

# EVALUATING AUSTRALIA’S NEW ANTI-PIRACY WEBSITE BLOCKING LAWS

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*In an attempt to tackle the pervasive problem of online copyright infringement, the Federal Parliament of Australia inserted s 115A into the Copyright Act 1968 (Cth) in 2015. Section 115A essentially permits the Federal Court of Australia to order an Internet Service Provider to block access to an overseas website that has the primary purpose of infringing, or facilitating the infringement of, copyright. This article provides readers with an in-depth summary of the origins, legal context and scope of s 115A followed by an analysis of the way that it has been applied in the four cases to date. It also considers the accuracy of the two main criticisms of s 115A — that it can be too easily circumvented and that it is an improper substitute for the improved delivery of licensed copyright material to Australian consumers. It argues that copyright owners, rather than ISPs, will likely have to bear the costs of any injunction granted under s 115A and that the Federal Court of Australia has been alert to the need to balance a variety of interests in website blocking applications. This article concludes that although some criticisms of s 115A are justified, website blocking still has a legitimate role in reducing online copyright infringement in Australia.*

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## I INTRODUCTION

The development of the internet has generated unprecedented benefits and opportunities. However, it has also presented copyright owners and exclusive licensees (collectively, 'rights holders') around the world with a significant new degree of difficulty in protecting their copyright. Much of this difficulty lies in the widespread presence and popularity of torrent, streaming and linking websites that freely host, distribute and link copyright infringing material to the public.<sup>1</sup> These types of websites cause great harm to creators, rights holders<sup>2</sup> and, ultimately, the public. Artists, directors, actors, producers, writers and others rely on the exploitation and protection of copyright to make a living, to fund new works and to provide an incentive to create.<sup>3</sup> If online copyright infringement results in fewer new works being

<sup>1</sup> 'Streaming' websites host and stream copyright material to its users. 'Torrent' or 'peer to peer network' websites allow groups of computers with the same network program to connect with each other and access copyright material from each other's hard drives. 'Linking' websites index hyperlinks to copyright material on other websites and/or to other linking websites that do the same: *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2017] FCA 965 (18 August 2017) [13]. Contrast these types of infringing websites with legal, licensed and subscription-based streaming websites like Netflix, YouTube, Stan, Presto, Spotify and Pandora.

<sup>2</sup> See Nigel Cory, 'How Website Blocking Is Curbing Digital Piracy without "Breaking the Internet"' (Report, Information Technology and Innovation Foundation, August 2016) 2–5; Productivity Commission, 'Intellectual Property Arrangements' (Inquiry Report No 78, Productivity Commission, 23 September 2016) 555–6. Studies have shown the extent of the harm that online copyright infringement has done to copyright industries generally; and clearly, creators and rights holders suffer as a direct result. For example, a 2011 study revealed that movie piracy alone cost the Australian economy more than \$1.3 billion in revenue in just 12 months: see IPSOS Media CT, 'Economic Consequences of Movie Piracy: Australia' (Report, Oxford Economics, January 2011) 3; Byron Frost, 'Will Streaming Services End Piracy?' (2015) 2(5) *Australian Media, Technology and Communication Law Bulletin* 55, 55. 'Illegal downloading of digital files is a growing threat to the music industry ... The International Federation of the Photographic Industry estimates that over 40 billion songs were illegally downloaded in 2008': Karla Borja, Suzanne Dieringer and Jesse Daw, 'The Effect of Music Streaming Services on Music Piracy among College Students' (2015) 45 *Computers in Human Behaviour* 69, 69. It is probable that, since 2008, this number has increased dramatically due to internet access becoming more widely available.

<sup>3</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6416 (Malcolm Turnbull, Minister for Communications). For an outline of the economic justifications for copyright law: see Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 59 [3.11]; Simon Stokes, *Art and Copyright* (Hart Publishing, 2<sup>nd</sup> ed, 2012) 7, 13–14: 'The advent of digital technology means copyright now

created, because creators and rights holders no longer have the incentive or the financial resources to do so, then in the end it is the public that suffers. This problem prompted governments in the European Union, United Kingdom, Singapore and Australia to construct statutory website blocking schemes to combat rampant online copyright infringement. Considering that public freedom to access information and creative works needs to be balanced with the interest in protecting the exclusive rights of right holders,<sup>4</sup> those governments set themselves a difficult and controversial task.

On 22 June 2015, the Federal Parliament of Australia successfully passed the *Copyright Amendment (Online Infringement) Act 2015* (Cth). That amending Act inserted s 115A into the *Copyright Act 1968* (Cth) ('*Copyright Act*'). Put simply, s 115A confers on the Federal Court of Australia ('Federal Court') the power to grant an injunction that requires an Internet Service Provider ('ISP') to take reasonable steps to disable access to an online location outside Australia if that online location has the primary purpose of infringing, or facilitating the infringement of, copyright.<sup>5</sup>

Four decisions have been made under s 115A since its enactment: *Roadshow Films Pty Ltd v Telstra Corporation Ltd*,<sup>6</sup> *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd*,<sup>7</sup> *Roadshow Films Pty Ltd v Telstra Corporation Ltd* (again)<sup>8</sup> and *Foxtel Management Pty Ltd v TPG Internet Pty Ltd*.<sup>9</sup> While the implications of those landmark decisions have been subject to little in-depth analysis and commentary,<sup>10</sup> those who have examined the decisions have

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has centre stage — those seeking to protect and exploit their works on CD-ROM, DVD, other new media and the Internet increasingly need to rely on copyright.' at 7.

<sup>4</sup> In Australia, at least, these are competing interests that the *Copyright Act 1968* (Cth) seeks to balance: see Peter MacFarlane and Paraskevi Kontoleon, *Music and the Law* (Federation Press, 2017) 99. See also *EMI Songs Australia Pty Ltd v Larrikin Music Publishing Pty Ltd* (2011) 191 FCR 444, 452 [29] (Emmett J); Nicolas Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15(2) *Vanderbilt Journal of Entertainment and Technology Law* 297, 298, 302–3.

<sup>5</sup> *Copyright Act* ss 115A(1)–(2).

<sup>6</sup> (2016) 122 IPR 81. The case of *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* was joined with *Roadshow Films Pty Ltd v Telstra Corporation Ltd*.

<sup>7</sup> [2017] FCA 435 (28 April 2017).

<sup>8</sup> [2017] FCA 965 (18 August 2017).

<sup>9</sup> [2017] FCA 1041 (1 September 2017).

<sup>10</sup> This is particularly true of the third and fourth cases listed, which were decided in August and September 2017. For brief summaries of the first and second cases: see Anita Cade and Marlia Saunders, 'Intellectual Property: Content Denied: ISPs Ordered to Block Overseas

considered them to be positive developments.<sup>11</sup> In contrast, the media and the general public in Australia have been very vocal in their criticism, not only of s 115A and the four decisions in particular, but also of website blocking laws in general. These criticisms have relied predominantly on the arguments that website blocking laws are too easily circumvented and that rights holders can best reduce online infringement simply by providing Australians with access to licensed copyright material that is more timely, affordable and convenient.

This article presents an in-depth summary of the origins, legal context and scope of s 115A and an analysis of the four decisions that have applied the section to date. It also assesses the accuracy of the criticisms directed at s 115A and website blocking laws in general. This article argues that, in light of the four relevant decisions, rights holders will likely have to pay each ISP the costs that they incur in complying with any future website blocking injunction. The discussion reveals that the Federal Court has demonstrated both the power and the will to balance a variety of interests when considering an application under s 115A. This article explains that while no website blocking regime can provide a perfect solution to online copyright infringement, s 115A was never intended to be the perfect solution. Nevertheless, it concludes that s 115A still has an important and reasonably effective role to play in reducing online copyright infringement in Australia.

This article begins in Part II by outlining the website blocking laws operating in the European Union, the United Kingdom and Singapore before recounting the factual origins of s 115A in Australia. Part III explains the legal context in which s 115A developed and Part IV examines the specific provisions of s 115A and their scope. Part V analyses the implications of the four decisions made under s 115A so far. Part VI explores the effectiveness of website blocking laws in reducing online copyright infringement.

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Piracy Sites' (2017) 31 *Law Society of New South Wales Journal* 76; Chantal Savage and Matthew Whitaker, 'First Website-Blocking Orders Granted in Australia to Curb Online Copyright Infringement' (2017) 20(4) *Internet Law Bulletin* 75; Simone Blackadder and Andrew Stewart, 'Site Blocking Case Handed Down: *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503' (2017) 36(1) *Communications Law Bulletin* 14; Harrison Ottaway, '*Roadshow Films Pty Ltd v Telstra Corp Ltd*' (2017) 20(3) *Internet Law Bulletin* 57; Eli Fisher, 'Music Piracy Siteblocking Injunction Granted' (2017) 36(2) *Communications Law Bulletin* 33.

<sup>11</sup> See, eg, Fisher, above n 10, 34–5.

## II WEBSITE BLOCKING LAWS

Since the turn of the 21<sup>st</sup> century there has been a steady rise in the number of countries that have enacted laws that confer on a court the power to order ISPs to block access to websites that infringe copyright. This development has predominantly occurred in Europe as a response to the European Union's *Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*,<sup>12</sup> which was issued in 2001. Art 8(3) of that Directive states:

Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.<sup>13</sup>

Under European Union law, member states are obliged to implement the Directive.<sup>14</sup> Over 15 member states have currently implemented the Directive, the most notable being the United Kingdom.<sup>15</sup> In 2003, the United Kingdom inserted s 97A into the *Copyright, Designs and Patents Act 1988* (UK) c 48, which states:

<sup>12</sup> *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167/10 ('EU Copyright Directive'). See also *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, In Particular Electronic Commerce, in the Internal Market* [2000] OJ L 178/1, arts 1–2, 12–15, recs 45–8; *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights* [2004] OJ L 195/16, arts 3, 9, 11, recs 23, 32.

<sup>13</sup> *EU Copyright Directive* [2001] OJ L 167/10, art 8(3). Recital 59 of the *EU Copyright Directive* explains that such injunctions are premised on the fact that '[i]n the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end'. For a discussion of art 8(3) of the *EU Copyright Directive*: see *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union (Fourth Chamber), C-314/12, 27 March 2014).

<sup>14</sup> *Treaty on the Functioning of the European Union (Consolidated Version)*, opened for signature 7 February 1992, [2012] OJ C 326/01 (entered into force 1 November 1993) art 288 ('FEU').

