



Australian Government
Attorney-General's Department

December 2022

Copyright enforcement review

Issues paper

About this review

Copyright, a type of property founded on a person's creative skill and labour, protects the original form or way an idea or information is expressed¹. Some common forms of copyright material include writing, movies and TV shows, visual art and images, music, and video games. In Australia, copyright is governed by the *Copyright Act 1968* (Cth) (the Copyright Act), which is administered by the Attorney-General's Department (the department).

Copyright arises automatically when an original work is made in a material form. It provides owners with exclusive economic rights to do certain acts with copyright material, or to give permission for someone else to do those acts, for a limited period of time². Depending on the type of material, copyright owners' exclusive rights may include the right to:

- copy (or reproduce) the material
- publish the material
- perform the material in public
- communicate the material electronically to the public (for example, through broadcast or over the internet)
- make an adaptation of the material (for example, write a screenplay based on a novel)
- cause the material to be heard and/or seen in public, and
- enter into a commercial rental arrangement in relation to the material.

In general, copyright is infringed when someone:

- does one of the exclusive acts reserved to the copyright owner without that owner's permission, or
- does certain things (such as selling, importing, hiring out or exhibiting) with items that were made in a way that infringed copyright.

Examples of copyright infringement could include downloading music, TV shows or movies from the internet, photocopying a book, or making a recording of a live performance, without permission and/or paying to do so.

In addition, the Copyright Act also allows copyright owners to take legal action against someone who does things to circumvent technological protection measures (technical tools designed to prevent copyright infringement, such as IP blocking based on location) used to protect their material without being able to rely on a relevant exception.³

¹ Copyright does not protect the idea or information itself.

² The duration of copyright can differ depending on the type of copyright material and if it has been made public.

³ A technological protection measure includes a device, product or technology used by a copyright owner to control access to a copyright work. Examples may include password protection or other forms of encryption. Australian copyright law includes a number of exceptions that allow for the legitimate circumvention of technological protection measures in some circumstances, such as for computer security testing, law enforcement and national security, or to facilitate certain aspects of libraries and archives' operations.

Copyright is distinct from other forms of intellectual property established under Australian law, such as designs, trade marks and patents. These are governed by their own legislation and have their own enforcement mechanisms.⁴

Copyright underpins the vibrancy and value of Australia’s creative industries and supports innovation across many other sectors of the economy. A robust and effective copyright system:

- encourages the creation of new creative material, while also
- allowing access, enjoyment and use of this material by the public with appropriate permission and /or payment, and
- reasonable uses of copyright material without permission in certain public interest circumstances⁵.

Copyright infringement may harm Australia’s creative ecosystem and broader economy by reducing or diverting income that creators of, and investors in, original material rely on for their financial sustainability. Copyright owners need to be able to take reasonable steps to protect and enforce their rights as part of a well-functioning copyright system. To this end, the current system includes a range of enforcement mechanisms (including industry-driven and statute-based mechanisms) to address unauthorised uses of copyright material. At the same time, it is important that consumers, service providers and other businesses are clear about when they can use copyright materials and in what circumstances.

The Government is committed to copyright laws that protect Australian artists and enable them to earn a living from their creative works. The Australian copyright enforcement regime must remain fit-for-purpose.

Purpose of this review

The Australian Government is undertaking this review to:

- understand current and emerging enforcement priorities and challenges
- gather views from all parts of the copyright system – including owners, users, institutions and service providers – on whether Australia’s copyright enforcement regime remains relevant, effective and proportionate, and
- seek feedback on whether there is any need to supplement or strengthen existing enforcement mechanisms, and if so, how this could be done without imposing unreasonable administrative or economic burdens.

Figure 1 provides an overview of the consultation process.

⁴ It is possible for some kinds of creative output to be protected by more than one kind of intellectual property law. For example, a two-dimensional work of visual art that is registered as a design under the *Designs Act 2003* may also continue to be protected by copyright.

⁵ The Copyright Act includes some targeted exceptions which allow unpaid uses of copyright material without permission in certain circumstances – for example, certain uses by a library or archives in the course of maintaining its collection; ‘fair dealings’ with copyright material for purposes such as research or study, criticism or review, or access by persons with a disability. The Copyright Act also provides for some statutory licences that allow entities such as schools, universities and governments to make certain *paid* uses of copyright material without seeking permission from individual copyright owners.

Figure 1 – Timeline for the review



Making a submission

The department invites interested parties to make a submission providing their views on the issues raised in this paper, supported by evidence (where possible). While the department encourages responses to be structured around the specific questions asked in this paper, you may also provide additional views and information relevant to Government consideration of copyright enforcement issues.

Submissions to this review processes should be made **by 7 March 2023, 5 pm**, through the [department's website](#), in Microsoft Word or PDF format. If you experience difficulty in submitting through the department's website, you may send your submission to copyright.consultation@ag.gov.au attaching a cover page with the following information:

- Whether your submission represents the views of an organisation or group (and if so, identifying which one), or your personal or professional views
- Your name
- Your email address and/or preferred contact number⁶
- A statement that you consent (or do not consent) to the Attorney-General's Department contacting you in relation to your submission and the broader review
- A statement that you:
 - consent to your submission being made public:
 - under your/your organisation's name, or
 - anonymously, or
 - do not consent to your submission being made public.

Your submission may be made public unless you request that it not be made public or the Attorney-General's Department considers it should not be made public. That will usually only occur for reasons associated with fairness (for example, because it appears to reveal private or confidential information relating to another person, or is potentially defamatory) and relevance. Submissions that are made public may include redactions made as the Attorney-General's Department considers appropriate.

⁶ Contact details will not be published, and are only used by the department for the purpose of contacting you in relation to your submission and/or the broader review if consent is provided.

If your submission includes confidential information that you would like to be redacted from a published version, please provide two separate versions of your submission:

- a public version (clearly marked as such) that includes your redactions – please upload this version through the department’s website at the link above
- a confidential version (clearly marked as such) that is not to be published – please email this version to copyright.consultation@ag.gov.au.

Current copyright infringement challenges

At a basic level, copyright infringement occurs when:

- someone does one of the exclusive acts reserved to the copyright owner (discussed above) without the owner’s permission, or
- deals in an item made in a way that infringed copyright, and a relevant exception (or statutory licence) under the Copyright Act does not apply.

In practice, this can take a variety of forms: examples include playing music or films in public without a licence, copying a substantial part of another writer’s original work in a book, the downloading and sharing online of unlicensed copies of TV series episodes or video games, or the importation and sale of clothing items printed with unlicensed artwork.

