

# Copyright Amendment (Online Infringement) Bill 2015

**SUBMISSION**



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# OVERVIEW

The Law Institute of Victoria (LIV) welcomes the opportunity to contribute to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Copyright Amendment (Online Infringement) Bill 2015 (the Bill).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing around 19,000 members. We advocate on behalf of our profession and the wider community, lead the debate on law reform and policy, lobby and engage with government and provide informed and expert commentary. The LIV is a constituent body of the Law Council of Australia.

The Law Institute of Victoria supports the underlying objective of this Bill which aims to reduce the incidence of online copyright infringement.

Great care should be taken when considering any proposed amendment to the law that involves the blocking of access to websites or other "online locations".

A court ordering an injunction that is too broad or an ISP inadvertently blocking access to a site that does not infringe copyright or facilitate the infringement of copyright may impact on the rights to access to information and freedom of expression, as well as potentially interfere with the property rights of owners of any websites inadvertently blocked.

We have set out our concerns below including: the need for transparency and open justice, possible impact on the public interest and human rights; and the technical matters regarding the nature of the blocks and their effectiveness in meaningfully reducing online copyright infringement.

# RECOMMENDATIONS

In summary, our recommendations are that the Bill should be amended as follows to safeguard the public interest:

- amend section 115A(1) to limit the power of the Court to block online locations that infringe or authorise the infringement of copyright (by removing “facilitates”).
  - If this primary recommendation is not accepted, a requirement be added to proposed section 115A(1)(b) that the infringement or facilitation of the infringement of copyright by the online location be “flagrant”.
- amend proposed section 115A(5) to expressly require the Court to consider any impact of a site-blocking order on freedom of expression;
- the Inquiry consider measures to ensure public interest arguments are fully considered by the Court prior to granting an injunction;
- introduce an obligation on the relevant ISP to inform site operators and end users of the reasons for the site no longer being accessible. For example, the ISP could be ordered to display a redirection page with details of the reasons for the block and the relevant appeal process for the affected parties;
- introduce a requirement that all orders for blocking access to online locations under this proposed power be reported by the relevant ISP to the Attorney-General’s Department;
- the deadline for the reporting on this Bill be delayed until the report from the Inquiry into the site blocking powers in section 313 of the *Telecommunications Act 1997* (Cth) (‘Telecommunications Act’) report has been finalised so that this current Inquiry can be informed by the technical evidence and findings of that Inquiry; and
- the Bill be amended to require an evaluation 24 months after the Bill commences.

# BACKGROUND

The Bill provides that copyright owners can apply to the Federal Court for an order against internet service providers (ISPs) to block access to “online locations” outside Australia whose “primary purpose” is to infringe or facilitate the infringement of copyright.

The parties to an action are the owner of the copyright and the ISP. The operator of the site in issue can apply to be joined as a party. There is an incentive for ISPs to not contest applications. An ISP will not be liable for any costs in relation to the proceedings unless it enters an appearance and takes part in the proceedings. ISPs (and their users) will bear the costs of implementation of the order.

For the copyright owner to obtain an injunction, it must establish that the online location in issue is:

- operated outside of Australia;
- infringes or facilitates the infringement of copyright; and
- has the primary purpose of infringing or facilitating the infringement of copyright

The Bill also provides a list of mandatory factors that the court must take into account in determining whether an order should be made:

- The flagrancy of the infringement, or the facilitation of infringement
- Whether the online location makes available or contains 'directories, indexes or categories of the means to infringe' copyright
- Whether the owner or operator demonstrates a 'general disregard for copyright generally'
- Whether the site has been blocked for copyright infringement in other jurisdictions
- Whether blocking access is a proportionate response
- The impact of any person, or class of person, likely to be affected
- The public interest
- The steps taken to notify the owner/operator of the site
- Any other remedies available to the rights holder under the *Copyright Act 1968* (Cth) ('Copyright Act')
- Any other matter prescribed by regulations
- Any other relevant matter

# UNCERTAINTY

This Bill includes undefined terms and new tests that are critical to the power to order that an ISP block access to sites, which is likely to lead to uncertainty in the application and scope of these injunctions.