<sup>15</sup> The relevant member states that have implemented the *EU Copyright Directive* are Germany, Belgium, Denmark, Austria, Norway, Iceland, Finland, Sweden, Netherlands, the United Kingdom, Ireland, France, Italy, Spain and Portugal: see Michael Williams and Rebecca Smith, 'Searching for the Silver Bullet: How Website Blocking Injunctions Are Changing Online IP Enforcement' (2014) 25 *Australian Intellectual Property Journal* 59, 61 n 12.

(1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.<sup>16</sup>

Although no application was made under s 97A until 2010, since then there has been an increasing use and consideration of the section.<sup>17</sup> Another interesting development in the United Kingdom arose out of the recent decision in *Cartier International AG v British Sky Broadcasting Ltd*.<sup>18</sup> In that case, the High Court of Justice of England and Wales held that it has the jurisdiction to grant an injunction against ISPs to block access to websites that infringe *trade marks* (eg, websites that offer counterfeit goods for sale).<sup>19</sup> The Court explained that this jurisdiction derived from s 37(1) of the *Senior Courts Act 1981* (UK) c 54,<sup>20</sup> rather than s 97A. The Court's decision is notable because of its potential ramifications for Australia — it could encourage Australian trade mark owners to call for the *Trade Marks Act 1995*

<sup>16</sup> *Copyright, Designs and Patents Act 1988* (UK) c 48, s 97A. See Annexure 2. The grant of injunctions under s 97A was initially opposed by ISPs, as was the scope of any injunction to be granted. However, in *Twentieth Century Fox Film Corp v Sky UK Ltd* [2015] EWHC 1082 (Ch) (28 April 2015), Bliss J made the observation that, following the first few decisions, the essential principles of s 97A have been settled: at [3]–[5] (Bliss J). ISPs have since chosen not to oppose the making of injunctions but instead have negotiated the wording of any orders to be made: see *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949 [3]–[4] (Arnold J); Anna Spies and Cate Nagy, 'The New Website Blocking Power: s 115A of the *Copyright Act*' (2015) 28(8) *Australian Intellectual Property Law Bulletin* 210, 212.

<sup>17</sup> See, eg, *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] EMLR 17 (29 March 2010); *Twentieth Century Fox Film Corporation v British Telecommunications Plc* [2012] 1 All ER 869; *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806; *Paramount Home Entertainment International Ltd v British Sky Broadcasting Ltd* [2015] 1 All ER 949; *1967 Ltd v British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch) (23 October 2014); *Twentieth Century Fox Film Corp v Sky UK Ltd* [2015] EWHC 1082 (Ch) (28 April 2015).

<sup>18</sup> [2017] 1 All ER 700.

<sup>19</sup> *Ibid* 715 [34]–[35], 725 [65]–[66], 726 [72]. For a summary of *Cartier International AG v British Sky Broadcasting Ltd* [2017] 1 All ER 700 and the principles it developed: see Sabiene Heindl, 'Trade Mark Owners Jump the Queue against Internet Service Providers (ISPs) for Website Blocking in the UK' (2017) 19(10) *Internet Law Bulletin* 450.

<sup>20</sup> 'The High Court may by order (whether interlocutory or final) grant an injunction ... in all cases in which it appears to be just and convenient to do so.': *Senior Courts Act 1981* (UK) c 54, s 37(1).

(Cth) to be amended so that ISPs would be required to block access to websites that infringe trade marks.<sup>21</sup>

In addition to the European Union and the United Kingdom, Singapore has also introduced its own website blocking laws.<sup>22</sup> In November 2014, Singapore's *Copyright Act* was amended to include ss 193DDA–193DDC.<sup>23</sup> Section 193DDA states:

- (1) Where the High Court is satisfied, on an application made by the owner or exclusive licensee of copyright in a material against a network service provider, that —
  - (a) the services of the network service provider have been or are being used to access an online location, which is the subject of the application, to commit or facilitate infringement of copyright in that material; and
  - (b) the online location is a flagrantly infringing online location,the High Court may, after having regard to the factors referred to in section 193DB(3), make an order requiring the network service provider to take reasonable steps to disable access to the flagrantly infringing online location.<sup>24</sup>

Only two applications have been made under the Singaporean legislation to date. In February 2016, an injunction to block access to the popular streaming website SolarMovie was successfully sought.<sup>25</sup> In August 2017, an

<sup>21</sup> Whether an amendment of that type is appropriate and necessary deserves further consideration, but it is not within the ambit of this article. Some consideration of that issue has already occurred — it has been suggested that the Federal Court might already have the power to grant an injunction against an ISP to block access to trade mark infringing websites under r 1.32 of the *Federal Court Rules 2011* (Cth); Heindl, above n 19, 451. Rule 1.32 states that the Federal Court can 'make any order that the Court considers appropriate in the interests of justice': *Federal Court Rules 2011* (Cth) r 1.32. See also *Federal Court of Australia Act 1976* (Cth) ss 23, 28.

<sup>22</sup> There have been several failed attempts to introduce copyright-focused website blocking laws in the United States of America: see Combating Online Infringement and Counterfeits Act, S 3804, 111<sup>th</sup> Congress (2010); Stop Online Piracy Act, HR 3261, 112<sup>th</sup> Congress (2011); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, S 968, 112<sup>th</sup> Congress (2011). For a list of all the countries in the world that allow the blocking of copyright infringing websites: see Cory, above n 2, 12–13.

<sup>23</sup> *Copyright Act* (Singapore, cap 63, 2006 rev ed) ss 193DDA–193DDC ('SCA'). See Annexure 3.

<sup>24</sup> *Ibid* s 193DDA(1).

<sup>25</sup> See Andy Leck, *Singapore: Updates on Site Blocking* (7 February 2017) Baker McKenzie <<http://www.bakermckenzie.com/en/insight/publications/2017/02/updates-on-site-blocking>>; Andy Leck and Cheah Yew Kuin, *Client Alert: Court Orders Blocking of Piracy*

application by a pay-television operator was rejected on the grounds that the applicant was neither the copyright owner nor an exclusive licensee and therefore had no grounds to sue.<sup>26</sup> The relatively infrequent use of s 193DDA so far might be explained by the fact that it takes rights holders substantial time and resources to gather the necessary evidence and navigate the judicial process.

Throughout 2014, the Federal Government of Australia was also exploring different ways in which online copyright infringement could be curbed. In a Discussion Paper published in July 2014, the Government displayed a desire for the development of a voluntary industry notice code in Australia by discussing the way that such codes were already operating in the United States of America, the United Kingdom and New Zealand.<sup>27</sup> The specific obligations contained in such codes vary, but they generally require ISPs, on instruction from rights holders, to notify and warn individual subscribers of any allegations of online copyright infringement made against those subscribers.<sup>28</sup>

In December 2014, the Commonwealth Attorney-General and the Minister for Communications wrote to rights holders, ISPs and consumer groups, requesting them to develop an industry notice code and register it with the Australian Media and Communications Authority under pt 6 of the *Telecommunications Act 1997* (Cth).<sup>29</sup> While a draft code was released for

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*Site under New Site-Blocking Framework* (February 2016) Baker McKenzie <[http://www.bakermckenzie.com/-/media/files/insight/publications/2016/02/court-orders-blocking-of-piracy-site/al\\_singapore\\_piracysite\\_feb16.pdf?la=en](http://www.bakermckenzie.com/-/media/files/insight/publications/2016/02/court-orders-blocking-of-piracy-site/al_singapore_piracysite_feb16.pdf?la=en)>.

<sup>26</sup> Irene Tham, 'High Court Rejects HK Pay-TV Firm's Request to Block Korean Drama Website', *The Straits Times* (online), 3 August 2017 <<http://www.straitstimes.com/tech/high-court-rejects-hk-pay-tv-firms-request-to-block-korean-drama-website>>.

<sup>27</sup> Government, 'Online Copyright Infringement' (Discussion Paper, Australian Government, 30 July 2014) 1–2. The Discussion Paper also proposed extending the liability for 'authorisation' infringement, extending the 'safe harbour' regime and introducing laws that would require ISPs to block access to overseas websites that infringe copyright (discussed below): at 3–7.

<sup>28</sup> *Ibid* 1–2.

<sup>29</sup> George Brandis and Malcolm Turnbull, 'Collaboration to Tackle Online Copyright Infringement' (Joint Media Release, 10 December 2014)

<<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2014/FourthQuarter/10December2014-Collaborationtotackleonlinecopyrightinfringement.aspx>>.

public comment on 20 February 2015,<sup>30</sup> it was abandoned after months of further negotiations because ISPs and rights holders were unable to agree upon who would pay the costs of implementing the code.<sup>31</sup> As discussed in Part V, the question of costs was also a key issue raised in the first two cases (but not the third and fourth cases) decided under s 115A in 2016 and 2017.

At the same time as negotiations were underway for the now-abandoned industry notice code, the Federal Government was also planning to introduce legislation that would require ISPs to block access to overseas websites that infringed copyright. This legislation was a key proposal that the Government had made in the July 2014 Discussion Paper<sup>32</sup> and specifically referenced the European Union and the United Kingdom's adoption of website blocking laws.<sup>33</sup> On 26 March 2015, the Copyright Amendment (Online Infringement) Bill 2015 (Cth) was put before the House of Representatives. The Bill was amended on 16 June 2015 in order to implement recommendations made in a report by the Senate Legal and Constitutional Affairs Legislation Committee. The Committee's report recommended that the Bill be passed subject to minor amendments and explanations.<sup>34</sup> The amended Bill was passed by the House of Representatives on 16 June 2015 and by the Senate on 22 June 2015, resulting in the insertion of s 115A into the *Copyright Act*.

Section 115A permits the Federal Court, on application by a copyright owner, to grant an injunction that requires a 'carriage service provider' (ie, an

<sup>30</sup> Communications Alliance Ltd, *Industry Code C653:2015 — Copyright Notice Scheme* (20 February 2015). For a discussion of the now-abandoned draft code's content: see David Yates and Lauren Gore, 'The Copyright Notice Scheme, Dallas Buyers Club and the Future of Online Copyright Infringement' (2015) 28(4) *Intellectual Property Law Bulletin* 98; Margaux Harris, 'Update on Two Recent Developments in Copyright Law: Infringement Notice Scheme Industry Code and Website Blocking Legislation' (2015) 19(8) *Inhouse Counsel* 117–19.

