

The Senate

Legal and Constitutional Affairs
Legislation Committee

Copyright Amendment (Online Infringement)
Bill 2015 [Provisions]

June 2015

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Recommendations

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'.

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.

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.

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).

Recommendation 5

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

Chapter 1

Introduction

1.1 On 26 March 2015, the Hon Malcolm Turnbull MP, Minister for Communications, introduced the Copyright Amendment (Online Infringement) Bill 2015 (the Bill) into the House of Representatives.¹

1.2 On the same day, pursuant to a report of the Senate Standing Committee for Selection of Bills, the Senate referred the provisions of the Bill to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 13 May 2015.² On 12 May 2015, the Senate granted an extension of time for reporting until 29 May 2015.³ On 29 May 2015, in its interim report, the committee advised the Senate that it intended to present its final report by 9 June 2015.⁴ On 9 June 2015, in a second interim report, the committee advised the Senate that it intended to present its final report by 11 June 2015.⁵

Conduct of the inquiry

1.3 In accordance with usual practice the committee wrote to a number of persons and organisations, inviting submissions to the inquiry by 16 April 2015. Details of the inquiry were also made available through the committee's website at http://www.aph.gov.au/senate_legalcon.

1.4 The committee received 49 submissions in response to this inquiry. The submissions are listed at Appendix 1 to this report and are available on the committee's webpage. The committee held a single-day public hearing for its inquiry on 1 May 2015. The names of witnesses who attended the hearing are listed in Appendix 2. The committee would like to thank all those who submitted, gave evidence and assisted with its inquiry.

Background to the Bill

1.5 On 30 July 2014, the Attorney-General, Senator the Hon George Brandis QC, and Mr Turnbull jointly released a discussion paper on the establishment of a legal framework to address online copyright infringement (discussion paper). The ministers emphasised the importance of the role of interested industries in this area, saying that:

¹ *Votes and Proceedings*, No. 111, 26 March 2015, p. 1248.

² *Journals of the Senate*, No. 90, 26 March 2015, p. 2458.

³ *Journals of the Senate*, No. 92, 12 May 2015, p. 2555.

⁴ Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Copyright Amendment (Online Infringement) Bill 2015 [Provisions]*, 26 May 2015, p. 1.

⁵ Senate Legal and Constitutional Affairs Legislation Committee, *Interim report for the inquiry into the Copyright Amendment (Online Infringement) Bill 2015 [Provisions]*, 9 June 2015, p. 1.

...in the dynamic environment of the digital economy, the Government believes that workable approaches to tackling online copyright infringement are most likely to come from the market. The role of the Government in this context is to provide a legal framework that facilitates industry cooperation.⁶

1.6 The government's consultation process received more than 100 submissions. Mr Turnbull advised Parliament that these submissions were taken into account in the drafting of the Bill. For example, as a result of the consultations, the proposed legislative scheme 'was modified to give more flexibility to courts in determining whether to order an injunction to capture future infringing technologies and to provide more safeguards for carriage service providers, operators, online locations and internet users'.⁷ Mr Turnbull stated that similar provisions have been 'working well in other parts of the world such as the United Kingdom, Ireland and Singapore'.⁸

Purpose of the Bill

1.7 The Explanatory Memorandum to the Bill notes that:

The purpose of this Bill is to introduce a key reform to reduce online copyright infringement. The scheme is deliberately prescriptive; it is intended as a precise response to a specific concern raised by copyright owners.⁹

1.8 The Bill would provide for a copyright owner to apply to the Federal Court of Australia (Court) for an injunction requiring carriage service providers (CSPs) to block access to foreign websites which have the primary purpose of infringing, or facilitating the infringement, of copyright. In doing so the Bill:

...acknowledges the difficulties in taking direct enforcement action against entities operating outside Australia. The proposed amendments are intended to create a no-fault remedy against CSPs where they are in a position to address copyright infringement.¹⁰

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

Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to creators...in combating online copyright infringement the most powerful weapon that rights holders have is to provide access to their content in a timely and affordable way. The government accepts that this is an important element in any package of measures to address online

6 Australian Government, *Online Copyright Infringement Discussion Paper*, July 2014, Ministers' covering letter.

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

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

9 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, p. 2.

