



Australian Government

Department of Communications and the Arts

# Regulation Impact Statement

## Copyright Amendment (Online Infringement) Bill

October 2018



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## Background

1. The *Copyright Act 1968* (Cth) (Copyright Act) protects the form or way an idea or information is expressed. The Copyright Act creates exclusive rights for copyright owners, including the right to copy, adapt, publish, communicate to the public and publicly perform copyright material. These exclusive rights provide an essential mechanism that underpins the viability and success of Australia's creators and creative industries. The scope of works protected under the Copyright Act include literary, artistic and musical works, and films and sound recordings.
2. Australia's copyright system balances incentives to create and disseminate new works by allowing fair access and use of these works by Australian consumers and other intermediaries and users (e.g. libraries and archives) for public policy benefits. These include free uses for purposes such as research and study, news reporting, criticism and review, disability access and parody and satire. The Copyright Act also contains statutory licences that enable governments and educational institutions to use copyright material for certain purposes on the condition that the copyright owner has the right to be paid equitable remuneration, often through an approved collecting society.
3. There have been a number of studies attempting to estimate the size of Australia's copyright industries. For example, the Productivity Commission found that the capital expenditure on 'artistic originals' (the category of goods covered by copyright) was estimated at \$2.7 billion in the year ending June 2015 — this equates to about 0.16 per cent of Australia's gross domestic product (ABS 2015a).<sup>1</sup> On the other hand, a [PwC report](#) commissioned by the Australian Copyright Council valued the contribution of the copyright industries at more than seven per cent of gross domestic product per year.
4. The Productivity Commission noted that Australia's copyright trade has shifted away from physical goods towards services with the emergence of digital distribution and consumption. The use of the internet to access and consume copyright material has led to increased opportunities for copyright owners to more broadly disseminate their products, while allowing consumers the opportunity to consume and enjoy content in new ways.
5. However, the downside has been that websites that contain infringing material, or facilitate the infringement of copyright, have emerged in larger numbers to enable users to illegally download copyright material such as music, television programs and movies.
6. Although it is difficult to quantify in revenue lost, it is clear that online copyright infringement poses a significant threat to Australia's creators and creative industries, due to the ease in which copyright material can be copied and shared through digital means without authorisation.
7. There are competing views about the causes of online copyright infringement, and these include the high price and inaccessibility of some film and TV content, the lack of information about legal alternatives, the ease with which consumers can access illegal content, and the lack of respect for copyright amongst some consumers.

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<sup>1</sup> Productivity Commission 2016, *Intellectual Property Arrangements*, No 78, at page 105.

8. The Productivity Commission noted that timely and competitively-priced access to content appeared to limit copyright infringement<sup>2</sup>, citing surveys on consumer attitudes undertaken by CHOICE and the Communications Alliance. This is an important factor that should be a key part of an overall strategy to combat online copyright infringement. However, the Productivity Commissions report was completed in September 2016, which is before any decisions under section 115A were handed down and before any studies about the effectiveness of the subsequent blocking were undertaken.

9. It is clear that one essential measure to address online copyright infringement is an effective enforcement regime that enables a copyright owner to take action to protect their rights, particularly where their copyright interests are being infringed. This is consistent with obligations that the Australian Government has under international agreements, such as the World Trade Organization's Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS Agreement). For example, Article 41 of the TRIPS Agreement provides that:

“Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

10. In that respect, the Copyright Act contains a number of civil remedies through court action that copyright owners can seek where there has been an infringement of their copyright material. Section 115 of the Copyright Act provides the following remedies for copyright infringement, or authorisation of copyright infringement:

- an injunction to restrain an infringement of copyright occurring or continuing.
- damages as compensation for infringement. In the case of a blatant infringement, or where some particular benefit has accrued to the defendant, additional damages may be awarded to a copyright owner. In determining the amount of damages for copyright infringement, a court may consider whether the infringement involved converting hardcopy material into digital form, as well as whether a stronger penalty would deter others from committing the same infringement.
- an account of profits, i.e. payment to the owner of copyright of the profit made by the infringer as a result of the infringement.

11. These remedies have proven to be effective in addressing large scale infringement that occurs in Australia. For example, the music industry succeeded in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 65 IPR 289 against particular individuals and entities responsible for the 'Kazaa' file sharing system, and in *Universal Music Australia Pty Ltd v Cooper (Cooper)* (2005) 150 FCR 1 against the creator and host of a website which contained links to copyright infringing music files.

