



**Response to Online Copyright  
Infringement Discussion Paper**  
September 2014

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## **1. INTRODUCTION**

Copyright Agency welcomes the Government's commitment to addressing the challenges faced by content creators from unauthorised use of their content, and its recognition that the current environment creates unacceptable barriers for creators seeking to participate in Australia's digital economy. Unauthorised use of content is a significant concern for Copyright Agency's members.

We also strongly support the Government's position that 'everyone has a role in reducing online copyright infringement.'

Our comments in this submission are intended to assist the Government to best meet its objective of providing a legal framework that facilitates industry cooperation to reduce online infringement.

## **2. SUMMARY OF SUBMISSION**

- it is in the interests of all Australians, for the short and longer term, that Australians consume and share legitimately sourced content;
- the failure to develop the industry codes referred to in the 2000 and 2004 amendments to the Copyright Act indicates that the current regulatory environment does not provide sufficient incentive to develop industry solutions;
- industry agreement on measures to deter unauthorised consumption and sharing of content, and to encourage authorised consumption and sharing of content, requires facilitation by the Government;
- in further developing its proposals, the Government should focus on solutions for online infringement and avoid amendments that may have consequences for other activities (for example, other situations involving authorisation of infringement);
- there needs to be a holistic approach to incentives for online service providers from authorisation liability and the safe harbour scheme;
- the proposal for site blocking should apply to all online service providers, not just internet service providers (ISPs), in order for it to meet its stated objectives and be consistent with international practice; and
- the Attorney General's Department should be resourced to report on unauthorised use of copyright content in Australia.

## **3. AUTHORISATION LIABILITY**

### **3.1 Intention behind 2000 amendments on authorisation liability**

The Government is seeking to give effect to the objectives of previous amendments to the Copyright Act rather than extending the intended application of the law.

Those objectives have not been realised. A major reason is that the industry code contemplated in the legislation has never eventuated.

When amendments in relation to authorisation liability were introduced by the Copyright Amendment (Digital Agenda Act) 2000, the Act's objectives included to:

(a) ensure the efficient operation of relevant industries in the online environment by:

(i) promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors; and

(ii) providing a practical enforcement regime for copyright owners; and

(iii) promoting access to copyright material online; and

(b) promote certainty for communication and information technology industries that are investing in and providing online access to copyright material.

Similarly, the Explanatory Memorandum for the Digital Agenda Bill said the objectives included:

- To fashion the improved copyright protection in the online environment so as to facilitate the growth of the information economy;
- ...
- To ensure that copyright law provides carriers and carriage service providers (including ISPs) with reasonable certainty about liability for infringements that occur on their facilities or infrastructure.<sup>1</sup>

The Explanatory Memorandum also said:

*The [factors for determining authorisation liability based on existing common law] are intended to provide a degree of legislative certainty about liability for authorising infringements. **Additional certainty** in relation to third party liability for copyright infringement is provided by new s.36(1A)(c). This paragraph specifies that **compliance with relevant industry codes of practice** is a factor in determining whether the person took reasonable steps to prevent or avoid the infringement. [emphasis added]*

The Discussion Paper says that the Government's proposals 'are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so'.

It is useful for the Government now to consider the reasons that an industry code has not eventuated to date, to ensure that the incentive intended by these proposals is realised.

### **3.2 Focus on online infringement**

In further developing its proposals, the Government should focus on the changes necessary to 'provide an effective legal framework that encourages industry cooperation' to develop measures to curb unauthorised consumption and sharing of content available online, and encourage authorised consumption and sharing.

We support the amendments proposed in this regard by Music Rights Australia (MRA).

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<sup>1</sup> Explanatory Memorandum to Copyright Amendment (Digital Agenda) Bill 1999.

### 3.3 Questions on authorisation liability

**QUESTION 1:** *What could constitute ‘reasonable steps’ for ISPs to prevent or avoid copyright infringement?*

Solutions in other countries, such as the industry-agreed Copyright Alert System in the US, provide examples of workable, effective ‘reasonable steps’.

ISPs may elect to terminate customer accounts in accordance with their customer contracts, but we do not propose that they be required to do so.

**QUESTION 2:** *How should the costs of any ‘reasonable steps’ be shared between industry participants?*

Under the US Copyright Alert System, costs are shared between content owners and ISPs. The exact way that costs would be shared under an Australian solution would depend on the details of that solution.

**QUESTION 3:** *Should the legislation provide further guidance on what would constitute ‘reasonable steps’?*

The legislation should enable further guidance through the Copyright Regulations, in a similar way that section 116AB enables the requirements for an industry code for the purposes of the safe harbour scheme to be prescribed in the Copyright Regulations.

**QUESTION 4:** *Should different ISPs be able to adopt different ‘reasonable steps’ and, if so, what would be required within a legislative framework to accommodate this?*

The US Copyright Alert system enables different ISPs to adopt whichever of the measures set out in the industry agreement best operate with their systems and processes, and we envisage a similar approach for the Australian environment.

**QUESTION 5:** *What rights should consumers have in response to any scheme or ‘reasonable steps’ taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?*

We suggest that the US Copyright Alert System provides a good model for addressing consumer interests in relation to mitigation measures.

