

**COMMUNICATIONS
ALLIANCE LTD**



Copyright Amendment (Online Infringement) Bill 2018

Communications Alliance submission to
Senate Environment and Communications
Legislation Committee
November 2018

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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.

Its vision 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>.

Introduction

Communications Alliance appreciates the opportunity to provide this submission to the Committee's consideration of the Copyright Amendment (Online Infringement) Bill 2018 (the Bill).

Communications Alliance has made a number of submissions on the likely impacts of proposed changes s115A of the *Copyright Act 1968*. Our previous submissions do not appear to have been taken into account in the drafting of the Bill.¹

This submission addresses Carriage Service Providers' (CSPs) concerns with the Bill, and CSPs' unease with the consultation process around the Bill.

Communications Alliance recommends the Bill not be passed in its current form, and for further consultation to be undertaken by the Department. If the Committee proposes to recommend the passage of the Bill, then we recommend the amendments discussed in this submission be made, chiefly:

- Avoid any unnecessary language changes to Section 115A, including on "reasonable steps"
- Eliminate the addition of extended blocking orders, which if implemented would remove vital Court oversight
- Do not expand the threshold test to "primary effect"

We would be open to providing specific drafting recommendations to the Committee for further discussion.

Section 115A has been operating effectively and efficiently to date

Section 115A has been in operation since June 2015 and has been the subject of multiple Federal Court decisions, including decisions to extend existing orders.

CSPs worked in good faith with Rights Holders to agree a standard set of orders in the first two applications, to ensure a consistent approach, and to obviate the need for CSPs to appear in subsequent proceedings. The agreed orders included an expeditious and streamlined process to extend existing orders, with Court oversight. While CSPs have not appeared in subsequent proceedings, Rights Holders have been successful in obtaining blocking orders, which CSPs have duly implemented.

We are not aware that any s115A application (or extended blocking order) that has been refused by the Federal Court. Further, the Federal Court has gone to great lengths in its decisions to provide clear and certain direction on the operation of s115A, based on the carefully negotiated orders between CSPs and Rights Holders. As a result, dozens of overseas online locations are currently being blocked. The scheme introduced by s115A is therefore operating in an effective and efficient way to help combat online infringement. Thus, we do not see any rationale for the significant changes the Bill is proposing to s115A.

¹ Communications Alliance's submission to the Department's March review can be found here:

https://www.commsalliance.com.au/_data/assets/pdf_file/0007/59740/180316_Letter-CA-Submission_Review-of-Copyright-Infringement-Amendment_V01_CGJ-003.pdf.

Our response to the Department's closed consultation on the Draft Exposure Bill is available to the Committee if requested.

We are concerned that the proposed changes to section 115A only reflect the interests of Rights Holders

The Bill proposes substantive changes to s115A, particularly when considered as a whole, including a new threshold test (which has not been previously raised publicly and does not have a precedent basis in copyright law) and the potential to remove Court oversight to extend existing orders.

The proposed changes appear to reflect only matters raised by Rights Holders, and do not appear to take into account matters raised by CSPs (. Prior to their inclusion in the Draft Exposure Bill, CSPs and other service providers were never provided with a formal opportunity to consider or respond to the amendments proposed in the Bill..

It also appears that other key stakeholders (including the Law Council of Australia, copyright users and online locations) have not been consulted.

The rushed approach to the consultation on the Exposure Draft of the Bill was particularly concerning, given the impact of the proposed changes and in particular, a widening of the threshold test and substantive changes to the way extended blocking orders can be made. . The single and combined consequences of these changes is not clear. For example, there doesn't appear to be a precedent for the introduction of a 'primary effect' test, so the meaning of those words and their impact is entirely unknown. Such a lack of clarity could (e.g.) lead to overblocking, with impacts on institutions such as libraries and universities, and could limit Australians' access to Virtual Private Networks (VPNs), which provide privacy and data protection. These concerns were raised by the Australian Digital Alliance and Choice in 2015. Similarly, CSPs may be exposed to increased liability from third parties impacted by the operation of a more broadly scoped s115A.

No clarity has been given by the Government to justify why changes to section 115 are necessary

We are concerned that the Government has not clearly established the 'problem' which needs resolution. The Explanatory Memorandum and Regulatory Impact Statement state that some of the proposed changes result from concerns raised by Rights Holders, but neither provide evidence to substantiate those concerns, nor address all proposed changes.

