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Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: ec.sen@aph.gov.au

19 November 2018

Dear Committee,

Re: Copyright Amendment (Online Infringement) Bill 2018

Electronic Frontiers Australia (EFA) appreciates the opportunity to provide this submission in relation to the proposed amendments to the *Copyright Act 1968* (Cth). EFA's submission is contained in the following pages.

About EFA

Established in January 1994, EFA is a national, membership-based non-profit organisation representing Internet users concerned with digital freedoms and rights. EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties in the digital context. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Angus Murray
Chair of the Policy Committee
Electronic Frontiers Australia

Introduction

We thank the Senate Standing Committees on Environment and Communications for the opportunity to provide submissions in relation to the *Copyright Amendment (Online Infringement) Bill 2018* ("**the Bill**").

In 2015, EFA noted that the core issue relating to copyright infringement is fair price and accessibility. Since then, while some progress has been made, there is a large volume of copyright material which is advertised to Australians despite not being commercially available to them in any form or at any price.

We repeat our 2015 recommendation that the abovementioned issue should be addressed as a matter of priority, and that any efforts invested by rightsholders into enforcement, litigation or lobbying should be matched or exceeded by efforts to innovate and overcome accessibility issues.

We have **attached** a copy of our submission to the Senate Legal and Constitutional Affairs Committee dated 23 March 2015 ("**our 2015 Submission**") for the Committee's reference.

We repeat our 2015 Submission and provide our further submissions in relation to the Bill below.

Submissions

EFA does not support the modification of the "primary purpose" test to include "primary effect" for the reasons outlined in our 2015 Submission. It is our concern that "lowering the bar" of the threshold for website blocking will have broad unintended consequences.

In this regard, we support the comments made by Nicholas J in the recent decision of *Television Broadcasts Limited v Telstra Corporation Limited* wherein his Honour held that:

> *"The Court must also be satisfied that the primary purpose of the online location is to either infringe copyright, or facilitate the infringement of copyright generally.* ***This is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse.*** *For example, the 'primary purpose' test would prevent an injunction to disable access to an art gallery website operated outside of Australia that may contain an unauthorised photograph. Thus, a website such as www.youtube.com or www.blogger.com would not prima facie satisfy the test as being an online location that infringes or facilitates infringement of copyright.* ***Technology and technological change is not to be chilled or targeted by this amendment***"[1].

In this context, it is our submission that the threshold of "primary purpose" ought not be altered (notwithstanding our 2015 Submission).

Furthermore, it is EFA's position that Australia ought to introduce a broad flexible fair use exception to bring Australia's Copyright Act into line with current societal practice and expectations and introduce essential flexibility into the law. It will provide resolutions for the shortcomings of the current fair dealing system and will ensure that the law enables, and is able to adapt to, innovations in technology, service provision, artistic practice, consumer behaviour and political speech. This recommendation has previously been made by the Australian Law Reform Commission[2] and the Productivity Commission[3].

[1] *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434 at [38] per Nicholas J.
[2] Australian Law Reform Commission, *Copyright and the Digital Economy* ALRC Report 122 (2013).
[3] Productivity Commission, *Intellectual Property Arrangements* Report No. 78 (23 September 2016).

In a broader sense, EFA also submits that:

1. We repeat our 2015 Submission that a finding of intent be required before any blocking injunction is granted pursuant to s. 115A of the Copyright Act 1968 and that no further scope should be given to rightsholders without balancing that scope with a broad "fair use" exception.

2. EFA recommends that reasonable technical investigations to properly identify the nature and source of an online location be made mandatory for any applicant in order to properly address the very real risk of collateral damage from overzealous site blocking.

3. Transparent reporting obligations ought to be put in place in relation to applications to the Court and Orders made in relation to websites which have been blocked pursuant to s. 115A of the *Copyright Act 1968*.

4. Section 115A(5) of the *Copyright Act 1968* ought to explicitly include a consideration for the impact of blocking access on freedom of expression.

In sum, EFA does not believe that there is a case for the expansion of the website blocking provision contained at s. 115A of the *Copyright Act 1968* without the introduction of a broad "fair use" exception with sufficient mechanisms to balance the legitimate interests of Australian consumers.