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Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: ec.sen@aph.gov.au

19 November 2018

Dear Committee,

Re: Copyright Amendment (Online Infringement) Bill 2018

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to the proposed amendments to the *Copyright Act 1968* (Cth). EFA's submission is contained in the following pages.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights. EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Angus Murray
Chair of the Policy Committee
Electronic Frontiers Australia

Introduction

We thank the Senate Standing Committees on Environment and Communications for the opportunity to provide submissions in relation to the *Copyright Amendment (Online Infringement) Bill 2018* ("**the Bill**").

In 2015, EFA noted that the core issue relating to copyright infringement is fair price and accessibility. Since then, while some progress has been made, there is a large volume of copyright material which is advertised to Australians despite not being commercially available to them in any form or at any price.

We repeat our 2015 recommendation that the abovementioned issue should be addressed as a matter of priority, and that any efforts invested by rightsholders into enforcement, litigation or lobbying should be matched or exceeded by efforts to innovate and overcome accessibility issues.

We have **attached** a copy of our submission to the Senate Legal and Constitutional Affairs Committee dated 23 March 2015 ("**our 2015 Submission**") for the Committee's reference.

We repeat our 2015 Submission and provide our further submissions in relation to the Bill below.

Submissions

EFA does not support the modification of the "primary purpose" test to include "primary effect" for the reasons outlined in our 2015 Submission. It is our concern that "lowering the bar" of the threshold for website blocking will have broad unintended consequences.

In this regard, we support the comments made by Nicholas J in the recent decision of *Television Broadcasts Limited v Telstra Corporation Limited* wherein his Honour held that:

> *"The Court must also be satisfied that the primary purpose of the online location is to either infringe copyright, or facilitate the infringement of copyright generally.* ***This is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse.*** *For example, the 'primary purpose' test would prevent an injunction to disable access to an art gallery website operated outside of Australia that may contain an unauthorised photograph. Thus, a website such as www.youtube.com or www.blogger.com would not prima facie satisfy the test as being an online location that infringes or facilitates infringement of copyright.* ***Technology and technological change is not to be chilled or targeted by this amendment***"[1].

In this context, it is our submission that the threshold of "primary purpose" ought not be altered (notwithstanding our 2015 Submission).

Furthermore, it is EFA's position that Australia ought to introduce a broad flexible fair use exception to bring Australia's Copyright Act into line with current societal practice and expectations and introduce essential flexibility into the law. It will provide resolutions for the shortcomings of the current fair dealing system and will ensure that the law enables, and is able to adapt to, innovations in technology, service provision, artistic practice, consumer behaviour and political speech. This recommendation has previously been made by the Australian Law Reform Commission[2] and the Productivity Commission[3].

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[1] *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434 at [38] per Nicholas J.
[2] Australian Law Reform Commission, *Copyright and the Digital Economy* ALRC Report 122 (2013).
[3] Productivity Commission, *Intellectual Property Arrangements* Report No. 78 (23 September 2016).

In a broader sense, EFA also submits that:

1. We repeat our 2015 Submission that a finding of intent be required before any blocking injunction is granted pursuant to s. 115A of the Copyright Act 1968 and that no further scope should be given to rightsholders without balancing that scope with a broad "fair use" exception.

2. EFA recommends that reasonable technical investigations to properly identify the nature and source of an online location be made mandatory for any applicant in order to properly address the very real risk of collateral damage from overzealous site blocking.

3. Transparent reporting obligations ought to be put in place in relation to applications to the Court and Orders made in relation to websites which have been blocked pursuant to s. 115A of the *Copyright Act 1968*.

4. Section 115A(5) of the *Copyright Act 1968* ought to explicitly include a consideration for the impact of blocking access on freedom of expression.

In sum, EFA does not believe that there is a case for the expansion of the website blocking provision contained at s. 115A of the *Copyright Act 1968* without the introduction of a broad "fair use" exception with sufficient mechanisms to balance the legitimate interests of Australian consumers.

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Via email

23 March 2015

Dear Committee Secretary,

Re: Copyright Amendment (Online Infringement) Bill 2015

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to the proposed amendment to the *Copyright Act 1968* (Cth). EFA's submission is contained in the following pages.

