

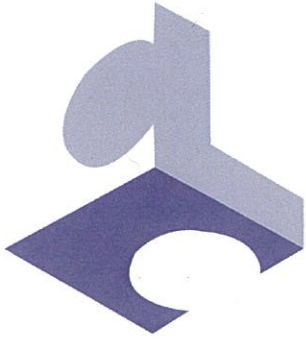
## **Communications Law Centre, UTS**

Submission to the Senate Legal and Constitutional Affairs  
Legislation Committee on the *Copyright Amendment  
(Online Infringement) Bill 2015*

16 April 2015

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## Communications Law Centre, UTS

### 1. Introduction

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- 1.1 The Communications Law Centre, UTS (“CLC”) is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate this opportunity to comment on the *Copyright Amendment (Online Infringement) Bill 2015* (“Bill”).
- 1.2 In September 2014, the CLC responded to the proposals made by the Attorney-General’s and Communications Departments in the *Online Copyright Infringement Discussion Paper* (“Discussion Paper”). In our submissions, we welcomed these proposals and, in particular, supported the proposed amendment of the *Copyright Act 1968* (“Act”) to enable extended injunctive relief.
- 1.3 Whilst the CLC broadly supports the measures set out in the Bill, it is clear that these cannot, alone, provide a full solution to the problem of online copyright infringement in Australia. The CLC also supports the implementation of the Copyright Notice Scheme Industry Code currently being reviewed by the Australian Communications and Media Authority. It further welcomes continuing action by copyright owners to make content globally accessible and affordable.
- 1.4 In the view of the CLC, it is appropriate that the injunctive relief enabled by the Bill should apply only against sites operated outside Australia. There are already workable avenues for copyright owners to pursue primary infringers in Australia.
- 1.5 The CLC understands that exclusive licensees are to enjoy the same standing as copyright owners under the new provisions (although licensees will not, of course, be able to bring actions against owners of copyright). The CLC considers it appropriate that exclusive licensees have standing to apply for injunctive relief.
- 1.6 In the following discussion, the CLC comments particularly on the following aspects of the Bill:
  - Fault element;
  - “Primary purpose” test;
  - Matters to be taken into account;
  - Respondents to actions;
  - Wholesale level blocking; and
  - Jurisdiction.

## 2. Fault element

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- 2.1 As indicated in our submissions on the Discussion Paper, whether a carriage service provider (“CSP”) has knowledge of the infringing (or facilitating) conduct should not, in our view, be a matter relevant to exercise of the new injunction power.
- 2.2 Accordingly, the CLC is pleased to see that the Bill’s provisions do not require knowledge, or fault, on the part of the relevant CSP.
- 2.3 Issues concerning CSPs in authorising infringement rightly remain a matter for consideration under sections 36 and 101 of the Act.

## 3. “Primary purpose” test

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- 3.1 As stated in our submissions on the Discussion Paper, the CLC considers that copyright owners should be required only to prove that *one* of the purposes of the offending website (or, in the language of the Bill, the “online location”) is infringement, or facilitation thereof.
- 3.2 The CLC shares the concern of the Australian Copyright Council (“ACC”) that the “primary purpose” test in proposed subsection 115A(1)(c) sets an unworkably high threshold. As contended by the ACC, the “primary purpose” test must be considered in the context of the matters set out in proposed subsection 115A(5). In our submission, the matters mandated for consideration in proposed subsections 115A(5)(a) – (g), and in proposed subsection 115A(5)(k), have particular relevance for any assessment as to purpose, as will be illustrated below.
- 3.3 It should also be recalled that the purpose test in proposed subsection 115A(1)(c) will be activated only if the Court is satisfied that the foreign online location does, in fact, infringe or facilitate infringement. This is not to suggest that any consideration of purpose should be abandoned, but rather, to acknowledge that proposed subsections 115A(1)(a) and (b) will in all cases perform a “filtering” function before the threshold test in proposed subsection 115A(1)(c) is engaged.
- 3.4 The CLC accordingly submits that proposed subsection 115A(1)(c) should be amended to read as follows:

“a purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia)”.
- 3.5 This change would lower the evidentiary threshold to be met by copyright owners, without relieving copyright owners entirely of the burden of establishing purpose. As noted by the ACC, there is practical difficulty in requiring copyright owners to prove a purpose (primary or otherwise) of a foreign online location. The amendment we propose would at least reduce the difficulty of this task, so that the Bill meaningfully reduces practical barriers faced by copyright owners in enforcing their rights.
- 3.6 Further, a “purpose” test would not, we submit, alter the substantive effect of proposed subsection 115A(1) as intended by the legislature. For example, the Explanatory Memorandum to the Bill affirmed the “primary purpose” test as a means of ensuring that the United States iTunes store (for

example) is not captured by proposed subsection 115A(1). The Minister for Communications, in his second reading speech, made a similar point about exclusion from the provision's operation of legitimate overseas sites such as US Netflix. However, adopting a "purpose" (rather than "primary purpose") test could not be expected to result in such sites (which are legitimate operations that lawfully provide copyright content to individuals located outside Australia) being captured by proposed subsection 115A(1).