Copyright owners seeking to enforce their copyright against such unauthorised uses can face significant time, resource and financial costs in monitoring for infringement and pursuing legal action against alleged infringers. Responding to an allegation of copyright infringement is also likely to give rise to similar barriers and costs.

The way we create and consume copyright material changes over time, and a significant number of Australians are embracing online and digital content. In the 2021 Consumer Survey on Online Copyright Infringement (‘2021 OCI survey’)⁷ commissioned by the department, 71% of respondents reported consuming content online⁸ in the three months to April 2022.

A range of technological advancements and market developments have contributed to this increase in appetite for digital and online content and the proliferation of such content, including the increasing role and influence of digital platforms (box 1). In addition, broader social and economic factors may have helped to accelerate the move to people consuming more copyright content online, with a new ‘normal’ still emerging. For example, the COVID-19 pandemic saw the closure of physical performance spaces and stay-at-home orders forced industry and consumers to move to online streaming of content, which may have resulted in some longer-term changes to consumer behaviour and industry practices. Other factors may include:

- the increase in different sources of paid and unpaid content sources (for example, the growth in video on demand streaming services), and
- cost of living pressures which have forced users to reconsider how and how often they consume content.

⁷ Orima Research, [Consumer Survey on Online Copyright Infringement 2021 Survey Findings Report](#) (2021).

⁸ At least one of music, movies/films, tv programs, video games or live sport.

Box 1 – Digital platforms and their impact on consumption of copyright content

Digital platforms have been defined by the Australian Competition and Consumer Commission (ACCC) as ‘applications that serve multiple groups of users at once, providing value to each group based on the presence of other users’.⁹ They are present across a range of sectors, and include online search engines, video-conferencing platforms, social media, digital content aggregators and e-commerce sites. Digital platforms typically generate their revenue from advertising via the collection and harnessing of user data and ‘capturing user attention’.¹⁰

Digital platforms and their services have a range of benefits for both consumers and businesses, such as being a useful resource for gathering information and exchanging ideas, enabling easier access to a vast array of online media with greater convenience and personalisation, and new distribution, marketing and revenue generating channels for Australian businesses and content creators.¹¹

However, digital platforms can also be used by third parties as a tool to engage in copyright infringement. For example, TV shows or music may be uploaded to some online platforms without the permission of the copyright owner, or the communication channels provided by such platforms may be used to circulate links to third-party file sharing programs or services, through which users may illegitimately stream or download content such as movies or live sport. Third parties may also use online marketplaces and e-commerce platforms to offer potentially infringing artwork and other products for sale.

While most Australians who consume content online do the right thing, a proportion will seek to do so in a way that infringes copyright. While this is understandably concerning to copyright owners, data does not indicate a strong upward or downward trend in demand for unlicensed and infringing digital content over recent years. Data on visits to piracy sites collected by industry data company MUSO, which may indicate overall demand for unlicensed digital content in Australia, is shown in figure 2 from 2017 to 2021.¹²

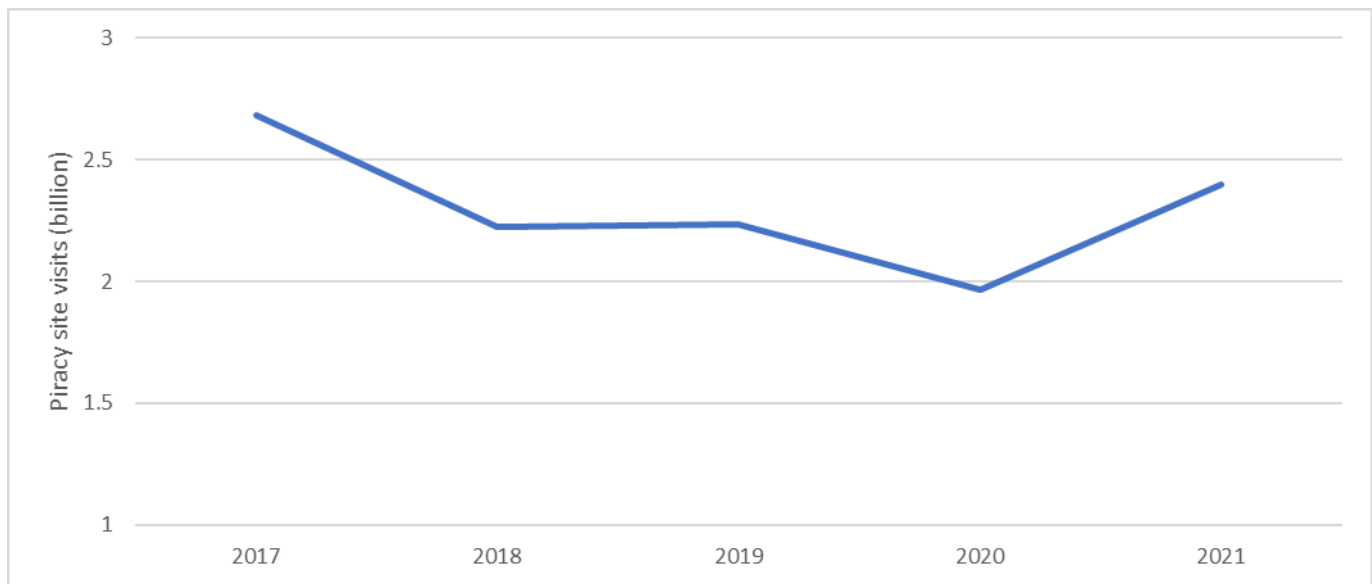
⁹ ACCC, [Digital Platforms Inquiry Final Report](#) (2019), 41.

¹⁰ ACCC, [Digital Platforms Inquiry Final Report](#) (2019), 43.

¹¹ ACCC, [Digital Platforms Inquiry Final Report](#) (2019), 47.

¹² This figure shows visits to the end of 2021, as the last complete year for which data is available at the time of publishing. Partial year data for 2022 suggests that final number of visits may be higher than in 2021. In the course of this review, the department will consider the full 2022-year data as it becomes available.

