

Send in the Take-downs

Sophie Dawson, Joel Parsons and Eleanor Grounds take a look at preliminary Recommendation 7 which proposes a mandatory take-down standard, and consider how it will operate in the context of sections 36(1A), 101(1) and 115A of the Copyright Act.

Your company has just produced the most popular drama in Australia. It's a runaway success. It was a boon for the Australian entertainment industry and enjoyed critical acclaim. A victim of its own success, a website called something along the lines of "Free+EZtvStreamZ4me.com" uploads the entire work for all and sundry to access free of charge. The investment of a literal cast of thousands is eroded in an instant by the actions of a solitary pirate.

Submissions to the ACCC from organisations in the culture and media industries have put the spotlight on a growing frustration with the "whack-a-mole" phenomenon of online copyright infringement: as soon as one pirate gets taken down, another pops up. There is a distinct view among content creators that the legislative regimes currently available to them to enforce their intellectual property rights in Australia are not "fit-for-purpose in the digital environment".¹

The issue of how to get copyright-infringing material taken offline is at the heart of Preliminary Recommendation 7 (**Recommendation 7**) of the ACCC's Digital Platforms Inquiry (the **Inquiry**) Preliminary Report (the **Report**). In essence, the implementation of Recommendation 7 would see the introduction of a mandatory take-down standard for copyright-infringing content which digital platforms (namely social media platforms, search engines and digital content aggregation

platforms) would have to adhere to. There is not a great deal known about how a mandatory take-down standard would operate in practice and there are various questions concerning how it will work and what it will do. In particular, what is the potential interaction of such a standard with both the authorisation liability provisions in sections 36(1A) and 101(1A) of the *Copyright Act 1968* (Cth) (the **Copyright Act**) and the recently re-vamped s 115A of the Copyright Act, which is also designed to assist copyright holders with having copyright-infringing material taken down?

Challenges for rights holders

Rights holders have long said they face significant difficulties in getting copyright-infringing content removed swiftly when it has been uploaded to, or streamed from, online platforms, before the damage is done.

Submissions made by mass media both to the Inquiry in 2018, and in response to the Report in 2019, expressed a uniform sentiment: the current legislative regime is not working. Free TV Australia noted in its submission to the Inquiry that "there is currently no streamlined take-down notice system or procedure in Australia that applies to the platforms and the ad hoc processes that exist or are negotiated between platforms and content owners are inadequate".² Moreover, content creators claim that these "inadequate" processes "devalue broadcasters' intellectual

property by allowing their content to be pirated".³ One concern expressed by content creators is that large digital platforms in Australia model their take-down processes on those of their American parent companies. For example, Google Australia's terms provide that Google responds to notices of alleged copyright infringement and terminates accounts of repeat infringers according to the process set out in the U.S. Digital Millennium Copyright Act.⁴ In its submission to the Inquiry, Foxtel argued that such processes do not appear to reflect the Copyright Act and criticised them as being "not set up to appropriately manage the prevalence of unauthorised content on their platforms, even where rights holders are proactive and invest heavily in seeking to have that content removed".⁵

Rights holders have expressed the view that these issues are particularly problematic in the case of live broadcasted events, such as sports matches. Rights holders have historically resorted to taking action against the infringer directly rather than seeking redress from the digital platform. In 2017, a Brisbane man who was livestreaming the highly anticipated boxing match between Danny Green and Anthony Mundine on Facebook to more than 100,000 viewers received a phone call from a Foxtel representative ordering him to stop the livestream.⁶ Another man, whose livestream had reached more than 150,000 viewers, had the stream of content to his set-top box cut off.⁷

1. News Corp Australia, *Submission to the Australian Competition and Consumer Commission Digital Platforms Inquiry Issues Paper*, 20 April 2018, p 130.

2. Free TV Australia, *Supplementary submission by Free TV Australia*, September 2018, p 8.

3. Above n 2, p 12.

4. Google, *Google Terms of Service*, 25 October 2017, <<https://policies.google.com/terms?hl=en&gl=au>>.

5. Foxtel and Fox Sports, *Foxtel and Fox Sports Response to the Australian Competition and Consumer Commission's Digital Platforms Inquiry Issues Paper*, April 2018, p 6.