The proposed changes will tip the delicate balance copyright seeks to achieve too far in favour of Rights Holders, making the operation of s115A uncertain (despite it being a settled area of law) and costly for CSPs, who will now likely need to participate in future proceedings.

CSPs have shown a laudable degree of goodwill in working with Rights Holders to ensure the effective and efficient operation of the current arrangements. In light of this, the significant changes proposed by the Bill, without appropriate consultation with service providers, or consideration of their concerns were unexpected.

Key Recommendations

Sections (1) and (2): Unnecessary and uncertain language changes

There are a number of language changes proposed in the Bill for which the Government has not established a need or provided a satisfactory explanation.

The repeal and replacement of Subsections 115A(1) and (2) creates considerable legal uncertainty. We have multiple Federal Court decisions based on the drafting of the current subsections. Rewording will require the Court and stakeholders to interpret the new sections, creating unnecessary legal and financial burdens on Rights Holders, CSPs, and the Court system.

The redrafting specifically opens questions regarding the 'Reasonable Steps' CSPs must take, and the burden of proof thresholds of applying for an injunction.

It is entirely unclear why these changes to the language of s115A(1) and (2) have been made - they are not necessary to give effect to the changes intended by the Bill as described by the Department or in the Explanatory Memorandum. The Department has advised that the changes would not have any impact on the legal interpretation – a statement that does not provide any reassurance to CSPs. If no change to legal interpretation is intended, then we would inquire what purpose the changes are seeking to achieve. Any change will be open to interpretation by stakeholders, including the Federal Court, and therefore give rise to uncertainty.

As the Bill is already proposing significant changes to established law, **Communications Alliance recommends strongly the amendments be as narrowly drafted as possible – instead of the significant changes to the Act currently included in the Bill - to avoid entirely unnecessary additional litigation.**

Reasonable Steps, Subsections (1) and (2)

The new Subsections (1) and (2) include language that an owner may apply for an injunction requiring a CSP to “take such steps as the Court considers reasonable,” differing from the current language in 115A, which is confined to “reasonable steps.” What orders is it envisaged that the Court would make, other than to simply disable access to an online location? If the changes are proposed for a purpose, to allow Rights Holders to seek other steps in their applications, and the Bill will have the impact of allowing this, those intentions need to be thoroughly and openly consulted on.

Questions this would open include if Rights Holders (e.g.) will apply for disconnection, or request that CSPs or search engine providers undertake proactive monitoring to identify URLs, domain names, or IP addresses.(2A) provides for very broad interpretation, leaving open these possibilities to the necessity of litigation, and we do not see the reason for its addition.

CSPs are also concerned that they may need to appear in s115A hearings to protect their interests against broader interpretations of this new wording concerning steps “the Court considers reasonable.”

Reasonable Steps, Section (2B)(a)

Section (2B)(a) provides a specific list of actions the injunction may direct CSPs to take. There is no established need or evidence for this level of specificity.

There have been multiple considered, clear, and measured Federal Court decisions by two separate judges on s115A. Communications Alliance does not see any evidence based need to alter the wording of 115A(1), nor to add a new s115A(2A).

The proposed change contemplates that the Court could make broader orders based on a Rights Holder's application. Such orders may demand a certain level of technical knowledge by the Court – which the Court might need assistance with from the CSPs. Accordingly, such orders may put CSPs in a position where it is necessary for them to enter an appearance and take part in the proceedings to make submissions to the Court as to the type of actions they are (or are not) technically able to implement.

The proposed changes are very uncertain as to scope and feasibility. They are also likely to lead to increased costs for CSPs and to heightened need for a CSP to be indemnified from actions by third parties who may be impacted by broader orders.

Also, the cost implications of actions other than blocking need to be considered, and this will re-open the question of cost reimbursement and require a potentially lengthy renegotiation of this issue.

Burden of proof

The current s115A provides a legal test, which requires that the Court be satisfied of the three limbs in s115A(1), before it may grant an injunction. The proposed s115A(1) entirely changes this section, and does not appear to replace the test, but instead states what type of injunction the owner of copyright may apply for.