<sup>31</sup> See, eg, Nick Whigham, *Rights Holders Abandon "Three Strikes" Notice Scheme as Fresh Piracy Fight Looms* (24 February 2016) News.com.au

<<http://www.news.com.au/technology/online/piracy/rights-holders-abandon-three-strikes-notice-scheme-as-fresh-piracy-fight-looms/news-story/a0590bf35b9fc1c6d0e847b12b2cacf1>>; Hannah Francis, "'Three Strikes' Scheme for Aussie Pirates Scrapped: Report", *Sydney Morning Herald* (online), 18 February 2016 <<http://www.smh.com.au/technology/technology-news/three-strikes-scheme-for-aussie-pirates-scrapped-report-20160218-gmxie1.html>>.

<sup>32</sup> Australian Government, above n 27, 1–2.

<sup>33</sup> *Ibid.*

<sup>34</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Copyright Amendment (Online Infringement) Bill 2015 [Provisions]* (2015) 29–33.

ISP) to ‘take reasonable steps to disable access’ to an ‘online location’ outside Australia if that ‘online location’ has the ‘primary purpose’ of infringing, or ‘facilitating’ the infringement of, copyright.<sup>35</sup> In his Second Reading speech to the Copyright Amendment (Online Infringement) Bill 2015 (Cth), the Minister for Communications stated that s 115A would provide:

an important part of the solution to the problem of online copyright infringement. It is vital that copyright owners have an efficient mechanism to disrupt the steady supply of infringing content to Australian internet users from overseas based websites.<sup>36</sup>

The Minister’s comments indirectly raise an important question about the legal context in which s 115A was enacted; namely, whether Australia already had practical and efficient legal avenues that rights holders could use to pursue overseas websites for copyright infringement. This question is addressed in Part III.

### III THE NEED FOR SECTION 115A IN AUSTRALIA: LIMITATIONS IN THE LAW

The introduction of s 115A was significant because it overcame inherent limitations in the law. In the context of copyright enforcement, four main constraints signalled to the Federal Government and rights holders that Australia’s existing laws were not well suited to the internet age and were in need of reform.

First, it is impracticable for rights holders to bring legal action against each internet user who has infringed copyright.<sup>37</sup> Even if individual legal action was practicable, it could produce only a ‘teaspoon solution to an ocean problem’.<sup>38</sup> Secondly, it is difficult for Australian rights holders to enforce

<sup>35</sup> *Copyright Act* ss 115A(1)–(2). The specific provisions and language of s 115A are discussed in further detail in Part IV.

<sup>36</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6416 (Malcolm Turnbull, Minister for Communications).

<sup>37</sup> See *Roadshow Films Pty Ltd v iiNet Ltd (No 2)* (2012) 248 CLR 42, 64 [55].

<sup>38</sup> *Re Aimster Copyright Litigation*, 334 F 3d 643, 645 (7<sup>th</sup> Cir, 2003) (Posner J), quoting Randal Picker, ‘Copyright as an Entry Policy: the Case of Digital Distribution’ (2002) 47 *Antitrust Bulletin* 423, 442. Copyright owners are also unlikely to take individual legal action because it could have potentially disastrous public relations results: see Nicolas Suzor, Rachel Choi and Kylie Pappalardo, ‘Moments of Flux in Intermediary Liability for Copyright Infringement in Australia’ in Mark Perry (ed), *Global Governance of Intellectual Property in the 21<sup>st</sup> Century* (Springer International Publishing, 2016) 129, 141. ‘In the United States the content industry initially attempted to prosecute consumers who engaged

their copyright against online infringers operating outside Australia.<sup>39</sup> Thirdly, in *Roadshow Films Pty Ltd v iiNet Ltd (No 2)* (*'Roadshow v iiNet'*)<sup>40</sup> the High Court of Australia effectively declared that, under ss 36 and 101(1)–(1A) of the *Copyright Act*, an ISP is unlikely to be held liable for the 'authorisation' of their subscribers' online copyright infringement.<sup>41</sup> Chief Justice French, Crennan and Kiefel JJ explained that:

the concept and principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system.<sup>42</sup>

Chief Justice French, Crennan and Kiefel JJ, and Gummow and Hayne JJ in a separate judgment, maintained that the problem of online copyright infringement would be better addressed by Parliament rather than by an undue widening of the meaning of 'authorise'.<sup>43</sup>

Finally, although the *Copyright Act* has contained a power to grant injunctions to disable access to an overseas infringing website since 2005,

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in rampant piracy, particularly repeat uploaders of illegal copies ... [such efforts were attacked] as unfair to average citizens, characterising the efforts as disproportionate, ineffective, and judicial overreach; and as a result the industry largely abandoned the effort.': Cory, above n 2, 6.

<sup>39</sup> See, eg, Sadaat Cheema, 'Why Australia Needs Site-Blocking' (2015) 34(2) *Communications Law Bulletin* 28, 29: 'it can be difficult to identify the individuals responsible for a particular website. Unfortunately, the registration system for Domain names and IP addresses is not reliable ... website operators and data servers are [also] generally located overseas; service of process and enforcement of judgment can therefore be complex and costly for plaintiffs'.

<sup>40</sup> (2012) 248 CLR 42 (*'Roadshow v iiNet'*).

<sup>41</sup> Ibid 71 [77]–[80] (French CJ, Crennan and Kiefel JJ). For a summary and analysis of this decision and its implications for 'authorisation' liability, see: Daniel MacPherson, 'The Implications of *Roadshow v iiNet* for Authorisation Liability in Copyright Law' (2013) 35 *Sydney Law Review* 467.

<sup>42</sup> *Roadshow v iiNet* (2012) 248 CLR 42, 71 [79] (French CJ, Crennan and Kiefel JJ). For the same reasons, a Virtual Private Network service provider is also unlikely to be held liable for 'authorisation' of online copyright infringement: Linda-Jane Vanhear, 'VPNs, Copyright and Protecting Personal Information' (2015) 12(10) *Privacy Law Bulletin* 262, 264.

<sup>43</sup> 'The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere, in constitutional settings different from our own, by specifically targeted legislative schemes': *Roadshow v iiNet* (2012) 248 CLR 42, 71 [79] (French CJ, Crennan and Kiefel JJ); 'The history of the [Copyright] Act since 1968 shows that the Parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those pressures are best resolved by legislative processes rather than by any extreme exercise in statutory interpretation': at 82–3 [120] (Gummow and Hayne JJ).

this power can be exercised only in very limited circumstances. Division 2AA of the *Copyright Act* (commonly labelled the ‘Safe Harbour’ regime)<sup>44</sup> sets limitations on the remedies that are available against an ISP that has ‘authorised’ copyright infringement but has also complied with certain conditions set under the Division.<sup>45</sup> Where an ISP carries out Category A activities, one of the limited remedies available includes ‘an order requiring the [ISP] to take reasonable steps to disable access to an online location outside Australia’ (s 116AG(3)(a)).<sup>46</sup> However, the grant of this remedy first requires an ISP to have been found liable for ‘authorisation’ of copyright infringement. As highlighted by *Roadshow v iiNet*, this prerequisite is unlikely to be met and it is therefore unsurprising that no injunction has ever been granted under s 116AG(3)(a).

The enactment of s 115A was therefore not simply the result of a mere desire to follow the lead of the European Union, the United Kingdom and Singapore in introducing website blocking laws. Section 115A was a response to inherent limitations in Australia’s laws. As a matter of policy, website blocking laws may also have seemed sensible because they can be applied without reference to the personal details or activities of an ISP’s subscribers. Website blocking laws are thus less susceptible to criticisms that they intrude upon personal privacy.<sup>47</sup>

The introduction of s 115A also occurred alongside the controversial proceedings in *Dallas Buyers Club LLC v iiNet Ltd* (‘*Dallas Buyers Club*’).<sup>48</sup> In that case, and subsequent related cases, the plaintiff attempted to use an

<sup>44</sup> The Safe Harbour regime came into force on 1 January 2005 as a result of the *US Free Trade Agreement Implementation Act 2004* (Cth).

<sup>45</sup> For a more detailed explanation of the Safe Harbour regime: see *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 [8]–[13] (Emmett J); Williams and Smith, above n 15, 71; Bowrey et al, above n 3, 250, 841.

<sup>46</sup> *Copyright Act* s 116AG(3): ‘the relief that a court may grant against a carriage service provider is limited to one or more of the following orders: (a) an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia; (b) an order requiring the carriage service provider to terminate a specified account.’

<sup>47</sup> Williams and Smith, above n 15, 59.

<sup>48</sup> *Dallas Buyers Club LLC v iiNet Ltd* (2015) 327 ALR 670 (‘*Dallas Buyers Club*’). For a summary and analysis of *Dallas Buyers Club* and the related decisions, see: Marcus Walkom, ‘Is the Net Tightening around Internet Pirates in Australia?’ (2015) 2(4) *Australian Media, Technology and Communication Law Bulletin* 47; Joshua Yuvaraj, ‘Pay or Else: How Protected Are Australian Internet Account Holders from Speculative Invoicing after *Dallas Buyers Club*?’ (2016) 27 *Australian Intellectual Property Journal* 37.

application for preliminary discovery for the purpose of engaging in the unscrupulous practice of ‘speculative invoicing’. Speculative invoicing involves sending an aggressive letter to an alleged infringer ‘demanding a large sum of money and offering to settle for a smaller sum which was still very much in excess of what might actually be recovered in any actual suit’.<sup>49</sup>

In *Dallas Buyers Club*, Perram J exercised the discretionary power under r 7.22 of the *Federal Court Rules 2011* (Cth) to order six ISPs to divulge the names and physical addresses of account holders associated with 4726 IP addresses. Dallas Buyers Club (‘DBC’)<sup>50</sup> submitted evidence that the 4726 IP addresses had illegally downloaded and shared DBC’s film online via BitTorrent. In making the order for preliminary discovery, Perram J imposed two conditions that would effectively prevent DBC from engaging in speculative invoicing. The first condition was that DBC could use the information only for the purposes of recovering compensation for infringements. The second condition was that DBC had to submit, for Federal Court approval, drafts of any letter it proposed to send to the relevant account holders.<sup>51</sup> DBC were also ordered to pay the ISPs’ costs of the proceedings and the costs of providing preliminary discovery.<sup>52</sup>

In a subsequent decision, Perram J stayed the order made in *Dallas Buyers Club* until DBC presented a satisfactory letter.<sup>53</sup> His Honour later refused to lift the stay in two final decisions because DBC’s proposed letters claimed impermissible damages.<sup>54</sup> Justice Perram would allow DBC’s proposed letters to claim compensation only for the cost of an actual purchase of a

<sup>49</sup> *Dallas Buyers Club* (2015) 327 ALR 670, 687 [73](v) (Perram J).