10 Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, pp 2–3.

copyright infringement...The bill complements these objectives by ensuring there is fair protection of the rights of content creators while balancing other competing interests in the online environment. This will be achieved by ensuring copyright holders have access to an effective remedy without unduly burdening carriage service providers or unnecessarily regulating the behaviour of consumers.¹¹

Key provisions of the Bill

1.10 The Bill proposes amendments to the *Copyright Act 1968* (Cth) (the Act). The substantive amendments to the Act are set out in Schedule 1 to the Bill. The key amendment would be the insertion of a new section 115A into the Act.

1.11 Proposed subsection 115A(1) would provide that the Federal Court of Australia may, on application by the owner of a copyright, grant an injunction (under proposed subsection 115A(2)) which would require a CSP to take reasonable steps to disable access to a specified online location.

1.12 The Court would be empowered to grant such an injunction if it were satisfied that:

- (a) the CSP provides access to an online location outside Australia;
- (b) the online location infringes, or facilitates an infringement of, the copyright; and
- (c) the primary purpose of the online location is to infringe or facilitate the infringement of copyright (whether or not in Australia).

1.13 Item 2 of Schedule 1 to the Bill would ensure that exclusive licensees would enjoy the same rights as copyright owners to bring an action under proposed section 115A. The same provision would also provide that where concurrent rights exist, all joint owners and/or licensees would need to be added to any relevant proceedings.

1.14 Proposed subsection 115A(5) sets out the criteria that the Court would need to take into account in a determination of whether to grant an injunction. This would include:

- the flagrancy of the infringement or facilitation of infringement of copyright;
- whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
- whether the owner or operator of the online location 'demonstrates a disregard for copyright generally';
- whether access to the online location has been disabled by court orders of other countries or territories on copyright infringement or related grounds;
- whether disabling access to the online location is a proportionate response in the circumstances;

11 The Hon Malcolm Turnbull MP, *House of Representatives Hansard*, 26 March 2015, p. 3591.

- the likely impact of granting the injunction on any person or class of persons;
- whether it is in the public interest to disable access to the online location;
- whether the copyright owner has given the notifications required under subsection 115A(4) (see below); and
- any other remedies available under the Act, other matters prescribed by regulations under the Act, or any other relevant matter.

1.15 The parties to the relevant action would be the copyright owner and the CSP under proposed subsection 115A(3). The person who operates the online location would also be a party, but only if that person were to make an application to be joined as a party to the proceedings.

1.16 Proposed subsection 115A(4) would require the copyright owner to notify the CSP and the person who operates the online location that an application was made. However, the Court could dispense with the requirement to notify the online operator if the Court were satisfied that the copyright owner made reasonable efforts to notify the operator but was unable to contact the operator or to determine the operator's identity or address.

1.17 Proposed subsection 115A(7) would empower the Court to limit the duration of an injunction, or upon application, to rescind or vary an injunction. Proposed subsection 115A(8) would provide that an application to rescind or vary an injunction could be made by the copyright owner, the CSP, the operator of the online location, or any other person prescribed by regulations.

1.18 Finally, proposed subsection 115A(9) would provide that the CSP would not be liable for any costs of court proceedings unless it chose to appear and take part in the proceedings.

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.¹

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.² 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.³

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.⁴

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'.⁵ 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.⁶

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.⁷

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'.⁸

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.⁹

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.¹⁰

Is site-blocking effective?

2.10 MRA suggested that the proposed legislation would act to undermine the sense of entitlement and change consumer behaviour.¹¹ 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.¹² 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'.¹³ 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

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.¹⁴

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*¹⁵ in which the Court found that rates of infringement through the Pirate Bay site had actually increased following the imposition of a block.¹⁶ 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*¹⁷ found that indiscriminate blocking may have an adverse impact on the freedom of an internet service provider (ISP) to conduct its business.¹⁸ 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.¹⁹

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*,²⁰ where Justice Arnold found that site blocking was justified even if it only prevented access by 'a minority of users'.²¹ 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*,²² 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

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).

Alexa as number 43 in the UK, while as at 21 November 2012, its UK ranking had dropped to number 293.²³

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.²⁴

2.14 Foxtel also cited Justice Arnold, in the case of *Cartier International AG & Ors v British Sky Broadcasting Limited & Ors* (Cartier case),²⁵ 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.²⁶

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'.²⁷

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.

