

The Senate

Environment and Communications
Legislation Committee

Copyright Amendment (Online Infringement)
Bill 2018

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Chapter 1

Introduction

1.1 On 13 November 2018, the Senate referred the provisions of the Copyright Amendment (Online Infringement) Bill 2018 (the bill) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 26 November 2018.¹

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The date for receipt of submissions was 20 November 2018. The committee did not hold a public hearing for the inquiry.

1.3 The committee received 26 submissions, which are listed at Appendix 1. The public submissions are available on the committee's website at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/OnlineInfringementBill.

1.4 The committee thanks all of the individuals and organisations that contributed to the inquiry.

Scope and structure of the report

1.5 This report comprises two chapters. The remaining sections of this chapter discuss the purpose of the bill, background to the bill and reports by other committees. Chapter 2 outlines the principle issues raised in evidence and presents the committee's views and recommendations.

Purpose of the bill

1.6 The bill seeks to expand the scope of the injunctive regime in section 115A of the *Copyright Act 1968* (Copyright Act). That section is aimed at blocking access by users in Australia to overseas online locations that facilitate large-scale infringement of copyright.

1.7 Section 115A currently permits copyright owners to apply to the Federal Court for an injunction requiring a carriage service provider to disable access to an online location outside Australia that has the primary purpose of infringing, or facilitating the infringement, of copyright.² The amendments in the bill seek to:

1 *Journals of the Senate*, No. 127—13 November 2018, p. 4084.

2 Explanatory memorandum, p. 3.

- provide that a copyright owner may apply to the Federal Court for an injunction in respect of an online location that has the primary purpose, or the primary effect, of infringing, or facilitating an infringement, of copyright (whether or not in Australia);
- include a rebuttable presumption that an online location is outside Australia, to reduce the evidentiary burden on copyright owners;
- enable copyright owners to seek injunctions requiring online search engine providers to take such steps as the Federal Court considers reasonable not to provide search results that refer users to blocked online locations;
- clarify that the Federal Court may grant injunctions in terms that allow:
 - the copyright owner and carriage service provider, by agreement, to apply an injunction to block other domain names, URLs and IP addresses that start to provide access to the online location after the injunction is made;
 - the copyright owner and online search engine provider, by agreement, to apply the injunction to not provide search engine results that include domain names, URLs and IP addresses that start to provide access to the online location after the injunction is made; and
- enable the minister, by legislative instrument, to declare that particular online search engine providers, or classes of online search engine providers, be exempt from the scheme.³

1.8 In his Second Reading Speech to the House of Representatives on the bill, the Minister for Families and Social Services, the Hon Paul Fletcher, stated that:

In February this year, the Government reviewed the existing scheme to determine whether it was operating effectively. In general, this assessment found that the scheme is working well, and that blocking arrangements have been implemented by carriage service providers with minimal disruption. However, there are some clear pressure points.

First, search engines enable users to discover the existence of blocked websites and provide alternative pathways to get to those sites. Second, the types of online piracy have also become broader, with increased use of sophisticated online locations, such as 'cyberlockers', that allow mass file-sharing. Third, new pathways to the blocked sites appear after the initial blocking, and these new pathways can't be blocked because they are not part of the original order. Finally, it can be difficult and costly to determine whether an online location is, in fact, located overseas.⁴

1.9 The minister stated that the measures in the bill directly address these concerns, adding that none of the measures will impede or affect the capacity for

3 Explanatory memorandum, p. 2.

4 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 3.

carriage service providers or search engine providers to voluntarily block or remove links to copyright infringing locations.⁵ The minister concluded that:

...the Government is seeking quick passage of this Bill so that Australia's creative industries can take action to protect their rights. These industries have put in place voluntary measures to make content more accessible and cheaper, and run education campaigns so that Australians are aware of the impact of piracy. It is now appropriate for the Parliament to support these efforts by reforming our copyright website blocking scheme to ensure it is fit-for-purpose in a contemporary digital media environment.⁶

Background to the bill

1.10 The Copyright Act creates exclusive intellectual property rights for owners, including rights to copy, adapt, publish, communicate to the public and publicly perform protected material. Works protected under the Copyright Act include literary, artistic and musical works, as well as film and sound recordings. The Copyright Act also contains a number of remedies through which copyright owners can enforce their rights.⁷ These have proven effective in addressing copyright infringement in Australia.

1.11 However, while copyright owners are easily able to take action against domestic sites, a number of foreign-based websites have emerged to provide access to copyrighted material. This has created difficulties for Australian copyright holders seeking to enforce their rights.⁸ In his second reading speech for the bill, the Minister for Families and Social Services, the Hon Paul Fletcher MP, noted in this regard that:

...the internet continues to create major challenges for Australia's creative industries. Online copyright infringement reduces the livelihood of Australian creators and investors, and foreign-based websites continue to illegally distribute the content of Australian copyright owners. The operators of these sites are often difficult or impossible to find, and are located in countries that do not have strong copyright laws.⁹

1.12 Difficulties associated with enforcing copyright against foreign-based websites were identified some years ago and, in response, the Government enacted the *Copyright Amendment (Online Infringement) Act 2015* (2015 Act). The 2015 Act inserted section 115A into the Copyright Act. That section permits a copyright owner to apply to the Federal Court of Australia (Federal Court) for an order requiring a

5 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 3.