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. “Facilitate” is not defined in the Bill nor is it a term currently in the Copyright Act. “Facilitate” has an expansive meaning, with its ordinary meaning encompassing “makes possible”. This inclusion of “facilitate” was not foreshadowed in the Discussion Paper published by the Attorney-General’s Department in July 2014.<sup>1</sup> The Australian Digital Alliance has noted that this “addition of ‘facilitation’ in the Bill has the potential to encompass sites from VPNs to cloud storage.”<sup>2</sup>

The power to order the blocking of sites that “facilitate” copyright infringement also takes the Australian law further than its counterparts in the EU.<sup>3</sup>

A more proportionate approach would be to remove reference to “facilitate” in s 115A(1), thereby limiting the power to websites that infringe, copyright (either directly or indirectly by authorisation).

If this recommendation is not accepted, the Bill could be amended to follow the model set out in the equivalent provision recently added to Singapore’s Copyright Act<sup>4</sup>. This provision required that the “facilitating” be flagrant. Adding a similar requirement to proposed section 115A(1)(b) may assist in minimising the possibility of sites which have substantial legitimate uses from being captured by an overly broad order.

These new powers should not, for example, be able to be used as an anti-competitive or anti-innovation measure against legitimate sites in the online environment. Most small foreign online operators are unlikely to be able to absorb the the cost of participating in the proceeding to put evidence before the court of the legitimate non-infringing uses of their site. Even with the addition of this “flagrancy” factor, great care will still need to be taken to ensure that blocking orders are a proportionate response and do not unduly impair legitimate services

## Recommendation 1

Amend section 115A(1) to limit the power of the Court to block online locations that infringe or authorise the infringement of copyright (by removing “facilitates”) .

If this primary recommendation is not accepted, a requirement be added to proposed section 115A(1)(b) that the infringement or facilitation of the infringement of copyright by the online location be “flagrant”.

<sup>1</sup> Online copyright infringement—public consultation, Attorney-General’s Department, <http://www.ag.gov.au/Consultations/Pages/Onlinecopyrightinfringementpublicconsultation.aspx>.

<sup>2</sup> Government introduces website blocking bill, 7 April 2015: <http://digital.org.au/content/government-introduces-website-blocking-bill>

<sup>3</sup> EU Court of Justice lays down rules for copyright site blocking injunctions, 27 March 2014, Bird & Bird: <http://www.twobirds.com/en/news/articles/2014/global/cjeu-lays-down-rules-for-copyright-site-blocking-injunctions>

<sup>4</sup> Singapore’s amended anti-piracy Copyright Act enables streamlined site-blocking, Center for Internet & Society, 29 July 2014, <http://cyberlaw.stanford.edu/blog/2014/07/singapore%E2%80%99s-amended-anti-piracy-copyright-act-enables-streamlined-site-blocking>

# CONSIDERATION OF THE PUBLIC INTEREST AND FREEDOM OF EXPRESSION

This proposed new power may impact on the rights to access to information and freedom of expression if an injunction is too broad, captures sites that have legitimate uses, or an ISP inadvertently blocks access to sites that do not infringe copyright or facilitate the infringement of copyright.

Ofcom (the UK communications regulator) suggested, when considering a similar proposed law, that such powers should:

**acknowledge and seek to address concerns from citizens and legitimate users, for example that site blocking could ultimately have an adverse impact on privacy and freedom of expression.** Any process designed to generate a blocking injunction also needs to be fair, such that the legitimate interests of other interested parties (i.e. sites which could be blocked by these processes, the end users who may lose access to particular content and the ISPs who may be involved in blocking obligations) can be properly considered by a Court.<sup>5</sup>

Proposed section 115A(5) should be amended to expressly require the Court to consider any impact of a site-blocking order on freedom of expression, by adding “impact of blocking access of freedom of expression” to the matters to be considered in proposed section 115A(5).

## Recommendation 2

Amend proposed section 115A(5) to expressly require the Court to consider any impact of a site-blocking order on freedom of expression.

The Bill includes a financial incentive for ISPs not to oppose an application for a site blocking order. We note that in the UK the majority of applications for site blocking orders have been uncontested. It has been suggested that the absence of a contradictor in the equivalent applications in the UK threatens the basic tenets of procedural fairness and propriety, having adverse consequences on both the substantive and procedural aspects, evident in the cases that followed TPB case.<sup>6</sup> If an ISP does not contest the application, then the Court will be deprived of a contradictor and the proceeding will be *ex parte* in nature.

There is a possibility that a concerned user, a consumer organisation or a digital rights organisation may apply to intervene in such applications under the Federal Court Rules, as occurred in the *Cartier* case in the UK.<sup>7</sup> However, putting to one side the question of resources, the prospective intervener would first need to be aware of the application for an injunction and second, be willing to risk any cost consequences that might flow if it is successful in intervening.

