



New South Wales
Council for Civil Liberties

**NSWCCL SUBMISSION TO
REVIEW OF THE COPYRIGHT
AMENDMENT (ONLINE
INFRINGEMENT) BILL 2015
LEGAL AND CONSTITUTIONAL
AFFAIRS LEGISLATION
COMMITTEE**

21st April 2015

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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NSW Council for Civil Liberties (NSWCCL) welcomes the Senate's referral of the Copyright Amendment (Online Infringement) Bill 2015 to the Legal and Constitutional Affairs Legislation Committee for review and for the opportunity to provide our considered views on the Bill.

Summary

NSWCCL acknowledges the right of copyright owners to seek appropriate enforcement measures for the protection of copyright. However, NSWCCL does not regard website blocking as a proportionate response to copyright infringement. In line with that view, Recommendation 1 argues that the Bill ought not to be passed.

In the alternative, should the proposal remain under consideration, Recommendations 2 to 5 offer amendments to the Bill to address the civil liberties concerns that this legislation raises.

Recommendation 2 addresses issues of procedural fairness. Recommendations 3.1-3.2 seek to confine the broad scope of the legislation. Recommendations 4 and 5 note the potential for over-inclusivity, with potentially negative implications for virtual private networks (VPNs) and cloud storage providers (Recommendation 4) and whistleblowers (Recommendation 5).

We note especially our concern with any kind of censorship, and with danger that sites may be blocked that in fact serve an important public service. The more effort that is made to catch piracy sites, the greater the risk that the legislation will be used to block sites whose chief function is to expose corruption or wrongdoing, whether by governments or by private enterprises.

Even a newspaper might be held to be infringing copyright in government documents, or in the documents of corporations, as a significant part of its operations. We urge the restriction to sites whose **only** purpose is the infringement of copyright.

For this reason, it is vital that the Legal and Constitutional Affairs Committee and the Parliament resist efforts, such as those made in some of the submissions on the Bill, to expand the range of organisations whose sites may be subject to blocking injunctions.

1. Proportionality

The position of the NSWCCL is that website blocking should not be undertaken in a society which cherishes the right to free speech. It is a disproportionate response to the problem of copyright infringement. To alleviate the problem of copyright infringement, the least intrusive means of achieving this ends is the most preferred. A de-facto internet filter, which this legislation is, is one of

the most intrusive ways to discourage piracy on the internet. It is also the method which is most prone to accidental blockages, intentional censorship, scope creep or other abuse.

The internet is a manifestation of free speech and has thrived due to the open exchange of ideas and innovations across the world. In many ways, it has made national borders and old business models obsolete. Even in a fictional world where an internet blocking regime could effectively remove infringing content, a website blocking regime is not a proportionate response as it represents an easily misused or mistakenly applied filter to permanently remove amounts of perfectly legal content from the Web.

Censorship is an unnecessary restriction on freedom of speech and violates Article 19 of the International Covenant on Civil and Political Rights. There are other more proportionate measures which run much less risk of censorship and which could be pursued to alleviate the problems of copyright infringement.

Recommendation 1

The website blocking bill known as the Copyright Amendment (Online Infringement) Bill 2015 should be rejected as it is disproportionate and risks being a tool for censorship, introducing an internet filter to Australia.

Alternative measures to reduce infringement, for example those recommended by the Parliamentary inquiry into "IT pricing and the Australia tax" would be more proportionate and less intrusive to all Australian internet users.

2. Procedural Fairness

In its current form, the Bill raises a number of concerns with respect to procedural fairness. The CCL has identified four major problems.

First, there is no apparent limit on the number of websites that can be listed in any one application. This could lead to a court being provided with an extensive list of online locations by a copyright owner in a single application and inhibit the court from full consideration of matters relevant to the determination of whether s 115A is engaged.

Second, there is a risk that applications will proceed without opposition, a problem raised in other submissions to this inquiry, such as the submission made by the Electronic Frontier Foundation. There appears to be little within the Bill's wording encouraging ISPs to make submissions opposing

the application. Although it is at the court's discretion whether or not to receive submissions from public interest advocates as amici curiae, given the public consequences of website blocking, it would be preferable for explicit provision to be made for advocates in the public interest to appear before the court under s 115A(3).

Third, there is no penalty set out under the Bill to mitigate the risk of abuse by copyright owners.

Fourth, the mechanisms for review of s 115A applications are worryingly inadequate. The CCL notes two subsidiary issues here: no clear redress is available where incorrect implementation of a website block leads to the incidental blocking of legitimate content. By contrast, in Europe, for instance, the Court of Justice of the European Union has stated that there must be rules enabling users of ISPs to assert their rights before the court once the implementing measures for blocking a website have been put in place so the method does not affect access to lawful content (*UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12) [2014] ECDR 12, [56]-[57]). Further, the orders may subsist for an unduly long period of time, although the internet landscape shifts rapidly. It would therefore be preferable to include time limitations in the order as a matter of course, with the copyright owner having to remake an application to the Federal Court as an inbuilt review mechanism.

Recommendation 2

Although the CCL has refrained from providing specific recommendations for each of the problems identified above, the CCL recommends that the Bill ought to address explicitly the issues of procedural fairness considered in this section.

