Music Rights Australia’s Response to Productivity Commission Report

February 2017

ANNEXURE C
Online Liability and Safe Harbours: 
The International Perspective

February 2017

IFPI represents the recording industry worldwide, with a membership comprising some 1,300 record companies in 63 countries and affiliated industry associations in 57 countries. Our membership includes the major multinational record companies and hundreds of independent record companies located throughout the world.

We have been asked by IFPI National Group ARIA to provide information about the scope and effects of safe harbours in other jurisdictions, and the current state of international developments in the area of intermediary liability legal frameworks.

1. INTERNATIONAL OVERVIEW:

At a time when the European Commission has proposed legislation to clarify the European online liability framework, and the US is reviewing the effects of its DMCA safe harbour legislation, the proposed extension of safe harbours in Australia would put the Australian online liability framework out of step with the international community.

ISP Safe Harbour provisions were designed almost two decades ago to protect crucial internet infrastructure companies from secondary copyright liability law suits while, as the US put it, preserving “strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment”1.

As the US Congress explained in 1998, with “constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials”2. Similarly, in Europe, the European Commission stated in 2000 that the intermediary liability regime in the E-Commerce Directive3 was intended to strike “a careful balance between the different interests involved in order to stimulate co-operation between different parties and so reduce the risk of illegal activity on-line”4.

2 ibid. p.2
In other words, intermediary liability regimes around the world, including in Australia, were intended to enable the internet to grow and function in a way that promotes innovation in both technological and creative industries. The current Australian safe harbours have served that purpose, and we are not aware of any evidence showing that the scope of the existing safe harbour has prevented innovation in Australia. The fact that Australian consumers have the choice of the same global services available to the majority of the rest of the world illustrates that the current law in Australia has not hampered the development of Australia’s digital market.

In the meantime in the US and the EU, inconsistent and sometimes expansive interpretations of the safe harbour provisions have caused harmful market distortions. These overly broad safe harbours have provided on the one hand a pretext for brazenly infringing services to plough their unsavoury trade, and on the other hand the opportunity for some online services to free-ride and engage with copyright material without entering into a market value licence or any licence at all for the use of those works.

As the EU Commission puts it in its 2015 Copyright Communication\(^5\):

> “platforms can also consider that they are not engaging in copyright-relevant acts at all, or that their activities are of a merely technical, automatic and passive nature, allowing them to benefit from the liability exemption of the e-Commerce Directive.

> This has prompted a growing debate on the scope of this exemption and its application to the fast-evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.”

As part of its flagship Digital Single Market initiative the European Commission has proposed legislation to clarify the EU intermediary liability regime (see section C below for details).

In the US, in recognition of the problems caused by the US DMCA section 512 safe harbour provisions, the US Copyright office is undertaking a study on the impact and effectiveness of the DMCA safe harbours.

We respectfully submit that the interests of the Australian economy and consumers would be best served by Australia participating in the international discussions about how best to legislate for the future rather than legislating now. Simply extending Australia’s safe harbours to reflect outdated laws in the US or Europe, which have failed for the reasons we set out below, will put Australia out of step with international developments and hold back rather than promote Australian innovation.

2. AUSTRALIA SHOULD NOT ENACT LEGISLATION THAT INTERNATIONAL EXPERIENCE SHOWS IS NOT FIT FOR PURPOSE

a. The US and EU intermediary liability regimes in the US and EU have distorted digital markets, causing a substantial value gap and threatening the future of the cultural economy

Creative content drives innovation

Music is the rocket fuel that has driven the growth of many online services. The record industry has been at the forefront of digital innovation, licensing around 40 million tracks and more than 350 digital music services in some 200 countries worldwide. There are some 20 licensed digital music services in Australia alone.

Music right holders are not benefitting fairly and proportionately

Even though music is used and enjoyed more than ever, music right holders have not benefitted fairly and proportionately from this increased consumption because overbroad safe harbours have had unintended consequences in distorting markets and affecting negatively the development of sustainable digital markets. Today some of largest music services claim to benefit from safe harbours in Europe and the US.

Uncertainty around the proper application of this framework has emboldened services that make available user-uploaded content to take an “act first, negotiate later” approach, building large music services without a licence, fundamentally distorting the negotiation process. If they do enter into licence negotiations (as opposed to carrying on business in the hope they will not be sued), they offer “take it or leave it” terms to right holders, knowing that the choice for right holders is to:

1. accept unfair terms and get some return for the use of their music;
2. rely on ineffective notice and takedown procedures to try to prevent their content being distributed without a licence (as to which see section 3 below); or
3. sue the service under an uncertain legal framework and delay any chance of getting income from their music.

