



# Submission to the Senate Environment and Communications Legislative Committee – Inquiry into the Copyright Amendment (Online Infringement) Bill 2018

**Joint Submission**

**20 November 2018**

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## 1 About us

- 1 The Australian Film & TV Bodies include the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and Independent Cinemas Australia (ICA).<sup>1</sup> They represent the widest range of film and TV interests in Australia.
- 2 Our aim is to support, protect and promote the safe and legal consumption of movie and TV content across all platforms, allowing creators to get compensated fairly for their work. We work together to promote this aim through education, public awareness and research programs. Our members represent a large cross-section of the film and television industry that contributed \$5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.<sup>2</sup>

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## 2 General Comments

- 3 The Australian Film & TV Bodies support the *Copyright Online Infringement Bill 2018* (the **Bill**) in its current form.
- 4 The Bill makes a small number of targeted and proportionate changes to the site blocking mechanism in s 115A of the *Copyright Act 1968* (Cth) (the **Act**), which will improve its efficiency and effectiveness in a manner that is consistent with international practice.
- 5 Section 115A was introduced in 2015 following an extensive review of legislative solutions to the internet piracy problem for Australia's creative industries. Its stated purpose was to "reduce online copyright infringement...as a precise response to a specific concern raised by copyright owners", by introducing a no-fault mechanism that did not require copyright owners to "first establish the [ISP's] liability for copyright infringement or authorisation of copyright infringement".<sup>3</sup> In the 3 years since its enactment, s 115A has proven to be an effective mechanism to counter online piracy and has reduced usage of blocked piracy sites by 53.4% since December 2016<sup>4</sup>.
- 6 At the time s 115A was introduced, the Government committed to a review of the provision several years after its enactment. That review took place in February/March 2018. It involved broad consultation carried out by the Department of Communications and the Arts (the **Department**). A further limited consultation was carried out by the Department in September 2018. These review processes "found the scheme is working as intended, but also identified some potential gaps and areas in which the scheme could be strengthened".<sup>5</sup> These were appropriate findings, given the available evidence on the operation of s 115A since its implementation.

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<sup>1</sup> See Appendix A for details for each of the organisations comprising the Australian Film & TV Bodies.

<sup>2</sup> Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association <[http://screenassociation.com.au/wp-content/uploads/2016/01/ASA\\_Economic\\_Contribution\\_Report.pdf](http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf)> v.

<sup>3</sup> *Copyright Amendment (Online Infringement) Bill 2015*, Explanatory Memorandum (**2015 EM**), p 2, para 1.

<sup>4</sup> Incopro Report on Site Blocking Effectiveness in Australia, February 2018.

<sup>5</sup> *Copyright Amendment (Online Infringement) Bill 2018*, Explanatory Memorandum (**EM**), p 10, para 2.

- 7 The findings of the Department's review processes are reflected in the amendments proposed by the Bill. The targeted amendments to s 115A that are effected by the Bill improve the practical application of the site blocking mechanism in a manner that balances the interests of all relevant stakeholders, and reflects the lessons learned since s 115A was introduced in 2015. In particular, the Bill improves the effectiveness and efficiency of the site blocking mechanism in achieving its objective of reducing large-scale copyright infringement by making a small number of targeted improvements, without adding complexity to the process or adversely affecting stakeholders or third parties in a disproportionate way.
- 8 The Australian Film & TV Bodies represent members who are the most frequent users of s 115A and are therefore in an ideal position to comment on the Bill and its impact. Overall these amendments will strengthen a provision which allows copyright owners to take action against online infringing locations, in which they bear the burden of applying to and satisfying the Court that the requested orders meet the requirements of s 115A. The more detailed comments below regarding the specific amendments introduced by the Bill are informed by this practical experience of using s 115A as an enforcement mechanism.

