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Legal and Constitutional Affairs Legislation Committee

Inquiry into the Copyright Amendment (Online Infringement) Bill 2015

Submission on behalf of Amcom and iiNet

1 Introduction

On 26 March 2015, the Senate referred the Copyright Amendment (Online Infringement) Bill 2015 (**the Bill**) to the Legal and Constitutional Affairs Legislation Committee (**the Committee**) for inquiry and report. The Committee is seeking submissions on the Bill.

Thomson Geer acts for Amcom Pty Ltd (**Amcom**)¹ and iiNet Limited (**iiNet**)² (collectively referred to as **our clients**) both of which are carriage service providers. As the Bill provides a means by which a copyright holder can obtain an injunction against a CSP, the Bill will clearly have a direct impact on our clients. Therefore our clients have each instructed us to provide a submission to the Committee on their behalf. As the submissions from our clients raise common issues, we are providing a joint submission on behalf of our clients.

Our clients welcome the opportunity of providing their feedback on the Bill to the Committee. Their feedback is set out below.

Our clients have concerns about whether the Bill will be effective and achieve its desired aim. In our clients' view site blocking is unlikely to be an effective way of dealing with online copyright infringement. Nevertheless, if the Government is intent on passing legislation that obliges CSPs to block online locations for the purpose of protecting copyright, our clients' view is that a CSP should only be required to block its customers from accessing an online location as a means of preventing copyright infringement if the CSP receives an order from a Court requiring the CSP to do so. In light of this, our clients agree with the approach in the Bill that requires a copyright owner to obtain an injunction from a Court before a CSP is required to take any steps to prevent access to an online location. Furthermore, our clients agree that:

- the scope of the Bill should be limited to online locations outside Australia because copyright owners have direct remedies under Australian law against the owners of online locations within Australia; and
- the threshold for obtaining an injunction should be high.³

In our clients' view, the Bill needs to balance the interests of copyright owners against:

- the interests of owners/operators of overseas online locations;
- the interests of individuals in Australia who may wish to view overseas online locations using the services of a CSP; and
- the interests of CSPs.

Subject to one concern, our clients believe that the Bill appropriately balances the interests of copyright owners against the interests of owners/operators of overseas online locations and individuals who may wish to view overseas online locations using the services of a CSP. Our clients' concern relates to the fact that the Bill does not include any express safeguard to prevent what is commonly referred to as 'over blocking'.

As regards the interests of CSPs, in our clients' view, the Bill fails to appropriately balance the interests of CSPs. Our clients believe that further work needs to be done on the Bill in order for it to appropriately balance the interests of CSPs. In particular, our clients believe that in order to appropriately balance the interests of CSPs it is necessary for the Bill to:

- provide guidance on what is meant by 'reasonable steps';

¹ The Amcom Group of companies includes Amcom Pty Ltd, which provides carriage services to business customers and Amnet Broadband Pty Ltd which provide carriage services to residential customers.

² The iiNet Group of companies includes the following carriage service providers that provide carriage services to residential and business customers: iiNet Limited, Adam Internet, Internode Pty Ltd, Pty Ltd, TransACT Capital Communications Pty Limited, TransACT Victoria Communications Pty Limited and Westnet Pty Ltd.

³ Explanatory memorandum to the Bill, at paragraph 6.

- require the CSP's cost of complying with an injunction to be borne by the copyright owner;
- ensure that a CSP that implements an injunction in good faith does not incur any legal liability for doing so; and
- minimise the need for CSPs to contest the copyright owner's application.

The remainder of this submission provides the reasoning behind our clients' concerns relating to 'over blocking' as well as each of the above contentions regarding the balancing of CSPs' interests.

2 The problem of 'over blocking'

The problem of 'over blocking' has been identified in the context of Section 313(3) of the *Telecommunications Act 1997* (**Telco Act**). Section 313(3) of the Telco Act requires CSPs to provide reasonable assistance to enforcement agencies. Section 313(3) has been used by enforcement agencies as a means of requiring CSPs to block websites that involve criminal activities.