Claiming exemption from liability undermines free and fair negotiations between digital services and right owners. Licenses, if they exist, are concluded in a market place that is rigged in favour of the platforms, causing a value gap between the value extracted from music by online services claiming to fall under safe harbours (such as some of the biggest user uploaded content services), and the revenues returned by these services to record companies and artists.
OVER BROAD SAFE HARBOURS CAUSE MARKET DISTORTIONS

YouTube launched in 2005 and has grown to be the world’s most popular on demand music service with an estimated 820 million users.  

Recording industry revenue from all non-subscription ad-supported services including YouTube (and others, although YouTube is by far the largest service in the non-subscription ad-supported market), was reported to be US$ 634 million in 2015.

If all of that revenue was attributed to YouTube alone, and despite the fact that it offers users the full music video on demand, *YouTube’s payments to music right holders in 2015 would amount to US$0.77 per user.*

YouTube is not an isolated case. A number of services, including structurally infringing services have claimed the benefit of the safe harbours, depriving right holders of the ability to capture adequate or, in many cases, any revenue from the online distribution of their content.

In contrast, the revenues distributed to right holders by services not claiming the benefit of safe harbours tell a very different story. *In 2015 Spotify’s payments to music right holders amounted to approx. US$ 18.00 per user.*

The stark difference between these annual per-user payments to right holders by services which both offer music on demand illustrates the scale and effect of the market distortion caused by the framework within which right holders are forced to negotiate in the largest music markets in the world, the EU and the US.

Put simply, record companies are unable to capture adequate revenues for the use of their music because of market distortions caused by overly broad safe harbours. While the proportion of revenues re-invested by record companies into talent remains very high (at approximately 27% globally), the losses in record industry revenues are reducing investments in new artists and recordings to the detriment of the cultural economy. These losses in investment in the cultural economy are not being made up by any other institutions or entities.

b. Uncertainty over the scope of the over-broad intermediary liability regimes in the US and EU is abused by pirate sites

Under the guise of a notice and takedown policy, pirate sites purport to be operating legally, knowing that right holders will have to incur huge expenses and in suing them to establish that the safe harbours do not apply and/or engage in mass notification programs which are

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6 Calculated on the basis of YouTube’s own estimate of over 1 billion unique monthly users and IFPI/IPSOS study finding that 82% of YouTube users use it to watch music videos / listen to music - http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf

not effective in preventing infringement (see section 3 below about the ineffectiveness of notice and takedown). The problem is compounded by uncertainty over the scope of safe harbours, making litigation complex, lengthy, and costly.

Meanwhile, the sites continue to operate and profit from infringement. The box below contains some examples of mass-scale infringing sites that have cynically claimed the benefit of the safe harbours.

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**OVER BROAD SAFE HARBOURS ARE OPEN TO ABUSE BY PIRATE SITES**

Megaupload: Mass-scale infringing site with 60 million users, estimated to have made US $42m for its owner Kim Dotcom

In the Kim Dotcom New Zealand District Court extradition judgment (Mr Dotcom faces prosecution in the US), the court cites extracts from online conversations between the management of the MegaUpload service. These discussions reveal how the operators of MegaUpload sought to benefit from the protection of the DMCA safe harbours in the full knowledge of the infringing content on their service from which they generated substantial profits.

Paragraph 71: “but it’s good to stay off the radar by making the front end look like crap while all the piracy is going through direct links & embedded.” And ORTMANN added, “the important thing is that nobody must know that we have auditors letting this stuff through.” VAN DER KOLK responded, “yes that’s very true also.” ORTMANN replied, “if we had no auditors – full DMCA protection, but with tolerant auditors, that would go away.” And VAN DER KOLK replied, “yes true.”