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.²⁸

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.²⁹

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.³⁰

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'.³¹

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

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.³² 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.³³

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.³⁴ 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.³⁵

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.³⁶ 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.³⁷ 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.³⁸

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.³⁹ However, Ms Carolyn Dalton of AIMIA noted that:

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.⁴⁰

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.⁴¹

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 owners⁴² 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.⁴³

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.⁴⁴

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.⁴⁵

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.⁴⁶

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.⁴⁷ 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...⁴⁸

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

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.⁴⁹

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.⁵⁰

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.⁵¹ 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.⁵²

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.⁵³

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.⁵⁴

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.⁵⁵

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.⁵⁶ 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.⁵⁷

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.⁵⁸ 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.⁵⁹

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

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.⁶⁰

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.⁶¹

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.⁶² 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

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.⁶³

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.⁶⁴

2.44 Associate Professor Weatherall noted that the term 'primary purpose' helps to qualify the high threshold for the availability of the injunctive remedy.⁶⁵ 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.'⁶⁶

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'.⁶⁷

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.⁶⁸ 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.⁶⁹

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

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'.⁷⁰

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.⁷¹

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.⁷²

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.⁷³ 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.⁷⁴

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.⁷⁵ 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.⁷⁶ In a similar vein, the CLC submitted that the Bill should be amended to specifically allow a single application to target multiple CSPs.⁷⁷

2.52 The Explanatory Memorandum to the Bill states that:

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.⁷⁸

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...⁷⁹

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.⁸⁰

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'.⁸¹

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

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.⁸²

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*.⁸³ 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.⁸⁴ 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.⁸⁵

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

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.

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

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.⁸⁷ 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.⁸⁸

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

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

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.⁹¹ 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.⁹² 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'.⁹³

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,

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...⁹⁴

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.⁹⁵

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.⁹⁶

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.⁹⁷

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',⁹⁸ proposed subsection 115A(9) may be

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.⁹⁹

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.¹⁰⁰

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 \$130 825.¹⁰¹ 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.¹⁰²

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.¹⁰³

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'.¹⁰⁴ 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.¹⁰⁵

2.71 The Communications Alliance pointed out that in *Dallas Buyers Club LCC v iiNet Limited*¹⁰⁶ 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.¹⁰⁷ 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).¹⁰⁸

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

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.¹⁰⁹

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.¹¹⁰

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.¹¹¹ Although the Explanatory Memorandum to the Bill notes that the Court may order an indemnity, this does not guarantee an indemnity.¹¹²

2.75 In the case of *Dallas Buyers Club LLC v iiNet (No. 3)*,¹¹³ 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.¹¹⁴

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.¹¹⁵ 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

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.¹¹⁶

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

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.

Labor Senators' Additional Comment

1.1 Labor believes that action is needed to reduce current levels of online piracy in Australia. The enforcement of copyright law is vital to our creative industries. Piracy damages our economy and destroys Australian jobs.

1.2 We support reasonable measures to discourage piracy. This includes blocking, by court order, overseas websites which flout the law and operate as online havens for copyright infringement. Accordingly, Labor will support this Bill subject to the government accepting the committee's recommendations.

1.3 However, there is much more work to be done on updating Australia's copyright laws.

1.4 The measure implemented in this Bill was first proposed by the government on 14 February 2014 in a speech by the Attorney-General. The site-blocking measure was only a very small part of the law reform agenda sketched out by Senator Brandis, who promised that he would do nothing less than re-write the Copyright Act.

1.5 That Act, Senator Brandis said quite rightly, is 'overly long, unnecessarily complex, often comically outdated and all too often, in its administration, pointlessly bureaucratic'. Senator Brandis promised that he would conduct 'a thorough and exhaustive exercise in law reform' to remedy this.

1.6 Almost sixteen months later, there is no sign of such reform from the government.

1.7 The government has still not responded to the Australian Law Reform Commission's report on copyright in the digital economy, commissioned by the last Labor Government, which was provided to the current government in November 2013. Nor has there been any further action even on measures the government itself suggested, such as the extension of the safe harbour scheme endorsed by the government in its piracy discussion paper in July 2014.

1.8 Labor calls on the government to proceed with a broader reform of copyright law. It is certainly important to take action against piracy, but there is a clear need for much more sweeping reform to protect the interests of artists, industry and consumers alike.

