

# Chapter 2

## Key Issues

2.1 The majority of submissions broadly supported the underlying objectives of the Bill, to prevent online infringement of copyright, but argued that either the Bill could be improved to make it more effective at achieving its stated purpose or other, non-legislative, means would be more effective at dealing with online copyright infringement than injunctive relief.<sup>1</sup>

2.2 The Communications Law Centre of the University of Technology Sydney (CLC) noted that it was clear that the Bill could not provide a full solution to the problem of online copyright infringement in Australia.<sup>2</sup> Mr Brett Cottle, Chief Executive Officer of APRA AMCOS appearing on behalf of Music Rights Australia Pty Ltd, also emphasised this point of view by stating:

We know that it is not a complete solution to the problem. We know that there is no silver bullet. But what it will do is create a practical and feasible means by which to address the problem.<sup>3</sup>

2.3 In a similar vein, Associate Professor Kimberlee Weatherall gave evidence that:

We have a whole legal system and a whole copyright system with lots of other remedies. And there are various ways you can attack an infringement. You can go to the court in the country where the site is located. You can do notice-and-take-down...We are not trying to create a practical tool for every case where there is a copyright infringement. That is not the goal of this legislation. The goal of this legislation is to create a narrow, targeted, specific solution to a serious problem in relation to certain serious sites. It is an extraordinary remedy that should not be granted lightly and should not be granted for every case where there is copyright infringement.<sup>4</sup>

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1 Australian Copyright Council, *Submission 1*, p. 1; Communications Law Centre, University of Technology Sydney, *Submission 2*, p. 1; Australasian Music Publishers Association, *Submission 5*, p. 2; Communications Alliance, *Submission 8*, p. 3; Village Roadshow Limited, *Submission 11*, p. 3; Screen Producers Australia, *Submission 17*, p. 1; Australian Communications Consumer Action Network, *Submission 20*, p. 4; Australian Publishers Association, *Submission 21*, p. 1; Australian Recording Industry Association, *Submission 25*, p. 2; Music Rights Australia, *Submission 26*, p. 2; Internet Society of Australia, *Submission 28*, p. 2; Phonographic Performance Company of Australia, *Submission 30*, p. 3; News Corp Australia, *Submission 33*, p. 1; Electronic Frontiers Australia, *Submission 36*, p. 2; Free TV Australia, *Submission 37*, p. 1; Coalition of Major Professional and Participation Sports Inc, *Submission 39*, p. 2; Australian Competition & Consumer Commission, *Submission 40*, pp 1–2; Law Council of Australia Business Law Section, *Submission 41*, p. 1; Law Institute of Victoria, *Submission 42*, p. 2; Dr Dimitrios Eliades, *Submission 46*, p. 1.

2 Communications Law Centre, University of Technology Sydney, *Submission 2*, p. 1.

3 Mr Brett Cottle, Chief Executive Officer of APRA AMCOS appearing on behalf of Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 12.

4 Associate Professor Kimberlee Weatherall, *Committee Hansard*, 1 May 2015, p. 10.

2.4 This chapter examines the key issues arising from the Bill. It commences by examining the problem of online infringement of copyright and the effectiveness of site-blocking as a mechanism for combatting infringement. The chapter then goes on to look at the specific provisions of the Bill.

### **Online copyright infringement**

2.5 Professor Fraser of the CLC noted that online copyright infringement poses an enormous commercial problem as it threatens the capacity of creators to make a living, by costing them 'hundreds of millions of dollars, or perhaps even billions of dollars'.<sup>5</sup> Ms Vanessa Hutley of Music Rights Australia Pty Ltd (MRA), explained:

The actual measurement—as you can understand, these activities do not often put themselves up for surveys. The losses of what people have done and the massive scale of what is done is often hard to measure, but the impact on the individual artist, the creators and those who support them is significant.<sup>6</sup>

2.6 Foxtel also noted that the costs of online copyright infringement are hard to quantify as it is impossible to say that, if somebody did not pirate a work, he or she would necessarily have acquired it in a legitimate way. However, Mr Bruce Meagher, Group Director of Corporate Affairs, Foxtel, explained that copyright infringement is a relevant economic factor that producers of film and television content have to take into account when negotiating with potential investors and broadcasters.<sup>7</sup>

2.7 The IP Awareness Foundation submitted that there has been a marked increase in the magnitude and frequency of online piracy over the past few years with a survey showing that approximately 29 per cent of the population could be classified as active online pirates. The same survey indicated that the 'key driving factor for pirating is that it is free'.<sup>8</sup>

2.8 Professor Fraser proposed that the main cause of online copyright infringement is not lack of access to material but a growing culture of entitlement. He stated that:

there now seems to be a sense of entitlement that consumers ought to be able to just take on content because they do not like the format or they do not like the price or they do not like the channel.<sup>9</sup>

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5 Professor Michael Fraser, Director, Communications Law Centre, University of Technology Sydney, *Committee Hansard*, 1 May 2015, p. 8.

6 Ms Vanessa Hutley, General Manager, Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 17.

7 Mr Bruce Meagher, Group Director of Corporate Affairs, Foxtel, *Committee Hansard*, 1 May 2015, p. 17.

8 IP Awareness Foundation, *Submission 7*, pp 4–5.

9 Professor Michael Fraser, Director, Communications Law Centre, University of Technology Sydney, *Committee Hansard*, 1 May 2015, p. 6. See also, Mr Brett Cottle, Chief Executive Officer of APRA AMCOS appearing on behalf of Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 18.

## What is site-blocking?

2.9 As noted in chapter 1, the proposed legislation would allow the Federal Court of Australia (Court) to grant an injunction requiring a CSP to take reasonable steps, as described in the order, to disable access to an online location located outside Australia that infringes, or facilitates an infringement of, copyright, if the Court is satisfied that the online location satisfies the relevant thresholds. As noted by the Communications Alliance, site-blocking may be achieved at a number of different levels, for example at the level of the Domain Name System (DNS), the IP address, the URL or another means. The Communications Alliance explained:

...the particular blocking method used has significant implications, for:

- the level of granularity and therefore precision, that is achievable;
- the degree of risk of 'collateral damage' to legitimate web sites and content; and
- the cost of the exercise.

The different methods also vary in terms of the difficulty of the customer circumventing the block—a feat that is possible for a tech-savvy internet customer in virtually every case.<sup>10</sup>

## Is site-blocking effective?

2.10 MRA suggested that the proposed legislation would act to undermine the sense of entitlement and change consumer behaviour.<sup>11</sup> In contrast, some submissions argued that the proposed legislation would be ineffective at reducing the incidence of online copyright infringement because ISP-level blocking is relatively easy to evade, for example through widespread and easy to use technologies such as virtual private networks (VPNs), proxy servers and other IP cloaking devices.<sup>12</sup> The Australian Communications Consumer Action Network (ACCAN) suggested that the proposed site-blocking regime 'may devolve into an expensive game of 'whack-a-mole', for which consumers will end up paying, through higher internet bills'.<sup>13</sup> Furthermore, as noted by the Internet Society of Australia:

...while the intent of the Bill appears to be aimed at content available using the World Wide Web protocol [and] 'websites', much of the content and index material is available through a wide variety of other protocols and systems. It is not feasible to filter traffic accessed through the array of

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10 Communications Alliance Ltd, *Submission 8*, pp 4, 8–9.