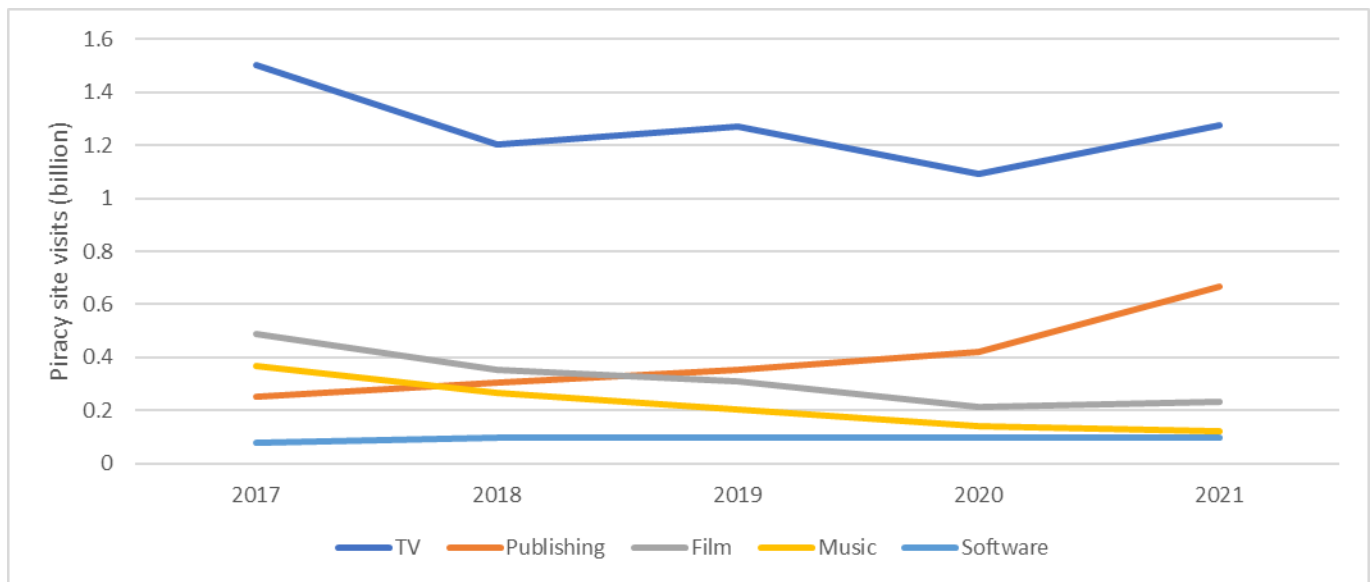
Figure 2 – Total Australian visits to piracy sites, 2017 to 2021



Source: Adapted from MUSO piracy data (2017 to 2021).

While there has been no strong upward or downward trend in copyright infringement overall, there is considerable fluidity in *specific forms* of online copyright infringement over time. For example, there has been a general downward trend in the demand for unlicensed television shows, films and music since 2017, but a general increase in the demand for unlicensed publishing materials¹³ (figure 3).

Figure 3 – Australian visits to piracy sites by content type, 2017 to 2021



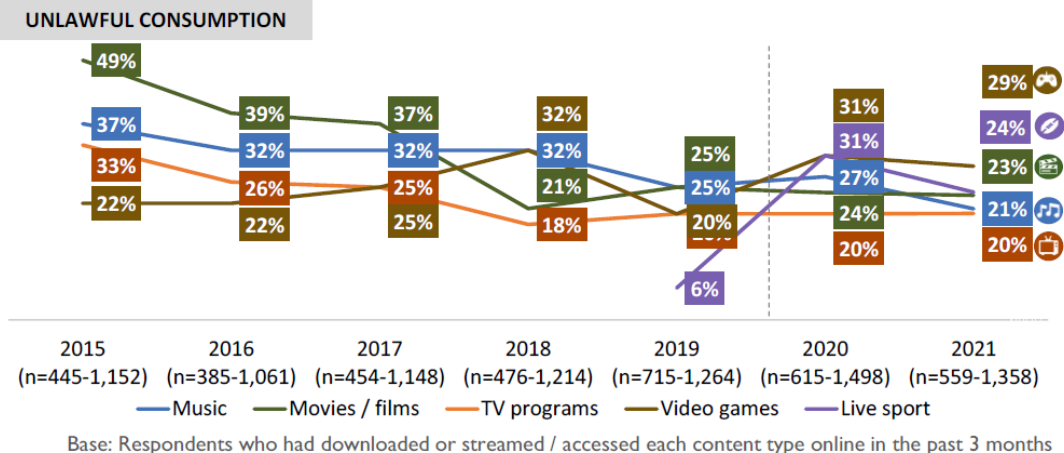
Source: Adapted from MUSO piracy data (2017 to 2021).

Data from the Australian Government’s consumer surveys on online copyright infringement, commissioned annually since 2015, also illustrates how consumer behaviour in relation to unlawful consumption of different

¹³ The growth in visits to publishing piracy sites in recent years is driven to a large extent by increases in visits to sites categorised as Manga sites, which accounted for over 60% of Australian visits to publishing piracy sites in 2021.

types of content can change over time. Figure 4 below shows the proportion of survey respondents who had recently consumed specific types of content online in at least one way that was likely to be unlawful.

Figure 4 – Unlawful consumption of content online, 2015 to 2021



* Caution should be used when comparing 2020-21 results to previous years due to methodology changes (indicated by vertical dotted line in charts).

Source: Orima Research, [Consumer Survey on Online Copyright Infringement 2021 Survey Findings Report](#) (2021), 3.

Beyond the methods of unlawful online consumption that have been studied in previous years’ online copyright infringement surveys, the department is aware that there are new and emerging technologies that may be changing the way people access content online (including infringing content). The use and effect of these technologies needs to be better understood and considered further, including as part of this review.

There is also evidence to indicate that there is still a significant degree of IP-infringing material, in the form of counterfeit goods that infringe trade marks and/or copyright, being purchased and imported into Australia. In the past 12 months alone, the Australian Border Force (ABF) has seized over 145 000 counterfeit items worth more than \$66 million¹⁴. Reflecting global trends, ABF detections of counterfeit goods are becoming more frequent in the postal stream; however, the bulk of the goods are still found in the air and sea cargo stream.

It is clear that the ability to more easily communicate and distribute copyright material online has presented new opportunities to copyright owners and users alike, including the ability for greater exposure to new global markets for owners and greater choice in, and access to, copyright works for consumers.

However, these changes also give rise to new challenges for copyright holders, who may find that longstanding enforcement challenges are exacerbated and/or that new enforcement issues emerge. For example:

- the geographically dispersed nature of online content distribution places pressure on copyright owners to monitor potential infringement globally, not just within Australia, and may raise jurisdictional difficulties should they detect and want to pursue infringing activity occurring outside of Australia, and

¹⁴ Data is unavailable on what proportion of these items and this total value relates to copyright-infringing items.

