Law Council
OF AUSTRALIA
Business Law Section

Senator The Hon George Brandis QC
Attorney-General and Minister for the Arts

The Hon Malcolm Turnbull MP
Minister for Communications

Online Copyright Infringement Consultation
Commercial and Administrative Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

5 September 2014

Dear Attorney-General and Minister,

Online Copyright Infringement Discussion paper – Submission

I have pleasure in enclosing a submission in response to the Online Copyright Infringement Discussion Paper.

The submission has been prepared by the Media and Communications Committee of the Business Law Section of the Law Council of Australia.

The submission endorses the submission lodged by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia and adds further commentary as to legislative proposals.

If you have any questions regarding this submission or would like further information or background to that raised in the submission, please contact the Committee Chair, Peter Leonard, by phone on 02-9263 4003 or via email at pleonard@gtlaw.com.au

Yours sincerely,

John Keeves
Chairman, Business Law Section

enc.

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Law Council of Australia Media and Communications Committee Submission on Online Copyright Infringement Discussion Paper

This submission has been prepared by the Media and Communications Committee of the Business Law Section of the Law Council of Australia.

We have reviewed the submission by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia and fully endorse that submission.

We also wish to make the following further comments with respect to Proposal 2: website blocking.

The Discussion Paper states that, under the site-blocking proposal being proposed by the Government, a court would be required to consider whether an injunction to block a website was "a proportionate response", and also to have regard to "the importance of freedom of expression".

In the event that the Government does enact a website blocking regime, the Committee considers that the following matters should be taken into account:

The Internet and freedom of communication

The Internet has become the most important vehicle for exercising freedom of communication: the freedom to create and transmit information, the freedom to receive information and the freedom to comment and engage in a dialogue. The Internet is a global system where Internet users frequently engage in local or national dialogues using the platform of overseas social media and other user generated content websites. A block on an overseas website may be a stronger fetter on freedom to communicate within Australia than a block on a domestic website where the reach of that overseas website into Australia is significant. Any legislative regime that provides a mechanism for a court to direct an ISP to block overseas websites has a potential to unduly fetter freedom of communication. The power of direction should therefore be drafted in sufficiently narrow and targeted terms so as to amount to a reasonable and proportionate response to the goal that is sought to be achieved.

The importance of a narrowly targeted regime

The Discussion Paper has proposed a website blocking regime to that would apply "*Internet site[s] operated outside Australia, the dominant purpose of which is to infringe copyrigh*t".

On its face, this could result in a website that contains more than a *de minimis* amount of "legitimate" content being blocked to anyone using an ISP subject to the jurisdiction of an Australian court. This Media and Communications Committee respectfully submits that a website-blocking regime that had the potential to operate in this way may well exceed what

could fairly be said to be a reasonable and proportionate response to the concerns outlined in the Discussion Paper, and may therefore amount to an unjustified interference with freedom of communication.

These concerns are not merely theoretical. The recent controversy regarding the *Australian Security and Investments Commission's* reliance on s 313 of the *Telecommunications Act* 1997 to inadvertently block 1200 websites[1] has highlighted the ways in which site-blocking regimes can operate in ways that were never intended and which raise substantial concerns as to freedom of communication.

Also, laws intended to protect freedom of communications and place clearly specified and limited confines upon derogations from such freedoms can have contrary outcomes. Two recent examples arise from adoption of the Standing Committee of Attorneys-Generals' model law on grant of suppression and non-publication orders[2].

As adopted for New South Wales courts (by the *Court Suppression and Non-Publication Orders Act* 2010 (**NSW Act**)), in deciding whether to make a suppression or non-publication order a NSW court must take into account that 'a primary objective of the administration of justice is to safeguard the public interest in open justice'[3] and balance that 'primary objective' against particular grounds upon which an order may be made[4]. Notwithstanding the clear expression of primacy of the public interest in open justice in any balancing of factors allegedly favouring a grant of a suppression or non-publication order, introduction of the NSW Act has led to a very large increase in suppression and non-publication applications and successful orders in New South Wales.[5]

In December 2013 the *Open Courts Act* 2013 (Vic) entered into effect. The purpose of the Act, as stated by the Victorian Attorney General at the time the Act was introduced, was to lessen the number of suppression orders. The Victorian Act contains a similar statement to the NSW Act as to the importance of the openness of our judicial system. Section 4 of the Victorian Act states "to strengthen and promote the principles of open justice and free communication of information, there is a presumption in favour of disclosure of information to which a court or

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[1] http://www.smh.com.au/digital-life/digital-life-news/government-accused-of-sneaking-in-web-filter-20130517-2jq3p.html

[2] Standing Committee of Attorneys-General (SCAG) (NSW), *Model Bill: Court Suppression and Non-Publication Orders Bill 2010*, available at http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/model_court_suppression_&_non_publication_orders_ bill_2010.pdf.

[3] *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7. The NSW Act defines 'non-publication order' as an order that 'prohibits or restricts information', and a 'suppression order' means 'an order that prohibits or restricts the disclosure of information (by publication or otherwise)': section 3. As to the primacy of open justice, see section 6.

[4] Section 8(1).

[5] Pat Bateman, 'The rise and rise of suppression orders', (13 March 2013) *Gazette of Law & Journalism.* See further Miiko Kumar and David Rolph, 'An Appetite for Suppression: Non-Publication Orders, Open Justice and the Protection of Privacy', *Sydney Law School Legal Studies Research Paper 14/65*, July 2014, available at http://ssrn.com/abstract=2467405.

tribunal must have regard in determining whether to make a suppression order". The Victorian Act also purported to 'raise the bar' in relation to the grounds required to be met for the making of a suppression order. For example, the previous ground of preventing a 'risk of prejudice to the administration of justice' became avoiding 'the real and substantial risk of substantial risk of prejudice'. There are other provisions in the Victorian Act that also purportedly 'raise the bar'. But despite the clearly stated aim and policy intent of the Victorian Act and the provisions aimed at avoiding suppression orders, the experience in Victoria is the same: that is, suppression orders continue to be made at an alarming rate.

In summary, this Media and Communications Committee welcomes the acknowledgement in the Discussion Paper of "the importance of freedom of expression". We are, however, concerned that the Discussion Paper contains no substantive discussion of how the Government would ensure that likely interference with freedom of communication arising from a website blocking regime is not disproportionate to the goal that the Government is seeking to achieve. Recent experience suggests that it is likely that even narrowly drafted legislation that states primacy of freedom of communications, and clearly enumerates and subordinates other factors to be taken into balance in determining whether to grant an order, will significantly increase fetters upon open communications. At the very least, this Media and Communications Committee respectfully submits that any legislation enacting a website blocking regime should require a court to consider, before granting a site-blocking injunction, the primacy of the objective of ensuring freedom of communication and then whether any likely interference with freedom of communication is demonstrably outweighed by the interests of the rights holder seeking the injunction.