Ryan Webb
Director, Copyright Reform & Policy, Commercial and Copyright Law Branch
Attorney-General's Department
By email: copyright.consultation@ag.gov.au

March 9, 2023

Dear Mr. Webb,

The Digital Industry Group Inc. (DIGI) thanks the Attorney-General's Department (the Department) for the opportunity to provide our views on the Copyright Enforcement Review 2022-2023, as outlined in the Copyright Enforcement Review Issues Paper (The Issues Paper).

By way of background, DIGI is a non-profit industry association that advocates for the interests of the digital industry in Australia. DIGI's members are Apple, eBay, Google, Linktree, Meta, TikTok, Twitter, Snap, Spotify, and Yahoo. DIGI's vision is a thriving Australian digitally-enabled economy that fosters innovation, a growing selection of digital products and services, and where online safety and privacy are protected.

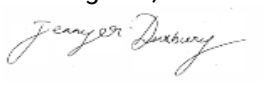
DIGI shares the Government's commitment to ensuring Australia's copyright regime remains relevant, effective, and proportionate, taking into account both needs of rights-holders able to take reasonable steps to protect and enforce their rights, the needs of consumers, service providers and other businesses are clear about when they are permitted to use copyright materials. Getting this balance right is vital to driving innovation across many sectors of the economy.

In this short submission we focus on the following issues raised:

1. Copyright enforcement online;
2. Authorisation Liability;
3. The need for copyright settings to support digital innovations; and
4. The proposal to introduce a small claims enforcement mechanism.

We thank you for your consideration of the matters raised in this submission. Should you have any questions, please do not hesitate to contact me.

Best regards,



Dr Jenny Duxbury
Director Policy, Regulatory Affairs and Research
Digital Industry Group Inc. (DIGI)

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1. Copyright enforcement online and safe habour scheme

The Department has asked for insights on the nature and scale of current copyright infringement challenges in Australia, having regard to the increased consumption of digital forms of content online. We consider the current legislative settings for enforcement to be fit for purpose, and are not aware of any data or trends that indicate major changes are needed. In particular, digital service providers continue to take highly effective steps to deal with infringing materials online, including by voluntarily removing and blocking access to websites that enable access to infringing materials. For example, Google proactively removes pirate websites from its search results as well as blocking proxy or mirror sites[1].

The Issues Paper identifies a range of industry developed tools for dealing with online infringement and asks questions about their utility (Questions 4 to 7), including whether these mechanisms are appropriate, and/or being appropriately used, to address or prevent actual or potential copyright infringement (Question 4) and if there are ways in which industry participants could work together more effectively or efficiently to address or prevent copyright infringement (for example, barriers to utilisation that could be removed; new or emerging mechanisms that could be adopted).

The Issues Paper also asks questions about the efficiency and effectiveness of the authorisation liability/safe harbour scheme (Questions 10 and 11). This issue is relevant to the question of whether industry mechanisms are being used, as an appropriate safe habour scheme will encourage proper use of industry tools and mechanisms. To achieve that goal, Australia needs to consider expanding the current safe harbour (notice and takedown scheme) to cover the broad range of online intermediaries that may unknowingly host infringing online content posted by users of their services. Currently, the safe harbour system under the Copyright Act is limited to internet access providers and certain other institutions, including education collecting institutions. As noted by the Productivity Commission in its Final Report on Intellectual Property Arrangements:

> In the Commission's view, extending the coverage of Australia's safe harbour regime, along the lines proposed in the Australian Government's exposure draft amendments, will improve the system's adaptability as new services are developed. Such an expansion is consistent with Australia's international obligations and is an important balance to the expanded protections for rights holders Australia has accepted as part of its international agreements. As such this is a

[1] Content Cafe, 15 December 2020, The fight against piracy continues during a tumultuous year

legislative amendment that should be made without delay.

RECOMMENDATION 19.1 The Australian Government should expand the safe harbour scheme to cover not just carriage service providers, but all providers of online services. and amend the definition of a service provider under s116ABA of the Copyright Act[2]

Copyright law in Australia should be updated and brought in line with the broader safe harbour schemes in jurisdictions such as the United States which has the Digital Millennium Copyright Act (DMCA). The DMCA balances the interests of rights holders to take steps against content that infringes their copyright, with clear, effective processes that enable online services to respond to claims of infringing content on their services. Such a scheme could also usefully complement a scheme for resolving small copyright claims should one be introduced (See discussion in section 5 below).