3. Broad Phrasing

General statutory language

Certain terms set out in the proposed legislation, namely, "primary purpose", "facilitate the infringement of copyright", "contains...categories of the means of infringement" and "demonstrates a disregard for copyright generally", are unduly broad. This is likely to create uncertainty of application and contribute to the problem of over-inclusivity canvassed under points 4 and 5 of this submission. The "primary purpose" test in particular fails to consider that there may be other legitimate uses of an online location even if those uses are not primary.

In general, the terms identified above invite further confinement of their scope and/or greater statutory explication.

Recommendation 3.1

In relation to the “primary purpose” test, the CCL advises **adopting narrower wording**. For instance, relying upon the definition of ‘Internet site dedicated to infringing activities’ in proposed US legislation [*Protect IP Act* s 968 §2(7) (112th Congress)], a blocked website could instead be required to have “no significant use other than” infringing or facilitating copyright infringement.

Mandatory factors in s 115A(5)

The mandatory factors in s 115A(5) that a court must consider before granting an injunction are inadequate. Given the wide-reaching impact of website blocking, an application by a copyright owner must pass a high threshold before such a remedy is granted. The need for a high threshold is contemplated by the Explanatory Memorandum at [6] and reflected by the relatively narrow wording of parallel international provisions, for instance, US copyright legislation governing the availability of injunctive relief [17 U.S.C. §512(j)(2)].

Recommendation 3.2

In order to ensure that website blocking is limited to infringements of a serious nature, the CCL proposes amending the following factors:

- Amending s 115A(5)(b) to state: “whether disabling access to the online location is a necessary and proportionate response in the circumstances, including whether it is, or is likely to be, ineffective to commence legal proceedings against the primary infringer”
- Amending s 115A(5)(c) to state: “the impact on any person likely to be affected by the grant of the injunction, including whether disabling access is likely to interfere with access to non-infringing material”

4. Virtual Private Networks and Cloud Storage Providers

The Bill may have unforeseen consequences. Websites offering Virtual Private Network (VPN) services may be blocked as they may facilitate a more private web browsing experience which could in turn be utilised by copyright infringers. If these websites are blocked as they are seen as facilitating infringement, the legitimate purposes of VPNs would also be blocked.

As Communications Minister Malcolm Turnbull has previously noted, VPNs are "extensively used for a wide range of legitimate purposes". The business, technical or privacy benefits of VPNs are completely unrelated to copyright. VPNs are also used and promoted by human rights advocates to subvert censorship regimes and other violations of civil liberties.

A small number of VPNs may market themselves solely based on their ability to protect copyright infringers. These particular VPNs may be seen under the legislation as a legitimate target for website blocking. In spite of this, A VPN promoted towards infringers is technologically identical to any other VPN and would only be blocked based due to its marketing rather than any substantive wrongdoing on the part of the provider.

Similarly, despite the intent of the law, legal cloud storage providers and web locker services could be blocked. It is in the nature of these services to hold a vast variety of content, and the fact that these sites could host pirated content should not make it legitimate to block them.

Blocking cloud storage sites would be a large impediment to citizens looking to share legal material online and constitute a violation of freedom of expression.

Recommendation 4

The proposed legislation should not extend to legitimate tools such as virtual private networks and upload sites such as widely used cloud storage providers.

5. Whistleblowers, Copyright and The Online Reproduction of Documents In The Public Interest

The NSWCCCL has concerns about the potential for abuse of this Bill with regards to the republication of copyrighted documents owned by government bodies or private entities. With respect to government copyright, unlike, for instance, the United States, where works of the United States government do not attract copyright protection [17 U.S.C. §105], there is no general prohibition in Australia against copyright subsisting in government materials, opening up the possibility of a government minister or department asserting copyright over a document in order to suppress its publication.

Under the proposed legislation, while the NSWCCCL acknowledges that the risk is relatively minute, an application could seek to block a site that hosts leaked or otherwise acquired copyrighted material, particularly if the site has reproduced a substantial number of documents. We note that many media organisations deal with and reprint content of this nature on a day-to-day basis. The ‘primary purpose’ criterion outlined in the Bill may provide some protection against the aforementioned application of this legislation, but it is arguable that certain media organisations and sites like Wikileaks, which publish a substantial number of such documents, could satisfy section 115A if a quantitative analysis of ‘primary purpose’ were undertaken.

The public interest test under paragraph (5)(g) goes some way towards allaying our concerns around the assertion of copyright on such documents, however, the wording of the paragraph remains vague, and in practice it may be difficult to argue public interest against an application for injunction.

Recommendation 5


The wording of subclause (5) ought to be clarified, and an explicit exemption from the legislation for documents in the public interest ought to be included in the text.

Concluding Comments

NSWCCL has contributed this submission because of the national importance and censorship risks of the proposed website blocking scheme, as well as its major implications for freedom of speech and other fundamental liberties long cherished in liberal democracies.

This submission was written by the NSWCCCL Free Speech and Privacy Action Group with the assistance of Martin Bibby. NSWCCCL hopes it will be of assistance to the Committee’s review and would be pleased to discuss any issues further if public hearing are held.

With regards



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