We understand that this may have been an unintentional effect of other changes, but strongly recommend reconsideration this redrafting. By not providing specific requirements, this has the potential to lead to more, and more diverse, applications by Rights Holders, as there is not specific clarity on precise thresholds. (To note, Rights Holders are a much broader category than the current s115A applicants, so a broad and unknown range of parties may wish to take advantage of the changes). This will increase fiscal and resource costs for all stakeholders, with additional court cases and possibly substantially increased volumes of blocks for CSPs. Increased volume of blocks could create pressure for CSPs to adopt new or different blocking techniques, which would impose significant cost, process, investment, and implementation issues.

Once again, the Bill includes a proposed change, opening up legal questions, without any evidence based need or articulated reason for the change.

Extended (“responsive”) blocking orders

Court oversight of blocking orders is paramount. It is not tenable for commercial parties – Rights Holders and Service Providers - to independently decide whether existing blocks should be extended thereby impacting the rights of third parties (including online location owners and online users) to distribute and access online content.

The process currently in place requires a Rights Holder to submit evidence to prove that additional online locations satisfy the criteria of s115A. The proposal to remove judicial oversight goes against the direct recommendations of the Court (see quote below), with a range of impacts, and no established cause or benefit.

The current Affidavit process balances Australia's judicial processes and Rights Holder's desire for a cost effective and expeditious outcome. This approach was previously agreed through long negotiations in two court cases, and has subsequently been used a number of times.

In the judgement for *Foxtel Management Pty Ltd v TPG Internet Pty Ltd & Ors* NSD 241 of 2016, Justice Nicholas stated that:

Another submission made by the applicants to the effect that the costs and inconvenience involved in following the procedure outlined in the respondents' proposed order 12 would be excessive or disproportionate was in my view exaggerated and, in any event, not to the point in circumstances where the legislature has specifically identified the matters upon which the Court must be satisfied before it may grant an injunction under s 115A in respect of an online location. In the case of a variation to an existing injunction, the Court may be willing to act on very little in the way of further evidence. **Nevertheless, whether or not there should be such a variation remains a matter for the Court.**²

It is contrary to Australia's judicial system for Rights Holders and CSPs (commercially interested parties) to be placed in a position where they must decide whether a Rights Holder has satisfied the requirements of s115A for each additional online location; for example, whether:

- the online location is outside Australia;
- the online location passes the primary purpose, and now the unknown and untested 'primary effect' test; and
- the salient features set out in s115A(5) including the '*flagrancy*' of the infringement, whether disabling access is a '*proportionate response*', and blocking would be in the '*public interest*', etc.

These are all questions that can only be decided by the Court.

An action by a CSP to block an online location, based on a unilateral agreement with a Rights Holder, could have very serious impacts on known and unknown third parties, including an outcome tantamount to censorship.

Communications Alliance recommends removing the proposed sections (2B)(a)(ii) and (2B)(b)(ii), aligning with the Court judgment, due to the above points and the following impacts:

Discussions between Rights Holders and CSPs

Paragraph 37 of the Regulatory Impact Statement (RIS) explains that the current process to apply for (and receive) an extension to an order typically takes two to four weeks, with some time following for the CSP to technically implement the block.

The negotiations required to reach agreement in writing between Rights Holders and CSPs would likely take at least two weeks to schedule, much less conclude. These negotiations would likely be lengthy and expensive, in contrast to the current process in which Court oversight provides clear and timely responses to extension requests.

Any time impose must also be balanced against the paramount need for Court oversight of any decision to block access to an online location (and the content it is seeking to distribute).

Indemnity

The proposed method for applying extended blocks raises new liability concerns for service providers. For example, what is a CSP's liability if an extended block (implemented based on an agreement by a CSP and a Rights Holder) it causes damage to a third party? Would a CSP be protected from a damages claim by the third party?

² Paragraph 139, *FEDERAL COURT OF AUSTRALIA, Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503, <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1503>

Inconsistencies

Applying this new method would almost certainly result in inconsistencies between CSPs as to the additional online locations that are agreed to be blocked, as agreements would be between a Rights Holder and each CSP separately, and not collectively.

Cost

Finally, it may become difficult to enforce the established principle that CSPs receive \$50 for each online location blocked to address cost challenges, given that the blocking of additional domains would not be tied to a court order.

