



Response to the ACCC's Digital Platforms Inquiry Preliminary Report dated 10 December 2018

ACC Submission date: 15 February 2019

A. VIEW OF THE AUSTRALIAN COPYRIGHT COUNCIL

1. The Australian Copyright Council (**ACC**) is an independent, non-profit organisation that represents the peak bodies for professional artists and content creators working in Australia's creative industries, as well as Australia's major copyright collecting societies.¹ Our members include representative bodies for a number of journalists and writers, including the Media, Entertainment & Arts Alliance, and the Australian Society of Travel Writers. We also regularly provide legal advice and educational seminars directly to (among others) journalists and producers.
2. As advocates for the contribution of creators to Australia's culture and economy, the ACC welcomes the ACCC's Preliminary Report as an important acknowledgment of the burdensome legal and practical issues faced by rights-holders wishing to protect their copyright. These issues are exacerbated by the current market structure in which a number of digital platforms possess, as found in the Preliminary Report, substantial market power. We also strongly believe that the integrity of the Australian media, and the work of its journalists, producers and other creators working within the industry, needs to be appropriately valued and preserved to ensure its continued contribution to Australian culture and public interest.
3. In response to the Preliminary Report, and as elaborated upon below, the ACC:
 - a. agrees that the Preliminary Report accurately sets out difficulties faced by rights-holders in the age of digital platforms, although we highlight some further issues below; and
 - b. broadly agrees with the recommendations of the Preliminary Report (particularly preliminary recommendation 7 regarding take-down), although that is subject to the comments made below in which we invite the ACCC to conduct further consultation into the issue of authorisation liability. The ACC also broadly supports the proposed areas for further analysis and assessment identified in the Preliminary Report (including the establishment of a digital platforms Ombudsman).

¹ See Schedule 1 for a full list of the ACC's affiliates.

B. RIGHTS-HOLDERS AND DIGITAL PLATFORMS

4. We live in a ‘copy and paste’ world such that technological advancements will continue to present difficult challenges requiring potentially tough solutions in the field of copyright.² With that in mind, the ACC agrees with and supports the ACCC’s identification of various issues faced by rights-holders in the context of their works being reproduced without authorisation via digital platforms, broadly summarised as follows:
- a. practical problems (including cost and delay) experienced when attempting to monitor and enforce copyright due to overseas-based defendants hosting content outside of Australia, noting that digital platforms may apply the same take-down procedures in the Australian jurisdiction as they do in the US subject to its *Digital Millennium Copyright Act* of 1998;³
 - b. there being minimal incentives for digital platforms to respond in a timely manner to take-down requests (thereby eroding the value of the works) or, indeed, any apparent positive obligations on digital platforms to search for and remove copyright-infringing content;⁴ and
 - c. restricted ability to pursue copyright claims pursuant to the *Copyright Act 1968* (Cth) including:
 - i. where ‘snippets’ of news articles, or headlines, are concerned;⁵
 - ii. due to uncertainties in establishing authorisation liability, that is, liability for the authorisation of a copyright infringing act where digital platforms are concerned;⁶ and
 - iii. potentially inadequate remedies even where a copyright claim is successfully pursued.⁷
5. As part of our funded objectives, the ACC offers a free legal advice service to (among others) members of our affiliate organisations. This includes journalists who are increasingly engaged as freelancers rather than employed journalists who do not even have the financial backing of a media employer. It is our experience that many of those individuals feel powerless to pursue legal claims and rarely do so – beyond a take-down request which may or may not be successful – due to the expense and complexity involved with pursuing unauthorised copyright use especially where a large digital platform located overseas is involved.
6. In addition to the problems identified by the ACCC in its Preliminary report, we have also identified the following factors as problems faced by rights-holders:
- a. a false belief on the part of individual rights-holders that Australian law somehow formally acknowledges a take-down process for search engines and social media sites, given that overseas processes are used to deal with local content;

² For further submissions in this area previously authored by the ACC, see [Submission to the ALRC – Copyright and the Digital Economy November 2012](#); [Submission in Response to Submission in Response to the ALRC Copyright and the Digital Economy Discussion Paper July 2013](#); [Copyright Modernisation Consultation Paper July 2018](#).

³ ACCC’s Digital Platforms Inquiry Preliminary Report dated 10 December 2018 pp 12, 91, 152, and 154-160.

⁴ Ibid 12, 91, 152 and 154.

⁵ Ibid 12, 141, 142, 273 and 279.

⁶ Ibid 12 and 143.

⁷ Ibid 143 and 157; *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541.

