



**SUBMISSION OF THE
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

February 10, 2009

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to provide comments on the Digital Economy Future Directions Consultation Paper (“Paper”).

IIPA is a coalition of seven trade associations representing the U.S. copyright-based industries – including the business and entertainment software, audio-visual, sound recording, music publishing and book publishing industries – in bilateral and multilateral efforts to improve international protection of copyrighted works. (A list and summary description of our member associations appears at the end of this submission.) Both directly and through our member associations, IIPA has a long history of involvement in the development of copyright law and enforcement policy in Australia, including submissions to a number of consultation exercises such as this one.

IIPA strongly supports the Australian Government’s goal of “increas[ing] the effective use of networked information and communication technologies (ICTs), especially the Internet, by consumers and all businesses.” Paper, at 1. In our view, a key ingredient in achieving this goal is strong and effective copyright law and enforcement throughout the digital economy. This view is informed by our experience in many countries that are all grappling with similar issues. An online environment that respects copyright is one that stimulates and rewards creativity, promotes the rule of law and reasonable commercial practices, enhances choice and contractual freedom, and fosters the healthy development of digital commerce. By contrast, an online environment in which copyright rules are ignored will be a less safe, less stable, and less welcoming venue for creators, consumers and businesses alike.

Some believe that there is an inherent conflict between copyright and e-commerce, and that the resulting contention is a zero-sum game. IIPA and its members urge the Australian Government to reject any proposals premised on this incorrect and simplistic viewpoint. Rather, it should take concrete steps to encourage the optimal symbiotic relationship among the content, technology and networking sectors, all of which have a vital stake in the success of digital commerce.

This submission focuses on four of the questions posed in the Paper.

1. *What evidence shows the possible barriers preventing greater online content offerings? What can be done to address these?* (Paper, p. 10)

As the Paper notes on page 10, “the content industry has significant concerns about the apparently extensive piracy of content on peer-to-peer networks.” Although Australian law, as interpreted and applied by the Australian courts, provides some important tools for use against the providers of peer-to-peer networks¹, and of other piratical services², the problem cannot be effectively tackled so long as some

¹ See, e.g., *Universal Music v Sharman* [2005] FCA 1242.

Internet Service Providers (ISPs) turn a blind eye to it and ignore repeated notifications that their networks are being used for purposes of massive infringement of copyright, including through use of illicit peer-to-peer (p2p) services. It would remove a significant barrier to greater online offerings of copyright materials of all kinds if the obligation of ISPs to respond constructively in these circumstances were clearly established, and if courts enforced that obligation. It is essential that stronger legal incentives be provided to ISPs to cooperate with right holders in combating online piracy. This would greatly enhance the confidence with which copyright owners would use the Internet as a venue for authorized dissemination of their works, and thus facilitate the legitimate distribution of works online.

We also note that while there may be some disagreements among policymakers about how best to address internet piracy, there is no factual question about the prevalence of infringement over p2p networks. The Paper's use of the word "apparently" to modify "extensive piracy of content on peer-to-peer networks" is misleading. The music sector, for instance estimates that only one of 20 downloads is authorized, producing a 95% global piracy rate for internet downloads of recorded music. Published reports by various analysts have estimated that as much as 80% of bandwidth during peak hours is consumed by p2p traffic, most of which is infringing. One study estimated in 2007 that 57% of all Australian internet traffic is due to p2p file exchanges; globally, up to 70% of p2p traffic consists of exchange of video data (motion pictures and television programs), virtually all of which is infringing.³ It is important that Australian policy makers fully understand this factual underpinning as they consider the critical question of how to address it.

2. *Should the existing safe harbour scheme for carriage service providers be broadened?* (Paper, p. 18)

With all due respect, we believe that this is the wrong question to pose. The real issue is what can be done to more effectively incentivize ISPs to cooperate with right holders against piracy on their networks. We endorse safe harbors to ensure that ISP's are not subject to unreasonable liability, but the touchstone for any discussion must be whether any given proposal enhances accountability and fosters reasonable cooperation in addressing infringing conduct.