<sup>50</sup> Voltage Pictures LLC, DBC’s parent company, was also a party to the proceedings.

<sup>51</sup> *Dallas Buyers Club* (2015) 327 ALR 670, 672 [5], 690–1 [93] (Perram J).

<sup>52</sup> *Ibid.* There was significant interest in the *Dallas Buyers Club* case because copyright owners had not previously applied for such orders of preliminary discovery in Australia, see: Yuvaraj, above n 48, 39.

<sup>53</sup> See *Dallas Buyers Club LLC v iiNet Ltd (No 3)* (2015) 327 ALR 695, 698 [13], 699–700 [22] (Perram J).

<sup>54</sup> See *Dallas Buyers Club LLC v iiNet Ltd (No 4)* (2015) 327 ALR 702, 703 [2]–[3], 705 [15], 707–8 [22]–[25], 710 [33]–[34] (Perram J); *Dallas Buyers Club LLC v iiNet Ltd (No 5)* (2015) 115 IPR 544, 545 [3], 555 [53] (Perram J). The impermissible damages were: (1) damages corresponding to the one-off licence fee each uploader would need to have paid for DBC to authorise each particular infringement; and (2) punitive damages under s 115(4) of the *Copyright Act*, depending on the number of copies of other copyrighted works that each infringer had downloaded, see: *Dallas Buyers Club LLC v iiNet Ltd (No 4)* (2015) 327 ALR 702, 705 [15], 710 [33]–[35]; Yuvaraj, above n 48, 41–2.

single copy of the film for each copy the alleged infringer had downloaded and damages corresponding to the amount it cost DBC to obtain each infringer's details.<sup>55</sup> These two forms of compensation were likely to lead to the recovery of relatively minor sums. The restrictions imposed by Perram J set a precedent that effectively nullified the potential for rights holders to use preliminary discovery for the purpose of speculative invoicing.<sup>56</sup>

While the *Dallas Buyers Club* saga came to an end almost six months after s 115A was enacted, the proceedings showed that, in the internet age, copyright law must provide rights holders not only with efficient, but also with fair, methods of enforcement. Establishing such a framework can avoid a situation where rights holders desperately search for and use business practices or methods of enforcement that are dishonest and unjustifiably harmful to Australian consumers. This point raises two interrelated questions about the nature of the framework in s 115A and the scope of the website blocking law, which are discussed in Part IV.

#### IV SECTION 115A OF THE *COPYRIGHT ACT*

The Revised Explanatory Memorandum ('REM') explains that s 115A of the *Copyright Act* is 'deliberately prescriptive; it is intended as a precise response to a specific concern raised by copyright owners'.<sup>57</sup> Section 115A states:

- (1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:
  - (a) a carriage service provider provides access to an online location outside Australia; and
  - (b) the online location infringes, or facilitates an infringement of, the copyright; and
  - (c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).
- (2) The injunction is to require the carriage service provider to take reasonable steps to disable access to the online location.<sup>58</sup>

<sup>55</sup> See *Dallas Buyers Club LLC v iiNet Ltd (No 4)* (2015) 327 ALR 702, 705–6 [15], 710 [34] (Perram J).

<sup>56</sup> See, eg, Suzor, Choi and Pappalardo, above n 38, 140–1.

<sup>57</sup> Revised Explanatory Memorandum, Copyright Amendment (Online Infringement) Bill 2015 (Cth) 2 [1] ('REM').

Although an ISP is bound by an injunction granted under s 115A, the section operates as a no-fault remedy. As the REM explains, copyright owners do not have to establish that an ISP has infringed copyright or ‘authorised’ the infringement of copyright.<sup>59</sup> Instead, s 115A is focused on the conduct and purpose of the targeted ‘online location outside Australia’ and whether the ISP merely provides access to it. It is therefore understandable that the grant of an injunction under s 115A is not intended to raise a presumption that the ISP has infringed copyright or ‘authorised’ the infringement of copyright.<sup>60</sup> Section 115A’s geographical reach is also limited to ‘online locations outside Australia’.<sup>61</sup> This means that copyright owners who want to take action against a local website for copyright infringement must pursue traditional remedies under the *Copyright Act*.<sup>62</sup>

Section 115A also contains several important ancillary provisions that require applications to be conducted with elements of due process. There are also provisions that allow the Federal Court to consider a variety of interests. Section 115A(3) states that the parties to an action under s 115A(1) are the copyright owner, ISP, and the person who operates the online location (if that person applies to be joined as a party to the proceedings).<sup>63</sup> Section 115A(4)

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<sup>58</sup> ‘Carriage service provider’ has the same meaning that it does in the *Telecommunications Act 1997* (Cth): *Copyright Act* s 10 (definition of ‘carriage service provider’). See *Telecommunications Act 1997* (Cth) ss 7 (definition of ‘carriage service provider’), 87. An exclusive licensee has the same right to bring an action under s 115A as a copyright owner does, except against the copyright owner: *Copyright Act* s 119(a). Section 120(1) states that where an exclusive licensee brings an action under ss 115 or 115A, the exclusive licensee is not entitled, except with leave of the Federal Court, to proceed with the action unless the copyright owner is joined as a plaintiff or defendant. In applications under s 115A, the Federal Court is likely to grant an exclusive licensee leave to proceed without the copyright owner: see *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* [2017] FCA 435 (28 April 2017) [49]–[51].

<sup>59</sup> REM 2 [3], [7].

<sup>60</sup> *Ibid* 2 [7].

<sup>61</sup> *Copyright Act* s 115A(1)(a).

<sup>62</sup> See, for example, the traditional remedies under s 115 of the *Copyright Act*. The requirement that an ISP provides access to an ‘online location outside Australia’ is ‘an important limitation ... [that] may reflect an assumption that other provisions of the [Copyright] Act provide copyright owners with adequate remedies in respect of online locations situated within Australia that have, as their primary purpose, copyright infringement or the facilitation of copyright infringement’: *Roadshow Films Pty Ltd v Telstra Corporation Ltd* (2016) 122 IPR 81, 91 [38] (Nicholas J). For an example of an Australian case where a website owner was found to have authorised the infringement of copyright in musical works, see: *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380. See also *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1.

<sup>63</sup> *Copyright Act* s 115A(3).

requires the copyright owner to notify the ISP and the person who operates the online location of an application under s 115A(1).<sup>64</sup> However, the Federal Court may dispense, on such terms as it sees fit, with the requirement to notify the person who operates the online location if the copyright owner is unable, despite ‘reasonable efforts’, to determine the identity or address of the person who operates the online location, or to send notices to them.<sup>65</sup> Section 115A(5) provides a list of factors that the Federal Court may take into account when determining whether to grant an injunction:

- (a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(c)
- (b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
- (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
- (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
- (e) whether disabling access to the online location is a proportionate response in the circumstances;
- (f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;
- (g) whether it is in the public interest to disable access to the online location;
- (h) whether the owner of the copyright complied with subsection (4);
- (i) any other remedies available under this Act;
- (j) any other matter prescribed by the regulations;
- (k) any other relevant matter.<sup>66</sup>

The REM makes it clear that the Federal Court is not compelled to take any or all of these factors into account, but if it does, it may prescribe the appropriate weight to be placed on each factor.<sup>67</sup>

<sup>64</sup> Ibid s 115A(4).

<sup>65</sup> Ibid.

<sup>66</sup> Ibid s 115A(5).

<sup>67</sup> REM 10 [48]. The factors in s 115A(5) are discussed briefly in the REM: at 10–12 [47]–[58].

Under s 115A(7), the Federal Court may limit the duration of or, upon application, rescind or vary an injunction granted under s 115A.<sup>68</sup> Section 115A(8) permits an application to rescind or vary an injunction to be made by the copyright owner, the ISP, the person who operates the online location, or any other person prescribed by the *Copyright Regulations 1969* (Cth).<sup>69</sup> Finally, s 115A(9) states that an ISP ‘is not liable for any costs in relation to the proceedings unless the [ISP] enters an appearance and takes part in the proceedings’.<sup>70</sup>

One of the initial concerns about the introduction of website blocking laws in Australia was that their application could be abused or inadvertently result in the blocking of innocent websites.<sup>71</sup> In an attempt to address those concerns, s 115A was limited by two key elements: ‘online location’ and ‘primary purpose’. In order to delineate the scope of s 115A, it is necessary to understand the meaning of those phrases.

While ‘online location’ is not defined in the *Copyright Act*, the REM explains that the phrase ‘is intentionally broad and includes, but is not limited to, a website, and would also accommodate future technologies’.<sup>72</sup> This does not appear to be controversial, considering that the *Copyright Act* needs to be an instrument that is adaptable to technological changes.<sup>73</sup> ‘Primary purpose’ is also undefined in the *Copyright Act* but its meaning is, again, clarified by the REM. The REM states that ‘primary purpose’ sets ‘an intentionally high threshold’ and directs the Federal Court to ‘consider the principal activity for which the online location exists and the principal intention of users of that

<sup>68</sup> *Copyright Act* s 115A(7).

<sup>69</sup> *Ibid* s 115A(8). At the time of writing, no other person has been prescribed by the *Copyright Regulations 1969* (Cth). The REM notes that the Chair of the Australian Competition and Consumer Commission or the Australian Communications and Media Authority might be suitable candidates to be prescribed: REM 12 [62].

<sup>70</sup> *Copyright Act* s 115A(9). This specific costs provision operates alongside s 43 of the *Federal Court of Australia Act 1976* (Cth), which confers on the Federal Court the jurisdiction to award costs in any proceeding before it: *Federal Court of Australia Act 1976* (Cth) s 43(1). Section 115A(9) does not also alter the Federal Court’s general rules about costs in pt 40 of the *Federal Court Rules 2011* (Cth).

<sup>71</sup> See, eg, Cheema, above n 39, 28, 30.

<sup>72</sup> REM 8 [36].