3.7 The Explanatory Memorandum also raises the example of an art gallery website operated outside of Australia, which may contain an unauthorised photograph. We would not expect a modified "purpose" test to capture such a site – if the infringement is inadvertent (or occasional), we consider it would be difficult to persuade the Court that even one "purpose" of the site is infringement, or facilitation thereof.

3.8 However, even if it could be said that "a purpose" of such a site was infringement or the facilitation of infringement, we consider it likely that the factors in proposed subsection 115A(5) would operate to prevent an injunction from being granted. In particular, in circumstances of inadvertent infringement by a site, we consider that the Court would likely draw (or would be constrained to draw) the following conclusions on matters mandated for consideration by subsection 115A(5) – for example:

- (a) The infringement is not flagrant;
- (b) There is an absence of directories, indexes and categories of the means to infringe or facilitate infringement;
- (c) The owner or operator does not demonstrate a disregard for copyright generally;
- (d) The online location has not been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- (e) Disabling access to the online location is not a proportionate response, given the ratio of infringing to non-infringing content appearing at the online location;
- (f) The impact of the grant of an injunction on the owner or operator of the website, and on users of the website, would be substantial; and
- (g) It is not in the public interest to disable access to the online location.

The Court would also have discretion to consider the particular circumstances of the online location (for example, whether, and if so, how often, the online location has included infringing material in the past) under proposed subsection 115A(5)(k) ("any other relevant matter").

Accordingly, even if "a purpose" of the gallery website could be said to be copyright infringement or its facilitation (which appears unlikely), the application of subsection 115A(5) could be expected to prevent the granting of an injunction to block it. In our view, the Bill contains safeguards to prevent the blocking of such sites, even in the absence of the onerous "primary purpose" threshold.

3.9 The CLC is also concerned that the "primary purpose" test introduces too much uncertainty into the assessment to be made under proposed subsection 115A(1). It is unclear how the various identified "purposes" of an online location, and the relationships between them, are to be assessed so as to determine which one "purpose" is "primary". For example, is the assessment to be made through a consideration of the relative revenue percentages of each "purpose"? Or through a consideration of the subjective importance placed on each "purpose" by the operator of the online location? If the

latter, can conclusions about the subjective views of the operator be drawn from objective evidence (and if so, which categories of evidence)?

- 3.10 The implied requirement to identify all “purposes” of an online location, allowing assessment of the relative importance of each in determining “primary purpose”, only increases the evidentiary burden placed on the copyright owner under proposed subsection 115A(1). The current lack of clarity as to the accepted means of assessing the relative importance of “purposes” also makes the copyright owner’s task more difficult.
- 3.11 Finally, as noted in our submissions on the Discussion Paper, a “purpose” test would have the effect that sites with a “primary purpose” that is not copyright infringement, but is nonetheless unlawful, are not excluded from the operation of the new provisions. Further, a “purpose” that is merely “secondary” (according to whichever means of assessing relative importance is to be adopted) may nonetheless manifest itself in numerous instances of infringement. Online locations that are shown to regularly or flagrantly infringe should not be excluded from consideration under proposed subsection 115A(1) merely because the Court cannot be satisfied that their “primary purpose” is infringement or the facilitation thereof. A “purpose” test would ensure that such online locations are subjected to consideration by the Court, with particular regard to the matters set out in proposed subsection 115A(5).

#### **4. Matters to be taken into account**

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- 4.1 As evidenced above, in our view it is important that the list of matters set out in proposed subsection 115A(5) be reviewed together with the threshold factors in proposed subsection 115A(1). The subsections will operate together to determine the circumstances in which an injunction is granted, and accordingly cannot be considered in isolation.
- 4.2 If the “primary purpose” test in proposed subsection 115A(1) is amended to be a “purpose” test, as suggested in paragraph 3.4, above, then we consider that the matters listed in proposed subsection 115A(5) will operate so that the combined effect of the subsections is substantively similar to the “primary purpose” test. Indeed, the same substantive effect could likely be achieved even reducing the number of matters listed in new subsection 115A(5), and/or amending the subsection to allow greater flexibility on the part of the Court (for example, by changing the matters from mandatory, to guiding, factors).
- 4.3 If the “primary purpose” test in proposed subsection 115A(1) remains in the Bill, then the CLC would be particularly concerned about the potentially limiting effect of the matters listed in new subsection 115A(5). For example, once the substantial evidentiary burden of proving a primary purpose of infringement is discharged by a copyright owner, we consider that a perceived absence of flagrancy should not weigh against the grant of an injunction. Similarly, if the Court is satisfied that an online location has a “primary purpose” of infringement (or facilitation of infringement), in our view the percentage of infringing content, compared to legitimate content, at that location at a particular point in time should not have the potential to determine the Court’s decision as to whether to grant an injunction.

