
**AUSTRALIAN COPYRIGHT COUNCIL'S SUBMISSION IN RESPONSE TO THE COPYRIGHT
AMENDMENT (ONLINE INFRINGEMENT) BILL 2018 ("BILL")**

NOVEMBER 2018

A. VIEW OF THE AUSTRALIAN COPYRIGHT COUNCIL

1. The Australian Copyright Council (**ACC**) has previously indicated its support for the site-blocking legislative scheme; it plays an important part in protecting the rights of copyright owners who face burdensome practical and technical issues in the current technological and global age.¹
2. With that in mind, the ACC supports the passage of the Bill in its present form as follows:
 - 2.1 ***Expansion of site-blocking scheme to online locations that have a 'primary effect' of facilitating copyright infringement – revised subsection 115A(1):*** Such an amendment appears aimed at allowing for cyberlocker services (which offer users password protected online hard-drive spaces) and other similar technological methods – which are constantly being developed and that fall outside the ambit of the 'primary purpose' test – to be caught by the legislation. This amendment would recognise the adaptive and evolving nature of technology and is therefore consistent with the current Copyright Modernisation Review² and other previous reviews which seek copyright reform that acknowledges a need for flexibility and technology neutral language. Section 115A would still contain stringent relevant factors to be considered by the Federal Court and, accordingly, it is difficult to see that unnecessarily broad injunctive orders will be made following such an amendment.
 - 2.2 ***Expansion of site-blocking scheme to online search engine providers to block certain search results – revised subsection 115A(2):*** Such an amendment acknowledges the ease by which consumers can access infringing content via global search engines not located in Australia (whether this involves being directed to alternative torrent sites or otherwise). This amendment is, in the ACCs view, consistent with the exclusion of online service providers from the expanded safe harbour scheme³ as it acknowledges that online service providers must accept some responsibility for the distribution of infringing content online. This view is consistent with recent developments in the European Union which will eventually see certain technology

¹ Australian Copyright Council's Submission in Response to the Review of Copyright Online Infringement Amendment, March 2018,
www.communications.gov.au/sites/g/files/net301f/submissions/australian_copyright_council_1.pdf.

² Currently overseen by the Department of Communications and the Arts,
<https://www.communications.gov.au/have-your-say/copyright-modernisation-consultation>.

³ Part V, Division 2AA of the *Copyright Act 1968* (Cth), which will from 29 December 2018 onwards contain an expanded definition of 'service providers' who will be able to benefit from the take-down process as an alternative to formal litigation.

companies being required to do more to prevent access to infringing material on their platforms.⁴

While proposed subsections 115(8A) and (8B) could on one reading provide an avenue for the purpose of the amendments to be undermined. The ACC does not raise any objections at this time, Under the assumption that this would only be used in extreme cases, following extensive public consultation as to the effect of excluding particular online search engine providers (or classes thereof).

2.3 Allowance for adaptive injunction orders and informal agreement by affected parties – new subsection 115A(2B): This amendment is desirable given that it:

- (a) will reduce some of the cost and unnecessary burden associated with the injunctive process and borne by all of the parties involved (noting that while applications made under the scheme can be made by owners of copyright, very few have the resources to do so);
- (b) reduces the pressures already placed on the Federal Court; and
- (c) introduces a desirable alternative to the litigious process, which is also consistent with the purpose of the safe harbour scheme.

The Federal Court will ultimately retain supervisory oversight of site-blocking orders. Interested parties other than copyright owners and ISPs would not apparently be prevented from approaching the Courts in the unlikely event that an agreement was struck beyond the intended purpose of the scheme.

- 3. Ultimately, the amendments proposed in the Bill would not alter the fact that the site-blocking scheme would continue to maintain a high evidentiary burden for applicants and would not be open for misuse to censor or attack innocent entities.

B. ABOUT THE AUSTRALIAN COPYRIGHT COUNCIL

- 1. The ACC is an independent, non-profit organisation that represents the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. We are advocates for the contribution of creators to Australia's culture and economy. A full list of our affiliates is available on our website, copyright.org.au.
- 2. The ACC is thankful to the Committee for considering the terms of this submission. Should there be any further queries or information required, please let us know.

Grant McAvaney
Chief Executive Officer

⁴ Directive on Copyright in the Digital Single Market, 2016/0280 ('EU Copyright Directive').