6 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 4.

7 For example, section 115 of the Copyright Act provides that a copyright owner may seek an injunction, damages or an account of profits.

8 Department of Communications and the Arts, *Regulation Impact Statement: Copyright Amendment (Online Infringement) Bill 2018* (October 2018), p. 4.

9 The Hon Paul Fletcher MP, *House of Representatives Hansard*, 18 October 2018, p. 3.

carriage service provider to block access to an online location outside of Australia that has the 'primary purpose' of infringing, or facilitating the infringement of, copyright.

1.13 The Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Copyright Amendment (Online Infringement) Bill 2015 recommended that the Government conduct an effectiveness review, to be completed two years after its enactment.¹⁰ The Government agreed that a review should be conducted.¹¹

Consultation process

1.14 The Department of Communications and the Arts (the department) conducted a review of section 115A of the Copyright Act in February of 2018. The department received 22 submissions, mostly from representatives of copyright owners, internet service providers, technology sector firms and digital rights groups.¹² Most stakeholder submissions agreed that section 115A has been a positive government initiative which is largely working as intended.

1.15 However, submitters noted that section 115A could be improved in a number of ways. For example, the joint submission from the Australian Film & TV Bodies recommended extending section 115A to other 'intermediary service providers' that facilitate access to content.¹³ A number of submitters also raised concerns that section 115A is currently limited to online locations outside Australia, and about the process to obtain extended orders to block new domain names, URLs and IP addresses.

1.16 The department concluded that while section 115A was achieving most of its aims, there was scope to consider improvements to address gaps in the scheme that enabled Australians to access overseas locations that infringe or facilitate the infringement of copyright.¹⁴

Reports of other committees

Senate Standing Committee for the Scrutiny of Bills

1.17 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills). The Scrutiny of Bills Committee assesses legislative

10 Senate Legal and Constitutional Affairs Legislation Committee, *Copyright Amendment (Online Infringement) Bill 2015 [Provisions]*, 11 June 2015, p. 32.

11 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 16 June 2015, p. 6416.

12 See <https://www.communications.gov.au/have-your-say/review-copyright-online-infringement-amendment>.

13 Australian Film & TV Bodies, Submission to Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 23 March 2018, pp. 18-19.

14 Department of Communications and the Arts, *Regulation Impact Statement: Copyright Amendment (Online Infringement) Bill 2018* (October 2018), p. 6.

proposals against a set of standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.18 In its *Scrutiny Digest No. 13 of 2018*, the Scrutiny of Bills Committee expressed concern that the bill would permit the minister to declare, by legislative instrument, that a particular online search engine provider or class of providers must not be specified in an application for an injunction, or an application to vary an injunction. The Scrutiny of Bills Committee emphasised that significant matters, such as the specification of providers that are to be exempted from an injunctive scheme, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The Scrutiny of Bills Committee also emphasised that the proposed power is very broad, in that it would permit the minister to exclude *any* online location from the operation of the injunctive scheme.¹⁵

1.19 The Scrutiny of Bills Committee requested the minister's advice as to why it is necessary to enable delegated legislation to exempt online search engine providers from the copyright injunctive scheme, and the appropriateness of amending the bill to as to specifically exclude certain classes of smaller providers.¹⁶

Parliamentary Joint Committee on Human Rights

1.20 At the time of this report, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) had not commented on the bill. It is expected that the Human Rights Committee's *Report 12 of 2018* will table on 27 November 2018.

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 13 of 2018* (14 November 2018), pp. 6-7.

16 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 13 of 2018* (14 November 2018), p. 7.

Chapter 2

Key Issues

Views on the bill

2.1 A number of submitters—particularly those representing the interests of copyright holders—expressed support for the bill. Music Rights Australia (MRA), for example, stated that the bill:

...is the product of deliberate and considered consultation and reflects a balanced approach to improving 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 illegal offshore sites.¹

2.2 MRA's submission states that the bill introduces welcome amendments which will ensure that section 115A is able to address the serious damage which illegal offshore sites inflict on the local music industry, while maintaining appropriate evidentiary burdens for copyright holders.² A number of other submissions expressly endorsed MRA's views, and urged the Senate to pass the bill without amendment.³

2.3 Other submissions in support of the bill stated that while section 115A is operating effectively, there are nevertheless potential gaps and areas in which that section could be strengthened. These submitters welcomed the amendments in the bill as targeted and proportionate changes to the injunctive regime which would enhance its operation and effectiveness.⁴ A number of submissions also emphasised that the bill reflects the outcome of an extensive consultation and review process.⁵

