

INQUIRY INTO THE *COPYRIGHT AMENDMENT (ONLINE INFRINGEMENT) BILL 2015*

SUBMISSIONS OF APRA AMCOS TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

16 APRIL 2015

Introduction

1. APRA AMCOS is grateful for the opportunity to contribute to the enquiry of the Legal and Constitutional Affairs Committee of the Commonwealth Senate into the proposed *Copyright Amendment (Online Infringement) Bill 2015 (Bill)*.
2. APRA is the collecting society in Australia in respect of the public performance and communication rights of composers and music publishers. This typically covers the performances of music in tens of thousands of Australian businesses, including retail shops, nightclubs, restaurants and festivals, among many other settings, as well as the communication of musical works online, such as in download and streaming services. AMCOS is the collecting society in Australia in respect of reproduction of music in certain formats. This covers the reproduction of songs and compositions on CD, DVD, online, for use as production music and for radio/TV programs. Together, APRA and AMCOS control the copyright for such purposes in almost all commercially available musical works, by virtue of assignments from its local members and affiliations with similar overseas societies. Since 1997, the two organisations have been administered in tandem, and these submissions represent the united view of both.
3. APRA AMCOS represents more Australian copyright owners than any other party. APRA AMCOS have more than 87,000 members and 107,000 licensees. They have a diverse membership, ranging from unpublished writers to major music publishers.
4. It is safe to say that almost every time an online copyright infringement of music takes place, APRA AMCOS's rights will be amongst those being infringed. Remaining duly mindful of that comment, and the profound commercial disruption that has faced APRA AMCOS and its members since the global spread of online music piracy, APRA AMCOS nevertheless perceives tremendous new opportunities to commercialise its members' assets in a digital environment – so long as this can be done within a regulatory framework that protects creators by compelling consumers to compensate them fairly for their work. APRA AMCOS does not consider the internet or digital technologies to be threats to the flourishing of Australia's creative industries – quite the contrary – rather, APRA AMCOS seeks appropriate safeguards for Australia's creative industries so that Australian creativity is not sacrificed at the altar of the digital revolution.
5. Copyright law ensures that Australian creators can participate meaningfully in the digital economy. In 2012, PricewaterhouseCoopers published its report on the Economic Contribution of Australia's Copyright Industries. In 2010/2011, 8% of the Australian Workforce was employed in an industry reliant on copyright, and copyright industries comprised 6.6% of GDP. As the Honourable Minister for Communications noted in the Bill's Second Reading Speech, the copyright industries generate economic value of more than \$90 billion, including \$7 billion in exports. Yet, as it was noted in the Explanatory Memorandum, digitisation means these industries are particularly susceptible to harm from online copyright infringement: "Online copyright infringement poses a significant threat to these incentives and rewards, due to the ease in which copyright material can be copied and shared through digital means without authorisation". This is, in APRA AMCOS's experience, entirely accurate. But, when the two points are considered

together – the contribution of the creative industries to the national economy, and the undermining of the creative industries’ businesses by online copyright infringement – one is left to imagine what potential might be realised by the Australian creative industries if protected adequately by law. As a matter of both principle and economic policy, providing such protection is critical.

6. It should also be understood that a proactive approach against piracy does not benefit copyright owners at the expense of all others. APRA AMCOS has observed that strong anti-piracy laws benefit licensors and licensees equally. Laws that make piracy more difficult, such as those being now proposed, not only function to better support content creators, but also level the playing field on which licensed providers and unlicensed providers operate. Creating an environment in which licensed providers face less of a competitive disadvantage as against infringers is important to attracting the investment of the technology companies of the future, which in turn benefits all consumers. Because this Bill would disable access to overseas platforms that facilitate infringement, this Bill is as beneficial for licensees and the public as it is for licensors.
7. Given the economic importance of Australian content, and as a matter of principle, the Australian government should move to protect its citizens from online piracy and the detriment it causes. In order to create an environment in which so many thousands of individual songwriters and composers can continue to trade, and in which the global public can continue to enjoy their works, the law should be amended to better protect their rights and secure their commercial, professional and artistic futures, as well as Australia’s cultural heritage.