About EFA
Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights. EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Angus Murray – Committee Chair
On behalf of EFA's Policy and Research Standing Committee

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EFA welcomes the opportunity to comment on the *Copyright Amendment (Online Infringement) Bill 2015*. EFA firstly notes that, as a preliminary draft, the essence of this amendment positively attempts to achieve a balance between the interests of rights holders, the interests of e-commerce and the consumer. In this regard, EFA welcomes the use of a court process to adjudicate the prospective blocking of websites.

EFA particularly welcomes the inclusion of safeguards and the basis of procedural fairness and transparency the the courts inherently provide, particularly as it requires hearing before the Federal Court.

Furthermore, EFA welcomes the inclusion of (albeit later discussed) a public interest criterion, the flexibility of time limits for the website subject to a blocking injunction and the ability for application to rescind or vary a blocking injunction.

However, EFA has a number of concerns with this proposed amendment and makes the following submissions.

1. Background and Complex Issues

EFA submits that the rapid evolution of the internet has caused issues to the way in which copyright material has, historically, been accessed. EFA strongly submits that the core of the issue relating to copyright infringement does not exist as a result of the means for infringement, but rather the lack of material accessible in Australia at the same time as the United States at a reasonable price (cf. http://streamin.it/discover).

EFA submits that this issue should be addressed as a matter of priority, and that any efforts invested by rights holders into enforcement, litigation or lobbying should be matched or exceeded by efforts to innovate and overcome accessibility issues.

2. Specific Amendments to the Bill

2.1. Extension of the "Primary Purpose" Test in s. 115(1)

EFA submits that the threshold under the "primary purpose" test detailed in the proposed s. 115A(1)(c) requires further clarification to minimise the possible risk that legitimate websites are affected by overzealous rights holders. While EFA agrees that a "primary purpose" is still a high standard, the untested and ambivalent nature of this threshold may see innocent websites be blocked.

As an example of such an occurrence, a legitimate website that engages in file sharing may fall under the above provision if the quantitative percentage of files shared are done so facilitating copyright infringement. It is difficult for legitimate hosts to prevent a large portion of their users from engaging in copyright infringement on their network, especially if the service is used for both legitimate and illegitimate purposes (such as those listed below).

As such, EFA recommends that the requisite threshold be increased to include a level of intent. While the considerations listed in s. 115A(5) include such *considerations*, EFA recommends that intention to facilitate copyright infringement be made a mandatory requirement of any successful injunction.

2.2. Specificity in Definitions

Many terms introduced in the draft Bill are unprecedented in Australian law, such as *inter alia* "online location" and "primary purpose". EFA recommends that such terms are given specific definitions in the *Copyright Act 1968* (**"the Act"**).

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2.3. Consideration of Impact on Freedom of Expression

EFA recommends that s 115A(5)(l) be added to include a consideration for the impact of blocking access on freedom of expression.

2.4. Specific Exceptions

Given the uncertainty of the "primary purpose" test, EFA recommends that specific exceptions be made for legitimate services that are often associated with copyright infringement. Some notable examples, *inter alia*, are:

1. File sharing websites such as "Zippyshare" or "Megaupload" (and any other similar services), where users upload files for others to download;

2. Cloud service providers, where users store files in their respective cloud account and have the option of sharing certain files or folders; and

3. Services that use a supplementary 'subsidiary' service, and only the latter satisfies the "primary purpose" test (for example, Twitter and the supplementary service Periscope); and

4. Providers of VPN services, which are used legitimately and legally by both consumers and businesses globally, as well as the privacy-conscious.

In relation to the first point, EFA submits that filesharing websites are a legitimate business model. The cause of their abuse exists, at least in part, to consumer frustration in relation to accessibility and fair pricing.

2.5. Consideration of Supplementary Services

EFA notes that there has, more recently, been instances of large scale copyright infringement through popular social media outlines, namely Twitter's 'Periscope' application[1]. EFA submits that this creates further uncertainty in relation to the primary purpose test. EFA makes this submission as it is highly unlikely that Twitter could fall within the operative scope of s. 115A(1)(c), however, it is plausible hosted applications and subsidiary sites could be subject to this provision. This must be understood in the context that the Periscope application, largely, draws its user-base from Twitter. As a result, it is feasible that s. 115A may result in a system where subsidiary sites that offer, or substantially allow, the primary purpose of infringement to be blocked whilst leaving the primary site that draws the user traffic unblocked and able to simply redirect users. In this regard, EFA makes the practical note that if this is the intention of s. 115A, it will serve only as a "whack-a-mole" approach to infringement.

