

Submission to the Online Copyright Infringement Discussion Paper

Executive summary

The ALCC welcomes the chance to provide input regarding the proposals outlined in the Attorney-General's Department's *Online Copyright Infringement Discussion Paper*.

Libraries are significant purchasers of legal content, analogue and digital, thereby contributing financially to Australian rightsholders. We support creators, from our award winning children's authors to the writers of academic and government reports.

Librarians and other information workers are partners of authors, publishers and other creators of copyright protected works. Librarians and other information workers recognise the intellectual property right of authors and other creators and will seek to ensure that their rights are respected.¹

We strongly believe that Australians should be able to access knowledge and culture, and work to provide legitimate access to that content.

The recognition and protection of the role of libraries and archives through the proposed **extension of the safe harbor provisions is strongly welcomed**. Using the wider definition of 'service provider' is consistent with international norms, compliant with international obligations and something which we have been advocating for a number of years.²

However we are concerned that in an attempt to address the issue of online copyright infringement, the proposal to **extend authorisation liability is disproportionate and will lead to unforeseen consequences** for non-ISP intermediaries. Our concerns include:

- An increase in uncertainty for libraries and archives
- An increase in legal risk for institutions undertaking their duties
- A disproportionate attention to enforcement rather than addressing many of the underlying issues and outstanding recommendations

We also have **concerns about the proposal to block overseas based websites whose 'dominant' purpose is infringing copyright**. As stated in the International Federation of Library Associations' Code of Ethics³

Librarians and other information workers reject the denial and restriction of access to information and ideas most particularly through censorship whether by states, governments, or religious or civil society institutions.

¹ Loida Garcia-Febo, Anne Hustad, Hermann Rösch, Paul Sturges and Amelie Vallotton (FAIFE working group) [IFLA Code of Ethics for Librarians and other Information Workers](#). (August 2011)

² See joint ADA and ALCC submission the Attorney-General Review '[Extending the scope of the copyright safe harbours](#)' (2011)

³ Loida Garcia-Febo, Anne Hustad, Hermann Rösch, Paul Sturges and Amelie Vallotton op. cit.

While acknowledging several positive aspects of the proposal, such as the use of judicial process, we would retain serious concerns about the blocking of legitimate communications, as well as the creep of blocking and filtering. Should the government decide to go ahead with this proposal, we make some suggestions for improvements to ensure that it remains an open and targeted process.

The responses below consider the proposals against their effect on libraries and archives and their users. We make no comment on the impact of the scheme on other intermediaries, including ISPs.

About the Australian Libraries Copyright Committee

The Australian Libraries Copyright Committee (ALCC) is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee with members representing the following organisations:

- Council of Australian University Librarians
- Australian Library and Information Association
- National and State Libraries Australasia
- National Library of Australia
- National Archives of Australia
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Australian Government Libraries Information Network

Extension of authorisation liability

Libraries' and archives' fundamental role is as an intermediary, providing their users with access to materials. The legal doctrine of 'authorisation' of copyright infringement, which defines the circumstances when an intermediary will be held liable for the infringements of its users, is fundamental to libraries' and archives' continued operation. The proposed 'extension' to authorisation liability has the potential to increase legal risk and uncertainty and is not supported by the ALCC.

Libraries are very aware of their responsibilities to avoid authorising copyright infringement. The fact scenario in Australia's seminal authorisation case, *UNSW v Moorhouse*⁴ was based in a library. In that case the court found the university had authorised the copyright infringements of its students by placing unsupervised photocopiers in the library. In response, s104B was inserted into the *Copyright Act 1968* (the Act) as a legislative fix⁵ to enable libraries to continue to serve their users.