11 Mr Brett Cottle, Chief Executive Officer of APRA AMCOS appearing on behalf of Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 12.

12 Electronic Frontier Foundation, *Submission 4*, p. 3; Institute of Public Affairs, *Submission 12*, p. 11; Internet Society of Australia, *Submission 28*, p. 3; Pirate Party Australia, *Submission 32*, pp 3–7. See also, Law Institute of Victoria, *Submission 42*, pp 10–11; Dr Matthew Rimmer, *Submission 44*, pp 26, 29, 64; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, p. 1.

13 Australian Communications Consumer Action Network, *Submission 20*, p. 8.

alternative communications protocols and methods, such as HTTPS, peer-to-peer, instant messaging, including any sites using dynamic database-driven content where the URL varies with each access.<sup>14</sup>

2.11 The Pirate Party and the QUT Intellectual Property Law and Innovation Research Group argued that site-blocking is ineffective as demonstrated by the findings of the European Court of Justice in the case of *Ziggo BV v BREIN Foundation*<sup>15</sup> in which the Court found that rates of infringement through the Pirate Bay site had actually increased following the imposition of a block.<sup>16</sup> Associate Professor Weatherall, in arguing that the injunction power must be narrowly targeted, pointed out that the European Court of Justice in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*<sup>17</sup> found that indiscriminate blocking may have an adverse impact on the freedom of an internet service provider (ISP) to conduct its business.<sup>18</sup> However, MRA highlighted that in that case the Court, after balancing rights holders' rights against the freedom to conduct business and the freedom of information of internet users, found that site-blocking injunctions were compatible with EU law.<sup>19</sup>

2.12 Australian Film and TV Bodies cited the reasoning in a United Kingdom case, *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc*,<sup>20</sup> where Justice Arnold found that site blocking was justified even if it only prevented access by 'a minority of users'.<sup>21</sup> The Australian Film and TV Bodies submitted that site-blocking was an effective means of combatting online infringement of copyright, also referring to the judgment of Justice Arnold in *EMI Records v British Sky Broadcasting Ltd*,<sup>22</sup> where he found:

...the evidence indicates that blocking orders are reasonably effective. The effect of the order made in Italy with regard to TPB referred to in *20C Fox v BT* at [197] was a 73% reduction in audience accessing TPB in Italy and a 96% reduction in page views. The blocking order made in Italy in relation to *KAT* has had a similar effect. As for the effect of the orders made in England in relation to TPB, as at 19 December 2011, TPB was ranked by

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14 Internet Society of Australia, *Submission 28*, pp 3–4.

15 *Ziggo BV v BREIN Foundation* [2014] ECLI:NL:GHDHA:2014:88, Gerechtshof Den Haag [Hague Court of Appeal].

16 QUT Intellectual Property Law and Innovation Research Group, *Submission 31*, p. 3; Pirate Party Australia, *Submission 32*, pp 4–5. See also Law Institute of Victoria, *Submission 42*, p. 10.

17 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12) [2014] ECDR 12 [55].

18 Associate Professor Kimberlee Weatherall, *Submission 23*, p. 4.

19 Music Rights Australia Pty Ltd, *Submission 26*, p. 13.

20 *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch).

21 Australian Film and TV Bodies, *Submission 13*, p. 6.

22 *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch).

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Alexa as number 43 in the UK, while as at 21 November 2012, its UK ranking had dropped to number 293.<sup>23</sup>

2.13 Foxtel also argued that site-blocking was effective citing a 2014 report of a study by Incopro into the efficacy of site-blocking in the United Kingdom. Foxtel submitted:

The Incopro Report found that on average, sites lose 73.2% of their estimated usage following a site blocking order and maintain those levels consistently over time.<sup>24</sup>

2.14 Foxtel also cited Justice Arnold, in the case of *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* (Cartier case),<sup>25</sup> where he found:

Overall, the conclusion which I draw from the evidence is that, in the section 97A context, blocking of targeted websites has proved reasonably effective in reducing use of those websites in the UK. No doubt it is the casual, inexperienced or lazy users who stop visiting those websites, whereas the experienced and determined users circumvent the blocking measures; but that does not mean that it is not a worthwhile outcome.<sup>26</sup>

2.15 The Attorney-General's Department (AGD) reiterated that while infringing sites may be re-established at a different online location, empirical evidence shows that they tend to reappear at a reduced rate. The AGD also stressed that, even if the effect of an injunction were temporary, the injunction would provide a secondary purpose, that being disruption of the business of online infringement. Mr Minogue of the AGD stated that there 'is a value in disrupting the business models that propagate and promote online piracy'.<sup>27</sup>

### **Unintended consequences of site-blocking**

2.16 The Law Institute of Victoria (LIV) cited the 2010 report by Ofcom, the communications regulator in the United Kingdom that examined the efficacy of site-blocking. The report concluded:

None of these techniques is 100% effective; each carries different costs and has a different impact on network performance and the risk of over-blocking.

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23 Australian Film and TV Bodies, *Submission 13*, p. 6 citing *EMI Records v BskyB* [2013] EWHC 379 (Ch) at [109] per Arnold J. See also News Corp Australia, *Submission 33*, p. 5; Foxtel, *Submission 45*, p. 3.

24 Foxtel, *Submission 45*, pp 3–4. See also Incopro, *Site blocking efficacy study - United Kingdom*, 13 November 2014, at <http://www.incopro.co.uk/wp-content/uploads/2015/04/Site-Blocking-Efficacy-UK-revised-19-03-2015.pdf> (accessed 5 May 2015).

25 *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* [2014] EWHC 3534 (Ch).

26 Foxtel, *Submission 45*, p. 4 citing *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* [2014] EWHC 3534 (Ch) at [236] per Arnold J.

27 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 56.

