



Music Rights Australia's Submission to the Senate Standing
Committee on Environment and Communications Review of
Copyright Amendment (Online Infringement) Bill 2018

November 2018

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RESPECTING AND PROTECTING CREATIVITY

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Music Rights Australia thanks the Senate Standing Committee on the Environment and Communications (the **Committee**) for the opportunity to make a submission to this review of the Copyright Amendment (Online Infringement) Bill (the **Bill**).

1. About Music Rights Australia

Music Rights Australia (**MRA**) is an organisation that protects the creative interest of artists within the Australian music community. MRA represents over 100,000 songwriters and music publishers through their association with the Australasian Mechanical Copyright Owners' Society (**AMCOS**) and the Australasian Performing Right Association (**APRA**)¹, and more than 125 record labels – both independent and major – through the Australian Recording Industry Association (**ARIA**).²

2. Summary

- MRA supports the Bill as currently drafted and urges the Committee to recommend the Bill is passed unamended by the Senate.
- The Bill is the product of wide and considered consultation with all affected parties, as evidenced by the inclusion of:
 - the primary effect test;
 - the rebuttable presumption that the online location is outside Australia; and
 - the inclusion of the novel subsection 8B which allows the Minister, by legislative instrument, to exclude an online search engine provider or a class of online search engine providers from the operation of the section.
- The flexible orders in s115A 2B(a)(ii) (and if necessary (b)(ii)) represent a robust and effective way to address the development of proxy sites designed to defeat site blocking orders. The section requires the Applicants to establish a nexus between the site against which the original orders have been made and the new proxy site. They must also obtain agreement in writing from each Carriage Service Provider (CSPs) (and if necessary each online search engine provider).
- There are robust checks and balances in section 115A to ensure that only those sites which are the intended objects of the section will be caught by the orders.
- The evidentiary threshold which Applicants must meet in section 115A cases will remain high and the Federal Court may still consider any or all of the section 115A (5) factors and any additional factors which it considers relevant before it makes orders.

¹ See www.apraamcos.com.au

² See www.aria.com.au

3. The Bill

MRA supports the passage of the Bill as currently drafted. It is the product of deliberate and considered consultation and reflects a balanced approach to improving the operation of section 115A while still maintaining the Parliament's intention to enact a prescriptive section to ensure the no-fault remedy is only used to target the worst of the worst illegal offshore sites.

MRA was actively involved in the consultation process leading up to the introduction of section 115A. The consultation process was extensive. The draft legalisation was subject to public consultation and a range of parties made submissions on the draft legislation including individual CSPs, consumer advocates and representatives from the digital community. At the time, MRA did not support the prescriptive scheme in the section and advocated for a remedy more like the UK legislation³.

MRA managed the first music industry section 115A case. The case was expensive to develop and the evidentiary threshold which the Applicants had to meet was onerous. A summary of the music industry's experience with the current legislation on is attached as Schedule A to this submission.

The Bill introduces welcome improvements to ensure the section fulfils its purpose to address the serious damage which illegal offshore sites inflict on the local music industry but does not lessen the evidentiary burden which copyright owners will carry to satisfy the Federal Court that the orders they seek should be made.

MRA supports the Bill as currently drafted because the changes incorporated in the Bill will allow copyright owners to take effective and efficient action against the illegal online offshore sites which develop their structures to avoid detection and enforcement. The new primary effect test will be of assistance to address the emerging problem of illegal offshore stream ripping sites in a cost effective and efficient manner. This new test will also allow cases to be developed against dedicated cyberlockers, the operation of which may not be captured by the primary purpose test.

MRA was actively involved in the Department's review of section 115A and was included in the consultation on the Bill.

Both rounds of consultation were considered and extensive. The Department addressed the concerns of copyright owners and CSPs and online search engine providers throughout the process, as evidenced by the inclusion of the new primary effect test, the rebuttable presumption the online location is outside Australia and the inclusion of the novel subsection 8B which permits the Minister to declare, by legislative instrument, that a

³ Copyright, Designs and Patents Act 1988 (Cth) section 97A

particular online search engine provider or a class of online search engine providers may be excluded from the operation of s115A.

MRA and its stakeholders had concerns about the inclusion of subsection 8B as a ministerial instrument could be utilised to side step the important process of policy development through public consultation and parliamentary review, which was undertaken with the development of the no-fault injunctive relief remedy.

However, on the assumption that subsection 8B would be utilised in only the most extreme cases and any exercise of the Minister's power under subsection 8B would be subject to public review and an evidence-based enquiry, MRA and its stakeholders do not object to its inclusion. We assume it is in the Bill to assuage concerns expressed by the digital community who clearly participated in the consultation process, as evidenced by its inclusion in the Bill.

Checks on unintended consequences

The Bill has been drafted to ensure the prescriptive structure of section 115A is maintained while ensuring it achieves its intended purpose of addressing the damage illegal offshore sites inflict on copyright owners and the creative industries generally.

