

Australia's Stop Online Piracy Act: Copyright Law, Site-Blocking, And Search Filters In An Age Of Internet Censorship

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Relying upon the work of Cory Doctorow, this article argues that Australia's copyright regime for site-blocking and search-filtering poses a threat to consumer rights, competition policy, and Internet Freedom. This article first reviews the model of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) introduced by the then Minister for Communications and the Arts the Hon. Malcolm Turnbull. Secondly, it explores the flurry of cases brought by the film, television, and music industries in respect of this legislative regime. Third, this article evaluates the expansion of this regime with the *Copyright Amendment (Online Infringement) Act 2018* (Cth). In light of such developments, the conclusion calls for a new approach for Internet regulation by the Australian Parliament. It highlights the need for a bill of rights in Australia for a digital age. As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet.

Introduction

In 2011, the United States Congress considered the highly controversial *Stop Online Piracy Act 2011* (US) – nicknamed SOPA. Amongst other things, the bill included provisions on court orders requiring Internet Service Providers to block access to websites.

Edward Black, the CEO and President of the Computer and Communications Industry Association, warned about the dangers of the bill.² He observed of the regime:

H.R. 3261, the Stop Online Piracy Act, has elements of pre-emptively stopping crime reminiscent of the plot of *Minority Report*, in which the government arrested people it suspected would commit crimes. This legislation would 'disappear' domains suspected of containing infringing copyright content.³

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² Edward Black, 'Internet Users, Free Speech Experts, Petition Against SOPA', *Huffington Post*, 13 December 2011.

³ *Ibid.*

Black noted that ‘SOPA claims to aim at domains that deliberately offer primarily copyright infringing content’.⁴ He observed that the legislation would impinge upon the freedom of speech protected by the First Amendment in the United States: ‘Many could support the purported goal, but the bill deploys the power of a nuclear weapon with little of the target-accuracy.’⁵ Black was concerned: ‘The collateral damage would undermine the security and functionality of the Internet.’⁶ He warned: ‘By ordering tech and telecom companies to ‘disappear’ domains suspected of infringing content, many legitimate domains and virtually all domains that allow user-generated content like Facebook, Twitter, and YouTube, would be snared in the dragnet.’⁷ Black observed: ‘This would dramatically change the speed, utility, and freedom of the Internet as we’ve come to know it.’⁸ He stressed: ‘Ironically, [SOPA] would do little to stop actual pirate websites, which could simply reappear hours later under a different name, if their numeric web addresses aren’t public even sooner’.⁹ Black observed: ‘Anyone who knows or has that web address would still be able to reach the offending website.’¹⁰

Mike Masnick observed that the bill engaged in copyright censorship, and raised larger constitutional issues about freedom of speech.¹¹ He commented:

The bill would have allowed the Justice Department to take down an entire website, effectively creating a blacklist, akin to just about every Internet censoring regime operated by the likes of China or those Axis-of-Evil-style foreign states our politicians are prone to shaming and using as evidence of American civil libertarian exceptionalism.¹²

Masnick noted that ‘Case law around the First Amendment is clear that you cannot block a much wider variety of speech just because you are trying to stop some specific narrow speech’.¹³ He observed: ‘Because of the respect we have for the First Amendment in the U.S., the law has been pretty clear that anything preventing illegal speech must narrowly target just that kind of speech.’¹⁴ The regime raised obvious problems in respect of prior restraint.

David Segal of Demand Progress highlighted the opposition to the various Internet Blacklist Bills – including COICA, PIPA, and SOPA. He said that the legislation ‘would’ve created a list of ‘rogue’ websites that the government

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Mike Masnick, ‘COICA/ PIPA/ SOPA Are Censorship’, in David Moon, Patrick Ruffini, and David Segal (eds), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet* (OR Books, 2013) 54-57.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

could block access to with minimal due process'.¹⁵ In response, there was a huge public outcry over SOPA – with opposition from both progressives and libertarians, civil society and the new economy.¹⁶ In the end, the overwhelming community opposition to the legislative proposals led to them being dropped.

Notwithstanding this major setback in the United States, copyright industries have lobbied other jurisdictions to introduce copyright site-blocking laws. The United Kingdom has established a procedure under section 97A of the *Copyright, Designs, and Patents Act 1988* (UK) for copyright rights holders to seek court orders to require internet service providers to block copyright-infringing sites.¹⁷ The European Union enthusiastically passed copyright site-blocking legislation in a range of national jurisdictions. A recent 2015 dissertation by Pekka Savola is highly critical of the copyright law and practice on blocking websites in the European Union.¹⁸ Savola comments:

Enforcement proceedings are problematic because typically only the copyright holder and possibly the provider are represented in court. Nobody is responsible for arguing for the users or website operators. The court should take their interests into account on its own motion. Unfortunately, many courts have not yet recognised this responsibility. Even this dual role as both the defender of unrepresented parties and judge is less than ideal and improvement is called for.¹⁹

This analysis suggests that there have been ongoing problems in respect of the site-blocking regime implemented in the European Union. Nonetheless, site-blocking has become much more mainstream in copyright jurisprudence. In early 2019, it was reported that over 4,000 sites are blocked by internet service providers around the world for copyright reasons.²⁰

¹⁵ David Segal, 'Now I Work for Demand Progress' in David Moon, Patrick Ruffini, and David Segal (eds), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet* (OR Books, 2013) 59-61.

¹⁶ David Moon, Patrick Ruffini, and David Segal (eds), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet* (OR Books, 2013).

¹⁷ For early case law, see *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch) (Newzbin 2 case); *Twentieth Century Fox Film Corp v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch), [2012] Bus LR 1525 (20C Fox v BT (No 2)); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch) ('The Pirate Bay case'); *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2)* [2012] EWHC 1152 (Ch); *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch); and *The Football Association Premier League Ltd v British Sky Broadcasting Ltd & Ors* [2013] EWHC 2058 (Ch) (16 July 2013) ('FirstRow Sports'). For a report on one of the pieces of litigation, see Liat Clark, 'Pirate Cull: UK Court Orders ISPs to Block 21 File-Sharing Sites', *Wired*, 29 October 2013.

¹⁸ Pekka Savola, *Internet Connectivity Providers as Involuntary Copyright Enforcers: Blocking Websites in Particular*, Faculty of Law, the University of Helsinki, 2015, <https://helda.helsinki.fi/handle/10138/153602>.

¹⁹ *Ibid.*

²⁰ Ernesto, 'Nearly 4,000 Pirate Sites Are Blocked by ISPs Around The World', *TorrentFreak*, 10 February 2019, <https://torrentfreak.com/nearly-4000-pirate-sites-are-blocked-by-isps-around-the-world-190210/>.