- the increasingly sophisticated technological tools used to lawfully produce, edit, manipulate and distribute original creative material may also be used to facilitate infringement.

Similarly, digital platforms and other companies that offer their digital services in many different countries may face challenges complying with those countries' respective copyright enforcement frameworks, which may differ in some respects. Consumers may also find it difficult to distinguish between lawful and unlawful ways of accessing and using copyright materials.

Questions

The department is seeking to understand the nature and scale of current copyright infringement challenges in Australia.

1. What challenges have you been facing in relation to copyright infringement in recent years? Are you seeing any changes or trends (including any forms or methods of infringement that are emerging or particularly concerning, or conversely, are becoming *less* prevalent or concerning)?
2. Can you provide any data on the scale of current copyright infringement, or the estimated economic impact of such copyright infringement on you, your organisation or your industry more broadly?
3. Are there any particular drivers of copyright infringement that you see as noteworthy or significant? Have these drivers changed in recent years?

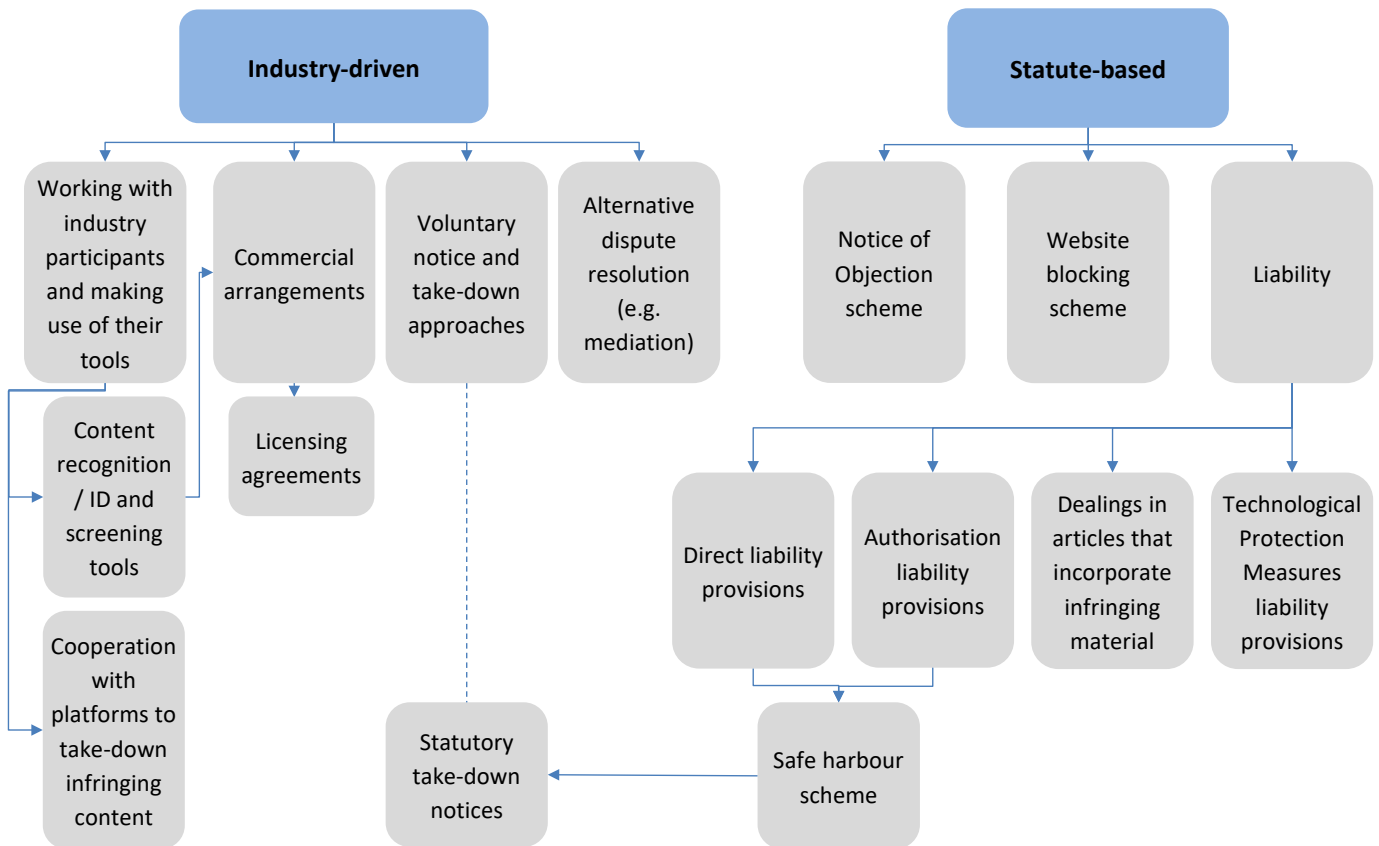
The copyright enforcement framework and its effectiveness

Copyright infringement may be addressed in a number of ways. Copyright owners have different options available to them depending on what type of infringement has occurred (including whether it is direct¹⁵ or deemed¹⁶ infringement), who is involved, and what actions or remedies are sought. Figure 5 provides a high-level, non-exhaustive overview of mechanisms.

¹⁵ That is, where a person has performed an act of copyright infringement through their own actions.

¹⁶ That is, where the law considers a person to be responsible for copyright infringement, even though they may not have directly performed the act of infringement.

Figure 5 – How copyright infringement may be addressed now



Broadly, enforcement mechanisms can be categorised as either statutory (under the Copyright Act) or driven by interactions between industry participants, including copyright owners and service providers ('industry-driven mechanisms'). Some mechanisms are used to prevent infringement before it occurs; others are used to mitigate or seek remedy for infringement after it occurs; and some may be used in either way.

The department is interested in understanding how, and to what extent, various enforcement mechanisms are currently used against copyright infringement, what drives stakeholders' decisions to use or avoid certain mechanisms, and whether there are any ways in which the system could be improved. This paper discusses some of the main enforcement mechanisms available in Australia.

The department is also interested in hearing stakeholder views and experiences of accessing and using the legal system and interacting with law enforcement bodies to enforce their copyright.