It has been suggested the new effects test could capture sites such as Pinterest.

MRA rejects this suggestion. MRA does not believe that this site, or sites like it, could fall within the effect test. Pinterest would never be named in a music copyright owners' section 115A Application.

However, even if such an application were contemplated by a copyright owner, section 115A has a significant number of checks and balances to ensure that such an Application would more than likely be unsuccessful.

Some of the factors which would support this conclusion are:

Under subsection 4 a copyright owner must notify any site which would be the subject of a section 115A Application. On receipt of this theoretical notice, were the site's operators to supply evidence which showed it did not have either the primary purpose or primary effect of infringing or facilitating infringement of copyright, it is unlikely that an Application would be lodged with the Federal Court.

Were a copyright owner to proceed with this theoretical Application, this response would need to be drawn to the Court's attention.

The site operator could also reply to the notice by agreeing to remove the alleged infringing material and no Application would be filed.

If this theoretical Application were to proceed to hearing the Applicant must still satisfy the Court that the site has either the primary purpose or the primary effect of infringing or facilitating the infringement of copyright.

If this theoretical Application were to proceed, the site operator would be able to attend to give evidence about how the site operates.

Additionally, notwithstanding the enumerated factors the Court may consider under section 115A (5) which include factors such as:

- the impact on any person or class of person likely to be affected by the grant of the injunction;
- whether it is in the public interest to disable access to the online location;
- whether the copyright owner complied with subsection 4 (giving notice of the intended Application); and
- whether disabling access to the online location is a proportionate response in the circumstances,

the Court has the inherent discretion to consider all matters it considers relevant before granting the orders sought.

All these factors, and other considerations such as the potential of adverse costs orders and an adverse judgment, would make it unlikely that this type of Application would ever happen.

It has been suggested that subsection 2B(a)(ii) and (b)(ii) should be deleted from the Bill

Apparently, there is an unfounded concern that the subsection could be used to add unrelated offshore locations to the blocking orders and such additions would not be subject to judicial review. This interpretation of the practical and cost- saving subsection stems from a misreading of the subsection.

It is clear that any agreement under subsection 2B(a)(ii) or 2B(b)(ii) to add other online locations to the orders must be in writing between the CSPs, the online search engine providers (if such an application is made) and the Applicant and there must be a nexus between the new online location (proxy site) and the online location which was subject to the original orders.

The Applicant bears the burden of showing that nexus and they must satisfy each CSP and each online search engine provider subject to the original orders of that nexus. Failure to reach agreement will require the parties to return to court to seek the orders.

There is a clear limitation on the scope on this practical cost-saving solution and any suggestion that this would be used to subvert due process is fanciful.

Some may suggest there should be additional conditions precedent under 115A (1)

115A(1)(a) and 115A (1)(b) create high evidentiary hurdles for Applicants and are not the only factors which Applicants must prove to obtain blocking orders.

No additions should be made to the Bill. To include an additional hurdle for copyright owners to prove as a condition precedent would undermine the legislative purpose of the section.

It has been suggested that wording from within the Copyright Act 1968 could be incorporated in the Bill. One such suggestion has been to use words from section 132AC such as **“the infringement is of a commercial scale prejudicing the copyright owner”**.

As previously stated, MRA opposes changes to the Bill. Specifically, MRA opposes the incorporation of concepts like *commercial scale of the infringement* in the context of a no-fault injunction and opposes the notion that the commercial scale of the infringement should be linked to **the** copyright owner.

The conditions precedent of the primary purpose and primary effect tests have been drafted with care. They focus the enquiry about the online location on the wider impact such illegal sites have on the relevant industry and copyright owners generally, not just the named Applicants.

To tie the impact of these illegal sites to a commercial test which requires evidence of the impact on **THE** copyright owner, rather than focusing on their primary purpose or primary effect, would render the section unworkable and subvert its purpose.

The evidentiary threshold which Applicants must meet in any section 115A Application is high and the Federal Court has been deliberate and careful in its review of the evidence and the Orders sought. There is no reason to believe that this will change were the Bill to pass as currently drafted.

In the music case the orders were negotiated with CSPs and while some matters with respect to costs and the use of a single landing page were not agreed before the hearing, the majority of operational issues were agreed and after due interrogation of the issues the

Court accepted the Applicants' evidence of primary purpose and the other factors they were required to prove and made the blocking orders which the Applicants sought⁴.

This remedy is meant to be effective and efficient, any addition to the Bill would make the section cumbersome and defeat its purpose.

The music industry is currently planning a second section 115A case and believes that the amendments to section 115A contained in the Bill will streamline the development of that case and assist the Applicants to obtain orders against illegal offshore stream ripping sites, which have developed into one of the largest sources of online infringing activity of music locally.