12. However, while copyright owners are easily able to take action against domestic sites, a number of foreign-based websites have emerged to provide access to infringing copyright material. Many of these are based in jurisdictions which have lax copyright enforcement or where it is difficult for Australian

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<sup>2</sup> Productivity Commission 2016, *Intellectual Property Arrangements*, No 78, at page 569



copyright owners to take civil action. Even where criminal action has been taken directly against the operators of a particular location, sometime the brand is used for mirror sites which continue to operate and attract significant web traffic (eg KickAss Torrents).

13. To address this, section 115A of the Copyright Act was introduced in 2015 with the aim of disrupting overseas online locations that facilitate large-scale copyright infringement and which is accessible by Australian consumers. The new section amended the Copyright Act to enable a copyright owner to apply to the Federal Court of Australia for an order requiring a Carriage Service Provider (CSP) to block access to a foreign online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.

14. The Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015 stated that the amendments would provide that:

- “... copyright owners would be able to apply directly to the Federal Court for an injunction to disable access to an infringing online location, without having to first establish the CSP’s liability for copyright infringement or authorisation of copyright infringement. This judicial process would be more efficient and avoid implicating CSPs unnecessarily.” (page 2)

15. Importantly, the Bill contained safeguards to ensure that the injunction would only be ordered in the most serious cases. First, the ‘primary purpose’ test was included to set an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse. For example, it was intended that the ‘primary purpose’ test would exclude online locations that are mainly operated for a legitimate purpose, but which may contain a small percentage of infringing content.

16. Secondly, before ordering an injunction, the Court may take into account a number of factors. These include:

- the flagrancy of the infringement or its facilitation;
- whether disabling access to the online location is a proportionate response in the circumstances
- the impact on any person likely to be affected by the grant of the injunction, and
- whether it is in the public interest to disable access to the online location.

17. Section 115A of the Copyright Act commenced on 27 June 2015 and, since that time, there have been a handful of cases brought by film and music industry copyright owners. All of these have been successful for copyright owners in obtaining injunctions. The cases are as follows:

- 15 December 2016: *Roadshow Films Pty Ltd v Telstra Corporation Ltd and Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2016] FCA 1503: These proceedings resulted in the blocking of domain names, Internet Protocol (IP) addresses and Uniform Resource Locators (URLs) that provided access to online locations known as “SolarMovie”, “The Pirate Bay”, “Torrentz”, “TorrentHound” and “IsoHunt”.
- 28 April 2017: *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435: This proceeding resulted in the blocking of domain names, IP addresses and URLs that provided access to online locations known as “KickassTorrents” or “KAT”.
- 18 August 2017: *Roadshow Films Pty Ltd v Telstra Corporation Limited* [2017] FCA 965: This proceeding resulted in the blocking of domain names, IP addresses and URLs that provided



access to 49 online locations, including “Demonoid”, “LimeTorrents”, “EZTV” and “CouchTuner”.

- 1 September 2017: *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041: This proceeding resulted in the blocking of domain names, IP addresses and URLs that provided access to online locations, including “YesMovies”, “LosMovies”, “CartoonHD”, “Putlocker”, “Torlock” and “1337x”.
- 27 April 2018: *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582: This proceeding resulted in the blocking of domain names, IP addresses and URLs that provided access to the online location “HD Subs”, and other specific locations from which various files may be downloaded by certain applications that operate on the Android operating system and enable access to content by the use of certain set-top boxes.
- 19 June 2018: *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933: This proceeding resulted in the blocking of domain names, IP addresses and URLs that provided access to 15 online locations, including “HDO”, “123Hulu”, “Watch32”, “WatchFreeMovies”, “SeriesTop”, “ETTV”, “Torrent Download” and “Torrents.me”.
- 20 September 2018: *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434: This proceeding resulted in the blocking of domain names, IP addresses and URLs that provided access to online services linked to seven Android-based set-top boxes (“A1”, “BlueTV”, “EV Pad Pro”, “FunTV”, “MoonBox C”, “Unblock TV Gen 3”, and “hTV5”).

18. During Parliamentary debate for the Copyright Amendment (Online Infringement) Bill 2015, the then Minister for Communications, the Hon Malcolm Turnbull MP, committed to review section 115A in response to a recommendation of the Senate Legal and Constitutional Legislation Committee.

19. The Department of Communications and the Arts conducted a review of section 115A in February/March 2018. The Department received 22 submissions, mostly from representatives of copyright owners, internet service providers, tech sector firms (including online search engine providers) and digital rights groups.

