COPYRIGHT ADVISORY GROUP
COAG EDUCATION COUNCIL

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Copyright Amendment (Online Infringement) Bill 2015

This submission is made on behalf of the Copyright Advisory Group to the Council of Australian Governments Education Council (***CAG***). CAG represents schools and TAFEs in Australia on copyright issues, and is assisted by the National Copyright Unit, a small secretariat based in Sydney, of which I am the Director. CAG members include Commonwealth, State and Territory Departments of Education, all Catholic Education Offices and the Independent Schools, as well as the majority of TAFE colleges.

CAG appreciates this opportunity to provide comments on the *Copyright Amendment (Online Infringement) Bill* 2015 ***(the Bill***). CAG would also like to take this opportunity to reiterate the urgent need for reform of the copyright safe harbours in Part V Division 2AA of the Copyright Act ***(the Act***). This reform, which was foreshadowed in the Government's Online Copyright Infringement Discussion Paper ***(Discussion Paper***), is long overdue and should be included in any copyright bill that goes forward following the Committee's review of the Bill.

CAG comments on the Bill

CAG makes two comments on the drafting of the Bill:

Facilitating copyright infringement

The site blocking regime set out in the Bill would apply to online locations that have the primary purpose of infringing copyright or facilitating an infringement of copyright. The Bill itself is silent as to what is intended by the term "facilitate".

CAG is concerned that as the Bill is presently drafted, the use of this term may have unintended consequences, including for copyright law more broadly. It is not clear, for example, whether the concept of "facilitating" copyright infringement is intended to encompass a wider range of conduct

than would come within the concept of "authorising" an act that infringed copyright.[1] If so, the proposed site blocking regime may be found to apply to conduct that would not amount to an infringement of copyright under Australian law. This would be quite out of step with approaches to site blocking that have been adopted in comparable jurisdictions. It may also have unintended consequences for the law of authorisation.

We note that paragraph 6 of Explanatory Memorandum to the Bill states that the purpose of the scheme is "*to allow a specific and targeted remedy to prevent those online locations which flagrantly disregard the rights of copyright owners from* ***facilitating access to*** *infringing copyright content"*. In our submission, this intention would be better reflected in the Bill if references in the Bill to "facilitating infringement" were changed to *"facilitating* ***access to*** *infringing content*".

Allowing for internet users to challenge overbroad orders that restrict access to legitimate content

CAG also submits that it would be appropriate to amend the Bill to provide for individuals and groups who may be adversely affected by a site blocking order to apply to the court to have the order varied or rescinded. We note that in the UK, courts have accepted the importance of ensuring that internet users have standing to challenge site blocking orders. In 2014, UK judge Justice Arnold said:

> *In order to make sure that the rights of users are protected, I consider that in future [site blocking] orders should expressly permit affected subscribers to apply to the Court to discharge or vary the orders.*[2]

In its current form, the Bill does not provide for internet users or public interest groups to apply to make such an application.

Copyright safe harbours

CAG is concerned that despite numerous Government consultations since 2005 – the most recent of which occurred at the end of last year – legislation has not been brought forward to give effect to the Government's foreshadowed amendment to the copyright safe harbours to include all online service providers.

The problem

Currently, the safe harbours are limited to 'carriage service providers' as defined in the *Telecommunications Act* 1997 instead of the broader term 'service providers' contained in the AUSFTA (and as used in the corresponding provisions in the United States).

The practical effect of this is that while commercial ISPs have the benefit of the safe harbour scheme, Australian educational institutions do not, even though their counterpart institutions in the United States do have such protection. This leaves Australian schools open to potential legal

[1] Under Australian copyright law, copyright can be infringed either by doing, or by authorising another person to do, one of the acts comprised in the copyright.

[2] Cartier International & ors v British Broadcasting Limited & Ors [2014] EWHC 3354 para 263

challenge for copyright infringements committed by students or staff using systems or networks provided by the institution. With the rollout of fast– speed broadband networks, schools are increasingly engaging with students online. They are doing this for educational purposes. While schools take reasonable steps to ensure, so far as possible, that their systems are not used to infringe copyright, they remain vulnerable to actions by copyright owners in respect of alleged infringing conduct by staff and students using their IT systems.

The risk that schools currently face is not merely theoretical: in 2003, music companies commenced proceedings against universities alleging that their IT systems had been used to infringe copyright. Schools are similarly exposed. There does not appear to be any – appropriate policy reason for providing schools with less protection than commercial ISPs – when this is clearly envisaged by AUSFTA.

What schools have asked for

The Attorney– General's Department (AGD) conducted consultations on this issue in 2005, 2011 and 2014. During each of these consultations, schools have asked for an expansion of the safe harbour scheme to include those entities which provide online services and access but currently fall outside the definition of 'carriage service provider'.

In its 2014 Discussion Paper, the Government proposed a simple amendment to the Act that would achieve the reform that schools have been seeking for 10 years. CAG strongly supported that proposal. It is not only schools (and other online service providers) that would benefit from this reform: copyright holders would also benefit by having a formal process set out in the Act to deal with any detected infringements occurring via school networks.

We urge the Committee to recommend that in the event that the Government proceeds with a site blocking regime, legislation also be enacted, at the same time, to bring about this urgent and long overdue reform.

Yours sincerely

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NATIONAL COPYRIGHT DIRECTOR