<sup>5</sup> “Site Blocking” to reduce online copyright infringement

A review of sections 17 and 18 of the Digital Economy Act, Ofcom, 27 May 2010, <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>

<sup>6</sup> A Pirate too Needs to be Heard: Procedural Compromises in Online Copyright Infringement Cases in the UK, 22 August 2014, *Laws* 2014, 3, 553-579: <http://www.mdpi.com/2075-471X/3/3/553>

<sup>7</sup> *Cartier International AG & Ors v British Sky Broadcasting Ltd & Ors* [2014] EWHC 3354 (Ch)

If it is only the copyright owner who is putting affidavit evidence before the court, this raises concerns about the transparency of the process and whether the Court will have appropriate guidance on the various public interest considerations set out in proposed section 115A(5).

Practical measures this Inquiry could consider to increase transparency and the likelihood of public interest arguments being fully considered by the Court include:

- amending the Bill to require the copyright owner to publish a notice in major newspaper/s concerning their application to seek site blocking orders and the Federal Court's website;
- amending the Bill to require the copyright owner to put on evidence relating to the public interest factors such as the proportionality of the order sought; and
- requiring the Court to deliver fully reasoned judgments concerning the order, even in uncontested applications.

### Recommendation 3

The Inquiry consider measures to ensure public interest arguments are fully considered, such as:

- amending the Bill to require the copyright owner to publish a notice in major newspaper/s concerning their application to seek site blocking orders and the Federal Court's website;
- amending the Bill to require the copyright owner to put on evidence relating to the public interest factors such as the proportionality of the order sought; and
- requiring the Court to deliver fully reasoned judgments concerning the order, even in uncontested applications.



# TECHNICAL ISSUES MUST BE SERIOUSLY CONSIDERED

The Bill states the injunction sought by the copyright owner is to require the carriage service provider (the ISP) "to take reasonable steps to disable access to the online location."

The proposed power of the Court to order the blocking of access to online locations must be exercised in a transparent manner and without being an inappropriate burden on ISPs. Transparency will assist in minimising the intrusion on the rights to access to information and freedom of expression.

The Bill does not require the judge to specify the methods to be adopted for blocking nor does it define what "reasonable steps" might mean in this context. To ensure that the Court is able to meaningfully consider the mandatory considerations of proportionality, the impact on other persons and the public interest, the applicant copyright owners should be required to provide the Court with expert technical guidance.

The experience in the UK has been that equivalent injunctions have specified the method of blocking given the pre-existing use of 'Cleanfeed' technology<sup>8</sup>. It is an interesting question as to whether the UK decisions would have gone the same way if the ISPs were being asked to use untried systems.

We have already seen unintended consequences of requests to ISPs to block access to website in Australia. In 2013, the Australian Securities and Investment Commission (ASIC) requested a number of ISPs to block access to sites said to be used for investment fraud. ASIC requested the ISPs to block IP addresses linked to a number of the sites and in the process access was blocked to unrelated sites. An internal review found that ASIC's section 313 notices had erroneously led to the blocking of more than 250,000 websites that hosted "no substantive content" related to ASIC investigations.<sup>9</sup> ASIC stated that their staff responsible for issuing the section 313 notices "were not aware that a single IP address can host multiple websites".<sup>10</sup> Reportedly, ASIC:

asked internet service providers (ISPs) to block sites, it believed were defrauding Australians, by [blocking an] IP address (such as 203.56.34.11) instead of [blocking a] domain name (such as sitedefraudingaustralians.com).<sup>11</sup>

Following this high-profile incident, the government announced an Inquiry into the site blocking powers in section 313 of the Telecommunications Act (Section 313 Inquiry).<sup>12</sup>

This current Inquiry should be informed by the technical evidence and findings of the Section 313 Inquiry. Accordingly, we suggest that the deadline for the Senate Legal and Constitutional Committee's report on this Bill be delayed until the Section 313 Inquiry report has been finalised.

