



12 February 2016

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Mr Sam Ahlin
Legal Director
Copyright Law and Policy Section
Department of Communications and the Arts
GPO Box 2154
AUSTRALIA

By email: copyright@communications.gov.au

Dear Mr Ahlin,

Copyright Amendment (Disability Access and Other Measures) Bill 2016

Thank you for the opportunity to provide comments in relation to the *Copyright Amendment (Disability Access and Other Measures) Bill 2016* (the Draft Bill).

Free TV Australia (Free TV) is the peak industry body representing Australia's commercial free-to-air television broadcasting licensees. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings. On any given day, free-to-air television is watched by more than 13.5 million Australians.

Broadcasters are major owners, licensors and licensees of copyright material. In 2013/14 commercial free-to-air broadcasters invested a record \$1.54 billion in Australian content, which underpins much of the Australian creative sector. Over the last 5 years, Free TV broadcasters have invested \$6.62 billion in Australian content. Our members also frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production.

As both content owners and content users, commercial free-to-air broadcasters recognise the importance of a fair and balanced copyright system to all Australians. A robust and effective copyright regime is one that fosters creativity and innovation, and supports the creative industries and those who invest in them.

Our comments focus on those aspects of the Draft Bill most relevant to Free TV members.

Educational statutory licence

Free TV is supportive of the suggested amendments to modernise the educational statutory licence so that it covers the copying and communication of broadcasts and the underlying content contained in those broadcasts.

Free TV notes that, while s 113P(1) proposes to exempt educational institutions from infringement of copyright in a work subject to subsection (d) which provides that the amount of the work copied or communicated must not unreasonably prejudice the legitimate interests of the owner of the copyright, s 113P(2) in relation to broadcasts is not subject to a similar

condition that the amount of the broadcast copied or communicated must not unreasonably prejudice the legitimate interests of the owner of the copyright.

This discrepancy between works and broadcasts appears to be a drafting anomaly that has existed in the *Copyright Act 1968* (the Act) since the introduction of the Part VA statutory licence in 1990 and is a hangover from that time.¹ While Free TV is of the view that the statutory licences are currently working well, there is no reason for the discrepancy in the drafting of this provision. In the same way as all other copyright exceptions under the law, exceptions in relation to the copying of broadcasts should not be permitted to prejudice the legitimate interests of the copyright owner. All copyright owners should be treated in the same way.

Recommendation

Free TV recommends that a similar provision to 113P(1)(d) should be included in s 113P(2) so that the legitimate interests of the owner of copyright must be considered in relation to broadcasts in the same way as with works.

Expansion of safe harbour scheme

Schedule 2 to the Bill proposes to expand the current 'safe harbour' scheme in the Act so that it effectively applies to all 'service providers' that provide online services. It currently only applies to 'carriage service providers' as defined in the *Telecommunications Act 1997*.²

Free TV strongly opposes this proposed amendment in its current form and without first ensuring that the existing legal framework effectively deals with authorisation infringement in the online environment.

The safe harbour scheme and authorisation liability provisions in the Act are inextricably linked. Free TV is concerned that, without effective authorisation provisions, the expansion of the safe harbour scheme to cover all online service providers will lead to the scheme being used as a mechanism to circumvent the authorisation infringements provisions in the Act.

The purpose of the safe harbour scheme is to provide carriage service providers with protection from liability for hosting or communicating infringing material *that they have no control over*.³ However, where a service provider is aware of an infringement and it is within the power of a service provider to take reasonable steps to prevent that infringement, the service provider should be required to take those steps. This is consistent with the purpose of the authorisation infringement provisions at ss 36 and 101 of the Act.⁴

The authorisation liability provisions as they are currently operating do not adequately achieve this purpose in the online environment. The decision in *Roadshow Films v iiNet* highlighted this.⁵ It found that iiNet had no direct technical power to prevent its customers from using the BitTorrent system and that it could not be inferred from iiNet's inactivity after receiving AFACT notices that iiNet had authorised copyright infringement infringements of its subscribers. This was despite the fact that iiNet had the technical power to prevent infringing activities by suspending or terminating user accounts, as well as a contractual relationship with users whereby they agreed not to use iiNet's service to infringe copyright.⁶

¹ *Copyright Amendment Act 1989*.

² *Telecommunications Act 1997*, s 7.

³ For example see Australian Government Attorney-General's Department, *Revising the Scope of the Copyright 'Safe Harbour Scheme'*, Consultation Paper (2011)

⁴ Explanatory Memorandum, *Copyright Amendment (Digital Agenda) Bill 1999*, Items 39, 87.

⁵ *Roadshow Films Pty Ltd v iiNet Ltd [2012] HCA 16*.

⁶ *Ibid*.

The Government has previously recognised this issue in its discussion paper, '*Online Copyright Infringement*',⁷ which proposed to amend the authorisation liability provisions of the Act so that it is clear that they are intended to function the same way in the online environment as they did in the analogue environment.

This issue must be addressed prior to any extension of the safe harbour scheme. In the absence of such amendments, service providers will have no incentives to ensure that their customers do not use their services for piracy. The broadening of the safe harbour scheme will undermine the incentives for service providers to work with rights holders to minimise copyright infringement.

Recommendation

Free TV recommends removing Schedule 2 from the Draft Bill. Schedule 2 should be subject to a separate consultation process. The implications of the amendments proposed in Schedule 2 should not be considered in isolation but rather concurrently with amendments to the authorisation liability provisions.

Contact

If you have any queries or wish to discuss any of the matters raised in this letter, please contact me on (02) 8968 7100.

We look forward to engaging with you further on these issues.

Yours sincerely,



Julie Flynn
Chief Executive Officer

⁷ Attorney-General's Department, *Online Infringement Discussion Paper*, July 2014.