## 4. INJUNCTIONS TO BLOCK INFRINGING OVERSEAS SITES

Overseas legislation relating to site blocking enables injunctions against ‘intermediaries’. The intention behind the government’s proposal would be better realised if the proposal applied to all intermediaries who are in a position to block access to infringing content on foreign websites, not just ISPs.

**QUESTION 6:** *What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?*

It should be for a court to determine, having regard to the factors in the legislation, whether or not to grant an injunction, the scope of any injunction, and who bears any costs associated with implementing an injunction.

We support the amendment proposed by MRA, based on the UK and Irish provisions.

## 5. EXTENDED SAFE HARBOUR SCHEME

The purpose of the safe harbour scheme is to provide an incentive for service providers to take steps to inhibit infringements of copyright through the use of their services.

The scheme was introduced following the Australia–US Free Trade Agreement (AUSFTA), which requires:

*(a) legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyrighted materials; and*

*(b) limitations in its law regarding the scope of remedies available against service providers for copyright infringements that they do not control, initiate, or direct, and that take place through systems or networks controlled or operated by them or on their behalf.*

The safe harbour concept originated in the US, where the consequences of infringement can be different to those in Australia, particularly because of the statutory damages provisions in the US. Statutory damages can far exceed the actual loss to the rightsholder. In Australia, by contrast, damages are awarded to compensate for actual loss. Additional damages can be awarded if the infringer has acted flagrantly.

The consequences of infringement are an important element of the context for safe harbour provisions, and the context for Australia is thus different to that for the US.

**QUESTION 7:** *Would the proposed definition adequately and appropriately expand the safe harbour scheme?*

The Discussion Paper notes that the scheme applies to both direct and authorised infringements. There is thus an interrelationship between authorisation liability (in sections 36 and 101) and the safe harbour scheme insofar as it applies to authorised infringements. The safe harbour scheme can only apply once liability is established. There thus needs to be clarity about which actions avoid liability altogether and which actions mitigate the consequences of liability.

The 2011 Public Consultation Paper ‘Revising the Scope of the Copyright Safe Harbour Scheme’, published in connection with a review by the Attorney-General’s Department, proposed a new definition of ‘service provider’, based on the definition in AUSFTA.<sup>2</sup>

In the current Discussion Paper, the Government seems to be proposing that ‘service provider’ be defined solely by reference to the four activities in sections 116AC–116AF. At face value, this would seem to mean that anyone engaged in these activities is deemed a ‘service provider’ even if they are not, in fact, providing any services to anyone other than their own staff. In addition, it is not clear that the safe harbour would only apply to ‘copyright infringements that they do not control, initiate, or direct’.

Further consideration of this proposal will need to take into account the requirements of AUSFTA and alignment between authorisation liability and the safe harbour scheme.

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<sup>2</sup> [www.ag.gov.au/Consultations/Pages/RevisingtheScopeoftheCopyrightSafeHarbourScheme.aspx](http://www.ag.gov.au/Consultations/Pages/RevisingtheScopeoftheCopyrightSafeHarbourScheme.aspx)

If the safe harbour scheme were to be available for non-public activities, then monitoring by copyright owners would be more difficult. For example, content owners can currently monitor content available from public websites and use notice and takedown procedures for infringing content.

We are open to discussing the application of a safe harbour scheme to service providers other than carriage service providers, but any such extended application should only apply to online service providers that are subject to similar obligations as those set out in MRA's proposed amendments regarding authorisation liability.

In addition, any changes should not have the effect of undermining any licensing solutions that are available on reasonable terms to the service provider. This includes the statutory licences in the Copyright Act for educational use and for government use.

## **6. BUILDING THE EVIDENCE BASE**

**QUESTION 8:** *How can the impact of any measures to address online copyright infringement best be measured?*

We submit that the Attorney General's Department should be resourced to report on unauthorised use of copyright content in Australia, including the levels of unauthorised use, contributing factors, and trends.

## **7. OTHER APPROACHES**

**QUESTION 9:** *Are there alternative measures to reduce online copyright infringement that may be more effective?*

There are a range of measures and initiatives that are complementary to the government's proposals. These include education campaigns, protocols developed with organisations involved in online advertising, and services directing consumers to licensed content.

Copyright Agency is a funding member of the Digital Content Guide, an online directory to licensed digital content.

## **8. REGULATION IMPACT STATEMENT**

**QUESTION 10:** *What regulatory impacts will the proposals have on you or your organisation?*

The proposals will assist our members to reduce unauthorised consumption and sharing of their content, thus increasing the opportunities for authorised consumption and sharing.

**QUESTION 11:** *Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?*

As indicated above, we suggest that the government confine its proposals to online service providers, as online infringement is the issue the government is seeking to address.

## **9. ABOUT COPYRIGHT AGENCY**

Copyright Agency is a not-for-profit copyright management organisation (CMO). It has more than 27,000 members, who include writers, artists and publishers.

Copyright Agency is appointed by the Australian Government to manage statutory licences in the Copyright Act for educational and government use of text and images, and to manage the artists' resale royalty scheme. It also offers a range of other licences as non-exclusive agent for its members, including to the corporate sector.

Copyright Agency also manages Viscopy's licensing and membership services. Viscopy is a CMO representing more than 10,000 visual artists.

Both Copyright Agency and Viscopy are affiliated with similar organisations in other countries, enabling the licensing of foreign content in Australia, and the collection of royalties for the use of Australian content overseas.