The paper provides the specific examples of social networking sites and video sharing sites, and describes these as "new, primarily user-generated content platforms." This may or may not be an accurate description. Page 16 of the paper offers several examples of how legitimate content, whether generated by individual users, political parties, commercial content creators, or others, can effectively be shared and disseminated via such sites. Of course this activity should be encouraged; but we know of no evidence that such developments in legitimate dissemination of content are in any way discouraged by the fact that these sites do not qualify as "carriage service providers" under Australian law. Similarly, as the Paper observes on page 16, "it is not clear whether the development of [such services] in Australia ... is impeded by the scope of the present 'safe harbour' scheme." We know of no evidence that this is the case.

At the same time, it is unquestionable, not only that social networking and video sharing sites "may host unauthorised content," as the Paper puts it, but that some of them are flooded with such content, and seem to depend on it for their economic viability and attractiveness to advertisers and other

(...continued)

² See, e.g., *Universal Music v. Cooper* [2005] FCA 972.

³ Data sources can be found at http://www.ipoque.com/userfiles/file/internet_study_2007.pdf, and <http://www.ifpi.org/content/library/DMR2008.pdf>, among others.

sources of revenue. This situation calls for the rigorous application of well-established copyright law concepts, including authorisation liability and liability for inducement of infringement, with the goal of encouraging cooperative efforts to move from the illegal model to the legitimate model. For services that refuse to do so, the copyright law should be applied to hold them accountable for infringements, and to impose on them the fully compensatory and deterrent remedies that international standards require. Trying to cram the activities and business practices of these sites into the detailed safe harbour model now in place for carriage service providers could be a costly diversion, in terms of time, energy and legal resources, from the real problem at hand.

In the United States, the broad definition of “service provider” in section 512(k)(1)(B) of title 17 means that social networking and video sharing sites are not categorically excluded from three of the safe harbors under the Digital Millennium Copyright Act (those for system caching [section 512(b)], storage [section 512(c)], and providing information location tools [section 512(d)]). However, such sites do not automatically qualify for any safe harbor. These sites can claim such safe harbors only to the extent that they engage in the specific activities defined in the law for each safe harbor, and that these specific activities are the basis for copyright liability claims against them. For example, such a site can seek to qualify for the safe harbor under section 512(c), but only to the extent that it infringes “by reason of the storage at the direction of a user of material” residing on the networks they control or operate, and not for any other activities it may engage in. The extent to which the activities of these sites fall within these definitions, or, on the other hand, exceed these boundaries, is currently the subject of litigation in a number of cases in U.S. courts. Of course, under U.S. law, service providers eligible for these safe harbors have some other legal obligations that do not have direct parallels in Australian law, such as the requirement to expeditiously disclose the identity of the alleged infringer upon receipt of an administrative subpoena (17 USC 512(h)).

Perhaps more importantly, there has been progress in the US and elsewhere with regard to voluntary cooperative arrangements against infringing activity on some of these sites. One example is the User Generated Content Principles, to which a number of such services and content owners have subscribed. See www.ugcprinciples.com. The stated objectives of the principles include “(1) the elimination of infringing content on UGC Services, (2) the encouragement of uploads of wholly original and authorized user-generated audio and video content, (3) the accommodation of fair use of copyrighted content on UGC Services, and (4) the protection of legitimate interests of user privacy.” *Id.* UGC sites that have signed on to the Principles are continuing to develop innovative business models for legitimate distribution of copyright content.

The Australian government should do more to encourage such voluntary cooperative agreements, whereby ISPs and right holders collaborate on technology, business practices, communications and consumer education to advance these goals. Under such agreements, the parties can work together to better identify how networks are being abused to commit infringement, which customers are repeatedly engaged in such abuses, and how such abuses can be expeditiously and effectively terminated. Simply expanding safe harbors is unlikely to generate greater impetus toward such cooperation; it may instead motivate inaction or foot-dragging.

One focus of government efforts should be on removing obstacles that may now exist to the negotiation and implementation of such agreements, some of which may derive from other principles of law that restrict freedom of contract and unduly restrain how ISPs can deal with customer data. The interests of Australian consumers in online access to the widest range of copyright materials would be much better served by such inter-industry cooperation than by lobbying campaigns to change the statutory categorization of various services.

3. *Does Australia's copyright law unreasonably inhibit the operation of basic and important internet services? If so, what are the nature of such problems and practical consequences? How should these be overcome?* (Paper, p. 18)

IIPA's short answer to this question is no – to our knowledge, there is no such inhibition. A more detailed answer is appropriate regarding the example given on page 17 of the Paper, user-generated content (UGC).