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### 3 “Primary purpose or primary effect”: s 115A(1)

- 9 Amended s 115A(1) extends the application of the provision to online locations outside Australia that have the “primary purpose or primary effect of infringing, or facilitating an infringement of copyright”. It is an amendment that the Australian Film and TV Bodies strongly support.
- 10 The existing limitation in s 115A to online locations that have the necessary “primary purpose” represents an “intentionally high threshold for the copyright owner to meet as a safeguard against potential abuse”: 2015 Explanatory Memorandum (**EM**), para 38. However, the Department's review processes have concluded that this threshold was too high, given that “stakeholders identified that s 115A does not...enable efficient injunctions against some online locations which disregard the rights of copyright owners but might not have the primary purpose of infringing copyright or facilitating the infringement of copyright”.<sup>6</sup> The Department's review identified cyberlockers as a particular problem. Another issue identified by the Department was the difficulty applicants face in proving the intent of operators of the foreign online locations (who are generally not parties to an action under s 115A): Regulation Impact Statement (**RIS**) paragraphs 31 to 34 and 38. (Some, but not all, of these difficulties will be addressed by the amended s 115(5A), which provides that the online location is presumed to be outside Australia unless the contrary is established - a welcome presumption.)
- 11 The proposed extension of the “primary purpose” threshold to include “primary effect” is a small and proportionate extension which ensures that pirate locations that generate significant profits by making infringing content available to Australian consumers are not able to avoid the reach of s 115A simply by hosting some amount of legitimate content as a ‘cover’ for their substantial infringing activities (as is the case with many cyberlockers – see RIS, paragraphs 33 and 34). It is appropriate that such steps

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<sup>6</sup> Department's October 2018 Regulation Impact Statement attached to the Explanatory Memorandum (**RIS**), para 813.

are not capable of defeating an application under s 115A, and conduct that involves disguising intentional infringing activity is not rewarded (and other operators of online locations are not incentivised to try to take advantage of a potential loop hole in s 115A).

- 12 The proposed expansion of the threshold to cover the primary “effect” of an online location is entirely consistent with the approach recommended by the Harper Review’s Final Report in replacing the purpose-based provisions of the Competition and Consumer Act 2010 with “purpose, effect or likely effect”, a recommendation that was accepted and has now been enacted into law with s 2 of the *Competition and Consumer Amendment (Competition and Policy Review) Act 2017* (Cth).
- 13 The approach introduced by the Bill is consistent with international practice. Other jurisdictions do not impose a “primary purpose” or similar requirement. For instance the EU Infosoc Directive<sup>7</sup> Art 8(3) states that “rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right”. The closest parallel is Singapore, where a primary purpose to commit or facilitate copyright infringement is a matter to which the Singapore High Court must have regard, but it can be given “such weight as the High Court considers appropriate” and it does not function as a minimum threshold.<sup>8</sup>
- 14 Legitimate services such as Dropbox and Pinterest would not be caught by s 115A as revised by the Bill, especially in light of the factors that the Court is required to consider under s 115A(5) (also referred to in the 2015 EM as setting an “intentionally high threshold” (2015 EM, para 6), and the Bill does not make any amendment relaxing those factors). This is confirmed in the EM, which recognises that the new test “is sufficiently high to exclude online locations that are primarily operated for a legitimate purpose but may contain a small amount of infringing content”. The Australian Film and TV Parties agree.
- 15 Additionally, it should be noted that the balance of the other amendments to s 115A(1) introduced by the Bill (“take such steps as the Court considers reasonable”) merely reflect how the Federal Court has applied the provision in practice to date, i.e. setting out the required steps in the blocking order: EM, page 11, para 1.

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## 4 Extension to online search engine providers

- 16 Section 115A reduces online copyright infringement by making it more difficult for Australians to access online pirate platforms. Allowing major search engines to continue to direct Australian internet users to those platforms once they have been blocked by an order of the Federal Court significantly undermines the policy and effectiveness of the blocking orders. There is no credible justification for leaving open this loop hole.

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<sup>7</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>8</sup> Section 193DDA(2), Singapore Copyright Act.