2.6. Cumulative Test of s. 115(5)(a)-(k) Factors

EFA does, however, note that this issue may be (at least partially) resolved by explicitly rewording s. 115A(5) to be constructed as a cumulative test whereby each of the requirements contained in s. 115A(5)(a) through (k) must be exhausted before granting injunctive relief. This recommendation is a good supplement or alternative to the more stringent 'primary purpose' test submitted above.

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[1] http://www.news.com.au/technology/online/twitter-threatens-to-ban-accounts-of-users-who-live-streamed-new-game-of-thrones-episodes-via-its-app-periscope/story-fnjwneld-1227303917766.

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3. Inherent Dangers of Site-Blocking

EFA submits that there have been issues with the implementation of website blocking in the past. Specifically, EFA notes that, in 2013, the Australian Securities and Investment Commission (ASIC) had, by way of s. 313 notices, requested that ISP block access to IP addresses associated with websites engaging in investment fraud. This was not executed in an effective manner and as a result more than 250,000 unrelated websites were blocked. EFA notes that this was caused by a misunderstanding relating to the way in which a website operates.

EFA submits that this is not a scenario that should be repeated and therefore recommends that s. 115A include the specific technical means to be implemented for the purpose of blocking the website so as to remove such a possibility.

Furthermore, EFA recommends that any blocked websites display a notice or redirection page with the following information:

1. Details of the block; and

2. Appeal process for affected parties.

4. Mandatory Disclosure of Intent to Pursue Injunction and Public Consultation

The current draft of the Bill makes 'public interest' a consideration under s 115A(5). However, it does not allow for any public input in the granting of an injunction. For instance, public interest and consumer groups are not given a voice in the determination of the public interest consideration. Additionally, ISPs actually have a financial disincentive to oppose any determination that is against the public interest.

For the purposes of accurately determining "public interest", EFA recommend that the Bill be amended to include a requirement for the copyright owner to publish a notice of their intention to seek an injunction on a dedicated webpage or an email service that interested parties can subscribe and unsubscribe from.

5. Scope Creep Resulting in Censorship

Due to Australia's common law system, there exists the possibility that the practical application of the s. 115A amendment could result in the opening of 'pandora's box' and result in a system of censorship. In this regard EFA recommends that further safeguards be implemented with the proposed amendment. These safeguards are as follows:

1. That an independent body be formed for the purpose of overseeing the implementation of s. 115A;

2. That the independent body record and, annually, make publicly available the number and scope of websites blocked pursuant to s. 115A; and

3. That the independent body reserves the right to remit decisions to the Federal Court.

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6. Summary of EFA's Recommendations

EFA makes the following recommendations:

1. The *Copyright Act 1968* (Cth) be amended to contain an explicit definition of "primary purpose" as provided in section 115A(1)(c);
2. Section 115A(5) include a requirement of intent;
3. Express immunity for specific services such as those listed above;
4. Specific definitions for terms that have been introduced that are not defined in other statute or Australian common law, such as those mentioned above;
5. Section 115A(5) be reworded to create a cumulative test requiring each subsection to be exhausted before injunctive relief be granted;
6. The addition of a consideration of site blocking on freedom of expression;
7. Section 115A includes a specific means for blocking of websites;
8. A blocked website be replaced with a landing page that outlines the reasons for the blocking and the appeal process;
9. An independent body be formed for the purpose of oversight and reporting on websites blocked pursuant to s. 115A; and
10. The addition of provisions for mandatory disclosure of intent and an opportunity for public input.

7. Conclusion

In summary, EFA acknowledges proposed legislation's intention and welcomes the inclusion of various safeguards, a public interest criterion, the flexibility of time limits for the website subject to a blocking injunction and the ability for application to rescind or vary a blocking injunction. EFA, however, submits that the amendment not be passed into force without the further inclusion of the recommendations outlined in section 6 of this submission.

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