We believe that it is feasible to constrain access to prohibited locations on the internet using one or more of the primary or hybrid techniques. The approaches considered vary in how precise they are, their operational complexity, and therefore their effectiveness. None of the methods will be 100% effective. We find that there is no uniformly superior technique as each carries risks in different areas. For instance IP address blocking carries a risk of over blocking, whilst URL blocking is limited in the scope of content it can block effectively. Overblocking occurs where a block is imprecise, so legitimate content is blocked alongside infringing content.<sup>28</sup>

2.17 The Australian Interactive Media Industry Association Digital Policy Group (AIMIA) raised the issues of over-blocking and the possibility that site-blocking may result in unintended consequences by referring to the decision by the Australian Securities and Investment Commission (ASIC) in 2014 to apply section 313 of the *Telecommunications Act 1997* (Cth) to block three sites that were hosting investment scams. The ASIC action had the effect of not only blocking the infringing sites, but also blocking access to thousands of legitimate websites that were hosted on the same IP addresses.<sup>29</sup>

2.18 The Communications Alliance described site-blocking as a relatively blunt instrument that would provide little more than a temporary solution in some instances, submitting that:

...rights holders should be required to produce evidence to the Court that the rights holder has checked rigorously that the online location which it is seeking blocked, does not also house legitimate content sites that might be at risk of being inadvertently blocked.<sup>30</sup>

2.19 The New South Wales Council of Civil Liberties described the problems associated with site-blocking by stating that 'site-blocking is prone to accidental blockages, intentional censorship, scope creep and other abuse'.<sup>31</sup>

2.20 The AGD reasoned that there was a distinction to be made between the execution of a regulatory power by a regulatory body such as ASIC and the grant of an injunction by a court. Unlike the execution of regulatory power, the matter is directly open to challenge by other interested parties. Furthermore, in order to grant an injunction, the Court would first need to find that an application meets the requisite

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28 Law Institute of Victoria, *Submission 42*, p. 10 citing "*Site Blocking*" to reduce online copyright infringement: A review of sections 17 and 18 of the Digital Economy Act, Ofcom, 27 May 2010, pp 4–5 at <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> (accessed 5 May 2015).

29 Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, pp 3–4. See also Communications Alliance Ltd, *Submission 8*, p. 3.

30 Communications Alliance Ltd, *Submission 8*, p. 3

31 New South Wales Council of Civil Liberties, *Submission 49*, p. 4. See also Australian Digital Alliance, *Submission 16*, p. 4; Law Institute of Victoria, *Submission 42*, p. 11; Dr Matthew Rimmer, *Submission 44*, p. 27; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, p. 1.

threshold and then come to the conclusion that the application does not unduly conflict with any of the safeguarding factors.<sup>32</sup> Finally, even if the Court were to order an injunction, the Court would retain a high level of discretion about the nature of the injunction. Such an injunction could be drafted to be quite surgical in its application, to avoid or to limit the extent to which the power could be abused by rights holders.<sup>33</sup>

2.21 Mr John Stanton of the Communications Alliance argued that, to avoid unintended consequences, appropriate checks, such as those currently undertaken by Interpol, would need to be taken prior to a blocking-order being granted.<sup>34</sup> Electronic Frontiers Australia recommended that to avoid abuse by rights holders, there is a need to create an independent body to oversee the regime or at very least provide for a periodic review of the legislation.<sup>35</sup>

### **Alternatives to site-blocking**

2.22 AIMIA and Google submitted that an alternative, multi-faceted approach to online copyright infringement may be a better solution to the problem. Both submitters argued that a key way to battle piracy would be to provide consumers with better, more convenient and legitimate access to content.<sup>36</sup> The use of digital tools such as Youtube's Content ID and eBay's Verified Rights Owners Program can also give rights owners more control over their content.<sup>37</sup> Both Google and AIMIA claimed that an effective way of combatting piracy would involve service providers blocking the ability of a pirate site to use advertising services, and thereby cutting off the money supply to the site.<sup>38</sup>

2.23 Some submitters suggested that rights holders should be required to engage in self-help schemes, for example a notice-and-take-down scheme, before being able to seek an injunction to block a site.<sup>39</sup> However, Ms Carolyn Dalton of AIMIA noted that:

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32 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, pp 65–66.

33 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 67.

34 Mr John Stanton, Chief Executive Officer, Communications Alliance Ltd, *Committee Hansard*, 1 May 2015, p. 23.

35 Electronic Frontiers Australia, *Submission 36*, p. 4.

36 Google, *Submission 27*, p. 2; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, pp [i]–1.

37 Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, p. [i]. See also Google, *Submission 27*, pp 2–3.

38 Google, *Submission 27*, p. 2; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, p. [i].

39 Softensify Pty Ltd, *Submission 10*, p. 1; Australian Digital Alliance, *Submission 16*, p. 12; Google, *Submission 27*, p. 8; Business Software Association of Australia Software Alliance, *Submission 35*, p. 3; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, p. 8.

...for local providers there is no sort of legal framework at the moment to be an eBay or a YouTube or a good corporate citizen and to develop one of these notice-and-take-down schemes. The legal framework is just not there. If we are going to look at peer-to-peer-piracy solutions and site-blocking solutions, we cannot let the third part of the puzzle fall off the table.<sup>40</sup>

2.24 On a related point, Google suggested that anti-piracy regulations may act as a deterrent to investment in digital content intermediaries in Australia. Google cited a study by the international think-tank Fifth Era & Engine which found that:

...80% of Australian investors are deterred from investing in new digital content platforms due to the risks they are exposed to as a result of the lack of safe harbours and emerging anti-piracy legislation.<sup>41</sup>

2.25 Some submitters and witnesses argued that the use of self-help methods would require an extra level of protection for service providers and users that could only be secured through formally introducing a comprehensive 'safe harbour' scheme and a 'fair use' standard. A 'safe harbour' scheme would provide intermediaries with protection from being liable for the conduct of their users so long as they appropriately cooperate with copyright owners<sup>42</sup> while a 'fair use' standard would promote freedom of expression by allowing access and use of copyright material so long as that use does not unreasonably affect the interests of the copyright holder.<sup>43</sup>

2.26 The AGD acknowledged that the 2014 discussion paper on the establishment of a legal framework to address online copyright infringement included the issue of expanding the 'safe harbour' and 'fair use' provisions of the Act. However, Mr Minogue noted that:

...[the] government made a decision, in the priorities that it would seek to address, that online piracy was the issue that it would seek to address at the earliest opportunity.<sup>44</sup>

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40 Ms Carolyn Dalton, Executive Director, Australian Interactive Media Industry Association Digital Policy, *Committee Hansard*, 1 May 2015, p. 30.

41 Google, *Submission 27*, p. 9.

42 Associate Professor Kimberlee Weatherall, *Committee Hansard*, 1 May 2015, p. 6; Ms Carolyn Dalton, Executive Director, Australian Interactive Media Industry Association Digital Policy, *Committee Hansard*, 1 May 2015, p. 30; Ms Patricia Hepworth, Executive Officer, Australian Digital Alliance, *Committee Hansard*, 1 May 2015, pp 41, 49; Copyright Advisory Group to the COAG Education Council, *Submission 9*, p. 2; Institute of Public Affairs, *Submission 12*, p. 15; Australian Digital Alliance, *Submission 16*, pp 3–4; Associate Professor Kimberlee Weatherall, *Submission 23*, pp 10–11; Google, *Submission 27*, pp 1, 8–9; Dr Matthew Rimmer, *Submission 44*, pp 33–34; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, pp 2, 9.

43 Australian Human Rights Commission, *Submission 3*, p. 2; Institute of Public Affairs, *Submission 12*, p. 5; Dr Matthew Rimmer, *Submission 44*, p. 54.

44 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 55.

