Queensland University of Technology
Brisbane Australia

This may be the author's version of a work that was submitted/accepted for publication in the following source:

Gray, Joanne
(2020)
Site-blocking under review: Who determines Australia's internet experience?
Digital Social Contract, 8 September 2020.
[Featured article]

This file was downloaded from: https://eprints.qut.edu.au/204089/

© Consult author(s) regarding copyright matters

This work is covered by copyright. Unless the document is being made available under a Creative Commons Licence, you must assume that re-use is limited to personal use and that permission from the copyright owner must be obtained for all other uses. If the document is available under a Creative Commons License (or other specified license) then refer to the Licence for details of permitted re-use. It is a condition of access that users recognise and abide by the legal requirements associated with these rights. If you believe that this work infringes copyright please provide details by email to qut.copyright@qut.edu.au

Notice: *Please note that this document may not be the Version of Record (i.e. published version) of the work. Author manuscript versions (as Submitted for peer review or as Accepted for publication after peer review) can be identified by an absence of publisher branding and/or typeset appearance. If there is any doubt, please refer to the published source.*

https://digitalsocialcontract.net/site-blocking-under-review-who-determines-australias-internet-exp

Site-blocking under review: Who determines Australia's internet experience?

Joanne E. Gray & Cheryl Foong

Australia's regime for blocking websites that host infringing copyrighted content is due for review this year and lawmakers should think very carefully about its trajectory.

With substantial expansions made to Australia's site blocking regime in 2018, there remains a looming question of whether the regime serves as a useful tool for limiting copyright infringement or instead expands the power of private companies to regulate the internet.

Tackling the whack-a-mole infringement problem

The objective of Australia's website blocking regime is to stop access to infringing content that is hosted overseas. Copyright owners can obtain an injunction from an Australian court that requires internet service providers (ISPs), including search engines, to block access to a foreign website in Australia.

Under the current regime, copyright owners and ISPs can also privately agree to extend an injunction to include any new websites that host the same infringing material, when they appear, without having to go back to court for a new injunction.

The rationale behind this type of flexible or adaptive injunction is to address what is commonly known as the 'whack-a-mole' problem — blocking one website is never enough, infringing content is likely to quickly and endlessly pop up somewhere on the internet.

Giving copyright owners and ISPs legal blessing to privately negotiate the removal of additional websites seems a fairly simple solution to this problem.

Yet, it's a solution that is heavily weighted in favour of copyright owners.

ISPs will have little incentive to spend their resources questioning or disputing a request. It's not their material that's being blocked, and they have an interest in avoiding conflict with the media and entertainment industries.

Most ISPs will be motivated to disable access to content in Australia at the request of copyright owners without much pushback.

Essentially, copyright owners and online service providers are left to determine what sites are made unavailable to the Australian public, with a finger on the scale in favour of copyright owners.

This might be fine, if only clearly infringing copyrighted works are removed under the regime. But when it comes to copyright on the internet, things are rarely so straightforward.

Under the current regime, the threshold for having an injunction granted is quite low. A copyright owner just needs to show that the website has the primary *effect* of infringing or facilitating the infringement of copyright. With this threshold in place, potentially, the regime could see tools like VPNs, and other socially beneficial services blocked, if they are used for infringing purposes by certain people at certain times.

A court might be up to the challenge of carefully examining complex cases and weighing up the impact on the public interest. But when left to ISPs and copyright owners to decide what is and isn't made available to Australians, we should not expect careful deliberation.

Who's in charge of policing the internet?

Australia's site-blocking regime falls within a global trend in internet regulation in which lawmakers seek to increase the regulatory responsibilities of online services providers.

ISPs and digital platforms have an outsized level of control over the flow of information in society and their capacity to regulate what people see and share online at scale is far greater than that of any traditional law enforcement or judicial institution.

Yet, relying on private companies to regulate the internet without sufficient oversight comes at a cost to the public interest. When private companies are left to rule, they do so with their own interests in mind.

The private interests of copyright owners lie in strict copyright enforcement. The private interests of ISPs include avoiding liability for copyright infringement. As private actors, neither are directly motivated to act in the public interest.

In effect, Australia's expanded site blocking regime promotes and legitimises private regulation of Australian citizen's access to the internet.

What can be done? Site-blocking under review

When passing the bill in 2018, the Senate committee recommended that the government review its effectiveness two years after enactment.

If the regime is reviewed this year and is not overhauled, the government might take some practical steps towards protecting the public interest by making the regime more transparent.

Private actors can only be held to account for their decisions if there is sufficient public knowledge of their activities. To improve transparency within the current regime, the government might mandate reporting on what websites have been blocked by ISPs or filtered out by search engines.

The Lumen Archive in the US provides a working example of such a system.

By mandating reporting and public disclosure, even for privately negotiated blocks, we may be able to achieve a level of transparency necessary to hold copyright owners and ISPs

accountable for conduct that could impinge on the Australian public's freedom to access information and socially beneficial digital services.

This article was written in collaboration with Dr Cheryl Foong at Curtin University. For a detailed analysis of Australia's site blocking regime see:
Foong, C. & Gray, J. 'From Little Things Big Things Grow: Australia's Evolving Site Blocking Regime' (2020) Australian Business Law Review Vol 48 Pt4.