Copyright Amendment (Online Infringement) Bill 2015

Mary Anne Neilsen
Law and Bills Digest Section

Contents

Purpose of the Bill ................................................................. 2
Background ................................................................. 2
Committee consideration .................................................. 3
  Senate Legal and Constitutional Affairs Legislation Committee ......................... 3
  Senate Standing Committee for the Scrutiny of Bills ........................................... 3
  Parliamentary Joint Committee on Human Rights .............................................. 3
Policy position of non-government parties/independents..... 3
Position of major interest groups ........................................ 4
Financial implications ....................................................... 7
Statement of Compatibility with Human Rights ................. 8
Key issues and provisions.................................................. 8
  Provisions ................................................................. 8
  Issues ............................................................................. 9
  Threshold questions (proposed subsection 115A(1)) ......................... 9
    ‘Primary purpose’ test......................................................... 9
  Meaning of ‘online location’ .................................................. 10
  ‘Facilitate’ copyright infringement............................................. 10
  Variation of an injunction (proposed subsection 115A(7)) ......................... 11
  Costs (proposed subsection 115A(9)) ....................................... 11
  List of matters for consideration by the Court
    (proposed subsection 115A(5)) ........................................ 12
    ‘Public interest test’ .......................................................... 12
Concluding comments .................................................... 13

Date introduced: 26 March 2015
House: House of Representatives
Portfolio: Attorney-General
Commencement: The day after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.
Purpose of the Bill

The purpose of the Copyright Amendment (Online Infringement) Bill 2015 (the Bill) is to provide a new mechanism to protect the interests of copyright holders by enabling online infringing material to be blocked by a carriage service provider without the need to establish fault on the part of that provider.

The Bill amends the Copyright Act 19688 to enable rights holders to apply for a court order requiring carriage service providers to block access to a website, operated outside of Australia that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

At the outset it is useful to clarify that in the discussion of online copyright infringement the terms internet service provider (ISP) and carriage service provider (CSP) are often used interchangeably. The Bill uses the term CSP and relies on the definition in section 87 of the Telecommunications Act 1997.7 Depending on the context of the discussion, this Bills Digest uses both terms.

Background

Copyright is concerned with encouraging the creation and dissemination of works of art and intellect, but also acknowledges that there are appropriate limits to the rights of copyright holders. Retaining a balance between the various interests has always been difficult and has become more so in the digital age.

Copyright protection is provided under the Copyright Act and gives the holder of copyright exclusive rights to license others in regard to copying a work, performing it in public, broadcasting it, publishing it and making an adaptation of the work. Rights vary according to the nature of the work. Those for artistic works, for instance, are different from those for literary and musical works.3

The Australian Law Reform Commission (ALRC) in its 2013 report, Copyright and the Digital Economy,4 considered an extensive range of challenges facing copyright in the digital age, making recommendations including a new fair use exception for copyright.5 The courts too, in a number of recent challenging decisions, have had to grapple with issues such as cloud computing, time shifting, web-based retransmission of broadcasts and liability of ISPs for copyright infringement.6

The Government is yet to respond to the ALRC report. In the meantime it is addressing online piracy, focusing particularly on ways of imposing increased responsibility on ISPs.

On 30 July 2014, the Attorney-General, Senator George Brandis, and the Minister for Communications Malcolm Turnbull, released a discussion paper on online copyright infringement (the Discussion Paper) and called for feedback and submissions.7

The Discussion Paper considered a number of proposals namely:

1. amending the Copyright Act to clarify the application of authorisation liability under sections 36 and 101 to ISPs and looking to industry to develop an industry based scheme or code8
2. introducing mechanisms for blocking infringing sites and
3. extending the safe harbour provisions to service providers other than ISPs (such as universities and schools).9

---

2. Section 10 of the Copyright Act defines carriage service provider by reference to section 87 of the Telecommunications Act 1997, accessed 13 May 2015. The definition in section 87 relates to supply of a ‘listed carriage service’ ‘to the public’.
3. For more information about copyright generally see the website for IP Australia, accessed 8 May 2015.
5. M Neilsen, ‘ALRC report released: copyright and the digital economy’, FlagPost, Parliamentary Library, Canberra, 20 February 2014, accessed 11 May 2015. Fair use is a defence to copyright infringement that essentially asks of any particular use: Is this fair? In deciding whether a particular use of copyright material is fair, a number of principles, or ‘fairness factors’ must be considered.
8. The authorisation provisions (sections 36 and 101) are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid copyright infringement where they are in a position to do so. The code or scheme would set out what would constitute reasonable steps to be taken by ISPs to prevent or avoid infringement.
In relation to the second of these proposals the Discussion Paper proposed that the Copyright Act be amended to enable rights holders to apply to a court for an order against ISPs to block access to a website operated outside Australia, the dominant purpose of which is to infringe copyright. The proposal was limited to websites operated outside Australia as rights holders are not prevented from taking direct action against websites operated within Australia.\footnote{The purpose of the safe harbour provisions (sections 116AA to 116AJ of the Copyright Act) is to give CSPs some protection from the otherwise unavoidable risk of liability for inadvertently hosting or communicating copyright infringing material on behalf of their users.}