2.27 Mr Minogue also added that the issues of fair use and fair dealing could be taken into account by the Court when considering the factors in proposed section 115A(5). The Bill, by specifying a long list of factors, would effectively remove uncertainty about how the Bill will be applied and this should have the ancillary effect of reducing the costs of interested parties.<sup>45</sup>

2.28 The Law Society of South Australia pointed to another proposal brought up in the 2014 discussion paper, the education notice scheme code, claiming that:

The Bill may...be premature at best, and may ultimately be otiose if the downstream internet consumer measures proposed by the Code are effective.<sup>46</sup>

2.29 However, as Foxtel indicated, notice schemes, as proposed by the draft communications code, have practical limits when dealing with online locations located outside Australia, as a rights holder's remedies would be jurisdictionally limited. It follows that the proposed site-blocking legislation is needed for online locations outside Australia.<sup>47</sup> The same issue would likely arise if seeking to implement a mandatory notice-and-take-down scheme in Australia. It follows that it would be unreasonable to require the parties to seek a self-help remedy prior to the grant of an injunction. The AGD explained that the *Federal Court Act 1976* (Cth) already requires parties to proceedings to indicate to the Court whether they have taken genuine steps to resolve the relevant dispute. However, the failure to seek a self-help remedy does not currently create a mandatory bar to legal proceedings. Mr Minogue explained that pre-action protocols do not work as:

...they in fact impose costs and retard resolution even though they look like they are going to achieve an outcome. The reason for that is that, if you impose a mandatory consultation or negotiation where there is no genuine will to compromise, all you are doing is imposing costs on parties to go through a process...<sup>48</sup>

2.30 In his Second Reading Speech to the House of Representatives on the Bill, Mr Turnbull stated that:

The new injunction power is one measure that the government is introducing to address online copyright infringement. International experience shows that a range of measures are needed to properly tackle the problem. The new injunction power will complement the industry code that is being developed between the internet service providers and copyright holders. When finalised, the code will create an education notice scheme that will warn alleged infringers and give them information about legitimate

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45 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 63.

46 The Law Society of South Australia, *Submission 48*, p. 1.

47 Mr Bruce Meagher, Group Director of Corporate Affairs, Foxtel, *Committee Hansard*, 1 May 2015, p. 19.

48 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 65.

alternatives. An injunction provision will be even more effective if users are properly educated and warned about online copyright infringement.<sup>49</sup>

2.31 The Copyright Agency expressed its strong support for the government stance and argued:

...that everyone has a role in reducing online copyright infringement. This includes the increasing availability of content from a range of legitimate sources, education and awareness, a commitment by consumers to support creation of content by acquiring it from legitimate sources, and a commitment by service providers to assist their customers to acquire content from legitimate sources.

The Bill reflects similar solutions to those successfully implemented in other countries. The experience overseas has shown courts ordering injunctions following careful consideration of the public interest, including implications for consumers and creators of content.<sup>50</sup>

### **Key provisions of the Bill**

2.32 The key provisions of the Bill that inspired debate during the inquiry were those related to imposing an injunction, the primary purpose test, the meaning of online location, the parties to actions, the matters to be taken into account by the Court and the costs of an action. These are discussed in the following sections.

#### ***Imposing an injunction***

2.33 The Internet Society argued that if an injunction requires a CSP to block a site, the Bill should explicitly require the CSP to notify a user of the fact that the relevant online location has been blocked as a result of an injunction through the use of a 'landing page', that is, a page notifying the user that the online location has been blocked.<sup>51</sup> The Communications Alliance noted that the Bill was silent as to the technical method of blocking and argued that:

The Court should have an opportunity to request expert technical guidance, particularly during the early years of operation of the legislation, so that it can fully understand the technical means by which an ISP is able to block a website and to seek to minimise any unintended consequences flowing from orders.<sup>52</sup>

2.34 The *Federal Court Rules 2011* (Cth) provide that the Court may appoint an expert to inquire into and report on any question or on any facts that arise from the proceedings, either upon the application of a party to the proceedings, upon the application of an interested person or upon its own motion.<sup>53</sup>

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49 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 26 March 2015, p. 3593.

50 Copyright Agency, *Submission 22*, p. 2.

51 Internet Society of Australia, *Submission 28*, p. 7.

52 Communications Alliance Ltd, *Submission 8*, pp 7–8.

53 *Federal Court Rules 2011* (Cth), Rules 1.40 and 23.01.

2.35 LIV suggested that the onus should fall on the applicant to provide the Court with expert technical guidance on a range of topics, as part of the application for an injunction.<sup>54</sup>

2.36 The Communications Alliance recommended that:

...the web site blocking method to be employed [should] be at the discretion of the ISP, ideally following discussion with the rights holder responsible for the injunction application. Should Courts decide to order that more complex and costly blocking methods be used, this needs to be taken into account in the Court order as it relates to compensation for ISPs' implementation costs.<sup>55</sup>

2.37 The AGD explained that the court may choose to order a CSP to notify users of an injunction through a landing page, but this would be a matter for the court to determine.<sup>56</sup> Mr Minogue also explained that:

The bill does not seek to dictate what method will be used. That would be limiting us to a particular technology at a particular time, and the Copyright Act is littered with things that are no longer appropriate for the time. It would be a matter for the court, based on the orders being sought by the applicant and if an ISP were also to appear the matters that they wanted the court to be aware of.<sup>57</sup>

2.38 MRA questioned whether an injunction should be limited to CSPs or, given the no-fault nature of the proposed legislation, whether the Bill should follow the lead of other jurisdictions and empower the Court to target any service provider or intermediary.<sup>58</sup> The Law Council of Australia (LCA) argued that:

The provision of internet services in Australia is multi-tiered, with some vertically integrated internet service providers providing international connectivity to the global internet, some retail only providers using others as wholesalers for connectivity, and some backbone and connectivity only providers. The most efficient way to block access to infringing online locations will often be to address the blocking at the relatively few international connectivity (wholesale) points, not at the multiplicity of retail interfaces of retail internet service providers.<sup>59</sup>

2.39 On a separate point, some submitters argued that the Bill should not have confined the power to grant injunctions to the Federal Court of Australia, but should

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54 Law Institute of Victoria, *Submission 42*, p. 8.

55 Communications Alliance Ltd, *Submission 8*, p. 9.

56 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 65.

57 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 64.

58 Music Rights Australia Pty Ltd, *Submission 26*, p. 8.

59 Law Council of Australia, *Submission 41*, p. 2.

have extended jurisdiction to the Federal Circuit Court to make the legal remedy more cost effective and, thereby, more accessible to all rights holders.<sup>60</sup>

2.40 The AGD responded to these arguments by stating that the decision to restrict the jurisdiction to the Federal Court of Australia was deliberate, but that the jurisdiction may be extended in the future. Mr Minogue stated:

What has worked very well in the UK in particular is having a body of jurisprudence and a number of judges who have become very expert, clever and sensitive to the interests of all sides as to how to implement the power in terms of the levels of satisfaction they require and the types of orders they should make to give effect to matters brought before them. The bill reflects a perception that, at least initially, the Federal Court being the place for relief would enable a body of jurisprudence and a body of expertise to be developed that would clear away a lot of the uncertainty.<sup>61</sup>

### ***Primary purpose test***

2.41 As noted in chapter 1, the Bill would provide that the Court could only grant injunctive relief if it were satisfied that the primary purpose of the online location was to infringe or to facilitate the infringement of copyright.

