



Submission to the *Senate Environment and
Communications Legislation Committee*
inquiry into the *Copyright Amendment
(Online Infringement) Bill 2018*

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1 Executive Summary

The *Copyright Amendment (Online Infringement) Bill 2018* (the Bill) under Committee inquiry resulted from a review conducted earlier this year of the provisions introduced to the *Copyright Act 1968* by the *Copyright Amendment (Online Infringement) Act 2015*.

Pirate Party Australia considers the Bill to have the following issues:

1. The new "primary effect" test is overbroad and creates an unjustified burden on sites with user-generated content when better models for managing infringing user-generated content exist.
2. The new provisions applying to online search engine providers are insidious and expansionary censorship.
3. The "provide access" provisions of the example injunction elements are also overbroad and could conceivably apply to any VPN or proxy service.
4. The new provisions permit the removal of judicial oversight from follow-up requests made by copyright holders for blocking additional addresses. This makes the carriage service provider or online search engine provider the arbiter of those requests – however, there is a significant chance of a conflict of interest.

The Bill also fails to address a variety of issues raised by Pirate Party Australia in a submission to the review earlier this year. In particular, injunctions are not time-limited.

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2 Introduction

Pirate Party Australia would like to thank the Senate Environment and Communications Legislation Committee for the opportunity to comment on the *Copyright Amendment (Online Infringement) Bill 2018* (the Bill).

Pirate Party Australia made a submission¹ to the review of the *Copyright Amendment (Online Infringement) Act 2015* (the Scheme) earlier this year, outlining a variety of present and emerging problems with the Scheme and recommending its repeal.

None of the changes proposed in the Bill substantively address issues raised in that submission. Indeed, they generally make things worse for everyone except the few large rightsholder corporations who the Scheme is set up for. Coincidentally, the two major parties have taken significant donations from such corporations over the years.²

The inclusion of online search engine providers into the class of entities that can be required to perform censorship on behalf of rightsholders simply demonstrates how the internet has interpreted censorship as damage and routed around it. We expect to see something similar in response if this bill passes unamended. It will be interesting to see what sort of online service providers will be targeted in a few years time when the Scheme is next amended.

In the spirit of constructive criticism, this submission will primarily engage with the existing provisions of the Bill, as well as suggest several additional provisions within the scope of the proposed changes.

2.1 About Pirate Party Australia

Pirate Party Australia (the Pirate Party) is a political party based around the core tenets of freedom of information and culture, civil and digital liberties, privacy and anonymity, government transparency, and participatory democracy. It formed in 2008, and is part of an international movement that began in Sweden in 2006. Pirate Parties have been elected to all levels of government worldwide.

¹Pirate Party Australia, Submission to Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*, 24 March 2018.

²Allie Coyne, *Village Roadshow boosts donations amidst copyright crackdown* (2 February 2015) iNews <<https://www.itnews.com.au/news/village-roadshow-boosts-donations-amidst-copyright-crackdown-399933>>.

3 Benign aspects of the Bill

3.1 Evidentiary presumption

The adoption of the evidentiary presumption that an online location is outside Australia is benign and reasonable. It's actually in rightsholders' interests to prove, if they can, that an online location is within Australia – because if they can do that, they can almost definitely identify the operator and then have more profitable remedies available.

3.2 Ministerial exemption powers

The provision for exempting specified online search engine providers has good intentions (at least as described in the explanatory memorandum³).

3.3 Assorted changes relating to Online Search Engine Providers

Most of the items resulting from the inclusion of online search engine providers (items 3, 4, 5, 6, 7 and 10 of Schedule 1) are also benign in and of themselves - what's not benign is the inclusion of online search engine providers in the first place.

4 Problems with the Bill

4.1 Primary Effect Test

The addition of a "primary effect" test in 115A(1)(b)⁴ is both horrifically overbroad and unnecessary. It is intended (per the explanatory memorandum) to result in the criminalisation of some online file storage systems, but really requires all on-line locations to monitor and restrict their user-generated content to avoid risking violation. The way to prevent access to such infringing material is to establish a notice-and-takedown process for individual items hosted at the online location, not wholesale blocking. If an online location did refuse to engage in a takedown process, a "primary purpose" argument would be easy to make. The Pirate Party would be extremely unsurprised to see a "primary effect" argument attempted

³Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2018 (Cth).

⁴N.B. References to proposed legislation are made to their intended numbering as in the Bill (i.e. what they would become in the Act if the Bill were adopted unamended).

against any online location with only a small proportion of infringing content – rightsholders have a history of being overzealous.⁵

Recommendation 1: Remove the “primary effect” test.

4.2 Online Search Engine Providers

The new provisions referring to online search engine providers, primarily 115A(2B)(b), are insidious censorship. (Site-blocking as the carriage service providers are currently forced to implement is merely overt censorship.)

Recommendation 2: Remove the provisions relating to online search engine providers.

4.3 “Provide Access” wording

The wording “provide access” in 115A(2B) is overbroad; any sort of proxy or VPN service could easily be specified as providing indirect access to an infringing location.

Recommendation 3: Specify the wording: “provide *direct* access”.

4.4 Removal of judicial oversight

Subparagraphs 115A(2B)(a)(ii) and 115A(2B)(b)(ii) are **extremely problematic** in that they permit additional censorship without oversight. Such a provision essentially forces carriage service providers and online search engine providers to be the arbiter of additional block-requests made by rightsholders. This mixing of concerns is especially bad if, for example, the carriage service provider and the copyright holder share other commercial interests, or if the online search engine provider and the host of the infringing online location share commercial interests.

⁵See generally *Viacom International Inc v YouTube Inc* (SD NY, No 07 Civ 2103, 23 June 2010).

Recommendation 4: Ensure judicial oversight of all site blocking.

5 Other existing problems that are fixable within the scope of the Bill

5.1 Cessation and renewal of blocking

The address (e.g. domain name, URL or IP address) that a service operates at can and does change. Indeed, infringing online locations routinely change addresses to evade blocks making this action making this action inefficient to carry out and likely to unintentionally block non-infringing content (resulting in potentially unlawful censorship). A new operator of a new service at a previously-blocked address may not have standing to apply for a rescindment of that block. Further, such bureaucracy can be avoided by placing a time limit on blocks.

Recommendation 5: Specify in paragraph 115A(8) that an operator of an online location unlucky enough to use a previously-blocked address has standing to apply for a rescindment.

Recommendation 6: Institute a renewable 6 month time limit on any block.

5.2 Remedies for erroneous or collateral blocking

No remedies appear to exist for online locations blocked erroneously or as collateral damage. It's possible that either could happen; multiple unrelated websites can be hosted from the same IP address, for instance.⁶

Recommendation 7: Introduce an appropriate remedy for erroneous or collateral blocking of innocent online locations, with unblocking being the minimum remedy.

⁶Rohan Pearce, *ASIC reveals depth of ignorance over website blocking debacle* (27 August 2014) Computerworld <https://www.computerworld.com.au/article/553342/asic_reveals_depth_ignorance_over_website_blocking_debacle/>.

6 Conclusion

It is still the Pirate Party's view that the Scheme is over-reaching in terms of the balance between private and public interests in intellectual property. The proposed amendments in the Bill only extend that over-reach.