

Committee Secretary
Senate Legal and Constitutional Affairs Committee
P O Box 6011
Parliament House
Canberra ACT 2600
Via email: legcon.sen@aph.gov.au

6 May 2015

Dear Madam

We are responding to the question raised by the Senate Committee Chair as to the Intellectual Property Committee of the Business Law Section of the Law Council of Australia's (the **Intellectual Property Committee**) view on the requirement in the Copyright Amendment (Online Infringement) Bill 2015 that the 'primary purpose' of the online location or website must be to infringe or facilitate infringement of copyright. The Committee Chair referred to the submissions by rights holders, to the effect that the primary purpose test was too high a threshold and that it should be replaced by a test of whether the website had a 'substantial purpose or effect' of infringing or facilitating infringement.

The Intellectual Property Committee's view is that the primary purpose test should be retained because it best captures the intention of the Bill to provide a blocking remedy against true pirate websites operating overseas. As the Explanatory Memorandum points out, the threshold is intentionally high so as to avoid the potential for legitimate websites to be blocked. The Intellectual Property Committee considers that the primary purpose test would cover the types of websites which have been the subject of website blocking orders in the United Kingdom.

The Intellectual Property Committee would be concerned by the adoption of a substantial purpose or effects test. We are of the view that it would create considerable uncertainty given the vagueness of the term 'substantial' and the interpretation given to the same term in another context in the *Copyright Act 1968*, namely the concept of 'substantial part' in which the term signifies 'not insignificant' or 'real'. The adoption of such a test has the potential to set the bar too low and allow blocking orders to be obtained against legitimate websites.

Yours faithfully,

John Keeves, Chairman
Business Law Section

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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