<sup>8</sup> <http://www.bailii.org/ew/cases/EWHC/Ch/2011/1981.html>

<sup>9</sup> Section 313: iiNet, industry orgs seek limits on website blocking, Computerworld, 28 August 2014,

[http://www.computerworld.com.au/article/553467/section\\_313\\_iinet\\_industry\\_orgs\\_seek\\_limits\\_website\\_blocking/](http://www.computerworld.com.au/article/553467/section_313_iinet_industry_orgs_seek_limits_website_blocking/)

<sup>10</sup> ASIC reveals depth of ignorance over website blocking debacle, Computerworld, 27 August 2014,

[http://www.computerworld.com.au/article/553342/asic\\_reveals\\_depth\\_ignorance\\_over\\_website\\_blocking\\_debacle/](http://www.computerworld.com.au/article/553342/asic_reveals_depth_ignorance_over_website_blocking_debacle/)

<sup>11</sup> Ben Grubb, How ASIC's attempt to block one website took down 250,000, Sydney Morning Herald,

<http://www.smh.com.au/technology/technology-news/how-asics-attempt-to-block-one-website-took-down-250000-20130605-2np6v.html>.

<sup>12</sup> Inquiry into the use of section 313 of the Telecommunications Act to disrupt the operation of illegal online services, APH,

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Infrastructure\\_and\\_Communications/Inquiry\\_into\\_the\\_use\\_of\\_section\\_313\\_of\\_the\\_Telecommunications\\_Act\\_to\\_disrupt\\_the\\_operation\\_of\\_illegal\\_online\\_services](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services)

#### Recommendation 4

The deadline for the reporting on this Bill be delayed until the report from the Inquiry into the site blocking powers in section 313 of the Telecommunications Act report has been finalised so that this current Inquiry can be informed by the technical evidence and findings of that Inquiry.

In its submission to the Section 313 Inquiry, the AIMIA digital policy group outlined their concerns about the lack of transparency with respect to the use of Section 313 Telecommunications site-blocking powers. AIMIA specifically noted that the convenors of the Melbourne Free University - an organisation that hosts free public lectures - was an example of just one of the organisations affected by the inadvertent overblocking resulting from ASIC's request to ISPs to block access to certain sites<sup>13</sup>.

Accordingly, we recommend that the Bill be amended so that, when an injunction has been granted, there is a requirement for some means of informing site operators and end users of the reasons for the site/s in question being no longer being accessible. For example, the ISP could be ordered to display a redirection page with details of the reasons for the block and the relevant appeal process for the affected parties.

We submit that this Inquiry should also carefully consider whether an appropriate remedy should be made available for such affected parties should their sites be wrongly blocked. If a legitimate site is wrongly blocked, its operator could suffer significant damage to their reputation and economic harm as users move to alternative sites. There could also be an impact on the public interest such as access to information from "over blocking" or disproportionate site blocking orders.

#### Recommendation 5

Introduce an obligation on the relevant ISP to inform site operators and end users of the reasons for the site no longer being accessible. For example, the ISP could be ordered to display a redirection page with details of the reasons for the block and the relevant appeal process for the affected parties.

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<sup>13</sup> Submissions to the Inquiry into the use of section 313 of the Telecommunications Act to disrupt the operation of illegal online services, APH,

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Infrastructure\\_and\\_Communications/Inquiry\\_into\\_the\\_use\\_of\\_section\\_313\\_of\\_the\\_Telecommunications\\_Act\\_to\\_disrupt\\_the\\_operation\\_of\\_illegal\\_online\\_services/Submissions](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services/Submissions)

# EFFECTIVENESS OF SITE BLOCKING

Questions have been raised about the efficacy of such orders in reducing online copyright infringement both in Australia and overseas. There is no compelling evidence that site blocking is a proportionate and effective measure.

In January 2014, the Court of Justice in The Hague ruled that the ban placed on The Pirate Bay by ISPs – put in place in 2012 – was to be dropped as it was deemed ineffective and therefore not justified<sup>14</sup>. In its decision, the court said that, despite the block, the number of infringing downloads had increased, indicating that a significant number of newcomers to piracy were “not deterred...to start downloading from illegal sources.”<sup>15</sup> The ISPs in question, Ziggo and Xs4all, acknowledged that several studies have shown that the block doesn't work, simply because it is extremely easy to circumvent. John Allen, the lawyer representing Ziggo, said during the trial in September: "The German court rejected a DNS block, because the judges themselves were able to circumvent it, without any advanced knowledge."<sup>16</sup>

Blocking indexing sites like The Pirate Bay may also lead to these sites creating relaying proxies faster than they can be blocked. Mirror sites can also take the place of blocked sites.<sup>17</sup> Ofcom, the Communications regulator in the UK, considered technical questions about the efficacy of site blocking in a 2010 report<sup>18</sup>. Relevantly, Ofcom found:

**None of these techniques is 100% effective; each carries different costs and has a different impact on network performance and the risk of over- blocking.**

