



27 August 2021

Cyber, Digital and Technology Policy Division
Department of Home Affairs

Sent via online submission form at homeaffairs.gov.au

ARTS LAW SUBMISSIONS – CYBER SECURITY REGULATIONS AND INCENTIVES

Introduction and executive summary

The Arts Law Centre of Australia (**Arts Law**) is a national community legal centre providing free or low-cost advice to artistic creators residing in all Australian states and territories.

Arts Law makes this submission on behalf of our broad client base, which includes artists and arts organisations that are, like much of the economy, consumers and providers of digital goods and services. In particular, this submission gives voice to issues faced by creators involved in the visual arts and craft markets and peak or professional organisations which represent the interests of those clients.

Arts Law understands that the Department of Home Affairs is seeking general information and views on ways to strengthen Australia's digital economy and make it more resilient to cyber security threats.¹ Arts Law seeks to briefly address the following issues arising out of the Discussion Paper:

- a) Clear legal remedies for consumers / other issues:² better protecting artists' copyright in a digital environment through minimum standards for platforms and/or an enforcement watchdog.
- b) Health checks for small businesses:³ ensuring any health checks are either voluntary or appropriately funded to avoid financial strain on small businesses and not-for-profits.

Arts Law has consistently raised concerns about the challenges facing artists, and in particular Aboriginal and Torres Strait Islander artists, when dealing with copyright infringement on online marketplaces. For example, Arts Law made submissions on the subject to the Senate Legal and Constitutional Affairs Committee on the Copyright Amendment (Online

¹ Discussion Paper – Strengthening Australia's cyber security regulations and incentives (p 2).

² Discussion Paper (pp 53-56).

³ Discussion Paper (pp 47-51).

Infringement) Bill 2015⁴ and to the Communications Alliance on the Copyright Notice Scheme Industry Code.⁵ Most recently, Arts Law raised these issues in its submission to the Australian Competition and Consumer Commission (**ACCC**) for its Digital Platform Services Inquiry – March 2022 General Report on General Online Retail Marketplaces.⁶

Copyright infringement in the digital economy

Under the rubric of strengthening Australia’s digital economy, Arts Law supports broadening the scope of this reform process to encompass copyright infringement on digital marketplaces. The underlying principles and rationale for increased cyber security regulation—a lack of clear minimum standards, information asymmetries, and inadequate legal remedies—line up squarely with the issues facing creators on online marketplaces, and the two areas can sensibly be considered together.

Arts Law has assisted numerous clients who have experienced instances of copyright infringement on online marketplaces. Consumers are being deceived into assuming such listings are for a genuine, authentic products or that they have been licensed legitimately to online vendors by the rights holders or creators. The challenges facing artists in response to these infringements include the following:

- a) Inadequate terms and conditions: online marketplaces each have their own terms and conditions and policies governing the platform (usually designed to limit the platform’s liability). Creators have no bargaining power to demand better protection for their work, and are subject to varying, often complicated and inadequate take down procedures.
- b) Difficulty monitoring infringements: infringers or infringing products appear across different platforms, often with new infringements emerging in a new location as soon as others have been painstakingly removed at the request of creators. Our clients struggle to monitor multiplying infringements, eroding their ability to commercialise and protect their work online and requiring considerable time to be spent on monitoring and take down activities.
- c) Anonymity of vendors: vendors are able to remain anonymous on many marketplaces, making it nigh impossible to identify infringers of copyright or cultural property. The online environment creates a free-for-all of infringement without consequences.
- d) Exploitation of Indigenous Cultural and Intellectual Property (ICIP): ICIP is inadequately protected under our current legal system and can be exploited on online

⁴ Arts Law submission dated 16 April 2015 to the Senate Legal and Constitutional Affairs Committee on the Copyright Amendment (Online Infringement) Bill 2015.

⁵ Arts Law submission dated 23 March 2015 to the Communications Alliance on the Copyright Notice Scheme Industry Code DR C653:2015.

⁶ Arts Law submission dated 19 August 2021 in response to July 2021 Issues Paper, “Digital Platform Service Inquiry – March 2022 Report on General Online Retail Marketplaces”.

marketplaces with relative impunity. Arts Law regularly advises Indigenous artist clients and cultural practitioners who have found inauthentic Indigenous art, or products embodying that art, on online marketplaces. Consumers are falsely led to believe these listings are genuine. While the Indigenous Art Code has helped establish standards to increase consumer confidence, it is voluntary and still evolving.

The Discussion Paper contemplates minimum standards to ensure digital goods and services providers are appropriately managing cyber security risks (for the benefit of the broader economy). A similar approach should be taken to copyright infringement on online marketplaces. Arts Law supports the implementation of simple, transparent standards (developed in collaboration with the industry) that place the onus on platforms to monitor and report on infringements, and provide creators with simple, low-cost avenues for redress. Platforms have the knowledge, technological means and resources to bear this burden, and it would strengthen the arts sector of the economy by allowing artists to commercialise their work in a secure way.

In conjunction with minimum standards, Arts Law also supports the government establishing an enforcement or informational body akin to Scamwatch⁷ (which facilitates the reporting of scams and helps the public recognise and avoid them) or the Office of the Australian Information Commissioner⁸ (which investigates complaints under *The Privacy Act 1988* (Cth) to uphold privacy and information access rights) to regulate digital platforms, manage compliance with minimum standards, and provide information and support to artists dealing with online marketplaces.

Health checks for small businesses

Arts Law supports the proposal in the Discussion Paper for voluntary cyber health checks for small businesses,⁹ as long as the cost to those businesses is kept low. Our client base includes a range of independent artists and arts organisations who provide or receive personal information and valuable intellectual property to or from small businesses and arts organisations. It is important that those businesses and organisations have robust cyber security measures in place to protect that material from potential breaches.

The voluntary health check could build practical guidance for entities which don't have the knowledge or resources to audit their own cyber security practices. As noted in the Discussion Paper, direct costs to participants should be kept low to encourage uptake.¹⁰ This could be achieved by the government providing education workshops for sole traders and small businesses and bearing the administrative costs of the health check. The body administering health checks should ensure that recommendations are appropriate for entities with limited resources.

⁷ <https://www.scamwatch.gov.au/>

⁸ <https://www.oaic.gov.au/>

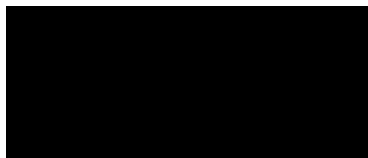
⁹ Discussion Paper (p 48).

¹⁰ Discussion Paper (p 49).

Importantly, the use of a public facing 'health check trust mark' would inform artists and consumers (who might otherwise be unaware of cyber security risks) about organisations they can trust. This is likely to create a positive feedback loop by which artists become more conscious of cyber security as a result of encountering organisations with the trust mark.

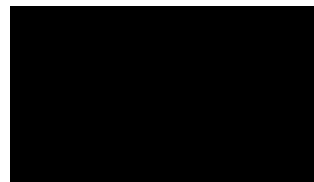
Conclusion

Arts Law appreciates the opportunity to make these submissions and welcomes any further discussion. Arts Law would be very pleased to discuss further how creators could be better protected on online marketplaces. Please contact Arts Law by email to artslaw@artslaw.com.au or by phone on (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.



Suzanne Derry

Acting Chief Executive Officer, Arts Law



Aditya Vasudevan

Solicitor, Arts Law