

**COMMUNICATIONS
ALLIANCE LTD**



Copyright Amendment (Online Infringement) Bill 2015

COMMUNICATIONS ALLIANCE SUBMISSION TO THE
SENATE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS

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INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission to the Committee's inquiry into the Copyright Amendment (Online Infringement) Bill 2015 ("the Bill").

We would be pleased to supplement this submission with an opportunity for the Committee to receive a briefing on technical aspects relating to the operation of the internet as it relates to online copyright infringement and web site blocking, if that would be helpful to the deliberations of the Committee.

This submission has also been endorsed by the Australian Mobile Telecommunications Association (AMTA).

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

The vision of Communications Alliance is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

The Communications Alliance Internet Service Provider (ISP) Members provide the internet services that millions of Australians rely on every day to connect with family and friends, conduct business, study and share knowledge and spend their leisure time. We do not condone online copyright infringement and do encourage the lawful use of the Internet. We would not support legislative changes that impede the ability of our Members' customers to access legitimate content and sites on the internet or impose onerous regulations and costs on Australian businesses.

1. Summary

Communications Alliance and its Members do not authorise or condone online copyright infringement. We have actively supported efforts to combat the practice. Our recent work in this area includes the creation of a Copyright Notice Scheme Code, designed to reduce the incidence of online copyright infringement and provide information to Australian consumers as to how to identify and readily access available content alternatives. The Code is currently awaiting registration by the Australian Communications and Media Authority (ACMA).

We support the underlying objectives of the Bill, but believe that the Bill is deficient in several respects. Communications Alliance is also disappointed that an exposure draft of the Bill was not released, to enable, in particular, technical input on how the matters addressed in the Bill may be implemented.

As outlined in this submission, we believe that the Bill requires amendment to:

- ensure consistency with the principles put forward by the Federal Government in its original discussion on the issue;
- achieve the Government's stated objectives; and
- reduce the risk of undesirable and unintended consequences.

The mechanisms proposed in the Bill were first canvassed by the Federal Government in its **"Online Copyright Infringement Discussion Paper"** released in July 2014 ("July Discussion Paper").

In the July Discussion Paper the initiative was described as **"Proposal 2 – Extended injunctive relief to block infringing overseas sites"**.

In its response to the July Discussion Paper, Communications Alliance warned that site blocking can be a relatively blunt instrument and has limitations. These include that:

- web site blocking has potential impacts beyond its intended application (see the example of ASIC using s313 of the Telecommunications Act in 2013, when it inadvertently blocked thousands of legitimate websites in Australia);
- web site blocking might be little more than a temporary solution in some instances, because blocked sites may reappear quickly under a different domain name or web address;
- savvy internet users will be able to find alternative means of accessing blocked sites, if they so desire; and
- site blocking does not address the substance of the problem – the sites and their operators will still exist before, during and after the blocking is undertaken.

Describing the proposal in the July Discussion Paper, the Government stated 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."

Based in part on those two key assurances, Communications Alliance gave cautious support to the proposal, i.e. we opined then and continue to believe that an appropriately structured and safeguarded injunctive relief scheme could play an important role in addressing online copyright infringement in Australia.

However, the requirements for rights holders to meet the reasonable implementation costs of ISPs, and to provide an indemnity to ISPs, are absent from the amending legislation.

Industry believes that the Bill requires amendment and improvement to ensure it is consistent, effective, appropriately safeguarded and structured.

In summary, we recommend that amendments be considered in order to:

- define the terms "online location" and "web site";
- make it clear that the legislation only applies to overseas web sites which are located and operated by persons outside Australia;
- make it explicit within the Bill that Rights Holders are required to meet an ISP's legal costs of the proceedings, and (in line with the Government's stated intention) all reasonable costs associated with an ISP giving effect to an order;
- make it explicit that ISPs have an indemnity, immunity, or safe harbour from third party actions resulting from the ISP complying with a web site blocking order;
- appropriately address technical issues, 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.

2. Scope of the Bill & Definitional Issues

Communications Alliance agrees that the scope of the injunction power should be limited to online locations (web sites) that are:

- outside Australia
- operated by a person outside Australia; and
- have as their primary purpose the infringement of, or facilitation of infringement of copyright.

As currently drafted, s115A(1) could be read to include circumstances where a web site is operated by a person *inside* Australia, but where the actual material is located on a server outside Australia. To provide greater clarity for the Court, ISPs and rights holders, we recommend that there is an express reference to an online location, located and operated by a person *outside* Australia.

We also recommend that the terms "online location" and "web site" are defined.

This term 'online location' is not commonly used in internet parlance and, unless it is defined, risks being ambiguous. Our assumption is that it means a specific web site – but it could just as easily be construed to be a town or other location on Google Maps or a computer-generated-image (CGI) set for an upcoming movie.

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).