6. Lily Mayers and Riley Stuart, *Danny Green vs Anthony Mundine live streamers will face legal action from Foxtel*, 5 February 2017 <<https://www.abc.net.au/news/2017-02-04/green-v-mundine-live-streamers-warned-to-brace-for-legal-action/8241276>>.

Digital platforms have also been vocal throughout the submission process, particularly in detailing the significant investment they have made in developing their own infringement detection technologies and take-down processes which content creators can utilise to take action against infringers. For example, Google has invested over USD\$100 million in YouTube's Content ID system, which deploys matching software to scan videos for copyright infringement (for example, a homemade video set to a copyrighted song), and then notifies the rights holder and allows them to monetise, track or block the content. In its extensive submission in response to the Report, Google stated that, on average, YouTube answers Australian live stream copyright requests in two minutes and has paid more than USD\$3 billion to rights holders who have chosen to monetise content using Content ID.⁸ Google also stated that Content ID has been used effectively to combat unauthorised live streams of events such as the music festivals and premier league football games.⁹

The nuts and bolts: How does Recommendation 7 work?

Recommendation 7 provides:

“The ACCC proposes to recommend that the ACMA determine a Mandatory Standard regarding digital platforms' take-down procedures for copyright-infringing content to enable effective and timely take-down of copyright-infringing content. This may take the form of legislative amendments to the Telecommunications Act so that the ACMA has the power to set a mandatory industry standard applicable to digital

platforms under Part 6 of the Telecommunications Act.”

This presents as an elegant solution, being a single set of changes providing at least two important results: the regulation of digital platforms, as well as an increase in clarity of the operation of the Copyright Act's authoriser liability provisions, as discussed below.

The core proposal of Recommendation 7 is the implementation of a mandatory take-down standard applying to digital platforms that outlines effective take-down procedures.¹⁰ As noted in the Report, “a mandatory code, unlike a voluntary regime, is more likely to incentivise the compliance of digital platforms as it would be supported by meaningful sanctions and subject to enforcement by a statutory authority”.¹¹ Importantly, the proposed standard provides for a civil penalty of up to \$250,000 per contravention to be imposed on a digital platform who does not comply with an industry standard.¹²

The ACMA has the power to set industry standards applicable to the telecommunications industry, thus it is proposed that legislative amendments to the *Telecommunications Act 1997* (Cth) (**Telecommunications Act**) be made so that the ACMA be given the power to make industry standards in relation to digital platforms as well. Namely, Recommendation 7 proposes that the definition of ‘telecommunications industry’ in Part 6 of the Telecommunications Act be amended to include ‘an industry that involves carrying on business as a digital platform’.

That definition will itself prove to be a difficult drafting exercise. The

Report itself acknowledges that “the types of platforms ... can be broadly defined”.¹³ In particular, the Australian Copyright Council has said that care needs to be taken in the drafting of this definition to ensure it “does not directly or indirectly capture Australian media organisations”.¹⁴

Clearer position on authorisation liability of platforms

A mandatory standard could also serve to affect the operation of existing copyright infringement liability provisions in the Copyright Act. Depending on the circumstances, the conduct of digital platforms could be captured by sections 36(1A) and 101(1A) of the Copyright Act, which provide for copyright infringement by authorisation. However, there are complexities in relation to the application of these provisions as they're currently drafted to digital platforms. As noted in the Report, “a digital platform that merely ‘provides facilities’ for copyright-infringing communications would not be liable for the copyright-infringing acts of its users, unless there is ‘something more’ to show that the digital platform authorised the infringement”.¹⁵

Under s 36(1A) and s 101(1A) of the Copyright Act, in order for a Court to determine whether ‘something more’ has been done to authorise copyright infringement, it must take into account:

- (a) the extent (if any) of the digital platform's power to prevent the copyright infringement;
- (b) the nature of any relationship existing between the digital platform and the copyright infringer; and

7. Ibid.

8. Google Australia Pty Ltd, *Digital Platforms Inquiry: Submission in Response to the ACCC's Preliminary Report*, 18 February 2019, p 11.