In Australia, copyright owners lobbied to pass site-blocking legislation in 2015, and further search-filtering legislation in 2018. Such measures were hastily debated and discussed in the Australian Parliament. To put this into context, the Australian Parliament spent a few years developing a moral rights regime from 1997-2000. Equally, the *Digital Agenda Act* in 2000 was the product of several years of inquiry. After the *Australia-United States Free Trade Agreement* 2004, it took a further couple of years before the changes to technological protection measures took place in the *Copyright Amendment Act 2006* (Cth). It took an extensive period of time before the right of resale (*droit de suite*) was passed in the Australian Parliament. The IT Pricing Inquiry has still not been acted on by the Australian Parliament.²¹ Likewise, key recommendations of the Harper Review have not implemented.²² The Australian Law Reform Commission's recommendations on copyright law have been neglected.²³ The Productivity Commission's report on IP Arrangements has been discussed and implemented in part.²⁴ There have been more than two decades of discussion and deliberation over the protection of Indigenous intellectual property (without there necessarily being a resolution to such matters). In light of this history of copyright law reform, the rush to push the *Copyright Amendment (Online Infringement) Act 2018* (Cth) through Parliament does seem like some reckless haste. The bill passed through the Parliament was poorly drafted and ill-designed and will no doubt have negative consequences and impact.

Given that SOPA was a poorly constructed legislative model, it seems extraordinary that the Australian Government should want to resurrect a site-blocking copyright regime like SOPA. Crude site-blocking copyright laws were profoundly discredited during the debates in the United States Congress. While no doubt copyright owners are enthusiastic about gaining such incredible powers, there remain deep concerns about how site-blocking regimes impact upon Internet freedom, innovation, and competition. Drawing upon the work of Cory Doctorow,²⁵ this article argues that Australia's copyright regime for site-blocking and search-filtering will have larger impacts upon the regulation of the internet. This article analyses the political debate around the legislation – as well as early judicial responses to claims under the regime. This article has three main parts. Part 1 reviews the passage of the *Copyright Amendment (Online Infringement) Act 2015* (Cth). Part 2 considers the key test cases in respect of this legislative regime. Part 3 examines the efforts to expand this regime even further, with the *Copyright Amendment (Online Infringement) Act 2018* (Cth). The conclusion calls for a new approach for Internet regulation by the Australian Parliament. It highlights the need for a bill of rights in Australia – particularly in an age of

²¹ House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (Report, 2013).

²² Ian Harper, Peter Anderson, Su McCluskey, and Michael O'Bryan, *Competition Policy Report*, Canberra: The Treasury, 2015.

²³ Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)*, Sydney: Australian Law Reform Commission, 2014.

²⁴ Productivity Commission, *Intellectual Property Arrangements*, Melbourne: Productivity Commission, 2016

²⁵ Cory Doctorow, *Information Doesn't Want to Be Free: Laws for the Internet Age* (McSweeney's, 2014).

the Internet, search engines, social media, and cloud computing. As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet—rather than a government web of censorship and surveillance.

I Copyright Amendment (Online Infringement) Act 2015 (Cth)

The proposal to give copyright owners the power to block websites and online locations is highly controversial.²⁶ The Australian Government devised a local version of the *Stop Online Piracy Act*—nicknamed #SOPA. There was a concern that such a power will interfere with civil liberties, traditional freedoms, and Internet rights. There was also an anxiety that copyright trolls will abuse such a scheme. The Australian Government has not crafted adequate and sufficient safeguards and protections for consumer in respect of the bill.

As Communications Minister, Malcolm Turnbull was sensitive to criticisms of the copyright regime. He was incensed by questions from the Fairfax journalist Ben Grubb about whether the legislation was an internet filter:

There's no internet filter here at all... What we're, look, what we are simply doing is proposing to amend the ... we're going to amend the Copyright Act to make it more straightforward for rights owners to do what they can do now, which is to seek an order that access be prevented' to a site that is ... infringing content.²⁷

Critics of the regime have been unconvinced by such sophistry, and have been of the view that blocking websites amounted to an internet filter.

Professor Dan Hunter from Swinburne University has commented that blocking websites is bad for Australia's digital economy.²⁸ He observed that 'a poorly drafted law will inevitably be used to threaten Australia's nascent cloud computing industry, because cloud storage is where a large number of infringing files are found these days.'²⁹

A. The Goals and Objectives of Copyright Law

In his second reading speech, the Minister for Communications, the Hon. Malcolm Turnbull introduced the bill, with these prefatory remarks: 'The *Copyright Amendment (Online Infringement) Bill 2015* amends the *Copyright Act 1968* to provide an effective new tool that rights holders use can then use to respond to commercial scale widespread copyright infringement

²⁶ Josh Taylor, 'Stop the Torrents: ISPs to Block Piracy Websites, Send Warnings', *ZD Net*, 10 December 2014, <http://www.zdnet.com/article/australian-isps-forced-to-block-piracy-websites-send-warnings/>

²⁷ 'Malcolm Turnbull Discusses Piracy Crackdown', Transcript, 10 December 2014, <http://www.scribd.com/doc/249750674/Malcolm-Turnbull-discusses-piracy-crackdown>

²⁸ Dan Hunter, 'Blocking Piracy Websites is Bad for Australia's Digital Future', *SBS*, 25 November 2014, <http://www.sbs.com.au/news/article/2014/11/25/blocking-piracy-websites-bad-australias-digital-future>

²⁹ *Ibid.*

on websites operated outside Australia.’³⁰ Obviously, there is much controversy over whether such a measure will be an ‘effective new tool’.³¹ There is also much debate over whether the measure is particularly well-adapted or specific to addressing commercial scale copyright infringement on websites operated outside Australia.

In his second reading speech, Malcolm Turnbull discusses the significance of the creative industries and copyright challenges.³² While asserting that the bill engages in ‘balancing’, the content of the bill is very much tilted towards enhancing the rights and remedies of copyright owners: ‘Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to creators’.³³

There is also a significant slippage in the discussion of the objectives of copyright owners between the interests of creators, and the interests of major distributors, such as publishers, film studios, television networks, and newspaper empires. Notably, the remedy contemplated by the bill would be largely only accessible to copyright owners, with significant legal and financial resources. If this bill was concerned about the interests of creators, it would do more to enhance the rights and remedies of creators against distributors. The bill does little to enhance the quite distinct interests of copyright users, consumers, and citizens, or the much corporate interests of copyright intermediaries and disseminators. Overall, the Minister Malcolm Turnbull succumbs to the fallacy of the ‘balancing’ metaphor – a conceptual problem which has been highlighted in Abraham Drassinower’s recent Harvard University Press book, *What’s Wrong with Copying?*³⁴ The ‘balancing’ metaphor is often used for political purposes to justify the continued expansion of copyright owner rights and remedies.

