

Submission by the
Media, Entertainment and Arts Alliance – Equity Section
To
Legal and Constitutional Affairs Committee

Inquiry into the Copyright Amendment (Online Infringement) Bill 2015

16 April 2015



The MEAA is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Introduction

MEAA represents members who rely on copyright recognition and enforcement and those concerned about arbitrary and disproportionate barriers to accessing information.

It is essential that copyrighted materials are valued and that producers', performers' and journalists' rights to benefit from the content they have generated is maintained.

This submission primarily represents the views of members of our Equity section, which represents the interests of actors and performers.

Copyright infringement is a serious threat to performers' livelihoods. Every quarter, MEAA disburses between \$1m to \$4m in residual payments to performers working in Australia on screen productions. The amount of residuals paid to performers is calculated on the number of times the content is licenced, sold and/or legally viewed. Performers receive nothing when a production is illegally downloaded.

For performers, residuals are a vitally important supplementary income stream. Australian professional actors receive substantially less average income than all other occupational groups (including non-professional and blue-collar occupations), a mean arts-related income of less than \$30,000 per year. Copyright infringement denies Australian screen actors their right to be properly remunerated.

The following principles guide this submission:

1. Our members create original content that entertains and informs their fellow citizens. They have the right to expect fair reward for their work.
2. Recognition and enforcement of the legal rights of copyright owners is critical for the future of our industry and the livelihood of our members.
3. There is no regulatory or legislative silver bullet to achieve this outcome. However a well-targeted regulatory framework may help to reduce copyright infringement and mitigate the damage arising from piracy.

4. A punitive approach that does not recognise the power of new technology and the right of Australian consumers to access content in a timely and affordable fashion may actually be a backward step for the future of our industries by encouraging piracy and, in the minds of some consumers, legitimising it.

5. Market based solutions and education of consumers about the importance of fair payment for original content must be the primary path to securing the future of our industry where breaches continue to occur. A regulatory framework is also necessary to ensure that original content makers can enforce their right to fair reward for their work.

6. Any legislative or regulatory element to a solution must clearly guard against any unintended limitation of free speech and exchange of information.

Copyright Amendment (Online Infringement) Bill 2015

The proposed Bill amends the *Copyright Act* 1968 to enable a copyright owner to apply to the Federal Court of Australia for an order requiring a Carriage Service Provider (CSP or ISP) to block access to an online location *outside* Australia that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

This would be achieved by way of injunction to disable access to an infringing online location while only having to establish on a prima facie basis the CSP's liability for or authorisation of copyright infringement.

The defined target of these injunctions is online locations whose 'primary purpose' is infringing or facilitating the infringement of copyright. Factors to be taken into account by a Court in determining the issue of an injunction include: **i)** the flagrancy of alleged offending behaviour; **ii)** whether disabling access to a location is a proportionate response; **iii)** the impact on persons affected by an injunction; and **iv)** the public interest in disabling online access.

Piracy's Causes

Piracy should not only be viewed as individuals seeking free content. Consumer frustration and resentment at geo-blocking and the related release and charging practices of rights owners is a significant impediment to securing community goodwill in favour of rights owners. As Minister for Communications, Malcolm Turnbull recently said in Parliament, 'in combating online copyright infringement the most powerful weapon that rights holders have is to provide access to their content in a timely and affordable way.'¹

MEAA fear that the introduction of the proposed injunctive power may, absent any corresponding commitment from copyright owners, serve to entrench current release strategies of mass copyright owners and simply add to their apparent immunity from market forces that would otherwise compel behavioural change.

MEAA believes that moves to legislatively address the legitimate concern of copyright owners to protect their work should be introduced in conjunction with market strategies which provide access to content in a timely and affordable way.

Copyright Notice Scheme Code 2015

The MEAA has reviewed the recently released Copyright Notice Scheme Code 2015 (the Code).

Whereas the federal government's Bill provides for legal remedies against an ISP, the Code relies on ISPs accepting reports about infringements from rights holders and then issuing notices to account holders concerning the alleged infringements.²

An account holder who receives three notices³ within a twelve month period may trigger, at the their request, a review by an Independent Adjudication Panel by submitting a 'Challenge Notice' and/or be subject to the ISP facilitating a discovery process to assist the rights holder to enforce its copyright. The Telecommunications Industry Ombudsman (TIO) is excluded from dealing with notice disputes.

¹ Hon Malcolm Turnbull, Second Reading Speech, 27 March 2015

² The Code appears to be restricted to residential account holders who are natural persons, thereby excluding business account holders. The MEAA is not aware of the reasons for this limitation.

³ Notice One is an 'Education Notice'; Notice Two is a 'Warning Notice'; and Notice Three is a 'Final Notice'

An ISP is ultimately required to 'act reasonably to facilitate and assist an application by a rights holder for Preliminary Discovery', which would presumably be directed towards a rights holder pursuing formal legal action.

MEAA supports the notion that warnings must be issued to a person who may be participating in piracy activity as an essential step in educating consumers and discouraging improper activity. We note a word of caution about the power imbalance between individual content consumers and the commercial entities who are likely beneficiaries of any punitive measures that might follow the issue of three notices within the prescribed period. MEAA joins with other interest groups and individuals in not supporting punitive action(s) against individual internet users.

MEAA Believes There is More Work to Be Done

As outlined above, a range of issues should be addressed in addition to the creation of more statutory offences or Code infringement procedure. These include reviewing the degrees to which strategic pricing and staggered (i.e. delayed) release dates actually encourage or provide the purported rationale for improper access to content. In some instances, these commercial decisions regarding strategic pricing and staggered release may constitute legitimate strategies to recover costs. Or they may constitute unfair commercial practices which lock out Australian consumers from timely and affordable access to content.

These issues also need to be addressed as part of a comprehensive strategy to reduce piracy in a manner which enjoys broad community support.

If the Bill is Progressed

MEAA request the inclusion of the following additional factors to which a court must have regard when considering the issue of an injunction:

- a. Whether copyright is owned by a single person or entity or is owned severally;
- b. The financial loss that will accrue if an injunction is not issued in respect of the online location;
- c. Whether the online location receives a commercial or monetary benefit from copyright infringement(s).

In addition, MEAA seeks the federal government's agreement to these new arrangements being subject to:

- The court's acceptance of submissions from interested persons (e.g. a public interest advocate) or entities about the necessity and/or duration of the injunction; and
- Unless otherwise provided, the Bill's provisions shall, if enacted, be subject to statutory (or equivalent review) after two years to determine the efficacy or otherwise of the scheme, including: i) the number of injunctions; ii) the benefits to copyright owners; iii) its impact on internet users; and iv) the impact on incidences of piracy.