2. Authorisation Liability

In relation to the questions raised in the paper about authorisation liability (question 10 and 11), we note that there is a considerable body of case law in Australia that interprets section 101 of the Copyright Act 1968 (Cth)stringently. Three of these cases have been found in favour of rights-holders against digital platforms, demonstrating that the current provisions afford strong protection for authorisation of copyright infringement in an online environment.[3] We do not consider that there is any case for changes to the current law on authorisation infringement. In the Pokémon Company International, Inc. v Redbubble Ltd case Redbubble was sued by Pokémon because of user-generated content uploaded to the Redbubble marketplace. As soon as Redbubble became aware that the content was allegedly infringing, by notification from Pokémon, the content was removed in accordance with Redbubble's notice and takedown procedures which were compliant with the DMCA. What followed was a protracted court process, with the result of an award of $1 against Redbubble due to a lack of evidence by Pokémon as to actual financial damage caused by the infringement, and the reasonableness of Redbubble's content management policies and processes. The case further demonstrates the need for more expansive and consistent safe harbour protection for online service providers in Australia that ensures all parties can access a simple, low cost and effective method of resolving disputes non litigiously.

3. Copyright settings to foster innovation.

The focus of the review is on enforcement, however there is also an opportunity for the Department to gather evidence to explore whether current legislative settings may need adjustment, to support the development of innovative 'frontier technologies' in Australia i.e. rapidly emerging technologies that have enormous potential for both driving economic growth and addressing pressing social challenges. The World Intellectual Property Organisation notes that frontier technologies include emerging digital technologies such as:

- Artificial Intelligence (AI)
- Big data

[2] Productivity Commission, *Intellectual Property Arrangement, Productivity Commission Inquiry Report*, p.567 as accessed at:https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf on 7 March 2023

[3] *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 (authorisation liability by hyperlinks); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (peer to peer file sharing); and *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 154 (online marketplace).

- The Metaverse,
- Internet of things (IoT),
- blockchain, and
- quantum computing[4].

Current legislative settings in Australia contain a handful of restricted purpose based fair use exceptions for copyright infringement which, in our view, would benefit from adjustment to ensure that Australia can take advantage of the potential benefit of these transformative technologies. By way of example, digital service providers are investing in research and development of innovative AI applications that can assist in the detection, removal and reporting of seriously harmful and illegal materials online, including pro-terror and child sexual abuse materials. Companies investing in these solutions need to be able to process large volumes of illegal materials, but also 'safe' legal materials so that the technology can learn to distinguish between the two. However, it is not clear to what extent the existing fair dealing exceptions in Australian law for private use would enable research and development of this nature. Rather than expanding exceptions on a piecemeal basis that may be difficult to keep up to date given the pace of digital innovation, we recommend considering a flexible exception that can fairly balance rightsholder and user interests as technologies evolve.

Challenging questions also arise regarding the copyright in AI generated innovations. The Copyright Act 1968(Cth) does not expressly deal with the issue of the ownership of computer-generated works, although it is clear that there can be no copyright protection afforded to works under Australian law absent a human author[5]. It is currently unclear whether works that are created by an AI program may therefore not benefit from copyright protection. The approach to ownership of AI generated works should be clarified.

4. Small claims copyright mechanism

The Issues Paper asks questions about the adequacy of existing enforcement mechanisms and options for improvement (Questions 12,13, and 14). It discusses international approaches to reducing the barriers involved in copyright litigation, providing examples of the United States Copyright Claims Board and small claims process and the UK intellectual property Court. The UK mechanism is relatively new and the US model for deciding claims on the merits is as yet untested. We note also that the US arbitration style model has been criticised on grounds it lacks procedural fairness (in part due to the lack of a robust appeals process), over favours rights-holders to the disadvantage of consumers, especially of online content, and was not supported by a strong cost benefit analysis. Therefore, it is difficult to assess whether these models are workable in Australia. If the government includes a small claims process for copyright infringement claims in its reform agenda it should first consider if there is sufficient evidence that the current mechanisms are not working. Such a body should be of limited jurisdiction with damages be capped at a threshold of $AUD10,000 (consistent with other small claims jurisdictions in Australia). It would also need to be resourced with flexible remedies including orders for the removal of online content, correction/apologies and provide for appeals on the merits. To minimise the potential for abuse it should be coupled to a strengthened notice and takedown scheme i.e. access to the tribunal for claims against intermediaries that do not have knowledge of infringing materials hosted on their services is made contingent on a proper request being made to the intermediary to remove materials that the intermediary does not action within a reasonable time frame. Such an approach would be consistent with that of the

[4] World intellectual Property Organization ' What are frontier technologies; fact sheet' 2023
[5] *Telstra Corp Ltd v Phone Directories Co Pty Ltd* [2010] FCAFC 149

United States, where its tribunal is empowered to decide claims for misrepresentation during the notice and counter-notice process for takedown or reinstatement of material on the internet under the DMCA.