Context

8. APRA AMCOS, together with many other stakeholders in the copyright industries, have engaged in lengthy negotiations with representatives of virtually all the ISPs in Australia, with the good faith intention of arriving at a solution that adequately protects copyright from online infringement. Such negotiations began long before the *Roadshow v iiNet* case placed a public spotlight on ISP culpability for online infringement (and certainly before the recent enquiry and *Dallas Buyers Club v iiNet* case returned the spotlight on the issue). APRA AMCOS’s negotiations with ISPs will continue into the future, so long as such negotiations are necessary to protect the copyright of its members.
9. For many years ISPs were resistant to agreeing to an industry code that required them to act when notified of their customers’ infringements. This issue became so protracted, that the Government was forced to intervene in late 2014.
10. During this impasse, piracy has continued to pose significant difficulty to the sustainability of the music industry. Based on newly released data from comScore and Nielsen, available in the IFPI *Digital Music Report 2015*, it is estimated that 20% of fixed-line internet users worldwide regularly access services offering copyright infringing music. IFPI estimates that in 2014, there were 4 billion music downloads via BitTorrent alone, the vast majority of which are infringing. IFPI notes that research by Ipsos across 13 countries highlighted that consumers accept that action needs to be taken to curb online piracy: 52% of respondents considered that downloading or streaming without the copyright owners’ permission was theft. 43% of respondents believe ISPs should take more responsibility to prevent the illegal distribution of music online.
11. Most interestingly for the purposes of this enquiry, it was demonstrated that action by ISPs to block users’ access to copyright infringing websites has become an increasingly accepted way of helping to tackle online piracy, simply because it is extremely effective. IFPI notes:

Website blocking has proved effective where applied. While blocking an individual site does not have a significant impact on overall traffic to unlicensed services, once a number of leading sites are blocked then there is a major impact. In the three years since The Pirate Bay and numerous other sites were blocked in the UK, there has been a 45% decline (from 20.4m in April 2012 to 11.2m in April 2014) in visitors from the UK to all BitTorrent sites, whether blocked by ISPs or not. In Italy, where courts have ordered the blocking of 24 BitTorrent sites, there has been a decline of 25.6% in the number of overall BitTorrent downloads in the country in the two years from January 2013.

12. These figures are clear evidence of the effectiveness of siteblocking schemes in the fight against online piracy. APRA AMCOS is especially cognizant of IFPI's finding that siteblocking schemes only have their desired impact once a number of leading sites are blocked. In light of these findings, APRA AMCOS submit that the legislation not only has to provide the Court with these essential powers, but must be designed to enable copyright owners to approach the Court for these orders with the convenience, simplicity and flexibility required to achieve the critical mass of orders necessary to reduce piracy substantially.
13. Whereas other countries in the Western world have been pioneering plans to better protect the copyright of its artists, and ISPs have faced a more demanding regulatory environment overseas, Australia has lagged behind in this respect. IFPI reports that in March 2014, the Court of Justice of the European Union ruled that the blocking of copyright infringing sites is compatible with EU law, including the EU Charter of Fundamental Rights, as copyright is a fundamental right requiring protection. Courts and authorities in 11 EU countries have ordered ISPs to block users' access to infringing websites. Website blocking of copyright infringing sites has been authorised in countries including Argentina, India, Indonesia, Malaysia, Mexico, South Korea and Turkey. In December 2014, Singapore too empowered its courts to order ISPs to block websites that infringe copyright. APRA AMCOS is relieved that this Government has taken a proactive stance on this important issue.

The Bill

14. The Bill, in its current form, unquestionably represents a compromise between the interests of content owners and consumers. It purports to be, and evidently is, the product of a balancing exercise that has negotiated the competing interests of the relevant stakeholders. Although the overall scheme is welcomed by the creative industries, it contains a number of obstacles that must be overcome to obtain injunctive relief. These obstacles are apparently intended as protections for the overseas online locations alleged to be facilitating copyright infringement, and the carriage service providers (**ISPs**) affected by the injunctions, so that the Court's power to award injunctive relief to copyright owners is not abused.
15. The accommodations given to the overseas online locations and, in some respects, to ISPs, include:
 - (a) the exclusive jurisdiction of the Federal Court of Australia, in proposed section 115A(1), which increases the costs, and thereby decreases the likelihood, of copyright owners seeking injunctive relief (as compared to granting jurisdiction to the Federal Circuit Court);
 - (b) the "primary purpose" threshold in proposed section 115A(1)(c) of the Bill;

- (c) the restriction on the Court’s power to permit only an order that the ISP take “reasonable steps” to disable access to the online location, in proposed section 115A(2) of the Bill;
 - (d) the standing requirements, in proposed section 115A(3); and
 - (e) the list of factors that the Court must consider before granting injunctive relief, in proposed section 115A(5).
16. Subject to what is otherwise suggested in these submissions, APRA AMCOS understands the basis for some of these restrictions.
17. The compromise between competing interests is not only clear from what is contained in the Bill, but also what is not. For a Bill targeted to reducing online copyright infringement in an efficient and practicable manner, it is also instructive what has been omitted from the scheme. There is no prohibition on advertising with overseas online locations that flagrantly infringe copyright, even though advertising dollars are the lifeblood of online copyright infringement. There is no scheme to assist copyright owners to recover damages against infringing overseas online locations, even though the Bill is expressly in response to the difficulty of enforcing rights overseas. The injunctive relief extends to overseas online locations, not the persons operating them, which means that there is no record of blocked infringers that makes seeking a subsequent round of orders in respect of another online location subsequently established by the same person easier. Copyright owners would be required to repeatedly trouble the Court for new orders to satisfy each new online location established by the same person, and have to satisfy the entire process each time. This would come at great cost to both the copyright owner and the Court. There are no additional penalties on consumers or ISPs – and the only penalty for the flagrant facilitator of copyright infringements is that the website is blocked. And the scheme would not extend to online locations operating within Australia.
18. APRA AMCOS acknowledges the statement in the Second Reading Speech that “the challenge though is to strike the right balance”: any suggestion that the Bill is a political concession made to copyright owners at the expense of internet freedom or ISPs is misguided. It *clearly* reflects the Government’s even-handed approach to mediating competing interests.