We believe that it is feasible to constrain access to prohibited locations on the internet using one or more of the primary or hybrid techniques. The approaches considered vary in how precise they are, their operational complexity, and therefore their effectiveness. None of the methods will be 100% effective. We find that there is no uniformly superior technique as each carries risks in different areas. For instance IP address blocking carries a risk of over blocking, whilst URL blocking is limited in the scope of content it can block effectively. Over-blocking occurs where a block is imprecise, so legitimate content is blocked alongside infringing content.<sup>19</sup>

Circumvention is now even easier than five years ago, when the Ofcom Report was prepared. Tools such as VPNs are used for many reasons and have become widely accessible and acceptable. In a recent survey, 16% of Australians surveyed had used a VPN to protect their privacy, for example<sup>20</sup>.

In Australia, the AIMIA digital policy group has previously submitted that there is a great deal of evidence to suggest that site blocking is ineffective as a means of preventing internet users from accessing prohibited

<sup>14</sup> 'Ineffective' Pirate Bay ban lifted by Dutch court, ZDNet, 28 January 2014, <http://www.zdnet.com/article/ineffective-pirate-bay-ban-lifted-by-dutch-court/>

<sup>15</sup> Site blocking won't be a panacea for online piracy, IPS Commons, 14 May 2014, <http://www.ipsccommons.sg/site-blocking-wont-be-a-panacea-for-online-piracy/>

<sup>16</sup> 'Ineffective' Pirate Bay ban lifted by Dutch court, ZDNet, 28 January 2014, <http://www.zdnet.com/article/ineffective-pirate-bay-ban-lifted-by-dutch-court/>

<sup>17</sup> Site blocking does it work? iiNet, 23 June 2014, <http://blog.iinet.net.au/site-blocking/> and Site blocking won't be a panacea for online piracy, IPS Commons, 14 May 2014, <http://www.ipsccommons.sg/site-blocking-wont-be-a-panacea-for-online-piracy/>

<sup>18</sup> "Site Blocking" to reduce online copyright infringement

A review of sections 17 and 18 of the Digital Economy Act, Ofcom, 27 May 2010, <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>

<sup>19</sup> "Site Blocking" to reduce online copyright infringement

A review of sections 17 and 18 of the Digital Economy Act, Ofcom, 27 May 2010, <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>

<sup>20</sup> Essential Vision survey, 8 April 2015 <http://essentialvision.com.au/privacy-on-the-internet>

content and services. AIMIA noted that other weaknesses of site blocking as a regulatory instrument include:

- Site blocking has the potential to jeopardise the security and integrity of the Internet. This has been demonstrated by prominent security experts. These experts have warned that the use of mandated DNS filtering to combat online infringement raises serious technical and security concerns, and that it would promote development of techniques and software that circumvent use of the DNS, thereby threatening the DNS's ability to provide universal naming.
- Site blocking is an inherently blunt instrument: it carries a high risk of blocking legitimate content if it is hosted on the same domain name or IP address as infringing content.<sup>21</sup>

We recommend that the Bill be amended to provide that all orders for blocking access under this new section be reported by the relevant ISP to the Attorney-General's Department.

#### **Recommendation 6**

Introduce a requirement that all orders for blocking access to online locations under this proposed power be reported by the relevant ISP to the Attorney-General's Department.

Further, given the concerns about the effectiveness of site-blocking and the nature of such a technical measure being a "blunt instrument", we recommend that the Bill be amended to require that this initiative designed to reduce online copyright infringement be evaluated by the Australian Communications and Media Authority or another appropriate entity within 2 years of this Bill being passed. This evaluation could consider issues such as the effectiveness of site blocking in reducing infringement, any unintended consequences of the injunctions and whether public interest arguments have appropriately been considered by the courts.

#### **Recommendation 7**

The Bill be amended to require an evaluation 24 months after the Bill commences.

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<sup>21</sup> Inquiry into the use of section 313 of the Telecommunications Act to disrupt the operation of illegal online services, APH, [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Infrastructure\\_and\\_Communications/Inquiry\\_into\\_the\\_use\\_of\\_section\\_313\\_of\\_the\\_Telecommunications\\_Act\\_to\\_disrupt\\_the\\_operation\\_of\\_illegal\\_online\\_services](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Infrastructure_and_Communications/Inquiry_into_the_use_of_section_313_of_the_Telecommunications_Act_to_disrupt_the_operation_of_illegal_online_services)