

Chapter 3

Committee's views and recommendations

3.1 The committee takes the view that online copyright infringement poses a significant threat to the viability and success of Australia's creative industries. Infringement occurs on a large scale and therefore rights holders need effective mechanisms to reduce the incentive for infringing practices.

3.2 In the opinion of the committee, subject to the following recommendations, the Bill should achieve its aim of targeting copyright infringement by online locations located outside Australia. The committee notes that the Bill does not purport to be a full solution to the problem of online copyright infringement and that the Bill would not detract from the ability of rights holders to use other remedies to protect their rights.

3.3 The committee acknowledges that the use of self-help mechanisms and the application of an industry-driven code could assist in reducing online copyright infringement, but does not consider that such measures need to be prerequisites to the implementation of this Bill.

Thresholds in the Bill

3.4 The committee believes that the high thresholds set by the Bill are both necessary and sufficient to establish a narrowly targeted remedy that should establish an appropriate balance between the need to protect the rights of owners of copyright and the need to protect CSPs and consumers against abuse of the remedy by rights holders. However, with regard to the matters to be taken into account by the Court in its deliberations under proposed subsection 115A(5) of the Bill, the committee considers that the Bill may be too prescriptive in requiring the Court to consider all the listed matters in every application for injunctive relief under section 115A. The committee takes the view that the Court should be able to exercise discretion in identifying the salient features of each matter on a case-by-case basis.

Recommendation 1

3.5 The committee recommends that section 115A(5) of the Copyright Amendment (Online Infringement) Bill 2015 be amended by replacing the words 'is to' with the word 'may'.

Virtual Private Networks

3.6 The committee acknowledges the evidence given by the Department of Communications regarding VPNs¹ but notes that the Bill does not explicitly contemplate the introduction of injunctions against VPNs. The committee also notes that VPNs are unlikely to meet the 'primary purpose test' in proposed paragraphs 115A(1)(a)-(c). The committee would however be reassured if the

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

government were to clarify the status of VPNs in the Explanatory Memorandum to the Bill.

The primary purpose test

3.7 The committee notes that the primary purpose test in proposed paragraphs 115A(1)(a)-(c) relates to the principal activity for which an online location exists and the principal intention of users of that online location. The committee is of the view that, where the infringement of copyright is in fact the 'primary purpose' of an online location, this purpose will be unambiguously apparent regardless of whatever other activities or links (such as advertising) may be associated with the online location. The committee acknowledges that the 'primary purpose' threshold is high but notes its confidence that rights holders' applications, and the Court's interpretation of the details of those applications, will effectively avoid inadvertent blocking of online locations which have a primary purpose that is not online infringement. However the committee urges the government to insert a legislative note into the Bill to clarify the operation of the primary purpose test.

The term 'facilitate'

3.8 The committee notes that the term 'facilitate' as used in proposed paragraph 115A(1)(b) should be considered to have its usual ordinary meaning. The committee further notes that a determination of whether an online location facilitates online infringement would be informed by the '*Matters to be taken into account*' by the Court, as detailed in proposed subsection 115A(5). However, the committee urges the government to clarify the meaning of 'facilitate' in proposed paragraph 115A(1)(b) and the manner in which this provision will be applied.

The Court's discretion

3.9 The committee takes the view that by providing the Court with a high level of discretion the Bill would allow the Court to both target specific issues that arise in individual cases and develop a general body of jurisprudence to provide more legal certainty into the future. As the Bill would allow the Court to tailor an order to the circumstances of a particular case, the committee expects that the Bill would encourage the Court to draft orders in such a way so as to effectively deal with the online copyright infringement but at the same time limit any unintended consequences such as over-blocking or accidental blocking.

3.10 The committee notes the suggestion to allow CSPs a level of discretion to determine the most appropriate method for blocking an infringing online location. The committee is of the view that making any such determination would best be achieved in consultation with rights holders. However, the committee is aware that the Court will most probably form its own view as to the nature of any injunctive relief on a case-by-case basis and this will be reflected in the orders of the Court.

3.11 The committee also received submissions that applications and subsequent orders for injunctive relief would be of limited utility if they are not imposed across multiple CSPs. The committee notes that this practice is already commonplace and would encourage the government to further clarify in the Explanatory Memorandum its expectation that this practice will continue.

3.12 The committee took evidence to the effect that the Court may require expert technical advice in order to better protect the interests of a range of parties and to ensure the effectiveness of its orders. The committee would be reassured if the Explanatory Memorandum to the Bill clarified the ability, where required, of the Court to access independent technical expertise by noting the Court's inherent right to appoint a court expert under *Federal Court Rules 2011* (Cth) Rules 1.40 and 23.01.

3.13 The committee would also be reassured if the Explanatory Memorandum more clearly specified that a rights holder would be obliged to include, in its application, independent technical advice that identifies possible impacts on third parties, such as the extent to which the blocking order could result in 'over-blocking' or accidental blocking of legitimate content and the potential exposure of CSPs to consequential liability.

