Bird & Bird

Digital Platforms and the mandatory take-down code

The ACCC has recommended that a mandatory industry code be implemented to govern the take-down process of digital platforms operating in Australia. This is to more efficiently facilitate rightsholders' requests for the removal of copyright-infringing content appearing on digital platforms. The ACCC proposes that the ACMA would develop and enforce the code.

The substance of Recommendation 8 appeared in the Preliminary Report as Recommendation 7. In its Final Report, the ACCC again says that a mandatory take-down code would have two key benefits:

1 It would assist content creators and media businesses in getting quicker and more efficient take-downs. Civil penalties of up to AU$250,000 could apply (if the civil penalty regime is similar to other pre-existing mandatory codes), incentivising compliance.

2 It would improve the clarity of authorisation liability under the *Copyright Act 1968* (Cth). Stakeholder submissions to the Inquiry suggested that ambiguity around the liability position of platforms as authorisers of copyright infringement under the Copyright Act means it does not act as an effective deterrent, and does not encourage platforms to remove infringing material. Judicial decisions have indicated that the mere 'provision of facilities' that enable a copyright infringement to occur does not constitute authorisation of copyright infringement. Section 36(1A) and 101(1A) of the Copyright Act say that a Court must consider whether the alleged authoriser of infringement took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice. Accordingly, a platform's failure to comply with a mandatory code would theoretically assist rightsholders in successfully suing platforms for copyright infringement, in the event the platform did not comply with the code.

The Final Report says that the new take-down procedures could be implemented by legislative amendments to enable the ACMA to develop a relevant mandatory standard under the Telecommunications Act 1997 (Cth) (as was recommended in the Preliminary Report). In the Preliminary Report the ACCC suggested that the definition of 'telecommunications industry' in Part 6 of the Telecommunications Act be amended to include "platforms", however, the Final Report leaves the mechanism of implantation open-ended, and says the code could be introduced via "any other appropriate legislative amendments". Drafting amendments to the Telecommunications Act in a way that was foreshadowed in the Preliminary Report would involve devising a definition of "digital platform". It is notoriously difficult to produce such a definition, and as the Australian Copyright Council has said, such a definition would require careful drafting to ensure it "does not directly or indirectly capture Australian media organisations".

Depending on the legislative mechanism utilised, once the ACMA is empowered to develop the mandatory code, the ACCC says the ACMA could consult with stakeholders as the ACMA would when developing any other code under the Telecommunications Act. Ironically, this could involve a requirement that the details of the mandatory standard be published in a newspaper circulating in each state and territory.

The ACCC says the eventual code should include a framework for co-operation between rights holders and digital platforms, to cover at least the following:

1. How rightsholders and digital platforms should co-operate to proactively identify and prevent the distribution of copyright-infringing content online.

2. Measures to improve communication between rightsholders and platforms, including the requirement that platforms have personnel available during Australian business hours, and during the broadcast of important live events.

3. Reasonable timeframes for the removal of infringing content and specific processes in the case of time-sensitive content such as live commercial broadcasts.

4. Mechanisms for rightsholders to make bulk notifications to address repeated infringement.

5. Measures to streamline the process by which the rightsholder must prove copyright ownership before take-down action occurs.

A key evolution between Recommendation 7 of the Preliminary Report and Recommendation 8 in the Final Report appears to be a greater emphasis on co-operation between platforms and rightsholders. The suggestion that platforms have people available during Australian business hours and during important broadcast events, and requiring digital platforms to have deference to time-sensitivity during such events, will be welcomed by broadcasters who trade on live-broadcast events and require quick action to protect their intellectual property. In recent years it has become apparent that a rudimentary live stream hosted on a digital platform which re-broadcasts a televised event, can be used to diminish the value in live-broadcast content for rightsholders.

It is intended that the code would have some interaction with sections 36(1A) and 101(A) of the Copyright Act, but it is currently unclear as to how the code will interact with other key provisions. For example, the recently introduced search-result blocking mechanism under s 115A(2) allows the Court to consider the availability of other remedies under the Copyright Act, or any other relevant matter, in determining whether a search-result blocking injunction is appropriate. The existence of a mandatory code could be seen as a "relevant matter", and could perhaps weigh against the granting of injunction pursuant to s 115A(2) in certain circumstances.

Section 115A(2B)(b)(ii) of the Copyright Act allows for a rightsholder who has secured a search result-blocking injunction to agree in writing with the search engine provider to block further search results that arise after the initial injunction has been granted. This is an attempt at a more dynamic approach to removing infringing content, but what is the difference between this and the user-driven process of complaints and take-downs described above? Furthermore, will the mandatory take-down standard affect the conduct of search engine providers where there has been an injunction granted under s 115A(2B)(b)(ii)? The Final Report notes the existence of the above mechanisms, but there is no consideration of their interaction with the proposed code.

Based on previous stake-holder submissions it is expected that Recommendation 8 will receive a mixed response from platforms and rightsholders. Assuming the government indicates a willingness to pursue this reform, as described above, there will likely be some time before the proposal can be implemented. Amendments to the Telecommunications Act, if that is the mechanism utilised, will be required before the ACMA then develops, consults on and implements the mandatory take-down code. This will likely take the relevant reform process into the second half of 2020 and possibly beyond.

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