The Minister comments that ‘Australia possesses a proud and valuable creative sector.’³⁵ He observes: ‘Our creative industries make a significant contribution to our national economy.’³⁶ The Minister maintains: ‘According to a 2012 report, Australia’s creative industries employ 900,000 people and generate economic value of more than \$90 billion, including \$7 billion in exports.’³⁷ The 2012 report, though, was commissioned by a Copyright Owner organisation, and, as such, should not be considered to be a reliable source of

³⁰ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015* (Cth)’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

³¹ Dan Hunter, ‘Blocking Piracy Websites is Bad for Australia’s Digital Future’, *SBS*, 25 November 2014.

³² The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015* (Cth)’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

³³ *Ibid.*

³⁴ Abraham Drassinower, *What’s Wrong with Copying?* (Harvard University Press, 2015).

³⁵ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015* (Cth)’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

³⁶ *Ibid.*

³⁷ *Ibid.*

evidence about jobs, economic value, and exports.³⁸ Indeed, it should be worth remembering that Australia is a net importer of copyright works. In terms of the balance of trade, higher copyright standards will benefit the United States, with its heavy concentration of large copyright industries.

In his second reading speech, Malcolm Turnbull repeatedly makes the basic error of confusing copying with ‘theft’.³⁹ He asserts: ‘What they do, in unlawfully accessing and then profiting from the intellectual and artistic endeavours of others, is a form of theft.’⁴⁰ He also refers more generally to ‘intellectual property theft’.⁴¹ It is surprising that Malcolm Turnbull would make such mistakes, given his interest in the topic. Such an approach confuses and conflates property law and intellectual property law. There is also perhaps an underlying slippage here between civil matters under copyright law (which is what this bill is about), and criminal offences under copyright law (which the bill is not about).

The bill was quite over-reaching in its scope and its application. A copyright owner will be able to block a website – even if the infringement occurring is not in Australia. Will a judge have to assess foreign copyright laws to make such a determination? There is a great variation between copyright laws around the world. There is a lack of uniformity in respect of copyright subsistence, the nature of rights (both economic and moral rights), the test for copyright infringement, and the operation of copyright exceptions. Conduct which may be infringing copyright in one jurisdiction may be perfectly legal in another. This will lead to dizzying array of complications.

RMIT’s Mark Gregory notes: ‘The idea that the Federal Court of Australia is to take into account copyright law for a country other than Australia when making a determination is novel, and possibly ground breaking’.⁴² He wondered: ‘Who would have thought the government would attempt to use the Federal Court of Australia to prevent Australians from accessing online content that does not infringe copyright in Australia?’⁴³

Procedurally, the bill sets up a bizarre process. The danger, of course, is that the owners of foreign sites will be unrepresented in this process. There does not seem much in the way of representation for other interests affected by the injunctions.

The work of Cory Doctorow has highlighted that copyright law also plays an important role in promoting access to knowledge, innovation, and

³⁸ Price Waterhouse Coopers, *The Economic Contribution of Australia’s Copyright Industries 1996-97 to 2010-11: Prepared for the Australian Copyright Council*, 2012, <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

³⁹ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Mark Gregory, ‘Abbott’s Copyright Kowtow A Step Backwards’, *Technology Spectator*, 1 April 2015, <http://www.businessspectator.com.au/article/2015/4/1/technology/abbotts-copyright-kowtow-step-backwards>

⁴³ Ibid.

competition.⁴⁴ Such values were not clearly embodied in the 2015 legislative regime in Australia.

B. The ‘Primary Purpose’ Test

The bill says that an injunction can be granted where ‘the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).’ This seems to be an incredibly crude provision. This drafting raises a whole host of jurisdictional questions and problems.

Malcolm Turnbull maintains: ‘Critically, the provisions in this bill have been carefully drafted to ensure that the new injunction power will not affect the legitimate websites and services that legally provide access to copyright material.’⁴⁵ He elaborates upon this issue:

First, the power is only as broad as it needs to be to achieve its objectives. The provision will only capture online locations where it can be established that the primary purpose of the location is to infringe or facilitate the infringement of copyright. That is a significant threshold test which will ensure that the provision cannot be used to target online locations that are mainly devoted to a legitimate purpose.⁴⁶

Turnbull maintains that the bill does apply to virtual private networks: ‘Where someone is using a VPN to access Netflix in the United States to get content in respect of which Netflix does not have an Australian licence, this bill would not deal with that because you could not say that Netflix in the United States has, as its primary purpose, the infringement or facilitation of the infringement of copyright’.⁴⁷ It is not clear that the text of the bill actually says this. The draft legislation says that one can take into account both Australian and overseas copyright infringement. There have been arguments made by Foxtel, amongst others, that Netflix has facilitated copyright infringement.⁴⁸ Notably, Sony Pictures has complained to Netflix over its unwillingness to stop Australians from using virtual private networks.⁴⁹

Considering the bill, Ben Grubb noted that there had been debates within the Government about whether the website-blocking power might affect virtual private networks (VPNs). He noted that there had been concerns about unintended consequences in the bill:

⁴⁴ Cory Doctorow, *Information Doesn’t Want to Be Free: Laws for the Internet Age*, San Francisco: McSweeney’s, 2014.

⁴⁵ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Tim Cushing, ‘Netflix Infringement Called Out During Australian Copyright Forum – One Major Studio Admits Windowed Releases are Stupid’, *Techdirt*, 15 September 2014m <https://www.techdirt.com/articles/20140915/08423728520/netflix-infringement-called-out-during-australian-copyright-forum-one-major-studio-admits-windowed-releases-are-stupid.shtml>

⁴⁹ Tim Biggs and Ben Grubb, ‘Sony lobbied Netflix to stop Aussie VPN users, leak shows’, *Sydney Morning Herald* (Sydney, 17 April 2015).

One of those unintended consequences, according to sources familiar with the drafting of the legislation, could have resulted in the websites of virtual private networks (VPNs) also being caught up in the blocking regime if they were deemed by a judge as facilitating copyright infringement. VPNs are often used to circumvent website filtering in countries by allowing users to ‘tunnel’ their internet traffic through another country where there is no filtering.⁵⁰

It is not necessarily clear how this issue has been addressed by the legislative drafting. If the Government wanted to exclude Virtual Private Networks from the bill, why has not it done so, expressly?

Unfortunately, it does seem to be the case that the bill has been badly drafted. The bill does not provide an adequate test of what is a ‘primary purpose’. It is notable that online sites can serve an amazing profusion of purposes. Search engines, such as Google and Yahoo!, have a multitude of purposes. Microblogging sites like Twitter serve many different functions. Cloud computing can be used in respect of hosting both authorised copyright content, and unauthorised copyright content. The bill does not provide adequate protection for legitimate websites and services that legally provide access to copyright material. The bill is particularly poor at dealing with websites and services, with multiples functions and purposes.