- b. a total inability to pursue copyright claims in countries where Australia has not entered into a reciprocal agreement of judgment enforcement;
 - c. while the site-blocking scheme contained within section 115A of the *Copyright Act 1968* (Cth) has provided some support to rights-holders in Australia where international online locations are concerned, in ... it is a scheme that is essentially prohibitive from a costs perspective for individuals to pursue;
 - d. even where take-down requests are acknowledged and acted on by digital platforms, that action often comes too late as far as preserving the value of the works involved (particularly a problem where news items are concerned), and are often of limited utility given that the same unauthorised content can often be found at alternative online locations as soon as the URL is taken down;
 - e. arguments unhelpfully raised in response to copyright concerns when they are raised, including:
 - i. broad interpretations of Australian fair dealing defences such as the reporting of news, criticism and review and satire; and
 - ii. the suggestion that portions of material copied from news stories are merely reproductions of 'facts' rather than works (for instance, where quotes of interviewees are lifted without permission from the original copy); and
 - f. Potential evidentiary burdens of showing joint authorship where various people may be involved in the production of a creative work.⁸
7. There is evidence to suggest that these problems will be further exacerbated in the area of news and current affairs given that a significant number of consumers will not pay for news.⁹

C. PRELIMINARY RECOMMENDATION 7: TAKE-DOWN STANDARD

8. The ACC supports further consideration of whether an ombudsman should be appointed to monitor the operations of digital platforms. We also note the ACCC's intention to share and discuss its findings with fellow regulators internationally; this will support the ongoing and positive discussions held at an international level by the Department of Communications and the Arts, and the Department of Foreign Affairs and Trade.
9. While the ACC in principle supports the preliminary recommendation substantively aimed at improving the position of rights-holders under copyright, namely the introduction of a mandatory code to be overseen by ACMA, the ACC says the following:
- a. Given that the consultation process involved with such a step will be, we would expect, lengthy and potentially costly, we would still invite the ACCC to as an initial step further consider ways of fixing the 'root' problem faced by rights-holders as it relates to introducing certainty in the areas of:
 - i. authorisation liability; and
 - ii. coupled with that, consideration of positive obligations on the part of digital platforms to monitor for copyright infringing content;

⁸ *IceTV v Nine Network Australia* (2009) 139 CLR 458; *Fairfax Media Publications v Reed* (2010) 80 IPR 11.

⁹ [Deloitte Media Consumer Survey 2018](#) pg 10.

- b. Specifically, the ACC invites consideration of the kinds of steps being currently considered in the EU which acknowledge that those digital platforms holding significant market power should have some accountability for the misuse of others by their platforms (whether it be the sharing or locating of infringing content);¹⁰
 - c. Take-down processes will provide limited assistance where certain content, such as live music concerts or sporting matches, are not dealt with immediately; and
 - d. If a mandatory code is to be pursued with associated amendments to the *Telecommunications Act 1997* (Cth), then care should be taken in any associated drafting such that:
 - i. the definition of 'digital platforms' (noting it extends in this Inquiry to 'online search engines, social media and digital content aggregators') does not directly or indirectly capture Australian media organisations;¹¹
 - ii. compliance with the mandatory code cannot be taken by a court as supporting a conclusion that there has not been an authorisation infringement on the part of a digital platform;¹²
 - iii. while the introduction of such a code may provide ACMA with further regulatory oversight, compliance with the mandatory code should not act in any way as a stumbling block to a rights-holder's ability to pursue a copyright claim, noting that that online service providers were, following extensive consultation, excluded from the operation of the expanded safe harbour scheme that came into operation in December 2018.¹³ Digital platforms should not be able to use compliance with a mandatory take-down code as a back-door way of obtaining the benefit of the safe harbour scheme.
10. In addition to the bodies identified at page 162 of the Preliminary Report as appropriate stakeholders for ACMA to consult with, the ACC would also invite consideration that there be specific reference to those representing creators' interests, including but not limited to the ACC.

D. CONCLUSION

11. The ACC acknowledges the difficulties involved with the issues concerning digital platforms and is thankful to the ACCC for considering the terms of this submission.
12. Should the ACCC have any further queries or require further information, please let us know.

Grant McAvaney
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Australian Copyright Council

¹⁰ Directive on Copyright in the Digital Single Market, 2016/0280 ('EU Copyright Directive').

¹¹ Noting that the term 'internet content host' may extend to platforms administered by media organisations: see cl 90, Schedule 5 of the *Broadcasting Services Act 1992* (Cth) as discussed in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCA 125.

¹² See [Free TV's Second Submission to ACCC Issues Paper dated September 2018](#) pg 15, responded to in the ACCC's Preliminary Report at pg 160.

¹³ See www.copyright.org.au/ACC_Prod/Test/News_items/2018/Safe_Harbour.aspx.

SCHEDULE 1: AFFILIATES OF THE ACC

As at the date of this Submission, membership of the Australian Copyright Council is comprised as follows:

1. Aboriginal Artists Agency
2. APRA AMCOS
3. Ausdance National
4. Australia New Zealand Screen Association
5. Australasian Music Publishers Association Ltd
6. Australian Directors Guild
7. Australian Guild of Screen Composers
8. Australian Institute of Architects
9. Australian Institute of Professional Photography
10. Australian Music Centre
11. Australian Photographic Judges Association
12. Australian Publishers Association
13. Australian Recording Industry Association
14. Australian Screen Directors Authorship Collecting Society Limited
15. Australian Society of Authors
16. Australian Society of Travel Writers
17. Australian Writers Guild
18. Authentic Design Alliance
19. Christian Copyright Licensing International
20. Copyright Agency
21. Media Entertainment & Arts Alliance
22. Musicians Union of Australia
23. National Association for the Visual Arts
24. National Tertiary Education Union
25. Phonographic Performance Company of Australia
26. Illustrators Australia
27. Screen Producers Australia
28. Screenrights