
The Inevitable Actors: An Analysis of Australia's Recent Anti-piracy Website Blocking Laws, Their Balancing of Rights and Overall Effectiveness

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Following the High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd and walking in the footsteps of countries such as the United Kingdom, in 2015 Australia introduced a website blocking injunction regime into the Copyright Act. The regime, which was expanded in 2018, allows an injunction to be brought against a carriage service provider or a search engine provider to block access to an overseas website whose "primary purpose" or "primary effect" is the infringement or facilitation of infringement of copyright. The regime has received criticism that it may amount to a form of censorship and a restriction on the freedom to access information, particularly where the website comprises both infringing and non-infringing content. This article argues, however, that these risks are low, that the regime successfully balances rights when dealing with the very real issue of online piracy, and could potentially be expanded to include other intermediaries.

I. INTRODUCTION

The illegal downloading of audiovisual material, primarily, sound recordings, films and television programs, has emerged as one of the most challenging issues for copyright owners as well as for carriage service providers (CSPs).¹ Broadly speaking this challenge springs from the ease with which an internet user can upload and download copyright protected material using streaming, *BitTorrent* and other peer-to-peer technologies.² Creators of audiovisual content (including writers, directors, actors, producers, musicians, music producers and other artists) rely on the exploitation and protection of their copyright protected works, first, to make a living and, importantly, to also enable the funding of new works.³ As Malcolm Turnbull, the then Minister for Communications said in 2015:

Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to its creators.⁴

If, as a consequence of widespread copyright infringement, there are less financial resources to create new works and consequently fewer works are created, not only do creators suffer but so too do members of the public.⁵

This economic justification for copyright protection was described recently by the Australian Competition and Consumer Commission *Digital Platforms Inquiry* as being that copyright "establishes incentives to

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¹ A CSP is defined in the *Copyright Act 1968* (Cth) as having the same meaning as in the *Telecommunications Act 1997* (Cth) (the *Telecommunications Act*). Section 87 of the *Telecommunications Act* defines a CSP as a person who supplies, or proposes to supply a listed carriage service to the public using a network unit owned by one or more carriers, or a network unit in relation to which a nominated carrier declaration is in force.

² Patrick Tyson, "Evaluating Australia's New Anti-piracy Website Blocking Laws" (2017/2018) 3 *UniSA Student Law Review* 87.

³ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) 28.

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2015 (Malcolm Turnbull).

⁵ Tyson, n 2, 89.

create works by giving rights holders a limited monopoly over the use of their material, with certain exceptions to enable appropriate use of those works to encourage competition and stimulate innovation”.⁶ In *IceTV Pty Ltd v Nine Network Australia Pty Ltd*⁷ French, Crennan and Kiefel JJ described the copyright balance where they said:

[T]he social contract envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.⁸

When faced with the problem of widespread online piracy, this balancing act underlies the challenge for the Australian Government and policy makers. In attempting to find a solution, the legislature opens itself up to criticism that the balancing process can be arbitrary and may lead to restrictions on free speech, access to information, and the rights of a CSP to carry on its business.⁹ This may particularly be the case where a website or online location contains a mix of both copyright infringing material and legitimate material.

However, as set out below, given the wording of the statutory regime set out in s 115A of the *Copyright Act 1968* (Cth) (the Act) and the guidance provided in the explanatory memoranda as well as the cases, these concerns have not come to pass in Australia and are unlikely to. Further, site-blocking in Australia, as well as in other jurisdictions, has been an effective, although not bullet-proof, mechanism for reducing online infringement of entertainment content as one element of a range of measures taken by copyright owners.¹⁰

As Brett Cottle, then Chief Executive Officer of APRA AMCOS stated:

We know that it is not a complete solution to the problem. We know that there is no silver bullet. But what it will do is create a practical and feasible means by which to address the problem.¹¹

Finally, as will also be discussed below, there may also be scope to broaden the regime to include not just CSPs and Internet Search Providers but some other intermediaries.

⁶ Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Final Report (June 2019) 258, quoting Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (November 2013) 59.

⁷ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; [2009] HCA 14.

⁸ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [25]; [2009] HCA 14.

⁹ David Lindsay, “Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness” (2017) 40(4) *UNSW Law Journal* 1507, 1512–1513.

¹⁰ Other measures include making entertainment content accessible on platforms such as *iTunes*, *Netflix* and *Amazon Prime*.

¹¹ Commonwealth, *Journals of the Senate*, No 92 (12 May 2015) 2555.