2.42 Several witnesses argued that the primary purpose test would be too subjective and hard to prove.<sup>62</sup> MRA remarked that 'it is vitally important that this legislation be practical and workable in public'. MRA summarised the rights holders' perspective that:

We have no doubt that Federal Court judges will put copyright owners to strict proof of the hurdles required by the legislation, and we believe that

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60 Australian Copyright Council, *Submission 1*, p.2; Communications Law Centre, University of Technology Sydney, *Submission 2*, p. 6; APRA AMCOS, *Submission 19*, p.3; Music Rights Australia Pty Ltd, *Submission 26*, p. 9; Phonographic Performance Company of Australia, *Submission 30*, p. 5. See also Ms Fiona Phillips, Executive Director, Australian Copyright Council, *Committee Hansard*, 1 May 2015, p. 16; Mr Maurice Gonsalves, Member, Intellectual Property Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 1 May 2015, p. 53.

61 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 63.

62 Professor Michael Fraser, Director, Communications Law Centre, University of Technology Sydney, *Committee Hansard*, 1 May 2015, p. 2; Mr Brett Cottle, Chief Executive Officer of APRA AMCOS appearing on behalf of Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 12; Mr Michael Williams, Solicitor, Gilbert and Tobin Lawyers appearing on behalf of Australian Film and TV Bodies, *Committee Hansard*, 1 May 2015, p. 14; Mr Bruce Meagher, Group Director, Corporate Affairs, Foxtel, *Committee Hansard*, 1 May 2015, p. 15; Ms Clare O'Neil, Director of Legal and Broadcasting Policy, Free TV Australia, *Committee Hansard*, 1 May 2015, p. 15; Ms Carolyn Dalton, Executive Director, Australian Interactive Media Industry Association Digital Policy Group, *Committee Hansard*, 1 May 2015, p. 27. See also Communications Law Centre, University of Technology Sydney, *Submission 2*, pp 3–4; Australian Film & TV Bodies, *Submission 13*, p. 12; Australian Digital Alliance, *Submission 16*, p. 5; Music Rights Australia, *Submission 26*, pp 6–7; Free TV Australia, *Submission 37*, p. 5.

the primary purpose test in the legislation will be too difficult and will make available to infringing sites a capacity to circumvent the purpose of the legislation. So we urge on the committee a recommendation that 'the' primary purpose be replaced by 'a' substantial purpose or effect of the online location being to infringe or facilitate the infringement of copyright.<sup>63</sup>

2.43 Choice approached the debate from a different perspective, proposing that the term 'primary purpose' should be clarified to ensure that online locations that have a substantial non-infringing use are excluded.<sup>64</sup>

2.44 Associate Professor Weatherall noted that the term 'primary purpose' helps to qualify the high threshold for the availability of the injunctive remedy.<sup>65</sup> Associate Professor Weatherall explained:

What the bill is trying to do is to have a narrow, targeted response—in a copyright act, to deal with a copyright problem...I do not think it is legitimate to say: 'Let's change the Copyright Act so we can take down all the sites we do not like because they happen to have some proportion of copyright material on them.'<sup>66</sup>

2.45 The Communications Alliance also supported the 'primary purpose' test on grounds that 'risks of unintended consequences are magnified significantly if you go below a primary purpose test'.<sup>67</sup>

2.46 The Explanatory Memorandum notes that the primary purpose test is intended to set a high threshold to provide a safeguard against any potential abuse by rights holders.<sup>68</sup> The AGD confirmed that:

...the decision [the] government made in relation to the bill is that it wanted to make very clear that the threshold for the ability of a rights holder to get an injunction was set deliberately high.<sup>69</sup>

2.47 The AGD also explained that the manner by which the Court would assess the threshold in any given case would depend on the facts before the Court, allowing the

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63 Mr Brett Cottle, Chief Executive Officer of APRA AMCOS appearing on behalf of Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 12. See also Mr Bruce Meagher, Group Director, Corporate Affairs, Foxtel, *Committee Hansard*, 1 May 2015, p. 15; Ms Clare O'Neil, Director of Legal and Broadcasting Policy, Free TV Australia, *Committee Hansard*, 1 May 2015, p. 15.

64 Mr Alan Kirkland, Chief Executive Officer, Choice, *Committee Hansard*, 1 May 2015, p. 44.

65 Associate Professor Kimberlee Weatherall, *Submission 23*, p. 4.

66 Associate Professor Kimberlee Weatherall, *Committee Hansard*, 1 May 2015, p. 10.

67 Mr John Stanton, Chief Executive Officer, Communications Alliance Ltd, *Committee Hansard*, 1 May 2015, p. 28.

68 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 9.

69 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 66.

Court to take all the circumstances of the case into account, which in the words of Mr Minogue would be a 'better proposition than a mechanical threshold'.<sup>70</sup>

### ***The meaning of online location***

2.48 The Communications Alliance noted that the term online location is not defined by the Bill and stated that:

This term 'online location' is not commonly used in internet parlance and, unless it is defined, risks being ambiguous...Precision is important when describing what ISPs will be asked to block, because unintended consequences can occur, particularly when legitimate content is hosted alongside infringing content on the same domain name or IP address.<sup>71</sup>

2.49 Associate Professor Weatherall posed that:

One possible concern is that 'online location' could be read to include a website subdomain, or a sub-part of a website. Such a reading would significantly broaden the scope of websites against which injunctions could be ordered.<sup>72</sup>

2.50 The Australian Digital Alliance (ADA) recommended that this ambiguity could be addressed if the Explanatory Memorandum were amended to provide examples of what would be considered an 'online location', such that judges could draw upon these by analogy.<sup>73</sup> The Business Software Association of Australia Software Alliance submitted that the Bill should also formally direct the Court to narrowly tailor its orders to minimise the potential for collateral damage.<sup>74</sup>

2.51 The Australian Publishers Association suggested that a definition of 'online location' should not just encompass the idea of a single web address but also the issue of mirror sites.<sup>75</sup> Other submissions suggested that the Bill should formalise the power of the Court to extend an injunction to cover substantially similar online locations to avoid the need to remake an application.<sup>76</sup> In a similar vein, the CLC submitted that the Bill should be amended to specifically allow a single application to target multiple CSPs.<sup>77</sup>

2.52 The Explanatory Memorandum to the Bill states that:

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70 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, pp 66–67.

71 Communication Alliance Ltd, *Submission 8*, p. 5.

72 Associate Professor Kimberlee Weatherall, *Submission 23*, pp 1–2. See also Google, *Submission 27*, p. 6; Internet Society of Australia, *Submission 28*, p. 6.

73 Australian Digital Alliance, *Submission 16*, pp 2, 5–6. See also Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, pp 4–5.