20. In general, most stakeholder submissions agreed that section 115A has been a positive Government initiative which is working as intended. Rights holders noted film industry commissioned studies which indicated that the traffic to blocked sites had declined. Research commissioned by the Department of Communications and the Arts (2015-2018) has found that there has been a decrease in those who consume infringing content from 42 per cent in 2015 to 38 per cent in 2017, and down to 33 per cent in 2018. This is a significant drop and confirms a trend in reduction in online copyright infringement rates in Australia.

21. Many noted that the Court proceedings were largely running smoothly, although they suggested section 115A could be improved in a number of ways. For example, copyright owners were concerned about the requirement to prove that an online location was located outside Australia, and the process to obtain an extended order to seek the blocking of new domain names, URLs and IP addresses.

22. The Department concluded that, while section 115A was achieving most of its aims, there was scope to consider modest improvements to address gaps in the scheme that enabled overseas locations to continue to be accessed by Australians through other means.

23. These suggested improvements form the basis of possible reforms to section 115A which are considered below.



## The problem

### *Australian consumers access infringing copyright material through search engine results*

24. There are genuine concerns from copyright owners about online copyright infringement in Australia. An [annual survey](#) conducted by the Department of Communications and the Arts has demonstrated that despite some gains, copyright infringement amongst digital consumers is higher in Australia (33 per cent) than the [UK](#) (25 per cent). The UK has a long established website blocking regime that enables responsive Court orders and the ability to consider a broader range of websites for blocking.

25. All but one of the section 115A cases to date have involved infringing film and TV content, which is the copyright content that is the most popular target for online copyright infringement. Although trending downwards, the rate of consumption of infringing film and TV content in Australia remains higher than that for music and computer games.

26. [Film commissioned studies](#) indicate that traffic to blocked websites is down, but a smaller percentage of Australian users are still continuing to get to blocked sites through other avenues. This gap in section 115A enables these sites to remain viable and allows infringing content to continue to be supplied to Australian users.

27. In a 2016 report, the Productivity Commission also noted a variety of stakeholder experiences with blocking websites. One stakeholder pointed to the UK experience with blocking orders as an example of successful blocking. However, some concerns were raised that parts of section 115A were not sufficiently defined, creating uncertain impacts (e.g. the lack of statutory definitions for “primary purpose” of an online location and whether infringements are “flagrant”). There were also concerns that website blocking might be ineffective where the block was avoided by changing the online location.

28. In addition, online search engine providers enable users to discover the existence of sites that may be the subject of an injunction and which are blocked by CSPs. This may occur where the user may not be looking for the site in the first place. Even though these sites are blocked, these results may appear on the first page of search results, or autocomplete results lead a user to these results, giving these sites an appearance of legitimacy and credibility.

29. Search results often contain alternative domain names and URLs that are not captured by the original injunction, or a list of websites that claim to have a list of alternate domain names or URLs, that will allow the user to get access to the blocked site.

30. At the moment, online search engine providers are not subject to s 115A and no injunction can be made to compel them to take reasonable steps to disable access to blocked sites.

### *Large scale infringing sites such as “cyberlockers” are still available to be accessed by Australians*

31. Section 115A requires the Court to be satisfied that the “primary purpose” of the online location in question is to infringe, or facilitate the infringement of, copyright. The Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015 stated that this was:

“... 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](http://www.youtube.com) or [www.blogger.com](http://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.” (page 9)

32. The Explanatory Memorandum also stated that the primary purpose test “would direct the Court to consider the principal activity for which the online location exists and the principal intention of users of that online location” (page 9).

33. The effect of this high threshold has been to cast doubt on whether particular sites, such as “cyberlockers” would be captured by section 115A. Cyberlockers are third-party file-sharing services, sometimes also known as “file hosting” services. Access is provided through password-protected hard drive space online. Users of these sites can share the cyberlocker password information with others, who can privately download the contents that the original user maintains on the site. Cyberlockers are able to house large movie and music files, and unlike BitTorrent file-sharing which is traceable, cyberlockers are very hard to monitor, as they employ one-to-one connectivity which is difficult to detect through surveillance tools. Because of this, cyberlockers are often used to trade infringing movie and music files.

34. A number of these sites have been identified by the [U.S. Trade Representative’s 2017 Out-of-Cycle Review of Notorious Markets Report](#) marketplaces that reportedly engage in, facilitate, turn a blind eye to, or benefit from substantial piracy as being sites that are “prominent and illustrative examples of online and physical”. In particular, according to [Australian Film and TV bodies](#), there are three cyberlocker type sites that are ranked in Australia’s top 50 large scale infringing sites. These are openload.co (ranked No. 6 in Australia’s top 250 infringing sites according to INCOPRO), rapidgator (ranked No. 31) and uploaded.net (ranked No. 33). These figures indicate that Australians use these sites and that there is a high likelihood that they are used by Australians for infringing purposes.