Following this consultation, on 10 December 2014, the Attorney-General and the Minister for Communications announced that the Government had chosen ‘the least burdensome and most flexible’ approach; requiring industry leaders to develop an industry code. The code would include a process to notify consumers when a copyright breach has occurred and provide information on how they can gain access to legitimate content (part of proposal one from the Discussion Paper).\footnote{Australian Government, \textit{Online copyright infringement; discussion paper}, op. cit., p. 5.}

The Ministers also flagged that in 2015 the Government would introduce legislation to amend the Copyright Act, to enable rights holders to apply for a court order requiring ISPs to block access to a website, operated outside of Australia, which provides access to infringing content (the second proposal in the Discussion Paper discussed above).\footnote{G Brands (Attorney-General) and M Turnbull (Minister for Communications), \textit{Collaboration to tackle online copyright infringement}, joint media release, 10 December 2014, accessed 11 May 2015.}

The Bill takes up this second proposal with some amendments based on input from Discussion Paper submissions.

**Committee consideration**

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 29 May 2015 (the Senate Committee inquiry). Details of the inquiry are available \textit{here}.\footnote{Senate Legal and Constitutional Affairs Legislation Committee, \textit{Inquiry into the Copyright Amendment (Online Infringement) Bill 2015}, The Senate, Canberra, 2015, accessed 12 May 2015.}

**Senate Standing Committee for the Scrutiny of Bills**

At the time of writing, the Committee has not commented on the Bill.

**Parliamentary Joint Committee on Human Rights**

At the time of writing, the Committee has not commented on the Bill.

**Policy position of non-government parties/independents**

In response to the December 2014 Government announcement referred to above, the Shadow Minister for Communications, Jason Clare, and Shadow Attorney-General, Mark Dreyfus, issued a statement saying that the Government has yet to develop a credible policy to deal with internet piracy:

> It is clear that action is needed both to deter piracy, and to encourage access to legitimate content.

The Government has passed the buck back to industry, asking rights holders and ISPs to reach an agreement among themselves. Malcolm Turnbull and George Brandis have still not settled key issues raised in the Discussion Paper they released in September. The Government has not made clear what steps an ISP should take to deter piracy and who will bear the costs of those steps.\footnote{Ibid.}

In relation to website blocking, the subject of this Bill, Mr Clare and Mr Dreyfus stated:

\begin{quote}
9. The purpose of the safe harbour provisions (sections 116AA to 116AJ of the Copyright Act) is to give CSPs some protection from the otherwise unavoidable risk of liability for inadvertently hosting or communicating copyright infringing material on behalf of their users.


12. Ibid.


\end{quote}
The Government’s only concrete decision is to introduce legislation providing for overseas websites facilitating copyright infringement to be blocked in Australia by court order. Site-blocking is unlikely to be an effective strategy for dealing with online piracy. Pirated content is likely to reappear as quickly as it can be taken down.

Any crackdown on the infringement of copyright needs to be accompanied by changes to make copyright law fairer, clearer, and more in keeping with public expectations. The Government should look after the interests of consumers.15

The Australian Greens have indicated they would not support the Bill. Senator Scott Ludlam stated ‘such a move would be a defacto Internet filter and would allow rights holders to unilaterally require websites to be blocked. This kind of Internet filter would not be effective at all due to the widespread availability of basic [virtual private network] VPN software to evade it’.16

Position of major interest groups

The interest that the Bill has generated is evident in the large number of submissions received by the Senate Committee inquiry. The 49 written submissions include a diverse range of views about the benefits and shortcomings of the Bill from groups representing rights owners and creative industries, internet service providers, consumer groups, legal bodies, academic institutions and public interest advocates.

To give a sense of the diverse range of views, this section of the Bills Digest refers to only a selection of these submissions. Further comments are included in the ‘Key issues and provisions’ section below.

