

Copyright Act Amendments: Safe Harbour and Disability Access

Luke Dale, Partner, Eli Fisher, Senior Associate, and Jonothan Cottingham-Place, Law Clerk, at HWL Ebsworth consider some recent and proposed changes to the Copyright Act.

Summary

Safe harbour changes

The 'safe harbour' scheme, as set out in Division 2AA of Part V of the *Copyright Act 1968* (**Act**) was drafted to offer some legal protection to carriage service providers in exchange for assisting rights holders with the identification of copyright infringers. The scheme protects carriage service providers from copyright infringements that they do not control, initiate or direct, provided they quickly remove the content upon notice.

The *Copyright Amendment (Service Providers) Bill 2017* (**Bill**), currently before the Senate, proposes to introduce several sections to the Act which extend the safe harbour scheme limitations on the scope of remedies to a broader range of 'service providers'.

Disability access

The *Copyright Amendment (Disability Access and Other Measures) Act 2017* (**Amendment Act**) came into force on 22 December 2017, amends the Act to provide a greater level of protection to those dealing with copyright works for people with certain types of disabilities.

These amendments follow Australia's ratification of the Marrakesh Treaty, and aim to improve access to published works for people who are 'blind, visually impaired and print disabled'. In summary, the Amendment Act will provide exceptions under copyright law, allowing for the legitimate reproduction of published works for visually impaired people.

Changes

Safe harbour changes

Currently, the Act provides safe harbour to "carriage service providers" in certain circumstances. As defined in the *Telecommunications Act 1997*, a carriage service provider is a person who uses a network unit to supply carriage services to the public. Under that definition, a carriage service provider most prominently includes telecommunications companies such as Optus, Telstra and TPG. The Bill intends to broaden the scope of those protected by safe harbour laws by introducing a new definition of 'service provider' under section 116ABA of the Act, which will include carriage service providers but also other categories of service providers. In particular, this will extend protection to educational institutions, libraries that either make their collection available to the public or are Parliamentary libraries, archives (including the National Archives of Australia and specified state archives), galleries, museums and key cultural institutions including specific archives and libraries that are not open to the public.

The Bill also affords safe harbour protections to organisations involved in assisting persons with a disability, including vision impairment or learning disabilities.

Disability access

The Amendment Act expands the definition of a person with a disability to include someone who has difficulty reading, viewing, hearing or comprehending copyright material in a particular

form. There is also a new definition of what constitutes an organisation assisting persons with a disability, which incorporates educational institutions, or not-for-profit organisations in which the principal function is to provide assistance to people with a disability.

These amendments will broaden the scope of those able to receive access to copyright materials under the Act. This is especially important to small or not-for-profit organisations who would otherwise adopt a risk averse approach, in that it allows them to take advantage of all available resources.

What does this mean?

Safe harbour changes

If this Bill is passed, it would see safe harbour rights extended to various types of new organisations. The changes would advocate a cheaper and quicker 'notice and take down' process without court intervention for deterring copyright infringements, which may assist in protecting and promoting the rights of intellectual property owners.

The Bill will also mitigate the risks associated with providing services to the public, for example allowing for the release of unpublished documents such as reports, articles and diaries. Without safe harbour protection, this would have left service providers, such as schools, universities and libraries vulnerable to legal action, as opposed to a request to have the infringing material removed.

It is important to understand that even if the Bill is passed there will be limitations to the protections

provided, especially to Australian creators and innovators. Under the amended act, website hosting companies based in Australia will still be liable for copyright infringing content uploaded by their users and clients, leaving them with the task of ensuring all content is monitored and managed prior to use.

Disability access

The Amendment Act introduces a flexible fair dealing exception for people with a disability, and individuals or organisations assisting persons with a disability. This exception allows copyright materials to be reproduced if the purpose is for people with a disability to have access to the material. This might include braille or audio reproductions of texts, or the enhancement and enlargement of certain media, including newspapers, articles, magazines or books.

The Amendment Act also provides for a second exception, protecting organisations assisting persons with a disability, or a person acting on behalf of such an organisation. This exception allows organisations to make copies of copyright material without infringing copyright, where the purpose is to assist a person with a disability to access the material, and the material cannot be obtained in that format within a reasonable time at an ordinary commercial place. However, this exception applies

only where the use of copyright material does not unreasonably impact on the commercial interests of a copyright holder. Failure to properly assess the commercial impact of a reproduction may result in penalties applying despite the protection afforded by the Amendment Act.

Comments

Generally

It is important to note that the more controversial extension of safe harbour to search engines, online platforms and cloud services, which was proposed in the Exposure Draft of the *Copyright Amendment (Disability and Other Measures) Bill 2016*, appears to have been shelved for now. Likewise, the implementation of a Fair Use regime, as proposed recently by the Australian Law Reform Commission (2014) and then the Productivity Commission (2016), has also not been advanced at this stage. Such a regime could theoretically alleviate some of the difficulties that these two reform packages are intended to address.

Safe harbour changes

Copyright owners who might previously have ignored infringements related to their intellectual property due to the time and costs associated with instituting legal proceedings might now consider filing 'notice and take down' claims with the new range of service providers.

For service providers, the Bill may afford the leeway required to extend the range of services currently provided. Universities, schools and libraries that are looking to provide greater online access to information will find themselves protected against adverse legal action as a result of intellectual property material that is published online. Libraries specifically, which provide access to online resources to the public, will be afforded a greater scope of protection, and consequently the ability to provide more information to the public. In summary, there will be a decrease in the risk of infringement for organisations that take reasonable steps to deal with copyright infringement.

Organisations should familiarise themselves with the responsibilities and obligations associated with coverage under safe harbour laws. The development of a more 'catch-all' infringement system may result in a sudden influx of notices being received by service providers. In this case, failure to act quickly and correctly may result in penalties applying.

Disability access

Organisations and individuals involved in assisting persons with a disability are now in a netter position to legitimately access, manipulate and reproduce copyright materials. It is important to note, however, that these exceptions are not without limitations. We recommend that advice should be sought in relation to copyright material prior to use, and wherever possible copyright owners should be contacted directly in advance, to ensure that the process is as fair and transparent as possible.

Contributions & Comments

Contributions and Comments are sought from the members and non-members of CAMLA, including features, articles, and case notes. Suggestions and comments on the content and format of the Communications Law Bulletin are also welcomed.

Contributions in electronic format and comments should be forwarded to the editors of the Communications Law Bulletin at:

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