74 The Business Software Association of Australia Software Alliance, *Submission 35*, p. 2.

75 Australian Publishers Association, *Submission 21*, p. 1.

76 Australian Copyright Council, *Submission 1*, p. 2, Free TV Australia, *Submission 37*, pp 7–8; Law Council of Australia, *Submission 41*, p. 2.

77 Communications Law Centre, University of Technology Sydney, *Submission 2*, p. 5.

The term 'online location' is intentionally broad and includes, but is not limited to, a website, and would also accommodate future technologies...This provision is technology neutral and is intended to capture both existing and future technologies that may be used to facilitate the infringement of copyright.<sup>78</sup>

2.53 This point was further reinforced by Mr Andrew Maurer of the Department of Communications, who said:

...what the bill seeks to do is implement, at a fairly high level but with sufficient direction to the court, what a rights holder would need to establish to enliven the court's jurisdiction to grant the particular injunction a rights holder is after and then to be satisfied that it should, in fact, make that order in that particular case....the bill does not target a particular technology. In fact, the government has attempted to make sure that that legislation is technology neutral...<sup>79</sup>

2.54 In his second reading speech, Mr Turnbull made the point that:

The provision will only capture online locations where it can be established that the primary purpose of the location is to infringe or facilitate the infringement of copyright. That is a significant threshold test which will ensure that the provision cannot be used to target online locations that are mainly devoted to a legitimate purpose.<sup>80</sup>

2.55 The Department of Communications explained that under the proposed legislation, a particular online location, such as a subdomain, or a particular technology, such as a VPN, would not be specifically targeted by or immune from an injunction. Rather, as indicated by the Department of Communications, if, as a question of fact, a rights holder were able to establish that a particular online location or technology had the primary purpose of infringing copyright then 'it would seem odd to legislatively protect such a factual instance'.<sup>81</sup>

### ***Parties to actions***

2.56 A further issue raised in evidence to the committee related to whether parties with an interest in opposing a blocking order were likely to join the proceedings. Electronic Frontier Foundation outlined that:

...in most cases, there will be nobody to advocate for the retention of content for which a blocking order is sought. The Australian intermediary who is party to the proceedings has no particular interest in opposing the blocking of foreign content. Although the foreign content provider is

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78 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, pp 8–9.

79 Mr Andrew Maurer, Assistant Secretary, Digital Productivity, Department of Communications, *Committee Hansard*, 1 May 2015, p. 57.

80 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 26 March 2015, p. 3592.

81 Mr Andrew Maurer, Assistant Secretary, Digital Productivity, Department of Communications, *Committee Hansard*, 1 May 2015, p. 57.

entitled to apply to the court to intervene in the proceedings, their joinder to the proceedings remains within the court's discretion (under proposed subsection 115A(3)), and this would entail considerable expense, due to the high costs of foreign parties securing representation before the Federal Court of Australia. As a result, most hearings are likely to be undefended, and the question of whether particular content should be blocked will seldom receive a full and fair hearing.<sup>82</sup>

2.57 Both the LCA and the Internet Society of Australia recognised this problem, stating that the likelihood is that most proceedings will be heard *ex parte*.<sup>83</sup> The Law Institute of Victoria raised the possibility that a concerned user, a consumer organisation or a digital rights organisation may apply to intervene in such applications under the Federal Court Rules.<sup>84</sup> ACCAN submitted that:

The introduction of a public interest test in the Bill acknowledges that there are important interests outside of those held by the parties to an action. However, without a clear avenue for these interests to be introduced it is likely they will be left to the judge alone to decide.

We recommend that there be a presumption in favour of allowing parties to become interveners or *amicus curiae* in the context of these injunction applications. This should apply both in circumstances where parties may have their interests affected by an injunction and where they wish to present public interest arguments against the granting of an injunction.<sup>85</sup>

2.58 Associate Professor Weatherall added to the debate stating that:

Clearly, Australian courts have the power to allow interveners and *amicus curiae* under the *Federal Court Rules*. But it is worth thinking through the practicalities of how this would operate in practice. It can be difficult for non-parties to Federal Court proceedings to find out about the proceedings when they are instituted...It would clearly not be appropriate to direct the Federal Court to allow appearance by an intervener or *amicus curiae* – this could create a significant burden for the Federal Court to accept multiple interveners or representations from different interests (including other right holder interests) which is unnecessary. Nor is it likely to be appropriate to adopt a practice such as that used for *Anton Piller* orders which require the briefing of an independent lawyer.

In my view, at least some additional requirement for publicity is appropriate. This could be instituted by requiring the applicant for an order to advertise the order in major newspapers or through some other suitable

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82 Electronic Frontier Foundation, *Submission 4*, p. 1.

83 Internet Society of Australia, *Submission 28*, p. 5; Law Council of Australia, *Submission 41*, p. 3.

84 Law Institute of Victoria, *Submission 42*, p. 6.

85 Australian Communications Consumer Action Network, *Submission 20*, p. 7.

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means in sufficient time before any hearing to allow for an application by a public interest body to act as intervener or *amicus*.<sup>86</sup>

2.59 The ADA argued that the need for publicity could be dealt with after an injunction is issued through the use of a notification page, to inform users who attempt to access a blocked website. However, as found by Justice Arnold in the *Cartier* case, the notification page should not merely state that access to the website has been blocked by court order, but it should also identify the party or parties which obtained the order and state that affected users have the right to apply to the Court to discharge or vary the order.<sup>87</sup> The committee acknowledges the ADA's argument that a notification page could be an effective means of informing third parties of proceedings but also notes that in the *Cartier* case the judge exercised his discretion to order the notification requirement. A notification requirement may not be necessary or appropriate in every case and therefore the committee accepts the evidence of the AGD, as outlined above, that under the proposed legislation the Court may choose to order a CSP to notify users of an injunction, but this should be a matter for the court to determine.<sup>88</sup>

#### ***Matters to be taken into account by the Court***

2.60 As noted in chapter 1, the Bill proposes to require the Court to consider at least eight matters when determining an application for an injunction. Organisations representing the interests of rights holders argued that this would create too many factors for the Court to consider; and instead, the Court should retain discretion to consider such matters as it determines to be relevant. These organisations also argued that the current safeguarding factors create too high a threshold, which would complicate and add to the cost of proceedings and place too high a burden of proof on

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86 Associate Professor Kimberlee Weatherall, *Submission 23*, p. 8.

87 Australian Digital Alliance, *Submission 16*, pp 14–15 citing *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* [2014] EWHC 3534 (Ch) at 264 per Arnold J.

