ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

Sophie Dunstone
Committee Secretary
Legal and Constitutional Affairs Legislation Committee
Commonwealth of Australia
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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Dear Madam,

Thank you for inviting us to make a submission to the Senate Inquiry into the Copyright Amendment (Online Infringement) Bill 2015, which we are pleased to do.

EFF believes that censoring content from the Internet through blocking or filtering is never the best approach to take in managing illegal behaviour online, and that it is always much better to address such behaviour at its source. Any blocking or filtering of content runs the risk of being over-extensive or under-extensive (frequently both at once), and more fundamentally, runs against the Internet's essential value as an open platform for free expression.

Having said that, when content is blocked online, it is important that this occurs in a transparent and accountable process in accordance with the rule of law, and only as necessary and proportionate in a democratic society. In this respect, the need for judicial authorisation of blocking in the Bill is consistent with emerging global norms such as the Manila Principles on Intermediary Liability, which provide that content must not be required to be restricted without an order by a judicial authority.[1]

Yet this alone is not enough to justify the removal of content, as that depends also on the jurisdiction that the judicial authority is granted by law to order such removals, and this is where the Bill falls down. Both the process by which the court will be asked to block online content, and the substantive grounds upon which it is asked to do so, are flawed.

Beginning with the process, we are concerned that in most cases, there will be nobody to advocate for the retention of content for which a blocking order is sought. The Australian intermediary who is party to the proceedings has no particular interest in opposing the blocking of foreign content. Although the foreign content provider is entitled to apply to the court to intervene in the proceedings, their joinder to the proceedings remains within the court's discretion (under proposed subsection 115A(3)), and this would entail considerable expense, due to the high costs of foreign parties securing representation before the Federal Court of Australia. As a result, most hearings are likely to be undefended, and the question of whether particular content should be blocked will seldom receive a full and fair hearing.

As to the substantive grounds on which blocking can be ordered, there is much

1 http://www.manilaprinciples.org

815 Eddy Street • San Francisco, CA 94109 USA
voice +1 415 436 9333 fax +1 415 436 9993 web www.eff.org email information@eff.org

uncertainty about exactly what exactly the bill covers. It extends (in proposed s.115A(1)) not merely to websites hosting material that infringes copyright in itself, but also to websites that may "facilitate the infringement of copyright"—or have the "primary purpose" of doing so, either in respect of the Australian copyright or a foreign copyright.

This could be read to ensnare the operators of Virtual Private Network (VPN) services, some of whom (such as getflix.com.au) specifically market their services for their ability to access blocked or geoblocked content. Nonetheless VPN services themselves are typically general-purpose Internet services that can be used for many other lawful purposes, and it seems disproportionate to allow these lawful services to be blocked merely on account of the way that they are marketed. The same is true of web locker services such as mega.co.nz, recently blocked by global payment intermediaries for no justifiable reason.[2]

Furthermore proposed s.115A(1)(c) provides that the court can consider the purpose of the operator being to infringe or facilitate infringement "whether or not in Australia". This means that the site operator might be committing or facilitating no infringement in their home country, yet be liable to have their website or service blocked. For example, there are countries that have life plus 50 year copyright terms, whereas Australia's copyright term is life plus 70 years. Is a website that makes such works available to the world without access restrictions—say for example, Canada's Project Gutenburg[3]—a site with a primary purpose of facilitating the infringement of copyright, given that there are a greater number English and French speakers in life plus 70 year countries who could potentially access those works than there are Canadians?

Amongst the factors in proposed s.115A(5) that the court can consider in determining whether to make an order are some very strange and inappropriate ones:

- Whether the owner or operator of the online location demonstrates a disregard for copyright generally—again, does this mean that Canadians are expected to have a regard for Australia's longer copyright term? Would an overseas website operator "demonstrate their disregard" for copyright law if their website hosted an article advocating for the abolition or reform of copyright law? This factor, if it requires foreign operators to hold copyright law—or any law—in high regard, seems to promote a very frightening species of thoughtcrime. Also given that, in most cases, the owner or operator of the online location will not be a party to the proceedings, it is difficult to surmise how their level of regard for copyright law could be accurately gauged.
- Whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright—we regard this factor as far too broad. Although we can assume that it is meant to target websites that host links to infringing content, such as the Pirate Bay, it could very easily be interpreted much more broadly to include purely informational sites such as doom9.org that provides information about ripping DVDs, including links to region-free firmware. To allow such websites to be

2 See Chanthadavong, Aimee, "*PayPal terminates services to Mega*" (March 2, 2015), available at http://www.zdnet.com/article/paypal-terminates-services-to-mega/.

3 http://www.gutenberg.ca/.

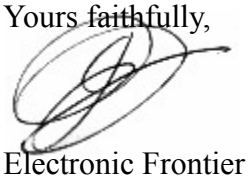
blocked would be a serious infringement of freedom of expression. It is also unclear how the presence of directories, indexes or categories should be taken into account by the court—is a website that contains embedded infringing material more or less liable to be blocked than one that links to such material? The Bill does not make this clear.

- Whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement—this appears to encourage the court to short-cut making its own determination of the facts, based on overseas orders that may be based on quite different copyright or blocking regimes, perhaps with far fewer safeguards than the proposed Australian regime.
- Whether disabling access to the online location is a proportionate response in the circumstances—whilst this is not an inappropriate criterion, we would observe that the 2011 Joint Declaration on Freedom of Expression and the Internet issued by four intergovernmental rapporteurs on freedom of expression argued that this will seldom be proportionate:

> Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure—analogous to banning a newspaper or broadcaster—which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse. … Content filtering systems which are imposed by a government or commercial service provider and which are not end-user controlled are a form of prior censorship and are not justifiable as a restriction on freedom of expression.[4]

EFF believes that the adoption of this bill is unacceptable for a liberal democracy such as Australia. As a bill purportedly meant to address copyright infringement, it is inevitably ineffective and offers little benefit. However its detriment is very clear, in that it further legitimizes the practice of website blocking. This will make it more difficult for Australia to take a stand against these practices when practised by authoritarian countries, and to resist pressure from domestic special interest groups to block more and more categories of content that they may find offensive or undesirable.

Yours faithfully,



Electronic Frontier Foundation
per Jeremy Malcolm
Senior Global Policy Analyst

4 UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Article 19, Global Campaign for Free Expression, and the Centre for Law and Democracy, "*Joint Declaration on Freedom of Expression and the Internet*," available at http://www.osce.org/fom/78309.