Summary

APRA AMCOS is well placed to comment on online copyright infringement, particularly in respect to music.

APRA AMCOS has made, over the course of many years, a significant effort to negotiate with ISPs to reduce the levels of piracy online. There has been no adequate resolution, such that the Government’s intervention became necessary.

APRA AMCOS welcomes the proposed amendment as one that will provide significant benefit to the creation of Australian content, as well as to the Australian economy. The scheme will simultaneously provide enormous benefit to licensed Australian service providers.

The Bill already contains significant compromises to stakeholders with competing interests to the copyright industries.

Primary Purpose

19. The Bill would empower the Federal Court, on application by the owner of a copyright, to grant an injunction to take reasonable steps to disable access to an overseas online location, if the Court is satisfied that (a) the online location infringes, or facilitates an infringement of, the copyright, and (b) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).
20. That is, for the copyright owner to have any rights under the proposed scheme, the overseas online location must, to the Court's satisfaction, have one of two primary purposes: to infringe copyright or to facilitate the infringement of copyright.
21. With respect, this test is ill-conceived. It is clear from the Second Reading Speech and Explanatory Memorandum that the test is in place to prevent the proposed scheme from being used to target online locations that are mainly devoted to a legitimate purpose. The example given in the Second Reading Speech refers to a legitimate streaming service located in the United States that is streaming content in respect of which it has all the copyright authority to stream to customers in the United States, but is accessed in Australia by way of a VPN. The example is not a compelling one. If, in Australia, the primary (perhaps only) activity is an infringing one, then there is nothing lost and much gained by disabling access, from Australia, to the legitimate website. The disablement of the website in Australia would not affect the legitimate operations of the website in the United States, where it is authorised to communicate the subject matter. But even putting that debate aside, the '*a substantial purpose or effect*' test – an alternative threshold recommended below – would more than accommodate such situations.
22. The example given in the Explanatory Memorandum refers to a website for an art gallery that may contain an unauthorised photograph. No doubt, the proposed primary purpose test also has value in respect of preventing the disablement of access to legitimate sites that are, at times, careless with their licensing obligations. For a site that communicates an abundance of material, a small amount of which happens inadvertently to infringe copyright, APRA AMCOS accepts that the proposed injunctive relief should not be enlivened. Again, the threshold, if amended to the test proposed below, would readily accommodate such situations.
23. There is no appreciable benefit gained by retaining the "primary purpose" test instead of the "a substantial purpose or effect" test, but there are significant concerns about the primary purpose test. The primary purpose of even the most egregious infringers of copyright might be something other than to infringe, or facilitate the infringement of, copyright. It might be to make music, or movies, or books, or television shows available to the public – and copyright might be entirely disregarded. Alternatively, the primary purpose of the online location might be to make money from advertising revenue; or to provide content as a means to attract users to a site, from whom the site may collect data to sell; or to create a platform for peers to share material. But this is a semantic debate with an easy solution. The use of the language in the Bill is simply, in APRA AMCOS's opinion, not worth the risk of arguments like those above, or the possibility of a Court interpreting the legislation literally and thereby rendering the proposed scheme inutile except in extreme, unlikely, cases where online locations declare that their *raison d'être* is to infringe, or facilitate the infringement of, copyright. Accordingly, the word 'purpose', which imports an intention, should be altered or expanded so that the enquiry undertaken by the Court will be able to consider substantial activity engaged in, or facilitated, by the overseas online location. This change would enable the Court to look to a more objective set of indicia, and would remove the semantic arguments described above. It is, in APRA AMCOS's view, an essential amendment.