Given this background, the library and information sector is naturally concerned with the proposals to tackle online piracy primarily through an extension to authorisation liability. When authorisation liability was defined under the 2000 *Digital Agenda Act*, it was a codification of the principles

⁴ *UNSW v Moorhouse* [1975] HCA 26 (1975)

⁵ S104B provides that if the prescribed notice is affixed to the machine used to infringe then 'neither the body administering the library or [archives](#), nor the [officer in charge](#) of the library or [archives](#), is taken to have [authorised](#) the making of the [infringing copy](#) merely because the [copy](#) was made on that machine.

enunciated in *Moorhouse*. The current proposal, to move ‘power to prevent’ from one of the three considerations and have it as a factor to consider when deciding what constitutes ‘reasonable steps’ will overturn the settled law and understanding developed in the judicial precedents since *Moorhouse*. While the discussion paper seems to be directed at the effects of an extension of authorisation to ISPs all intermediaries will be affected by any changes to the scope of authorisation liability. It is unclear exactly how the change would play out, but it is clear it would increase uncertainty for libraries and archives.

Increased uncertainty and legal risk

In research recently commissioned by the Australian Digital Alliance (ADA) into the effects of extended authorisation⁶, Dr Giblin of Monash University noted a number of examples of areas where libraries would face uncertain legal liability and uncertainty as to the extent of their liability and the appropriate ‘reasonable steps’ they would need to undertake. Some simple examples of areas that would become practically difficult for libraries to negotiate include:

- Libraries allowing users to carry their mobile phone with inbuilt cameras inside library premises
- Library loan of materials, especially newer technologies such as ebooks
- Patron use of digitised unpublished and orphan historical works
- Library provision of ICT resources which may include access to cloud copying and storage
- Library provision of wifi and internet access to their users

Libraries play an important role in our society. The provision of internet is a key example.⁷ Libraries provide equality of access to users, and the provision of free internet is a key public benefit,⁸ as can be seen through projects like the Federal Government’s ‘Digital Hubs’⁹. The ability for users to walk in and access the internet, without pre-registering or providing multiple forms of personal identification can be important in ensuring access for the vulnerable.

Libraries are unlikely to be invited to any ISP/rightsholder discussions as to a ‘graduated response’ or other industry code for internet users. However the existence of such a code would have to be taken into account when deciding on whether libraries had taken ‘reasonable steps’ to prevent infringement. If libraries, daunted by uncertainty, chose to shelter in the extended safe harbours then they would have to wrestle with having an implemented policy for termination for repeat infringers.¹⁰ These steps would be logistically and ethically daunting for libraries, and could lead to a general curtailment of access.

Another complication arises from the fact that libraries themselves are customers of ISPs. This ranges from the libraries who utilise public wifi provision¹¹ to those who contract with commercial ISPs. It is unclear how ISPs would be expected to deal with corporate clients with limited power over

⁶ Giblin, R *Authorisation in Context: a research paper commissioned by the Australian Digital Alliance* (August 2014)

⁷ See for just one example SA libraries <http://www.libraries.sa.gov.au/page.aspx?u=48>

⁸ ALIA *ALIA Internet Access in Public Libraries Survey 2011* (2011)

⁹ See

http://www.communications.gov.au/digital_economy/programs_and_initiatives/digital_hubs_programme

¹⁰ See *Copyright Act 1968* s116AH

¹¹ For example the state library of SA uses the City of Adelaide free public wifi

the eventual end users. Would ISPs place additional burdens on libraries to monitor and curtail users' activity? Or would libraries be at risk of disconnection for the infringements of their users?

Enforcement of a broken system

The library and archive sector is disappointed at the focus on enforcement when there are long overdue reforms needed. Outstanding recommendations from the ALRC *Copyright and the Digital Economy*¹² inquiry, the *IT Pricing*¹³ review, the *Competition and IP*¹⁴ Review, the outstanding report into technological protections measures¹⁵ (TPMs) and long-standing issues such as perpetual copyright in unpublished works mean that Australia's copyright system is not adequate for the challenges of today.

The recent recommendation to introduce a 'fair use' exception is a case in point. At the moment many works that would be non-infringing in the USA would be infringing in Australia, with our narrower copyright exceptions. While the paper doesn't specify what exactly would constitute 'online infringement' we presume it concerns works that would be infringing in Australia, as otherwise works accessed from countries with little or no copyright protection would be fine. This could potentially see libraries (and other intermediaries) required to take steps to block access to popular YouTube Videos or facebook memes as they are technically 'infringing' content.