#### *New avenues to a blocked site readily appear after an initial Court order*

35. Operators and owners of online locations are quickly able to circumvent blocking orders by changing domains names, IP addresses and URLs. These are available to users who can access these blocked sites until a copyright owner can return to the Court to obtain an extended order to add the new domains names, IP addresses and URLs.

36. Copyright owners currently have a procedure through which they can return to the court and apply for an extension of the orders to cover these new domains names, IP addresses and URLs. All extensions requested by copyright owners have so far been granted (Foxtel – June 2017, December 2017, February 2018, and Roadshow – February 2018).

37. The process usually takes about two to four weeks from start to finish and the CSPs then have up to 15 working days to implement the blocks. This process operates too slowly to allow copyright owners to address this the emergence of new pathways to the blocked site. The Department understands that the Court has the power under the existing s 115A to make more responsive orders and that could be made more clear through a clarifying amendment.





## The need for government action

38. In response to the Department's 2018 consultation, film industry copyright owners argued that section 115A does not fully achieve the policy objective of disrupting the supply of online infringing content to Australians. Amongst other issues, these stakeholders identified that the section 115A does not:

- require online search engine providers to disable access to search results to websites that are already subject to a Federal Court injunction that applies to a CSP.

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. Proving the intent of operators of these foreign online locations and their Australian users can be a particular problem.

- efficiently disable mirror and proxy online locations which disregard the rights of copyright owners and are subject to an existing Federal Court injunction under section 115A, now and into the future.

39. There have attempts to address these concerns in other countries through voluntary measures, such as in the [UK](#). Voluntary measures are welcome, and legislative changes to section 115A will not prevent these arrangements from being entered into. Indeed, there is unlikely to be a call for copyright owners to seek an injunction under section 115A if these voluntary measures are effective. However, it is important to have a legislative fall-back if such measures are not adequate, or where they are no longer being adhered to by CSPs or online search engine providers.

40. Concerns raised in the 2018 consultation point to the need for a clearer and more effective legislative framework for copyright owners to protect and enforce their rights. In the absence of more effective tools, online copyright infringement in Australia may continue to be higher than some other countries. As noted above, comparing the results of our online copyright infringement survey with comparable surveys shows that copyright infringement amongst digital consumers is higher in Australia (33 per cent) than the UK (25 per cent) and Canada (26 per cent).

41. In the case of the UK, part of its success may be attributable to the more extensive copyright enforcement regime that applies, including a website-blocking scheme that is more far-reaching and responsive. For example, in the UK, "live blocking injunctions", have been obtained by the Premier League both in respect of the final portion of the 2016/17 season (in a test case before the High Court in March 2017) and subsequently in respect of the entire 2017/18 season.

42. There is a strong case to consider reforms to the current website blocking arrangements to ensure that creators and investors get a fair return from lawfully acquired films and music.

## Policy options

43. The Department has considered three policy options, which are:



- i) No change. Under this option, there would be no change to section 115A, which would operate as it currently does.
- ii) Extend section 115A to online search engine providers and lower the threshold to “primary purpose or primary effect”. Under this option, section 115A would be updated to apply to online search engine providers and a broader range of foreign sites (e.g. cyberlockers) could be blocked under a section 115A injunction. It would be made clear that a Court has existing power to make more responsive orders.
- iii) Extend section 115A to online service providers and lower the threshold to “substantial purpose or effect”. Under this option, section 115A would be updated to apply to online search engine providers and a broader range of foreign sites (e.g. cyberlockers and some websites/platforms) could be blocked under a section 115A injunction. It would be made clear that a Court has existing power to make more responsive orders.

Under all options, voluntary measures would continue to apply. However, it is highly unlikely that a copyright owner would seek an order from the Federal Court – either under existing arrangements (Option 1) or under the revised arrangements (Option 2 or Option 3) – if those voluntary arrangements were effective in addressing copyright infringement.

## Impact analysis

### Option 1: No change

44. Option 1 would enable s 115A orders to continue to be made against CSPs for new online locations, and the current process for obtaining extended orders for new domain names, IP addresses and URLs would need to be followed. A number of stakeholders to the 2018 review argued that there should be no change on the basis that the applications had been successful, that traffic to blocked sites was lower, and that voluntary measures were already in place to complement the existing s 115A regime.

45. Under a no change option, consumers would be able to readily access blocked sites via alternate domain names that could appear on search engine results, and would be able to freely access cyberlocker sites to store and share material, including infringing material. For those consumers who already comply with the law, there is likely to be no change as there is no evidence to suggest that prices for legitimate content are increasing. The introduction and rapid consumer take up of streaming services, with an increasingly broader repertoire of content, will provide a competitive environment amongst these services, with a wider range of options for consumers to access.