Grooveshark: Mass-scale infringing site with 35 million users

Grooveshark claimed that its service fell within the DMCA safe harbours. It was not until some way into litigation against it, after right holders had been forced to incur very substantial costs, that the discovery process revealed that the service which had been claiming the protection of the safe harbours had in fact been uploading infringing content to the service itself:

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8 CAPITOL RECORDS, LLC V. ESCAPE MEDIA GRP., INC, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 12-CV-6646 (AJN) (S.D.N.Y. Mar 25, 2015)
9 Ibid. p.11
c. **Notice And Takedown**, the mechanism which was intended to protect right holders as a quid pro quo for the granting of liability limitations to service providers, is ineffective as a tool against piracy

Our international umbrella organisation IFPI acts as a notice provider on behalf of its members, which include ARIA’s members. Globally in 2015, IFPI and its national groups identified over 14.7 million infringing files and links for removal, indicating the scale of work required to operate a notice and takedown system on a global basis.

Furthermore, most service providers remove only the specific URL link notified in the takedown notice without taking any further action. This makes the process ineffective because (a) even if one URL link or one copy of an infringing file is removed, there are typically many thousands of other URL links to, or other copies of, the same infringing title which remain online; and (b) content or links once removed are often quickly re-posted and most service providers do not take any steps to prevent this. For example, according to IFPI Marc Ronson’s Uptown Funk appeared over 3,000 times on Soundcloud following the first notice and over 400 times on Zippyshare.

These factors leave right holders to pursue a constant game of whack-a-mole, using substantial resources to locate every single URL that leads to a specific file, notify the service provider, and then repeat the process after they are re-posted.

Too often notice and take down is viewed cynically and some services deliberately structure their businesses to benefit from the period in between the posting of the file, and the detection and removal by right holders.

The vast majority of pirate services available in the EU and US have claimed the benefit of safe harbours, despite these laws never having been intended to apply to structurally or deliberately infringing services.
Grooveshark

When considering the effect of takedown notices on the service, the court cited EMI’s expert who described Grooveshark’s system as acting as a “technological Pez dispenser: Each time a Primary File for a song is removed due to a DMCA takedown notice, a Non-Primary File is slotted in to take its place”.

EMI and others v BSYB and others (a UK website blocking action)\(^{10}\)

Similarly to the Grooveshark case, when considering the notice and takedown programs purportedly operated by the three peer-2-peer sites that would be the subjects of the blocking order, the court found:

“For the reasons set out in the evidence of the Claimants’ witness Kiaron Whitehead, the Websites’ purported policies of removing infringing content only upon the provision of individual takedown notices would, even if rigorously implemented, be wholly inadequate to prevent the type of large scale, widespread copyright infringement which the Websites are engaged in.”

The notice and takedown system under the US and EU legal frameworks has plainly failed to tackle online infringement. While creating an enormous amount of work and cost for right holders in monitoring sites which profit from infringement of their works, the ineffectiveness of the system leaves right holders unable to prevent mass-scale infringements, even with the use of highly sophisticated notification systems.

Of course it is even more difficult for smaller right holders to detect and notify infringements as made clear in testimonies before the US House Judiciary Committee, 113th (2014) on the DMCA\(^{11}\). See for example the testimony of Sandra Aistar (at 88-89):

“Independent authors and creators “lack the resources of corporate copyright owners” and instead issue “takedown notices themselves, taking time away from their creative pursuits.”

The problems inherent in the notice and takedown system are being examined as part of the US and EU reviews.

\(^{10}\) EMI RECORDS LIMITED and others V. BRITISH SKY BROADCASTING LIMITED and others [2013] EWHC 379 (Ch) at para 68

3. THE EUROPEAN COMMISSION HAS PROPOSED LEGISLATION TO ADDRESS THE DISTORTIONS CAUSED BY SAFE HARBOURS AND THE US IS CONDUCTING A STUDY INTO THE PROBLEMS CAUSED BY THE DMCA HOSTING SAFE HARBOUR

In December 2015 the EU issued a Communication - Towards a modern, more European copyright framework 12, which set out an intention to address distortions in digital markets caused by uncertainty surrounding the liability of certain online services:

“A precondition for a well-functioning market place for copyright is the possibility for right holders to license and be paid for the use of their content, including content distributed online. The production of rich and diverse creative content and innovative online services are part of the same equation. Both — creative content and online services — are important for growth and jobs and the success of the internet economy.

There is, however, growing concern about whether the current EU copyright rules make sure that the value generated by some of the new forms of online content distribution is fairly shared, especially where right holders cannot set licensing terms and negotiate on a fair basis with potential users. This state of affairs is not compatible with the digital single market’s ambition to deliver opportunities for all and to recognise the value of content and of the investment that goes into it. It also means the playing field is not level for different market players engaging in equivalent forms of distribution.

[...]

the situation raises questions about whether the current set of rights recognised in EU law is sufficient and well-designed.

