



Ms Christine McDonald  
Secretary  
Senate Environment and Communications Legislation Committee  
Parliament House  
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20 November 2018

Dear Ms McDonald

Foxtel.com.au

**Re: Inquiry into the Copyright Amendment (Online Infringement) Bill 2018**

Thank you for the opportunity to provide comments on the Copyright Amendment (Online Infringement) Bill 2018 (the Bill).

Foxtel welcomes the Bill and has contributed extensively to the Government's consultation activities surrounding the development of the Bill. Foxtel is a key stakeholder regarding the Bill, having used the existing site-blocking provisions in section 115A of the *Copyright Act 1968* (Cth) (the Act) on numerous occasions.

### **Background**

Section 115A of the Act was introduced in 2015 to help reduce online copyright infringement. The provisions enable a copyright owner to apply to the Federal Court of Australia to block access to an online location operated outside Australia with the primary purpose of infringing (or facilitating infringement of) copyright content.

In its capacity as a copyright owner, Foxtel has had three primary applications and six secondary applications heard by the Federal Court, thus far resulting in the blocking of 36 sites and around 320 domains.

In total, the Federal Court has ordered around 88 sites and 475 domains to be blocked under section 115A.

Foxtel's experience of section 115A is that it is both efficient and effective in achieving its fundamental goal of reducing copyright infringement. This is supported by the extensive evidence relating to the reduction of traffic to sites subject to blocking orders<sup>1</sup>, as well as the increasingly efficient manner in which blocking claims are being considered and dealt with by the Federal Court.

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<sup>1</sup> **Incopro Site Blocking Efficacy – Key Findings Australia February 2018, page 2, <https://www.creativecontentaustralia.org.au/research/2018>.**

## The need for further refinement

Whilst it is Foxtel's experience that the provisions in section 115A are operating in a positive way and have delivered on the objective of helping to reduce online copyright infringement, Foxtel supports the amendments proposed by the Bill and believes they will further enhance the section's operation and effectiveness, as they:

- amend the online locations covered to include those that have the 'primary effect' or the primary purpose of infringing, or facilitating and infringement of, copyright. This expands the focus from an online location's primary purpose to the effect of its use;
- make it clear that the Court may specify a method of identifying any new domain names, URLs or IP addresses – also known as 'proxy' sites – that provide access to the online location. Currently, the process is the copyright owner must file affidavit evidence and seek orders from the Court to amend those made in the original application to include the proxy sites; and
- broaden the application to 'online search engine providers' as well as carriage service providers (CSPs). Search is the most prolific source via which people access piracy sites.

### 'Primary effect'

Clause 2 of the Bill would amend section 115A so that a copyright owner may apply for an injunction in relation to online locations that not only have the primary purpose of facilitating online copyright infringement, but also in relation to sites which have the 'primary effect' of facilitating an infringement of copyright. This expansion will substantially improve the operation of section 115A.

It can be difficult in some circumstances to establish that some online locations have the 'primary purpose' of infringing copyright (the current threshold), even though that is the practical effect of the locations. This is relevant to online file-hosting services, such as cyberlockers, which are widely used to facilitate the unauthorised sharing of copyright material. Data prepared for Foxtel shows that between March to August 2018, visits to cyberlocker sites ranked ahead of visits to torrent indexing sites and were second only to visits to video streaming sites.

Any concerns as to this amendment leading to the blocking of legitimate websites are misplaced. The burden of proof is on the copyright owner to satisfy the Federal Court that the online location meets this threshold, with section 115A(5) containing an extensive list of matters which may also be taken into account by the Court in determining whether to grant the injunction.

Notably, in the Federal Court proceedings to date: the Court has not declined to make orders with respect to any online location the subject of an application; no person who operates an online location has ever applied to be joined as a party; and nor has any application been made by such persons to vary or discharge the orders made by the Court.

### Proxy sites

While section 115A has provided an effective method of reducing traffic to infringing locations, there are methods by which location operators can avoid the injunctions. For example, they may use another domain name, create a new URL or obtain a new IP address. This allows the blocked online location to become accessible to users again.

The Bill provides a means of further mitigating the impact of this behaviour through new subsection 115A(2B). This empowers the Federal Court to make



injunctions which require CSPs and online search engine providers to block (or not provide in search results) certain domain names, URLs and IP addresses that provide access to an online location, including ones that emerge after an injunction is made, provided the parties agree in writing.

Foxtel supports new subsection 115(2B) as means of ensuring greater flexibility in the scheme and as a way of reducing the expense of formal Federal Court proceedings via agreement between the parties. Copyright owners will still be required to apply for a new injunction in relation to new online locations that are not proxy sites of previously blocked online locations, ensuring no online location will be blocked without appropriate judicial scrutiny.

### Search engine providers

Clause 2 of the Bill inserts a new subsection 115A(2) that will enable a copyright holder to apply to the Federal Court for an injunction to require online search engine providers to take reasonable steps to not provide a search result that refers users to online locations that infringe copyright.

This is an important change, as search continues to be the most used source of accessing piracy sites.<sup>2</sup>

Research prepared for the Department of Communications and the Arts found that 20% of all adults and 50% of active copyright infringers responded with "Search engine" when asked how they find out where to access pirated movies and TV shows.<sup>3</sup> Foxtel strongly believes that extending the site blocking powers to search engines so that they must not provide search results that refer users to online locations that infringe copyright would have a substantial impact on reducing online copyright infringement in Australia.

We understand that search engines already remove URLs from site indexes to comply with other Australian laws and community standards. On this basis we do not believe the expansion of these powers to search engine providers will be overly burdensome for search providers and that it would be relatively routine for search engines to comply with Australian blocking orders.

For example, search engines currently de-index URLs for purposes including national security, violation of defamation and privacy and security laws, and can remove that content at the request of governments and in some cases individuals. We note that where search engines remove content in line with their product community standards this is done on a voluntary basis, rather than being compelled to do so by law, adding further weight to the argument that removal of content by search engines is relatively easy.

Lastly we note the new subsection 115A(8B) of the Bill which provides for the ability to exempt specific search providers or classes of search providers from an application for an injunction. We do not believe that such a provision is required.

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<sup>2</sup> SARI, **The Role of Search in Content Piracy Australian Survey Key Results March 2018**, <https://www.creativecontentaustralia.org.au/research/2018>.

<sup>3</sup> Sycamore, **Project Harrison: Australian Piracy Behaviours and Attitudes 2017 Wave**, page 26, <https://www.creativecontentaustralia.org.au/research/2018>.



### Concluding remarks

Foxtel recommends the Bill be passed in its current form. This will further enhance the operation and effectiveness of the site blocking power which forms an important part of the overall effort to reduce online copyright infringement, and supports Foxtel's ability to contribute to Australian culture and the economy.

Thank you for the opportunity to comment on these matters.

Yours Sincerely,

Lynette Ireland  
Chief General Counsel