46. Copyright owners would continue to derive significant benefits from the current scheme because they would be able to disrupt the majority of large-scale infringing websites that appear in the future. However, it is uncertain whether they would be able to block sites that have large amounts of infringing content but where the purpose of the site is not clear (e.g. cyberlockers). Left unchecked, there is a risk that Australian users will begin to utilise these types of sites to access and share infringing material.

47. It is possible that, if parties seek changes, the Federal Court may adopt a more streamlined process in the future to deal with the challenge of addressing new pathways to an online location (e.g. through the development of a practice note). Parties could agree before Court proceedings on a set of injunction order terms that would facilitate further blocking of future pathways to an online location with the future agreement of both parties. However, it is unclear whether the Court will adopt such an approach.



48. In terms of online search engine providers, copyright owners could also seek to develop voluntary agreements similar to UK arrangements, where infringing domain names and URLs are demoted from particular search results, and autocomplete results are modified to not return terms that lead users to pirated sites. If these arrangements work as intended, users would not be able to access blocked sites and less savvy internet users will not be able to discover the existence of the sites.

49. However, there is uncertainty in relying entirely on voluntary arrangements between copyright owners and online search engine providers, particularly where these involve multi-national businesses, or where the arrangements are developed in other jurisdictions. These arrangements may be subject to change in the future without any notice. The Australian Government would have no control over the content of the arrangements (the UK Government does have some oversight) and would not be in a position to advise on, or assist with, any future improvements or implementation issues.

50. Maintaining the status quo would not change regulatory costs to business, community organisations or individuals.

## Regulatory Costs

| Business<br>(\$ million) | Community<br>Organisations | Individuals | Total change in costs |
|--------------------------|----------------------------|-------------|-----------------------|
| \$ 0                     | \$ 0                       | \$ 0        | \$ 0                  |

## Option 2: Extend to online search engine providers and extend the “primary purpose” test

51. Under this option, section 115A would be updated to apply to online search engine providers. Copyright owners would be able to seek an injunction against CSPs, who could be required to take reasonable steps to disable access to an overseas online location that had the primary purpose or primary effect of infringing, or facilitating infringement of, copyright. If a copyright owner seeks blocking by a CSP, they may also seek blocking by an online search engine provider.

52. Consumers would face more restrictions in attempting to access blocked sites because alternate domain names would be blocked more quickly, and would be less likely to appear in search engine results. Instead of returning to the Court to obtain an extended order (which can take between 2-4 weeks), the copyright owner could agree with a CSP and / or an online search engine provider to more swiftly block access to a location through new domain names, URLs and IP addresses.

53. Consumers would also face more restrictions in being able to access cyberlocker sites to store and share material, including infringing material. Consumers who wanted to store legitimate material would have to find a legitimate site elsewhere.

54. The [online search engine market](#) in Australia is dominated by Google (92%) and Bing (5%) and it is expected that copyright owners will seek injunction orders against these providers only. These providers would have to decide whether to contest applications by rights holders under section 115A, and be in a position to implement any orders made by the Court.



55. In terms of the infrastructure required to disable access to online locations, it is clear at least in the case of Google that it possesses the technical means to delist entire websites and has done so in other contexts, such as in response to Court orders in the following instances:

- *Google Inc. v Duffy* [2017] SASCFC 130 (Oct. 4, 2017) (Australian case involving defamation);
- *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014) (European Court of Justice on the “right to be forgotten”); and
- *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34, [2017] 1 S.C.R. 824 (Canadian case involving trade secrets).

56. In addition, Google and Bing have agreed with rights holders on a “[code of practice](#)” in the UK that includes demoting UK search results of copyright infringing websites. We understand that the effect of this is intended to be worldwide, ie infringing websites will be demoted from Australian search results. From this, it is clear that both these online search engine providers have the existing capability to modify their search engine results to implement any orders under s 115A, although there may be a cost of maintaining systems to ensure they are up-to-date and effective (see further discussion below).

57. During the consultation on the Exposure Draft Bill, concerns were raised that a possible unintended consequence would be to raise costs for providers of online applications that are not a known conduit to sites hosting infringing copyright works, or raising costs or creating other barriers to entry for challengers to the established incumbents in internet search.

58. However, the risk of this is low because Court actions have been brought, and are far more likely to be brought under Option 2, against online search engine providers that are known conduits to infringing works (the Court must be satisfied that the service provider is providing access to the site otherwise it will not be reasonable to require them to block access), and small operators are unlikely to be targeted as has transpired to date with CSPs under section 115A.

