



AUSTRALIAN
COPYRIGHT COUNCIL

**SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
COMMITTEE ON THE COPYRIGHT AMENDMENT (ONLINE INFRINGEMENT)
BILL 2015**

APRIL 2015

The Australian Copyright Council (ACC) welcomes the introduction of the *Copyright Amendment (Online Infringement) Bill 2015*.

The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. A full list of our members is attached at Appendix 1.

The ACC is broadly supportive of the Bill as one part of the Government's strategy to address online copyright infringement. However, there are a number of operational features of the Bill we wish to raise for the Committee's attention:

Standing

We note that the Bill refers to the 'owner of a copyright'. We wish to confirm our understanding that the purpose of the amendments in item 2 is to extend the definition of 'copyright owner' to exclusive licensees for the purposes of proposed paragraph 115A.

If this is not the case, we submit that exclusive licensees should be given the power to apply for a site blocking injunction, consistent with their standing to apply for remedies under the *Copyright Act* generally.

Jurisdiction

We further note that the Bill limits jurisdiction to the Federal Court of Australia (see item 4). If the Government's intention is to provide an efficient process for copyright owners to address online copyright infringement without unnecessarily implicating carriage service providers (as stated in the *Explanatory Memorandum*) we query why the Federal Circuit Court has not been given jurisdiction to deal with such matters. We note that the Federal Circuit Court otherwise has jurisdiction to grant injunctions in copyright matters.

We are concerned that limiting the jurisdiction to the Federal Court of Australia may prejudice the ability of individual creators to access this remedy and may otherwise affect the cost effectiveness of the scheme.

Online location

Experience overseas indicates that an infringing website can pop up at different domain names. We query whether the term 'online location' is broad enough for an injunction to cover replicas of the same infringing website popping up at different domains. It seems to us that this is crucial for the legislation to be effective.

Primary Purpose Test

The Bill requires the court to be satisfied (inter alia) that the 'primary purpose' of the online location is to infringe copyright or facilitate infringement of copyright. While the ACC appreciates the reasons for setting a high threshold for the copyright owner to meet, we query how, as a matter of practice, a copyright owner can satisfy a court as to the primary purpose of a foreign service provider with which the copyright owner has no direct relationship. Further, in our submission, the 'primary purpose' test also fails to take into account the dynamic nature of online services.

While we support the need to safeguard against blocking legitimate services, we are concerned that the primary purpose test may set the threshold so high as to make the regime practically unworkable. In our submission this issue is already adequately dealt with by the 'proportionality' factor in proposed 115A(5)(e)

Factors to be taken into account

The Bill sets out a long list of factors that the Court must take into account in deciding whether or not to grant an injunction. We have a number of concerns in this regard.

Our primary concern is that by setting out a list of factors that must be taken into account, the legislature is fettering the ordinary discretion of the Court. In our submission, the recent decision of Perram J in *Dallas Buyers Club LLC v iiNet Limited* [2015] FCA 317 is a striking example of the Court effectively exercising its discretion to balance the competing interests.

We note that the proposed approach seems to be largely drawn from the Singapore

Copyright (Amendment) Act 2014. We note that while the Singaporean *Copyright Act* has its origins in the Australian Act, there has been some divergence in recent years. For example, one of the factors to be taken into account is 'flagrancy'. As the *Explanatory Memorandum* notes, 'flagrancy has a particular meaning in s 115 of the Australian *Copyright Act* which is not replicated in Singapore.

Likewise, some of the factors are very vague. For example, how is it to be established whether the online location 'demonstrates a disregard for copyright generally' in proposed 115(5)c and what is 'the public interest' in proposed 115A(5)(g)?

In our submission, it is also unclear how the Court is to balance the various factors. While the Singaporean Act expressly provides that the court "shall have regard to, and give such weight as [it] considers appropriate" (see s 252CDA) the Bill currently before the Committees is silent on this.

Ordinary conventions of statutory interpretation would suggest that the Court treat each factor equally. We note that this might be difficult as a matter of practice given the long list of factors the Court must consider. We note that s 33 of the *Acts Interpretation Act 1901* provides that 'powers, functions and duties may be exercised or must be performed as the occasion requires'. In our submission, this provides little guidance.

In our submission, it would be preferable not to fetter the Court's discretion in this manner. It would still be possible to include a list of factors which the Court may take into account.

What is the cost?

Finally, we would be interested to understand more about the calculation of the financial impact of the Bill on Carriage Service Providers.

Conclusion

In conclusion, the ACC is supportive of the Bill in principle. We are however concerned that some of the procedural matters highlighted in this submission will limit the effectiveness of this legislation in achieving its stated purpose of reducing online copyright infringement.

We hope that the Committee finds these comments useful. Please do not hesitate to contact us if we can provide any further assistance.

Fiona Phillips

Executive Director

Appendix 1: Australian Copyright Council Affiliates

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 24 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artists' Agency
Ausdance
Australian Commercial & Media Photographers
Australian Directors Guild
Australian Institute of Architects
Australian Institute of Professional Photography
Australian Music Centre
Australasian Music Publishers Association Ltd
Australian Publishers Association
APRA AMCOS
Australian Recording Industry Association
Australian Screen Directors Authorship Collecting Society
The Australian Society of Authors Ltd
Australian Writers' Guild
Christian Copyright Licensing International
Copyright Agency|Viscopy
Media Entertainment & Arts Alliance
Musicians Union of Australia
National Association For The Visual Arts Ltd
National Tertiary Education Industry Union
Phonographic Performance Company of Australia
Screen Producers Australia
Screenrights