Industry-driven mechanisms

Industry participants, including copyright owners, users and service providers, may engage with each other outside of the legal system to address actual or potential infringing activity. Such 'industry-driven' mechanisms may include:

- copyright owners (or representatives) approaching alleged infringers directly (e.g. direct communication such as a 'cease and desist' letter, seeking the rectification of an alleged infringement)

- copyright owners utilising systems or tools made available by service providers (such as digital platforms or other commercial service providers) to identify and control the online use of their material by third parties
- copyright owners negotiating with other industry participants to enter into voluntary partnerships or other agreed-upon actions to address particular forms of infringement, and
- parties utilising mediation, alternative dispute resolution and other non-court remedies in the first instance to resolve disputes.

This section of the issues paper outlines a few of the more common types of industry-driven copyright enforcement mechanisms on which the department is seeking views and information. Respondents may also provide views and information on any other relevant industry-driven enforcement mechanisms.

Notice and takedown measures

When a copyright owner detects online activity that they believe infringes their copyright, they may first approach the alleged infringer or person hosting the infringing material to seek a remedy. For instance, a copyright owner might ask the alleged infringer or host to voluntarily take down the infringing material, or to enter into a licensing agreement (discussed below) if they would like to continue using the material.

This may be an effective approach, particularly where the infringer or host is unaware that they may be infringing copyright and are open to rectifying any issues. However, if the copyright owner is unable to obtain the redress sought through this direct method, they may consider legal action against the alleged infringer.

Some digital platforms offer their own notice and takedown policies and processes that copyright owners who believe their rights have been infringed may use. Some of these policies and processes may be influenced by overseas legislation such as the United States *Digital Millennium Copyright Act* (1998).

Working with industry participants and utilising industry-developed tools

Industry participants, including copyright owners and digital platforms, may choose to work together to address copyright infringement issues.

Copyright owners and other industry participants may cooperate with each other to:

- identify infringing content on, or accessible through, the latter's services and platforms; and/or
- take down infringing material (or links to such material) in a timely manner, including in real time.

Platforms may also proactively take down material, links or sites that they consider likely to be infringing, or facilitating infringement.

A range of tools are also offered by other industry participants, which copyright owners may also utilise to manage and enforce their rights.

- Automated content recognition/identification or screening tools¹⁷ offered by some digital platforms allow copyright owners to upload their content and find matches to content uploaded to the platform by third parties. If matches are found, copyright owners may seek to pre-emptively block, or monetise the content (for example, through a share of advertising revenue in some cases).

¹⁷ For example, YouTube Content ID and Facebook Rights Manager.

- Other tools developed and offered by independent service providers may help copyright owners detect and take enforcement action against uses of their content online that they believe infringe their rights.

The increasing use of such powerful tools raises important questions for content owners, users and platforms alike, including about how to deal with disputes and potential misuse.

Commercial arrangements

An important way in which copyright owners make use of the exclusive rights provided under copyright is to enter into commercial arrangements with those who seek to use their copyright material. Licensing is one main commercial arrangement used by copyright owners (box 2).

Box 2 – Licensing copyright material

Copyright owners may formally grant permission to others for the use of their material through a licence. A licence specifies the conditions under which the material may be used, including payment.

Many forms of licensing exist, including:

- Direct licensing — a licence agreement entered into with the copyright owner directly by the intended user. Terms may be individually negotiated with each user, or offered on a standard form basis without an opportunity to negotiate specific terms (for example, in the case of end-user licensing agreements, which are typically offered on a ‘take it or leave it’ basis)
- Collective licensing — licensing agreements are facilitated through the use of collecting societies who act on behalf of groups of copyright owners. Entry into agreements is often voluntary, although the Copyright Act provides for compulsory licences in certain circumstances (through the statutory licensing regime).

Copyright owners may use commercial arrangements to mitigate or remedy copyright infringement that has already occurred. For example, if a copyright owner becomes aware that a user has infringed their copyright, they may reach out to the user and offer to allow them to continue using the material so long as they enter into a licence or other commercial arrangement. The arrangement could also involve a payment to cover the period of unauthorised use of the material.

Any enforcement action required in relation to commercial arrangements would occur through traditional private law mechanisms (such as contract law).¹⁸

¹⁸ Under the Copyright Act, certain forms of licences (for example, statutory licenses may be considered by the Copyright Tribunal in certain circumstances).

Questions

4. Are the currently available industry-led mechanisms appropriate, and/or being appropriately used, to address or prevent actual or potential copyright infringement? Which mechanism(s) are most frequently and/or effectively used, and why?
5. What factors influence your decisions on what action(s), if any, to take through industry-led mechanisms in response to actual or potential copyright infringement?
6. Are the costs (including financial and time costs), benefits and risks of industry-driven mechanisms appropriately shared between different parties?
7. Are there ways in which industry participants could work together more effectively or efficiently to address or prevent copyright infringement (for example, barriers to utilisation that could be removed; new or emerging mechanisms that could be adopted)?

Statute-based mechanisms

The Copyright Act provides for a range of ways to address copyright infringement. These statute-based mechanisms may be used in addition to the industry-led mechanisms discussed above.

In particular, some statute-based mechanisms, such as the website blocking scheme and safe harbour scheme (including the process for take-down notices under the scheme), provide a framework for interactions between copyright owners and certain online service providers to address copyright infringement issues.

This section will primarily consider the Act's website blocking scheme, authorisation liability provisions, and safe harbour scheme (including its associated statutory take-down process). Respondents are invited to comment on these mechanisms, as well as any other statute-based enforcement mechanisms not discussed in this paper.

'Website blocking scheme'

The 'website blocking scheme'¹⁹ allows for the blocking of overseas websites that are available to Australian consumers, which have the primary purpose or primary effect of infringing, or facilitating an infringement, of copyright.

Under the scheme, copyright owners may apply to the Federal Court of Australia for an injunction (or 'website blocking order') requiring carriage service providers²⁰ to block access to these infringing sites. Copyright owners may also request that an injunction require a search engine provider to take reasonable steps so as not to provide a search result that refers to the online location in question. In deciding whether or not to grant an injunction, the Federal Court considers factors including the flagrancy of infringement, the impact of the injunction, and the public interest.

¹⁹ Established under section 115A of the Copyright Act.

²⁰ As defined in the *Telecommunications Act 1997* (Cth).

First introduced in 2015,²¹ the website blocking scheme was expanded in 2018²² following stakeholder concerns raised through a public review process. The 2018 amendments included:²³

- expanding the threshold test for granting injunctions
- allowing injunctions to be applied to the search results of online search engine providers, and
- clarifying the Federal Court’s ability to make responsive orders applying to new or related online locations without the need for a further injunction²⁴.