2.4 Submitters opposing the bill argued that section 115A as currently drafted is operating efficiently and effectively, and consequently there is no need for further

1 Music Rights Australia, *Submission 3*, p. 3.

2 Music Rights Australia, *Submission 3*, p. 3.

3 Australasian Music Publishers' Association Limited (AMPAL) *Submission 4*, p. 1; Phonographic Performance Company of Australia, *Submission 6*, p. 1; APRA AMCOS, *Submission 10*, p. 1; Australian Recording Industry Association (ARIA), *Submission 12*, p. 2; Australian Independent Record Labels Association (AIR), *Submission 21*, p. 1.

4 Australian Copyright Council, *Submission 13*, p. 2; Free TV Australia *Submission 16*, pp.1–2; Foxtel, *Submission 19*, p. 2; Coalition of Major Professional & Participation Sports (COMPPS), *Submission 23*, p. 2.

5 Australasian Music Publishers Association Limited (AMPAL), *Submission 4*, p. 2; Australian Film and TV Bodies, *Submission 11*, pp. 2–3; Copyright Agency, *Submission 18*, p. 1.

amendment. These submissions also contended that the measures proposed by the bill are unnecessarily broad, and may give rise to adverse unintended consequences.⁶

2.5 Submitters opposing the bill also raised concerns that the introduction of the bill was 'rushed forward' without a thorough review of the extent of any problems with the current injunctive regime. These submissions argued that the timeframe for the introduction of the bill was problematic given the substantial changes proposed, and asserted that the proposed changes prioritise the interests of copyright owners rather than reflecting the interests of all stakeholders.⁷ For example, the Communications Alliance (CA) submitted that:

The proposed changes appear to reflect only matters raised by Rights Holders, and do not appear to take into account matters raised by CSP...Prior to their introduction 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 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.⁸

Issues raised

2.6 A number of submissions also provided commentary on specific elements of the bill, in particular the proposals to:

- introduce a 'primary effect' test into section 115A;
- extend the injunctive regime in section 115A to online search engine providers; and
- allow the Federal Court to grant 'adaptive' injunctions, which would permit copyright holders, carriage service providers and online search engine providers to extend an injunction to additional online locations without a further order by the Court.

2.7 Stakeholder views on these matters are considered in further detail below.

6 Google LLC, *Submission 7*, pp. 1–2; Pirate Party Australia, *Submission 9*, p. 2; Internet Association of Australia Inc., *Submission 14*, p. 1; Australian Digital Alliance, *Submission 15*, p. 3; Communications Alliance, *Submission 20*, p. 2; Digital Industry Group (DIGI), *Submission 25*, pp. 3–5.

7 Google LLC, *Submission 7*, pp. 1–2; Internet Association of Australia Inc., *Submission 14*, p. 1; Australian Digital Alliance, *Submission 15*, p. 3; Communications Alliance, *Submission 20*, p. 3.

8 Communications Alliance, *Submission 20*, p. 3.

Introduction of a 'primary effect' test

2.8 Proposed section 115A(1) would permit a copyright owner to apply to the Federal Court for the grant of an injunction in respect of an online location that infringes, or facilitates the infringement, of copyright, and has the primary purpose *or the primary effect* of infringing or facilitating an infringement of copyright.

2.9 Australian Film and TV Bodies and Foxtel argued that the existing test in section 115A (that is, the 'primary purpose' test) may hinder or prevent the achievement of the objectives of the injunctive regime, as the test is often difficult to meet.⁹ Foxtel, for example, stated that:

It can be difficult in some circumstances to establish that some online locations have the 'primary purpose' of infringing copyright (the current threshold), even though that is the practical effect of the locations. This is relevant to online file-hosting services, such as cyberlockers, which are widely used to facilitate the unauthorised sharing of copyright material.¹⁰

2.10 Submissions supporting the introduction of a 'primary effect' test also argued that this test would assist the injunctive regime in section 115A of the Copyright Act achieve its intended purpose. This is because it would ensure that the scheme is able to capture online locations—in particular 'cyberlockers'—which may not have the primary purpose of infringing copyright, but which are nevertheless making infringing content available to Australian users.¹¹ In this regard, the Australian Copyright Council (ACC) stated that the introduction of the 'primary effect' test would:

...recognise the adaptive and evolving nature of technology and is therefore consistent with the current Copyright Modernisation Review and other previous reviews which seek copyright reform that acknowledges a need for flexibility and technology neutral language.¹²

2.11 Submitters supporting the introduction of a 'primary effect' test also acknowledged concerns that the test could capture legitimate services. However, the submitters argued that these concerns were misplaced, noting in particular the variety of factors that the Federal Court would be required to consider before granting an injunction, and the fact that the burden of establishing that an online location meets the 'primary effect' test continues to fall on the copyright owner.¹³

9 Australian Film and TV Bodies, *Submission 11*, p. 3; Foxtel *Submission 19*, p. 2.

10 Foxtel, *Submission 19*, p. 2.

11 Village Roadshow Australia, *Submission 2*, p. 1; Music Rights Australia, *Submission 3*, pp. 4–5; Australian Film and TV Bodies, *Submission 11*, p. 6; Australian Copyright Council, *Submission 13*, p. 1; Foxtel, *Submission 19*, p. 2.