9. Above n 8, p 54.

10. Australian Competition & Consumer Commission, *Digital Platforms Inquiry Preliminary Report*, December 2018, p 162.

11. Above n 10, p 161.

12. *Telecommunications Act 1997* (Cth) s 570(3)(b).

13. Above n 10, p 23.

14. Australian Copyright Council, *Response to the ACCC's Digital Platforms Inquiry Preliminary Report dated 10 December 2018*, 15 February 2019, p 4.

15. Above n 10, p 143; *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, [401].

- (c) whether the digital platform took any reasonable steps to prevent or avoid the copyright infringement, **including whether the digital platform complied with any relevant industry code of practice** [our emphasis].¹⁶

While the High Court has held that an internet service provider (**ISP**) had no direct ability to prevent its customers from using an unlawful peer-to-peer file-sharing network to unlawfully download movies,¹⁷ digital platforms are likely to have greater power to prevent their users from uploading copyright-infringing content.¹⁸ The Report suggests that a mandatory take-down standard would provide more certainty in instances where content creators are seeking to pin liability on digital platforms for authorising copyright infringement.

What would the mandatory take-down standard look like?

The precise content of the proposed mandatory take-down standard is currently unknown. No specific drafting has been proposed by the ACCC, making it difficult to analyse or predict the effectiveness of such a standard. However, this has not prevented industry stakeholders from making suggestions on what the standard should (or should not) look like. Suggestions include:

- a clear and realistic procedure for removing or disabling copyright-infringing content, “including a requirement to optimise technologies to detect infringing content, for example automated detection by technologies such as

Content ID, upload filters or other techniques”;¹⁹

- positive obligations on digital platforms to proactively monitor for and identify copyright-infringing content²⁰ and put mechanisms in place to prevent infringing content from being re-uploaded once it has been removed, including content with only minor variations to the original upload;²¹
- a specific process for engaging with rights holders, including timeframe limits on responding to inquiries and/or take-down requests;²²
- a requirement that material be removed expeditiously or, in the case of live content, immediately;²³
- a “three-strikes and you’re out” policy requiring digital platforms to terminate the account of a user who posts infringing material twice, receives a warning from the digital platform, and posts infringing material a third time;²⁴
- a requirement that digital platforms automatically compensate rights holders for any advertising revenue generated by the platform as a result of the infringing content;²⁵ and
- making it clear that compliance with a mandatory code would not automatically block rights holders from pursuing a copyright claim, or supporting a conclusion that a digital platform has not authorised infringement.²⁶

Free TV Australia argued in its response to the Report that “a ‘weak’ industry standard without clear obligations which sufficiently address rights holders’ concerns would risk further undermining authorisation liability”²⁷ and that a standard would only be effective if accompanied by an effective enforcement regime.

On the contrary, platforms like Google have argued that the introduction of a mandatory standard “would represent a departure from global best practices” and “will necessarily compromise the flexibility and efficiency of the existing tools ... resulting in a system that serves neither rights holders nor Australian consumers”.²⁸ In its submission to the Report, Google pointed to the extensive list of existing anti-piracy and anti-copyright infringement measures in place, arguing that “the proposal of a mandatory take-down standard could compromise the flexibility and efficiency of alternative approaches to combating copyright infringement”.²⁹ In addition to software like Content ID, Google employs a range of other protective measures, including demoting Google Search results which have received a large number of valid copyright take-down notices, the Trusted Copyright Removal Program (whereby rights holders can submit large volumes of take-down requests for webpages on a consistent basis) and preventing terms closely associated with piracy being suggested as part of the Autocomplete function on Google Search.

16. Copyright Act 1968 (Cth) s 36(1A), 101(1A).

17. *Roadshow Films v iiNet Limited* [2012] HCA 16.