24. Moreover, any requirement that *the* primary purpose (or even *the* ‘substantial purpose of effect’) is to infringe, or facilitate the infringement of, copyright, is likely to lead to unintended consequences. The language of the Bill implies that there will be a singular purpose that can be identified as a primary purpose, and that other substantial purposes will be excluded as irrelevant for this analysis. Rather than looking to *the* primary or substantial purpose of the online location, the Court should consider the multitude of substantial purposes (and effects). For example, a website that seeks to facilitate the unauthorised reproduction of music or movies so to derive advertising revenue, might include bona fide reviews of the subject matter. It would of course be indemonstrable that users are visiting the site for the free access to the subject matter as opposed to the reviews, and it would be available to the website operator (or the respondent ISP) to resist the injunction on the basis that *the* primary purpose of the online location is to review music and movies, and not to infringe copyright. There are already other mechanisms inserted in the Bill to prevent injunctions being granted in respect of online sites that genuinely have a legitimate purpose. There is no need to include such a test in a manner that does not permit a range of substantial purposes (and effects) to be considered. As it stands, the legislation would provide an obvious loophole to escape the operation of this scheme and, by mandating it in the legislation, Courts would be powerless to apply the law appropriately.
25. An amendment that would allow for multiple purposes (and effects) is especially important given that “primary” has potential to adopt a number of meanings in practice. For example, if it refers to traffic through the online location, it may speak at least of users or of data. That is, if the vast majority of users share a few personal photos and literary works via an online platform (lawful), but a small minority of users on that same platform share many commercial sound recordings and cinematograph films, which latter activity comprises the bulk of the data flow (unlawful), would one or the other be considered “primary”? Given the dilemmas that might arise in ascertaining *the* primary purpose of an online location, the Court should be given the flexibility to grant injunctive relief when copyright infringement is a substantial purpose or effect of the online location, and not have to concern itself with finding that such a purpose (or effect) is more dominant than any and all others.

Recommendation

Proposal 1

Proposed section 115A(1)(c) should be amended so that section 115A(1) provides for the “a substantial purpose or effect” test, as follows:

The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:

- (a) a carriage service provider provides access to an online location outside Australia; and
- (b) the online location infringes, or facilitates an infringement of, the copyright; and
- (c) a substantial purpose or effect of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

Proposal 2

In the alternative, proposed section 115A(1)(c) should be amended so that section 115A(1) at least provides for multiple purposes to be considered, as follows:

The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:

- (a) a carriage service provider provides access to an online location outside Australia; and
- (b) the online location infringes, or facilitates an infringement of, the copyright; and
- (c) a primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

Reasonable steps

- 26. Proposed section 115A(2) provides that the injunction is to require the ISP to take “reasonable steps” to disable access to the online location. The provision is explained in the Explanatory Memorandum: “This may include blocking its subscribers from accessing a website operated overseas that facilitates copyright infringement in any such a [sic] manner as the Court sees fit.”
- 27. The inclusion of the “reasonable steps” phrase can only serve to cap the Court’s discretion; it is intended to signal to the Court that the Court may not enjoin an ISP to take steps that are “unreasonable” to disable access to the online location. But, to the extent that this is the intention behind its inclusion, it may serve little practical purpose and only reduce the efficacy of the overall scheme.
- 28. The requirement may be read in at least two different ways. Presumably the intention behind the drafting is that where a Court grants an injunction, the injunction may list specific steps that must be taken to disable access to the online location – but those steps must be reasonable. Another possible interpretation is that a Court has no power to enjoin an ISP to take specific steps as it is restricted to making the broad order that the ISP “take reasonable steps to disable access to the online location”. This alternative reading would deny the Court any discretion as to the steps that must be taken, and entrust the process of disablement to the ISP. If the first interpretation is correct, as is presumed, it should be clarified, so to avoid unnecessary argument.
- 29. Even assuming that the first interpretation is correct, questions are still raised as to the purpose of including the “reasonable steps” requirement. In practice, once a Court is satisfied in relation to all the other thresholds necessary to grant such an injunction, whatever steps are necessary to disable access to the website must surely, in those circumstances, be reasonable. The only conceivable potential for a course of action to be unreasonable would be if there were a simpler or cheaper means of achieving the same end – and it is unimaginable that a Court would, in receipt of all relevant submissions, make orders that achieved nothing more than other cheaper and simpler orders. That is, it is hard to envisage that the process of seeking an injunction would benefit in any way from the inclusion of the “reasonable steps” requirement, particularly given that the Federal Court is anyway empowered to make orders as it thinks appropriate (section 23 of the *Federal Court Act 1976* (Cth)) and would always intend to act as reasonably as possible.
- 30. Not only does the inclusion of the “reasonable steps” requirement add no appreciable benefit, it causes the following difficulties:
 - (a) the “reasonable steps” requirement invites those affected by the orders sought to put to the Court that there are no easy or convenient means of disabling access to the site, and that therefore – notwithstanding all other requirements being

satisfied – the legislation does not permit the Court to make an injunction, for only “reasonable steps” may be ordered; and

- (b) conceivably, the “reasonable steps” requirement could also be marshalled by an ISP or an affected online location to argue that a different approach was taken on a previous occasion, and therefore the ordered approach constitutes unreasonable steps.

