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

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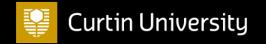
Law, Technology & Labour Governance Symposium, Perth 2020



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

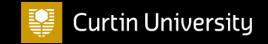
- A Problem: Australians finding the sites and getting around those blocks anyway
- The Solution: Filtering injunction against Online Search Provider



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

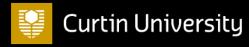
Website blocking – purpose of infringing/facilitating infringement

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

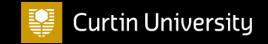


Section 115A

Envisaged as allowing

'a <u>specific</u> and <u>targeted</u> 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

 Effect: Nudging ISPs/Search Engine Providers towards agreement that favour rightsholders



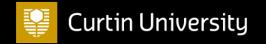
Effects Test

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'

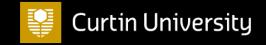
OR fine tuning responsibilities of various stakeholders?

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

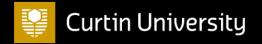
Impacts on access to innovation (in addition to information)

Transparency of internet regulation

Practical

Increase transparency

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



Thank you

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