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Christine McDonald
Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: ec.sen@aph.gov.au

Dear Ms McDonald

Copyright Amendment (Online Infringement) Bill 2018

Free TV thanks the Committee for the opportunity to comment on the Copyright Amendment (Online Infringement) Bill 2018 (**the Bill**).

Free TV represents Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide a variety of channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by an average of 13 million Australians.

Free TV members are major owners, licensors and licensees of copyright material. A robust and effective copyright regime is one that fosters creativity and innovation, and supports the creative industries and those who invest in them. As both content owners and content users, commercial free-to-air broadcasters recognise the importance of a fair and balanced copyright system to all Australians.

Section 115A is an important part of this system. It encourages copyright owners and CSPs to work together to reduce online piracy. It also provides a targeted tool for copyright owners to disrupt large-scale online copyright infringement by websites that operate outside Australia and distribute infringing copyright material to Australians. It is critical that s115A operates effectively so that illegal content hosted on overseas websites cannot be accessed in Australia, disrupting Australian markets and thwarting the Government's measures to combat online piracy.

Free TV's view is that, while s 115A has been efficient in reducing online piracy so far, this Bill makes minimal targeted changes to improve the provision's operation and increase its efficiency and effectiveness. In particular:

- The 'primary purpose and effects' test will significantly reduce the risk that this provision will inadvertently protect pirated sites from s 115A's application; and
- The expansion to online search engine providers will mean that the provision will better capture those service providers involved in facilitating access to pirated content for consumers.

Free TV strongly supports this Bill. We expand on these points below.

“Primary purpose or primary effect” test

The amendments in Schedule 1 of the Bill will allow the Court to now consider the primary effect of an online location in addition to the primary purpose of it.

Free TV supports this amendment. The test as it is currently drafted may hinder or prevent the achievement of the objectives of the provision as it is a very difficult test to meet. Where an online location makes available both infringing and non-infringing material, the primary purpose test alone could act as a bar to the granting of an injunction, even where the business model of the site in question involves multiple purposes, one of which is to infringe, or to facilitate the infringement of, copyright.

Research conducted by INCOPRO illustrates this concern.¹ It shows that a substantial number of online locations enabling access to piracy are hosting sites which can serve legitimate purposes.² In Free TV’s view, this should not serve to protect those sites from the application of s 115A where they are making pirated content available.

Our view is that the addition of a primary effects test will significantly reduce the risk that this provision will inadvertently protect pirated sites from the application of s 115A if they are making pirated content available.

It will mean that the court will be able to consider the effect as well as the purpose of the online location. It will not be reliant on an assessment of the intention of the site owner alone but could also have regard to the practical impact of the infringement that is taking place. By including the words ‘primary effect’, the court is given greater scope to evaluate the appropriateness of the injunction, having regard to the circumstances.

We understand that some stakeholders have expressed concerns about this amendment inadvertently capturing innocent and common activities. In our view, there is no evidence to suggest that this is the case. Ultimately it will be a matter for the Court to determine whether an injunction is appropriate in the circumstances and section 115A provides significant scope for the Court to consider:

- Whether access to the online location is a proportionate response in the circumstances (s115A(5)(e));
- Whether it is in the public interest to disable access to the online (s 115A(5)(g)); and
- Any relevant matter (s115A(5)(k)).

Expansion to online search engine providers

The Bill will allow copyright owners to apply for injunctions against online search engine providers if there is an application against a CSP on foot. This is an important amendment which will mean that the provision will better capture those service providers involved in facilitating access to pirated content for consumers.

Online search engine providers may be equally involved in facilitating access to infringing content for consumers, and in some cases even benefiting from that facilitation by serving advertising at the offshore website providing infringing content. There is therefore no reason for them not to fall within the scope of this provision.

¹ INCORPO, Site Blocking Efficacy – Key Findings – Australia, February 2018.

² Ibid.

Ultimately whether or not an injunction is granted against an online search engine provider will depend on a Court determining that it is appropriate in all the circumstances. Online search engine providers will not fall within the scope of the provision unless they are providing consumers with access to infringing content and a court determines that it is appropriate to grant the injunction in accordance with all of the factors in s 115A.

As such, Free TV's view is that the extension of s 115A to online search engine providers increases the efficacy of s 115A and is proportionate to the potential harm that could arise to rights holders from search engine providers facilitating access to infringing copyright content.

Contact

If you have any queries or wish to discuss any of the matters raised in this letter, please do not hesitate to contact me on

Kind regards,

Bridget Fair
Chief Executive Officer
Free TV Australia