88 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 65.

the applicant.<sup>89</sup> Submitters also expressed concern that the Bill was silent about how the various matters would need to be weighed against each other.<sup>90</sup>

2.61 Some submitters and witnesses argued the opposite, that is, the factors should be expanded to include a freedom of expression or a fair use factor.<sup>91</sup> Mr Timothy Wilson of the Australian Human Rights Commission suggested that the lack of a fair use provision in the Bill may result in Australian law coming into conflict with the law of other jurisdictions.<sup>92</sup> On the issue of freedom of expression, Mr Chris Berg of the Institute of Public Affairs equated the proposed legislation to censorship and challenged whether the 'social benefits conferred by this new censorship power to block access to websites [would] outweigh the social costs'.<sup>93</sup>

2.62 The AGD explained the reasoning behind the extensive list of factors by stating:

With this bill, the government in Australia could have decided to have a very broad head of power and then leave it to the court to decide. But one of the things we have learnt through the ALRC process about fair use and fair dealing is that, because we are dealing with commercial matters, uncertainty itself raises a high cost—or the prospect of a cost—which,

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89 Mr Brett Cottle, Chief Executive Officer, APRA AMCOS representing Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 13; Mr Michael Williams, Solicitor, Gilbert and Tobin Lawyers representing Australian Film & TV Bodies, *Committee Hansard*, 1 May 2015, p. 14; Ms Clare O'Neil, Director of Legal and Broadcasting Policy, Free TV Australia, *Committee Hansard*, 1 May 2015, p. 15; Ms Fiona Phillips, Executive Director, Australian Copyright Council, *Committee Hansard*, 1 May 2015, p. 16; Australian Copyright Council, *Submission 1*, p. 2; Australian Film & TV Bodies, *Submission 13*, p. 13; APRA AMCOS, *Submission 19*, pp 8–11; Australian Recording Industry Association, *Submission 25*, pp 7–9; Music Rights Australia Pty Ltd, *Submission 26*, pp 5–8; Phonographic Performance Company of Australia, *Submission 30*, p. 4; News Corp Australia, *Submission 33*, pp 10–11; Free TV Australia, *Submission 37*, pp 2, 7–9; Coalition of Major Professional and Participation Sports Inc, *Submission 39*, p. 3; Foxtel, *Submission 45*, p. 6. See also Communications Law Centre, University of Technology Sydney, *Submission 2*, p. 4.

90 Australian Copyright Council, *Submission 1*, p. 3; Communications Law Centre, University of Technology Sydney, *Submission 2*, p. 5; Village Roadshow Ltd, *Submission 11*, p. 3; Australian Film & TV Bodies, *Submission 13*, p. 13; APRA AMCOS, *Submission 19*, p. 11; Australian Recording Industry Association, *Submission 25*, p. 9; Music Rights Australia Pty Ltd, *Submission 26*, p. 8; Phonographic Performance Company of Australia, *Submission 30*, p. 4; News Corp Australia, *Submission 33*, p. 11; Free TV Australia, *Submission 37*, pp 2, 8–9; Law Council of Australia, *Submission 41*, p. 2; Foxtel, *Submission 45*, p. 6.

91 Australian Digital Alliance, *Submission 16*, pp 2, 9–11; Australian Libraries Copyright Committee, *Submission 18*, p. 2; Associate Professor Kimberlee Weatherall, *Submission 23*, p. 6; Google, *Submission 27*, p. 7; Electronic Frontiers Australia, *Submission 36*, pp 2–3; Law Institute of Victoria, *Submission 42*, pp 2, 6; Australian Interactive Media Industry Association Digital Policy Group, *Submission 47*, p. 8.

92 Mr Timothy Wilson, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 1 May 2015, p. 33.

93 Mr Chris Berg, Senior Fellow, Institute of Public Affairs, *Committee Hansard*, 1 May 2015, p. 36. See also Institute of Public Affairs, *Submission 12*, p. 3.

whether or not it is incurred, becomes a barrier to action. So the bill did seek to quite deliberately set out the preconditions to the court having jurisdiction and then the factors the court needs to take into account. So while those factors are quite a lengthy menu of things that a court would need to consider, normally the court would have a broad discretion to make orders...<sup>94</sup>

2.63 The AGD also noted that the Bill would not require the Court to give equal weight to each of the factors and, as such, if some factors were not directly relevant to the case, they could be dismissed very quickly. The AGD suggested that this would mean that not every determination would be a costly exercise.<sup>95</sup>

2.64 On the issue of whether a new factor should be included to require the Court to consider the potential impact of an order on freedom of expression or fair use, the AGD noted that it would be open to the Court to consider this factor under the proposed paragraph 115A(5)(g), pertaining to public interest. The Explanatory Memorandum to the Bill states:

Proposed paragraph 115A(5)(g) would require the Court to consider whether it is in the public interest to disable access to the online location, taking into account the public interest in the freedom of expression, and other public interest issues such as, for example, freedom of access to information.<sup>96</sup>

2.65 As stated in the Explanatory Memorandum, proposed paragraph 115A(5)(k) would provide the Court with sufficient discretion to take any other matter into account, ensuring there would be sufficient flexibility for additional factors to be taken into account when determining whether to grant an injunction.<sup>97</sup>

### **Costs**

2.66 As noted in chapter 1, proposed subsection 115A(9) would provide that a CSP would not be liable for any costs in relation to court proceedings, unless it chose to appear and take part in the proceedings. APRA AMCOS submitted that the use of the term 'any costs in relation to the proceedings' would be too broad. APRA AMCOS argued that, given the statement in the Explanatory Memorandum that the provision 'is not intended to alter Part 40 of the *Federal Court Rules 2011* (Cth) which provide for the Court to make orders as to costs',<sup>98</sup> proposed subsection 115A(9) may be

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94 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 63.

95 Mr Matthew Minogue, First Assistant Secretary, Civil Law Division, Attorney-General's Department, *Committee Hansard*, 1 May 2015, p. 64.

96 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 11.

97 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 11.

98 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 12.

interpreted as meaning that if a CSP did not enter an appearance the CSP would neither be held liable for the legal costs nor the costs of implementing an order and, as such, the costs of blocking the online location would fall to the applicant. Mr Cottle recommended that the proposed subsection be removed from the Bill, arguing:

It seems to be, at best, confusing with the terminology used in the explanatory memorandum, and we believe that the issue of costs ought best to be left to the court's discretion in any particular circumstances.<sup>99</sup>

2.67 The Australian Film and TV Bodies argued that:

Requiring rightsholders to meet any costs of an ISP is disproportionate, unnecessary, out of step with international practice and contrary to the fundamental principles of copyright law. As the site blocking decisions in the UK have demonstrated, the costs of complying with an injunctive relief order are not excessive or onerous, and that ISPs can deploy existing technology that they are already using to do so.<sup>100</sup>

2.68 The Financial Impact Statement in the Explanatory Memorandum to the Bill estimates that CSPs would be liable to an annual cost of approximately \$130 825.<sup>101</sup> This figure was derived from a calculation of the average cost of blocking an online location multiplied by the number of online locations expected to be subject to a blocking order multiplied by the average number of CSPs that would be subject to a blocking order.<sup>102</sup>

2.69 ACCAN argued that:

To minimise impact on consumers it is our preference that the cost of this amendment be kept to an absolute minimum. We believe the most equitable cost allocation would see rights holders pay for the ISPs costs of implementing and maintaining the blocking capability. This is equitable because it shifts costs onto those who derive benefit. In contrast, costs on ISPs are likely to be passed on to consumers equally, regardless of ability to pay.<sup>103</sup>

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99 Mr Brett Cottle, Chief Executive Officer, APRA AMCOS representing Music Rights Australia Pty Ltd, *Committee Hansard*, 1 May 2015, p. 13. See also Ms Clare O'Neil, Director of Legal and Broadcasting Policy, Free TV Australia, *Committee Hansard*, 1 May 2015, p. 15; Australian Recording Industry Association, *Submission 25*, p. 9; Music Rights Australia Pty Ltd, *Submission 26*, pp 8–9; Phonographic Performance Company of Australia, *Submission 30*, p. 5; News Corp Australia, *Submission 33*, pp 13–14; ; Free TV Australia, *Submission 37*, pp 12–13; Foxtel, *Submission 45*, p. 8.

