



28 May, 2007

The Secretary,
Senate Environment,
Communications Information Technology and the Arts Committee
PO Box 6100
Parliament House,
CANBERRA ACT 2600

By Email: ecita.sen@aph.gov.au

Dear Sir/Madam

RESPONSE TO COMMUNICATIONS LEGISLATION AMENDMENT (CONTENT SERVICES) BILL 2007 ('THE PROPOSED LEGISLATION')

We thank you for the opportunity to comment on the above proposed legislation.

About the Arts Law Centre of Australia

The Arts Law Centre of Australia (**Arts Law**) was established in 1983 and is the national community legal centre for the arts.

Arts Law provides legal advice, publications, education and advocacy services each year to over 2500 Australian artists and arts organisations operating across the arts and entertainment industries.

About our clients

Our clients not only reside in metropolitan centres, but also contact us from regional, rural and remote parts of Australia, and from all Australian states and territories. Our client base is multi-cultural, and both Indigenous & non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists and the organisations which support them.

The comments that we make in this submission are informed by our clients' profile, which is that they are:

- new, emerging artists or established arts practitioners or arts organisations;
- creators of their own material and users of other artist's work;
- operating arts businesses;
- operating in all arts sectors;

- working in both traditional and digital media;
- on low incomes/ with limited funds;
- needing to be self-reliant in business;
- limited in their ability to enforce rights;
- eager for accessible legal information, although they typically have limited legal education; and
- at least professionally, legally compliant.

What impact is the proposed legislation likely to have on Artists?

The arts have a long history of interaction with available technologies. With the increased use of content convergent technologies, artists have used technologies both for the creation and dissemination of their work. Respective examples of such work include interactive music videos, and live streaming of multimedia art forms, short films, short experimental digital cinema, video artworks, web and sound art. The convergent content services technology has provided not only an alternative form of expression for artists, but also a means through which they are able to market, and therefore possibly generate income from, their work. In some cases, particularly where digital and multimedia artists are concerned, the use of this technology may be the artist's sole means of generating income or interest in their work.

The proposed legislation is likely to detrimentally affect artists' use of convergent content technologies for the purposes of artistic expression, as well as their ability to disseminate said works through that technology. Arts Law submits that the onus imposed on carriage service providers to 'remove access to a service where it is considered to contain prohibited material'¹ is likely to result in an exercise of that very broad discretion in a way which may discriminate against digital and multimedia artists.

Objectives likely to affect artists:

Community Standards and the Arts

One of the key objectives behind the proposed legislation is the requirement that 'providers of convergent content services should be required to respect *community standards*'² (emphasis added). Of key concern to Arts Law is how such community standards are to be assessed in light of the arts. The proposed legislation fails to consider that community standards and expectations in relation to artistic works, may differ from those in relation to generally available content, for example, advertising. While Arts Law supports the objective of protecting children from exposure to 'inappropriate or harmful' content, the broad discretion available to convergent content service providers for the removal of works which do not comply with such an objective, has the potential to discriminate against the Arts sector.

Consistent treatment of 'essentially the same content'

This objective serves to potentially discriminate against artists who may be affiliated with a particular style or means of communicating their work, if such style or means of communication is taken for the purposes of the proposed legislation to exclude them on the basis of such similarity. Each work is individual and this highlights the

¹ Communications Legislation Amendment (Content Services) Bill 2007, Explanatory Memorandum, The Parliament of the Commonwealth of Australia, Pg 2

² Ibid, pg 8

need for a flexible assessment procedure. Differences between works may include the content itself, the way in which the content is made available, the way in which the content is made interactive, or the effect of the individual interactions with the available work.

The danger in legislating for the more efficient removal of access to works which are 'essentially the same content' is that content service providers may 'err on the side of caution' and remove access to *all* works which they assess as being similar to other access barred examples. As such, the potential danger is that an entire genre of artistic expression could be 'tarred with the same brush' and made inaccessible to the public.

Paragraph 89 of the Explanatory Memorandum discusses the proposed regulations in relation to ephemeral content, stating that the education of industry assessors would facilitate a consistent approach. It is our understanding that part of this intended consistency is the removal of 'like' material. The danger in creating a system of removing works by virtue of their similarity to other works is two-fold; it:

- (a) assumes that the assessor of the work is able to distinguish and compare two works; and
- (b) supports a system which relies on the discretion of the individual assessor in their distinguishing and comparing the works (which in itself is inconsistent with the idea of uniformity).

As such, when such 'education' occurs, the consideration of arts based issues may be an investment in the ability of such assessors to appropriately distinguish and compare digital and multimedia material relevant to the arts.

Lack of appeal process – suggestions for change

Arts Law is also concerned about the lack of appeal processes available to content creators who have been denied access to carriage service provider's platforms, as a result of such platforms deciding that the material is inappropriate. Despite providing a complex system for the revocation of take-down notices as described in Clause 48 to 51³ (inclusive), it does not provide a simple appeals process for content providers. We submit that the need for a fair review process exists and that such process could essentially follow the process available to those seeking to have content *removed* from internet service provider (ISP): including an internal appeal through the ISP, followed by an external review through the Australian Communications and Media Authority ('AMCA'). Such a process would not only give artists the flexibility of dealing directly with the ISP involved, but would also, upon progression to ACMA, highlight the nature of the issues faced by content creators in light of these amendments.

Conclusion

It is our submission that the proposed legislation does not adequately take into account the needs of filmmakers, multimedia and digital artists in Australia. The broad scope of the discretion available to ISP's for the refusal of access to certain material, is likely to detrimentally affect both artistic expression and dissemination. The proposed legislation does not, in our view, sufficiently cater for artists likely to be affected and fails to provide an appeals or revocation avenue to content creators, against whom an access decision has been made.

³ Communications Legislation Amendment (Content Services) Bill 2007, Division 2,

As Arts Law was not consulted during the DCITA's consultation process, we submit that further investigation regarding the impact of these proposed changes on artists creating content needs to be further explored.

We are prepared to expand on any aspect of this submission, verbally or in writing.

Yours Faithfully,
Artslaw Centre of Australia