The ALCC strongly recommends that any further moves towards enforcement are made at the same time as the other reforms being undertaken so as to ensure a cohesive and workable copyright system.

Website blocking

The discussion paper proposes 'extended injunctive relief' for rightsholders against overseas based websites whose dominant purpose is to infringe copyright.

As stated above, the library and archive sector is fundamentally uncomfortable with censorship and filtering of the web, which can block access to knowledge and legitimate speech.

The core mission of librarians and other information workers is to ensure access to information for all for personal development, education, cultural enrichment, leisure, economic activity and informed participation in and enhancement of democracy.¹⁶

Website blocking should be a last resort¹⁷ and conducted in an open and transparent manner.

We acknowledge some strong positives in the way the provision is currently drafted. The use of the impartial judicial process, the requirement for rightsholders to indemnify intermediaries, the onus of

¹² [Copyright and the Digital Economy](#) (ALRC Report 122) (2013)

¹³ [At what Cost? IT Pricing and the Australia Tax](#) (2013)

¹⁴ Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000)

¹⁵ Attorney-General's Department [Review into Technological Protection Measures](#) submissions closed 2012, report still to be released

¹⁶ Loida Garcia-Febo, Anne Hustad, Hermann Rösch, Paul Sturges and Amelie Vallotton op. cit.

¹⁷ We note that this is only available to 'overseas' based websites – we would prefer it to be for websites outside of any practical reach of the rightsholders. If there is, for example a US based rightsholder organisation and a US based site, it would be reasonable for direct action to be commenced in the USA. Some scope for this to be considered by the court would ensure this measure is used only when no other measures would be practical.

proof being on the rightsholders and the additional factors that would have to be taken into account (effect on freedom of expression, proportionality and the rights of individuals are currently suggested).

We would like to see these bolstered. For example, we would like there to be a requirement for the reasons for granting an injunction to be published, even if the action is *ex parte* or by consent. Similarly, we would expect that each website would be considered by the judge against the agreed standard, even if the action is not contested. We have some concerns about 'dominant purpose' as we have seen several sites flourish that have dual purposes, with some people using them to disseminate illicit material and others to undertake legitimate communications. The requirement to consider proportionality, freedom of expression and individual rights should be mandated.

Court orders should be limited to that which is required, so listing specific sites, and be time limited. Parties who wish to add new sites or extend the time should have to approach the court again.

Finally there should be monitoring, both of the effectiveness of the scheme and to ensure that other sites are not blocked by accident. ASIC's recent accidental blocking of quarter of a million websites¹⁸ is a pertinent example.

Extended safe harbours

The ALCC wholly supports the extension of the safe harbours to encompass non-ISP service providers. This move is consistent with our international obligations, in particular the safe harbour provisions of AUSFTA. It brings us into line with the USA, and will provide comfort and security to intermediaries if they chose to rely on the safe harbours when undertaking the actions in s116AC-AF.

We do caution that while safe harbours may offer safety to libraries and archives for some activities, they are not a substitute for the extension of authorisation liability. The safe harbours have stringent requirements, including an implemented policy for termination, that mean that they need to be used with caution. It would not be suitable for libraries to be required to rely on the safe harbours for matters that are either currently not within the scope of authorisation liability or for which the library is taking 'reasonable steps' under today's considerations. Additionally some potential causes of authorisation liability, such as patron mobile phone use, would not fall within the categories of action eligible for protection.

In conclusion

For the reasons provided above, the members of the Australian Libraries Copyright Committee welcome the extension of the safe harbours provision but are against the proposals in their current form for the extension of authorisation liability and the blocking of overseas based websites whose 'dominant' purpose is infringing copyright.

¹⁸ See for example <http://www.abc.net.au/news/2014-08-27/asic-accidentally-blocked-250000-websites-ip-address/5701734>