- 17 The dominant role played by search engines in facilitating the ongoing access by internet users to these infringing locations is reflected in consumer research conducted by Screen Audience Research International in its 'Role of Search in Piracy' Report.<sup>9</sup> This report found that:
- (a) 70% of first-time consumers of illegitimate content online use search engines when discovering a source of illegal content. Of these consumers, 44% state that they were not actively looking for infringing content at the time – they are directed to it by operation of the search technology;
  - (b) The most common search terms leading consumers to pirate sites are generic and do not demonstrate any clear intent to seek infringing content or knowledge of its location; and
  - (c) 47% of online consumers trying to access a blocked infringing site use search engines to find an alternative site.
- 18 These findings are consistent with internet traffic data collected from Copyrightpage (the site blocking notice page managed and operated by a group of rightsholders which provides the 'blocked' message for some carriage service providers).<sup>10</sup> The actual webpage traffic data shows that search engines are responsible for an extraordinary **98% of all referrals** by intermediaries to the blocked sites. This data clearly demonstrates that search engines are a conduit to online pirate content and uniquely placed to meaningfully impact access to pirate websites, through compliance with site blocking orders.
- 19 The gap in coverage of s 115A in relation to search engines was identified by the Department as a flaw in s 115A in its current form: RIS, paras 28 -30.
- 20 To address this significant issue, and not rely on the uncertainty of voluntary compliance, the Bill extends s 115A to allow orders to be made against "online search engine providers", provided the requirements of the provision are met. This is a narrow and proportionate extension to the current regime, that is directly targeted at the problem identified in the Department's review: EM, page 11.
- 21 There is no danger that this amendment would unintentionally apply to online platforms other than search engines. The language of the Bill and the EM explicitly refer only to search engines, and the EM is even more specific in language and intent that the amendment would apply only to "major internet search operators that index search results on the World Wide Web": EM, page 15, para 1. The meaning of this will be clear to an Australian Court. Major search engines have increasingly come before Australian Courts and been quick to identify themselves by the distinct nature of their services, in comparison with other online service providers. The language of the Bill will also be understood in the context of the proposed new definition of "service provider" in the safe harbour provisions in Div 2AA of the Act, when it comes into force.
- 22 The Bill also includes a mechanism to allow the Minister to make a declaration excluding online search engine providers from the operation of the Scheme: see new s 115A(8A and (8B). The EM clarifies that this is intended to provide a "safety net" to ensure that a very narrow range of "smaller operators"

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<sup>9</sup> SARI, *The Role of Search in Piracy* (March 2018) [https://www.creativcontentaustralia.org.au/\\_terature\\_211105/SARI\\_-\\_Ro\\_e\\_of\\_Search'\\_Austra\\_an\\_Survey](https://www.creativcontentaustralia.org.au/_terature_211105/SARI_-_Ro_e_of_Search'_Austra_an_Survey).

<sup>10</sup> There have been nearly 3.5 million sessions recorded at Copyrightpage to date. Data available on file with the Australian Film & TV Bodies.

not intended to be captured by s 115A are excluded from reach: EM page 15, paras 1-2. While this mechanism is unusual and unprecedented in the context of intellectual property legislation, and the Australian Film & TV Bodies have concerns about potential unintended consequences, if it is used judiciously in the limited circumstances foreshadowed by the EM, it is a provision that could work in this particular instance. To provide some certainty and guidance for the industry, consideration might be given by the Department of Communications and the Arts to develop guidelines for the Minister to consider in making a declaration.

- 23 Other relevant amendments included in the Bill will ensure that the interests of stakeholders are recognised and effectively balanced by the extension to major search engines. In particular, the Bill introduces factors that can be taken into account by the Court before a site blocking order is made against a search engine i.e. (1) “whether not providing search results that refer users to the online location is a proportionate response in the circumstances” and “whether it is in the public interest not to provide search results that refer users to the online location”: new s 115A(5)(ea) and (ga). Further, search engines will only be required to block search results in Australia, and they will be on the same footing as carriage service providers (**CSPs**) in relation to costs if they do not participate in the proceedings: new s 115A(9) and EM, page 11, para 5. The Bill levels the playing field between search engines and CSPs.
- 24 This amendment is also consistent with international best practice. Court orders requiring search engines to disable access to infringing sites have already been made in the European Union. In the *Allostreaming* cases,<sup>11</sup> the French Supreme Court confirmed that search engines could qualify as intermediaries under Article 8.3 of the EU InfoSoc Directive, and thus could be subject to orders to delist websites ordered blocked under Article 8.3. The Court concluded that search engines were among those intermediaries best placed to bring copyright-infringing activities to an end. The amendment will therefore bring Australia into line with the best practice around the world in terms of the scope and operation of site blocking orders.

