



## **ARTS LAW CENTRE OF AUSTRALIA SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE ON THE COPYRIGHT AMENDMENT (ONLINE INFRINGEMENT) BILL 2015**

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# **Arts Law Centre of Australia submission to the Senate Legal and Constitutional Affairs Committee on the Copyright Amendment (Online Infringement) Bill 2015**

## **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 expert legal advice, publications, education and advocacy services each year to over 4,000 Australian artists and arts organisations operating across the arts and entertainment industries.

Our clients reside in metropolitan centres and in regional, rural and remote parts of Australia. They are from all Australian states and territories. Our client base is multi-cultural, Indigenous and non-Indigenous.

Arts Law supports the broad interests of artistic creators, the vast majority of whom are emerging or developing artists. We also represent the organisations that support them.

As an independent organisation giving legal advice to copyright users, copyright owners and creators across Australia, Arts Law is in a unique position to comment on the balance between competing interest groups. Arts Law advocates for artists to be rewarded for their creative work so that they can practise their art and craft professionally. We also support fair and reasonable access to copyright material. We believe that balance is crucial in fostering creativity and is essential for the intellectual and cultural development of society.

While the online environment provides new opportunities for creators to reach new audiences and collaborate, online infringement is a problem for creators large and small. If a creator's work is online then there is a real potential that the work is going to be taken without the creator receiving any payment. What was once only a problem for the music industry is now a problem across all art forms – writers, photographers, visual artists and filmmakers.

## **Submission**

Arts Law thanks the Legal and Constitutional Affairs Committee for the opportunity to make a submission in relation to the **Copyright Amendment (Online Infringement) Bill 2015**:

- 1 Arts Law supports the statement of matters to be taken into account by a court, which is set out in clause 115A (5) of the Bill, that will ensure that the interests of the copyright owners as well as the interests of ISPs and the operator of the online location would be taken into account before the Court makes a decision to block access to an online location.
- 2 In relation to the costs likely to be incurred by ISPs of implementing the injunctions described in paragraph 20 of the Explanatory Memorandum, Arts Law's position is set out in our submission to the Discussion Paper published by the Attorney General's Department (2014), these costs should be treated as a cost of the ISP doing business in the online environment. Arts Law wishes to restate our submission to the Discussion Paper regarding costs:

- [2.1] Because ISPs generating income from providing internet access, that the ISPs have the primary responsibility for ensuring their services are not used to defeat the policy objectives of the copyright legislation. Arts Law notes that in the *Newzbin2* case,<sup>1</sup> Mr Justice Arnold stated in relation to costs claimed by the ISP British Telecom (BT) in relation to implementing the blocking of infringing websites, “[i]n my judgment the costs of implementing the order should be borne by BT. The Studios are enforcing their legal and proprietary rights as copyright owners and exclusive licensees, and more specifically their right to relief under [copyright law]. BT is a commercial enterprise which makes a profit from the provision of the services which the operators and users of *Newzbin2* use to infringe the Studios’ copyright. As such, the costs of implementing the order can be regarded as a cost of carrying on that business.”<sup>2</sup>
- 3 Arts Law, in our submission to the Communications Alliance on the Copyright Notice Scheme Industry Code (DR C653:2015), has supported a policy position of greater ISP liability because ISPs are making money though providing internet access and the volume of data being distributed through their network. We believe ISPs have a primary responsibility for ensuring internet services are not being used to defeat policy objectives of copyright laws.
- 4 Our client data in the last year shows that out of a total of 177 requests for advice as to copyright infringement, 61 queries related to online infringement; that is, 34% of queries related to online infringement of copyright. This data provides an indication of the significant impact on artists of copyright infringement occurring in the online environment.
- 5 While Arts Law believes that independent creators with low incomes will be unable to afford to take legal proceedings to seek injunctions, Arts Law supports the actions of larger rights holder groups that are in a position to obtain injunctions to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright as we would anticipate a positive flow-on effect to our clients as the result of changes to consumer behaviour engaging in online copyright infringement.
- 6 Arts Law’s position regarding injunctive relief is set out in our submission to the Discussion Paper published by the Attorney General’s Department (2014). Arts Law wishes to restate our submission to the Discussion Paper regarding injunctive relief:
- [6.1] Rights holders should have the ability to obtain injunctions that require ISPs to disrupt, or block altogether, data traffic to and from particular sites (e.g. thePirateBay.org and cyberlockers) that are considered to be hubs for infringing activity.
- [6.2] Guidance as to the matters that a court could be required to determine when granting an injunction can be found in the decisions of the English court in respect to the