The website blocking scheme has been well-utilised since its introduction in 2015, with the Federal Court hearing more than 30 website blocking cases, ordering over 1600 injunctions (sites blocked) and more than 330 extension orders to block sites that replaced original versions after they had been blocked.²⁵

Evidence suggests that the scheme has had a positive effect in reducing the extent to which consumers are accessing content through websites that are infringing copyright. The department’s 2021 OCI survey found that of the 11% of respondents who had encountered a blocked website in the past 3 months, the majority (59%) subsequently gave up trying to access the material, and 18% sought lawful access to the material instead.

However, it is possible for users to navigate around or through a site block using a range of technological tools and techniques. The 2021 OCI Survey found that almost one in five respondents who had encountered a blocked website in the past 3 months used these tools and techniques to navigate around the block. This may be done through relatively well-known methods such as the use of search engines to locate alternative (unblocked) sites, proxy sites and virtual private networks (VPNs) to bypass a site block.

In recent years, the popularity of some tools, including the use of alternative or custom domain name system (DNS) services, may be increasing, although still only used by a minority of Australians. Alternative or custom DNS allows a user’s computer to find addresses of domains that may otherwise be blocked²⁶. However, such tools also have other, legitimate uses not directly related to accessing content, including to improve the speed, reliability, security and customisability of the user’s internet experience, which may be the primary motivators for their use.

²¹ Via the *Copyright Amendment (Online Infringement) Act 2015*.

²² Via the *Copyright Amendment (Online Infringement) Act 2018*.

²³ Parliament of Australia, [Bills Digests, Copyright Amendment \(Online Infringement\) Bill 2018](#) (2018).

²⁴ To address mirror sites that ‘phoenix’ or appear after a site is blocked.

²⁵ Departmental analysis of [Commonwealth Courts](#) listing data.

²⁶ In the 2021 OCI survey, it was found that a 23% of respondents were familiar with custom DNS services, and 4% had used or experienced them.

Questions

8. How effective and efficient is the current website blocking scheme as a way of combating copyright infringement and steering online consumers towards legitimate sources of content? For example, is the application process working well for parties, and are injunctions operating well, once granted?

9. Could the way the website blocking scheme operates be improved in any way (for example to address the use of new and emerging technologies to navigate around or through website blocks), including through changes to how the current scheme is practically implemented, or potential amendments to legislation?

(a) What impact would any such changes have on you or your organisation?

(b) Are there any potential broader or unintended consequences (for example, on other aspects of internet traffic management) that should be taken into account when considering changes that may be suggested through this consultation process?

Authorisation liability and the safe harbour scheme (and related mechanisms)

Two forms of liability for copyright infringement are possible under the Copyright Act:

- liability in relation to an infringing act a person has done themselves (**direct liability**), and
- liability in relation to an infringing act a person is taken to have authorised another person to have done (**authorisation liability** - a form of deemed liability) (box 3)²⁷.

Box 3 – Requirements for authorisation liability

Authorisation liability relates to circumstances in which a person or entity (such as a service provider) has not directly themselves committed an act that infringes copyright, but is found by a court to have *authorised* the doing of an infringing act (by someone else) in Australia, and thus may be found liable. In determining authorisation liability, the court must consider:

- the extent (if any) of the person's power to prevent the doing of the act concerned
- the nature of any relationship existing between the person and the person who did the act concerned, and
- whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.¹

The courts in various cases have found (based on the particular circumstances of each case) that an entity may be found to have authorised an infringing act even if they did not explicitly sanction or endorse the act; inactivity or indifference may constitute an authorisation; and authorisation liability is not intended to place a proactive or positive obligation on service providers to protect another's copyright (that is, an obligation to monitor for copyright infringement).

²⁷ Section 36 of the Act sets out liability for literary, dramatic, musical or artistic works. Section 101 of the Act sets out liability for subject matter other than works, for example sound recordings, cinematograph films, and broadcasts.

Authorisation liability was part of copyright law long before digital technology became a dominant mode of consuming copyright material. For example, a foundational case on how authorisation liability is interpreted in Australia related to the use of a coin-operated photocopying machine in a university library to copy a substantial portion of a hard-copy book.²⁸ However, the ongoing shift in demand towards digital and online content, including through large digital platforms, has expanded the range and complexity of the circumstances in which a party might be found to have authorised someone else’s infringing activity. (For example, if a person uploads copyright infringing content online, the providers of the services the person used to do so might – depending on the specific circumstances – be found to have authorised the infringement and therefore be liable.)

A copyright owner may seek to pursue enforcement action against an entity that it believes has authorised the infringement²⁹. This might include, but is not limited to, circumstances where:

- the alleged authorising entity is more readily identifiable than the individual infringing user; or
- numerous discrete instances of infringement (by multiple users) are alleged to have occurred using the same service provider’s system or platform.

Safe harbour scheme

In recognition of the need to provide legal incentives for service providers to cooperate with copyright owners in deterring the infringement of copyright, a ‘safe harbour’ scheme (in Part V, Division 2AA) was established under the Copyright Act in 2005³⁰.

The safe harbour scheme offers some legal protection to qualifying third parties by protecting them against financial liability for direct infringement in some circumstances,³¹ as well as limiting the remedies available to copyright owners in relation to copyright infringement that takes place through their systems, but which they do not control, initiate or direct³².

Initially applying only to carriage service providers, the scheme was extended in 2018³³ to also apply to certain online service providers operating in the public sector, including organisations assisting persons with a disability, libraries, archives, key cultural institutions and educational institutions. The scheme does not extend to other online service providers—for example, it does not cover digital platforms.

In order to be able to rely on the safe harbour scheme, carriage and relevant online service providers must satisfy certain conditions, such as (but not limited to):

- adopting and reasonably implementing a policy for the termination, in appropriate circumstances, of the accounts of repeat infringers
- complying with relevant industry codes in force

²⁸ *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

²⁹ Authorisation liability can be pursued instead of (or in addition to) pursuing enforcement action against a directly infringing online user.

³⁰ The scheme commenced on 1 January 2005 via the *US Free Trade Agreement Implementation Act 2004* (Schedule 9).

³¹ For example, when an online service provider may automatically cache content.

³² If the safe harbour scheme applies, copyright owners may still seek orders disabling access to overseas online locations and terminating a specified user’s account, as well as orders to remove or disable access to infringing copyright material, but cannot seek damages, an account of profits, additional damages or monetary relief (Copyright Act, section 116AG).