<sup>73</sup> See, eg, Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2013) 19. See generally Lyria Bennett Moses, ‘Adapting the Law to Technological Change: a Comparison of Common Law and Legislation’ (2003) 26(2) *University of New South Wales Law Journal* 394.

online location'.<sup>74</sup> A distinction may be drawn between the 'purpose' and 'motive' of a website. For example, where copyright infringement is the principal activity for which a website exists, the fact that the motive or incentive of the operator is to draw profits from advertising revenue does not mean that the 'primary purpose' is to profit from advertising.<sup>75</sup>

'Primary purpose' should cause little concern for popular websites like YouTube, Twitter, Facebook or SoundCloud. Although those and other similar websites may contain a small amount of infringing material, they would not necessarily have the requisite 'primary purpose'.<sup>76</sup> Furthermore, the 'primary purpose' test is not intended to capture overseas websites that provide licensed copyright material in the website's local jurisdiction, but may not be licensed to provide the copyright material to residents in Australia or other countries (eg, Netflix (USA) and iTunes (USA)).<sup>77</sup> These types of websites frequently use geo-blocking methods to prevent persons outside the licensed geographical area from accessing the website. However, geo-blocking can be circumvented and the result is that the overseas website communicates unlicensed (infringing) copyright material.<sup>78</sup> The REM confirms that, in these circumstances, overseas websites like Netflix (USA) would not satisfy the 'primary purpose' test.<sup>79</sup>

<sup>74</sup> REM 9 [38], [40].

<sup>75</sup> Ibid 9 [40]. The distinction that can be made under s 115A between 'purpose' and 'motive' is not unheard of in other areas of law. For example, the distinction can be made in criminal law when analysing a defendant's mens rea as well as in statutory interpretation when determining the purpose, intention or motive of the legislature in relation to a particular Act, see, eg: *Hyam v Director of Public Prosecutions* [1975] AC 55, 73 (Lord Hailsham); Jordan Wei Peng Teng and Rebecca Mahoney, 'Zaburoni v The Queen (2016) 256 CLR 482' (2016) 37 *Adelaide Law Review* 553, 560–2; Thomson Reuters, *The Laws of Australia* (at 15 April 2013) 25 Interpretation and Use of Legal Sources, '3 Statutes' [25.1.710].

<sup>76</sup> REM 9 [38].

<sup>77</sup> Ibid 9 [39].

<sup>78</sup> See, eg, Campbell Thompson, 'Popcorn Time for Rights Holders? Australia's New Website Blocking Laws' (2015) 18(8) *Internet Law Bulletin* 170, 174. Thompson argues that a website infringes copyright through unauthorised 'communication' where it provides copyright material to residents outside the geographical area in which it has been licensed. This is contrary to ss 86(c) and 101(1) of the *Copyright Act*.

<sup>79</sup> REM 9 [39]. As the Minister for Communications stated in his Second Reading speech: 'If Australian rights owners have got issues about American sites selling content to Australians in respect of which they do not have Australian rights, they should take it up with them. The big boys can sort it out between themselves and leave the consumers out of it': Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6417 (Malcolm Turnbull, Minister for Communications).

In addition, Virtual Private Networks ('VPNs') are unlikely to be caught by s 115A. VPNs can be used for various unlawful purposes like the circumvention of overseas website geo-blocking. However, VPNs also have legitimate uses, including maintaining the privacy of a user's activity on the internet.<sup>80</sup> In his Second Reading speech, the Minister for Communications emphasised the point that s 115A was not designed to capture 'VPNs that are promoted or used for legitimate purposes'.<sup>81</sup> A VPN that explicitly markets itself as a tool to circumvent geo-blocking or injunctions would not be promoting itself for legitimate purposes and is thus likely to constitute an online location that has the primary purpose of facilitating copyright infringement.<sup>82</sup>

The restriction imposed by 'primary purpose' can be contrasted with the Federal Court's broad power to order an ISP to take 'reasonable steps to disable access to the online location'. The REM states that this power may allow the Federal Court to grant an injunction requiring an ISP to block access to a website 'in any such a manner as the Court sees fit'.<sup>83</sup> For example, the Federal Court might order an ISP to implement one or more of the following technical website blocking methods: Domain Name System Blocking ('DNS Blocking'), Uniform Resource Locator Blocking ('URL Blocking') and/or Internet Protocol Address Blocking ('IP Address Blocking').<sup>84</sup> This broad power operates alongside s 23 of the *Federal Court of Australia Act 1976* (Cth), which gives the Federal Court the ancillary power 'to make orders of such kinds, including interlocutory orders ... as the Court thinks appropriate'.<sup>85</sup> As the cases decided under s 115A demonstrate, these broad powers were used to make a wide range of orders.

<sup>80</sup> Thompson, above n 78, 174; REM 9 [39].

<sup>81</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6416 (Malcolm Turnbull, Minister for Communications). See also REM 9 [39].

<sup>82</sup> Thompson, above n 78, 174.

<sup>83</sup> REM 9 [41].

<sup>84</sup> For a discussion of these website blocking methods, see, eg: *Roadshow Films Pty Ltd v Telstra Corporation Ltd* (2016) 122 IPR 81, 85–6 [13]–[15] (Nicholas J); Cheema, above n 39, 28–9; Cory, above n 2, 8–11; Ofcom, "Site Blocking" to Reduce Online Copyright Infringement: a Review of Sections 17 and 18 of the Digital Economy Act (27 May 2010).

<sup>85</sup> *Federal Court of Australia Act 1976* (Cth) s 23 (emphasis added).

## V THE FIRST CASES TO TEST SECTION 115A

At the time of writing, four decisions have been made under s 115A: *Roadshow Films Pty Ltd v Telstra Corporation Ltd* ('*Roadshow v Telstra (2016 Decision)*'),<sup>86</sup> *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* ('*Universal Music Australia v TPG*'),<sup>87</sup> *Roadshow Films Pty Ltd v Telstra Corporation Ltd* ('*Roadshow v Telstra (2017 Decision)*')<sup>88</sup> and *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* ('*Foxtel v TPG*').<sup>89</sup> As will be shown, the first two landmark decisions had a significant influence on the third and fourth cases and will continue to do so in future cases brought under s 115A. That influence will extend primarily to the interpretation of s 115A and to the substance and form that any future website blocking injunctions and costs orders will take. The first, third and fourth cases were spearheaded by the film and television industry; and the second by the music industry. In each case, the applicants were seeking to block some of the most notorious torrent and streaming websites.

A *Roadshow v Telstra* (2016 Decision)

On 15 December 2016, Nicholas J handed down the first decision under s 115A in *Roadshow v Telstra (2016 Decision)*. That case involved two joint applications by a total of eight major film, television and broadcasting corporations against a long list of Australian ISPs, including Telstra, Optus, TPG, M2 and iiNet. The first application sought an injunction to disable access to SolarMovie (an overseas website providing unauthorised streaming of films and television shows). The second application sought an injunction to disable access to The Pirate Bay, Torrentz, isoHunt and TorrentHound (overseas websites providing unauthorised torrent files for films and television shows).

In his judgment, Nicholas J took time to comment on the meaning of 'facilitate' within s 115A. While 'facilitate' is not defined in the *Copyright Act*, commentators have argued that it sets a lower threshold than 'authorisation'.<sup>90</sup> Justice Nicholas evidently shared this view when he stated that 'facilitate' is 'broad' and requires a court to 'identify a species of

<sup>86</sup> (2016) 122 IPR 81 ('*Roadshow v Telstra (2016 Decision)*').

<sup>87</sup> [2017] FCA 435 (28 April 2017) ('*Universal Music Australia v TPG*').

<sup>88</sup> [2017] FCA 965 (18 August 2017) ('*Roadshow v Telstra (2017 Decision)*').

<sup>89</sup> [2017] FCA 1041 (1 September 2017) ('*Foxtel v TPG*').

<sup>90</sup> See Thompson, above n 78, 171; Suzor, Choi and Pappalardo, above n 38, 143.

infringing act and ask whether the online location facilitates that act by making its performance easier or less difficult'.<sup>91</sup> An online location may 'facilitate' copyright infringement 'merely by making it easier for users to ascertain the existence or whereabouts of other online locations that themselves infringe or facilitate the infringement of copyright'.<sup>92</sup>

Following those remarks, Nicholas J reflected upon the point in time that the Federal Court must be satisfied of the various elements in s 115A. His Honour concluded that the Federal Court must be satisfied *at the time of granting the injunction*.<sup>93</sup> The words 'provides', 'infringes' and 'facilitates' were also held to be 'neutral in temporal meaning in that they apply to past as well as present conduct'.<sup>94</sup> Furthermore, 'online location' should include a 'location ... that was online at the time the relevant proceeding commenced but is not online either at the time of the hearing or at the time of granting the injunction'.<sup>95</sup> Justice Nicholas justified his interpretation of 'online location' on the basis that:

Too narrow a reading of the language used ... would deprive the section of much of its usefulness eg if it were construed so as to allow an operator to avoid an injunction simply by taking a website off-line temporarily for a period of days, weeks or months during the course of the relevant proceedings.<sup>96</sup>

After careful examination of the evidence, Nicholas J was satisfied that the necessary elements were met and that it was appropriate to grant the injunctions sought.<sup>97</sup> His Honour made over 20 identical orders in both applications. The orders of greatest importance are summarised below.

<sup>91</sup> In making these comments, Nicholas J referred to the *Macquarie Dictionary* definition of 'facilitate', stating that 'the word "facilitate" means "to make easier or less difficult; help forward (an action or process etc)": *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 93 [47], quoting *Macquarie Dictionary* (Macquarie Dictionary, 6<sup>th</sup> ed, 2013).

<sup>92</sup> *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 93 [47].

<sup>93</sup> *Ibid* 94 [50]. Rather than at the time the proceedings were commenced or at the time of the hearing.

<sup>94</sup> *Ibid* 95 [52].

<sup>95</sup> *Ibid* 95 [53].

<sup>96</sup> *Ibid*. If the targeted location is not online by the time of the hearing or at the time of granting the injunction, that would be a matter relevant to the Federal Court's discretion as to whether to grant the injunction: at 95 [54].

<sup>97</sup> *Ibid* 84 [6], 99 [77], 103 [98], 104 [111], 105 [118], 106 [123].

1 *Method of Website Blocking*: The ISPs had to take ‘reasonable steps to disable access’ to the online locations. This order would be complied with if, within 15 business days, the ISPs implemented one or more of the following methods: (a) DNS Blocking; (b) IP Address Blocking; (c) URL Blocking; and (d) any alternative technical method as agreed in writing between an applicant and an ISP.