12 Australian Copyright Council, *Submission 13*, p. 1.

13 Music Rights Australia, *Submission 3*, pp. 6–7; Australian Film and TV Bodies, *Submission 11*, p. 5; Australian Copyright Council, *Submission 13*, p. 1; Free TV Australia, *Submission 16*, pp. 2–3;

2.12 The majority of submissions opposing the introduction of a 'primary effect' test raised concerns as to its breadth, emphasising that the current 'primary purpose' test sets an intentionally high threshold for copyright owners seeking injunctive relief. The Australian Digital Alliance (ADA), Communications Alliance and the Pirate Party Australia argued that lowering this threshold could result in the site blocking scheme in section 115A being applied to online locations operated for legitimate purposes.¹⁴ The ADA and the Communications Alliance further argued that this could create difficulties for smaller businesses that lack the resources to invest in sophisticated copyright removal technology.¹⁵ The ADA stated that the introduction of a 'primary effect' test:

...ignores the reality that, due to the lack of general exemptions in our [Copyright] Act, a large number of innocent and everyday activities currently infringe copyright in Australia, including generating memes, auto-translation, cloud storage, caching and indexing, and sharing screenshots of websites...This means that sites which are perfectly legal in other jurisdictions with more internet-appropriate copyright laws, such as the United States, infringe copyright in Australia.¹⁶

2.13 The Pirate Party Australia also argued that the breadth of the proposed 'primary effect' test could place undue burden on the operators of online locations, stating that the test 'requires all online locations to monitor and restrict their user-generated content to avoid risking violation'.¹⁷

2.14 Finally, opponents of a 'primary effect' test argued that such a test is unnecessary. In this respect, the submitters argued that section 115A as currently drafted is operating effectively, and that the current 'primary purpose' test has not presented a barrier to copyright owners seeking injunctive relief.¹⁸ For example, Google LLC (Google) stated that it is 'not aware of any cases where an applicant has failed to have a site blocked because of the current formulation of the test' in section 115A. Google added that:

Not a single hypothetical example of such a site has been put forward by those seeking the amendments. This can only be explained by the fact that no such examples exist, or that such examples do exist, but those seeking

14 Pirate Party Australia, *Submission 8*, pp. 5–6; Australian Digital Alliance, *Submission 15*, p. 4; Communications Alliance, *Submission 20*, pp. 7–8. See also Dr Matthew Rimmer, *Submission 24*, pp. 4, 18–19.

15 Australian Digital Alliance, *Submission 15*, p. 4; Communications Alliance, *Submission 20*, p. 8.

16 Australian Digital Alliance (ADA), *Submission 15*, pp. 4–5.

17 Pirate Party Australia, *Submission 9*, p. 5.

18 Electronic Frontiers Australia, *Submission 5*, p. 2; Google LLC, *Submission 7*, p. 6; Internet Association of Australia *Submission 14*, p. 1; Communications Alliance, *Submission 20*, p. 8.

the amendments are concerned that the Australian public would oppose the amendments if those sites were revealed.¹⁹

Government position

2.15 The Department of Communications and the Arts' submission acknowledged the concerns relating to the inclusion of a 'primary effect' test in section 115A—particularly the concerns that the breadth of the proposed test would result in the capture of legitimate online locations.²⁰

2.16 However, the department argued it is 'highly unlikely' that legitimate online locations would be captured by the injunctive regime, stating that:

Legitimate online locations that may have some infringing activity will not have the 'primary purpose or primary effect' of infringing copyright, or facilitating the infringement of copyright. While they may have some effect in terms of infringing material, this will generally not be the intended primary purpose of the location, nor its primary effect. Rather, the injunction provisions will only capture locations that meet this threshold, such as 'cyberlockers' that, in some instances, predominantly contain infringing copies of online material.²¹

2.17 The department emphasised that subsection 115A(5) sets out checks and balances on the exercise of the Federal Court's power to grant an injunction. The department concluded that it is difficult to envisage the circumstances in which the Court would grant an injunction against a legitimate online location (such as Pinterest or Dropbox) unless that location were to alter its services so as to have the primary purpose or primary effect of infringing or facilitating the infringement of copyright.²²

Extension of injunctions to online search engine providers

2.18 The bill seeks to extend the injunctive regime in section 115A of the Copyright Act to online search engine providers. In this respect, proposed subsection 115A(2) provides that an applicant may request that an injunction require an online search engine provider to take such steps as the Court considers necessary so as not to provide a search result that refers to the online location. Proposed subsection 115A(2B) further seeks to permit an injunction to require online search engine providers not to provide search results that include certain domain names, URLs and IP addresses.