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## 5 Extending blocking orders

- 25 The Bill introduces a new provision in s 115A(2B) which clarifies that the Federal Court may issue blocking orders in terms that require the carriage service provider or online search engine provider to block domain names, URLs and IP addresses that they agree with the copyright owner have started to provide access to the online location after the injunction was made.
- 26 This is targeted at the problem identified by the Department, that “online locations are quickly able to circumvent blocking orders by changing domain names, IP addresses and URLs” and that the process for obtaining new orders “operates too slowly to allow copyright owners to address...the emergence of new pathways to the blocked site. The Department has recognised, based on the review of the evidence of site blocking applications in practice, that the Court has the power under the existing s

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<sup>11</sup> *SFR and Others v Association of Cinema Producers and Others*, Cour Cass, C v 1, 6 Ju y 2017, No 16 17.217, 16 18.298, 16 18.348, 16 18.595, ECLI:FR:CCASS:2017:C100909 (A ostream ng).

115A to make more responsive orders and that could be made clear through a clarifying amendment”: RIS, paras 35 and 37. No stakeholder is prejudiced by this amendment.

- 27 Whether or not an injunction containing this flexibility is issued is still a matter to be determined by the Court in each case. While rightsholders will in practice bear the burden of monitoring for new online locations, CSPs and search engines will need to agree in writing to extend the blocking order to any new online locations that are notified to them. As confirmed by the EM, “[i]t is not intended that the injunction would permit a copyright owner to unilaterally determine new domain names, URLs and IP addresses, without written agreement between themselves and [the] carriage service provider or online search engine provider.” EM, page 13, para 2. Existing safeguards are maintained; blocking new online locations will require “a new, separate application to the Court: EM, page 13, para 3.
- 28 This amendment brings Australia closer to practices in comparable international jurisdictions. In the United Kingdom, blocking injunctions can be extended by simple notification to the ISP, without the need for any written agreement from the ISP. The UK Intellectual Property Office is considering introducing an administrative site blocking regime<sup>12</sup> and other countries in the European Union and in the Asia-Pacific region have already done so (e.g. Indonesia, Korea, Portugal, Malaysia, and Thailand). The Australian Film and TV Bodies support the enactment of this small and proportionate extension to Australia’s Court-supervised site blocking mechanism.

The Australian Film & TV Bodies appreciate the opportunity to participate in this consultation and are available to provide further information on request.

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<sup>12</sup> Intellectual Property Office UK Government response to the call for views regarding illicit IPTV streaming devices page 2, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/750177/Gov\\_Response\\_calls\\_for\\_views\\_illicit\\_IPTV.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/750177/Gov_Response_calls_for_views_illicit_IPTV.pdf)



## Appendix A: Full descriptions of members of the Australian Film & TV Bodies

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA), and Independent Cinemas Australia (ICA). These associations represent a large cross-section of the film and television industry that contributed \$5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.<sup>13</sup>

- a) The ASA represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on promoting and protecting the creative works of its members. Members include: Village Roadshow Limited; Motion Picture Association; Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc., and Fetch TV.
- b) AHEDA represents the \$1.1 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as intellectual property theft and enforcement, classification; media access, technology challenges, copyright, and media convergence. AHEDA currently has 13 members and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment, and Defiant Entertainment. Associate Members include Foxtel and Telstra.
- c) The MPDAA is a non-profit organisation representing the interests of theatrical film distributors before Government, media, industry and other stakeholders on issues such as classification, accessible cinema and copyright. The MPDAA also collects and distributes cinema box office information including admission prices, release schedule details and classifications. The MPDAA represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia, and Warner Bros. Entertainment Australia.
- d) NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, 2018 being its 72nd year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as the prominent independent exhibitors Reading Cinemas, Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas, and other independent cinema owners which together represent over 1400 cinema screens.
- e) AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major US film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or

<sup>13</sup> Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association on <<http://screenassociation.com.au/wp-content/uploads/2016/01/ASA-Economic-Contribution-Report.pdf>> v.



indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).

- f) ICA is a not for profit industry association that develops, supports and represents the interests of independent cinemas and their affiliates across Australia and New Zealand. ICA's members range from single screens in rural areas through to metropolitan multiplex circuits and iconic arthouse cinemas including Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas, and Majestic Cinemas. ICA's members are located in every state and territory in Australia, representing over 580 screens across 152 cinema locations.