Music Rights Australia's Submission in Response to the Exposure Draft – *Copyright Amendment (Service Providers) Regulations 2018*

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RESPECTING AND PROTECTING CREATIVITY

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Music Rights Australia thanks the Department of Communication and the Arts (the **Department**) for the opportunity to make a submission in response to the Exposure Draft – Copyright Amendment (Service Providers) Regulations 2018.

1. About Music Rights Australia

Music Rights Australia (**MRA**) is an organisation that protects the creative interest of artists within the Australian music community. MRA represents over 95,000 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. Responding to the Exposure Draft – Copyright Amendment (Service Providers) Regulations 2018

2.1 Application of Regulations to '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?***

MRA will not comment on this question but looks forward to the opportunity to comment on any additional suggestions advanced by stakeholders.

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.

From the copyright owners' perspective section 19 has as its central purpose the creation of a single point of contact within a service provider's organisation to which copyright owners can send notices for the purposes of a condition in subsection 116AH(1) of the Act. The section sets out the clear obligations on the service provider to appoint the designated representative and publish the relevant information to facilitate that communication. If changes were to be made to this section it is essential that they continue to promote simplicity and efficiency to facilitate the notice process. A wide range of copyright owners with limited financial and administrative capabilities will seek to utilise the notice process

[1] See www.apraamcos.com.au

[2] See www.aria.com.au

and it is essential that the notice process, which is designed to remove infringing material or links to infringing material from the service providers' networks, functions effectively for them.

MRA would suggest that any internal complexities concerning which entity within the service provider's structure must act on a notice, once it has been received by the designated representative, should be addressed through the service providers' internal administrative processes. The burden of identifying a particular entity or branch of the service provider or an entity which the service provider administers upon which a notice is to be served should not fall on the copyright owners or their representatives.

The notice system needs to be effective and efficient. Copyrights owners are under some strict timelines in the process and so it is important that the process is seamless and achieves the goal of removal of infringing material or links to infringing material as easily and quickly as possible. Any unnecessary complexity will frustrate the purpose of the safe harbour processes.

2.2 Industry Codes

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

MRA notes that Regulation section 18A (3) states:

"An industry code may contain any or all of the following ……."

However, section 18 (b) states the industry code must include a provision to the effect that standard technical measures are ….. "

The decision to make standard technical measures and updating caching material optional for a section 18A code or codes when they are mandatory for section 18 industry codes is unclear.

Additionally, this does not aligned with the statement in the consultation paper at page 9:

"The new section 18A outlines the following requirements which will need to be fulfilled in order to have a valid industry code, or a variation of such a code:

……

b) the code must contain specific provisions in relation to STMs or caching (subsection 3)".

MRA suggests that in order to create equivalent codes for service providers under the Act section 18 (3) may need to be amended to read *must* rather than *may* for some or all of sub sections 18(3) (a), (b) and (c).

The notice processes in the Act and the Regulations are not fit for purpose. Any notice process which does not address the current digital environment will not result in effective removal of infringing material on a permanent basis.

The inadequacy of the US DMCA notice and takedown procedures has been commented on extensively in the US review and MRA has referenced the issues in numerous submissions.[3]

This issue remains a significant impediment to the effective operation of any notice scheme and failure to address it will significantly impact the effectiveness of Division 2AA Part V of the Act.

While MRA understands this review is not concerned with the operation of Division 2AA Part V of the Act, this issue does impact the effectiveness of the notice process and will impact the operation of any industry code which is developed under a section 116AB "industry code" (a) or (b) of the Act and sections 18 and 18A of the Regulations. Until such time as the notice process is designed to address the issue of take down and stay down, any industry code will result in an activity-based outcome rather than a results-based outcome.

MRA acknowledges that many of the designated service providers currently have some processes which they have implemented to address the instances of links from their networks to infringing material or the placement of infringing material on their networks. However, these processes are not consistent or uniform and are currently not transparent to copyright owners. MRA is not aware of what steps, if any, the designated service providers take with respect to standard technical measures or copyright material cached on their networks.

Copyright owners believe the development of an industry code or codes will assist the parties to address these issues without recourse to expensive and unproductive litigation.

While MRA is hopeful that there will be productive discussions with the designated service providers, our experience in the development of the Copyright Notice Scheme with carriage service providers presents sobering evidence of the challenges the parties face in the development of a consensus driven code under the Regulations and the Act.

MRA is concerned that the time and effort which all the parties will put into the development of an industry code or codes under section 18A will place burdens on the resources of copyright owners and the designated service providers and may not result in agreement unless there is oversight and assistance from the Government and the Department.

[3] Music Rights Australia's Submission in response to Copyright Amendment(Disability Access and Other Measures) Bill 2016

The Copyright Notice Scheme was negotiated with a relatively small number of carriage service providers, as opposed to the wide range of designated service providers with whom the music industry would need to negotiate under section 18A, yet despite considerable effort by all parties consensus could not be achieved.

In order to avoid the issues which frustrated those discussions MRA makes the following suggestions:

- The Government should establish a timetable for the development of the code or codes between the copyright owners and the designated service providers. Preferably this timeline should operate before the designated service providers get the benefit of the safe harbour protections. MRA notes that the Regulations are to take effect six months from the Royal Assent of the *Copyright Amendment (Service Providers) Act 2018* and suggests that the timeline of six months, while challenging, should be the period fixed by the Government for the parties to develop the code or codes. If the designated service providers and copyright owners fail to agree a code or codes within the period, the Government should then step in to assist in finalising the outstanding issues.
- Without a fixed timeline and mediated solution, designated service providers will have little or no incentive to agree an industry code or codes, because there is no consequence for them if an industry code does not operate. However, the absence of industry codes may have consequences for a range of copyright owners whose copyright works may appear on or be linked to from the designated service providers' networks without their permission. The ability to approach the designated service providers through an established process, which has been agreed by the particular copyright industry group and the designated service provider, would be of considerable benefit for the many small businesses in the music industry who are copyright owners. Currently these small businesses and their industry representatives do not have the capacity to engage with designated service providers on a case by case basis. It is in their interests, and in the interests of the designated service providers, to have an efficient and effective process to remove the infringing material or the links to the infringing material. The code or codes will also assist the parties to address emerging issues as they arise.
- The Government should make a clear statement that the operating costs of the code or codes should be borne by the designated service providers as a cost of doing business and as a consequence of the benefit they obtain under the safe harbour provisions.

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

It is MRA's position that it is potentially too flexible and refers to the issues raised in response to Question 3. MRA requests that the Department recommend a timetable is put in place for the development of the code or codes. Additionally, MRA suggests the Department recommends that if the parties fail to agree a code or codes the Government should step in to assist the parties to reach agreement.

Question 5: ***Will the proposed amendments to section 18 of the Regulations (and consequently section18A have any unintended effects?***

In the circumstance of long and drawn out negotiations between the copyright owners and the designated service providers and in the absence of a code or codes, MRA is concerned that the steps which designated service providers are currently taking will no longer be enforced and copyright owners will find themselves worse off.

Faced with a drop in standards and increased instances of copyright infringement on the networks of certain designated service providers, copyright owners may be forced to take expensive and protracted litigation to determine what reasonable steps a designated service provider should take to remove infringing material or links to infringing material from their networks.

This unintended consequence can be avoided if the Government takes proactive steps to assist the parties to achieve a mediated outcome if they cannot agree a code or codes within a set timeframe.

Should the Department have any questions about the MRA submission, please contact Vanessa Hutley General Manager MRA at [redacted].