choice

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Copyright Amendment (Online Infringement) Bill 2015

Submission to the Senate Legal and Constitutional Affairs Committee

ABOUT US

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. By mobilising Australia's largest and loudest consumer movement, CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most.

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INTRODUCTION

CHOICE appreciates the opportunity to provide the following comments on the Copyright Amendment (Online Infringement) Bill 2015 (the Bill) to the Senate Legal and Constitutional Affairs Committee.

CHOICE does not believe that the Bill should be implemented because it is unlikely to reduce access to sites facilitating online infringement and even less likely to reduce the rates of online infringement.

While no amendments can address these central concerns, if the Bill is to go ahead there are changes that could be made to make sure legitimate services like Virtual Private Networks (VPNs) are not captured by the Bill. These form the focus of this submission.

It is important to acknowledge that providing rights holders with the ability to restrict consumer access to websites is a demonstrably ineffective method for reducing piracy. Circumventing a website block is not difficult. Individuals can use VPNs, Smart Domain Name Systems, browser plug-ins, mirror sites, proxy sites and other techniques to get around such blocks. When weighing the likely ineffectiveness of the Bill against the estimated $130,825 yearly costs which will be borne primarily by law-abiding consumers, this legislation is not justified.[1]

Beyond concerns about the effectiveness of what is essentially a legislative framework to establish an industry initiated and run internet filter, this Bill does not address the causes of online piracy. CHOICE's research has consistently shown that consumers in Australia pay more for identical digital products than consumers in comparable markets, such as the USA or United Kingdom.[2] Providing Australians with better access to digital content at a comparatively reasonable price will give consumers a greater incentive and opportunity to access content legitimately. We think it is unfortunate that this approach favours a heavy-handed legislative approach ahead of market-based reforms, such as those recommended by the House of Representatives 2012-13 Inquiry into IT Pricing and also the recent Final Report of the Federal Government's Competition Policy Review.[3]

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[1] CHOICE research has found that only 34% of Australians download or stream content in breach of copyright laws. See CHOICE, November 2014, 'Digital Consumers – paying for content behaviour and attitudes'. The estimate of yearly costs is found in the Explanatory Memorandum to the Bill.
[2] CHOICE, 26 May 2011, 'Submission to Productivity Commission – Inquiry into the Economic Structure and Performance of the Australian Retail Industry', available at http://www.pc.gov.au/_data/assets/pdf_file/0009/109746/sub082.pdf
[3] See the final report of the House of Representative s Standing Committee on Infrastructure and Commuinications Inquiry into IT Pricing, 'At what cost? IT Pricing and the Australia Tax', tabled 29 July 2013 and the 'Final Report' of the Competition Policy Review, released 31 March 2015.

1. The three step test

The Bill provides a three step test that must be satisfied in order for the court to grant an injunction requiring Internet Service Providers (ISPs) to disable access to websites. To grant an injunction, the Court must be satisfied that:

a) a carriage service provider provides access to an online location outside Australia; and
b) the online location infringes, or facilitates an infringement of, the copyright; and
c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

There is a concern that the 'primary purpose' test is ambiguous. This test has not been used previously, and it is unclear how it will apply to websites that 'facilitate' infringement. The explanatory memorandum states that the Bill "excludes online locations that are mainly operated for a legitimate purpose, but may contain a small percentage of infringing content". It is not clear what constitutes a "small percentage" and at what point a website moves from this category and into the category of websites that exist primarily to infringe copyright. The Bill should clearly define 'primary purpose' in a way that ensures websites that have a substantial non-infringing use are excluded.

The test is even less clear for websites facilitating online copyright infringement. For instance, there is currently a lack of legal clarity on whether or not circumventing online geoblocks to access legitimate overseas content delivery services constitutes copyright infringement. CHOICE shares the view of the Attorney-General's Department and the Minister for Communications; circumventing a geoblock to access a legitimate service such as Netflix US does not constitute online copyright infringement.[4] However, there is significant industry opposition to this interpretation, indicating that passage of the Bill in its drafted form is likely to lead to applications being made by rights holders to disable access to websites offering VPN services.[5]

If a view is taken that circumventing geoblocks to access legitimate overseas-based content is an infringement, then the Bill could be used to disable access to websites offering VPN services. Government inquiries have recommended that consumers be able to circumvent

[4] See statements made by the Hon. Malcolm Turnbull MP, Minister for Communications, on his website that circumventing a geoblocks in order to access an overseas service like US Netflix is not illegal under the Copyright Act (http://www.malcolmturnbull.com.au/policy-faqs/online-copyright-infringement-faqs#VPN). Also see statements made by staff from the Attorney-General's Department on Wednesday 13 February 2013 to the House of Representatives Standing Committee on Infrastructure and Communications for the Information Technology Pricing hearings, to the effect that geoblocking is not a technological protection measure under the Copyright Act 1968 (pp4-10).

[5] See the Australian Copyright Council's January 2015 Information Sheet G127v01 at http://www.copyright.org.au/find-an-answer/browse-by-a-z/.

geoblocks.[6] Most recently, the Final Report of the Federal Government's Competition Policy Review recommended addressing international price discrimination by ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.[7] Disabling access to websites that provide these services would stymie reform efforts and increase the barriers that consumers currently face when attempting to access the benefits of robust, international competition. This would be an unfortunate outcome given the current policy priority of improving Australia's competition framework for the digital era.