Removing the “reasonable steps” requirement would aptly enable a Court to take each case on the evidence before it (with reference, of course, to relevant precedent), while avoiding unnecessary argument. The legislation should not expose the Courts and copyright owners to the risk that such unintended but foreseeable arguments are made.

- 31. APRA AMCOS notes that the UK counterpart to this scheme does not have any similar provision, and that the approach taken by Justice Arnold in *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch) was lauded in the Explanatory Memorandum. In that case, his Honour made detailed orders in relation to the technical means to be adopted by the ISP to block access to the relevant website. APRA AMCOS submit it is appropriate to leave Australian judges similarly to determine the appropriate steps (reasonably, as their Honours would do anyway) to disable access to an online location. Doing so does not give rise to any restrictions on the Court’s discretion, which in turn has future-proofing benefits for the scheme.

Recommendation

Proposed section 115A(2) should be deleted.

Matters to be taken into account

- 32. Proposed section 115A(5) requires that, in determining whether to grant the injunction, the Court is to take various listed matters into account. APRA AMCOS proposes to deal with this aspect of the scheme in two parts, the first addressing the inclusion, as a matter of principle, of a list of items that must be considered by a Court, and the second addressing specific items in the list.

Inclusion of the list

- 33. The imposition of a 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 chapeau of the proposed section states that the Court “is to” take into account the various matters; that is, it must take those matters into account. APRA AMCOS submits that it is generally undesirable to prescribe a set of matters that the Court must, out of obligation, consider, as opposed to a set of matters that the Court may, at its discretion, factor into a decision as to whether to grant an injunction.
- 34. It is also undesirable in relation to specific matters that are not conducive to being a consideration that a Court must obligatorily factor into its determination. The list contains omnibus provisions such as “(i) any other remedies available under this Act; (j) any other matter prescribed by the Regulations; [and] (k) any other relevant matter.” This would seem to obligate, as opposed to permit, the Court to consider any other “relevant matter.” If these provisions were to be enacted, the Court would be without power to make an injunction without considering all other possible remedies provided for under the Copyright Act, one by one. APRA AMCOS would be surprised if this is really the intention of the legislation. Moreover, the matter at proposed section 115A(5)(d) *requires* the Court to consider whether access has been disabled by orders from a court

of another country. This is certainly sensible when injunctive relief has been given in relation to an online location in another country, but surely the mere fact that a particular online location has not been the subject of an application for injunctive relief in a foreign jurisdiction carries no weight in the decision to grant relief here – particularly, given that many jurisdictions have no such remedy available, and different jurisdictions may be affected by online locations differently. Surely the intention behind the inclusion of these omnibus provisions, and the foreign jurisdiction provision, is that a Court *may* consider them, if the Court considers it worthwhile, and not that a Court must attend to them.

35. In APRA AMCOS's respectful submission, the list – in its entirety – should not be made obligatory. The list should be pruned, in the manner described below, and should ultimately provide guidance that the Court may consult when determining whether to grant an injunction. This list is significantly longer and imposes more onerous requirements on the Court than its counterparts in places such as Singapore and the United Kingdom, countries that have seen highly successful implementations of similar injunctive relief schemes. In fact, in the United Kingdom, apart from the Court being obligated to consider whether effective notice was given, the Court has complete discretion as to whether the injunction should be given. APRA AMCOS contends that forcing copyright owners to gather and adduce evidence relating to this myriad of factors creates an unnecessary and costly hurdle for copyright owners to overcome in order to succeed in their applications, and may have the effect of undermining the stated purpose of sustaining the 'viability and success of creative industries'.
36. Clearly, the Bill was based in large part on equivalent Singaporean legislation. In that country the *Copyright (Amendment) Act 2014* amended the *Copyright Act* (Chapter 63) so that section 193DB(3) provides a list of matters the High Court of Singapore must have regard to in deciding whether to issue an injunction against a 'flagrantly infringing online location', including:
- a) the harm that has been or may foreseeably be caused to the plaintiff;
 - b) the burden that the making of the order will place on the network service provider;
 - c) the technical feasibility of complying with the order;
 - d) the effectiveness of the order;
 - e) any possible adverse effect on the business...of the network service provider;
 - f) whether some other comparatively effective order would be less burdensome; and
 - g) all other matters which it considers relevant.
37. Further, s 193DDA(2) provides a list of matters the Court must have regard to in assessing flagrancy itself:
- a) whether the primary purpose of the online location is to commit or facilitate copyright infringement;
 - b) whether the online location makes available or contains directories, indexes or categories of the means to commit or facilitate copyright infringement;
 - c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
 - 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 the online location contains guides or instructions to circumvent measures, or any order of any court, that disables access to the online location on the ground of or related to copyright infringement; and
- f) the volume of traffic at or frequency of access to the online location.