3.14 Finally, the committee is persuaded about the use of a 'landing page' to advise that an online location can no longer be accessed where any individual attempts to access a site that has been blocked by court order.

Recommendation 2

3.15 The committee recommends that the Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015 be amended to specify that 'reasonable steps to disable access to an online location' may include a requirement to post a landing page at the blocked online location, specifying that the relevant online location has been blocked by a court order and outlining details of that order.

The need for a review

3.16 The AGD noted that although the Bill was preceded by a regulatory impact statement, a formal cost-benefit analysis was not commissioned.² As such, the committee received no information that provided a comparison between the expected benefits to rights holders and the potential costs to other parties. Although this does not affect the committee's ability to determine the merits of the proposed legislation, it does lead the committee to give consideration to the recommendation of the Internet Society of Australia that:

...the Government review the effectiveness of this Bill one year after its enactment. The review should include the number of sites/locations blocked, the number of sites/locations that continue to provide access to alleged infringing material, the costs to CSPs of implementing requirements of the Bill, and the practical effectiveness and ease of bypass of the methods used to implement blocking.³

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

3 Internet Society of Australia, *Submission 28*, p. 7. See also Australian Communications Consumer Action Network, *Submission 20*, p. 9; Associate Professor Kimberlee Weatherall, *Submission 23*, p. 9; QUT Intellectual property law and innovation research group, *Submission 31*, p. 8; Dr Dimitrios Eliades, *Submission 46*, p. 1.

3.17 Such a review may also be a useful mechanism to examine the issue raised by the LCA that the Bill should allow the Court to target internet service providers that have international (wholesale) connectivity, not just those who provide retail services.⁴ The committee notes that the Bill would already provide the Court with sufficient discretion to limit an order to those CSPs that provide international connectivity to the global internet, should the Court determine that this would be the most effective method of targeting the online copyright infringement. However, the committee considers that, as the aim of the Bill is to provide the Court with a high level of discretion to develop a technology-neutral specialised body of jurisprudence, the Bill could be amended in the future to also allow the Court to order a specialised wholesale internet service provider to block an online location. The committee did not receive sufficient evidence to make a specific recommendation on this issue and, but the committee concludes that this issue should be examined as part of a review of the legislation.

Recommendation 3

3.18 The committee recommends that the government conduct a formal review of the effectiveness of the Copyright Amendment (Online Infringement) Bill 2015, to be completed two years after its enactment.

Safe harbours

3.19 The committee notes that safe harbours are among a range of options that may be considered at a later time. The committee stresses that the Bill relates to copyright infringement by an online location outside Australia. It does not relate to alleged authorisation of an infringement by any domestic entity. The application of authorisation liability is not within the scope of the Bill.

Costs

3.20 On the issue of legal costs and the costs of implementing orders, the committee notes that the aim of the Bill is to provide an overarching structure under which the Court can develop a strong body of jurisprudence. As such, the Bill preserves the discretion of the Court to tailor its findings and any resulting order to the facts of the particular case. Following this reasoning, the committee takes the view that questions of cost should be a matter for the Court to determine, on a case-by-case basis. The committee notes that, in the absence of malice, a non-party to proceedings would not normally be liable for costs. As such, the committee questions the utility of the proposed subsection 115A(9), which, in the opinion of the committee, serves only to confuse the issue of costs.

3.21 The committee also urges the government to clarify its position regarding the attribution of costs of compliance with orders where injunctive relief is granted. The committee further highlights the evidence that where court orders require a CSP to implement a complex and/or expensive blocking method, the need for a CSP to defray the costs of those measures becomes more acute. The committee notes the persuasive

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

evidence of service providers to the effect that as a CSP bears no fault or liability for the infringement of copyright by its subscribers, the CSP should not be required to contribute to the cost of the remedy. The committee is of the view that more clarity is required to reassure CSPs that the costs associated with site-blocking will primarily be borne by those parties who are seeking the remedy.

3.22 Finally, the committee notes the compelling evidence regarding the need to indemnify a CSP for acts done or omitted to be done in compliance with court orders. The committee has regard to the reasoning of Justice Perram in *Dallas Buyers Club LLC v iiNet (No. 3)*,⁵ but urges the government to provide greater clarity on the issue of CSP indemnity from consequential actions.

Recommendation 4

3.23 The committee recommends that the Explanatory Memorandum be amended to provide greater clarity and guidance on the issue of service provider costs and liability subsequent to the service provider's compliance with court orders made under proposed section 115A of the *Copyright Act 1968 (Cth)*.

3.24 The committee recommends that the Bill should be passed subject to the recommendations listed above.

Recommendation 5

3.25 The committee recommends that, subject to the preceding recommendations, the Copyright Amendment (Online Infringement) Bill 2015 be passed.

**Senator the Hon Ian Macdonald
Chair**

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