2.19 A number of submissions in support of these measures noted that the proposal to extend to the injunctive regime to online search engine providers is a narrow and

19 Google LLC, *Submission 7*, p. 6.

20 Department of Communications and the Arts, *Submission 22*, p. 5.

21 Department of Communications and the Arts, *Submission 22*, p. 5.

22 Department of Communications and the Arts, *Submission 22*, p. 6.

proportionate measure which responds to concerns identified during the departmental review of section 115A, and which will have a meaningful impact on the volume of traffic to pirate sites.²³

2.20 Submissions in support of extending the application of section 115A to online search engine providers also emphasised the key role that search engine providers can play in facilitating the infringement of copyright, noting that the current injunctive regime does not currently extend to these entities.²⁴ Australian Film and TV Bodies provided detailed commentary on the role that online search engines have in the infringement of copyright, stating that:

The dominant role played by search engines in facilitating the ongoing access by internet users to these infringing locations is reflected in consumer research conducted by Screen Audience Research International in its 'Role of Search in Piracy' Report. This report found that:

- (a) 70% of first-time consumers of illegitimate content online use search engines when discovering a source of illegal content. Of these consumers, 44% state that they were not actively looking for infringing technology – they are directed to it by the operation of the search technology;
- (b) The most common search terms leading consumers to pirate sites are generic and do not demonstrate any clear intent to seek infringing content or knowledge of its location; and
- (c) 47% of online consumers trying to access a blocked infringing site use search engines to find an alternative site.²⁵

2.21 Australian Film and TV Bodies further noted that:

'the actual webpage traffic data shows that search engines are responsible for an extraordinary 98% of all referrals by intermediaries to blocked sites. This data clearly demonstrates that search engines are a conduit to online pirate content and uniquely placed to meaningfully impact access to pirate websites, through compliance with site blocking orders'.²⁶

2.22 Screen Producers Australia and Foxtel argued that the extension of the injunctive regime to search engine providers would not result in undue burdens for search engine providers, noting that providers already modify available search results to comply with Australian law.²⁷ In this respect, Foxtel stated that:

23 Screen Producers Australia, *Submission 1*, p. 2; Australian Society of Authors, *Submission 8*, p. 2; Australian Film and TV Bodies, *Submission 11*, p. 5.

24 Australian Copyright Council, *Submission 13*, p. 1; Free TV Australia, *Submission 16*, p. 2; Foxtel, *Submission 19*, p. 3.

25 Australian Film and TV Bodies, *Submission 11*, p. 5.

26 Australian Film and TV Bodies, *Submission 11*, p. 5.

27 Screen Producers Australia, *Submission 1*, p. 2; Foxtel, *Submission 19*, p. 3.

...search engines currently de-index URLs for purposes including national security, violation of defamation and privacy and security laws, and can remove that content at the request of government and in some cases individuals. We note that where search engines remove content in line with their product community standards this is done on a voluntary basis, rather than being compelled to do so by law, adding further weight to the argument that removal of content by search engines is relatively easy.²⁸

2.23 The Australian Copyright Council and Australian Film and TV Bodies noted that the extension of the injunctive regime to search engine providers is broadly consistent with international best practice—in particular with recent developments in the European Union.²⁹

2.24 The ADA, Communications Alliance and Google opposed the extension of the injunctive regime to online search engines. These submitters argued that it may increase the costs of the injunctive regime and increase regulatory burden, without delivering additional benefits to rights holders.³⁰ In this regard, the ADA argued that the existing site blocking regime already ensures Australian users are unable to access infringing material, stating that:

...it is unclear how adding search engines to the list of service providers covered by the website blocking scheme would change access to the sites in Australia when they are already blocked at the ISP level. Material on these sites will already be unavailable to users searching from Australia. As such, this proposed extension has no clear purpose or effect.³¹

2.25 Submissions opposing this measure also noted that no countries that have implemented site blocking legislation have extended the operation of that legislation to online search engine providers. Further, in countries with site blocking legislation, search engine providers willingly and regularly cooperate with rights holders to remove infringing material—without the need for special legislative measures.³² In this regard, Google stated that:

According to the Motion Picture Association of Canada, there are now at least 42 countries that have either adopted, implemented or are legally obliged to adopt and implement, measures to ensure ISPs take steps to disable access to copyright infringing websites. However, not one of these

28 Foxtel, *Submission 19*, p. 3.

29 Australian Film and TV Bodies, *Submission 11*, p. 6; Australian Copyright Council, *Submission 13*, pp. 1–2.

30 Google LLC, *Submission 7*, pp. 5–6; Australian Digital Alliance (ADA), *Submission 15*, p. 10; Communications Alliance, *Submission 20*, pp. 9–10.