2 *Establishment of Landing Page*: The ISPs had to redirect any subscriber attempting to access a disabled online location to a ‘landing page’.<sup>98</sup> The landing page had to state that access to the online location was disabled because the Federal Court had determined that it infringes, or facilitates the infringement of, copyright.

3 *Variation and Revocation of the Orders*: The owner or operator of an online location targeted by the injunction and the owner or operator of any other online location who claims to be affected by the injunction may apply to vary or discharge the orders made.<sup>99</sup>

4 *Extension of Orders to Additional Websites*: If, during the operation of the orders, a targeted online location operates from a different Domain Name, IP Address or URL then the applicants may apply to the Federal Court, with supporting affidavits, to extend the operation of the orders to the different Domain Name, IP Address or URL.

5 *Duration of Orders*: The orders expire in three years, but the applicants can apply, six months prior to the expiry of the orders, to extend the orders for a further three years.<sup>100</sup>

6 *Costs*: The applicants pay a portion of Telstra’s, Optus’s, M2’s and TPG’s compliance costs at a rate of \$50 per Domain Name the subject of DNS Blocking.<sup>101</sup>

<sup>98</sup> A ‘landing page’ is a website that internet users are diverted to if they attempt to access the disabled online location: REM 10 [43].

<sup>99</sup> Such an application must set out the orders sought and the basis for the variation or discharge (supported with evidence).

<sup>100</sup> The orders stipulated that an application for an extension of the duration of the orders can only be successful if the applicants believe in good faith that the online locations continue to have the primary purpose of infringing, or facilitating the infringement of, copyright.

<sup>101</sup> For the full and detailed list of orders: see *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 113–20. The applicants had to also pay the ISPs’ costs of preparing evidence and

The costs orders were the major area of contention between the applicants and ISPs. Telstra and TPG argued that their ‘set-up costs’ (ie, the costs incurred in configuring their systems to facilitate compliance with any order made under s 115A) should be paid by the applicants.<sup>102</sup> Justice Nicholas rejected that argument on the basis that the set-up costs would permit the ISPs to comply with the orders in that proceeding and any future proceeding under s 115A.<sup>103</sup> His Honour also considered it to be desirable and essential that the ISPs had the technical capacity to comply with orders under s 115A and noted that the set-up costs would have been incurred eventually irrespective of the relevant proceedings.<sup>104</sup> Justice Nicholas stated that the set-up costs were ‘a “general cost of carrying on business”’ as an ISP.<sup>105</sup> Although the ISPs lost on that point, they successfully argued that they should be entitled to recover the costs that they would incur in complying with the injunctions (‘compliance costs’). Justice Nicholas accepted the ISPs’ argument that under s 115A they stood in a similar position to an innocent third party against whom an order of preliminary discovery is made.<sup>106</sup> In that situation, the innocent third party is entitled to recover the costs it incurs in providing discovery.<sup>107</sup>

The decision in *Roadshow v Telstra (2016 Decision)* was not to be the end of the debate over compliance costs because the issue was raised again, nearly five months later, in the second case decided under s 115A, *Universal Music Australia v TPG*.

#### B Universal Music Australia v TPG

On 28 April 2017, Burley J delivered his decision in *Universal Music Australia v TPG*. That case involved an application under s 115A by five major music companies and organisations against another long list of Australian ISPs. The applicants sought an injunction to disable access to the torrent website KickassTorrents. Based on the evidence, Burley J was

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making submissions on the issue of compliance costs and the issue of whether and how the injunctions can be extended to additional online locations: at 120.

<sup>102</sup> Ibid 111 [141]–[142]. Telstra’s set-up costs were \$10 261 and TPG’s set-up costs were \$21 195.

<sup>103</sup> Ibid 111 [143]–[144].

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 111 [144].

<sup>106</sup> Ibid 111 [145]–[146].

<sup>107</sup> Ibid.

satisfied that it was appropriate to grant the injunction sought.<sup>108</sup> The orders his Honour made were almost entirely similar in effect to the orders in *Roadshow v Telstra (2016 Decision)*.<sup>109</sup> Justice Burley also highlighted and accepted many of the comments that Nicholas J made about s 115A in *Roadshow v Telstra (2016 Decision)*, which may suggest that these two cases have laid the foundation for a relatively consistent approach to the interpretation of s 115A.

The main disagreement between the parties was, again, about who should bear the compliance costs. The applicants submitted three key arguments for why the ISPs should bear all compliance costs. First, compliance costs are a ‘cost of doing business’ as an ISP. Secondly, the ISPs will benefit from website blocking because they provide paying customers with access to licensed copyright material and thus accrue a benefit beyond that of a mere bystander or innocent third party. Thirdly, compliance costs are *de minimis* — and in the context of a website blocking regime that is intended to be efficient and economical, arguments over trivial costs should be avoided.<sup>110</sup> The ISPs adopted the same argument that they advanced in *Roadshow v Telstra (2016 Decision)*<sup>111</sup> and argued further that an injunction under s 115A is intended to serve the interests of the applicants.<sup>112</sup> Justice Burley accepted the ISPs’ arguments and made the following observation:

<sup>108</sup> *Universal Music Australia v TPG* [2017] FCA 435 (28 April 2017) [76].

<sup>109</sup> There were only very minor differences. For example, in *Universal Music Australia v TPG* the applicants were permitted to apply to have the duration of the orders extended, but there was no specification as to how long an extension may be. This is in contrast to *Roadshow v Telstra (2016 Decision)*, where the duration of the orders could, upon application, be extended by three years: Cf *Universal Music Australia v TPG* [2017] FCA 435 (28 April 2017) [v]; *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 116. Furthermore, in *Universal Music Australia v TPG*, Burley J ordered that the injunction be complied with through DNS Blocking. URL Blocking and IP Address Blocking were methods that could be used only if agreed in writing between an applicant and an ISP. However, in *Roadshow v Telstra (2016 Decision)*, Nicholas J allowed the injunction to be complied with through DNS Blocking, URL Blocking and/or IP Address Blocking without the need for agreement in writing: Cf *Universal Music Australia v TPG* [2017] FCA 435 (28 April 2017) [ii]; *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 114.

<sup>110</sup> *Universal Music Australia v TPG* [2017] FCA 435 (28 April 2017) [89]–[92].

<sup>111</sup> The argument was that, under s 115A, the ISPs should be treated like an innocent third party who complies with an order against them for preliminary discovery and the administration of subpoenas: *ibid* [95]–[98]; *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 111 [146].

<sup>112</sup> *Universal Music Australia v TPG* [2017] FCA 435 (28 April 2017) [95].

s 115A was enacted to benefit rights holders ... Others undoubtedly do benefit from the proper policing of copyright law. Such laws benefit the cultural heritage of the community by encouraging the creative arts, the original owners of the copyrights ... and current owners and licensees. However, the legislation most directly and immediately benefits copyright owners and exclusive licensees.<sup>113</sup>

The ISPs' high degree of participation in the first and second cases can be contrasted with their more passive approach in the third and fourth cases decided under s 115A, *Roadshow v Telstra (2017 Decision)* and *Foxtel v TPG*.

### C *Roadshow v Telstra (2017 Decision) and Foxtel v TPG*

On 18 August 2017, Nicholas J handed down his second decision under s 115A in *Roadshow v Telstra (2017 Decision)*. The applicants and respondents (ISPs) in that case were the same as those in *Roadshow v Telstra (2016 Decision)*. The applicants sought an injunction to block access to 49 different streaming, torrent and linking websites, which Nicholas J considered appropriate to grant based on the evidence.<sup>114</sup>

On 1 September 2017, Burley J also delivered his second decision under s 115A in *Foxtel v TPG*. In that case, the applicants sought an injunction to block access to 127 different streaming, torrent and linking websites which were part of 17 website groups.<sup>115</sup> Justice Burley was satisfied by the evidence that the injunction was appropriate to grant.<sup>116</sup>

These two cases can be discussed concurrently given that they had the same important features. In both cases, the orders made were virtually identical in form and effect to the orders in *Roadshow v Telstra (2016 Decision)* (and therefore *Universal Music Australia v TPG* too);<sup>117</sup> the applicants made no further attempt to argue that they should not be liable to pay the compliance

<sup>113</sup> Ibid [102]. Although Burley J did not need to decide who should bear the set-up costs (because those costs had already been incurred and resolved in *Roadshow v Telstra (2016 Decision)*), he stated that in respect of that issue he agreed with Nicholas J: at [104]

<sup>114</sup> *Roadshow v Telstra (2017 Decision)* [2017] FCA 965 (18 August 2017) [41].

<sup>115</sup> Ibid [2].

<sup>116</sup> Ibid [24]–[128].

<sup>117</sup> *Roadshow v Telstra (2017 Decision)* [2017] FCA 965 (18 August 2017) [i]–[vi]; *Foxtel v TPG* [2017] FCA 1041 (1 September 2017) [i]–[vi].

costs; and the ISPs did not actively participate in the proceedings.<sup>118</sup> In *Roadshow v Telstra (2017 Decision)*, Nicholas J did not make any new comments about the interpretation of s 115A. In *Foxtel v TPG*, Burley J stated only that Foxtel, despite being a co-owner of the copyright in one of the relevant cinematograph films, was not precluded from bringing an action on its own and without joining the other co-owners.<sup>119</sup>

#### D Implications of the Four Decisions

It is unsurprising that the issue of costs was disputed in *Roadshow v Telstra (2016 Decision)* and *Universal Music Australia v TPG* — that issue had been a major area of contention in European Union and United Kingdom website blocking cases, and was also a key topic of debate before and after the enactment of s 115A. Rights holders argued that they would bear the costs of investigations and court applications and that it would therefore be fair for the ISPs to bear all compliance costs.<sup>120</sup> The ISPs argued that they should be entitled to compliance costs because rights holders would be the direct beneficiaries of reduced infringement and increased royalty streams following an injunction under s 115A.<sup>121</sup>

Given that the first two cases under s 115A determined the issue of compliance costs in the same manner, and no subsequent attempts were made in the third and fourth cases to change that position, it appears that future cases will follow suit. While the compliance costs in an individual case under s 115A are minimal, the cumulative costs are likely to be substantial as future applications mount up over time. Therefore, Australian ISPs have been afforded an important degree of financial protection. This result can be contrasted with the position of ISPs in the United Kingdom, who have been required to bear their compliance costs under s 97A of the *Copyright, Designs and Patents Act 1988* (UK) c 48.<sup>122</sup>

The four decisions also demonstrated that the Federal Court has both the power and the will to balance the interests of rights holders, ISPs, overseas

<sup>118</sup> *Roadshow v Telstra (2017 Decision)* [2017] FCA 965 (18 August 2017) [3]; *Foxtel v TPG* [2017] FCA 1041 (1 September 2017) [4].