Consumer groups such as ACCAN have been concerned about the impact of the new bill on virtual private networks. ACCAN observed: ‘ACCAN believes consumers should have the freedom to choose where they purchase content’.⁵¹ ACCAN stressed: ‘Improved choice will also address some of the problems around access, delayed release dates and affordability which fuel piracy.’⁵²

Similarly, consumer advocacy group CHOICE has been concerned the new copyright laws could allow industry groups to block or hinder the use of VPNs.⁵³ Erin Turner commented: ‘We know that at least 684,000 Australian households already save money and get better deals by accessing overseas content using tools like a VPN.’⁵⁴ She said: ‘Currently, [the proposed bill] is far from clear when it comes to whether using a VPN to access a legitimate service like US-based Hulu is legal or not’.⁵⁵

Such concerns are certainly pertinent, given recent copyright threats against global roaming services in New Zealand.⁵⁶

⁵⁰ Ben Grubb, ‘No Limits: Rights-Holders Could Potentially Block Hundreds of Piracy Websites in Australia with a Single Strike’, *The Sydney Morning Herald* (Sydney, 26 March 2015)

⁵¹ Hannah Francis, ‘Fears VPNs Could Be Blocked in Piracy Crackdown’, *The Sydney Morning Herald* (Sydney, 20 April 2015)

⁵² *Ibid.*

⁵³ Tim Biggs and Ben Grubb, ‘Sony lobbied Netflix to stop Aussie VPN users, leak shows’, *Sydney Morning Herald* (Sydney, 17 April 2015).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Jeremy Kirk, ‘In New Zealand, Legal Battle Looms Over Streaming TV’, *Techworld*, 14 April 2015, <http://www.techworld.com.au/article/572569/new-zealand-legal-battle-looms-over-streaming-tv/>; PC World <http://www.pcworld.idg.com.au/article/572569/new-zealand-legal-battle-looms-over-streaming-tv/>

C. The Matrix of Factors

Section 115A (5) of the bill has a laundry list of matters to be taken into account by a court in determining whether or not to grant an injunction:

In determining whether to grant the injunction, the Court is to take the following matters into account:

- (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.

In his second reading speech, the Minister maintained that this multi-factorial test will help the court consider ‘a broad range of factors that reflect competing public and private interests.’⁵⁷ He commented:

The court must consider the flagrancy of the infringement. This provision particularly contemplates online locations that deliberately and conspicuously flout copyright laws. The court must also consider whether blocking access to the online location is a proportionate response in the circumstances. For example, the court may consider the percentage of infringing content on the online location compared to the legitimate content or the frequency with which the infringing material is accessed by subscribers in Australia.

Another consideration for the court is the overall public interest. The internet has revolutionised our ability to disseminate information and knowledge. The court must weigh the public interest in access to information against the public interest in protecting our creative industries. These competing public interests must themselves be considered in the wider context of the private interest which it is the

⁵⁷ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015* (Cth)’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

principal purpose of the bill to protect—that is, the right of content creators to the protection of their intellectual property.⁵⁸

However, the factors are pretty clearly tilted towards the interests of copyright owners. There are significant drafting problems as well in respect of the factors. The motley collection of factors seem vague, ambiguous, ill-defined, and over-inclusive.

It is both odd and peculiar that the first factor is the ‘the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement’. As previously discussed, this will be an incredibly difficult task, given that the court is meant to consider the question of infringement, not only in Australia, but elsewhere around the world. The second factor says it is relevant ‘whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright.’ This phrasing would make me concerned whether search engines and index sites could be swept up in the scope of this bill. The third factor is ‘whether the owner or operator of the online location demonstrates a disregard for copyright generally.’ This seems an incredibly vague factor. How is a court supposed to determine a general ‘disregard for copyright’? That hardly seems like a precise or specific factor test. The fourth factor is ‘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.’ Given the territorial nature of copyright law, this is quite a strange way to approach this question. Moreover, it should be remembered that many authoritarian governments engage in website-blocking for political purposes. It seems to me an absurd situation for an Australian court to have to consider whether China or Iran or North Korea is blocking access to websites or online locations, on the grounds of intellectual property or otherwise.

The fifth factor is whether ‘disabling access to the online location is a proportionate response in the circumstances.’ If proportionality is an important factor, it should be spelt out properly. The sixth factor is vague and open-ended – ‘the impact on any person, or class of persons, likely to be affected by the grant of the injunction.’ The seventh factor is ‘whether it is in the public interest to disable access to the online location.’ Again, this is a highly vague statement. This factor fails to address whether or not questions about human rights should be taken into account by the court in an assessment of the grant of an injunction. The eighth factor is whether ‘the owner of the copyright complied with subsection (4).’ It is notable that there is a failure to address circumstances of copyright trolls in respect to this factor.

The ninth factor notes ‘any other remedies available under this Act.’ However, the Act really fails to properly explain the relationship between the blocking power and other existing remedies. Is the blocking power an exceptional remedy? Or will it be an everyday, commonplace occurrence? The tenth factor is ‘any other matter prescribed by the regulations.’ There has been a real problem with the Attorney-General drafting broad regulation-making powers in internet bills – like this one, and the Data Retention legislative regime.

⁵⁸ Ibid.

There is a real danger of political interference, with the Attorney-General of the day being able to manipulate the relevant factors for a court to consider by means of regulation. The eleventh factor is ‘any other relevant matter.’

Notably, the bill does not provide proper guidance as to how a court should weigh this long list of factors. The Federal Court of Australia – and perhaps the High Court of Australia – will have to make sense of this array of factors.

D. Injunction

In his second reading speech, the Minister Malcolm Turnbull also argued that the court would play a role in respect of using its discretion in respect of the injunctions.⁵⁹

Mark Gregory, a Senior Lecturer in the School of Electrical and Computer Engineering at RMIT University, was concerned about the technical operation of the bill.⁶⁰ He said: ‘Section 9 of the Bill is likely to become known as the iiNet clause or the ‘shut up and do as your told’ clause because it states that ‘the carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings.’⁶¹ Gregory was concerned that regulations would have to illuminate the infrastructure for the bill: ‘If an injunction is granted the ISPs will need to know the process that should be taken to block the online location and provide notification to their customers of the website block.’⁶² He worried: ‘Given that the online location may reappear with a different IP address very shortly after an injunction has been enforced, ISPs are likely to be inundated with injunctions at regular intervals and will therefore require additional staff and resources to handle the expected load.’⁶³

Turnbull insisted that the bill ensured ‘copyright holders have access to an effective remedy without unduly burdening carriage service providers or unnecessarily regulating the behaviour of consumers.’⁶⁴ Unfortunately, the legislation will place heavy burden upon internet service providers. Moreover, the regime will heavily regulate the behaviour of consumers. The bill is not an example of light-touch regulation.

The legislation devised by the Coalition Government in many ways reflects the position of political donors, such as Village Roadshow Limited, who

⁵⁹ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, the House of Representatives, Parliament of Australia, (26 March 2015) 28.

