



Express law

fast track information for clients

1 SEPTEMBER 2014

Online Copyright Infringement Discussion Paper: extended deadline for submissions

The Government released the *Online Copyright Infringement Discussion Paper* on 30 July 2014. The discussion paper outlines 3 proposals for reforming the *Copyright Act 1968 (Cth)* to address online piracy.

The proposals, if adopted, would extend authorisation liability for copyright infringement, facilitate 'blocking' of infringing overseas websites by internet service providers (ISPs) and expand the operation of the current 'safe harbour' scheme.

In pursuing these reforms, the Government is seeking to 'create a legal framework that will facilitate industry cooperation to develop flexible and effective measures to combat online piracy'.

The Government's proposals

First proposal: extended authorisation liability

The first proposal is to extend liability for authorisation of copyright infringement, and is especially relevant to the liability of ISPs.

Currently, when determining whether a person is liable for authorising an act that infringes copyright, under ss 36(1A) and 101(1A) of the Copyright Act, the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned
- (b) the nature of any relationship existing between the person and the person who did the act concerned
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

The discussion paper proposes amendments to these provisions as a direct legislative response to the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42.

In *Roadshow Films v iiNet*, 34 major films studios brought an action against iiNet in which they claimed that iiNet had authorised acts that infringed copyright because it had the power to prevent its customers from illegally downloading movies and infringing copyright by issuing warnings to them or suspending or terminating their internet service.

The High Court held unanimously that iiNet had not authorised any acts of copyright infringement, as it did not have a direct technical power to prevent its customers from using illegal downloading services; it only had an indirect power to do so by terminating their contractual relationship.

Given this, and the lack of information provided to iiNet about the allegedly infringing activities of its customers, it was reasonable for iiNet not to take action in response to these allegations.

The Government's first proposal for reform is intended to make clear that, even where an ISP does not have 'direct power to prevent a person from doing a particular infringing act, there still may be reasonable steps that can be taken by the ISP to discourage or reduce online copyright infringement'.

It is proposed that the 'reasonable steps' element currently in para (c) will explicitly set out a number of factors that must be taken into account when considering whether reasonable steps have been taken. The extent (if any) of the person's power to prevent the doing of the act concerned would be only one of the factors considered in assessing whether reasonable steps had been taken to avoid the infringement.

The Government is looking for industry to come to an agreement on a scheme that specifies what 'reasonable steps' would entail. Failing this, the Government will prescribe its own measures.

Importantly, the discussion paper notes that the Government does not expect any such scheme to impose measures that would interrupt a consumer's internet access or impose sanctions on consumers without due process.

Second proposal: extended injunctive relief to block infringing overseas sites

The second proposal is to give courts the power to grant injunctions against multiple ISPs, requiring them to block access to overseas websites that contain infringing content.

The proposal is intended to overcome difficulties associated with having to take enforcement action against websites operated overseas. It would also enable rights holders to seek to block access to websites that offer infringing material without needing to establish liability for authorisation of copyright infringement by ISPs.

Before granting an injunction, a court would need to be satisfied that the dominant purpose of the website is to infringe copyright. Other factors would also need to be taken into account, such as the rights of persons affected, the proportionality of the response and freedom of expression.

Third proposal: extended safe harbour scheme

The third proposal is to extend the existing 'safe harbour' scheme, which precludes monetary remedies being awarded against 'carriage service providers' (as defined in the *Telecommunications Act 1997* (Cth)) who are found liable for primary or authorisation infringement when carrying out 'relevant activities' where certain conditions are met.

There are 4 categories of relevant activities covered by the safe harbour scheme, including, for example, 'acting as a conduit for internet activities by providing facilities for transmitting, routing or providing connections for copyright material' (Category A).

The proposal extends the 'safe harbour' scheme by substituting the reference to 'carriage service provider' under the Telecommunications Act with the term 'service provider', thereby allowing entities other than ISPs, such as universities and online search engines, to take advantage of the protections under the scheme.

Extended deadline for submissions

The Government has extended the deadline for submissions in response to the proposals to **5 September 2014**.

Any submissions received after the extended deadline may not be considered.

For further information please contact:

Rachel Chua

Senior Executive Lawyer

T 02 6253 7086

rachel.chua@ags.gov.au

Adrian Snooks

Deputy General Counsel Commercial

T 02 6253 7192

adrian.snooks@ags.gov.au

Tony Beal

Deputy General Counsel Commercial

T 02 6253 7231

tony.beal@ags.gov.au

Important: The material in *Express law* is provided to clients as an early, interim view for general information only, and further analysis on the matter may be prepared by AGS. The material should not be relied upon for the purpose of a particular matter. Please contact AGS before any action or decision is taken on the basis of any of the material in this message.

This message may contain confidential or legally privileged information. Only the addressee has the right to use or disseminate this information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS. Find out more about AGS at <http://www.ags.gov.au>.

If you do not wish to receive similar messages in the future, please reply to: <mailto:unsubscribe@ags.gov.au>