4.4 In this respect, the CLC concurs with the concerns of the ACC, as described in its submissions on the Bill. The list of matters that the Court must consider, in the current version of the Bill, is long and it is unclear how the various factors are to be weighed against one another. The weight that might be given to particular matters listed in proposed subsection 115A(5) is of concern when considering the threshold matters that must be satisfied under subsection 115A(1) as currently proposed.

## **5. Respondents to actions**

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5.1 In the Discussion Paper it was stated that a new injunctions power under the Act would “clarify that a rights holder may list a number of ISPs as respondents to an application for injunctive relief”.

5.2 It is necessary that a copyright owner be able to list a number of CSPs as respondents, for the very reason identified by the Discussion Paper: that this would “reduce the opportunity for people to ‘evade’ the operation of [injunction] orders by switching ISPs”. Allowing subscribers to evade the operation of injunctions by switching CSPs would substantially lessen the practical benefit of extended injunctive relief.

5.3 Whilst the Explanatory Memorandum to the Bill implies that multiple CSPs may be subject to an injunction order (“The effect of the order would be to prevent Australian subscribers of CSPs that are subject to the order from accessing some online locations”), this is not made explicit.

5.4 The CLC considers that the ability of copyright owners to list a number of CSPs as respondents to a single action should be clearly reflected in the text of the Bill.

## **6. Wholesale level blocking**

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6.1 The Discussion Paper similarly noted that, pursuant to a new injunctions power, infringing websites “would need to be blocked by carrier level ISPs at the wholesale level, ensuring that re-sellers would be unable to make blocked sites available to subscribers”.

6.2 The effect of an injunction under the current version of the Bill is to require the relevant CSP to “take reasonable steps to disable access to the online location”.

6.3 Some guidance as to the kinds of steps that may be “reasonable” in this context is provided by the Explanatory Memorandum to the Bill. Yet, it appears to be contemplated that the specific actions to be taken by a CSP will be detailed by Court order in each case.

6.4 We do not doubt the wisdom of the Court to make appropriate orders according to the circumstances. Nonetheless, for the sake of clarity and certainty, we submit that the Bill should include a minimum requirement for carrier level CSPs to block access at wholesale level.

## **7. Jurisdiction**

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7.1 We note that the Bill provides for jurisdiction to lie with the Federal Court of Australia only. The Federal Circuit Court of Australia, and the Supreme Courts of States and Territories, are expressly stated not to have jurisdiction in respect of applications under proposed section 115A.

7.2 In this respect, the CLC concurs with the points made by the ACC in its submissions. In our view, the process of applying for injunctive relief under the new provisions would be made more efficient and more equitable (by improving access for individual copyright owners, in particular) by extending jurisdiction to the Federal Circuit Court.

## 8. Conclusion

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8.1 The CLC welcomes the introduction of the Bill and commends the extension of injunctive relief for copyright owners under the Act.

8.2 It is appropriate, in our view, that the Bill outlines a “no-fault” scheme, which does not require an investigation into the knowledge (or lack thereof) of the respondent CSP.

8.3 However, the CLC shares the concerns of the ACC that the “primary purpose” threshold test sets an unworkably high barrier for copyright owners seeking relief. The CLC recommends that proposed subsection 115A(1)(c) should be amended to impose a “purpose”, rather than “primary purpose” test. This would lessen the evidentiary burden faced by copyright owners, without substantively impacting upon the Bill’s safeguards for legitimate overseas sites, or sites that inadvertently infringe (for example).

8.4 The CLC agrees with the views of the ACC that the list of matters in proposed subsection 115A(5) is overly long, and that it is currently unclear how each of the matters is to be weighed against the others. The CLC would be particularly concerned about the potential operation of proposed subsection 115A(5) in circumstances in which the “primary purpose” test is retained. Accordingly, the list of matters in proposed subsection 115A(5) should be reduced, and/or more judicial discretion allowed in their application, particularly if the “primary purpose” test is retained.

8.5 Further, the CLC considers that:

- the ability of copyright owners to bring an application listing multiple CSP respondents; and
- the requirement for carrier level CSPs to block online locations at wholesale level, where the Court orders access to be disabled,

should both be expressly stated in the Bill.

8.6 Finally, for reasons of efficiency and access equity, we consider that both the Federal Court and the Federal Circuit Court should be given jurisdiction to hear applications under new section 115A of the Act.

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