Generally rights holders groups are supportive of legislation enabling site blocking injunctions but a number express concern that the threshold tests in the Bill have been set so high to make the scheme practically unworkable. On the other side of the argument groups representing ISPs, consumers and public interest groups, while not condoning internet piracy, question whether the Bill is an effective response to the problem and also argue that site-blocking regimes can negatively impact upon internet freedom, innovation, and competition.17

For example the collective submission from the Australian Film/TV Bodies18 supports the Bill stating that the no-fault injunction remedy is an ‘appropriate response to the reality of the way in which online infringement needs to be addressed’.19 The submission also notes that the response is in keeping with a number of other countries including Singapore and European Union member countries such as the United Kingdom where, it says, site blocking injunctions have proven to be technically feasible and effective. In regard to the UK scheme the submission argues:

... although some users in the UK continued to engage in illegal downloading by using dedicated and multi-site proxies to circumvent judicial relief orders, that traffic was insignificant when compared to the overall decline in traffic to the blocked piracy site.20

Nevertheless the submission argues there is scope for improvement of the Bill—some of the more specific recommendations relating to the impact of the high threshold test and the large number of factors that a court must consider before granting a site blocking injunction.

Two copyright collecting societies, the Australian Performing Rights Association (APRA) and Australian Mechanical Copyright Owners Society (AMCOS) made a joint submission.21 They welcome the proposed amendment as ‘one that will provide significant benefit to the creation of Australian content, as well as to the

References:
15. Ibid.
18. The collective name for the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators (NACO) and the Independent Cinemas Association of Australia (ICAA).
19. Australian Film and TV Bodies, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Copyright Amendment (Online Infringement) Bill 2015, 16 April 2015, p. 4, accessed 11 May 2015.
20. Ibid., p. 7.
Australian economy’. 22 The Bill, in their view, ‘clearly reflects the Government’s even-handed approach to mediating competing interests’. 23

APRA and AMCOS also point to studies showing that site-blocking schemes in overseas jurisdiction have been effective in the fight against online piracy. 24

The Australian Copyright Council is broadly supportive of the Bill as one part of the Government’s strategy to address online copyright infringement. However the submission raises a number of the procedural features that in its view will limit the Bill’s effectiveness; for example, the high threshold test regarding infringement and the restrictions on the Court’s discretion when deciding whether to grant injunctions. Like some other rights holder groups, the Council also queries why the Federal Circuit Court has not been given jurisdiction to deal with site blocking injunctions, noting that the Federal Circuit Court otherwise has jurisdiction to grant injunctions in copyright matters. 25

The Communications Law Centre, University of Technology Sydney, (CLC) broadly supports the measures set out in the Bill but states that it is clear that these cannot, alone provide a full solution to the problem of online copyright infringement in Australia. 26 The CLC also supports the implementation of the Copyright Notice Scheme Industry Code currently being reviewed by the Australian Communications and Media Authority (ACMA). It further welcomes continuing action by copyright owners to make content globally accessible and affordable. 27

The Internet Society is critical, arguing the drafting of the Bill is imprecise in a range of areas that will potentially impact negatively on ISP and their customers. They state:

We do not believe that the legislation will necessarily achieve the Government’s stated aims... It will not prevent access to a vast array of allegedly infringing material available on the Internet either because it is delivered by means other than the ‘web’, because the URL of the material varies with each access, or because many users bypass the systems ISPs might use to control access. 28

And:

The Bill will impose a cost on Carriage Service Providers and that cost no doubt will be passed on to consumers – at a time when CSPs and their customers are already facing significant expenses to comply with the data retention legislation. 29

The Internet Society is further concerned about the possibility of CSPs blocking access to legitimate material that should not be subject to this Bill simply due to the risk of high costs in appearing in court to defend demands to do so. 30

The Australian Digital Alliance (ADA) agrees that reduction in internet piracy is a laudable objective, and is ‘not opposed to a judicial process for issuing injunctions against overseas websites that flagrantly infringe copyright, as long as the power is appropriately targeted in scope and has adequate safeguards that reflect each of the interests at stake’. 31 However ADA states this is not the case with the Bill and argues:

The Bill as presented has deficiencies in drafting that could lead to legitimate sites being blocked. In order to ensure that genuinely unlawful sites are targeted, we recommend that the definition for infringing websites in s115A(1) is tightened and additional safeguards are added to s115A(5). Sites that may fall under the definition as currently...
formulated include overseas providers of VPNs, cloud storage providers, providers of Internet Relay Chat (IRC) or BitTorrent software, as well as some general hosting sites that may host a mixture of infringing and non-infringing works.  