[...]

platforms can also consider that they are not engaging in copyright-relevant acts at all, or that their activities are of a merely technical, automatic and passive nature, allowing them to benefit from the liability exemption of the e-Commerce Directive. This has prompted a growing debate on the scope of this exemption and its application to the fast-evolving roles and activities of new players, and on whether these go beyond simple hosting or mere conduit of content.”

(emphasis added)

Following extensive consultation, on 14th September 2016 the European Commission published a Directive on Copyright in the Digital Single Market13. The Explanatory Memorandum to the Directive describes one of its purposes as follows:

“Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution

and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.”

To achieve this aim, the Directive clarifies the liability of certain online services, and the application of safe harbours as follows:

- **Confirms that User Upload Content (UUC) services are “communicating content to the public”**

  Recital 38, par. 1 clarifies that service providers which “store and provide access to the public to copyright protected works or other subject matter uploaded by their users” (i.e. UUC services) are therefore liable for the communication to the public of those works and subject matter.

- **Clarifies that only truly passive service providers are eligible for ‘safe harbour’ protection**

  Recital 38, par. 2 then clarifies that service providers are eligible for the liability exemptions provided in Article 14 of the E-Commerce Directive only when they do not play an “active role”, such as by optimising the presentation of the uploaded content or promoting it, and irrespective of the nature of or the means used for such optimisation or promotion.

- **Creates an obligation upon UUC services providing access to large amounts of content to take measures, for instance effective content recognition technologies, to ensure that unauthorised content does not appear on their services.**

  This obligation in Article 13 of the Directive applies to all services providing access to large amounts of content, whether or not they qualify for safe harbour protection. It therefore addresses the failings of existing notice and takedown procedures to prevent the availability of unauthorised content on services claiming the benefit of the safe harbours.

Meanwhile, in December 2015 the US Copyright Office recently launched a study into Section 512 DMCA.\(^1\) Introducing the study, the Copyright Office states:\(^2\):

“While Congress understood that it would be essential to address online infringement as the internet continued to grow, it may have been difficult to anticipate the online

\(^1\) Ibid. p.3  
\(^2\) http://copyright.gov/fedreg/2015/80fr81862.pdf  
http://copyright.gov/policy/section512/
world as we now know it, where each day users upload hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement. The growth of the internet has highlighted issues concerning section 512 that appear ripe for study. Accordingly, as recommended by the Register of Copyrights, Maria A. Pallante, in testimony and requested by Ranking Member Conyers at an April 2015 House Judiciary Committee hearing, the Office is initiating a study to evaluate the impact and effectiveness of section 512 and has issued a Notice of Inquiry requesting public comment. Among other issues, the Office will consider the costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public. The Office will also review how successfully section 512 addresses online infringement and protects against improper takedown notices.”

December 2015: The US Copyright Office notice and request for public comment

“If enacting section 512, Congress created a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet based services. The system reflected Congress’ recognition that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement.”

“Recent research suggests that the volume of infringing material accessed via the internet more than doubled from 2010 to 2012, and that nearly one quarter of all internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material. While Congress clearly understood that it would be essential to address online infringement as the internet continued to grow, it was likely difficult to anticipate the online world as we now know it—where, each day, users post hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement.

As observed by the House Judiciary Committee’s Ranking Member in the course of the Committee’s ongoing multi-year review of the Copyright Act, and consistent with the testimony of the Register of Copyrights in that hearing, the operation of section 512 poses policy issues that warrant study and analysis.”

(emphasis added)

CONCLUSION

The intermediary liability regimes designed almost two decades ago are no longer fit for purpose for today’s online environment dominated by Web 2.0 services, such as participatory networks and User Upload Content services. Services that didn’t even exist two decades ago have developed, often on the back of providing access to creative content for free, into highly profitable global conglomerates.

These services are unrecognisable from the nascent online infrastructure providers that the safe harbour regimes sought to nurture. Due to a mission creep the safe harbours in the US and the EU have distorted markets and prevented the creative industries from benefitting fairly from the use of their content, inhibiting the sustainable growth and balanced development of the digital market place.

The balance in the online content market place has been disrupted to such an extent that the EU is proposing legislation to address the problem and the US is reviewing Section 512 of the DMCA, the lynchpin of its online intermediary liability regime. We respectfully submit that Australia should participate in the discussions about the future rather than hastily implementing outdated legislation.