Senator Jacinta Collins
Australian Labor Party

Senator Catryna Bilyk
Australian Labor Party

Australian Greens Dissenting Report

1.1 The Copyright Amendment (Online Infringement) Bill 2015 is the latest in a long line of misguided attempts by the government to monitor, control and censor the Internet.

1.2 The Bill will allocate a significant new censorship power to the Court that will be used by copyright owners to block access to online content. However, there is a substantial weight of evidence showing that it will be relatively easy to evade the Bill's provisions, that it does not contain appropriate safeguards, and that it may result in legitimate online sources being blocked.

1.3 Most importantly, there is also a significant weight of evidence showing that the Bill will not meet its aims, as it does not address the underlying cause of online copyright infringement: The continual refusal of offshore rights holders to make their content available in a timely, convenient and affordable manner to Australians.

1.4 The committee's report into the Bill canvasses a number of these concerns, which were raised by many stakeholders during the inquiry. However, the report's conclusions and recommendations do not acknowledge or deal with these outstanding concerns regarding the Bill.

1.5 In their submission, major telecommunications companies Amcom and iiNet note that 'site blocking is unlikely to be an effective way of dealing with online copyright infringement',¹ a view supported by Google, which notes in its submission: 'There is increasing evidence to suggest that site-blocking is not the most effective means of stopping piracy.'²

1.6 Part of the reason for this is the ease of avoiding site-blocking mechanisms. Noting a variety of popular techniques already available for the purpose, consumer group CHOICE notes in its submission: 'Circumventing a website block is not difficult.'³

1.7 A number of submissions to the inquiry pointed out that a more effective way of dealing with Internet piracy would be to address its root cause: The lack of commercial options in the Australian market.

1.8 CHOICE wrote in its submission:

CHOICE's research has shown that consumers in Australia pay more for identical digital products than consumers in comparable markets, such as the USA or United Kingdom. Providing Australians with better access to digital content at a comparably reasonable price will give consumers a greater incentive and opportunity to access content legitimately.⁴

1 Amcom and iiNet, *Submission 15*, p. 2.

2 Google, *Submission 27*, p. 6.

3 CHOICE, *Submission 34*, p. 2.

4 CHOICE, *Submission 34*, p. 2.

1.9 The extremely rapid uptake of the Netflix Internet television services after its March 2015 launch is one strong indication that Australians will adopt commercial services where they are available, instead of infringing copyright.

1.10 Submitters highlighted the fact that this issue had been examined in detail by the 2013 inquiry into the pricing of technology products and content by the House of Representatives Standing Committee on Infrastructure and Communications. The government has not yet responded to that report.

1.11 Submitters also raised a number of other substantive issues with the Bill. Similar legislation in the UK has shown that ISPs and foreign website owners would be unlikely to contest the site blocks, due to the cost of doing so and the effort involved for a foreign party in involvement in Australian legal action, meaning that many of the site-blocking actions would be likely to pass uncontested through the courts without sufficient advocacy on both sides.

1.12 There are also concerns that the language in the Bill is not specific enough to prohibit some legitimate providers of online services (such as Virtual Private Network providers) from being blocked.

1.13 During any legislative process, it is important that the rights of all stakeholders be considered so that a balance can be struck between the rights of individuals, industry, and other organisations. Unfortunately, the Australian Greens do not believe the Committee has adequately taken the views of stakeholders other than copyright holders into account in its report.

1.14 Neither does the report adequately address concerns that the Bill will not be effective in meeting its aims.

Recommendation 1

1.15 The Australian Greens recommend that the Bill not be passed.

Senator Scott Ludlam
Australian Greens

Appendix 1

Public submissions

- 1 Australian Copyright Council
- 2 Communications Law Centre
- 3 Australian Human Rights Commission
- 4 Electronic Frontier Foundation
- 5 Australasian Music Publishers Association
- 6 Confidential
- 7 IP Awareness Foundation
- 8 Communications Alliance
- 9 Copyright Advisory Group to the COAG Education Council
- 10 Softensify Pty Ltd
- 11 Village Roadshow Limited
- 12 Institute of Public Affairs
- 13 Australian Film & TV Bodies
- 14 Media, Entertainment and Arts Alliance – Equity Section
- 15 Amcom and iiNet
- 16 Australian Digital Alliance
- 17 Screen Producers Australia
- 18 Australian Libraries Copyright Committee
- 19 APRA AMCOS
- 20 Australian Communications Consumer Action Network (ACCAN)
- 21 Australian Publishers Association
- 22 Copyright Agency
- 23 Assoc. Prof. Kimberlee Weatherall

