QUT Intellectual property law and innovation research group

Submission to Senate Standing Committee on Legal and Constitutional Affairs on the Copyright Amendment (Online Infringement) Bill 2015.

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Executive Summary

Additional safeguards are necessary to ensure human rights are adequately protected. All systems of blocking access to online content necessarily raise difficult and problematic issues of infringement of freedom of speech and access to information. Given the importance of access to information across the breadth of modern life, great care must be taken to ensure that any measures designed to protect copyright by blocking access to online locations are proportionate. Any measures to block access to online content must be carefully tailored to avoid serious and disproportionate impact on human rights.

This means first that the measures must be effective and adapted to achieve a legitimate purpose. The experience of foreign jurisdictions suggests that this legislation is unlikely to be effective. Unless and until there is clear evidence that the proposed scheme is likely to increase effective returns to Australian creators, this legislation should not be introduced.

Second, the principle of proportionality requires ensuring that the proposed legislation does not unnecessarily burden legitimate speech or access to information. As currently worded, the draft legislation may result in online locations being blocked even though they would, if operated in Australia, not contravene Australian law. This is unacceptable, and if introduced, the law should be drafted so that it is clearly limited only to foreign locations where there is clear and compelling evidence that the location would authorise copyright infringement if it were in Australia.

Third, proportionality requires that measures are reasonable and strike an appropriate balance between competing interests. This draft legislation provides few safeguards for the public interest or the interests of private actors who would access legitimate information. New safeguards should be introduced to ensure that the public interest is well represented at both the stage of the primary application and at any applications to rescind or vary injunctions.

We recommend that:

- The legislation not be introduced unless and until there is compelling evidence that it will have a real and significant positive impact on the effective incomes of Australian creators.
- The ‘facilitates an infringement’ test in s 115A(1)(b) should be replaced with ‘authorises infringement’.
- The ‘primary purpose’ test in s 115A(1)(c) should be replaced with: “the online location has no substantial non-infringing uses”.
- An explicit role for public interest groups as amici curiae should be introduced.
● Costs of successful applications should be borne by applicants.
● Injunctions should be valid only for renewable two year terms.
● Section 115A(5) should be clarified, and cl (b) and (c) be removed.
● The effectiveness of the scheme should be evaluated in two years.

1. Internet filters are unlikely to have a substantial impact on rates of copyright infringement

Despite the claims made in the explanatory memorandum, there is no evidence to suggest that this legislation is proportionate. The scheme is likely to have little impact on rates of copyright infringement in Australia. It is well established that circumvention technologies are legally and cheaply available to Australian consumers. History has also demonstrated that services that authorise access to infringing material are able to easily evade these measures.¹

**Recommendation:** The legislation not be introduced unless and until there is compelling evidence that it will have a real and significant positive impact on the effective incomes of Australian creators.

The experience of other jurisdictions is incomplete at best, and there is little to suggest that foreign schemes have been effective. Preliminary evaluations of the United Kingdom’s s97A² scheme suggest that while measured levels of access to blocked websites predictably fell, traffic to other websites that provide links to infringing content increased.³ The methodology used to evaluate the effectiveness of the UK scheme was severely limited. It does not take into account any increase in use of VPNs or other technologies to access blocked websites, nor can it take into account any shift in consumer behaviour towards other, less monitored avenues of obtaining infringing content.

The lack of evidence led the European Court of Justice to strike down website blocking in the Netherlands. An order to require ISPs to block access to The Pirate Bay was overturned on appeal,⁴ and the Court noted that rates of infringement had actually increased following the imposition of the block. The inference drawn by the

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¹ See, for example, the inability of ISP level filters to block access to The Pirate Bay: http://www.gizmodo.com.au/2015/03/the-pirate-bay-is-successfully-dodging-isp-level-site-blocking/
² Copyright, Designs and Patents Act 1988 (UK)
³ https://torrentfreak.com/uk-site-blocking-gives-boost-to-pirate-linking-sites-150102/
court was that the measure could not have been proportionate, since it necessarily imposed a cost on freedom of speech for little ascertainable benefit.\(^5\)

The fact that these measures have not been proven to work in other jurisdictions indicates that they are not likely to be in the interests of the Australian public. A blocking scheme imposes significant costs on Internet Service Providers, costs that must ultimately be recouped from Australian consumers. It also poses significant risks for freedom of expression. There is little reason to think that these costs and risks are justified by any countervailing benefits to rightsholder groups, and particularly not to Australian rightsholders and creators.

