

21 April 2015

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee

Copyright Amendment (Online Infringement) Bill 2015

COMPPS and its members appreciate the opportunity to make submissions to the Senate Legal and Constitutional Affairs Committee inquiry into the *Copyright Amendment (Online Infringement) Bill 2015 (Bill)*.

COMPPS made a detailed submission regarding the Online Copyright Infringement Discussion Paper (July 2014) (**Discussion Paper**). A copy of this submission is available at <http://www.ag.gov.au/Consultations/Documents/OnlineCopyrightInfringement/OnlineCopyrightInfringement-TheCoalitionOfMajorProfessionalAndParticipationSportsInc.pdf> (**Discussion Paper Submission**).

1. Copyright and COMPPS members

COMPPS consists of the seven major professional sporting organisations in Australia:

- Australian Football League,
- Australian Rugby Union,
- Cricket Australia,
- Football Federation Australia,
- Netball Australia,
- National Rugby League, and
- Tennis Australia.

The importance of copyright to COMPPS members and the enforcement challenges faced by COMPPS members in respect of online copyright infringement are set out in detail in the Discussion Paper Submission. We do not propose to re-state that detail in this submission other than to note, in summary:

- copyright is fundamental to the exploitation and licensing by COMPPS members of media rights to the major sporting events and other content controlled by COMPPS members; and
- online infringement of this content is a significant issue for COMPPS members.

2. Copyright Amendment (Online Infringement) Bill 2015

COMPPS and its members welcome the attention of the Government on the significant enforcement challenges faced by rights holders in respect of online copyright infringement.



COMPPS and its members support the introduction of a regime to enable rights holders to take action to block access to overseas based online services that infringe or facilitate the infringement of copyright.

As a result, COMPPS and its members are broadly supportive of the Bill.

However, COMPPS members do have concerns they would like to raise with the Committee regarding certain aspects of the Bill and the Explanatory Memorandum for the Bill. These concerns relate to:

- (a) the requirement in section 115A (1) (c) of the Bill that an online location must have the 'primary purpose' of infringing or facilitating infringement in order for an injunction under section 115A to be available; and
- (b) the mandated list of matters the Court would be required to take into account under section 115A (5) of the Bill in determining whether to grant the injunction.

3. Primary purpose

The Discussion Paper proposed that, in order to grant an injunction requiring ISP's to block access to a particular website, a Court would need to be satisfied that the 'dominant purpose' of the website was to infringe copyright.

In the Discussion Paper Submission, COMPPS raised significant concerns with such a 'dominant purpose' requirement.

These concerns also apply to the 'primary purpose' requirement proposed in section 115A (1) (c) of the Bill.

COMPPS and its members do not consider that the primary purpose requirement is necessary or appropriate.

COMPPS notes the comments in the Explanatory Memorandum¹ that the primary purpose requirement is intended to set a high threshold for the availability of an injunction under section 115A and provide a safeguard against potential abuse of the injunction.

However COMPPS submits that the primary purpose requirement is unnecessary, as the inherent discretion of the court regarding the granting of an injunction and the established case law regarding injunctions already sets an appropriately high threshold for when an injunction will be available and provides safeguards against abuse of the injunction.

COMPPS and its members also have concerns regarding the potential application of the primary purpose requirement. For example, it is arguable that the primary purpose of many infringing sites or services is to make money (for example from advertising), with copyright infringement one of the methods used to seek to achieve this commercial objective. If COMPPS members are unable to establish the primary purpose of services that are clearly infringing copyright in their content, then the injunctive right provided under section 115A will be illusory.

COMPPS considers that the primary purpose requirement will impose an unreasonable evidentiary burden on rights holders, as it is likely to require rights holders to seek to adduce evidence regarding the general purposes of the relevant online location.

The inclusion of the primary purpose requirement in section 115A may also provide an incentive for the operators of infringing sites or services to seek to mask the true purpose of the site/service, in order to avoid the operation of section 115A.

¹ Paragraphs 38 and 39 of the Explanatory Memorandum

COMPPS submits that the primary purpose requirement is unnecessary and risks introducing significant uncertainty and evidentiary burdens into a process that is intended to be streamlined and efficient.

4. Mandatory matters

COMPPS has concerns regarding the mandatory matters required to be taken into account under section 115A (5) of the Bill.

COMPPS and its members do not believe that it is necessary or appropriate to be overly prescriptive regarding the matters a court is required to take into account in determining whether to grant an injunction under section 115A.

The determination of whether to grant an injunction will always depend on the facts and circumstances of the particular case, as well as the inherent discretion of the court. Imposing a lengthy, mandated list of matters a court must take into account is an inflexible approach, which is likely to unnecessarily add to the evidentiary burden imposed on rights holders. COMPPS notes that such an approach imposes greater requirements than those that exist under the comparable UK and Irish legislation.

COMPPS and its members believe a less prescriptive approach regarding the matters the court is required to consider is more flexible and appropriate.

COMPPS also has concerns regarding some of the specific matters required to be taken into account under section 115A (5). In particular:

- (a) section 115A (5) does not include a requirement to consider the rights or interests of rights holders, such as the interests of rights holders in preventing or stopping copyright infringement;
- (b) the requirements to take into account flagrancy of infringement (section 115A (5) (a)) and disregard for copyright generally (section 115A (5) (c)) could impose an unreasonable evidentiary burden on rights holders, particularly as many operators are likely to seek to mask the purpose or intent of their site or service;
- (c) the requirement under section 115A (5) (f) to consider the impact on any person or class of persons likely to be affected by the grant of the injunction is excessively broad, particularly as there is no requirement to consider the rights or interests of rights holders; and
- (d) the requirement under section 115A (5) (g) to consider the 'public interest' and the comments in the Explanatory Memorandum² regarding relevant public interest matters including 'freedom of expression' or 'freedom of access to information'. COMPPS and its members do not believe that vague and open ended concepts such as 'public interest' or 'freedom of expression' should limit the availability of remedies for clear and significant infringement of the intellectual property rights of rights holders.

In order to ensure the proposed legislation provides copyright owners with a practical and effective weapon in the ongoing fight against online copyright infringement, COMPPS requests that the final form of the legislation does not include the primary purpose requirement and takes a less prescriptive approach regarding the matters the court is required to consider.

² Paragraph 52 of the Explanatory Memorandum

Please contact me if you have any queries regarding the matters set out in this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Malcolm Speed', written in a cursive style.

Malcolm Speed
Executive Director