- 24 Australian Independent Record Labels Association
- 25 Australian Recording Industry Association
- 26 Music Rights Australia Pty Ltd
- 27 Google
- 28 Internet Society of Australia
- 29 Arts Law Centre of Australia
- 30 Phonographic Performance Company of Australia
- 31 QUT intellectual property law and innovation research group
- 32 Pirate Party Australia
- 33 News Corp Australia
- 34 Choice
- 35 BSA | The Software Alliance
- 36 Electronic Frontiers Australia
- 37 Free TV Australia
- 38 BBC Worldwide Australia Pty Ltd
- 39 Coalition of Major Professional and Participation Sports Inc.
- 40 Australian Competition & Consumer Commission (ACCC)
- 41 Law Council of Australia
- 42 Law Institute of Victoria
- 43 Liberty Victoria
- 44 Dr Matthew Rimmer
- 45 Foxtel
- 46 Dr Dimitrios Eliades
- 47 Australian Interactive Media Industry Association Digital Policy Group
- 48 The Law Society of South Australia
- 49 NSW Council for Civil Liberties

Appendix 2

Public hearings and witnesses

Friday 1 May 2015—Sydney

AGAR, Ms Sarah, Campaigns and Policy Adviser, Choice

AHLIN, Mr Sam, Principal Legal Officer, Commercial and Administrative Law Branch, Attorney-General's Department

BERG, Mr Chris, Senior Fellow, Institute of Public Affairs

CHARD, Mr Christopher Brian, Managing Director, Roadshow Entertainment

CORBIN, Ms Teresa, Chief Executive Officer, Australian Communications Consumer Action Network

COTTLE, Mr Brett Robin, Chief Executive Officer, APRA AMCOS

DALTON, Ms Carolyn, Executive Director, Australian Interactive Media Industry Association Digital Policy Group

FOULADI, Mr Daniel, Head of Products, Verizon

FRASER, Professor Michael, Director, Communications Law Centre, University of Technology, Sydney

GONSALVES, Mr Maurice, Member, Intellectual Property Committee, Business Law Section, Law Council of Australia

HAIPOLA, Ms Kirsti, Principal Legal Officer, Commercial and Administrative Law Branch, Attorney-General's Department

HEPWORTH, Ms Patricia Ruth, Executive Officer, Australian Digital Alliance

HERPS, Mr Aaron, Assistant Managing Director, Operation and Technology, Australian Screen Association

HUTLEY, Ms Vanessa, General Manager, Music Rights Australia Pty Ltd

IRELAND, Ms Lynette, Chief General Counsel, Foxtel

KIRKLAND, Mr Alan, Chief Executive Officer, Choice

MAURER, Mr Andrew, Assistant Secretary, Digital Productivity, Department of Communications

MEAGHER, Mr Bruce, Group Director Corporate Affairs, Foxtel

MINOGUE, Mr Matthew, First Assistant Secretary, Civil Law Division, Attorney-General's Department

O'HALLORAN, Mr Xavier, Policy Officer, Australian Communications Consumer Action Network

O'NEIL, Ms Clare Joanna, Director of Legal and Broadcasting Policy, Free TV Australia

PATTON, Mr Laurie, Chief Executive Officer, Internet Society of Australia

PHILLIPS, Ms Fiona, Executive Director, Australian Copyright Council

RAICHE, Ms Holly, Chair, Policy Committee, Internet Society of Australia

STANTON, Mr John, Chief Executive Officer, Communications Alliance

WEATHERALL, Associate Professor Kimberlee Gai, Private capacity

WILLIAMS, Mr Michael John, Solicitor, Film and TV Bodies

WILSON, Mr Timothy Robert, Human Rights Commissioner, Australian Human Rights Commission

Appendix 3

Tabled documents, answers to questions on notice and additional information

Answers to questions on notice

Friday, 1 May 2015—Sydney

- 1 Attorney-General's Department – response to a question taken on notice at a public hearing on 1 May 2015 (received 6 May 2015)
- 2 Australian Digital Alliance – response to a question taken on notice at a public hearing on 1 May 2015 (received 6 May 2015)
- 3 Law Council of Australia – response to a question taken on notice at a public hearing on 1 May 2015 (received 6 May 2015)