The New South Wales Council of Civil Liberties (NSWCCL) does not regard website blocking as a proportionate response to copyright infringement and therefore believes the Bill ought not to be passed. The submission states:

The position of the NSWCCL is that website blocking should not be undertaken in a society which cherishes the right to free speech. It is a disproportionate response to the problem of copyright infringement. To alleviate the problem of copyright infringement, the least intrusive means of achieving this ends is the most preferred. A de-facto internet filter, which this legislation is, is one of the most intrusive ways to discourage piracy on the internet. It is also the method which is most prone to accidental blockages, intentional censorship, scope creep or other abuse.

However as an alternative to not passing the Bill, NSWCCL offers amendments to address the civil liberties concerns that the Bill raises, some of these are discussed under the ‘Key issues and provisions’ section below.

The Australian Communications Consumer Action Network (ACCAN) supports effective and proportionate efforts to prevent online piracy but raises a number of concerns about the reach and effectiveness of the Bill. One of its main concerns relates to Virtual Private Networks (VPNs) and how they might be affected under the proposed scheme. The submission states that many Australian consumers are already using VPNs to access content that is geo-blocked in Australia, but there is much ambiguity around the legality of this. ACCAN therefore argues that the Bill is an opportunity to clarify the status of VPNs so that these services are not themselves subject to blocking, thereby limiting consumer access to paid overseas content.

ACCAN also recommends that the Government conduct a cost benefit analysis of the Bill before it is implemented and again after 18 months of operation, noting that Dutch research found that site blocking against file sharing often has an immediate effect, but this fades out after a period of six months as new sources of pirated material emerge.

ACCAN’s concern is that this website blocking Bill may devolve into an expensive game of ‘whack-a-mole’ which consumers will end up paying for through higher internet bills.

The Business Law Section of the Law Council of Australia had previously submitted that the site blocking proposal in the Discussion Paper should not go ahead, arguing that it lacked appropriate protections for consumers or innocent websites. However, as the terms of the Bill have made some changes to the initial proposal, the Law Council has a new view and is therefore broadly supportive. Nevertheless the Law Council still has some concerns and comments, some of which are discussed below under the ‘Key issues and provisions’ heading.

The Law Institute of Victoria supports the underlying objective of the Bill which aims to reduce the incidence of online copyright infringement. However it believes that great care should be taken when considering any proposed amendment to the law that involves the blocking of access to websites or other ‘online locations’.

A court ordering an injunction that is too broad or an ISP inadvertently blocking access to a site that does not infringe copyright or facilitate the infringement of copyright may impact on the rights to access to information and

---

32. Ibid., p. 1.
35. Ibid., p. 7.
36. Ibid., p. 8.
freedom of expression, as well as potentially interfere with the property rights of owners of any websites inadvertently blocked.\(^3^9\)

In terms of technical concerns regarding site blocking, the Law Institute and other submitters point to problems with the operation of the blocking powers in section 313 of the *Telecommunications Act*.\(^4^0\) In 2013, the Australian Securities and Investments Commission (ASIC) requested a number of ISPs to block access to sites said to be used for investment fraud. An internal review found that this erroneously led to the blocking of more than 250,000 websites that hosted ‘no substantive content’ related to ASIC investigations.\(^4^1\) The House of Representatives Standing Committee on Infrastructure and Communications is currently inquiring into the site blocking powers under section 313 of the *Telecommunications Act*. The inquiry website is available [here].\(^4^2\) The Committee is due to report on 1 July 2015. The Law Institute recommends that the Senate Committee inquiry into this Bill delay reporting until it can be informed by the technical evidence and findings of that inquiry.