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<sup>1</sup> *Twentieth Century Fox Film Corporation v British Telecommunications Plc* [2012] 1 All ER 869, [2011] EWHC 2714 (Ch) (26 October 2011) ‘*Newzbin2*’ case <http://www.bailii.org/ew/cases/EWHC/Ch/2011/2714.html>

<sup>2</sup> *Newzbin2* case [32].

injunctions directed against the Newzbin1 website<sup>3</sup> and the Newzbin2 website.<sup>4</sup> In the Newzbin2 case Mr Justice Arnold considered the authority of English courts to grant injunctions against ISPs and held that for such an injunction to be made,<sup>5</sup> it was enough that the ISP knew in general terms the scale of copyright infringement occurring on the infringing website so that actual knowledge of a particular transaction infringing copyright was not required.<sup>6</sup> Arnold J. also considered the question as to the manner by which rights holders can provide an ISP with information as to infringing activity so that the ISP has "actual knowledge"; Arnold J stated that *"a service provider may be given actual knowledge of infringement by receipt of a sufficiently detailed notice and a reasonable opportunity to investigate the position."*<sup>7</sup>

[6.3] The operators of infringing websites and cyberlockers and technically-proficient web-users may be able to circumvent the effect of blocking injunctions. However that does not destroy the justification for injunctions to block data traffic to and from particular sites as the disruption to the operation of the website can be recognised as being sufficient justification.<sup>8</sup>

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<sup>3</sup> *Twentieth Century Fox Film Corporation v Newzbin Ltd* [2010] FSR 21; [2010] EWHC 608 (Ch) (29 March 2010) Kitchin J. held that the defendant (which operated the Newzbin1 website), which indexed and sorted postings to Usenet groups, is liable for the copyright infringement of its users when they download films, software and television programmes and issued an injunction under s.97A of Copyright, Designs and Patents Act 1988 (CDPA).

<sup>4</sup> *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2012] 1 All ER 806, [2011] RPC 28, [2011] EWHC 1981 (Ch) (28 July 2011). In the 1<sup>st</sup> 'Newzbin2' case Arnold J. considered: the s.97A CPDA requirement of actual knowledge of another person using an internet service to infringe copyright; and the legal remedies that can be obtained to combat online copyright infringement by the Newzbin2 website that operated in essentially the same manner as the Newzbin1 website; Arnold J. confirmed that a blocking injunction is already available under s.97A CPDA, albeit with a narrower scope than the injunction envisaged under ss. 17-18 Digital Economy Act 2010 (UK).

<sup>5</sup> Section 97A(1) CDPA (UK) requires "actual knowledge of another person using their service to infringe copyright".

<sup>6</sup> 1<sup>st</sup> 'Newzbin2' case [2011] EWHC 1981 (Ch) at [147]-[149]. <http://www.bailii.org/ew/cases/EWHC/Ch/2011/1981.html>

<sup>7</sup> Ibid. [149].

<sup>8</sup> Arnold J., in the 1<sup>st</sup> 'Newzbin2' case, commented that it is difficult to accurately predict whether people would cease their activities or find substitute sources of unauthorised content; and notwithstanding that uncertainty, *"the order would be justified even if it only prevented access to Newzbin2 by a minority of users"*. [2011] EWHC 1981 (Ch) at [198]. In a subsequent decision Arnold J. confirmed that the injunction was targeted, technically feasible and financially affordable; *Twentieth Century Fox Film Corporation v British Telecommunications Plc* [2012] 1 All ER 869, [2011] EWHC 2714 (Ch) (26 October 2011). The 2<sup>nd</sup> 'Newzbin2' case. <http://www.bailii.org/ew/cases/EWHC/Ch/2011/2714.html>