APRA AMCOS notes that the Court is permitted to place any weight on the factors under section 193DDA(2) as it sees fit.

- 38. APRA AMCOS respectfully submits that the matters contemplated by the Singaporean legislation above set a threshold requirement more appropriate to achieving the stated purposes of the Bill, and provide the Court with appropriate latitude in respect of discretion. They sufficiently address the concerns of stakeholders (including copyright owners and consumers) at a level of generality that places far fewer fetters on a judge's discretion. Furthermore, there has been no significant opposition to these provisions in Singapore and several industry groups (most notably the International Federation of the Phonographic Industry) are currently preparing applications to block online locations such as The Pirate Bay pursuant to the new provisions. That is, the pared-back list is achieving its aims in Singapore.
- 39. In the United Kingdom, section 97A of the *Copyright, Designs and Patents Act 1988* (UK) allows the High Court to grant an injunction against an ISP, but only when that ISP has 'actual knowledge' of another person using their service for the purposes of copyright infringement. The UK drafters did not perceive the need to provide a list of matters the Court is to take into account, except in relation to the adequacy of the notice given to the ISP. Rather, the Court must have regard to "all matters which appear to it in the particular circumstances to be relevant". That is, the entire determination is – save for the requirements relating to notice – at the Court's discretion. (It should be noted that the UK Courts are bound by other obligations, by virtue of various EU treaties; but their obligations under the *Copyright, Designs and Patents Act* are limited so to give them considerable latitude to determine the most appropriate course of action.)
- 40. In *Paramount v BSKB*, aside from an examination by Justice Arnold of particular technical aspects relating to the form of the infringement by the websites in infringing the claimants' copyright, the High Court of England and Wales was satisfied with a straightforward assessment of evidence adduced by the claimants. Furthermore, it was stated that "as with most of the previous applications (for injunctions under s 97A), the Defendants do not resist the application, and have agreed the terms of the orders that should be made if the Court is satisfied that it is appropriate to make orders in respect of the Websites." APRA AMCOS submits that the UK scheme is an eminently workable mechanism that places no unnecessarily onerous evidentiary burden on the copyright owners, has faith in the Courts to make appropriate decisions based on the ever-changing nature of cases that come before them, and does not risk exposing the various parties (including the Courts) to unnecessary expenses incurred in satisfying formalities.
- 41. It is useful also to consider how, in leading copyright cases, the Courts have treated lists of matters and factors they have been bound by legislation to take into account. Sections 36(1A) and 101(1A) of the Copyright Act provide that the Court, when determining whether or not a person has authorised the doing of an act comprised in the copyright of a work or other subject matter, must take the following matters:
 - a) the extent (if any) of the person's power to prevent the doing of the act concerned;
 - b) the nature of any relationship existing between the person and the person who did the act concerned; and

c) whether the person took any reasonable steps to prevent the doing of the act...

42. In the *Kookaburra* case, Jacobson J stated that “difficulties arise in making out the claim for authorisation against the EMI parties because I am required to address the mandatory considerations set out in s 36(1A) of the *Copyright Act*.” On appeal to the Full Court, Jagot J allowed an aspect of the cross-appeal on the basis of either an “error of principle” or “inadequate reasons” constituted by the trial judge’s brief consideration of the matters required. As is clear from this example, compliance with mandatory lists of factors for consideration has posed a difficulty in the course of litigation. Moreover, each expensive judgment (and appeal) might have been obviated if the legislation had provided the Court with adequate latitude to make appropriate decisions on the evidence before it.
43. It is APRA AMCOS’s position 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.

Recommendation

Proposed section 115A(5) should be amended to invite, rather than obligate, the Court to consider the factors, and should permit the Court to ascribe whatever weight to each factor as it considers appropriate in the circumstances. Accordingly, the list of matters to be taken into account when deciding whether to grant injunctive relief should be introduced as follows:

(5) In determining whether to grant the injunction, the Court can give such weight to the following matters as it considers appropriate: ...”

Specific matters in the list

44. Proposed section 115A(5)(a) requires that the Court take into account the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement. The Second Reading Speech explains that this provision contemplates online locations that deliberately and conspicuously flout copyright laws. The Explanatory Memorandum further illustrates the underlying motivation: “Flagrancy is a subjective element that goes toward the intention of the operator of the online location. The term ‘flagrancy’ is used in subparagraph 115(4)(b)(i) [as well as sections 116AO, 116D, 135AOE and 248J] of the Act in relation to additional damages. It is intended to be punitive to address wrongful conduct or circumstances where the infringer (or in this case, the operator of the online location) demonstrates a general disregard for copyright.” That being the case, it remains to be seen what benefit is had by separating the enquiry in proposed section 115A(5)(a) from that in proposed section 115A(5)(c); the applicant’s satisfaction of, or failure to satisfy, one would surely repeat itself in the other. Further, it is inappropriate to import one of the thresholds for additional damages into a test that is not geared toward punishing the offender. APRA AMCOS accepts that failure to satisfy one of the listed factors does not necessarily translate into a failure to obtain injunctive relief, but queries why the standard provided here should borrow from the demanding standards of additional damages. The consequence of the injunction is simply not comparable to that of an additional damages order. This is not to dismiss the need for a threshold that requires that the infringement is serious and not merely slight, but the importation of a word very familiar to copyright discourse into a new scheme is an invitation for the word’s judicial interpretations to come along with. Rather, this matter should be deleted and any relevant aspect of this enquiry be subsumed into the enquiry at proposed section 115A(5)(c).