Site blocking that is based on an IP address can result in more than one website being blocked. When an innocent website is blocked, this is referred to as 'over blocking'. Requests made by the Australian Securities and Investment Commission under Section 313(3) of the Telco Act have resulted in over blocking in the past, most notably when approximately 1,200 websites were inadvertently blocked as a result of a request under Section 313(3) that was intended to block a single site⁴. Our clients believe that the Bill should expressly deal with the issue of over blocking by imposing a specific obligation on the copyright owner to demonstrate that its application includes reasonable steps for the CSP to take that will not result in any over blocking.

3 Guidance on what is meant by reasonable steps

Our clients acknowledge that it is intended that the Bill should have flexibility and be technologically neutral. That said, it is clear that the Bill is intended to cover website blocking⁵. In light of this, our clients submit that the Bill could usefully provide guidance to CSPs but retain flexibility and be technologically neutral if the following note (or a note of similar effect) is inserted after sub-Section (2) of proposed Section 115A:

Note: reasonable steps may include a CSP employing technical measures to block its subscribers from accessing a specified website.

The concept of 'reasonable steps' has special meaning under section 101(1A) of the *Copyright Act 1968*. Section 101(1A) makes whether a person took 'reasonable steps' relevant to whether authorisation liability exists. What amounts to 'reasonable steps' is very open to debate and was a central question in *Roadshow Films Pty Limited v iiNet Limited*⁶, a case in which a number of copyright owners brought unsuccessful proceedings against iiNet for the alleged authorisation of the online copyright infringements of iiNet's customers. It is in no one's interest that there be uncertainty about what amounts to taking reasonable steps. In light of this, our clients believe that the breadth of the Court's jurisdiction to make an order to take 'reasonable steps' should be limited to making orders that set out with particularity what steps the CSP must take. This should include identification of the particular online location(s). Furthermore, as discussed in section 6 below, a requirement that the copyright owner be required to seek to gain the CSP's agreement as to particular reasonable steps before the

⁴ See <http://download.asic.gov.au/media/1346726/Senate-Estimates-Opening-Statement-4-June-2013.pdf>

⁵ Explanatory memorandum to the Bill, at paragraph 40.

⁶ [2011] FCAFC 23

copyright owner is permitted to make an application to the Court will also help to avoid any uncertainty as to what steps may be required.

Our clients also believe that the Bill should avoid a situation where copyright owners may seek to impose onerous obligations on CSPs under the guise of 'reasonable steps'. Our clients believe that the chances of copyright owners seeking to make ambit claims as regards particular reasonable steps can be reduced if:

- The Bill is amended so that the Bill refers to reasonable *and proportionate* steps.
- The Bill includes a power to make regulations, subject to consultation with CSPs, that are able to specify what steps will be reasonable and proportionate in commonly occurring scenarios (for example in respect of particular technology).
- The copyright owner is responsible for the CSPs' cost of compliance. Making the copyright owner responsible with the cost of compliance will act as an incentive for the copyright owner to seek to find the simplest and cheapest option (discussed further below).

4 The CSP's cost of complying with an injunction should be borne by the copyright owner

In our clients' view, the potential for over blocking is not the only parallel that can be drawn between the subject matter of the Bill and Section 313(3) of the Telco Act. As regards the effect on a CSP's interests, the effect of Section 313(3) of the Telco Act and the Bill are essentially the same – i.e. the CSP is expected to incur costs in order to assist a third party. In the case of Section 313(3) of the Telco Act, the third party consists of enforcement agencies. In the case of the Bill, the third party consists of copyright owners. If a CSP should be required to bear the costs of protecting someone else's interests, then one would expect that this would apply in the case of Section 313(3) of the Telco Act given that there is an obvious public benefit in providing assistance to enforcement agencies who are acting in the public interest. However, it has been expressly provided for by statute that CSPs should not bear the costs of complying with requests for assistance from enforcement agencies.⁷ In our clients' view, if a CSP is not, as a matter of principle, expected to bear the cost of assisting enforcement agencies who are acting in the public interest, that principle applies even more strongly in the case of assisting copyright owners to enforce private rights.