We note, also, the use of the term "facilitation" in s115A(1)(b) and (c). We assume this term is intended to carry its ordinary dictionary meaning, but to avoid confusion it may be appropriate to define the term or to use an alternative term such as "allow", "enable" or the like.

We believe that the matters outlined in subsection 5 of the Bill are a reasonable set of issues for the Court to be required to take into account, subject to our comments in sections 5, 6 and 7 below.

3. Cost Considerations

The Government clearly outlined its intentions regarding this issue in the July Discussion Paper, which stated, in relation to the proposal for Extended Injunctive Relief, 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*".

It was partly on the basis of these two assurances that industry gave cautious support to the web site blocking proposal. But these two elements appear to be missing from the amending legislation. Communications Alliance believes that cost recovery for ISPs should go further, to include the ISP's costs of the proceedings.

Initial feedback from Government officials as to the absence of these elements in the Bill has suggested that these matters would be dealt with by the Court on a case-specific basis when considering injunctive applications.

Even if this were to be the case, the Government's stated intentions on this issue should be clearly spelled out in the Bill and the associated Explanatory Memorandum, so that the Court has the benefit of a clear indication of the Government view.

It is useful to note that Justice Perram ordered in the *Dallas Buyers Club* judgment in the Federal Court on 7 April that both the costs of the proceedings and implementation costs of ISPs complying with the preliminary discovery order should be met by rights holders.

We note that the Government short form Regulation Impact Statement (RIS) alluded to at para. 11 of the Explanatory Memorandum anticipates a cost impost on internet service providers (ISPs) as a result of the legislation. It is not clear from the Explanatory Memorandum reference whether the estimated costs to industry relate only to Court proceedings, or implementation costs pursuant to an injunction.

Communications Alliance wrote to the Attorney General on 3 April to request a copy of the short form RIS. At the time of lodging this submission to the Committee, we had not received a copy of the RIS.

When ISPs or other Carriage Service Providers or Carriers are required to undertake tasks in response to requests from law enforcement or national security agencies (LENSAs) under s.313 and 314 of the Telecommunications Act 1997, they are entitled to recover their costs from those agencies. The same principle should apply to the implementation costs that ISPs will incur as a result of the Bill and ensuing injunctions.

We don't believe that the current wording in the Bill, (that an ISP is not liable for costs *unless* it enters an appearance and takes part in the proceedings) is appropriate. An ISP must file a notice of address for service in a proceeding to which it is a party. An ISP will be required to enter a notice of appearance even if it doesn't oppose, or consents to, an order. An ISP should not be exposed to cost consequences in these circumstances.

An ISP should properly be regarded as a third party to the proceedings, against whom an injunction is granted. A web site blocking injunction is like a third party injunction, notwithstanding that the ISP is a named party to the proceedings. There is no finding of knowledge or fault on the part of the ISP. Therefore rights holders should be required to meet the reasonable costs of the ISP that are associated with compliance with the order. This is in line with well-accepted principles where court orders are made against third parties to the main action (such as Mareva injunctions or third party subpoenas).

4. Indemnity, Immunity or Safe Harbour for ISPs

Compliance with an injunction granted under s115A places ISPs at real risk of being sued by the web site owners, or users in certain circumstances; e.g. if compliance with a court order results in over-blocking or unjustified interference with a web site operator's business.

While the Explanatory Memorandum notes that the Court may order an indemnity, this should be made explicit. Communications Alliance suggests that protection for the ISP could be in the form of an indemnity from the rights holder, or a statutory immunity (e.g. in the form of section 313 of the Telecommunications Act), or safe harbour for the ISP.

5. Judicial Considerations & RH/ISP Cooperation

To reduce costs for all participants, it is important that the court process be as simple & standardised as possible – e.g. standard applications used and standard orders sought.

There is uncertainty as to how the Court will interpret the requirements of the legislation when making orders. We believe that all those impacted by the legislation would benefit from greater clarity.

For example, an important step to promote efficiency will be the extent to which the rights holder applying for an injunction initiates discussion with the relevant ISP(s) to:

- establish agreement as to the online location being targeted;
- confirm and demonstrate that appropriate checks have been made to ensure that the proposed blocking will not spill into the blocking of legitimate and lawful locations; and
- discuss any other relevant considerations including timing, costs and web-site blocking methods to be used.

Initial discussions with some right holders has suggested a willingness to adopt this cooperative approach. Rights holders and ISPs equally should be encouraged to continue down this path.

Further, rights holders should be required to produce evidence to the Court that the rights holder has checked rigorously that the online location which it is seeking blocked, does not also house legitimate content sites that might be at risk of being inadvertently blocked.

Rights holders should also be required to advise the Court whether the online location which it is seeking to block has previously been blocked, or been the subject of a similar court order. This would help inform the Court (and stakeholders) whether blocking injunctions are being effective, or are simply pushing infringing behaviours to different locations.