45. Proposed section 115A(5)(b) requires that the Court take into account whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate the infringement of, copyright. The Explanatory Memorandum explains that search engines or websites based primarily on user-generated content are not the intended targets of the proposed injunction power. Rather the proposed provision is intended to capture online locations that provide programs, links, directories, indexes or other tools to assist copyright infringement. It appears to be the case that such an enquiry is obviated by the “primary purpose” threshold (or, if amended, a variant of it). Nevertheless, APRA AMCOS is satisfied that this matter need not be amended.
46. Proposed section 115A(5)(c) requires that the Court take into account whether the owner or operator of the online location demonstrates a disregard for copyright generally. As mentioned above, it is unclear what value this enquiry has separate to the one at proposed section 115A(5)(a). APRA AMCOS, however, considers this enquiry to be a more appropriate one – given that it carries no precedential baggage – than the one suggested at proposed section 115A(5)(a). There may be fair questions as to whether this matter is necessary given the “primary purposes” test (or an amended variant). But to the extent that a list of matters to be considered should remain, and that this particular enquiry does not duplicate the “primary purpose” enquiry, this matter should be on that list.
47. Proposed section 115A(5)(d) requires that the Court take into account 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. APRA AMCOS considers that this matter is a worthwhile one for a Court to consider, but reiterates its concern about the matter being considered obligatorily (as opposed to at the Court’s discretion). Of course, an online location may be the subject of an injunction application in Australia before it becomes the subject of one overseas. This is entirely foreseeable, given that many countries do not provide for such a remedy, and copyright owners might be affected in different jurisdictions more profoundly than in others. It should not persuade the Court against making an injunction that no other jurisdiction has done so yet, but should be compelling if one has. A Court should therefore not be obligated to consider it, but may consider it if worthwhile.
48. Proposed section 115A(5)(e) requires that the Court take into account whether disabling access to the online location is a proportionate response in the circumstances. The Explanatory Memorandum clarifies that, for example, the Court may decide that a website has a substantial or significant non-infringing purpose, so blocking that particular website is unlikely to be a proportionate response. The Court may also wish to consider the frequency with which infringing material is accessed by consumers in Australia from that particular online location. The Second Reading Speech further explains this provision, suggesting that the Court may consider the percentage of infringing content on the online location compared to the legitimate content or the frequency with which the infringing material is accessed by subscribers in Australia. Again, this enquiry appears to be obviated by the “primary purposes” threshold (or, if it is amended, a variant of it.) Obligating a Court to consider it again, after satisfying itself in relation to the “primary purposes” threshold is duplicative of resources, and reinforces why the list of matters should be cast as guidance that *may* be considered by the Court if worthwhile. To the extent that the list is so recast, this is a sensible matter to guide the Court.
49. Proposed section 115A(5)(f) requires that the Court take into account the impact of any person, or class of persons, likely to be affected by the grant of the injunction. The Explanatory Memorandum explains that affected persons could include the operator of the online location, the ISP, subscribers of the ISP or users of the online location. Where a single ISP may be the subject of an application, the Court may also wish to consider

whether granting the injunction may result in a loss of subscribers to that particular ISP. In APRA AMCOS's respectful submission, this is an inappropriate factor to be considered – whether obligatorily or at the Court's discretion – at least as it is currently worded. “Any person, or class of persons, likely to be affected” is far too broad a description. The Court should simply have no hesitation to deprive individuals from access to facilities to infringe copyright. Their interests in accessing unauthorised material should not carry any weight when balanced against copyright owners' interests in blocking access to unauthorised material. APRA AMCOS consider that this matter should be deleted.