Communications Alliance supports the underlying objectives of the Bill but believes it is deficient in several respects. It argues that the Bill requires amendment to:

- ensure consistency with the principles put forward by the Government in its original discussion paper? on the issue (in particular with regard to cost and indemnity issues)\(^4^3\)
- achieve the Government’s stated objectives and
- reduce the risk of undesirable and unintended consequences.\(^4^4\)

In relation to technical concerns, Communications Alliance recommends a range of technical amendments including:

- clarification that the method used by an ISP to block access to a website (e.g. at the level of the Domain Name System (DNS), the IP address, the URL or another means) is at the discretion of the ISP;
- appropriate checks to be undertaken by rights holders before web sites are blocked, to reduce the risk of legitimate web sites being blocked inadvertently;
- provision for a ‘landing page’, hosted by rights holders so that internet users attempting to access a court-ordered blocked site will be directed to this page and see an explanation as to why the site was blocked and where they can seek further information;
- provide more detailed guidance to the courts that will need to interpret the legislation and ensure that technical guidance is available to Courts, where required; and
- allow an application to be brought, or an order to be made, against more than one ISP, to prevent customers from swapping ISPs to avoid the effect of an injunction.\(^4^5\)

**Financial implications**

The Bill should have no financial implications for Government, although there would be costs for both copyright owners and CSPs. The Explanatory Memorandum states that the introduction of the injunction power was the


\(^4^1\) Ibid., p. 8.


\(^4^3\) Cost and indemnity issues are described under the heading ‘Key issues and provisions’.


\(^4^5\) Ibid., p. 4.
subject of a short-form regulation impact statement which estimated a total cost of $130,825 to CSPs on an annual basis.\textsuperscript{46}

It is of note that the usual practice of including a regulation impact statement in the Explanatory Memorandum has not been followed with this Bill. A number of submissions question why this statement is not publicly available with some also calling for a full cost benefit analysis before the Bill is implemented.\textsuperscript{47}

**Statement of Compatibility with Human Rights**

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.\textsuperscript{48}

**Key issues and provisions**

**Provisions**

*Item 1* in Schedule 1 to the Bill is the key provision and inserts a **new section 115A** into the *Copyright Act*.\textsuperscript{49}

**New subsection 115A(1)** provides that the Federal Court of Australia may, on application by the owner of a copyright,\textsuperscript{50} grant an injunction to require a Carriage Service Provider\textsuperscript{51} (CSP) to take reasonable steps to disable access to an online location. In order to grant the injunction the Court must be satisfied that:

- the CSP provides access to an online location outside Australia
- the online location infringes, or facilitates an infringement of the copyright and
- the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

**New subsection 115A(3)** provides that the parties to an action requesting an injunction to block an online location are:

- the owner of the copyright
- the CSP
- the person who operates the online location (that is the alleged infringer) but only if that person applies to the Court to be joined as a party.

The CSP is not liable for any costs of proceedings unless they take part in them *(proposed subsection 115A(9))*\textsuperscript{52}

An injunction granted under section 115A may upon application from a party to the proceedings or a person prescribed by the regulations be varied or rescinded by the Federal Court *(proposed subsections 115A(7) and (8))*.

In determining whether to grant the injunction, the Court is to take into account a list of matters in **proposed subsection 115A(5)**. The list which is non-exhaustive and mandatory for the Court to follow consists of:

- the flagrancy of the infringement, or the flagrancy of facilitating the infringement
- whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright
- whether the owner or operator of the online location demonstrates a disregard for copyright generally

---


\textsuperscript{47}. For example the Australian Communications Consumer Action Network, op. cit., pp. 8–9. Note that there is further discussion of costs under the heading ‘Key issues and provisions’ below.

\textsuperscript{48}. The Statement of Compatibility with Human Rights can be found at pp. 4–7 of the Explanatory Memorandum to the Bill.

\textsuperscript{49}. *Copyright Act 1968*, accessed 11 May 2015.

\textsuperscript{50}. Note that by virtue of *Item 2* in Schedule 1 of the Bill an exclusive licensee could also bring such an action.

\textsuperscript{51}. Section 10 of the *Copyright Act* defines CSP by reference to section 87 of the *Telecommunications Act 1991*. The definition in section 87 relates to supply of a ‘listed carriage service’ ‘to the public’.

\textsuperscript{52}. The Explanatory Memorandum states that this provision is not intended to alter Part 40 of the Federal Court Rules which provides for the Court to make orders as to costs.
(d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement

(e) whether disabling access to the online location is a proportionate response in the circumstances

(f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction

(g) whether it is in the public interest to disable access to the online location

(h) whether the owner of the copyright had notified the operator of the online location as required under subsection 115A(4)

(i) any other remedies available under the Copyright Act

(j) any other matter prescribed by the regulations

(k) any other relevant matter.

Issues

Threshold questions (proposed subsection 115A(1))

As noted above, proposed subsection 115A(1) requires that before granting an injunction the Court is to be satisfied that the primary purpose of the online location is to infringe copyright or facilitate infringement of copyright. Submitters to the Senate Committee inquiry into the Bill raised a number of issues about the wording of this provision.

