

7 March 2023

Copyright Enforcement Review
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: copyright.consultation@ag.gov.au

Dear Sir/Madam,

Copyright Enforcement Review

1. The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (the **Committee**) welcomes the opportunity to provide this submission to the Department in response to the Copyright Enforcement Review: Issues Paper.
2. The Committee further welcomes the recognition in the Issues Paper of the importance of ensuring that Australia's copyright laws protect Australian artists and allow them to earn a living from their creative efforts.

Enforceability of rights is not just a litigation issue

3. The announcement of this review emphasised the importance of protecting artist incomes from 'theft or leakage'. Given that emphasis, we note that copyright infringement is not the only way in which creative workers face difficulties in enforcing their rights. They also face well-documented struggles to find out how their works are being used, what revenues are generated, and how their share of those revenues is calculated. These difficulties can arise in their relationships with those who invest in their work (such as record labels, or book and music publishers) as well as those who simply distribute their work (eg, Amazon for ebooks, Audible for audiobooks, Spotify for music streaming, and YouTube for online video). The European Union has sought to address these issues with its 2019 Digital Single Market Directive, which requires member states to give artists and performers various new rights, including rights to transparency on the above matters. We encourage consideration of such mechanisms for Australia, to help ensure creative workers can enforce their rights.

Small claims

4. One of the most significant challenges facing creators, and those who invest in their creative efforts, is the cost of enforcing those rights. It is very expensive to take legal action to enforce one's copyright where someone infringes it. Usually, the costs of enforcing copyright in the legal system far outweigh any pecuniary remedies that will be awarded. These factors combine to ensure that only the most well-resourced and determined can realistically enforce their rights.

5. Accordingly, the Committee supports the implementation of some form of “small claims” forum to enable claims to be brought and resolved quickly and expeditiously. Whether that takes the form of a special court list (as in the UK), or a tribunal or panel (as in the USA), may depend on constitutional considerations. However, the Committee submits that overseas experience indicates that some features should be considered to ensure the forum functions appropriately:
 - there should be a cap on the amount that can be claimed—e.g. \$10,000 or \$20,000;
 - proceedings should be conducted as informally as possible;
 - a claimant should be required to file their submissions, written statements or affidavits and supporting materials establishing their claim when initiating their claim;
 - the respondent should be required to file their submissions, written statements or affidavits and materials in answer within a fixed period after service of the claim on them—e.g. 28 or 42 days;
 - discovery, if any, should be permitted only in rare or limited cases;
 - the trial of the claim should be fixed for hearing within a specified timeframe—a few weeks at most;
 - the final hearing should be of limited duration—1 or at most 2 days; and
 - each party should bear its own costs, or costs should be limited to a specified maximum amount.
6. The Committee notes that proving the quantum of damages or the profits made by an infringer can be a very expensive and time-consuming exercise, with costs very far in excess of any likely amount recovered. Accordingly, the Committee suggests that consideration be given to allowing a claimant to claim a fixed, specified amount by way of pecuniary remedy without the need to prove actual loss. One suggestion was the inclusion of a check box for the specified amount. The Committee notes, however, that this proposal raises many complex issues and requires further consideration.
7. It is important that the person(s) managing and determining the claim be trained in, and have experience in, copyright. In theory, small claims can be brought in magistrates’ or local courts. In practice, however, relevant judicial officers are frequently unfamiliar with copyright law and its intricacies, which leads both to greater expense and also uncertain and unpredictable results which, in turn, undermines confidence.
8. To facilitate access, it will be important that any forum for the resolution of these types of disputes is located at least in each capital city. Consideration should also be given, as with the Copyright Claims Board in the USA, to providing for the hearings to take place online.