31 Australian Digital Alliance, *Submission 15*, p. 10.

32 Australian Digital Alliance, *Submission 15*, p. 10; Communications Alliance, *Submission 20*, p. 10. See also Digital Industry Group (DIGI), *Submission 25*, p. 6.

countries has thought it necessary or desirable to extend ISP site blocking to other online service providers such as search engines.³³

Government position

2.26 The department's submission observed that major online search engine providers have acknowledged that they have an important role in copyright enforcement, and that these providers are often active in disrupting infringement.³⁴ Further, copyright infringement involving online search engine providers is not unique to Australia, and foreign jurisdictions have taken steps to address this issue. In this regard, the submission noted that:

...the UK has brokered a code of practice, under which search engine providers have agreed to undertake copyright enforcement efforts that extend beyond what is contemplated in this Bill. The Department understands from overseas counterparts that these copyright enforcement mechanisms have been effective.³⁵

2.27 The department further stated that the website blocking arrangements under section 115A do not preclude or prevent voluntary measures to prevent copyright infringement being entered into by relevant parties. The department argued that, to the extent that voluntary measures are effective, it is unlikely that a copyright owner would seek an injunction, particularly given the potential delays and costs associated with doing so. The department emphasised that section 115A provides an appropriate legislative 'backstop' should voluntary arrangements prove ineffective.³⁶

'Adaptive' injunctions

2.28 Proposed subsection 115A(2B) seeks to allow the Federal Court to grant injunctions in terms that would allow copyright holders, carriage service providers and online search engine providers, by agreement, to extend an injunction to domain names, URLs and IP addresses that start to provide access to the infringing online location captured by the original injunction after that injunction is made.

2.29 The bill's explanatory memorandum stated that these measures are intended to respond to circumstances in which an online location seeks to avoid an injunction under current section 115A by using another domain name, URL or IP address which refers users to the same infringing content.³⁷

2.30 Submissions in support of the measures argued that they would be a reasonable addition to the injunctive regime, and would likely provide the flexibility

33 Google LLC, *Submission 7*, p. 5.

34 Department of Communications and the Arts, *Submission 22*, p. 5.

35 Department of Communications and the Arts, *Submission 22*, p. 4.

36 Department of Communications and the Arts, *Submission 22*, p. 5.

37 Explanatory memorandum, p. 12.

necessary to ensure online locations are not able to circumvent blocking orders merely by establishing new domain names, IP addresses and URLs.³⁸ In this regard, the ACC asserted that the measures are desirable, on the basis that they will:

- reduce some of the cost and unnecessary burden associated with the injunctive process and borne by all parties involved;
- reduce the pressures already placed on the Federal Court; and
- introduce a desirable alternative to litigation, which is consistent with the purposes of the safe harbour scheme in the Copyright Act.³⁹

2.31 Music Rights Australia and Australian Film and TV Bodies argued that the measures are appropriately circumscribed, noting that the copyright holder would bear the burden of establishing a nexus between any online location added to an injunction by agreement and the location subject to the original order.⁴⁰ The submitters also emphasised that the Federal Court would retain supervisory oversight over all site blocking orders, ensuring that online locations would not be blocked without appropriate judicial scrutiny.⁴¹

2.32 The joint submission by Australian Film and TV Bodies drew attention to practices in comparable international jurisdictions, noting that:

The UK Intellectual Property Office is considering introducing an administrative site blocking regime and other countries in the European Union and in the Asia-Pacific region have already done so (e.g. Indonesia, Korea, Portugal, Malaysia, and Thailand).⁴²

2.33 The ADA, Communications Alliance and Pirate Party of Australia opposed the introduction of 'adaptive' injunctions. These submitters focussed on the lack of judicial oversight, contending that the injunctions would require copyright holders, carriage service providers and online search engine providers to negotiate and determine matters that can, and should, only be determined by a Court.⁴³ In this regard, the ADA argued that:

Due to the serious and extreme nature of the potential impact of the scheme, it is essential that close judicial oversight be maintained to ensure that websites are not erroneously blocked or blocked without clear evidence of

38 Screen Producers Australia, *Submission 1*, p. 2; Australian Society of Authors, *Submission 8*, p. 2; Australian Film and TV Bodies, *Submission 11*, pp. 7–8; Foxtel, *Submission 19*, p. 3.

39 Australian Copyright Council, *Submission 13*, p. 2.

40 Music Rights Australia, *Submission 3*, pp. 5–6; Australian Film and TV Bodies, *Submission 11*, pp. 7–8.

41 Australian Film and TV Bodies, *Submission 11*, p. 7; Australian Copyright Council, *Submission 13*, p. 2; Foxtel, *Submission 19*, p. 3.