18. Above n 10, p 143.

19. Free TV Australia, *Submission by Free TV Australia*, February 2019, p 31.

20. Above n 14, p 3.

21. *Ibid.*

22. Above n 19, p 32.

23. *Ibid.*

24. *Ibid.*

25. *Ibid.*

26. Above n 14, p 4.

27. Above n 19, p 30.

28. Above n 8, p 51.

29. Above n 8, p 53.

Google has advocated for the extension of the safe harbour scheme in the Copyright Act to digital platforms, in lieu of the mandatory take-down standard proposed in Recommendation 7. Whether it be the safe harbour scheme under Part V, Div 2AA or the site-blocking provisions in s 115A of the Copyright Act (as discussed below), it is evident that there is room for a conversation about whether an existing system could be adapted to incorporate digital platforms, as opposed to the introduction of a new system altogether.

Cutting to the chase: Copyright Act, s 115A

As outlined above, the apparent policy aim of Recommendation 7 is to give content creators an efficient mechanism to have content which infringes their copyright removed from digital platforms. In theory, it would give content-creators further means of disrupting the online supply of copyright-infringing content.

That also happens to be a stated purpose of the *Copyright Amendment (Online Infringement) Bill 2018* (Cth),³⁰ which introduced several amendments to s 115A of the Copyright Act. This begs the question: how would a mandatory take-down standard interact with the site-blocking provisions in s 115A?

Section 115A of the Copyright Act provides rights holders with the ability to apply to the Federal Court to grant an injunction directing an ISP to disable an online location outside Australia that infringes, or facilitates an infringement of, copyright, and has the primary purpose or primary effect of infringing, or facilitating and infringement of, copyright. In essence, s 115A was introduced to target unlawful pirate movie and music streaming sites.

Rights holders wanting to rely on s 115A to get infringing content taken down from digital platforms the likes of which Recommendation 7 is concerned with may face a variety of challenges. Firstly, the requirement that the website hosting the infringing content is an online location *outside* Australia may pose difficulties if the digital platform page in question is hosted in Australia. Secondly, the task of proving that a global search engine or social media platform's primary purpose or effect is to facilitate the infringement of copyright is mammoth. Thirdly, the site-blocking regime operates through the courts. In contrast, it seems the proposed mandatory standard (as vague as it currently is) would not require the first two of these thresholds to be met. However, it may still fail to address the same timeliness issue as the site-blocking regime.

The amendments made to s 115A in 2018 included the introduction of s 115A(2), which allows for the Court to grant injunctions requiring online search engine providers to take reasonable steps to remove search results that provide access to online locations giving access to infringing conduct. To date, there has been no judicial consideration of this section.

The alignment of purpose between the search result-blocking regime under s 115A(2) and whatever is to come of Recommendation 7 raises the obvious questions whether the rights conferred under both will in substance overlap, and whether they will interact. Of particular concern is whether, if they operate concurrently, they each have the potential to affect the operation of the other. For example, in determining whether a search result-blocking injunction should be granted, the Court may consider various matters including the availability of other remedies under the Copyright Act,³¹ and any other relevant matter.³²

The extent to which a search engine is also liable as an authoriser of copyright infringement, and in turn the extent to which that search engine has complied with any mandatory standard, will undeniably be relevant to these matters. If it becomes clear that a search engine is liable as an authoriser, does that mean that a copyright owner is more or less likely to be successful in obtaining an injunction pursuant to s 115A?

Section 115A(2B)(b)(ii) allows for a rights holder who has secured a search result-blocking injunction to agree in writing with the search engine provider to block further search results that arise after the initial injunction has been granted. This is an attempt at a more dynamic approach to removing infringing content, but what is the difference between this and the user-driven process of complaints and take-downs described above? Furthermore, will the mandatory take-down standard operate to regulate the conduct of search engine providers where there has been an injunction granted under s 115A(2B)(b)(ii)?

Submissions to the Inquiry, the Report and responses to the Report have not discussed the potential interaction in any substantive way, probably because the amendments were implemented in parallel with the Inquiry, and are yet to be judicially considered. The extent to which stakeholder submissions will be taken into account in any redrafting of the recommendation remains to be seen. The ACCC's final report is due 3 June 2019.

30. Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2018* (Cth), p 6.

31. *Copyright Act 1968* (Cth), s 115A(5)(i).

32. *Copyright Act 1968* (Cth), s 115A(5)(k).