‘Primary purpose’ test

The Explanatory Memorandum states that the ‘primary purpose’ test is an intentionally high threshold for the copyright owner to meet and is set high as a safeguard to ensure the provision cannot be used to target online locations that are mainly devoted to a legitimate purpose.\(^53\) The Explanatory Memorandum gives two examples of what the Bill is aiming not to catch — an art gallery website operated outside of Australia which may contain an unauthorised photograph and secondly, an overseas online location that provides legitimate copyright material to individuals within another geographic location but is not licensed to distribute that copyright material in Australia (for example the US iTunes store). These it is argued would not be caught by the provision because their primary purpose is not to facilitate infringement.\(^54\)

The Communications Law Centre, along with many rights holder groups, is concerned that the primary purpose test sets an unworkably high threshold. It recommends that there should be a ‘purpose’ rather than a ‘primary purpose’ test. This would lessen the evidentiary burden faced by copyright owners, without substantively impacting upon the Bill’s safeguards for legitimate overseas sites, or sites that inadvertently infringe.\(^55\)

Similarly, the collective submission from the Australian Film/TV Bodies argues that the primary purpose threshold is likely to be highly problematic in practice based upon the experience of the interpretation of other purpose based provisions under Australian law:

In the analogous field of competition law, cases seeking to rely on proof of purpose have often been unsuccessful, because of the reluctance of a Court to impute purpose where the allegation is serious and there is no direct proof of the state of mind of the party. The High Court has observed that the test of a provision using the language of purpose is a subjective one, rather than an objective test.

If s115A(1) is interpreted as requiring proof of a subjective purpose of the overseas website then the threshold may be difficult to meet in practice. The site operators are likely to be located outside the jurisdiction, as would their records (which might typically provide direct evidence of purpose in the form of unguarded communications). There may be no direct proof available of subjective purpose. The illegal status of the piracy website ecosystem results in

\(^53\) Explanatory Memorandum, op. cit., p. 9.

\(^54\) Ibid.

\(^55\) Communications Law Centre, op. cit., pp. 2–3.
the vast majority of such site operators making every effort to remain anonymous and to ensure that their ‘purpose’ is undeclared.  

APRA and AMCOS are also critical of the primary purpose test and recommend replacing it with a ‘substantial purpose or effect test’.

**Meaning of ‘online location’**

The term ‘online location’ is not defined in the Bill and the Explanatory Memorandum states that the term is intentionally broad and includes, but is not limited to, a website and would also accommodate future technologies.

Some rights holders groups argue that the term may not be broad enough for an injunction to cover replicas of the same infringing website popping up at different domains.

However a number of other submissions were critical of the broad nature of this term arguing that the term should be construed as narrowly as possible in order to achieve the purposes of the Bill. The ADA suggests that the Explanatory Memorandum should be amended to provide examples of what would be considered an ‘online location’ that judges may draw upon by analogy.

Communications Alliance recommends that the term ‘online location’ be defined as it is not commonly used in internet parlance and unless it is defined, risks being ambiguous:

> Precision is important when describing what ISPs will be asked to block, because unintended consequences can occur, particularly when legitimate content is hosted alongside infringing content on the same domain name or IP address. (e.g. blocking streamingmusic.blogspot.com will result in every other blogspot account being blocked).

**‘Facilitate’ copyright infringement**

A number of submissions raise concerns about the word ‘facilitate’. The Law Institute of Victoria and the ADA, noting that the term is not defined in the Bill, argue that it will therefore have an expansive meaning with its ordinary meaning encompassing ‘make possible’. This inclusion of ‘facilitate’ was not foreshadowed in the Discussion Paper and as the ADA has argued, this addition ‘has the potential to encompass sites such as VPNs and cloud storage providers.’ The Law Institute of Victoria argues:

> A more proportionate approach would be to remove reference to “facilitate” in s 115A(1), thereby limiting the power to websites that infringe, copyright (either directly or indirectly by authorisation).

If this recommendation is not accepted, the Bill could be amended to follow the model set out in the equivalent provision recently added to Singapore’s Copyright Act. This provision required that the “facilitating” be flagrant. Adding a similar requirement to proposed section 115A(1)(b) may assist in minimising the possibility of sites which have substantial legitimate uses from being captured by an overly broad order.