⁶⁰ Mark Gregory, ‘Abbott’s Copyright Kowtow A Step Backwards’, *Technology Spectator*, 1 April 2015, <http://www.businessspectator.com.au/article/2015/4/1/technology/abbotts-copyright-kowtow-step-backwards>

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ The Hon. Malcolm Turnbull, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

demanded a new regime for site-blocking, claiming that current copyright laws were inadequate and insufficient.⁶⁵

E. The Internal Debate within the Australian Labor Party

Initially, the Australian Labor Party was critical of the Coalition Government's approach to the regulation of copyright law. In a powerful critique in 2014, Jason Clare MP maintained that the Abbott Government does not understand the Internet:

The Abbott Government has made it clear it doesn't understand the internet or its users. Senator Brandis demonstrated this with his complete inability to explain metadata earlier this year. Malcolm Turnbull is about to buy an ageing copper network because he thinks that by 2023 the median household in Australia will only require 15 Mbps.⁶⁶

Jason Clare argued: 'It is clear that action is needed both to deter piracy, and to encourage access to legitimate content.'⁶⁷ He also wondered whether the proposals of the government would be effective: 'Site-blocking is unlikely to be an effective strategy for dealing with online piracy'.⁶⁸ Jason Clare maintained that 'the Government has passed the buck back to industry, asking rights holders and ISPs to reach an agreement among themselves'.⁶⁹ He contended: 'Any crackdown on the infringement of copyright needs to be accompanied by changes to make copyright law fairer, clearer, and more in keeping with public expectations'.⁷⁰ In his view, 'The Government should look after the interests of consumers'.⁷¹

However, in the end, after receiving generous donations from the film industry, the Australian Labor Party switched its position and supported the *Copyright Amendment (Online Infringement) Act 2015 (Cth)*.⁷² The Shadow Attorney-General Mark Dreyfus seemed to be the key figure behind this move.⁷³ In his second reading speech, he employed the discourse of 'piracy' to justify the need for giving copyright owners the ability to engage in site-blocking:

⁶⁵Village Roadshow Limited, Donor Annual Return 2014-2015, <https://periodicdisclosures.aec.gov.au/Donor.aspx?SubmissionId=56&ClientId=21869>

⁶⁶ Jason Clare MP, 'Government Fails to Deliver on Internet Piracy', Press Release, 10 December 2014, <http://www.jasonclare.com.au/media/portfolio-media-releases/1538-government-fails-to-deliver-policy-on-internet-piracy>

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Nick Evershed, 'Australian Political Donations 2014-15', *The Guardian*, 1 February 2016, <https://www.theguardian.com/australia-news/datablog/ng-interactive/2016/feb/01/australian-political-donations-2014-15-search-the-data>; and Village Roadshow Limited, Donor Annual Return 2014-2015, <https://periodicdisclosures.aec.gov.au/Donor.aspx?SubmissionId=56&ClientId=21869>

⁷³ The Hon. Mark Dreyfus, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*', Hansard, House of Representatives, Parliament of Australia (16 June 2015) 6393.

Given how central copyright protections are to supporting creative activity of all kinds, we should be deeply concerned about the current level of online piracy. We should not mince words about this: Australia has a very serious problem with piracy. Available figures indicate that it is one of the worst in the developed world. A lot of the public debate about this topic is focused on popular foreign content, like *Game of Thrones*.⁷⁴

Dreyfus maintained: ‘The current level of online piracy clearly necessitates government action.’⁷⁵ He was supportive of further measures to modernise copyright law: ‘If we allow our copyright law to become outdated, obsolete, we cannot expect to thrive in the new digital economy.’⁷⁶

The Shadow Minister for Communications Hon. Michelle Rowland MP also supported the bill.⁷⁷ She tried to employ semantics to maintain that the legislation was not in fact an internet filter:

This bill does not provide for a sort of internet filter. It provides a judicial remedy on a case-by-case basis for conduct that flouts existing Australian law. The requirements of the bill are strict, and we can expect Federal Court judges to exercise the site-blocking power cautiously and with restraint.⁷⁸

Much like her colleague Dreyfus, she sought to justify the legislation in terms of the need to address ‘piracy’: ‘We believe action is needed to reduce current levels of online piracy and that the enforcement of copyright law is vital to our creative industries.’⁷⁹

Although he has professed his opposition to censorship, the Hon. Graham Perrett was a keen supporting of the site-blocking legislation. He stressed that ‘piracy damages a vulnerable industry and impacts on precious Australian jobs.’⁸⁰

Changing his tune from 2014, Jason Clare MP supported the site-blocking copyright legislation.⁸¹ Yet, he warned that ‘we need to be careful not to overestimate how effective this legislation might be.’⁸² Clare commented, though, that there needed to be affordable access to copyright work: ‘Content also has to be cheap, quick and easy to get. And that is a job for business not for this parliament.’⁸³ Mindful of a recent parliamentary inquiry, Clare

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ The Hon. Michelle Rowland, ‘Second Reading Speech on *the Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, House of Representatives, Parliament of Australia (16 June 2015) 6406.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ The Hon. Graham Perrett MP, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, House of Representatives, Parliament of Australia (16 June 2015) 6410.

⁸¹ The Hon. Jason Clare MP, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, House of Representatives, Parliament of Australia (16 June 2015) 6400.

⁸² Ibid.

⁸³ Ibid.

emphasized that there was a need to take action to ensure that Australians received a fair deal in respect of IT pricing.⁸⁴

The Hon. Terri Butler also expressed reservations about the ability of Australian consumers to obtain timely and affordable access to copyright content.⁸⁵ She expressed the view:

It is fair to say that Australian consumers of digital products want fair and timely access to content. It has been described as being more of an issue about service than about price—in other words, the view is that if consumers had more convenient and timely access to digital content then the fact that they would also have to pay for it would not dissuade them from using that lawful way of obtaining content. That is not just my view. That concern has been around for some time in relation to how people can get access to digital content in this country in a fair and timely way.⁸⁶

Nonetheless, she supported the site-blocking legislation, arguing that it was a ‘moderate’ intervention: ‘We, as I say, will always take a critical and moderate approach to supporting any interventions in this area, because it is quite a nuanced and faceted question, but this, we believe, is a moderate and appropriate approach to the issue of combating online piracy.’⁸⁷

However, there was some dissent from Ed Husic MP about how the Australian Labor Party had supported the copyright site-blocking regime.⁸⁸ He argued that the legislation reflected ‘an ethos that tries to limit the liberalising force of the internet to the extent that it tries to skew benefits to producers, rights holders, and entrenched interests at the expense of others’.⁸⁹ He warned: ‘We cannot remain insular, imposing a quasi-form of protectionism to prop up profits at the expense of consumers.’⁹⁰ Husic contended: In the wider context it demonstrates an absence of commitment by this government to having a coherent approach to dealing with piracy ... it is tough on piracy but not on the causes of piracy.⁹¹ He argued that there was a need to change the way in which Australian consumers were treated:

For years consumers of content have been forced to accept content later than overseas consumers at higher prices. It's a business model that helped prop up profits of rights holders, and consumers have been cynically forced to accept a business model that simply fleeces them.⁹²

⁸⁴ The House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (Parliament of Australia, 2013).

