

29 June 2018

The Director, Copyright Law Section
Department of Communications and the Arts
GPO Box 2154
CANBERRA, ACT 2601

By email: copyright@communications.gov.au

Dear Director,

Exposure Draft – Copyright Amendment (Service Provider) Regulations 2018

Nightlife appreciates the opportunity to provide a response to the Exposure Draft – Copyright Amendment (Service Provider) Regulations 2018 and participate in this review.

We note that the Government's view is that it is important to balance 'the interests of innovators, investors and creators with the health, economic and social welfare of consumers and Australian society as a whole' Australian Government (2017), ([Australian Government Response to the Productivity Commission's Inquiry into Intellectual Property Arrangements](#), pg.3). Further, the Australian Copyright Council also quote in their values that copyright laws are designed to "balance the interests of consumers and service providers" (Australian Copyright Council). Importantly, this review aims to "*inform advice to the government to support copyright policy that reflects the interests of copyright creators, users and distributors*".

On the basis of the two points above, Nightlife as both a user and distributor is able to provide input into those elements of the consultation that it is well versed from a commercial operator context. With respect to the Exposure Draft, we have elected to comment only on Question 5 of the consultation.

Kind regards,



Mark Brownlee
Managing Director

BACKGROUND ON NIGHTLIFE

Established in 1989, Nightlife is Australia's premier music subscription service for business and with 120 staff, it is the country's largest employer in the music-tech space. Privately owned and headquartered in Brisbane, it represents locally developed IP and technology consistently adapted to meet the evolving needs of our 3,500 clients nationally. Our clients cross all industry segments, but our primary verticals are hospitality and fitness, where the value of music is greatest.

As a music tech business, Nightlife depends on the rights holders and collection societies to not only provide content but also to ensure certainty in licensing to underpin the business and provide confidence to continue investing in the product. Equally Nightlife and our peers rely on the rights holders and collection societies to ensure the industry is functional and distributing revenues appropriately from the users that we invoice to the creators that they represent.

Given Nightlife's twenty-nine-year history working with both the licensors (our 250+ content suppliers globally) and licensees (our clients throughout Australia and export territories) of copyright protected content and our tech background, we are uniquely positioned to provide insights into Copyright reform and amendments in Australia.

Nightlife is an avid supporter of artists and since inception has ensured that it delivers sufficient information to rights holders and collection societies alike, to enable them to pay the appropriate artist when their music has been used. The music industry is more complex today than ever before with more rights holders, content and service providers creating an explosion in data. Defining a consistent standard for repatriation that ensures the fair distribution of revenues and is manageable by all parties is now possible but relies on a close collaboration between tech and music businesses. Nightlife can play an important role in facilitating this opportunity and is pleased to be supporting reform that promotes a robust and reliable copyright framework.

PREAMBLE

Digital disruption has amplified issues inherent in the background music sector for decades. Thirty years ago the background music sector was in its infancy and as such the amount of content in use was relatively small and policing infringement was simple. Nightlife and a small number of our peers, were correctly licensed, routinely paid appropriately for the use of music and it was easy for us to tell the rights holders who to pay. There was no such thing as consumer services and hence infringement was rare and easy to shut down.

Fast forward 30 years and the landscape has changed dramatically, with technology innovations significantly outpacing copyright law. There are now many more options for businesses to turn to for music, some legitimate and licensed, others not. And the breadth of content and complexity associated with ownership has exploded. Crucially, businesses like Nightlife have been a constant and since the beginning have respected copyright and ensured that we provide our licensors with the requisite data to support the accurate payment to artists for the use of their work. But we have become the exception rather than the norm.

Nightlife is on paper as a supporter of stronger Safe Harbour provisions. As a small- to- medium music technology innovator, we support the Government's efforts to create an environment that does not support the illegal use of copyrighted material, especially in the commercial sector where we operate. The current changes to the Copyright Act are creating a more certain and sustainable business environment for Australian businesses and rights owners and to that end we would encourage the Government to ensure these measures are consistently applied in both on and offline environments.

RESPONSE TO EXPOSURE DRAFT – COPYRIGHT AMENDMENT (SERVICE PROVIDER) REGULATIONS 2018

Minor Changes to industry codes developed under paragraph (a) (registered under the Tel Act)

Question 5:

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

Exemptions to the US Digital Millennium Copyright Act (DCMA) have been steadily added since the Act was passed in 1998. One of the root causes for the flow of change was the impact of disruptive technologies and new business models that could not reasonably have been foreseen at the time of passing the Act.

An example could be the use of photocopiers in libraries in the United States in the 1970s. When broader protection was given to fixed creative material, liability became a concern for many public institutions. This was initially addressed with quite specific exceptions, though as technology changed a multiple of amendments were required to copyright law to alleviate the potential of widespread unintended infringement. This has mostly been captured by the DMCA since, though few would ever have conceived that a dispute over the liability of making copies in a library would have gone on to enable the legal infrastructure for services such as YouTube, Facebook and SoundCloud to leverage this legislation to provide commercial services, by transferring liability to end users.

Through this lens and in the context of question 5, Nightlife is of the view that the proposed amendments to section 18 (and by extension, 18A) of the Regulations represent an appropriate response based on what can reasonably be foreseen today to strike the correct balance between creative and commercial imperatives. In order to maintain this balance, it is recommended that cross-representative consultation is maintained with interested parties to enable an efficient and effective response to changes in the landscape and to ensure that the best outcomes are delivered for the Australian economy and the broader public interest. For example, given the possible development of sector-based codes, a risk could arise that codes with cross-sector connotations are developed in isolation (concurrently or otherwise) and result in the introduction of ambiguity through conflicting provisions.

While not a Service Provider under current definitions, Nightlife is uniquely positioned to add value to such ongoing dialogue as a small-to-medium Australian business that is a recognised music technology innovator and expert in the copyright landscape with strong ties to multinational technology suppliers, record labels (multinationals and independents alike) and creative communities. Nightlife is a strong advocate of Government strategies that relate to investment in innovation, development of productive environments for small businesses and promoting the growth of internationally competitive industries. Similarly, Nightlife as a business shares core values with Government in the areas of transparency, accountability, probity, equitability and contestability. Nightlife would welcome the opportunity to provide informed input to ongoing consultation on this matter and to participate in roundtables for related matters in the interests of ensuring a diversity of voices is heard.