These new powers should not, for example, be able to be used as an anti-competitive or anti-innovation measure against legitimate sites in the online environment. Most small foreign online operators are unlikely to be able to absorb the cost of participating in the proceeding to put evidence before the court of the legitimate non-infringing uses of their site. Even with the addition of this “flagrancy” factor, great care will still need to be taken to ensure that blocking orders are a proportionate response and do not unduly impair legitimate services.
Variation of an injunction (proposed subsection 115A(7))

As already noted, proposed subsection 115A(7) allows the Court to vary injunctions. The Law Council argues that this provision needs to be tightened to clarify its scope and to cope with the problems that will inevitably face the Court where there are attempts by the operator of an online location to subvert the orders of the Court by moving infringing content to another electronic address. The Law Council recommends that an appropriate procedure could be set up by a provision that specifically enables the Court to make an order enabling the injunction to extend to any other location where, ‘following blocking of an online location, substantially the same content is made available at another location, but subject to prior notice given by the copyright owner to the Court’.  

Costs (proposed subsection 115A(9))

A number of submissions raise concerns about proposed subsection 115A(9)—that CSPs will not be liable for costs unless they take part in the proceedings. The Law Council is representative of a number of submissions when it expresses concern that:


A further matter raised in regard to costs is that the Bill does not address the question of who should pay the costs of implementing an order to block access to a third party website—the right holder or the CSP. While the Discussion Paper proposal had suggested that ‘rights holders would be required to meet any reasonable costs associated with an ISP giving effect to an order and to indemnify the ISP against any damages claimed by a third party’, the Explanatory Memorandum to the Bill in fact suggests that the CSP is to pay.

The Law Council and others argue that an order that the CSP bear the costs of implementing an order will impose a cost that will be passed on to all users of the CSP’s service. That is, the costs order will essentially act as a tax on all users, not just infringers.

Communications Alliance submits that it had given cautious support to the website blocking proposal, partly on the basis of the assurances from Government that rights holders would meet the costs associated with the scheme. Its submission also notes that:


Communications Alliance also observes that:


65. Law Council of Australia, op. cit., p. 2.
66. Ibid., p. 3.
68. Law Council, op. cit., p. 3.
69. Communications Alliance, op. cit., p. 6.
70. Ibid.
On the other hand, the Arts Law Centre of Australia believes the costs should be treated as a cost of the CSP doing business in the online environment. The Centre also argues that because they generate income from providing internet access, it is CSPs that have the primary responsibility for ensuring their services are not used to defeat the policy objectives of the copyright legislation.\footnote{Arts Law Centre of Australia, \textit{Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Copyright Amendment (Online Infringement) Bill 2015}, 16 April 2015, pp. 2–3, accessed 5 May 2015.}

The Australian Film/TV Bodies have a similar view arguing that requiring rights holders to meet any costs of an ISP is:

\begin{itemize}
  \item disproportionate, unnecessary, out of step with international practice and contrary to the fundamental principles of copyright law. As the site blocking decisions in the UK have demonstrated, the costs of complying with an injunctive relief order are not excessive or onerous, and that ISPs can deploy existing technology that they are already using to do so.\footnote{Australian Film and TV Bodies, op. cit., p. 21.}
\end{itemize}

\textbf{List of matters for consideration by the Court (proposed subsection 115A(5))}

Proposed subsection 115A(5) provides a list of 11 mandatory factors the Court must take into account when determining whether to make an order. This provision was a matter of discussion in many submissions to the Senate inquiry, a common theme being that the long list of factors that the Court must take into account places unnecessary fetters on the ability of a court to make appropriate decisions on the evidence before it.

The Law Council represents the view of many submitters when it recommends that:

\begin{itemize}
  \item given the jeopardy that is created by mandatory consideration of many factors including ‘other relevant matters’, the Court should be expressly empowered to give such weight as the Court considers appropriate to relevant (including listed) matters.\footnote{Law Council, op. cit., p. 2.}
\end{itemize}

Expressing a similar view APRA and AMCOS’s position is that obligating the courts to consider matters that may not, in the circumstances, warrant consideration is undesirable:

The list in proposed section 115A(5) also serves to act as a list of costly hurdles for copyright owners to overcome in order to protect their rights.\footnote{APRA AMCOS, op. cit., p. 11.}

The Australian Recording Industry Association (ARIA) and Music Rights Australia (MRA) both suggest that either the list of factors in subsection 115A(5) be completely deleted, or alternatively, some of the 11 factors should be deleted, in particular, paragraphs 115A(5)(c), (d), (g), (i) and (j).\footnote{Australian Recording Industry Association, \textit{Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Copyright Amendment (Online Infringement) Bill 2015}, 16 April 2015, p. 9, accessed 11 May 2015.}