59. Even where a small operator is targeted, the Court would still be required to order that they take “reasonable steps” to disable access to an overseas online location. In many cases, a small operator may not have the capability to not provide a search result that refers a user to an online location, and therefore there may not be “reasonable steps” that a Court can order.

60. In addition, Option 2 will be supported by a power for the Minister to exclude, via legislative instrument, smaller entities from the provisions in the unlikely event of them being subject to injunction orders. This safeguard will ensure that Ministerial oversight is available to ensure that the Scheme does not impede the legitimate operations of, or the entry into the marketplace of, smaller online search engine providers.

61. The net annual impact of this option on online search engine providers would total \$0.5m in the first year but fall to zero in following years. This is based on the reports of legal costs from the section 115A cases to date. This includes the following costs:

- An average \$0.4m cost of proceedings for online search engine providers. Given the dominant market share of two providers of search results to users in Australia, Google and Bing, copyright owners are unlikely to pursue any other providers. It is expected that these major providers will only bear the cost of proceedings for the first one or two cases, possibly to develop agreed orders. After this, it is likely that they will not make an appearance, similar to the process that CSPs have adopted.



- An average \$0.1m setup and maintenance costs for two online search engine providers to ensure the technical capability to take steps the Court considers to be reasonable. It is understood that online search engine providers have already set up systems to undertake steps to reduce copyright infringement under a [UK voluntary code of practice](#), and court-ordered website blocking in France. Further setup costs are unlikely, in the presence of existing systems, but there may be a cost of maintaining systems to ensure that they are up-to-date and remain effective. To the extent that an online search engine provider also takes steps in other jurisdictions, these costs may be shared across countries.

62. Although there may be costs borne by copyright owners, these are not costs of regulation for copyright owners. It is a commercial decision for a copyright owner to seek an injunction. If an owner does not wish to seek an injunction against online search engine providers for any reason (e.g. the costs exceed the benefits of lower copyright infringement), that is their choice. There is no obligation to seek or even consider an injunction, and therefore no regulatory costs. The cost of implementing the individual blocks incurred by online search engine providers would, consistent with [section 115A decisions to date](#), be recoverable from copyright owners.

63. During the consultation on the Exposure Draft Bill, concerns were raised that some sites (e.g. Pinterest), might have the “primary effect” of facilitating the infringement of copyright, if a particular copyright owner (e.g. a photographer or studio) decided to make an application under s115A. Similar concerns were raised that the same risk could apply to non-infringing cyberlockers sites used, for example, by legitimate small businesses that need to share large-size files such as wedding videographers or distance education providers.

64. However, copyright owners would be more likely to seek cooperation from the operators of popular websites to address online infringement issues (e.g. removing pay-per-view content appearing on Facebook Live) rather than seeking a court injunction. If an application was made, the operator of a popular website would be more likely to appear in the Court and oppose the making of an order, and provide detailed arguments as to why it should not be made.

65. In particular, the likelihood of the Court ordering an injunction would be extremely low when the “primary purpose or primary effect” test is read in conjunction with subsection 115A(5). Under subsection 115A(5), the Court may, in determining whether to grant an injunction, take into account certain factors, such as:

- whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- whether disabling access to the online location, or 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 to disable access to the online location, or not to provide search results that refer users to the online location.

66. Once these factors are applied, a Court would be likely to conclude that an injunction should not be made against popular sites such as Pinterest that have large amounts of legitimate material. The Court would also have regard to the aim of section 115A as noted in the Explanatory Memorandum to the Copyright Amendment (Online Infringement) Bill 2015, which stated that sites 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.



## Regulatory Costs

| Business<br>(\$ million) | Community<br>Organisations | Individuals | Total change in costs |
|--------------------------|----------------------------|-------------|-----------------------|
| \$ 0.5                   | \$ 0                       | \$ 0        | \$ 0.5                |

### Option 3: Extend to online service providers and lower threshold to “substantial purpose or effect”

67. Under this option, section 115A would be extended to apply to online search engine providers. If a copyright owner seeks blocking by a CSP, they may also seek a Court order for an online service engine provider to take reasonable steps to not provide a search result that refers a user to an online location.

68. Option 3 would also lower the threshold for online locations from “primary purpose” to “substantial purpose or substantial effect”. This would provide a much lower threshold, which may open up website blocking targeted beyond worst offender websites to other websites that may also host significant legitimate activity.