50. Proposed section 115A(5)(g) requires that the Court take into account whether it is in the public interest to disable access to the online location. 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. APRA AMCOS notes 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; 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. APRA AMCOS therefore recommend that this matter be deleted from the list at proposed section 115A(5). If the legislature disagrees with this submission, APRA AMCOS submit that the Explanatory Memorandum, and any other public elaboration on this matter, should not list only those public interest factors that might outweigh the interests compelling injunctive relief, but rather *all* public interest considerations. APRA AMCOS refers to the human right, not just in relation to free expression, or access to information, but also to enjoy the rewards of one's creations (as described in Article 15 of the ICESCR). The explanatory material should not suggest incorrectly that public interest considerations, such as human rights, are unilaterally in favour of not granting injunctive relief, and are in competition, for these purposes, only with private commercial rights.
51. Proposed section 115A(5)(h) requires that the Court take into account whether the owner of the copyright complied with the notice requirements in proposed subsection (4). This is, an APRA AMCOS's respectful submission, an entirely sensible matter for the Court to take into account.
52. Proposed section 115A(5)(i)-(k) requires that the Court take into account the omnibus provisions referred to above, whose consideration should be invited rather than obligated. In relation to proposed subsection (i) in particular, the effect of this subsection, perhaps unintentionally, is to attract suggestions that an application for an injunctive remedy under the proposed scheme should be sought as a last resort, when all other potential remedies are unavailable or impracticable. This suggestion should simply not be made, particularly given the scheme comes as a response to the practical difficulties in enforcing rights (that is, seeking any other available remedy) overseas. Proposed section 115A(5)(j), by obligating the Court to consider any other matter that is prescribed in the regulations, creates the possibility that further matters will have to be factored in by the Court when those matters have not been scrutinised by the relevant stakeholders, in the same manner as a legislative amendment. Currently, there are no known matters being considered for inclusion in the regulations. If issues arise which necessitate amendments to address specific matters, these should be dealt with by way of legislative amendment. Even should this approach be unsatisfactory, surely the provision at proposed section 115A(5)(k) covers whatever issues may be relevant to be considered. Accordingly, APRA AMCOS recommend that proposed sections 115A(5)(i) and 115A(5)(j) be removed from the list and, on the basis that the list removes the obligation

on, and rather invites, the Court to consider any other relevant matter, proposed section 115(5)(k) should remain on the list.

Recommendation

Proposed section 115A(5) should be amended so that section 115A(5) reads as follows:

(5) In determining whether to grant the injunction the Court can give such weight to the following matters as it considers appropriate:

- (a) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of copyright;
- (b) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- (c) 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;
- (d) whether disabling access to the online location is a proportionate response in the circumstances;
- (e) whether the owner of the copyright complied with subsection (4); and
- (f) any other relevant matter.

Costs

- 53. Proposed section 115A(9) provides that the ISP is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings. 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.
- 54. APRA AMCOS submits that the language of “any costs in relation to the proceedings” is too broad, and may invite the suggestion that the ISP will not be liable for the costs of implementing the disablement (or any other result of the injunction application.)
- 55. If the intention behind this provision is to assure ISPs that if they do not appear at an application to which they are listed as a respondent, they will not be penalised with costs orders against them, then this should be clearly stated in the Explanatory Memorandum. This provision would be, in APRA AMCOS’s view, a justifiable and even-handed one, geared toward ensuring that the scheme is efficient. Further clarification, however, would be beneficial.
- 56. In APRA AMCOS’s view, it is preferable that this provision is deleted, and that the Explanatory Memorandum contain the necessary guidance on this point.

Recommendation

Proposed section 115A(9) should be deleted, and the Explanatory Memorandum should contain a passage such as the following:

In the interests of efficiency, where an application brought by the copyright owner for injunctive relief is uncontroversial, it is preferable that the respondent carriage service provider(s) not have to enter an appearance in Court. This would make the application cheaper for the copyright owner(s) and the carriage service provider(s) named in the application, and would reduce the strain on the Court. To this end, and for the sake of clarity, it is not intended that the respondent carriage service provider(s) will be liable for any costs of the application, simply because it or they do not enter an appearance in the Court. That being said, where respondent carriage service provider(s) elect to contest an application, the Court may make orders for costs as it considers appropriate in the circumstances.

Miscellaneous

57. The following are some smaller suggestions that might be made for the sake of clarity:

- (a) Proposed section 115A(1)(a) requires that the relevant online location is outside Australia, but proposed section 115A(4)(b) imagines the possibility of a situation where the copyright owner is unable despite reasonable efforts to determine the identity or address of the person who operates the online location. It should be clarified that the scheme applies to online locations operating in all locations, unless it can be proven that the online location is operating from within Australia.
- (b) Proposed section 115A(3) lists the parties to an action under proposed section 115A(1) as the owner of the copyright; and the carriage service provider; and the person who operates the online location if, but only if, that person makes an application to be joined as a party to the proceedings. The words “an application” should be amended to “a successful application”.

Conclusion

58. APRA AMCOS is grateful for the Government’s response to this serious issue, and appreciates the opportunity to comment on the Bill to the Legal and Constitutional Affairs Committee of the Commonwealth Senate. APRA AMCOS remains available to assist in any aspect of this enquiry.

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APRA AMCOS