100 Australian Film & TV Bodies, *Submission 13*, p. 21. See also Foxtel, *Submission 45*, p. 8.

101 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 3.

102 Estimate of costs for Carriage Service Providers (CSPs) for website-blocking appended to Attorney-General's Department, *Answers to a questions taken on notice*, received 6 May 2014.

103 Australian Communications Consumer Action Network, *Submission 20*, p. 8.

2.70 The LCA described the position of a CSP in the injunction proceedings as being an 'innocent third party'.<sup>104</sup> The LCA submitted that:

It should be borne in mind that the carriage service provider is not the infringer targeted by this procedure, but is very much playing an ancillary role. The carriage service provider is being ordered to block access to the website to assist the right holder through this procedure in the right holder's dispute with the website operator. The position of the carriage service provider is akin to that of a person against whom a court makes orders for pre-action discovery to assist a right holder to identify who the infringer is or to preserve property pending judicial determination.<sup>105</sup>

2.71 The Communications Alliance pointed out that in *Dallas Buyers Club LCC v iiNet Limited*<sup>106</sup> Justice Perram ordered that both the costs of the proceedings and implementation costs of CSPs complying with the preliminary discovery order should be met by rights holders.<sup>107</sup> The Communications Alliance argued that the legislation should be amended to clearly state that CSPs should not be liable for any legal costs or any consequential costs of implementation, stating that:

When ISPs or other Carriage Service Providers or Carriers are required to undertake tasks in response to requests from law enforcement or national security agencies (LENSAs) under [sections] 313 and 314 of the Telecommunications Act 1997, they are entitled to recover their costs from those agencies. The same principle should apply to the implementation costs that ISPs will incur as a result of the Bill and ensuing injunctions... An ISP should properly be regarded as a third party to the proceedings, against whom an injunction is granted. A web site blocking injunction is like a third party injunction, notwithstanding that the ISP is a named party to the proceedings. There is no finding of knowledge or fault on the part of the ISP. Therefore rights holders should be required to meet the reasonable costs of the ISP that are associated with compliance with the order. This is in line with well-accepted principles where court orders are made against third parties to the main action (such as Mareva injunctions or third party subpoenas).<sup>108</sup>

2.72 In response to a question on how, in practice, the cost shifting could take place Mr Xavier O'Halloran of ACCAN suggested that:

...one possibility, in situations where cost agreements cannot necessarily be arrived at, is to have an independent arbiter consider what the costs of an

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104 Mr Maurice Gonsalves, Member, Intellectual Property Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 1 May 2015, p. 52.

105 Law Council of Australia, *Submission 41*, p. 3.

106 *Dallas Buyers Club LCC v iiNet Limited* [2015] FCA 317; (2015) 112 IPR 1.

107 *Dallas Buyers Club LCC v iiNet Limited* [2015] FCA 317; (2015) 112 IPR 1 at [93] per Perram J.

108 Communication Alliance Ltd, *Submission 8*, p. 6.

ongoing implementation of a scheme like this are and establish a cost regime for that.<sup>109</sup>

2.73 The LCA reasoned that:

A Court should not be constrained by statute in its ability to make appropriate orders as to costs, having regard to the principles discussed above. Further...an order that the carriage service provider bear the costs of implementing an order will impose a cost that will be passed on to all users of the carriage service provider's service. That is, the costs order will essentially act as a tax on all users, not just infringers. Some constraint on what the costs are may be imposed by competition between service providers for customers...therefore...a subpoena costs regime may be worth considering, as these cover legal as well as implementation costs.<sup>110</sup>

2.74 The Communications Alliance submitted that CSPs would also need to be sure that they would be indemnified from costs of legal proceedings that may result from a site-blocking injunction, for example where the owner of an online location sues the CSP for losses that result from the implementation of a block or for accidental blocking resulting from a poorly targeted or imprecise order.<sup>111</sup> Although the Explanatory Memorandum to the Bill notes that the Court may order an indemnity, this does not guarantee an indemnity.<sup>112</sup>

2.75 In the case of *Dallas Buyers Club LLC v iiNet (No. 3)*,<sup>113</sup> the respondents sought an indemnity from the applicant for claims brought against them as a result of compliance with the court order. Justice Perrem reasoned that:

Since the ISPs will be obeying a Federal Court order in providing that information they will have no such liability. They do, it is true, have an exposure to misconceived suits which have no basis. However, that is not Dallas Buyers Club's responsibility and I do not see that it should be required to indemnify the ISPs in respect of such actions.<sup>114</sup>

2.76 On a separate point, the New South Wales Council of Civil Liberties noted that the Bill fails to include a provision to penalise applicants for misuse of the provisions.<sup>115</sup> The committee takes the view that such an express provision is not necessary, as the Court has means in Division 6.1 of the *Federal Court Rules 2011* (Cth) to deal with a vexatious litigant. Furthermore, as the LCA suggested, the legal

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109 Mr Xavier O'Halloran, Policy Officer, Australian Communications Consumer Action Network, *Committee Hansard*, 1 May 2015, p. 46.

110 Law Council of Australia, *Submission 41*, p. 3.

111 Communication Alliance Ltd, *Submission 8*, p. 7. See also Amcom and iiNet, *Submission 15*, p. 4.

112 See Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 9.

113 *Dallas Buyers Club LLC v iiNet (No. 3)* [2015] FCA 422.

114 *Dallas Buyers Club LLC v iiNet (No. 3)* [2015] FCA 422 at [20] per Perram J.

115 NSW Council for Civil Liberties, *Submission 49*, p. 5.

costs to the applicant for the first few orders could be in the order of \$30 000 or more, due to the amount of evidence that would need to be compiled to allow the Court to determine the matter with a mind to building a body of jurisprudence. It is accurate that once the first few orders have been made these costs would decrease, but the costs would still provide a significant disincentive to misuse of the process. Furthermore, the costs would provide an incentive for rights holders to consult with CSPs to seek a self-help mechanism prior to approaching the Court.<sup>116</sup>

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116 Mr Maurice Gonsalves, Member, Intellectual Property Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 1 May 2015, p. 52.