\textbf{‘Public interest test’}

Some of the specific factors for consideration listed in proposed subsection 115A(5) were also discussed in submissions, the ‘public interest’ test in paragraph 115A(5)(g) in particular, drawing considerable comment. The public interest test (whether it is in the public interest to disable access to the online location) was added following feedback to the Discussion Paper. The Explanatory Memorandum explains that this matter would invite the Court to take into account the public interest in the freedom of expression, and other public interest issues such as, for example, access to information.\footnote{Explanatory Memorandum, op. cit., p. 11.}

Rights owners groups such as APRA and AMCOS, ARIA and MRA were critical of a public interest test noting that the legislation would not have to direct a court to consider the public interest, where relevant, when determining whether to exercise its discretion in favour of the application for injunctive relief. Rather the public interest would naturally be at the forefront of the Court’s mind. Further, obligating the Court to consider the public interest is likely to force the Court to entertain unhelpful amicus briefs.\footnote{APRA AMCOS, op. cit., p. 13.}
The Australian Film/TV Bodies also state that such a test is not appropriate, arguing it is a concept not applied under Australian copyright law:

> It is not a defence to copyright infringement or the remedies that a Court may award a copyright owner that establishes copyright infringement. The Copyright Act already strikes a balance between competing interests of copyright owners and users, that reflects (indirectly at least) what is in the public interest. The EM does not explain why there is any need for an additional balancing concept.\(^78\)

ACCAN acknowledges that a public interest test was added following feedback to the Discussion Paper noting also that the addition recognises that there are important interests outside of those held by the parties to an action. However without a clear avenue for these interests to be introduced ACCAN states that it is likely that they will be left to the judge alone to decide. Therefore, ACCAN recommends that there be a presumption in favour of allowing parties to become interveners or amicus curiae in the context of these injunction applications.\(^79\)

The Law Institute of Victoria recommends that proposed section 115A(5) be amended to expressly require the Court to consider any impact of a site-blocking order on freedom of expression.\(^80\)

### Concluding comments

As the 2013 ALRC report on copyright showed, the digital world has brought great challenges to the law of copyright. Of those many challenges, it is the problem of online piracy that the Government has chosen to prioritise and which this Bill is seeking to address.

The numerous and quite substantial submissions to the Senate Committee inquiry into the Bill expressing a diverse range of views are indicative of the complexities and the challenges of tackling enforcement of online copyright infringement.

Undoubtedly online piracy is a serious problem with significant economic consequences and in an increasingly sophisticated technical environment, enforcement is difficult. That said, the remedy of site blocking injunctions that the Bill is proposing is equally serious.

Generally rights holders groups are supportive of legislation enabling site blocking injunctions but a number express concern that the threshold tests in the Bill have been set so high to make the scheme practically unworkable. On the other side of the argument groups representing ISPs, consumers and public interest groups, while not condoning internet piracy, question whether the Bill is an effective response to the problem and also argue that site-blocking regimes can negatively impact upon internet freedom, innovation, and competition.

The Government defends the Bill as providing an intentionally high threshold for the copyright owner to meet as a safeguard to ensure the provision cannot be used to target online locations that are mainly devoted to a legitimate purpose.

As Associate Professor Kimberlee Weatherall has said in defence of the Bill, it is important that the threshold is high because the remedy that the Bill is proposing is ‘extraordinary’. Extraordinary, because it involves, ‘actively blocking communications and preventing Australians from seeing websites that would be available elsewhere in the world’. Extraordinary also because it is unusual in our legal system to require innocent third parties to act to enforce the legal rights of others, particularly when there are to be no pending legal proceedings.\(^81\) In Professor Weatherall’s view, this remedy must therefore be exceptional and restricted, targeting only the worst infringing websites.\(^82\)

The challenge facing the Parliament is to determine firstly, if site blocking injunctions are an appropriate remedy to combat online piracy and if so, is the Bill well drafted to meet that need? Will the remedy be effective and is the injunction power appropriately targeted in scope and does it provide adequate safeguards that reflect each of the interests at stake? The substantial submissions to the Senate Committee inquiry would suggest that there is room for refinement.

---

78. Australian Film and TV Bodies, op. cit., p. 17.
80. Law Institute of Victoria, op. cit., p. 6.
82. Ibid.
Copyright Amendment (Online Infringement) Bill 2015

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.