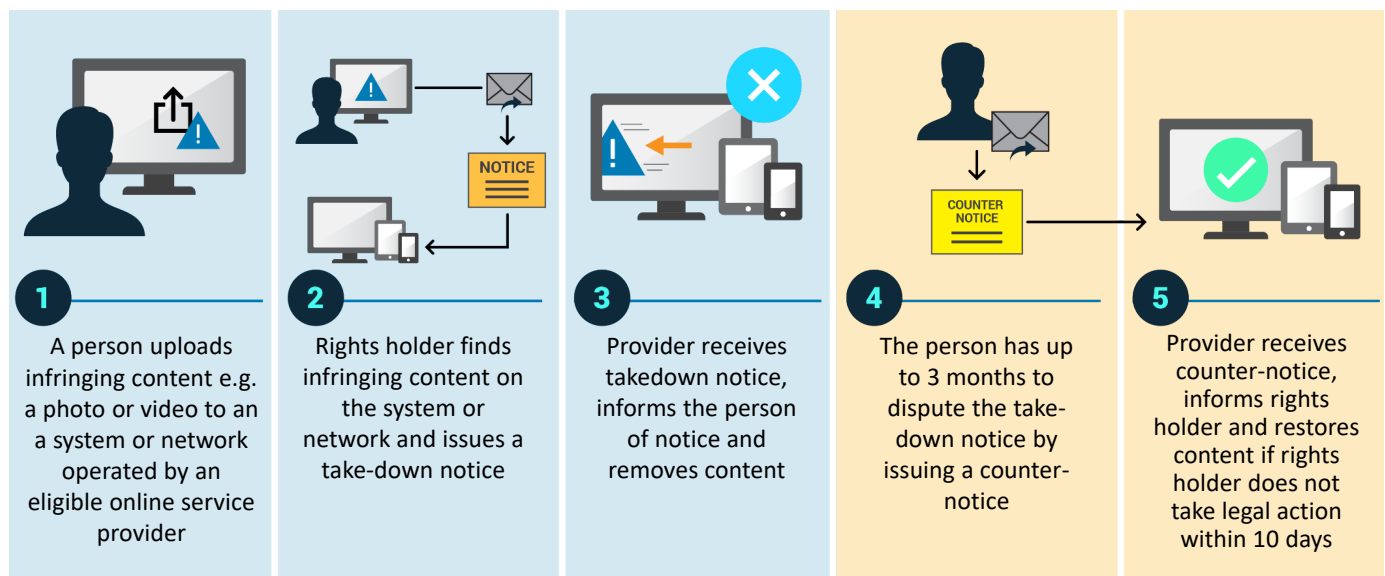
³³ Via the *Copyright Amendment (Online Infringement) Act 2018*.

- complying with the scheme’s statutory notice and take-down procedures to expeditiously remove or disable access to copyright material on its system or network that:
 - has been found by a court to be infringing,
 - is, or is likely to be, infringing, or
 - is cached material that has been removed from its original site,
 in response to notification from a copyright owner,³⁴ and
- not receiving a financial benefit directly attributable to the infringing activity.

The statutory notice and take-down procedures mentioned above give copyright owners, eligible service providers and individual users a standardised way of making and dealing with reports of infringement. The *Copyright Regulations 2017* detail the steps each party needs to take and timeframes for doing so, including in relation to notification of users and the management of disputes. They also provide standard forms for the various kinds of notice that may need to be issued – for example, a take-down notice issued by a copyright owner in relation to claimed infringement, or a counter-notice issued by a user disputing claims in the original notice – setting out the information that needs to be included.

Figure 6 below shows an example of how the statutory notice and take-down procedures under the safe harbour scheme might operate in practice.

Figure 6 – Statutory notice and take-down process – example of operation



³⁴ Notification can also be provided by an exclusive licensee or agent.

Questions

10. How effectively and efficiently are the authorisation liability provisions and/or safe harbour scheme (and associated notice and take-down process) currently operating as mechanisms for addressing copyright infringement? For example:

(a) How clear are the circumstances in which a party may be considered to have authorised another person's copyright infringement, given the courts' interpretation of the authorisation liability to date?

(b) How effective and efficient is the safe harbour scheme (and associated statutory notice and take-down process) in striking the right balance between combatting copyright infringement and protecting the legitimate interests of service providers?

11. Are there ways in which these provisions could be amended to improve their effectiveness or efficiency?

(a) How would such changes affect you or your sector?

(b) Are there any potential broader or unintended consequences that should be taken into account when considering changes that may be suggested through this consultation process?

Use of the legal system and law enforcement in relation to copyright infringement

Copyright owners are also able to access and use the legal system and interact with law enforcement bodies to enforce their copyright. This paper seeks stakeholder feedback on their experiences in, and perspectives on, doing so.

Using the courts to seek remedies against alleged infringement

The Copyright Act empowers copyright owners to commence legal action in relation to copyright infringement.³⁵ Copyright owners choosing to enforce their rights and seek remedies against alleged infringement can do so through the courts system.³⁶ In Australia, the Federal Court of Australia and the Federal Circuit and Family Court of Australia (Division 2) have jurisdiction to hear intellectual property matters, including copyright.³⁷

³⁵ Under section 115.

³⁶ Copyright owners may also use the courts system to address any contractual disputes arising from commercial arrangements.

³⁷ The Federal Circuit and Family Court of Australia (Division 2) is intended to hear less complex matters and resolve disputes in an efficient and cost effective manner, using fair and appropriate dispute resolution processes. The Federal Court of Australia is a superior court which has original jurisdiction in relation to resolving more complex matters and hears appeals from Division 2 of the Federal Circuit Court and Family Court of Australia, and is intended to decide disputes as quickly, inexpensively and efficiently as possible.

It appears that in between 2019 and 2021, around 150 copyright matters were brought before the courts, with approximately 60% heard in the Federal Court of Australia and 40% in the Federal Circuit and Family Court of Australia (or its predecessor, the Federal Circuit Court).³⁸

Some copyright owners and users may find it difficult to access and engage with the courts system. Some reasons for this can include the monetary, time and resource costs incurred in seeking legal advice and pursuing the matter through the courts system.

The Federal Court has an ‘expedited claims process’ which allows parties to seek a quicker or more truncated hearing process and to use more informal pleadings than usual.³⁹ Some of Australia’s international counterparts (including the United States and United Kingdom) have also introduced tailored mechanisms to streamline consideration of lower-value copyright (and other intellectual property) matters—see box 4 for further information. Stakeholder views are sought on whether any similar approach could be appropriate within Australia’s legal system.