⁸⁵ The Hon. Terri Butler, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2015 (Cth)*’, Hansard, House of Representatives, Parliament of Australia (16 June 2015) 6413.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ The Hon Ed Husic MP, ‘Adjournment Debate: Innovation, Telecommunications’, Hansard, House of Representatives, Parliament of Australia (18 June 2015) 6884, and Ben Grubb, ‘I Don’t Like It’: Labor MP Ed Husic Hits Out at ‘Unfair’ Anti-Piracy, Website-Blocking Bill’, *The Sydney Morning Herald* (Sydney, 18 June 2015).

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

Husic commented: ‘What this bill does is get government to help business to keep fleecing consumers or to support that type of ethos.’⁹³ He also expressed concerns as to whether VPNs would be affected by the Coalition Government’s approach to copyright in the future. Husic was concerned that the recommendations of the inquiry into IT Pricing had been ignored.⁹⁴

In his book, *Information Doesn’t Want to Be Free: Laws for the Internet Age*, Cory Doctorow has some sage advice for copyright owners: ‘Things that don’t make money: Complaining about piracy; Calling your customers thieves; Treating your customers like thieves.’⁹⁵ He maintained that there was a need for copyright owners to develop appropriate business models, which provided for accessible and affordable access to copyright content.

F. The Critique of the Australian Greens

The Australian Greens have also been highly critical of the copyright proposals of the Coalition Government. Senator Scott Ludlam of the Australian Greens has commented:

The Greens will not support amendments to the Copyright Act to allow rights holders to apply for a court order requiring ISPs to block access to a website. Such a move would be a defacto Internet filter and would allow rights holders to unilaterally require websites to be blocked. This kind of Internet filter would not be effective at all, due to the widespread availability of basic VPN software to evade it.⁹⁶

In his second reading speech, Senator Scott Ludlam elaborated upon his concerns about the legislation.⁹⁷ He complained that the Australian Government ‘has cherry picked an element that was not even canvassed in the [Australian Law Reform Commission] report and brought that forward because it gives it the impression of having done something and it directly answers to its cashed-up donors and lobbyists, which, we are well aware, is how this government works.’⁹⁸ He observed: ‘So it is lazy from a policy point of view and it is also lazy politics.’⁹⁹ Ludlam warned: ‘It is dangerous because it does create the architecture of a second internet filter in this country.’¹⁰⁰ Ludlam observed that Turnbull had previously opposed an Internet filter.¹⁰¹ He observed: ‘During the inquiry into the bill, major companies, including Amcom, iiNet and Google—and even some of the bill’s supporters—

⁹³ Ibid.

⁹⁴ The House of Representatives Standing Committee on Infrastructure and Communications, *At What Cost? IT Pricing and the Australia Tax* (Parliament of Australia, 2013).

⁹⁵ Cory Doctorow, *Information Doesn’t Want to Be Free: Laws for the Internet Age* (McSweeney’s, 2014).

⁹⁶ Senator Scott Ludlam, ‘Industry Code on Copyright Will Not Address Real Problem’, The Australian Greens, Press Release, 10 December 2014, <http://greens.org.au/node/6800>

⁹⁷ Senator Scott Ludlam, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)’, Australian Senate (Parliament of Australia, 22 June 2015) 4021.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

emphasised that blocking websites will not stop people from accessing content.¹⁰² He commented that the regime could be circumvented: ‘There are dozens of ways of getting around a website being blocked, ranging from using a virtual private network—or a VPN—to using one of many streaming apps or websites, or just getting hold of the files on a USB stick and running them from there.’¹⁰³

Ludlam was concerned whether legitimate services would be affected by the site-blocking regime:

Both the Minister for Communications and the shadow Attorney-General have stated that the bill is not intended to catch legitimate services like virtual private network providers, but the bill does not make it clear. Again, I am hoping that this is a relatively uncontroversial amendment. VPNs have a very wide variety of legitimate uses, and I think it is extremely concerning that this bill has left vague the fact that it may be possible for a court to decide that the primary purpose of VPN services is to facilitate or to infringe copyright.¹⁰⁴

Ludlam was concerned that there would be inadequate representation of the public interest: ‘The structure of the bill makes it very clear that, at least after the first several actions, it is very unlikely that these blocking injunctions, that will come, most likely, from foreign rights holders, will be blocked either by the affected website owners—who may be based overseas and who are not necessarily going to want the expense of defending an Australian legal case—or the ISPs.’¹⁰⁵ He maintained: ‘The experience in the UK, where a similar regime prevails, shows that ISPs are likely to only contest the first few injunctions before waving through most of what comes afterwards’.¹⁰⁶ Ludlam observed: ‘And that—again, to foreshadow—goes to why we have proposed, in another of our committee stage amendments, that much wider standing should apply, so that the courts can hear from affected third parties or others who might want to put a public interest point of view or who have a private interest even though they are not the ISP or somebody more immediately affected.’¹⁰⁷

Citing the inquiry into IT Pricing, Ludlam argued that there is a need for a change in market behaviour: ‘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’.¹⁰⁸

David Leyonhjelm of the Liberal Democrats also complained that ‘website blocking is a drastic remedy and a blunt tool.’¹⁰⁹

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Jeremy Malcolm, ‘Users betrayed as Australia Adopts a Copyright Censorship Regime’, *EFF*, 23 June 2015, <https://www.eff.org/deeplinks/2015/06/users-betrayed-australia-adopts-copyright-censorship-regime>

G. Stakeholder Perspectives

There were a range of stakeholder perspectives about the legislation.¹¹⁰

Foxtel chief executive Richard Freudenstein asserted that there was evidence from Europe that web-blocking measures have had a significant impact upon rates of copyright infringement.¹¹¹ Freudenstein also asserted: “This about blocking access to sites run by criminals and gangs: these are not crusaders for freedom, they are out to make money by stealing other people's intellectual property.”¹¹² This statement shows a poor understanding and appreciation of copyright history. Even since the inception of copyright law, there have been concerns about governments. There is a long history of governments, corporations, associations, and individuals bringing copyright action in order to censor free speech or at the very least chill free speech.

CHOICE Australia—the leading consumer rights’ group in Australia—was also disappointed by the copyright proposals.¹¹³ Alan Kirkland was wary of ‘an industry-run internet filter to block ‘offending’ websites’.¹¹⁴ He commented:

We know that internet filters don’t work. This approach has been called ineffective and disproportionate by courts overseas, and it risks raising internet costs for everyone.¹¹⁵

Kirkland said that there was a need to fix the availability, and the high prices in respect of copyright works.

