to the current deadlock between relevant parties, it has denied the Government the power to fill the resulting void with a code that represents a compromise between the interested groups.

Such a code would be capable of satisfying Australia's obligations under the AUSFTA (Art 17.11.29), which is phrased in terms of, for example, '*standard technical measures* accepted in the Party's territory' (Art 17.11.29(b)(vi)(B)). This does not *per se* require an industry-developed code, merely a code that reflects 'industry standards'. This is a matter that the Australian Film & TV Bodies consider the Government is capable of ascertaining, especially if following a further 12 months of negotiations that would allow the various stakeholders to put forward their positions as to what constitutes appropriate 'standard technical measures'.

To this end, the Government may seek to set out a draft industry code within the Regulations with standard technical measures that the parties would fall back to if no agreement could be reached within an appropriate timeframe. Given that each industry code would have to be separately agreed, and because of the potential for confusion between different codes, it would be preferable to have a code that would set appropriate minimum baselines of compliance and could act as a single source of information for parties seeking to invoke the protections of the safe harbour. Any such code could differentiate the obligations on different types of service providers, as appropriate.

Question 5: Will the proposed amendments to section 18 of the Regulations (and consequently section 18A) have any unintended effects?

Subject to the comments above, the Australian Film & TV Bodies support the proposed amendments to section 18 of the Regulations (including the introduction of section 18A).

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

Specifically in relation to section 18, the Australian Film & TV Bodies commend the Government for removing the phrase 'does not deal solely with caching' from section 18. This change effectively removes a potential conflict between the Act and the Regulations.

The provision for industry codes to be agreed solely in relation to a class of owners and exclusive licensees of copyright also provides an incentive for agreement on an industry code, and enables the introduction of multiple industry codes to the extent that agreement can only be reached with a certain group of rightsholders.

However, there remains a problem with paragraph (a)(ii) of the definition of industry code in s 116AB of the Act, in that the requirement of registration under the Telecommunications Act is inconsistent with the provision in regulation 18(a) that 'the industry code must be developed through an open voluntary process by a broad consensus of (i) owners and exclusive licensees of copyright or a class of owners and exclusive licensees of copyright; and (ii) carriage service providers'. Under the Telecommunications Act, a code can only be registered by ACMA if it has been developed by a body or association that represents a section of the telecommunications industry, and follows a prescribed consultation process in relation to members of that industry (e.g. CSPs). As a result, a voluntary code developed under regulation 18 cannot be registered under the Telecommunications Act, and therefore would not satisfy the requirements of paragraph (a)(ii) of the definition of industry code in s 116AB of the Act.

More generally, if the scheme does not include sufficient incentives to lead to the development of appropriate industry codes, the amendments may inadvertently legitimise infringement of copyright on DSPs' services. DSPs, who are normally responsible actors in this regulatory space, would be encouraged by such a system to take the benefits of safe harbour protection without expecting to take countervailing steps to protect copyright.

Accordingly, we would support the Government to conduct a review 18 months after the enactment of the *Copyright Amendment (Service Providers) Regulations 2018*, to address the need for any amendments to be made to the Regulations to promote the agreement of appropriate industry codes, including a fallback mechanism if insufficient agreement has been reached between service providers and rightsholders. This would be the most effective way to ensure that the provisions proposed are actually leading to the development of industry codes and that the amendments are meeting their objectives.

Appendix A: Full descriptions of members of the Australian Film & TV Bodies

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and Independent Cinemas Australia (ICA). These associations represent a large cross-section of the film and television industry that contributed $5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.[4]

a) ASA represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on promoting and protecting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.; and Fetch TV.

b) AHEDA represents the $1.1 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as intellectual property theft and enforcement, classification, media access, technology challenges, copyright, and media convergence. AHEDA currently has 13 members and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel and Telstra.

c) The MPDAA is a non-profit organisation representing the interests of theatrical film distributors before Government, media, industry and other stakeholders on issues such as classification, accessible cinema and copyright. The MPDAA also collects and distributes cinema box office information including admission prices, release schedule details and classifications. The MPDAA represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros. Entertainment Australia.

d) NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, 2018 being its 72nd year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as

[4] Access Economics, *Economic Contribution of the Film and Television Industry,* Access Economics Pty Limited, (February 2015), <http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf>, p iv.

the prominent independent exhibitors Reading Cinemas, Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners which together represent over 1400 cinema screens.

e) AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S. film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

f) ICA develops, supports and represents the interests of independent cinemas and their affiliates across Australia and New Zealand. ICA's members range from single screens in rural areas through to metropolitan multiplex circuits and iconic arthouse cinemas including Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and Majestic Cinemas. ICA's members are located in every state and territory in Australia, representing over 560 screens across 144 cinema locations.