42 Australian Film and TV Bodies, *Submission 11*, p. 7.

43 Pirate Party Australia, *Submission 9*, p. 6; Australian Digital Alliance, *Submission 15*, p. 9; Communications Alliance, *Submission 20*, pp. 5–6.

malicious infringement. Any amendments which imply that rights holders will be given much greater latitude in determining which websites to block, or that ISPs may be required to monitor the communications of their clients for copyright purposes, should be avoided, to ensure the integrity not just of the scheme but of the Australian legal system itself.⁴⁴

2.34 The ADA, Communications Alliance and Google argued that there is little, if any, evidence to suggest that orders extending the application of an injunction are slow or expensive to obtain.⁴⁵ In this respect, Google noted that the Federal Court in *Foxtel Management Pty Ltd v TPG Internet Pty Ltd & Ors* stated that the Court may be willing to act on very little in the way of additional evidence in the case of a variation to injunction,⁴⁶ adding that in *Roadshow Films Pty Ltd v Telstra Corporation Limited*, the Court made an order that:

....specifically addressed the issue that the...Bill is said to address. Namely, the order provides a very simple and effective method for the applicants to get site blocking orders in respect of websites that begin to operate from a different Domain Name, IP Address or URL after the date of the initial order. It is hard to conceive of a simpler process that maintained proper oversight than the one formulated by his Honour Justice Nicholas.⁴⁷

2.35 The submitters also contended that the proposed 'adaptive' injunctions could in fact place additional burden on rights holders, carriage service providers and online service providers. In this respect, the ADA noted that:

Based on past experiences of negotiations between rights holders and CSPs, it is likely that the...process would be costly, lengthy and problematic, and arguably would be less efficient than a Court order, particularly considering the established abridged process for expanding blocks.⁴⁸

Government position

2.36 The department's submission acknowledged concerns raised by stakeholders that proposed subsection 115A(2B) would allow copyright owners to dictate steps to carriage service providers and online search engine providers.⁴⁹ However, the department argued that this is not the case, stating that:

If the CSP or online search engine provider were not to agree with the copyright holder about new domain names, URLs and IP addresses that

44 Australian Digital Alliance, *Submission 15*, p. 9. See also Dr Matthew Rimmer, *Submission 24*, pp. 4, 21.

45 Google LLC, *Submission 7*, p. 6; Australian Digital Alliance, *Submission 15*, p. 9; Communications Alliance, *Submission 20*, pp. 5–6.

46 Google LLC, *Submission 7*, p. 2.

47 Google LLC, *Submission 7*, p. 6.

48 Australian Digital Alliance, *Submission 15*, p. 9;

49 Department of Communications and the Arts, *Submission 22*, p. 4.

emerge after the injunction is made, the copyright holder would need to return to the Court to seek an extended order. The new provisions intend to make clear that the Federal Court may grant more responsive injunctions and reduce the potential need for parties to return to the Court as new pathways to blocked sites emerge.⁵⁰

Ministerial power to exclude online search engine providers

2.37 Proposed subsection 115A(8B) seeks to enable the minister, by legislative instrument, to declare that online search engine providers, or classes of such providers, be exempt from the injunctive scheme in section 115A.

2.38 A number of submissions raised concerns about the inclusion of this power, noting that it provides an avenue for the amendments proposed by the bill to be undermined. These submissions largely argued that the power was not required, but may be acceptable if used only in the most extreme circumstances and following extensive public consultation.⁵¹ For example, Phonographic Performance Company of Australia stated that:

...the checks and balances within section 115A make such declarations unnecessary, as the high evidentiary burden which Applicants carry to satisfy the primary purpose or effect tests and the other factors which the Court may consider before orders are made would prevent unintended consequences in the application of section 115A to online search engine providers.⁵²

2.39 As outlined earlier, the Scrutiny of Bills Committee also raised concerns regarding the breadth of the proposed power, and queried the minister with respect to its necessity.⁵³

Committee view

2.40 The committee is of the view that the amendments proposed by the bill are likely to improve the operation of the injunctive scheme in section 115A of the Copyright Act, and represent a measured and proportionate response to concerns identified by stakeholders in relation to the operation of that scheme. In this respect, the committee also notes that the majority of submissions received by the committee supported the bill and recommended that it be passed unamended.

50 Department of Communications and the Arts, *Submission 22*, pp. 4–5.

51 Music Rights Australia, *Submission 3*, p. 4; Phonographic Performance Company of Australia, *Submission 6*, pp. 1–2; Australian Film and TV Bodies, *Submission 11*, p. 6; Australian Copyright Council, *Submission 13*, p. 2.

52 Phonographic Performance Company of Australia, *Submission 6*, p. 2.

53 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 13 of 2018* (14 November 2018), pp. 6–7.

2.41 The committee appreciates the concerns raised with respect to the scope of the amendments, particularly those regarding the proposals to introduce a 'primary effect' test, extend the operation of the injunctive regime to search engines, and allow the Federal Court to issue 'adaptive' injunctions. However, the committee is of the view that there appear to be adequate safeguards in the bill to ensure that the measures would not result in unintended and adverse consequences.