The Communications Alliance has been cautious about the Coalition Government’s copyright plans.¹¹⁶ The Communications Alliance, whose members include iiNet and Optus, have commented that the bill is vague and ambiguous and fails to specify what type of blocking should be undertaken.¹¹⁷ John Stanton commented on the proposed bill:

The bill is very generic on this. And yet there are different costs and risks associated with different types of blocking methodology. We have cautioned that website blocking is a relatively blunt tool, with risks of ‘collateral damage’ if not applied with precision. There is uncertainty as

¹¹⁰ John Stewart and Benjamin Sveen, ‘Contested Legislation over ‘Illegal Downloads’’, *Lateline*, 19 June 2015, <http://www.abc.net.au/lateline/content/2015/s4258735.htm>

¹¹¹ Dominic White, ‘ISPs Resist Website Blocking Bill’, *The Australian Financial Review* (Sydney, 13 April 2015).

¹¹² *Ibid.*

¹¹³ Luke Hopewell, ‘CHOICE Slams Government Piracy Plans, Labels Site Blocking As Internet Filter in Disguise’, *Gizmodo*, 10 December 2014, <http://www.gizmodo.com.au/2014/12/choice-slams-government-piracy-plan-labels-site-blocking-as-internet-filter-in-disguise/>

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ Clare Reilly, ‘Censorship by Internet Filter’: Industry Reacts to Proposed Piracy Laws’, *CNet*, 10 December 2014, <http://www.cnet.com/au/news/censorship-internet-filter-industry-reacts-to-proposed-piracy-laws/>

¹¹⁷ Dominic White, ‘ISPs Resist Website Blocking Bill’, *The Australian Financial Review* (Sydney, 13 April 2015).

to how courts will interact with and interpret the requirements of the legislation when making orders.¹¹⁸

Stanton was concerned that the phrases ‘online location’ and ‘website’ were not precisely defined under the bill. Such ambiguity left open the danger of the bill being used for copyright censorship – whether that be purposely or accidentally. Moreover, the Communications Alliance was concerned about the lack of information over the costs of such prescriptive regulation. Stanton said: ‘The government originally said rights holders would be responsible for meeting implementation costs and that seems to have disappeared since the government first proposed it.’¹¹⁹ He observed: ‘It is reasonable for us to understand what the expectations and costs are rather than agreeing to a high level bill.’¹²⁰

Pirate Party Australia has denounced the new copyright regime.¹²¹ President of the Pirate Party, Brendan Molloy, has commented:

This proposal is effectively the beginning of an Australian version of the failed US *Stop Online Piracy Act*. Notification schemes, graduated response schemes and website blocking do not work. They are costly, ineffective and disproportionate, as evidenced by academia and decisions of foreign courts. Fighting the Internet itself as opposed to solving the lack of convenient and affordable access does not work, nor does propping up business models that rely upon the control of content consumption in the digital environment.¹²²

Deputy President, Simon Frew, added: ‘Website blocking is censorship, plain and simple.’¹²³ He commented: ‘By ignoring the IT Pricing Inquiry and numerous submissions to different reviews that Australians are regularly paying more and waiting longer for content, the Coalition is looking to enact a legislative dinosaur that will be easily bypassed by savvy Internet users in seconds.’¹²⁴

The Institute of Public Affairs has also expressed reservations about the proposed copyright regime.¹²⁵ Chris Berg commented:

The government’s proposal to block websites that infringe copyright is an internet filter and a threat to free speech. This is nothing more than an internet filter, of the sort which the Coalition proudly opposed when it was proposed by the Rudd and Gillard governments. There is no

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Pirate Party Australia, ‘Pirate Party denounces attempt to introduce beginning of Australian SOPA-style regime’, 10 December 2014, <http://pirateparty.org.au/2014/12/10/pirate-party-denounces-attempt-to-introduce-beginning-of-australian-sopa-style-regime/>

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Chris Berg, ‘The Coalition is Reviving Labor’s Internet Filter with its Copyright Website Blocking Scheme: IPA’, <https://ipa.org.au/publications/2311/the-coalition-is-reviving-labor%27s-internet-filter-with-its-copyright-website-blocking-scheme-ipa>

reason to believe that this will reduce copyright infringement in any material way.¹²⁶

Such criticism is notable—given that the Institute of Public Affairs is frequently an ally and a friend of the Coalition Government, across a range of policy fields.

II Copyright Litigation over Site-Blocking and Search-Filtering

The Australian courts considered the operation of the scheme for site-blocking copyright-infringing sites in a number of precedents. Thus far, copyright owners have been largely successful in a number of instances in satisfying judges of the Federal Court of Australia of the need for site-blocking orders. There has been only the odd case which has not proceeded.

The copyright litigation in respect of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) has also highlighted some of the problems with the approach of site-blocking. There has largely been a failure by sites to defend themselves in court proceedings – with only the rare opposition. So many of the arguments in the cases have been uncontested. In some respects, the Australian courts have contemplated straightforward cases thus far, where there is clear evidence of facilitation of copyright infringement. There have not yet been more ambiguous cases – in which there have been mixed purposes in respect of sites. There has not been a full consideration of the myriad of factors that judges should take into account.

In 2017, David Lindsay was hopeful that there would be a ‘demanding and ambitious’ proportionality analysis.¹²⁷ He argued that ‘the introduction of some form of proportionality has the potential to improve, first, the nature and transparency of judicial decision-making in awarding a blocking injunction and, secondly, impose principled limits on the jurisdiction’.¹²⁸ Unfortunately, in practice, proportionality has not necessarily received much in the way of judicial contemplation. There has yet really been an elaboration of the rules in respect of site-blocking and proportionality.

A. *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503

In the 2016 case of *Roadshow Films Pty Ltd v Telstra Corporation Ltd and Foxtel Management Pty Ltd v TPG Internet Pty Ltd*, Nicholas J considered applications by Roadshow to block access to online locations known as ‘SolarMovie’, ‘The Pirate Bay’, ‘Torrentz’, ‘TorrentHound’ and ‘IsoHunt’.¹²⁹

¹²⁶ Ibid.

¹²⁷ David Lindsay, ‘Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness’ (2017) 40 (4) *University of New South Wales Journal* 1507-1538.

¹²⁸ Ibid., 1538.

¹²⁹ *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503.

In his judgment, Nicholas J provided some technical background on the internet, internet protocol address, uniform resource locator, domain names, the domain name system server, DNS blocking, URL blocking, IP address blocking, proxy servers and BitTorrent.