MRA urges the Committee to recommend the Bill be passed as it is currently drafted as it is the product of consultation and it addresses the concerns and requests of the relevant parties.

Should the Committee have any questions about the MRA submission, please contact Vanessa Hutley General Manager MRA at

⁴ See Schedule A to this submission for further detail

SCHEDULE A

Summary of Music Industry's experience using the current legislation

- Section 115A of the Copyright Act 1968 (the **Act**) gives copyright owners the ability to apply to the Federal Court of Australia for no fault injunctions against ISPs to block offshore sites whose primary purpose is copyright infringement or the facilitation of copyright infringement.
- The music industry has filed one section 115A case. Its objective in filing site blocking cases here and in other jurisdictions is to disrupt the operation and proliferation of illegal sites in a particular jurisdiction. Disruption of piracy cannot be achieved through one action. Evidence from the UK and other jurisdictions shows that sustained action against multiple websites over a period will have a lasting impact.
- Data indicates section 115A cases (including those filed by the film industry and Foxtel⁵) have disrupted access to the sites against which site blocking orders have been made. However, if this trend is to continue copyright owners will need to take more actions over a longer period against other illegal sites to ensure the section 115A site blocking remedy is operating as it was intended to operate.

Background

- There are over 20 online licensed music services in Australia which make music available to consumers across platforms and devices at a range of price points including free on some advertising supported services: see www.digitalcontentguide.com.au; www.promusic.org.
- Music industry copyright owners have filed one section 115A case. The case⁶ (the **music case**) was filed against Kick Ass Torrents (**KAT**) and several KAT proxy sites. These sites were downloading sites. During the preparation of the music case, but after the Application had been filed, US authorities shut down the KAT site and the music case proceeded against KAT proxy sites only.
- In order to narrow the issues between the parties, MRA met with representatives of some of the ISPs. Other ISPs did not agree to these pre-application discussions. These discussions continued between the parties' legal representatives up to the hearing in October 2016.
- Most issues were agreed between the parties prior to the hearing.
- The ISPs took the position that as this was a no-fault remedy they would not contest evidentiary matters as it was for the Applicants to prove their case

⁵ *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA1503; *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2017] FCA 965; *Foxtel Management v TPG Internet Pty Ltd* [2017] FCA 1041

⁶ *Universal Music Pty Limited and Ors v TPG Internet Pty Ltd and Ors* [2017] FCA 435

and satisfy the Court they had met the evidentiary threshold to obtain the blocking orders.

- The Applicants led substantial evidence:
 - Of subsistence of copyright;
 - That the carriage service providers provide access to online locations outside Australia;
 - That the KAT proxy sites were online locations outside Australia;
 - That the Applicants had notified the carriage service providers and the operators of the KAT proxy sites of the Application;
 - Of flagrancy of copyright infringement; instances of facilitation of copyright infringement; demonstrated disregard of copyright by the operator of the KAT proxy sites; examples of orders made in other jurisdictions against the KAT site; and
 - Of the negative impact which online copyright infringement had on copyright owners and the music industry generally.
- The Applicants' evidence was accepted by the Court.
- In the music case, the parties had agreed the blocking technology which ISPs could use prior to the Court making the orders.
- The issues between the parties at the hearing centred on:
 - Costs of implementing the site blocking (referred to in the cases as **compliance costs**);
 - The wording of some aspects of the orders, including wording to be used on a landing page and use of a single landing page; and
 - Legal costs of the proceedings (**legal costs**).
- The ISPs did not have a single position on the compliance costs or the landing page issues.
- The matter ran for one and a half days from 25 October 2016.
- Judgment was delivered on 28 April 2017.
- The ISPs implemented the blocks within the time -period set out in the orders and they remain in place.
- Immediately after the film industry and Foxtel cases were filed, MRA worked with the other copyright owners to appoint a third party to develop and manage a landing page which ISPs could use when they blocked sites (the **Copyright Landing Page**).
- At present it appears only Optus and Foxtel are using the Copyright Landing Page. The other ISPs have chosen to implement their own landing pages.
- The Applicants paid the compliance costs to each ISP for each domain name which has been blocked.
- Prior to the hearing, the Applicants and the Respondents had agreed a process to apply to the Court to add proxy sites to the existing orders.

- In effect the music case was against proxy sites because the KAT site had been closed down. Therefore, the Applicants have not filed any applications to add proxy sites.
- The Applicants are currently developing a case against illegal offshore stream ripping sites. Over the past 12 months these sites have increased their activities and are now a major source of copyright infringement or facilitation of copyright infringement locally.
- Site blocking cases are expensive matters to run. In all section 115A cases to date the Courts have ordered that the Applicants pay each CSP named in the Application \$50 per domain name for compliance costs. Additionally, in the music case the Applicants were ordered to pay the Respondents' legal costs for certain aspects of the matter.