2.42 With respect to the proposed 'primary effect' test, the committee acknowledges the concerns that the test may capture online locations operated for legitimate purposes. However, the committee considers that there are adequate safeguards in section 115A (including as amended) to ensure that this would not occur in practice. In this regard, the committee also notes the department's evidence regarding the anticipated operation of the 'primary effect' test and applicable safeguards, as well as the assertion that the test would be 'highly unlikely' to capture legitimate online locations.

2.43 The committee further notes that, as outlined above, a number of submitters asserted that it is unnecessary to extend the injunctive regime to online search engine providers. However, in light of the significant role that these providers may play in both the infringement and enforcement of copyright, the committee is of the view that the measure is appropriate. In this regard, the committee notes the department's submission that while copyright holders may seek to restrict access to infringing content by agreement with search engine providers, the measures in the bill provide an important 'backstop' in the event that voluntary arrangements are ineffective.

2.44 With respect to the proposal to permit 'adaptive' injunctions, the committee acknowledges the concerns that the measure would require copyright holders and service providers to determine matters that should be left to the Court, as well as the concerns that these orders may be open to abuse. However, the committee is of the view that the measures are appropriately circumscribed. In particular, the committee notes the evidence that the Court would maintain ultimate oversight over these injunctions, as well as the evidence that there must be a sufficient nexus between the online location covered by the original injunction and the location to which the order is expanded.

2.45 The committee considers that, on balance, the benefits of the bill outweigh any potential negative impacts that could arise from the proposed amendments. The committee therefore recommends that the bill should be passed.

Review

2.46 In light of the concerns raised in submissions, the committee considers that there may be merit in conducting a review of the operation of the bill two years after its enactment. The committee considers that this should provide sufficient time to assess whether the concerns raised in submissions are borne out in practice, and to identify any areas where the operation of the injunctive regime in section 115A could be clarified, rationalised or improved.

Ministerial power to exclude online search engine providers

2.47 As outlined above, a number of submissions raised concerns about the proposal to allow the minister, by legislative instrument, to exempt online search engine providers from the operation of the injunctive scheme in section 115A. The Scrutiny of Bills Committee was also concerned about the breadth of the power and has sought a response from the minister about this matter. The committee notes that senators will have an opportunity to consider the minister's response once it is provided to the Scrutiny of Bills Committee.

Recommendation 1

2.48 The committee recommends that the government review the effectiveness of the measures contained in the bill two years after its enactment.

Recommendation 2

2.49 The committee recommends that the Senate pass the bill.

**Senator Jonathon Duniam
Chair**

Australian Greens' additional comments

1.1 The Australian Greens are strongly supportive of both creative and innovative industries in Australia. These fields are increasingly overlapping, as digital distribution becomes more and more prevalent, which created both opportunities and risks for content creators and service providers.

1.2 We will continue to work to ensure that the interests of both creative and innovative industries are protected, and we do not believe that these two things are mutually exclusive. Our future will be made brighter by Australian creators and innovators working together to deliver Australian content to the world.

1.3 These two industries are fundamental to the future of work and play in our country and the more support and protections we provide, the more we are investing in jobs for young Australians into the future.

1.4 We suggest, as the Greens have contended in the past, that site-blocking is not the most effective means of stopping piracy. Site-blocking does not stop people from accessing content.

1.5 Rather, copyright is better addressed by making the content available: conveniently, affordably, and in a timely way. We have seen this to great effect with the popularity of Netflix in Australia and the impact on piracy.

1.6 We acknowledge that whilst the Bill is intended to address gaps within the current scheme, unintended consequences of extending website blocking practices are a concern that we hold and would like to further explore to ensure that free speech and public discourse are not unduly affected.

Senator Janet Rice
Australian Greens

Appendix 1

Submissions

Submissions

- 1 Screen Producers Australia
- 2 Village Roadshow Limited
- 3 Music Rights Australia
- 4 Australasian Music Publishers' Association Limited (AMPAL)
- 5 Electronic Frontiers Australia
- 6 Phonographic Performance Company of Australia
- 7 Google LLC
- 8 Australian Society of Authors
- 9 Pirate Party Australia
- 10 APRA AMCOS
- 11 Australian Film and TV Bodies
- 12 Australian Recording Industry Association (ARIA)
- 13 Australian Copyright Council
- 14 Internet Association of Australia Inc
- 15 Australian Digital Alliance
- 16 Free TV Australia
- 17 Australian Publishers Association
- 18 Copyright Agency
- 19 Foxtel
- 20 Communications Alliance
- 21 Australian Independent Record Labels Association (AIR)
- 22 Department of Communications and the Arts
- 23 Coalition of Major Professional & Participation Sports (COMPPS)
- 24 Dr Matthew Rimmer
- 25 Digital Industry Group Inc (DIGI)
- 26 Confidential