Expansion of the threshold test

The proposed expansion of the threshold test from '*primary purpose*' to '*primary purpose or primary effect*' will have significant consequences and requires urgent consultation with all relevant stakeholders, including the Law Council of Australia.

The Department has explained that this change is intended to be one of the key policy changes of the Exposure Draft, and has been requested by Rights Holders, however there was no specific consultation with CSPs, or search engine providers, or other stakeholders on this substantive change prior to the exposure draft.

We understand that the proposed change is intended to capture "cyberlockers." That intention, however, is not specified in the amended section. Thus, the expanded test could encompass a raft of indeterminate locations, and is open to that interpretation by Rights Holders and the Court.

Communications Alliance was informed that there was strong reliance by the Department on a 2014 report in formulating this part of the Bill.³ The quickly changing nature of access to online information raises questions about the utility and reliability of research undertaken more than four years ago. The report focused on the profitability of cyberlockers, recommending payment gateways as a method to act against them, not blocking, and in fact presents a range of reasons why infringing cyberlockers are captured under the "primary purpose" test.⁴

It is not clear to us why the primary purpose test would not apply to a cyberlocker, particularly in the context of the factors the Court must take into consideration under s115A(5). As discussed above, the 2014 report itself contemplates a range of reasons why infringing cyberlockers are clear in their intentions and therefore captured under the "primary purpose" test.

We are not aware of the Federal Court refusing an application under s115A on any basis, but particularly that an application failed the 'primary purpose' test. It is therefore unclear why Rights Holders (and the Department) contend that a broader, far less certain test be

³ Behind the Cyberlocker Door: A report on how shadowy cyberlocker businesses use credit card companies to make millions. A NetNames Report for Digital Citizens Alliance.

⁴ In the report's introduction "Cleaning up the Cyberlocker Content Theft Problem," the report states that "Cyberlockers have been indicted criminally, in the case of MegaUpload, and found liable in civil court, in the case of Hotfile." Additionally, the report goes into detail on the commercial model of these infringing cyberlockers, explaining that "Cyberlockers generally pay or provide various incentives to those who distribute popular infringing content and discourage the use of their services for reliable data storage" (pg 1), and provides that yet another identifying feature of infringing cyberlockers is that they rarely have, or enforce, repeat infringer policies (pg 5). This paints a clear picture that infringing cyberlockers have the primary purpose of infringing on copyright, and an additional primary effect test would not be necessary to capture them.

introduced. We are not aware of a precedent in copyright law for a 'primary effect' test, and it will raise questions including what is a primary effect, and what is the effect on. The scope of these words are entirely unknown and will depend on how the Court determines a Rights Holder application based on them. As a result, instead of filing a Submitting Notice and relying on the previously agreed orders between Rights Holders and CSPs, a CSP may be compelled to enter an appearance and take part in future proceedings.

Additional unintended consequences result from the breadth of "primary effect," which could potentially capture a number of websites, or internet-connected products and services, the blocking of which would not be in the public interest. For example, Pinterest – a widely used site, certainly not with the primary purpose of infringement, could be argued to have the 'primary effect' of facilitating the infringement of copyright, particularly if a concerned Rights Holder (for example a photographer or studio) decided to make an application under s115A.

The same risk could conceivably apply to non-infringing cyberlockers, - sites used, for example, by legitimate small businesses that need to share large size files such as wedding videographers or distance education providers.

We disagree with the Department's comments that these types of sites would obviously be excluded by the Court under the required tests in 115A(5). Firstly, any Rights Holder (including but not limited to Rights Holders who have filed previous applications) may bring an application under s115A. Secondly, we cannot conclude what the Court may decide on the basis of any application before it. **Communications Alliance strongly recommends retaining the current 'primary purpose' test.**

Other Concerns

115A(9)

Communications Alliance raised the below concern in our submission to the Department's review earlier in the year. We were disappointed to see significant changes to the Bill in favour of Rights Holder arguments, without any consideration of the below suggestion.