69. Consumers would face stricter restrictions in attempting to access blocked sites because alternate domain names would be blocked more quickly, and would be less likely to appear in search engine results. Instead of returning to the Court to obtain an extended order (which can take between 2-4 weeks), the copyright owner could agree with a CSP and an online search engine provider to more swiftly block access to a location through new domain names, URLs and IP addresses.

70. Consumers would face stricter restrictions in attempting to access blocked sites because alternate domain names would be blocked more quickly, and would be less likely to appear in search engine results. Consumers would face more restrictions in being able to access cyberlocker sites to store and share material, including infringing material. Consumers who wanted to store legitimate material would have to find a legitimate site elsewhere. Sites that provide access to legitimate and non-legitimate material could also be blocked from Australian consumers if they meet the “substantial effect” element and the Court has no concerns with the safeguard factors in subsection 115A(5).

71. As with Option 2, the same issues would be raised for smaller online search engine providers in relation to their capability to enforce section 115A orders, and the likelihood that Google and Bing would be the only online search engine providers that are targeted. However, they may be required to take reasonable steps to not provide a search result that refers a user to a bigger number of online locations.

72. As with Option 2, the likely net annual impact of this option on online search engine providers would total \$0.5m in the first year but fall to zero in following years. This is based on the reports of legal costs from the section 115A cases to date. This includes the following costs:

- An average \$0.4m cost of proceedings for online search engine providers. Given the dominant market share of two providers of search results to users in Australia, Google and Bing, copyright owners are unlikely to pursue any other providers. It is expected that these major providers will only bear the cost of proceedings for the first one or two cases, possibly to develop agreed



orders. After this, it is likely that they will not make an appearance, similar to the process that CSPs have adopted.

- An average \$0.1m setup and maintenance costs for two online search engine providers to ensure the technical capability to take steps the Court considers to be reasonable. It is understood that online search engine providers have already set up systems to undertake steps to reduce copyright infringement under a [UK voluntary code of practice](#), and court-ordered website blocking in France. Further setup costs are unlikely, in the presence of existing systems, but there may be a cost of maintaining systems to ensure that they are up-to-date and remain effective. To the extent that an online search engine provider also takes steps in other jurisdictions, these costs may be shared across countries.

73. Although there may be costs borne by copyright owners, these are not costs of regulation for copyright owners. It is a commercial decision for a copyright owner to seek an injunction. If an owner does not wish to seek an injunction against search engine providers for any reason (e.g. the costs exceed the benefits of lower copyright infringement), that is their choice. There is no obligation to seek or even consider an injunction, and therefore no regulatory costs. The cost of implementing the individual blocks incurred by online search engine providers would, consistent with [section 115A decisions to date](#), be recoverable from copyright owners.

74. During the consultation on the Exposure Draft Bill, concerns were raised that some sites (e.g. Pinterest), might have the “primary effect” of facilitating the infringement of copyright, if a particular copyright owner (e.g. a photographer or studio) decided to make an application under s115A. Similar concerns were raised that the same risk could apply to non-infringing cyberlockers sites used, for example, by legitimate small businesses that need to share large-size files such as wedding videographers or distance education providers.

75. However, copyright owners would be more likely to seek cooperation from the operators of popular websites to address online infringement issues (e.g. removing pay-per-view content appearing on Facebook Live) rather than seeking a court injunction. If an application was made, the operator of a popular website would be more likely to appear in the Court and oppose the making of an order, and lead detailed arguments as to why it should not be made.

76. Concerns about “overblocking” may have some substance if the threshold is lowered from “primary effect” to “substantial effect”. The likelihood of the Court ordering an injunction would still be low but it will depend on how the Court applies the factors under subsection 115A(5). That is, the Court may, in determining whether to grant an injunction, take into account certain factors, such as:

- whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- whether disabling access to the online location, or 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 to disable access to the online location, or not to provide search results that refer users to the online location.

77. Once these factors are considered, a Court would still be likely to conclude that an injunction should not be made against popular sites such as Pinterest that have large amounts of legitimate material. However, there may be other sites with large amounts of both legitimate and non-legitimate material that could be the subject of an injunction. This would raise concerns about “overblocking” and might raise counter-claims from owners/operators of legitimate sites that could be brought against copyright owners and CSPs who have implemented the blocks under the Court order.



## Regulatory Costs

| Business<br>(\$ million) | Community<br>Organisations | Individuals | Total change in costs |
|--------------------------|----------------------------|-------------|-----------------------|
| \$ 0.5                   | \$ 0                       | \$ 0        | \$ 0.5                |

## Consultation

78. The options presented here take into account views from a public consultation in February and March 2018, as part of the Department's review of section 115A. The Department received 22 submissions, mostly from representatives of copyright owners, internet service providers, tech sector firms (including online search engine providers) and consumers.