The principle that copyright owners should bear the cost of any acts done by CSPs to prevent online copyright infringement is also supported by the judgement of Emmett J in *Roadshow Films Pty Limited v iiNet Limited*. Emmett J decided that before there was any prospect of a CSP being required to take steps to prevent online infringement of copyright by its customers, it was necessary for the copyright owner to, amongst other things, reimburse the CSP for its reasonable costs of complying with the copyright owner's request.⁸

The principle that copyright owners should bear the cost of any acts done by CSPs to prevent online copyright infringement has recently been applied in a case where a copyright owner sought preliminary discovery from our clients and other CSPs.⁹

5 A CSP that implements an injunction in good faith should not incur any legal liability for doing so

As with our clients' contention about the costs of complying with the injunction, this contention is also based on drawing a parallel with the operation of Section 313(3) of the Telco Act and the approach of Emmett J in *Roadshow Films Pty Limited v iiNet Limited*.

⁷ See Section 314(2) of the Telco Act.

⁸ [2011] FCAFC 23, at paragraph 257.

⁹ See *Dallas Buyers Club LCC v iiNet Limited* [2015] FCA, 317, at paragraph 93.

As regards Section 313(3) of the Telco Act, the effect of Section 313(5) of the Telco Act is to exclude any liability that a CSP may have from an action in damages arising from the CSP acting in good faith on a request from an enforcement agency under Section 313(3) of the Telco Act. Our clients submit that the principle behind Section 313(5) should also apply where a CSP is acting pursuant to an injunction made at the request of a copyright holder.

As regards the approach of Emmett J in *Roadshow Films Pty Limited v iiNet Limited*, Emmett J decided that before there was any prospect of a CSP being required to take steps to prevent online infringement of copyright by its customers, it was necessary for the copyright owner to, amongst other things, indemnify the CSP in respect of any liability reasonably incurred by the CSP as a consequence of mistakenly suspending or terminating a service on the basis of allegations made by a copyright owner.¹⁰

In light of the above, our clients submit that the Bill should either:

- contain an exclusion of liability for a CSP against any claims against it arising from its implementation of an injunction in good faith (i.e. in similar terms to section 313(5)); or
- oblige the copyright owner to provide an indemnity to the CSP against any claims that arise from the CSP implementing an injunction in good faith.

6 The Bill should minimise the need for the CSP to contest the copyright owner's application

Our clients submit that having contested proceedings between the copyright owner and CSP every time a copyright owner wishes to rely on the provisions in the Bill is in neither party's interest. Therefore, the Bill should do all it can to minimise the need for a CSP to contest the application. In our clients' view, this can be done by:

- expressly providing that the copyright owner must bear the cost of implementing the injunction (discussed in Section 4 above);
- expressly excluding a CSP's liability or requiring the copyright owner to indemnify the CSP in respect of any claims made against the CSP arising from the CSP implementing the injunction in good faith (discussed in Section 5 above);
- barring a copyright owner from making an application to the Court unless it has first sought to gain the agreement of the CSP as to the particular 'reasonable steps' that the CSP will be required to take to disable access to the online location in the event that the Court decides it is appropriate to grant the application (please note, our clients wish to stress that this obligation should be limited to the issue of 'reasonable steps'. Whether or not the application has merit must be determined by the Court and is not something that should be capable of being agreed between the copyright owner and the CSP);
- barring a copyright owner from making an application to the Court unless it has first sought to gain the agreement of the CSP as to the payment of the CSP's costs of complying with the injunction; and
- not requiring the CSP to comply with the injunction until after the CSP's costs have been paid.

¹⁰ *ibid*, at paragraph 257.

Our clients submit that if the above matters are left to judicial discretion, then it is more likely that the application will need to be contested by the CSP.

Thomson Geer Lawyers on behalf of:

**Amcom Pty Ltd and
iiNet Limited
16 April 2015**