CSPs contend that amendments to Section 115A(9) might be warranted. Currently, this section provides that CSPs "are not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings." CSPs understand the rationale of the provision but note that given the changing nature of technology in the field of copyright infringement (e.g. streaming, apps for set-top boxes etc.) there may be circumstances in which a CSP might reasonably want to be heard in the proceedings in order to advise on the workings of a technology or the technical details of disabling access to a website without necessarily being liable for parts of the costs of the proceeding. The provision of such technical expertise is quite different to an appearance and should not per se trigger liability for costs. CSPs recommend that this section be reviewed in this light and a form of 'reasonable test' be introduced to enable the Federal Court to have access to all technical expertise when making a decision to grant or not to grant an injunction.⁵

We believe that further consideration of s115A(9) is warranted in the context of the Bill, which if adopted in its current form is likely to require CSPs (acting reasonably) to need to enter an appearance and to take part in future proceedings - CSPs should not incur a cost penalty for doing so.

Retrospectivity of amendments

We note that paragraph 12 of the Bill, sub paragraph (b), allows for retrospective application of the amendments. It refers to applications made on or after commencement, and that it may apply to varying or rescinding of an injunction made before or after the commencement.

If the Court specifies a method for identifying any new domain names or addresses (as in (2B)(a)(ii) and (2B)(b)(ii)), then presumably this method could also be retrospectively added by variation to existing injunctions.

We strongly disagree with any retrospective application of an amended s115A, which could have significant effects – such as creating an extended blocking order or including an online search engine provider - without providing that those determinations be undertaken through a full court case where all parties – including the site owner - are aware of the full impact and possible reach of the Court's decision.

Online search engine providers

Communications Alliance strongly supports submissions provided by relevant search engine providers on this topic.

There is no additional utility to including search engines in the scheme, as websites are blocked at the CSP level, and thus those websites and their contents remain inaccessible to Australian users.

⁵ Communications Alliance Submission, Review of the Copyright Online Infringement Amendment:
https://www.communications.gov.au/sites/g/files/net301/f/submissions/communications_alliance.docx

Additionally, we understand that search engine providers willingly and regularly cooperate with Rights Holders in other jurisdictions, such as the EU and UK. In these cases, Rights Holders inform search providers when injunctions have been granted, and the search providers remove infringing sites from their results. This process works smoothly, and has not required any legislation. To our knowledge, rights holders have not approached search engine providers in Australia to do the same. Thus, there is no established need for this change, and it appears to be contrary to the government's red-tape reduction agenda, as it is significantly expanding a legislative application despite no attempts to resolve the (non-established) problem otherwise.

There are a range of unintended consequences and specific considerations which need to be considered in greater detail that were glossed over in the attenuated consultation process. The expensive and drawn-out court processes CSPs and Rights Holders underwent following the original establishment of 115(A) does not need to be repeated in its entirety.

The Department should consider including specific guidance in the Explanatory Memorandum which may be helpful in this circumstance, for example that the Bill does not require search engines to undertake any proactive monitoring of their service to identify URLs, domain names or IP addresses at which the online locations, the subject of the site blocking orders, may be accessible.

We would also like to note the disappointing double standard in expanding the scope of 115A to search engine providers while continuing to refuse extension of Safe Harbours to online service providers.

Lack of Consultation

In the initial February/March consultation with the Department, Communications Alliance was informed that the Department would consult further once it had received all written submissions and would provide an opportunity to discuss and respond to any specific proposals for change by other parties, prior to moving ahead.

Unfortunately, this level of consultation was not undertaken. Instead the Department provided CSPs with 5 working days to respond to an Exposure Draft which included the significant changes discussed above. The consultation was of limited scope, as it appears, for example, that the Law Council of Australia and other relevant stakeholders were not consulted.

Communications Alliance was assured in discussions with the Department that this was solely an Exposure Draft and that consultation would continue. However, the Bill introduced to Parliament, while changing some superficial aspects, did not take into account the strong feedback provided by Industry, or other groups such as the Australian Digital Alliance. We are concerned that this Bill being 'rushed through' Parliament, and ask the Committee to consider if there is an evidentiary basis for making the proposed changes, and seeking to implement them with minimal consultation and maximum speed.

Finally, we note that none of the substantive amendments or feedback provided by CSPs appear to have been taken into account in the Bill. While CSPs were generally supportive of retaining the balance and procedures as previously discussed, we did note in our previous submission to the Department's review the suggested change related to section 115A(9), discussed above, which was not taken into account.

This is a challenging and concerning approach to consultations for such fundamental changes to established law, and we are grateful for the opportunity for Committee review of the Bill.



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