As noted above, to the extent that so-called UGC sites feature original content that has actually been created by their users, there is, of course, no need to change copyright law: those creators, like any others, are free to disseminate their works, with whatever restrictions they choose (or no restrictions). Similarly, to the growing extent that these sites feature content that has been specifically licensed by creators (including commercial creators such as those represented by IIPA's member associations) for such uses, there is certainly no need for any additional exceptions. In this area, the "practical solutions" that the Paper references are already being put in place to facilitate licensing. They include such specific voluntary licensing regimes such as Creative Commons and the Automated Content Access Protocol, and programs such as YouTube's AudioSwap, in which video uploaders are invited to add sound tracks using pre-licensed sound recordings.⁴

Putting to one side the cases of original content or licensed content, the issue arises with unlicensed uses of content on UGC sites, and whether any new copyright exception ought to be created for this purpose. This question can receive a positive answer only if it can be shown that a significant range of such uses – that would otherwise qualify in terms of the well-established "tripartite test" of global copyright norms (see TRIPS Art. 13; WCT Art. 10; WPPT Art. 16) – cannot be accommodated within existing exceptions to protection under Australian law. IIPA believes that those existing exceptions ought to provide ample scope for appropriate unlicensed uses of copyright materials in the UGC environment, and that no exception for unauthorized UGC-related uses of content would be justified.

Put another way, it is difficult to imagine a new exception for UGC, not overlapping considerably with existing exceptions, that could pass muster under the tripartite test. In this regard, it is important to note that the licensing of copyright materials for use on social networking and UGC sites is becoming increasingly widespread, and that thus any proposed copyright exception in this area would face a heavy burden in demonstrating that it did not conflict with a normal exploitation of the work.

Finally, it is noteworthy that neither in common law jurisdictions like the United States, nor in civil law jurisdictions like those of continental Europe, has any country seen fit to adopt a new limitation on exclusive rights to benefit those who wish to make unauthorized use of copyright materials so that they may post them as "user generated content". Indeed, the absence of any such exception in US law does not appear to have inhibited the robust growth of UGC services in that market. IIPA respectfully suggests that this is not a trail Australia should blaze.

4. *What are priority issues that will facilitate the use of PSI [public sector information]?* (Paper, p. 5)

The Paper provides several compelling examples of how the private sector can add value to information generated by government, and how those value-added products can deliver significant

⁴ See <http://creativecommons.org/>; www.the-acap.org; http://www.youtube.com/audioswap_main.

benefits to many sectors of the economy and society. IIPA supports the Paper's emphasis on making PSI accessible "on terms that clearly permit the use and re-use of that information." Paper, at 3. What does not come through as clearly in the Paper is that the private sector activities that add value to PSI require considerable investments in time, expertise, resources, and creativity. Changes to the PSI regime must ensure that incentives for such investment – including copyright protection for the resulting value-added products and services – are preserved and strengthened. The definition of PSI, and the scope of "open access" policies made applicable to it, must be carefully drawn, so that they do not sweep in these value-added products in a way that imposes onerous restrictions on fundamental rights of copyright owners to reproduce and distribute their works.

For example, articles in scientific and medical journals are the product not only of the work of researchers, which may be government-funded, but also of journal publishers, who edit and compile this research, and who finance rigorous peer review processes to ensure that the public can have confidence in the validity and usefulness of the final product. While the Paper is correct that some "materials that result from publicly-funded cultural, educational and scientific activities" should be classified as PSI, applying that label to articles in scientific and medical journals would be problematic, even if the articles "result from" publicly-funded research. Mandating rigid open access policies for such articles would not only raise significant questions concerning Australia's compliance with global copyright norms; it could also have other negative repercussions on the huge and growing dissemination networks for scientific and medical research that journal publishers already operate directly or through licensing arrangements. IIPA urges the Australian government to take care that commendable efforts to increase public access to PSI do not spill over into unjustified incursions on copyright in works based on PSI to which the private sector has added significant value.

IIPA appreciates the Department's consideration of our views. If further information is needed, please do not hesitate to contact the undersigned.

