

RESPONSE TO TYSON: EVALUATING AUSTRALIA'S NEW ANTI-PIRACY WEBSITE BLOCKING LAWS

MICHAEL WILLIAMS*

This commentary responds to Patrick Tyson's article in this volume which analyses Australia's new website blocking laws. It begins by explaining the context in which these provisions were added to the Copyright Act 1968 (Cth) and then considers some of the recent evidence suggesting that the new no-fault based anti-piracy approach to internet-enabled copyright infringement does form a useful addition to Australia's copyright enforcement regime.

CONTENTS

I	Introduction	122
II	The Context in which Site-Blocking Laws Were Introduced in Australia	124
III	The Effectiveness of Site Blocking.....	126
IV	Conclusion.....	127

I INTRODUCTION

When Sean Parker launched his music Peer-to-Peer ('P2P') file sharing service Napster in June 1999, little did he (or the world) know how he would unleash profound and irreversible changes on the music industry by harnessing the power of the internet. In the almost two decades since that time, the music industry has nearly halved in size, and was remade from a model where the supply of music on physical articles (CDs) shifted to distributing music through subscription streaming services.

The music industry was not alone in feeling the effects of consumer driven mass copyright infringement. As Jack Valenti, head of the Motion Picture

* B Econ, LLB (Hons) (University of Sydney); Partner, Gilbert + Tobin. I am grateful for the invaluable assistance and support of Connor Hogg, BA, LLB (Hons) (Macquarie University); Graduate, Gilbert + Tobin.

Association, famously predicted in 2000, internet infringement would return to plague the film industry like 'Banquo's ghost'.¹ In an age in which some businesses have flourished and grown via the power of the internet, the entertainment industries have struggled to enjoy the same benefits when faced with the scale of internet piracy. The industry in Australia has not been immune to these technology driven changes; in this new age, Australia continues to be recognised internationally both for its films — and for its film piracy.²

Many strategies using the existing legal tools available were deployed in response. They were fault-based strategies, depending on proof of infringement on the part of the targets of the actions (website operators, hosts of linking sites, P2P operators and intermediaries).³ Early successes were overshadowed by later setbacks, as courts drew bright line distinctions between bad actors (who were found liable) and intermediaries (who were not found liable). This development would ultimately stymie copyright enforcement efforts.

More recently, enforcement action has pivoted to an alternative 'no-fault' approach. This was pioneered in the United Kingdom with s 97A of the *Copyright, Designs and Patents Act 1988* (UK) drawing on art 8(3) of the European Union's 2001 *Copyright Directive*.⁴ Many years after site-blocking orders had been implemented in the UK and Europe, the Australian Government identified site-blocking orders as the least controversial of the possible measures against internet piracy and subsequently s 115A of the *Copyright Act 1968* (Cth) was enacted.⁵ Criticisms of site-blocking laws in Australia were relatively muted. Now with four Federal Court decisions in

¹ Michael Williams, 'Effective IP Enforcement: Strategic Approaches to Countering Software Piracy' (2002) 10 *Journal of the Australian and New Zealand Societies of Computers and the Law* 32, 37 n 2.

² Mark C Scott, 'From Convicts to Pirates: Australia's Dubious Legacy of Illegal Downloading' (10 April 2015) *The Conversation* <<https://theconversation.com/from-convicts-to-pirates-australias-dubious-legacy-of-illegal-downloading-39912>>.

³ See *A&M Records Inc v Napster Inc*, 239 F 3d 1004 (9th Cir, 2001); *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380; *Universal Music Australia Pty Ltd v Sharman Networks Ltd* (2006) 150 FCR 110; *Roadshow Films Pty Ltd v iiNet Ltd (No 2)* (2012) 248 CLR 42 ('*Roadshow v iiNet*').

⁴ *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, art 8(3).

⁵ Australian Government, 'Online Copyright Infringement' (Discussion Paper, Australian Government, 30 July 2014) 5.

Australia, the comprehensive primary article by Patrick Tyson, ‘Evaluating Australia’s New Anti-Piracy Website Blocking Laws’,⁶ is a timely review of the laws and their effectiveness.