Box 4 – International approaches to reducing the barriers involved in copyright litigation

*United States Copyright Claims Board and small claims process*⁴⁰

In December 2020, the US Congress established a ‘copyright small claims process’, directing the Copyright Office to establish a Copyright Claims Board (CCB) to resolve certain copyright disputes in an efficient, user-friendly forum. The CCB started taking cases in mid-2022. Should both parties to a matter consent to its use, the CCB is a streamlined alternative to court action, available for disputes up to \$30,000. CCB procedures are accessible to anyone, and there is no requirement for representation. Only basic documents and information are needed, and proceedings are held by video conference without formal court motions. The CCB hears three types of matters: claims of infringement, claims seeking declarations that specific activities do not infringe copyright, and claims of misrepresentation in notices.

*United Kingdom Intellectual Property Enterprise Court*⁴¹

In the UK, applicants may choose to pursue copyright matters in the Intellectual Property Enterprise Court (IPEC) as an alternative to bringing the matter to Chancery Division of the High Court. IPEC was reformed in the early 2010s as a way to provide a cheaper and more streamlined procedure to deal with simpler, lower value claims. There is no requirement that parties be represented by barristers, improving its accessibility.

The IPEC may be a suitable forum in which to resolve a particular dispute where a party may have limited financial resources to fairly engage in litigation, the claim is not overwhelmingly complex and could be heard in 2 days or less, there are a small number of witnesses, and (to a lesser degree) where the value of the claim is relatively small. The ‘small claims track’ of the IPEC is able to hear certain intellectual property matters including copyright, where: the remedies sought are damages for infringement, an account of profits, delivery up or destruction of infringing items and/or a final injunction to prevent infringement in the future; and total compensation sought does not exceed £10 000.

³⁸ From data compiled by Dr Alex Malik.

³⁹ Federal Court of Australia, [Central Practice Note: National Court Framework and Case Management \(CPN-1\)](#) (2022).

⁴⁰ Copyright Claims Board, [About the Copyright Claims Board](#) (no date).

⁴¹ HM Courts & Tribunals Service, [Guide to the Intellectual Property Enterprise Court Small Claims Track](#) (2018); [The Intellectual Property Enterprise Court Guide](#) (2022).

Remedies and penalties under the Copyright Act

The Copyright Act provides a range of remedies and penalties aimed at providing appropriate and proportionate restitution for copyright owners whose rights have been infringed, and to discourage copyright infringement and related acts⁴². The specific remedies and penalties a court may impose vary depending on the form of copyright infringement (or related act).

For example, through the court process copyright owners are able to seek civil remedies such as an injunction, and/or either damages or an account of profits, for infringement of their copyright.⁴³ These remedies:

- put a stop to infringing actions (in the case of injunctions)
- financially compensate the copyright owner for the infringement (damages), and
- ensure that the infringer does not profit from the act of infringement (account of profits)⁴⁴.

Some provisions allow a court to impose a criminal penalty onto a person who has engaged in copyright infringement or another related act, in certain circumstances. For example, a person found to have committed an offence like engaging in commercial-scale infringement, or distributing or publicly exhibiting infringing copies commercially, may be liable to pay a fine and/or face a period of imprisonment.

Fines under the Copyright Act may be up to a maximum of 850 penalty units (equivalent to \$118 700 in 2022⁴⁵) and/or 5 years imprisonment⁴⁶, depending on the specific offence. Many of the offences under the Act⁴⁷ have a maximum penalty of 550 penalty units (\$122 100) and/or 5 years imprisonment.

Copyright owners may also engage with the Australian Border Force⁴⁸ (ABF) to prevent the importation of suspected infringing goods. Provisions under the Copyright Act provide for the 'Notice of Objection Scheme', which allows the ABF to seize goods suspected of infringing certain forms of intellectual property, including copyright. To make use of this scheme, copyright owners must lodge a formal Notice of Objection with the ABF, accompanied by a Deed of Undertaking agreeing to repay costs, should they occur, resulting from the holding of goods made through the seizure process.⁴⁹ A Notice of Objection is a free application process, and once approved or registered, is valid for 4 years.

When goods are seized under a Notice of Objection, the importer and the objector or their legal representative are notified in writing. The importer must make a claim for the release of the seized goods within 10 working days from the date of notification — otherwise the goods are deemed forfeited. If a claim for the release of the goods is made, then the objector will be notified and will have 10 working days to either commence legal action or consent to the release of the goods to the importer. If no legal action is

⁴² Such as circumventing technological protection measures without a relevant exception.

⁴³ Copyright Act, section 115.

⁴⁴ Under section 115(3) of the Act, defences are available to 'innocent' infringers that result in only an account of profits being available as a remedy (and not damages).

⁴⁵ Commonwealth of Australia, [Notice of Indexation of the Penalty Unit Amount](#) (2020).

⁴⁶ For example, section 132AK Aggravated offence —work etc. converted to digital form.

⁴⁷ In Part V, Division 5 of the Copyright Act ('Offences and summary proceedings').

⁴⁸ The Australian Border Force is a portfolio agency of the Department of Home Affairs.

⁴⁹ Australian Border Force, [How to import intellectual property](#) (2020).

commenced by the objector within the relevant period, then ABF is required to release the goods to the importer (provided other legislative requirements are met).⁵⁰

Questions

12. What factors influence your decisions on what action(s), if any, to take through the legal system and/or law enforcement in relation to suspected or alleged copyright infringement?

(a) For example, have you found mechanisms such as mediation, alternative dispute resolution and other non-court remedies to be preferable as ways to resolve disputes?

13. Are the various avenues available through the legal system and law enforcement to address copyright infringement suitable and effective? For example:

(a) Have you sought to engage with the courts or law enforcement in relation to suspected or alleged copyright infringements? If so, please provide (if possible) any data or examples in relation to your experiences.

(c) Are the current civil and criminal remedies under the Copyright Act appropriate?

(d) What barriers (if any) do you face in engaging with the legal system? Could any models introduced in other international jurisdictions to streamline consideration of copyright matters be potentially relevant in an Australian context?

(e) Were you previously aware of the ABF's Notice of Objection border enforcement application process?

14. Are there any ways in which the current system could be improved? How would such changes affect you or your sector?

⁵⁰ Australian Border Force, [How to import intellectual property](#) (2020).