

From Little Things Big Things Grow: Australia's evolving website blocking regime

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The Injunction and its scope

- **A Problem:** Websites with primarily infringing *purpose* beyond the jurisdiction of Australian courts
- **The Solution:** Website blocking injunctions against ISPs

- **A Problem:** Australians finding the sites and getting around those blocks anyway
- **The Solution:** Filtering injunction against Online Search Provider



The Injunction and its scope

- **A Problem:** Mirror websites presenting the same infringing content via a different web address (a.k.a. 'whack-a-mole' problem)
- **The Solution:** Injunction extended to such sites by agreement

- **A Problem:** Websites that have primary *effect* (but not primary purpose) of facilitating infringement not covered
- **The Solution:** Threshold lowered to 'effects test'



The 'no fault' regime in summary

2015

- Website blocking – purpose of infringing/facilitating infringement

2018

- Effect of infringing/facilitating infringement
- 'Adaptive' injunction
- Application to Online Search Providers
- Presumption that online location is overseas

Where are we going with this?

Copyright Act 1968 (Cth), s 115A



Section 115A

- Envisaged as allowing

‘a specific and targeted remedy to prevent those online locations which flagrantly disregard the rights of copyright owners from facilitating access to infringing copyright content’.

- Revised Explanatory Memo (2015)



'Adaptive' Injunction

Factors

- Who is to determine whether indeed mirror site?
 - Does ISP/Search Provider have incentive to disagree?
 - Consider consequences of an injunction vs agreement
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- **Effect:** Nudging ISPs/Search Engine Providers towards agreement that favour rightsholders



Effects Test

- In conjunction with 'facilitating' infringement = low bar
- Does it cover VPNs?
- What about other online consumer services?
E.g. – subtitles; stream ripping tools
- **Effect:** Excluding nascent online platforms that have the potential to evolve into valuable services



Is a proprietary lens appropriate?

- Proprietary copyright vs Regulatory copyright

Law sets entitlement and 'gets out of the way'

OR fine tuning responsibilities of various stakeholders?

Joseph Liu, 'Regulatory Copyright' (2004)

- 'No fault' ≠ no consequences

- Outcome:

- Regulatory functions driven by proprietary interest;
- lack of regard for the public interest



Judicial oversight?

- Factors – s 115A(5):

- (a) the flagrancy of the infringement...

- (b) whether ...contains directories, indexes or categories of the means to infringe, or facilitate an infringement ...;

- (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 [or not providing search result under (ea)] 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 [or not provide search result under (ga)]; ...

- (h) whether the owner of the copyright complied with subsection (4) [notice to operator of online location];

- ...

- (k) any other relevant matter.

A global trend

- Laws designed to encourage private regulation of the internet
- In the interest of efficiency – rely on automation
- E.g. EU DSM Directive – Right to communicate to the public

Annemarie Bridy, 'EU Copyright Reform: Grappling with the Google Effect' (2019)

Capacity = Responsibility? Accountability?



Moving forwards: Proposals

Conceptual

- Eschew purely proprietary approach
 - No fault ≠ no consequence / impact
- Consider less immediately measurable costs
 - Impacts on access to innovation (in addition to information)
 - Transparency of internet regulation

Practical

- Increase transparency
 - Public database of blocked websites / search results (even if privately negotiated)



Thank you

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