This proposal, along with the other policies currently being considered to increase enforcement of copyright in Australia, is unlikely to be in the public interest in the medium to long term. Increased enforcement mechanisms are unlikely to reduce rates of infringement unless penalties become so severe and so regular that they become extremely punitive. The primary result of these systems is to continue the costly arms race of legal action and technological circumvention that has been underway since Napster. If we have learnt anything from the last two decades of the ‘copyright wars’, it is that the best way to tackle copyright infringement is by satisfying the public’s demand for content in accessible, convenient, and affordable channels. Until the Australian market is better served by foreign rightsholders, increasing the severity of copyright law is only likely to be counter-productive.

2. The legislation should be clearly limited to sites that would clearly be unlawful under Australian law

The current draft poses a serious risk that legitimate online locations that would not be unlawful under Australian law would be blocked. This should be avoided — there is no legitimate justification for blocking access to sites that would not be unlawful if they were operated within Australia. We recommend that the threshold for an online location to be blocked be clearly set at a high bar. The test should be amended to only apply to apply to foreign online locations where there clear and convincing evidence that the foreign site would, if it operated in Australia, authorise the infringement of copyright. The threshold for blocking a foreign online location should be at least equal to the threshold for a finding of authorisation. Given that the foreign service provider will have a reduced ability to contest the order, it should likely be substantially higher than the authorisation test. For the sake of clarity and certainty, this should further be qualified by a requirement that the foreign site clearly does not have substantial non-infringing uses. These measures would ensure that this

\(^5\) Ibid.
legislation achieves its goal of targeting flagrantly infringing sites without unduly impinging on legitimate speech and services.

**Recommendation: s 115A(1)(b) should be amended to replace the term ‘facilitates an infringement’ with ‘authorises infringement’.
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The proposed amendment enables injunctions to be granted with respect to online locations that have the primary purpose of infringing copyright or facilitating the infringement of copyright. The Explanatory Memorandum states that this amendment is not intended to affect existing laws on authorisation liability, and that the threshold test is set intentionally high to target only those sites that “flagrantly disregard the rights of copyright owners”. However, the manner in which the proposed test is worded is not likely to achieve this effect. We have Australian case law at the highest level that discusses the meaning of “authorise”, but no case law that considers the meaning of “facilitate” in the context of copyright infringement. Without some clarification, there is a very real risk that courts will read “facilitate” to be broader than “authorise”. This would have the apparently unintended consequence that the obligation to block online locations might extend to sites that would not contravene Australian law.

**Recommendation: s 115A(1)(c) should be amended to replace the test of ‘primary purpose’ with: “the online location has no substantial non-infringing uses”
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This risk is not adequately mitigated by the requirement that the primary purpose of the online location is to facilitate infringement. This test instead introduces more uncertainty into an already complex area of law. Purpose denotes intent, but it is unlikely that courts in these circumstances will have the requisite evidence before them to come to a reliable determination about the intent of a foreign service provider. Presumably, service providers will not always be so careless as to advertise their intent to facilitate infringement. Courts will therefore be required to “look between the lines” to find evidence of intent to facilitate infringement. This is likely to be highly problematic, since many sites that might facilitate infringement on some level will also facilitate access for important, lawful purposes as well.

The intended effect of the ‘primary purpose’ test in section 115A(1)(c) could be better achieved by specifically incorporating the US jurisprudence on ‘substantial non-infringing uses’ — otherwise known as the ‘Sony test’. This test, developed in

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6 Section 115A(1)(c) Copyright Amendment (Online Infringement) Bill 2015 ; Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 [2].
7 Explanatory Memorandum, Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015, [7].
8 Ibid, [6].
9 University of New South Wales v Moorhouse and Angus & Robertson (Publishers) Pty Ltd. (1975) 133 CLR 1; Roadshow Films Pty Ltd v iiNet Limited [2012] HCA 16.
response to the need to protect emerging technologies with legitimate and innovative uses, arose in the context of a suit brought in relation to Sony’s Betamax video recorders.\textsuperscript{10} By specifically incorporating this language in the draft legislation, Australian courts would have the benefit of a well-developed body of case law to help determine when an online location should be blocked.

