29 June 2018

Ms Emma Shadbolt
Acting Director
Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

copyright@communications.gov.au

Dear Ms Shadbolt,

The Australian Publishers Association (APA) is pleased to provide a response to the Exposure Draft Copyright Amendment (Service Providers) Regulations 2018.

We note that the current bill before Parliament limits the extension of safe harbour to educational institutions, organisations serving the needs of the print disabled, libraries, archives and cultural organisations. We welcome this measured reform of the Copyright Act 1968 (Cth) (the Act). We welcome, too, the proposed amendments to the Copyright Regulations to bring them into line with the pending changes in the Act:

- to replace 'carriage service provider' with 'service provider' and
- to introduce a procedure for making an industry code for service providers.

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 APA does not have any comment on additional changes other than those proposed.

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.

The APA strongly supports the aim of section 19, to establish a central line of

communication with service providers to ensure an efficient and affordable redress mechanism for creators to control their intellectual property, manage online copyright infringement and minimise its impact. We support the comments by Music Rights Australia (MRA) that a simple communication and single point of contact for service providers is necessary for the take down notice system to work for rights holders (particularly the individual creator) in the way it is intended.

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

We note the correction, as identified by MRA, to section 18A (3), changing "may" to "must"[1] in the exposure draft.

We endorse a collaborative approach to developing an industry code. We note, however, that there is no consequence for service providers if there is no code, but there is a problem for rights holders.

- For all activities (categories A to D) a service provider "must accommodate and not interfere with standard technical measures used to protect and identify copyright material"[2] if an industry code is in force - but not if there is no industry code.
- For category B activities, "a provider must comply with the provisions of a relevant industry code...which relate to updating cached material and not interfering with technology used at the originating site to obtain information about the use of copyright material"[3] if an industry code is in force - but not if there is no industry code.

As there is no incentive for service providers to collaborate on an industry code we endorse the proposal for the Department of Communications and the Arts to have a role in mediating a solution should an agreement not be reached between stakeholders within a certain period of time.

As a starting point of discussion, the APA considers the cost of any take down notice scheme should be borne by service providers. Any other arrangement undermines the purpose of safe harbour legislation in avoiding the significant expense of litigation for creators.

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

[1] Regulation section 18A (3) currently states "An industry code may contain any or all of the following…" which does not align with section 18 (b)

[2] Exposure Draft - Copyright Amendment (Service Providers) Regulations 2018, June 2018, p.6

[3] ibid

develop a workable code?

As there is no incentive for designated service providers to work flexibly with rights holders, we propose that an endpoint to discussion be imposed so that both sides actively engage in achieving a workable code.

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

Without an industry code, we are concerned that rights holders will be worse off under the scheme. We maintain that the single most important test of any safe harbour legislation should be whether the property rights of creators remain adequately respected.

The APA is the peak national body for Australian book, journal and electronic publishers. Established in 1948, the Association is an advocate for all Australian publishers - large and small; commercial and non-profit; academic and popular; locally and overseas owned. The Association has approximately 210 members and, based on turnover, represents over 90% of the industry. Our members include publishers from all sectors of the publishing industry - trade and children's, schools and academic publishing.

We look forward to the passing of the Copyright Amendment (Service Providers) Bill 2017, the implementation of new regulations, a productive collaboration across industries toward an appropriate industry code and a balanced safe harbour regime.

Yours sincerely,

Michael Gordon-Smith
Chief Executive