<sup>119</sup> *Foxtel v TPG* [2017] FCA 1041 (1 September 2017) [28].

<sup>120</sup> See Williams and Smith, above n 15, 69.

<sup>121</sup> See Peter Knight, 'Recent Developments in Managing Online Piracy — an Interview with Jane Perrier, General Counsel, Intellectual Property, Telstra' (2015) 18(7) *Internet Law Bulletin* 145, 146.

<sup>122</sup> See Williams and Smith, above n 15, 69–70.

website operators and consumers in applications under s 115A. First, the ISPs were provided flexibility as to the technical method they could implement in order to block the websites: DNS Blocking, IP Address Blocking, or URL Blocking. However, DNS Blocking appears to be the preferred technical method. Secondly, an innocent third party who is affected by an injunction under s 115A can apply to have the injunction varied or revoked. Such an application could foreseeably occur where an innocent website has been blocked inadvertently. Finally, and most notably, in *Roadshow v Telstra (2016 Decision)* Nicholas J rejected a proposed order that would permit the applicants to give written notice to the ISPs to extend the injunction to new websites without any court oversight. His Honour was clear that the applicants must apply to the Federal Court to extend the injunction to new websites and that such an application would be scrutinised carefully.<sup>123</sup> That condition was also adopted in the second, third and fourth cases. The rejection of ‘rolling injunctions’ was undoubtedly a win for due process under s 115A.

An additional point needs to be made about the fact that the ISPs did not take part in the third and fourth cases; applications under s 115A now appear to be essentially *ex parte* and this is likely to continue in the future as ISPs take a step back into more passive roles. Given this trend, courts must be vigilant and rights holders must make full and fair disclosure.<sup>124</sup> One question that remains is whether the website blocking regime in s 115A is out of reach for rights holders who are not large and well-resourced corporations. Given that litigation under s 115A involves a substantial cost, there may be many rights holders who cannot take advantage of the provision. Another lingering question is whether website blocking injunctions granted under s 115A will reduce the rates of online copyright infringement in Australia. The latter question and other related issues are explored in Part VI.

## VI THE EFFECTIVENESS OF WEBSITE BLOCKING

In the wake of the decisions in *Roadshow v Telstra (2016 Decision)* and *Universal Music Australia v TPG*, many in the media and the general public in Australia heavily criticised the effectiveness of website blocking laws in

<sup>123</sup> See *Roadshow v Telstra (2016 Decision)* (2016) 122 IPR 81, 109–10 [136]–[138].

<sup>124</sup> *Aristocrat Technologies Australia Pty Ltd v Allam* (2016) 327 ALR 595, 599 [15] (Gageler J).

reducing online copyright infringement.<sup>125</sup> The criticisms about effectiveness relied on two main arguments. The first argument was that internet users can easily circumvent website blocks through a variety of means. The second argument was that rights holders can best reduce online copyright infringement simply by providing Australians with access to licensed copyright material that is more timely, affordable, convenient and varied than it currently is. Senator Scott Ludlam advanced the same arguments when s 115A was debated in the Federal Parliament of Australia:

If people are determined to pirate content, it is very difficult to stop them ... The only effective way to deal with copyright infringement on the kind of scale that the government is concerned about is to just make it available: conveniently, affordably and in a timely way. The [20<sup>th</sup> century] distribution model ... is broken. That model worked before the internet existed.<sup>126</sup>

There is certainly force to the criticisms. In respect of the first argument, internet users require only determination and basic computer skills to circumvent website blocks. For example, VPNs allow users to cloak their geographic location by providing an alternative network route for data and this can be used to circumvent DNS Blocking, IP Address Blocking and URL Blocking, even if those blocking methods are imposed in combination.<sup>127</sup> Internet users can also use proxy websites or reconfigure the DNS system that their computer uses, a relatively quick and simple process.<sup>128</sup> These methods were shown publicly to be successful at circumventing the blocks

<sup>125</sup> See, eg, Tim Biggs, 'Blocking Pirate Bay Will Not Stop VPN-savvy Australians', *Sydney Morning Herald* (online), 16 December 2016 <<http://www.smh.com.au/technology/news/blocking-pirate-bay-will-not-stop-vpnsavvy-australians-20161216-gtckba.html>>; Paula Dootson, Kylie Pappalardo and Nicolas Suzor, *Blocking Access to Illegal File-Share Websites Won't Stop Illegal Downloading* (15 December 2016) *The Conversation* <<http://theconversation.com/blocking-access-to-illegal-file-share-websites-wont-stop-illegal-downloading-70473>>. See also Benjamin Sveen, 'Pirate Bay's Peter Sunde Says Australia's Proposed Website Blocking Scheme Won't Deter Downloaders', *ABC News* (online), 20 June 2015 <<http://www.abc.net.au/news/2015-06-19/pirate-bay-cofounder-mocks-proposed-website-blocking-legislation/6559288>>.

<sup>126</sup> Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, 4022 (Scott Ludlam).

<sup>127</sup> See Cheema, above n 39, 31; Ofcom, "Site Blocking" to Reduce Online Copyright Infringement: a Review of Sections 17 and 18 of the Digital Economy Act (27 May 2010) 26-41.

<sup>128</sup> See, eg, TorrentFreak, *First Aussie Pirate Bay Blocks Get Defeated in Seconds* (20 December 2016) <<https://torrentfreak.com/first-aussie-pirate-bay-block-gets-defeated-in-seconds-161220/>>; Claire Reilly, *The Pirate Bay Is Blocked Australia Wide ... Except it Really Isn't* (21 December 2016) *CNET* <<https://www.cnet.com/au/news/the-pirate-bay-blocked-australia-wide-proxy-mirror-site-dns-blocking-telstra-vodafone-optus/>>.

imposed by the decision in *Roadshow v Telstra (2016 Decision)*.<sup>129</sup> In addition, the operators of blocked websites can simply shift their websites to new online locations. If rights holders attempt to extend the relevant website blocks to the new online locations then in essence they begin to engage in a game of ‘whack-a-mole’, where as soon as the websites are blocked, they appear again at new locations.

A recent study supports the second argument against s 115A. In 2015, Paula Dootson and Nicholas Suzor reported and commented on qualitative research they had conducted into the attitudes of Australian consumers toward online copyright infringement and the existing distribution framework established by rights holders.<sup>130</sup> The authors provided evidence that substantiated ‘a common intuition: one of the major reasons that Australians seek out illicit downloads of content ... is that it is more difficult to access legitimately in Australia’.<sup>131</sup> Dootson and Suzor explained that:

The geographically segmented way in which copyright is exploited at an international level has given rise to a ‘tyranny of digital distance’, where Australians have less access to copyright goods than consumers in other countries. Compared to consumers in the United States ... and the European Union ... Australians pay more for digital goods, have less choice in distribution channels, are exposed to substantial delays in access, and are sometimes denied access completely.<sup>132</sup>

Dootson and Suzor’s research suggested that the business practices of rights holders are, in fact:

<sup>129</sup> See, eg, Claire Reilly, *The Pirate Bay Is Blocked Australia Wide ... Except it Really Isn't* (21 December 2016) CNET <<https://www.cnet.com/au/news/the-pirate-bay-blocked-australia-wide-proxy-mirror-site-dns-blocking-telstra-vodafone-optus/>>; YouTube, *The Pirate Bay Telstra Fix (Wired Connection)* (19 December 2016) <<https://www.youtube.com/watch?v=nD7Osy1zfgM>>.

<sup>130</sup> Paula Dootson and Nicolas Suzor, ‘The Game of Clones and the Australia Tax: Divergent Views about Copyright Business Models and the Willingness of Australian Consumers to Infringe’ (2015) 38(1) *University of New South Wales Law Journal* 206.

<sup>131</sup> *Ibid* 207.

<sup>132</sup> *Ibid* (citations omitted). ‘In the digital age, while the costs of delivering content to Australian consumers has fallen significantly, digital copyright goods remain substantially more expensive than in other countries. There appears to be a keen awareness in Australian society that Australians are paying significantly more for access to digital goods that are delivered by the same servers over the same network infrastructure that delivers orders to consumers in other jurisdictions. Control over digital distribution channels enables foreign rightsholders to maximise their profits through regional pricing, just as parallel importation laws did for physical goods’: at 210 (citations omitted).

counterproductively increasing incentives for consumers to infringe ... the lack of convenient and cheap legitimate distribution channels risks undermining public support for copyright law. Our research shows that consumers blame rightsholders for failing to meet market demand, and this encourages a social norm that infringing copyright, while illegal, is not morally wrongful.<sup>133</sup>

Dootson and Suzor considered that increased lobbying for and reliance on new legislative methods of copyright enforcement would alienate Australian consumers further and would in effect work against the interests of rights holders.<sup>134</sup> They concluded that the best strategy to reduce online copyright infringement is to ‘ensure that Australians can access copyright goods in a timely, affordable, convenient, and fair lawful manner’.<sup>135</sup> While Dootson and Suzor acknowledged that the distribution of copyright material in Australia has been improving, they noted that ‘it is by no means complete; there is still a long way to go before Australian consumers experience parity of convenience and competition for distribution channels in the Australian market, and prices remain much higher in Australia’.<sup>136</sup>

Dootson and Suzor’s findings are reinforced by two recent parliamentary and government reports, which determined that Australian consumers have access to limited content but must pay comparatively high prices. In 2013, the House of Representatives Standing Committee on Infrastructure and Communication released its report into information technology pricing in Australia. The Committee found that Australian ‘prices are significantly higher than what might be expected as a consequence of any costs arising from delivery in the Australian market’.<sup>137</sup> The Productivity Commission’s

<sup>133</sup> Ibid 208. Dootson and Suzor highlighted the point that copyright owners’ business practices are increasing their own enforcement costs: ‘The lack of accessibility and high prices of copyright goods in Australia leads to substantial economic waste. The unmet consumer demands means that Australian consumers are harmed by lower access to information and entertainment goods than consumers in other jurisdictions. The higher rates of infringement that fulfils some of this unmet demand increase enforcement costs for copyright owners and imposes burdens either on our judicial system or on private entities — like ISPs — who may be tasked with enforcing the rights of third parties.’: at 208.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid 236.