II THE CONTEXT IN WHICH SITE-BLOCKING LAWS WERE INTRODUCED IN AUSTRALIA

Evaluating the relative effectiveness of site-blocking measures depends on understanding how they compare with other enforcement options. One starts with the relative difficulty of direct enforcement action against internet users, particularly after the controversial result in *Dallas Buyers Club LLC v iiNet Ltd (No 5)*.⁷ Then there is the difficulty of enforcement against overseas actors. There is also the unsuitability of using authorisation law to deal with P2P infringements as explained by the High Court of Australia in *Roadshow Films Pty Ltd v iiNet Ltd (No 2)* (*Roadshow v iiNet*).⁸ Tyson has identified these factors as the drivers which pushed policy makers to look elsewhere for responses to online copyright infringement.⁹ Rights holders took those very same issues to the Australian Government in support of the introduction of a site-blocking provision in Australia, including the words of the members of the High Court of Australia emphasising the view that a legislative response was needed.¹⁰ As the primary article concludes, ‘s 115A was a response to inherent limitations in Australia’s laws’.¹¹

There were other factors too, some of which the primary article identifies. Attempts by the Government to broker an industry code between rights

⁶ Patrick Tyson, ‘Evaluating Australia’s New Anti-Piracy Website Blocking Laws’ (2017–2018) 3 *University of South Australia Student Law Review* 87.

⁷ *Dallas Buyers Club LLC v iiNet Ltd (No 5)* (2015) 115 IPR 544.

⁸ *Roadshow v iiNet* (2012) 248 CLR 42.

⁹ Tyson, above n 6, 96–100.

¹⁰ *Roadshow v iiNet* (2012) 248 CLR 42, 71 [79] (French CJ, Crennan and Kiefel JJ): ‘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’; and ‘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).

¹¹ Tyson, above n 6, 98.

holders and ISPs failed.¹² Authorisation principles were more problematic when applied to mass online infringement than the High Court acknowledged in *Roadshow v iiNet*. The Court took a conservative approach to the interpretation of the concept of ‘authorisation’ in the infringement provisions and gave relatively little emphasis to the explicit factors listed under s 101(1A) of the *Copyright Act*, including: s 101(1A)(a) which refers to ‘the extent of the person’s power to prevent the doing of the act concerned’; s 101(1A)(b) which refers to ‘the nature of any relationship existing between the person and the person who did the act concerned’; and s 101(1A)(c) which refers to ‘whether the person took any reasonable steps to prevent or avoid’ the infringement. It found that ‘power to prevent’ required technical power and was not satisfied by a purely contractual power;¹³ that the relationship between internet subscribers and their Internet Service Provider (‘ISP’) was relatively remote;¹⁴ and that it was unreasonable to expect an ISP on notice to exercise contractual power to prevent the infringements by subscribers based on notifications given by rights holders¹⁵ (effectively reframing the enquiry under s 101(1A), which is in terms of steps actually taken, not whether any steps existed). This reading rendered s 101(1A) largely irrelevant for general purpose internet service providers and, once authorisation law had been framed in this way, there was no work for the ‘use of certain facilities’ defence under s 112E to do. All of this was despite the fact that the ISP had positively asserted that it did take reasonable steps required as conditions of its safe-harbour defence, and that this defence had been rejected by the Full Court of the Federal Court¹⁶ (the High Court of Australia did not need to consider it given its approach to authorisation).

Is it any wonder why the Government identified the introduction of s 115A as a way of entirely bypassing the difficulties in authorisation law that *Roadshow v iiNet* had exposed and which were incapable of remediation without conflict between rights holders and ISPs and other digital operators? Site blocking under s 115A represented a fresh start, free of these

¹² Claire Reilly, *Three Strikes Out: Anti-Piracy Scheme Shelved Over 'Prohibitive' Costs* (18 February 2016) CNET <<https://www.cnet.com/au/news/three-strikes-out-manual-anti-piracy-scheme-shelved-over-prohibitive-costs/>>.

¹³ *Ibid* 67–69 [65],[69], [70] (French CJ, Crennan and Keifel JJ); see also 88 [137]–[139] (Gummow and Hayne JJ agreeing).

¹⁴ *Ibid* 70 [73] (French CJ, Crennan and Keifel JJ); see also 88 [137]–[139] (Gummow and Hayne JJ agreeing).

¹⁵ *Ibid* 70 [74]–[75] (French CJ, Crennan and Keifel JJ); see also 88 [137]–[139] (Gummow and Hayne JJ agreeing).

¹⁶ *Roadshow Films Pty Ltd v iiNet Ltd* [21011] FCAFC 23 (24 February 2011).

aggravations and disagreements; it bypassed entirely the vexed issue of fault for online piracy and focused instead on preventing its continuation. There were several models that could have been adopted, particularly the United Kingdom's s 97A, but the Australian Government chose to use the model of the Singaporean site-blocking law,¹⁷ while making some amendments. This has its benefits and disadvantages, but it has had no material impact on the way in which the site-blocking provisions have been applied in practice in Australia.