79. Most stakeholder submissions agreed that section 115A has been a positive Government initiative which is working as intended. Several stakeholders argued that there was no immediate need for change. In particular, some rights holders and intermediaries believed there should be no substantive amendments. However, the film, sports and broadcasting industries proposed changes to expand section 115A to online search engine providers. Digital rights groups called for the repeal of s 115A altogether.

80. The Department continued to consult with stakeholders on suggested changes made by copyright owners as part of a limited consultation conducted in September 2018. Copyright owners were supportive of changes that are reflected in Option 2. CSPs and online search engine providers did not support these proposals, arguing that there may be unintended consequences. Online search engine providers also argued that the legislative requirements are unnecessary as they take voluntary measures in cooperation with copyright owners.

81. To add clarity and address these concerns, the Option 2 proposal was adjusted to make it clear that:

- an injunction may require CSPs and online search engine providers to block future pathways to blocked sites where these providers have agreed with copyright owners to take this action. The wording was expressly included in a subsection to make it clear that CSPs and online search engine providers cannot be coerced or forced into agreeing with copyright owners about the blocking of these new pathways.
- the safeguard factors already in place in section 115A (e.g. public interest, proportionality etc) may be taken into account before a Court orders an injunction. This addressed concerns from CSPs who were concerned that an order could be made requiring them to terminate the accounts of users, or to block sites that have legitimate content, i.e. to go beyond simply blocking of websites.

82. The Department consulted with the Australian Competition and Consumer Commission, Department of Industry, Innovation and Science, Attorney-General's Department, Department of the Prime Minister and Cabinet, Department of Treasury, and Department of Finance. The Department also consulted with its counterpart agencies in other countries. We understand from these discussions that website blocking by CSPs is operating well in the UK and in Singapore. In addition, as noted above, the





UK Government has facilitated a voluntary code of practice that requires action by Google and Microsoft to address online copyright infringement.

## Preferred option

83. Option 2 is the best option in addressing ongoing problems with online copyright infringement in Australia. Extending section 115A to online search engine providers, and including a “primary purpose or primary effect” threshold is a balanced and measured approach that will enable copyright owners to more effectively enforce their rights while only providing a modest impact on online search engine providers. The “primary purpose or primary effect” threshold and Federal Court oversight will ensure that Australian consumers will be able to continue to access legitimate websites while only targeting sites that are the worst offenders.

84. Option 1 would not achieve these objectives because the identified gaps in section 115A (e.g. discoverability, cyberlockers and the lack of certainty around voluntary measures) will not be adequately addressed. Government inaction would not be acceptable given that website blocking measures are contributing to lower levels of online copyright infringement in Australia, and improvements to section 115A are more likely to further improve these outcomes.

85. Option 3 would be an unreasonable extension of section 115A and could have an unacceptable impact on lawful and beneficial activities. Lowering the threshold for online location to those with a “substantial purpose or substantial effect” for infringing copyright (or facilitating copyright infringement) is likely to capture many websites that have significant legitimate purposes. Australian consumers could lose reliable access to websites they currently use every day for legitimate purposes, but happen to also host a significant amount of infringing (or at least not expressly permitted) activity.

## Implementation and evaluation

86. The implementation of Option 2 would be achieved by legislative amendments to section 115A of the Copyright Act. Subject to Government decisions and parliamentary timings, these amendments will be included in a Bill that will be introduced in Parliament in the 2018 Spring Sittings.

87. The Department will continue to monitor the operation of any amendments, especially any impact on online copyright infringement and legitimate online services. The Department will continue to run an annual survey of online copyright infringement in Australia, including consumer behaviours on website blocking, and compare results with similar UK and Canadian surveys. The Department will examine how the annual survey can be adjusted to monitor the effectiveness of changes to section 115A, including on how the price of digital copyright content influences the behaviour of Australian consumers. It will also review any research commissioned by copyright industries and consumer groups that focus on this issue. The Department will also continue to liaise with stakeholders to understand the impacts of website blocking on communities and industries, and review court orders and judgments.

88. The Department will also continue to monitor copyright enforcement activities in other countries, and liaise with foreign government counterparts. In particular, the Department will monitor the development of new enforcement mechanisms following the EU Parliament's recent copyright proposals which will require digital platforms, including online search engine providers, to take further steps to assist with copyright enforcement. This will help evaluate Australian copyright enforcement efforts in a global context and with regard to cooperation of digital platforms.