9. The Committee urges caution before precluding a party from being legally represented. Experience in other “no representation” regimes shows that such a rule can lead to significant disadvantage. First, for example, large organisations will have an advantage as they can afford to employ or train someone to handle such disputes. Secondly, experience in the Fair Work regime (where leave to be represented is required) is that this leads to uncertainty, which can leave a party unprepared if leave is not granted, and wasted expense.¹ Companies that do not employ someone to handle such disputes will often pay for a lawyer to prepare draft documents and “coach” the employee representing the company at the hearing.
10. The Committee suggests, in this context, that consideration also be given to whether it may be appropriate that the same or a similar forum also have jurisdiction in relation to the enforcement of other intellectual property rights, in particular registered trade mark infringement and patent infringement. Similar issues of access to justice can arise in those cases (see, for example, the Patents Accessibility Review, Final Report tabled 27 May 2021, recommendation 9, which is awaiting government response).

Copyright Tribunal proceedings

11. Secondly, the Committee notes the time and costs involved in determination of claims before the Copyright Tribunal. Proceedings often take years before a final determination is reached. This delays the receipt of equitable royalties by copyright owners. The costs involved can also significantly reduce the moneys available for distribution to copyright holders.

Safe harbour schemes

12. Thirdly, the Committee notes that the definition in the Australian legislation of service providers who can benefit from the safe harbour provisions is very narrow; much more limited than the definitions applicable in the United States of America and the European Union.
13. The very limited scope of service providers who can benefit from the safe harbour provisions severely limits the practical utility of the provisions. It also appears to be inconsistent with Australia’s obligations under article 17.11.29 of the Australia – United States Free Trade Agreement.
14. The failure to provide wider safe harbours deprives copyright holders, and all other interested parties, of a quick and cheap remedy, which is often the main practical benefit of litigation because the particular conduct that is the subject of complaint is stopped.
15. It is also important to note that online service providers are not just exposed to liability for “authorisation”. Where copyright material is stored, even briefly, on their systems, there will be a reproduction of the copyright work and (often) a making available of the material to the public involving an exercise of the communication right. Both these acts, if done without the copyright owner’s permission, are direct infringements. When an entity directly infringes copyright, knowledge of the

¹ See, eg, Law Council of Australia, *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022*, [Submission](#) to the Education and Employment Legislation Committee, 11 November 2022, 31-32.

infringement and even taking precautionary steps to reduce or avoid infringement are irrelevant.

16. In some cases, service providers may seek to rely on notice and take down procedures implemented under foreign laws such as §512 of the *Digital Millennium Copyright Act* in the United States.
17. Such measures do not provide protection under Australian law.
18. Such measures also impose the costs of seeking advice about compliance with foreign laws which may not be feasible for all but the most well-resourced and, in any event, is inappropriate unless the business is seeking to operate in the foreign market. As Dr Sam Alexander has noted:²

. . . there is evidence to support the view that safe harbour protection in the United States supports innovation and the lack of safe harbour protection in Australia for OSPs undermines it. In particular, the capability and innovative output that has been experienced by YouTube and similar platforms following YouTube were compared with the ‘chilling effect’ following the Pokémon Case [Pokémon Company International, Inc. v Redbubble Ltd [2017] FCA 1541] in the Australian digital ecosystem. Given this evidence, it is considered there is a need to reconsider the scope of Australia’s copyright safe harbour.

However, it was also noted that the [US safe harbour position] DMCA § 512 is not perfect and is not above reform. Accordingly, if the copyright safe harbour is extended to OSPs, three amendments could be made to division 2AA to bring greater clarity and balance. First, a more specific definition of a ‘policy of terminating accounts of repeat infringers’ ... Second, an additional limitation of wilful blindness could be included in the legislation. And, finally, the takedown notice regime could be strengthened by empowering an advisory service within the Department, and IP Australia (or another authority) could be allowed to regulate notices that have been issued in bad faith. (p 113)

19. The Committee notes that government reviews have recommended extension of the scheme including, most recently, the Productivity Commission’s *Inquiry into Intellectual Property Arrangements* rec. 19.1.

² “A Quiet Harbour: Finding a Balanced Approach to the Copyright Liability of Online Service Providers” (2020) 32 Bond Law Review 90

Conclusion and further contact

20. The Committee would be pleased to discuss any aspect of this submission.

21. Please contact the Chair of the Committee, Angus Lang, at lang@tenthfloor.org or on 02 9232 4609, if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section