<sup>137</sup> Commonwealth, *At what Cost? IT Pricing and the Australia Tax: House of Representatives Standing Committee on Infrastructure and Communications*, Parl Paper No 238 (2013) 3–4 [1.17] (*‘IT Pricing Paper’*). For examples of price differences between Australia and other countries like the United States of America, see at 28–30.

2016 report into Australia's intellectual property arrangements went further. The Commission determined that the combined use of copyright, exclusive licences and geo-blocking in Australia has created a market that offers consumers a 'lower level of digital service (such as a more limited music or TV streaming catalogue) at a higher price than in overseas markets'.<sup>138</sup> Following the consideration of several consumer-based surveys and studies, the Commission concluded that:

the case for further policy change or Government action on copyright infringement is weak. Rights holders, their publishers and other content providers are best placed to bring content to Australian consumers in a timely and competitively priced way. This approach is the most efficient and effective way to reduce online copyright infringement.<sup>139</sup>

In light of the evidence presented, it appears that the criticisms of s 115A are justified. However, that does not inevitably permit the conclusion that s 115A will be wholly ineffective in reducing online copyright infringement and has no legitimate place in Australia.

Several studies have investigated the effect of website blocking injunctions granted under s 97A of the *Copyright, Designs and Patents Act 1988* (UK) c 48 and have determined that the website blocks were reasonably effective in reducing rates of online copyright infringement. A report by Incopro in 2014 revealed that 'ISP blocks had a significant impact on all blocked sites ... On average, sites in the UK lose 73.2% of their Alexa estimated usage following a site block and maintain those levels consistently over time'.<sup>140</sup> Similarly, a report by Carnegie Mellon University on the effect of 53 different website blocks imposed in November 2014 under the UK legislation found that the blocks:

caused a 90% drop in visits to the blocked sites while causing no increase in usage of unblocked sites. This led to a 22% decrease in total piracy for all users affected by the blocks (or a 16% decrease across all users overall). We

<sup>138</sup> Productivity Commission, 'Intellectual Property Arrangements' (Inquiry Report No 78, Productivity Commission, 23 September 2016) 142. See also Commonwealth, *IT Pricing Paper*, above n 137, 14–15, 18.

<sup>139</sup> Productivity Commission, above n 138, 569.

<sup>140</sup> Incopro, *Site Blocking Efficacy Study: United Kingdom* (13 November 2014) Australian Screen Association, 4 <[http://auscreenassociation.film/uploads/reports/Incopro\\_Site\\_Blocking\\_Efficacy\\_Study-UK.pdf](http://auscreenassociation.film/uploads/reports/Incopro_Site_Blocking_Efficacy_Study-UK.pdf)>. 'Alexa' is a web traffic data and analytics service. Cf Todd Spangler, 'Pirate Bay Shutdown Has Had Virtually No Effect on Digital Piracy Levels', *Variety* (online), 13 December 2014 <<http://variety.com/2014/digital/news/pirate-bay-shutdown-has-had-virtually-no-effect-on-digital-piracy-levels-1201378756/>>.

also found that these blocks caused 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 like BBC and Channel 5.<sup>141</sup>

That report showed that website blocking, when done on a large enough scale, can change consumer behaviour; it can shift consumers away from accessing infringing websites to legitimate online sources.<sup>142</sup> In *EMI Records v British Sky Broadcasting Ltd*,<sup>143</sup> Arnold J also pointed out that:

the evidence indicates that blocking orders *are* reasonably effective. The effect of the order made in Italy with regard to [The Pirate Bay or 'TPB'] ... was a 73% reduction in audience accessing TPB in Italy and a 96% reduction in page views. The blocking order made in Italy in relation to [KickAss Torrents] has had a similar effect. As for the effect of the orders made in England in relation to TPB, as at 19 December 2011, TPB was ranked by Alexa as number 43 in the UK, while as at 21 November 2012, its UK ranking had dropped to number 293.<sup>144</sup>

Research into the effectiveness of website blocking in the United Kingdom cannot, of course, be automatically applied to Australia. The legal framework, attitudes of consumers toward online copyright infringement and the circumvention of website blocking laws, and the availability of licensed sources of copyright material differs between Australia and the United Kingdom.<sup>145</sup> Nonetheless, the evidence does lend some support to the view that website blocking laws imposed under s 115A can and will be at least somewhat effective in reducing rates of online copyright infringement in Australia. As Sadaat Cheema notes, website blocking:

does cause inconvenience to end users, whether by having to download encryption software or by having to pay a monthly subscription fee for a VPN service. While site-blocking will not keep out the most determined users, it will almost certainly have an impact on others.<sup>146</sup>

<sup>141</sup> Brett Danaher, Michael D Smith and Rahul Tehang, 'Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behaviour' (Research Report, Carnegie Mellon University's Initiative for Digital Entertainment Analytics, April 2016) 2.

<sup>142</sup> *Ibid.*

<sup>143</sup> [2013] EWHC 379 (Ch) (28 February 2013).

<sup>144</sup> *Ibid* [106] (Arnold J) (emphasis in original). Lord Justice Kitchin made similar comments in *Cartier International AG v British Sky Broadcasting Ltd* [2017] 1 All ER 700, 706 [13], 709 [20].

<sup>145</sup> See Cheema, above n 39, 31.

<sup>146</sup> *Ibid.*

It is true that there will always be internet users who can and will circumvent website blocks. It is also true that operators of infringing websites can circumvent website blocks. But those truths do not detract from s 115A's role, which is to *reduce* copyright infringement in Australia, not to eliminate it entirely. The Minister for Communications acknowledged the proper role of s 115A in his Second Reading Speech to the Copyright Amendment (Online Infringement) Bill 2015 (Cth) by admitting that '[t]here is no silver bullet to deal with internet piracy'.<sup>147</sup> As Eli Fisher colourfully explained, it has never been suggested that, following the introduction of s 115A, rights holders would be seen in some sort of rapturous 'V-J in Times Square kiss celebrating the end of the war' against online infringement.<sup>148</sup> Rather, s 115A is designed to be 'a very useful if imperfect tool for rightsholders to reduce ... piracy in Australia and encourage Australian consumers to migrate from illegal platforms to legitimate ones that compensate creators. And nothing more'.<sup>149</sup>

Section 115A is clearly intended to operate in tandem with other tactics to reduce online copyright infringement. For example, rights holders and the Federal Government could create educational programs highlighting the importance of copyright to consumers and informing them about lawful sources of copyright material. The development of an industry notice code could also be restarted. Such a code might be used not only to warn an individual ISP subscriber of their alleged online infringement, but also to simultaneously act as a separate educational system. The best possible measure, however, is for rights holders to take much more significant steps to improve the supply of licensed copyright material to Australian consumers.<sup>150</sup> Although not commonly understood or recognised by the media and the general public in Australia, s 115A has always been intended to operate as one part of a wider approach to online copyright infringement. The Minister

<sup>147</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6416 (Malcolm Turnbull, Minister for Communications).

<sup>148</sup> Fisher, above n 10, 34–5 (emphasis in original).

<sup>149</sup> *Ibid.* 'Site-blocking is not a panacea but it *will* make a significant difference': Cheema, above n 39, 31 (emphasis in original). '[I]t is important to remember that the aim of website blocking, like other online enforcement methods, is not to eliminate online piracy altogether, but to change consumers' behaviour by raising the cost — in terms of time and willing to find alternatives sites [sic] and circumvention tools — to make the legal sources of content more appealing.': Cory, above n 2, 8.

<sup>150</sup> See: Knight, above n 121, 145; Cheema, above n 39, 31. Cory has outlined several other legal and non-legal ways that governments and rights holders might tackle online copyright infringement domestically and internationally, giving examples from the United States of America: Cory, above n 2, 7–8.

for Communications emphasised in his Second Reading Speech that s 115A 'is not intended to operate in a vacuum. The availability of content that is timely and affordable is a key factor in the solution to online copyright infringement'.<sup>151</sup>

## VII CONCLUSION

This article has explained that the precedent established by the four decisions, particularly *Roadshow v Telstra (2016 Decision)* and *Universal Music Australia v TPG*, will likely require right holders to pay an ISP's costs of complying with an injunction granted under s 115A. It has also explained that in each case the Federal Court demonstrated that it has the power and will to make orders under s 115A that balance the interests of copyright owners, ISPs, website operators and consumers. This was evidenced by the fact that affected third parties can apply to vary or revoke the website blocking injunctions and the fact that the Federal Court rejected the proposal for 'rolling injunctions'. The rejection of 'rolling injunctions' should help assuage fears that s 115A would be abused because rights holders would be allowed to extend a website blocking injunction to new websites without any court oversight.

This article has also explained that s 115A cannot be, and was never intended to be, the ultimate solution to online copyright infringement in Australia. Section 115A is vulnerable to simple methods of circumvention by consumers and website operators. Furthermore, rights holders can best reduce rates of online infringement in Australia by providing consumers with access to content that is more timely, affordable and convenient. Should such steps not be taken alongside the use of s 115A, consumers will continue to infringe copyright of content online in high numbers because they will see it as morally justifiable in the circumstances.

When s 115A was enacted, the Federal Government committed itself to a review of the section that would take place 18 months after it began to operate.<sup>152</sup> It has been over two years since that commitment was made and a review has yet to be announced. This may be because, until recently, there

<sup>151</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 June 2015, 6417 (Malcolm Turnbull, Minister for Communications). 'When infringing sources of content are disrupted, this disruption will be most effective if Australian consumers have legitimate sources to turn to that provide content at competitive prices and at the same time that it is available overseas.'

<sup>152</sup> *Ibid.*

has been only a small sample of website blocks to review. It is likely that the Federal Government is waiting for more cases to be decided and more website blocks to be imposed. Considering that a reasonable amount of time has passed since the first two successful applications, and that around 180 websites have just been blocked in the third and fourth cases, it may soon be appropriate to conduct a review.

The purpose of copyright law is to reward creators for their works. However, the long term effect of a stable and effective copyright system is that the public will be able to continue enjoying creative works that are the lifeblood of culture. Section 115A may not be perfect, but in this new and challenging internet age it is one important step that advances and protects the interests of the creators and rights holders of works and the members of the public who enjoy their works.