

## Site Blocking Laws in Australia

In 2015, the Copyright Amendment (Online Infringement) Bill 2015 (Cth) passed through the Australian Senate, providing content copyright owners and licensees with the ability to take action against websites that infringe their Intellectual Property rights. <sup>1</sup>

Rightsholders can apply to the Federal Court for an injunction (a court order compelling someone to stop doing something) directing Internet Service Providers (ISPs) to block access to websites that infringe copyrighted content <sup>2</sup> when:

- ▶ The geographical origin of the website is located outside of Australia; and
- ▶ The website has the 'primary purpose' of infringing, or facilitating the infringement of, copyright.

In essence, the rightsholders are responsible for initiating the action, the Court reviews the evidence and supervises the process and the granting of an injunction (including its terms), and the ISP then complies with the injunction.

IP address blocking is a common global method of preventing access to banned websites and can be particularly effective where there is an easily identifiable target with an IP address that is known. <sup>3</sup>

### Federal Court Decision December 2016

In February 2016, Roadshow Films with a collective of film and television studios, plus pay television provider, Foxtel brought separate proceedings against major ISPs – including TPG, Telstra and Optus.

The rightsholders were seeking orders for ISPs to take reasonable steps to disable access to a number of foreign websites which provided access to infringing copyright content.

In December 2016, Justice John Nicholas found that the requirements under section 115A of the Copyright Act for website blocking orders had been met and determined that:

- Redirection to a landing page should be mandatory
- An abridged variation mechanism would be followed for new URLs, IP addresses or domain names

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<sup>12</sup> Jones, Alexandra. 2016. "Anti-piracy laws in Australia." Legal Vision.

<sup>3</sup> Danaher, B, Smith, M & Telang, R. 2015. "The effect of piracy website blocking on consumer behaviour." Carnegie Mellon University.



- The ISPs would bear the cost of infrastructure implementation
- Content owners would pay \$50 per domain name for each ISP
- Parties would bear their own legal costs except for effecting orders and new domain names
- The blocks would be for three years and subject to extension

While the courts have ruled that follow-on injunctions to block mirror and proxy sites must be under court supervision, the process is becoming simpler and more streamlined.

## The efficacy of site blocking

While the new anti-piracy law might compel an ISP to block one pirate site, a handful of ‘mirror sites’ or copycat sites often pop up once the original domain has been blocked. Critics argue that site blocking is thus an ineffective “blunt instrument”.

However, there is considerable evidence that site blocking is effective because it removes the immediate temptation to infringe and creates a barrier that usually deters the casual user.

Of course, the barrier can be overcome with time and effort, but with the increased presence of cost effective legitimate services, defeating the barrier does not appear to be worth the effort for most people. <sup>4</sup>

“The principal argument for implementing site blocking for copyright infringement, and for demonstrating that it does not ‘break the internet,’ is the fact that it is already being done widely for a number of law enforcement purposes... child pornography, sites that promote terrorism, racism and hate speech, online gambling, the dissemination of malware and investment fraud, and so on.” <sup>5</sup>

The UK cases granting injunctions in 2014 unanimously found that the type of site blocking requested by the rightsholders was technically feasible (and in many cases already in use) and not excessively costly to the ISPs. <sup>6</sup>

While being rolled out in different ways around the globe, the solution of seeking court or administrative remedies to disable access to websites that are based in jurisdictions beyond the reach of national courts, is spreading and gaining wider acceptance, both by content providers and ISPs. <sup>7</sup>

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<sup>457</sup> Stephens, Hugh. 2017. “Disabling access to large scale pirate sites – site blocking works.” Canada.

<sup>6</sup> Danaher, B, Smith, M & Telang, R. 2015. “The effect of piracy website blocking on consumer behaviour.” Carnegie Mellon University.

At the end of the day, it will also be consumers who benefit given the frequency with which users accessing infringing sites are exposed to malware and high-risk advertising – such as the promotion of pornography, gambling and scams.

Users of infringing content sites are three times more likely to be exposed to hacking, viruses and malicious activity than on legitimate sites.

## Global site blocking research

Recent studies conducted by Carnegie Mellon University (CMU) and the Information Technology and Information Foundation (ITIF) convincingly demonstrate that blocking pirate websites works in terms of changing consumer behaviour (i.e. directing consumers away from infringing content to sources of legitimate content) while at the same time not interfering with normal internet operations.<sup>8</sup>

“The growing awareness and rapid take-up of this defensive measure globally illustrates the extent to which disabling access can be a highly effective tool to curtail online piracy.”

The CMU study was based on the experience in the UK, but the efficacy of site blocking has been proven in markets as varied as South Korea and Portugal.

Further research by the ITIF in Washington, DC, expanded on the CMU study and extrapolated its conclusions to 24 other countries that employ some form of access disablement or site blocking.

**Site blocks caused a 90% drop in visits to the blocked sites, leading to a 22% decrease in total piracy for all users affected by the blocks.**

There was a 6% increase in visits to paid legal streaming sites like Netflix and a 10% increase in videos viewed on legal ad-supported streaming sites.

In Portugal, overall usage of the top 250 infringing websites decreased by 23.4% during the review period even while access to pirate websites globally increased during the same period. And in South Korea, visits to infringing sites declined on average 90% three months after disabling access.

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<sup>8</sup> Danaher, B, Smith, M & Telang, R. 2015. “The effect of piracy website blocking on consumer behaviour.” Carnegie Mellon University.

<sup>9</sup> Danaher, B, Smith, M & Telang, R. 2015. “The effect of piracy website blocking on consumer behaviour.” Carnegie Mellon University.

<sup>10</sup> Stephens, Hugh. 2017. “Disabling access to large scale pirate sites – site blocking works.” Canada.

In the European Kino case the EU Court of Justice ruled that blocking orders do not need to lead to a complete cessation of the infringement. Acknowledging that blocking orders are inherently capable of being circumvented, the Court found it worked to discourage users. <sup>10</sup>

The fact that some subscribers (likely to be a small minority) could seek to circumvent the orders does not deny their effectiveness.

**The judgement found that the site blocking orders were proportionate because they did not “unnecessarily deprive internet users of access” to legitimate content.**

The measures had the effect of preventing “or at least making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the [infringing] subject-matter.” <sup>11</sup>

Increasingly ISPs are coming to realize that disabling access to infringing sites does not negatively impede their main business of providing access. Indeed, it enhances their ability to do so. <sup>12</sup>

At the end of the day, it comes down to a decision as to whether intellectual property is going to be accorded the same degree of protection as other law enforcement issues in our society where site blocking has been invoked. <sup>13</sup>

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<sup>11</sup> Kino. 2014. UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mBH. Case C-314-12, 27. Austria.

<sup>12</sup> Stephens, Hugh. 2017. “Disabling access to large scale pirate sites – site blocking works.” Canada.

<sup>13</sup> Stephens, Hugh. 2017. “Blocking offshore pirate websites – it can be both effective and manageable.” Canada.