The Court should have an opportunity to request expert technical guidance, particularly during the early years of operation of the legislation, so that it can fully

understand the technical means by which an ISP is able to block a website and to seek to minimise any unintended consequences flowing from orders.

6. Web Site Blocking Methodologies and Implications

It is unclear from the Bill and the Associated Explanatory Memorandum what method(s) service providers would be expected to use in order to block access to online locations. This lack of clarity arises because there is a number of different ways that a web site can be blocked.

Further, the particular blocking method used has significant implications, for:

- the level of granularity and therefore precision, that is achievable;
- the degree of risk of 'collateral damage' to legitimate web sites and content; and
- the cost of the exercise.

The different methods also vary in terms of the difficulty of the customer circumventing the block – a feat that is possible for a tech-savvy internet customer in virtually every case.

Method 1: DNS: Blocking a web site at the level of the Domain Name System (DNS) is typically the simplest and least costly method to achieve the objectives of the Bill. This method does, however, also carry the greatest risk of unintentional blocking of other web-sites and/or IP addresses that reside under the same domain name.

In most instances it will also be impossible for wholesale providers to 'flow-down' to their wholesale customers the blocked access to a specific web-site, as those downstream providers will be using a different domain name. To further complicate matters, large corporate customers and Government customers also often use their own DNS.

Method 2: IP Address: This method involves an ISP/CSP employing a filter on its network edge routers or core routers. The filter operates via a manipulable access list that will deny customers access to specific IP addresses.

(Note: Methods 1 and 2 are the options typically used by ISPs in Australia to block sites on request from INTERPOL. Such requests are accompanied by safeguards such as independent verification that legitimate content will not also be blocked, removal of the web-site from the list once blocking is no longer required and the use of a landing page.)

Method 3: URL: This method is more granular, but also more complex and costly to implement. It typically requires additional software and more extensive system reconfiguration. It might also impair the performance of the blocker's network by, for example, increasing latency.

We strongly believe that the linked issues of implementation costs and blocking-methodology expectations should be clarified as a matter of urgency before the Committee or the Parliament agree to endorse or pass the Bill into law.

We recommend that the web site blocking method to be employed be at the discretion of the ISP, ideally following discussion with the rights holder responsible for the injunction application. Should Courts decide to order that more complex and costly blocking methods be used, this needs to be taken into account in the Court order as it relates to compensation for ISPs' implementation costs.

What happens when an Internet user tries to access a blocked web site?

If an internet user attempts to access a blocked website, the user should be directed to a common, or common-looking landing page, hosted by rights holders, that explains that access to the site is blocked due to legal action that is designed to combat online copyright infringement and, ideally, directs any queries to the relevant rights holder.

Use of such a landing page would help educate consumers as to why the site has been blocked, provide a contact point in case they believe the site has been blocked in error, and educate them on legitimate ways in which they can access content. This will also help to avoid ISPs receiving calls from customers who assume there is a fault with their service, because they are getting error messages when trying to access a blocked site.

7. Application may be brought, or an order may be made, against more than one ISP

The legislation should expressly allow for an application to be brought, and an order to be made against, more than one ISP. This was contemplated on page 6 of the Government's July 2014 Discussion Paper, but does not appear to have been incorporated in the Bill.

This recommended provision is important to prevent Australian internet users from simply swapping service providers, in order to avoid the effect of an injunction. This would severely undermine the effectiveness of any injunction. For example, Communications Alliance recommends that the words 'carriage service provider' are replaced with 'carriage service provider(s)'.

While this issue could be considered to fall under s115(5)(f) – being one of the factors that a court may take into account when granting an injunction - Communication Alliance believes that the current drafting is too vague, and recommends that the issue is expressly dealt with as an additional factor to be considered by the court under s115(5).

8. Summary of Recommendations

Communications Alliance's recommends that the following matters be considered:

1. Define the terms "online location" and "web site".
2. Make it clear that the legislation only applies to overseas websites which are located and operated by persons outside Australia.
3. Make it explicit that Right Holders are required to meet an ISP's legal costs of the proceedings, and (in line with the Government's stated intention) all reasonable costs associated with an ISP giving effect to an order.
4. Make it explicit that ISPs have an indemnity, immunity, or safe harbour from third party actions resulting from the ISP complying with a website blocking order.
5. Specify that the web-site blocking method to be employed is at the discretion of the ISP, ideally following discussion with the rights holder responsible for the injunction application. Should Courts decide to order that more complex and costly blocking methods be used, this needs to be taken into account in the Court order as it relates to compensation for ISPs' implementation costs.
6. Appropriately address technical issues, including:
 - ensuring that appropriate checks are undertaken before web-sites are blocked, to reduce the risk of legitimate web sites being blocked inadvertently; and
 - provision for a 'landing page', when internet users attempt to access a court-ordered blocked site.
7. 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.
8. 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.



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