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IIPA Member Associations

Association of American Publishers (AAP)

AAP is the principal trade association of the American book and journal publishing industry and has over 300 members. AAP members publish hardcover and paperback books in every field, including general fiction and nonfiction, textbooks, reference works, religious books, scientific, medical, technical, professional and scholarly books and journals, poetry and children's literature. AAP members also produce audio and videotapes, computer software, loose leaf materials, electronic products and services (including on-line databases), CD-ROMs, and a range of educational materials, including classroom instructional and testing materials. AAP's primary functions are to promote the status of publishing around the world, to assist in protecting its members' copyrights at home and abroad, and to defend intellectual freedom at home and the freedom of written expression worldwide. For more information, please visit www.publishers.org.

Business Software Alliance (BSA)

The Business Software Alliance is the foremost organization dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programs foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, CA, Cadence Design Systems, Cisco Systems, CNC Software/Mastercam, Corel, Dell, EMC, HP, IBM, Intel, McAfee, Microsoft, Monotype Imaging, PTC, Quark, Quest Software, SAP, Siemens PLM Software, SolidWorks, Sybase, Symantec, Synopsys, and The MathWorks. For more information, please visit www.bsa.org.

Entertainment Software Association (ESA)

The ESA is the U.S. association dedicated to serving the business and public affairs needs of the companies publishing interactive games for video game consoles, handheld devices, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$9.5 billion in entertainment software sales in the U.S. in 2007, and billions more in export sales of entertainment software. The ESA offers services to interactive entertainment software publishers including a global anti-piracy program, owning the Electronic Entertainment Expo trade show, business and consumer research, government relations and First Amendment and intellectual property protection efforts. For more information, please visit www.theesa.com.

Independent Film & Television Alliance (IFTA)

The Independent Film & Television Alliance (formerly AFMA) is the global trade association of the independent motion picture and television programming industry. Headquartered in Los Angeles, the organization represents and provides significant entertainment industry services to more than 160 member companies from 22 countries, consisting of independent production and distribution companies, sales agents, television companies, studio affiliated companies, and financial institutions engaged in film finance. Forty percent of the Independent Film & Television Alliance's membership and thirty percent of the association's board of directors are from outside the U.S. Collectively, the Independent Film & Television Alliance's members produce more than 400 independent films and countless hours of television programming each year and generate more than \$4 billion in distribution revenues annually. For more information, please visit www.ifta-online.org.

Motion Picture Association of America (MPAA)

The Motion Picture Association of America, along with its international counterpart the Motion Picture Association (MPA), serves as the voice and advocate of six of the largest producers and distributors of filmed entertainment. Founded in 1922 as the trade association for the American film industry, the MPAA/MPA has broadened its mandate over the years to represent a diverse and expanding motion picture industry. Today, the association represents not only the world of theatrical film, but also major producers and distributors of entertainment programming for television, cable, satellite, home video, Internet and looking into the future, for delivery systems not yet imagined. Among its principal missions, the MPAA/MPA directs an anti-piracy program to protect U.S. films from infringement throughout the world. The MPAA/MPA also works to eliminate unfair trade barriers and increase competition in the international marketplace. For more information, please visit www.mpaa.org.

National Music Publishers' Association (NMPA)

Founded in 1917, the National Music Publishers' Association (NMPA) is a trade association representing over 700 American music publishers, who in turn administrate the catalogs of over 27,000 publishers. The NMPA's mandate is to protect and advance the interests of music publishers and their songwriter partners in matters relating to the domestic and global protection of music copyrights. Music publishers control the copyrights for the underlying compositions of songs on behalf of the songwriters they represent. The NMPA is the leading trade association in the United States for music publishers, and advocates for their interests, as well as for their songwriter partners, by protecting, upholding, and advancing their valuable copyrights. The Harry Fox Agency, Inc., a subsidiary of the NMPA, is the premier U.S. mechanical rights organization, licensing mechanical and digital uses of music in the United States on CDs, digital services, records, tapes and imported phonorecords. For more information, please visit www.nmpa.org.

Recording Industry Association of America (RIAA)

RIAA is a trade association, founded in 1952, which represents several hundred companies that create, manufacture and/or distribute approximately 90 percent of all legitimate sound recordings in the U.S. The U.S. recording industry employs hundreds of thousands of workers at a variety of levels and produces a foreign trade surplus. RIAA maintains a legal and investigative staff to fight against all forms of music piracy and is associated with local recording industry groups around the world to extend this fight. One of its principal missions is to ensure that copyright legislation remains adequate in light of a rapidly changing technological environment, and that appropriate conditions exist to foster creativity in music through increased investment, production, and distribution. For more information, please visit www.riaa.com.