AUSTRALIAN DIGITAL ALLIANCE

To the Senate Standing Committee on Legal and Constitutional Affairs, Legislation Committee

Response to question on notice from Committee Hearing on 1 May 2015, from the Australian Digital Alliance

"How could the fundamental human rights to freedom of expression and freedom of information be captured as a factor this bill, as is the case in the EU?"

The ADA submits that a factor should be added to s115A(5).

The factor should read "the impact on freedom of expression and freedom of access to information".

The Charter of Fundamental Rights of the European Union Article 11 "Freedom of expression and information" provides

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
>
> 2. The freedom and pluralism of the media shall be respected.[1]

As the CJEU found in *Telekabel*[2] and the English High Court followed in *Cartier*[3] this fundamental right must be considered when granting injunctions under the EU Directives[4]

> None the less, when the addressee of an injunction such as that at issue in the main proceedings chooses the measures to be adopted in order to comply with that injunction, he must ensure compliance with the fundamental right of internet users to freedom of information.
>
> In this respect, the measures adopted by the internet service provider must be strictly targeted, in the sense that they must serve to bring an end to a third party's infringement of

[1] Charter of Fundamental Rights of the European Union 2000/C 364/01 <http://www.europarl.europa.eu/charter/pdf/text_en.pdf>

[2] C-314/12 UPC Telekabel v Constantin and Wega <http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30dd8126939f7ab445618167f9c8647285ab.e34KaxiLc3qMb40Rch0SaxuPc3j0?text=&docid=149924&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=220432>

[3] See Cartier International & ors v British Broadcasting Limited & Ors [2014] EWHC 3354 at 182 and also 193-196 <http://www.bailii.org/ew/cases/EWHC/Ch/2003/3354.html> and also EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 379 (Ch) (28 February 2013) at

[4] Note also that injunctions not granted under an EU directive still take into account Article 10 of the European Convention of Human Rights "Freedom of expression 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." http://www.echr.coe.int/Documents/Convention_ENG.pdf See for example

> copyright or of a related right but without thereby affecting internet users who are using the provider's services in order to lawfully access information.[5]

The Explanatory Memorandum echoes the reasoning from this quote: the 'purpose of the scheme is to allow a *specific and targeted* remedy to prevent those online locations which flagrantly disregard the rights of copyright owners from facilitating access to infringing copyright content' (EM at [6]). We submit that explicitly recognising the importance of freedom of expression and access to information would better reflect the government's intentions and help ensure that both parties', and the court's attention is directed to the impact on non-infringing communications and speech. Inclusion of such a factor would not make the remedy less effective: copyright owners have contended that the UK scheme, under which courts are obliged (as a result of EU law) to consider freedom of expression explicitly is effective. Courts have not found it an obstacle to block users from access to information when they are able to obtain it from a legitimate source.[6]

Australia is obviously not subject to the same obligations in relation to European Union directives, and while the explanatory memorandum (EM) (at 18) rightly points to our obligations under the ICCPR, courts are not required to explicitly consider that freedom of opinion and expression.

Under s115A(5)(g) the court is to consider the "public interest" which the EM notes (at 54) would include "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".

In our submission, this is inadequate protection for fundamental human rights, especially as the public interest is likely to also encompass rights that may come into conflict with freedom of expression, such as protection of intellectual property.

Freedom of expression and access to information are most important when considering sites that have both legitimate and infringing uses. Although the ADA strongly contends that s 115A ought not to extend to sites that merely 'facilitate' infringement, if this broad wording is retained, we would consider it even more critical to include a reference to freedom of expression and access to information, as activities that facilitate infringement could include journalists' publications and other sites which provide information without providing infringing content. Freedom of expression considerations may also be particularly important when dealing with sites that are not infringing in their home jurisdiction but are infringing in Australia. For example materials that are permitted under an exception not available in Australia, such as fair use, or materials that have a shorter copyright term overseas.

We recommend that the EM should explicitly link the protections under Article 19 of the International Covenant on Civil and Political Rights to the factor "impact on freedom of expression and access to information" and also make note of the EU experience.

[5] C-314/12 UPC Telekabel v Constantin and Wega

[6] See for example EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors [2013] EWHC 379 (Ch) (28 February 2013) at 107