The explanatory memorandum to the Bill states that "the purpose of the scheme is to allow a specific and targeted remedy to prevent those online locations which flagrantly disregard the rights of copyright owners from facilitating access to infringing copyright content." In order to achieve this goal, it is recommended that the flagrancy of the infringement be moved from s5(a) in the list of factors to consider, to instead form part of the test that must be satisfied in order to grant an injunction. This, combined with a clear definition of 'primary purpose', would provide greater certainty, and ensure that the Bill only captures the kind of flagrant infringement that it is intended to address.

Recommendations 1, 2 and 3

The wording of s115A(1) is ambiguous, containing a new test that may have the consequence of capturing a broader range of websites than intended. CHOICE recommends re-wording s115A(1) as follows:

- The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:
    a) a carriage service provider provides access to an online location outside Australia; and
    b) the online location infringes the copyright; and
    c) the primary purpose of the online location is to infringe copyright (whether or not in Australia); and
    d) the infringement is flagrant.

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[6] See House of Representatives Standing Committee on Infrastructure and Communications, July 2013, 'At What Cost? IT pricing and the Australia Tax', recommendation 5, http://www.aph.gov.au/PARLIAMENTARY_BUSINESS/COMMITTEES/HOUSE_OF_REPRESENTATIVES_COMMITTEES?url=ic/itpricing/report.htm.
[7] Professor I. Harper et al, March 2015, 'Competition Policy Review Final Report', recommendation 31, http://competitionpolicyreview.gov.au/files/2015/03/Competition-policy-review-report_online.pdf

The Bill should also be amended to define 'primary purpose' to exclude sites with a substantial non-infringing use.

CHOICE recommends that if the final version of the Bill does retain references to online locations that facilitate copyright infringement, then the Copyright Act 1968 be amended to make it clear that circumventing a geoblock through the use of a VPN or similar technology does not constitute copyright infringement, and that providing such a service does not facilitate copyright infringement.

2. The public interest

There are some instances in which the public benefit associated with allowing access to an online location may outweigh the detriment occasioned by copyright infringement. For example, if a website provides accessible content that is unavailable elsewhere, the public interest may be such that maintaining access to the website is a better option than disabling access. Regardless of individual views on the merits of this argument, there should be an opportunity for it to be made on behalf of the public in response to an injunction application.

The Bill does not make explicit allowance for public interest bodies to intervene in appropriate injunction applications, or to seek revocation or review of an injunction that has been ordered. While Rule 9.12 of the Federal Court Rules 2011 provides that a person can make an application for leave to intervene in a proceeding, the Court has discretion in determining whether or not to allow such an application. There are no positive triggers in the Rules that would require the Court to allow a person to intervene.

Injunction applications made pursuant to the Bill are likely to be uncontested. The Bill provides ISPs with an incentive to not oppose applications made by rights holders.[8] The importance of safeguards to protect the public interest is high here, given the likelihood that these applications will be decided on the papers.

Given these circumstances, it would be desirable for the Bill to expressly provide for the public's right to be heard in these applications. Supporting this goal, the Bill should also place a positive obligation on rights holders to facilitate public awareness of their injunction applications.

[8] s115A(9) of the Bill.

Recommendations 4, 5 and 6

The likely uncontested nature of the injunction applications combined with the public interest in access to information leads CHOICE to conclude that the Bill should include robust safeguards to ensure the public interest is considered. We recommend inserting the following clause into the Bill:

- A person may apply to the Court for leave to intervene in an application under s115A.
- The Court must grant the application if satisfied that:
    a) the person has a special ability to represent the public interest; and
    b) the person's contribution will be useful and different from the contribution of the parties to the proceeding.

CHOICE also recommends that the Bill be amended to include a requirement that the applicant for an injunction publish a notice in major newspapers to alert the public to their application.

In addition to this, CHOICE recommends that the Bill be amended to require ISPs to display a notice to users who attempt to access a blocked site, providing information to enable these affected users to apply to the Court to vary or discharge the order.

3. Extending safe harbours

The Government's Online Copyright Infringement Discussion Paper, released in 2014, proposed three options for approaching copyright reform.[9] Two of these options focused on strengthening enforcement of copyright, and are being implemented through this Bill and an industry Code.[10] The third proposal, the extension of safe harbours in the Copyright Act 1968, has not yet been acted upon.

The safe harbour scheme operates to limit the remedies available against carriage service providers for direct or authorised infringement when they are engaging in certain relevant activities, such as caching or storing copyright material on their networks. The safe harbours scheme excludes certain parties due to the definition of 'carriage service provider', even if they

[9] Australian Government, July 2014, 'Online Copyright Infringement Discussion Paper', available at http://www.ag.gov.au/Consultations/Documents/Onlinecopyrightinfringement/FINAL%20-%20Online%20copyright%20infringement%20discussion%20paper%20-%20PDF.PDF

[10] The *Copyright Notice Scheme Code 2015*, has been submitted to the Australian Communications and Media Authority, but not yet registered (http://www.commsalliance.com.au/about-us/newsroom/TIO-complaints-per-provider-decrease-5.5-per-cent).

engage in the relevant activities. For example, a university does not fall under the definition, so cannot rely on the safe harbours. The Online Copyright Infringement Discussion paper recommended that the safe harbours be extended to cover these types of entities, and CHOICE agrees with this recommendation.

Recommendation 7

Recognising that a holistic approach to copyright law reform is necessary, and that reform should not focus solely on punishing infringers, safe harbours in the Copyright Act 1968 should be extended as proposed in the Online Copyright Infringement Discussion Paper 2014.