

1 September 2014

Online Copyright Infringement Consultation
Commercial and Administrative Law Branch
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

Online Copyright Infringement Discussion Paper

Thank you for the opportunity to comment on the Government's Online Copyright Infringement Discussion Paper.

About Screenrights

Screenrights is a non-profit copyright collecting society representing rightsholders in film, television and radio. We have 3693 members from 62 countries. These include producers, distributors, broadcasters, sales agents and rightsholders in underlying works used in audio-visual material.

We administer a range of statutory licences, including the educational licence in Part VA of the Copyright Act and the retransmission licence in Part VC. These licences enable simple and effective access to audiovisual material and provide an important source of payment to our members for the use of their works.

Online copyright infringement

Our members' works are highly susceptible to online copyright infringement, affecting both creators of film and television and the broader economy. The most recent studies show piracy costs the Australian economy \$1.37 billion a year (Australian Screen Association: "The Economic Consequences of Movie Piracy" 2011). This was a conservative estimate that didn't count each pirated copy as a lost sale. The study was also conducted more than three years ago. The true scale of the problem may therefore be considerably larger than this study indicates.

Screenrights recognises that a multi-pronged approach is the most effective way to combat piracy. This includes education, effective legal access to copyright material through commercial and statutory licensing, and legislative measures that ensure all parties work together in tackling this problem.

The proposals

Screenrights strongly endorses the submission of the Australian Copyright Council in response to the Government's Discussion Paper. We make the following additional comments:

Proposals 1 and 2:

Screenrights supports proposals to extend authorisation liability so the absence of any power to prevent a particular infringement would not, by itself, preclude a person from taking reasonable steps to prevent or avoid an infringing act. We are concerned however that any amended legislation puts sufficient onus on ISPs to reach agreement with rightsholders on guidelines for what would constitute reasonable steps to be taken by ISPs.

We also support the second proposal for extended injunctive relief, however we have concerns about rightsholders being required to meet any reasonable costs associated with an ISP giving effect to an order, and to indemnify the ISP against any damages claimed by a third party. We see no reason why rightsholders should automatically be required to bear all costs. In our view, allocation of costs should be decided by a court.

Extended Safe Harbour Scheme

Screenrights is concerned that any extension of the safe harbour scheme should be carefully and cautiously considered. In particular, we believe further consideration needs to be given to the potential interaction between such an extension and the Part VA licence.

In the past there have been suggestions that educational institutions be specifically included as beneficiaries of such a scheme. We understand the Government is not proposing to extend the scheme to specified entities but rather to apply it to entities engaged in the categories of relevant activity, without specifying who these entities are. We assume this would mean that say a university could rely on safe harbor if it is engaged in the relevant activities, as could search engines such as Google and conceivably sites such as Facebook, eBay and Amazon.

First, we strongly believe that any broad extension of the scheme, such as the one proposed, must be coupled with clear details as to the obligations of those seeking to rely on the scheme. We also note that these obligations may not necessarily be the same for a carriage service provider as they would be for a site such as Facebook.

In relation to educational institutions relying on safe harbor, we are particularly concerned about how such an extension of the scheme would operate in conjunction with the Part VA broadcast licence for educational institutions.

Conceivably an educational institution could rely on safe harbour provisions to avoid monetary penalties should they breach the terms of their licence with infringing copies being shared over their networks. We would strongly object to any undermining of the licence through an extension of safe harbour.

We also note that under the licence, educational institutions can and do keep copied programs on their networks for an indefinite period of time. The licence requires them to report “anniversary online copies” to us if and when they are being surveyed. These are copies that were put online during the survey period in any year prior, and are therefore having an “anniversary” at this time. The reporting of this anniversary generates a new payment for the copyright owner as compensation for the fact that this capacity to keep copies indefinitely removes the need to make further copies and may have a negative impact on a rightsholder’s income.

The very real difficulty that both Screenrights and the education sector are grappling with is how to identify these copies on systems such as Blackboard and Moodle, which are not administered centrally and not readily searchable.

Our concern is that extension of safe harbour to include educational institutions should not hinder the capacity of copyright owners to seek payment for such copies. Again, we would see this as undermining the licence, detrimentally affecting our members’ payment for the educational use of their work.

Other approaches

Screenrights recognises that one of the most effective tools for combatting piracy is the provision of simple and technology neutral access to copyright material.

We believe our educational licences achieve this. Prior to the introduction of Part VA in 1990, there was considerable infringement of broadcast material by educators. This occurred because of the difficulty educators faced in obtaining permission to use this content prior to its broadcast. The considerable indemnity payments made by educational institutions for past copying when they first entered agreements with us substantiates this.

Over the last twenty years we have continued to ensure that our licence meets the changing needs of educators in the digital classroom. Most recently, our online streaming service, EnhanceTV Direct (www.enhancetv.com.au) has given teachers instant access to a vast archive of educational programs streamed to them at home or at school.

We believe innovative services such as this have a vital role to play in reducing piracy, and we continue to work closely with our members and our licensees to ensure our services meet their changing needs.

Conclusion

Screenrights notes that the creative industries are committed to working co-operatively with Government and other stakeholders to develop a legal framework which ensures there are effective and flexible processes in place to protect copyright online.

We also note that there are several proposals being advanced in this consultation period from representatives of the creative industries including the Music Rights Association and the Film and TV Bodies submission.

These proposals have been developed to achieve the shared outcome of having an effective legal framework to provide incentives for rightsholders and legitimate access for consumers.

Screenrights welcomes the opportunity to contribute to this important debate.

More information

If you would like further information about Screenrights or any aspects of our submission, please let me know.

Yours sincerely

Simon Lake
Chief Executive