3. Protecting the public interest
The proposed scheme provides little practical protection for human rights. As it is currently drafted, it is likely that a blocking injunction will often be granted in a default judgment. Copyright owners may be able to obtain an injunction with little supporting evidence. Internet Service Providers are actively discouraged from opposing applications made by rightsholders by the threat that costs will be awarded against them.\textsuperscript{11} ISPs also have no direct interest in which foreign locations are blocked beyond the costs that they are asked to bear. It is also likely that foreign service providers will often not be able to attend or will choose not to bear the costs of attending the hearing in regards to blocking their online location. Australian citizens, whose rights to access information are most directly impacted by this proposal, have no standing to contest applications.

Recommendation: An explicit role for public interest groups as amici curiae
In order to ensure that the public interest is well represented, we strongly recommend that leave be routinely granted for public interest groups to be heard in any application for an injunction to be granted or removed. Justice Arnold in the recent Cartier case in the UK, for example, found the assistance of the Open Rights Group to be particularly helpful in determining whether an injunction should be granted.\textsuperscript{12} Given the limited resources available to most public interest groups, we recommend that these groups be permitted to participate as amici curiae, rather than as intervenors. In the alternative, we suggest that a general presumption be introduced that these groups will not be liable for costs.

Recommendation: Costs of successful applications should be borne by applicants
We also recommend that ISPs should not ordinarily be liable for the costs of taking part in proceedings. The recent experience in the Dallas Buyers Club v iiNet\textsuperscript{13} litigation highlights the importance of ensuring that ISPs have an incentive to

\textsuperscript{10} Sony Corp. of America v. Universal City Studios, Inc. (1984) 464 U.S. 417
\textsuperscript{11} Copyright Amendment (Online Infringement) Bill 2015 s 115A(9).
\textsuperscript{12} Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors [2014] EWHC 3354 (Ch), [7].
\textsuperscript{13} Dallas Buyers Club LLC v iiNet Limited [2015] FCA 317.
represent the public interest and the interests of their customers in copyright actions. In that case, this important role was recognised by the Court, and the applicant was ordered to pay the costs of the application. This is an important principle that should be incorporated into the current legislation. Given that this scheme is designed to compel third parties without fault to protect the interests of copyright owners, it is just and fair that rightsholders bear the costs of determining that each application is adequately made out.

**Recommendation: Introduce an explicit sunset clause for each injunction**

In order to help ensure that filters on online locations are proportionate, we recommend that a sunset clause be introduced on all injunctions of no more than two years. This will help to ensure that online locations that change in content or ownership are not blocked for longer than necessary. This is in line with the recent UK *Cartier* case, where Justice Arnold ordered that the obligation to block online locations would expire in two years.\(^\text{14}\) Orders should be renewable on application before the end of this period.

**Recommendation: s 115A(5) should be clarified**

We strongly support the inclusion of an explicit proportionality test in the list of factors that the Court must take into account in s 115A(5)(e). This list, however, is longer than it needs to be, and many of the factors are either extraneous or confusing. Clauses (b) and (c) in particular seem to be highly problematic.

Clause 5(b) should be removed. It currently reads: “whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright”. This clause appears to us to be almost meaningless. At best, it duplicates the test in s 115A(1)(b) “infringes or facilitates an infringement of” copyright. In all likelihood, it merely adds complexity to the test for no apparent benefit.

Clause 5(c) should also be removed. It currently reads: “whether the owner or operator of the online location demonstrates a disregard for copyright generally”. It appears that this clause considers intention to be an aggravating factor when considering an injunction to block an online location, but there is no clear justification for this. Subjective intent has never been part of the test for copyright infringement, and intent seems irrelevant to the question of whether an online location should be blocked or not. The target of regulation is the end user, in these cases, and if any intent is relevant, it is that of those accessing the location. More problematically, there is no clear way for the Court to be able to determine intent on the evidence that is likely to be presented before it.

\(^{14}\) *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch), [265].
Recommendation: the effectiveness of the scheme be evaluated in two years

As a scheme that has a necessary impact on the human rights of access to information and of freedom of communication, this scheme should only remain in effect if it is demonstrably effective and proportionate. We recommend that an explicit sunset and review period be introduced into the scheme, and an independent body be tasked and funded to evaluate the scheme after that period. In order to facilitate independent review and enable public oversight, we also recommend that all orders and reasons be made accessible online as soon as is reasonably possible following a successful or unsuccessful application.