III THE EFFECTIVENESS OF SITE BLOCKING

All of this brings us, and the author of the primary article, to the key issue — the effectiveness of orders under s 115A. Conceptually, there would be a strong case for expecting some reduction in access to pirate websites when internet users cannot do so with as much ease. As Tyson notes,¹⁸ there is little published research on the impact of site-blocking orders on traffic to pirate websites by Australians. Recently, however, there has been a release of data on the efficacy of Australia's site blocking laws by Incopro, the organisation that also collected such data in the United Kingdom.¹⁹ Commissioned by the representative body of the film and television industry, internet traffic data was recorded between 1 October 2016 and 31 March 2017 for the five sites blocked in December 2016. The findings confirm the hypothesis of the primary author (and this writer), that Australian site-blocking orders have significantly reduced access to the blocked websites by Australian internet users. Australian traffic to the blocked websites fell by 71.7 per cent. These results are remarkably consistent with research into the impact of blocking orders in the United Kingdom.²⁰

These results also tend to debunk the theoretical argument that site blocks will be easily circumvented by internet users, for example by using VPNs.²¹ The data here and overseas do not support this proposition. Although the

¹⁷ *Copyright Act* (Singapore, cap 63, 2006 rev ed) ss 193DDA–193DDC.

¹⁸ Tyson, above n 6, 118–19.

¹⁹ Incopro, *Site Blocking Efficacy: Australia* (May 2017) Australian Screen Association <http://www.incoproip.com/resources-news-events/case-studies-reports/?r_cat=reports-category>.

²⁰ *Ibid* 3.

²¹ See, eg, 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, 225.

percentage of traffic to blocked sites via proxies has increased by 43 per cent since site blocking began, this has had a limited impact on access to the blocked sites. In overall terms, including proxy users, there has been a decline of 59.6 per cent.²² As Tyson notes, site blocking will not end internet piracy as we know it.²³ When only five of the 250 most accessed pirate sites were blocked, there was a 4 per cent overall decline in web traffic. This was before the second and third site-blocking cases blocked another 66.

Perhaps the discussion of access to content, and cost, does not add much to the analysis of s 115A. The argument that Australia is inadequately served by content providers requires more empirical analysis of the evidence of access and price. We do know that film release schedules frequently have major releases opening in Australia before they do in the US.²⁴ Most content is readily available through most music and film and television subscription services,²⁵ with public broadcasters, commercial free-to-air and pay TV operators also offering streaming and catch up services. As for the link between inaccessible content and piracy, the most popular content tends to be pirated even after commercial release in Australia.²⁶ An analysis of the impact of price differentials between content inside Australia and content outside Australia is beyond the scope of both the primary article and this response. No doubt there will be more research to fill this gap. However, it might be intuitively assumed that a user who pirates content is unlikely to be motivated to do so by a differential of a few dollars or a few cents. Nothing, when it comes to the internet, can really compete with free.

IV CONCLUSION

Site-blocking orders under s 115A have created a whole new paradigm for copyright enforcement in Australia. Like site-blocking orders made in

²² Incopro, above n 19, 3.

²³ Tyson, above n 6, 119.

²⁴ So, for example, in 2002, only six of the 92 largest grossing Hollywood films were released in Australia prior to their release in the United States of America, whereas in 2016, 51 of the 95 largest grossing Hollywood films came out in Australia first.

²⁵ See, eg, Spotify, Deezer and Pandora for music; and Netflix, Stan, Amazon Prime Video, YouTube Red and Hayu for film and television.

²⁶ Tim Biggs, 'Game of Thrones: One Third of Australian Fans Planning to Pirate Season 7', *The Sydney Morning Herald* (online), 29 June 2017 <<http://www.smh.com.au/technology/technology-news/game-of-thrones-one-third-of-australian-fans-planning-to-pirate-season-7-20170629-gx107h.html>>.

Europe, they have been increasingly used by content industries to address mass copyright infringement by internet users. Evidence tends to suggest that they are effective, but more evidence is needed to confirm this. Certainly the internet has not been 'broken' by them. As the author of the primary article notes, these orders were never intended to be the 'ultimate solution' (or indeed a 'silver bullet').²⁷ They are part of a multi-factor solution to infringement. Based on their success to date, they are likely to continue to be a preferred response of rights holders in Australia.

²⁷ Tyson, above n 6, 119–20.