Nicholas J observed that Roadshow has objected to ‘SolarMovie’ engaging in copyright infringement in respect of a number of films and television programs, including *The Lego Movie*,¹³⁰ *Tron Legacy*,¹³¹ *Cinderella*, *Spy*, *Kingsman: The Secret Service*, *Transformers: Age of Extinction*, *The Gambler*, *Spider-Man 2*, *Jurassic World*, *This is the End*, *Straight Outta Compton*, *The Big Bang Theory* and *Shameless*. Nicholas J found that ‘SolarMovie’ was being used to infringe or facilitate the infringement of copyright in respect of Roadshow films: ‘I am satisfied that the SolarMovie website was designed and operated to facilitate easy and free access to cinematograph films made available online, something which, I would infer, has almost certainly occurred without the permission of the owners of the copyright in such films’.¹³²

The judge also noted that ‘it is apparent that the SolarMovie website positively encouraged the infringement of copyright on what I am satisfied is likely to be a widespread scale.’¹³³ The judge held: ‘These activities involved a flagrant disregard for the Roadshow copyright owners’ rights, the rights of other copyright owners whose films were made available online at the SolarMovie website, and copyright generally’.¹³⁴ The judge ruled: ‘Blocking orders have already been made in relation to many of the SolarMovie sites in other jurisdictions.’¹³⁵

The accompanying proceeding involved an action by Foxtel against The Pirate Bay, Torrentz, TorrentHound and IsoHunt in respect of copyright infringement of television programs, such as *Wentworth*, *Open Slather*, *A Place to Call Home*, and *Real Housewives of Melbourne*. In respect of The Pirate Bay, the judge found: ‘Each site, which I am satisfied is located outside Australia, facilitates the infringement of copyright, including Foxtel’s copyright in the Foxtel programs, which can be downloaded using magnet links found there’.¹³⁶

¹³⁰ There was much criticism of Village Roadshow for releasing *Lego Movie* later in Australia than elsewhere in the world: Nic Christensen, ‘Village Roadshow Admits ‘Mistake’ in Holding Back *Lego Movie*, as ISPs Disagree on Piracy’, *Mumbrella*, 10 September 2014, <https://mumbrella.com.au/village-boss-made-hell-mistake-lego-movie-isps-content-providers-struggle-find-common-ground-250603>

¹³¹ There are perhaps certain ironies about bringing copyright action in respect of *Tron Legacy* – given the film itself is about computing hacking, intellectual property infringement, and impersonation of online personae: See Peter Bradshaw, ‘Tron: Legacy – Review’, *The Guardian*, 17 December 2010, <https://www.theguardian.com/film/2010/dec/16/tron-legacy-review>

¹³² *Roadshow Films Pty Ltd v Telstra Corporation Ltd* [2016] FCA 1503.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

The judge held: 'I am also satisfied that the primary purpose of each of the active TPB sites is to facilitate the infringement of copyright.'¹³⁷

Reflecting upon the decision, Paula Dootson, Kylie Pappalardo and Nicolas Suzor doubted whether site-blocking would be sufficient to stop copyright infringement.¹³⁸ They contended: 'In the 17 years since Napster, one of the first file-sharing services, punitive legal responses are yet to be proven effective at reducing rates of infringement.'¹³⁹ Dootson, Pappalardo and Suzor argued: 'This experience suggests that stricter copyright laws are not the most effective way to address copyright infringement'.¹⁴⁰ They maintained: 'Instead of investing resources into legal proceedings, we suggest that rights-holders should invest in innovative platforms that provide consumers with greater access to content in a timely manner at a fair price'.¹⁴¹

B. *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435

In the 2017 case of *Universal Music Australia Pty Limited v TPG Internet Pty Ltd*, the Federal Court of Australia considered an application by various members of the music industry for the blocking of domain names, IP addresses and URLs that provided access to online locations known as 'KickassTorrents' or 'KAT'.¹⁴² There was a concern that 'Kickass Torrents' had facilitated copyright infringement of such sound recordings as Major Lazer's album, 'Peace is the Mission', The Kite String tangle's album, 'Vessel', Guy Sebastian's song 'Like a Drum', Indigenous singer Jessica Mauboy's album 'Beautiful', Fall Out Boy's album 'American Beauty/ American Psycho', Justin Bieber's album 'Purpose', and Ellie Goulding's work, 'Delirium'.¹⁴³ There was a complaint that 'Kickass Torrents' had enabled copyright infringement in respect of musical works, including such numbers as Sia's 'Chandelier', 'AC/DC's Highway to Hell', Taylor Swift's 'Shake It Off', and One Direction's 'Steal My Girl'.¹⁴⁴

Considering the matter, Burley J held:

The KickassTorrents website (KAT website) is a website which can be accessed by users of the internet via a number of different domain names. Users of the website are encouraged to search for digital content on the website and download it. The primary, and probably the sole, function of the website is to enable the digital downloading of musical works, sound recordings, movies and books, free of charge and

¹³⁷ Ibid.

¹³⁸ Paula Dootson, Kylie Pappalardo, and Nicolas Suzor, 'Blocking access to illegal file-share websites won't stop illegal downloading,' *The Conversation*, 15 December 2016, <https://theconversation.com/blocking-access-to-illegal-file-share-websites-wont-stop-illegal-downloading-70473>

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435

¹⁴³ Appendix A of *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435

¹⁴⁴ Appendix B of *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435

without the licence or approval of the owners of copyright in those works. The evidence indicates that the website enables users to infringe copyright on an industrial scale.¹⁴⁵

Burley J noted: ‘The KAT website has already been the subject of orders blocking access to it on the basis of copyright infringement in a ‘significant number of jurisdictions’, including the United Kingdom, Ireland, Denmark, Italy, Finland and Belgium.’¹⁴⁶ The judge held: ‘The scale of the infringement is such that it has a real and meaningful impact on the creation of new copyright content.’¹⁴⁷ Accordingly, the judge concluded: ‘I accept the applicants’ submission that the orders sought would be effective at preventing a meaningful proportion of Australian users from infringing copyright via the online location in the future, without giving rise to a danger of ‘overblocking’ legitimate websites.’¹⁴⁸ The judge also noted that ‘the evidence reveals that the applicants have taken steps to ensure that Australian customers have access to their licensed copyright content by other, legal means.’¹⁴⁹

C. *Roadshow Films Pty Ltd v Telstra Corporation Limited* [2017] FCA 965

In the 2017 matter of *Roadshow Films Pty Ltd v Telstra Corporation Limited*, the Federal Court of Australia considered an application by Roadshow for the blocking of domain names, IP addresses and URLs that provided access to 49 online locations, including ‘Demonoid’, ‘LimeTorrents’, ‘EZTV’ and ‘CouchTuner’.¹⁵⁰ Nicholas J was the presiding judge once again. The judge was satisfied that the sites had infringed the copyright of Roadshow Films – particularly in respect of *Kingsman: The Secret Service*:

I am satisfied, on the evidence of Mr Fraser, Mr Kraegen and Mr Stewart, that each Online Location has infringed or facilitated the infringement of copyright subsisting in one or more of the applicants’ Roadshow Films. In particular, I am satisfied that, by making the film ‘Kingsman: The Secret Service’ available to the public on the Streaming Online Location ‘Kinogo’ website, the copyright owner’s copyright has been infringed.¹⁵¹

The judge held: ‘The applicants’ evidence establishes that the primary purpose of each of the Online locations is to make available online and/or facilitate the making available online or reproduction of motion pictures and television programs without the licence of the copyright owner, including in respect of one or more of the Roadshow Films.’¹⁵² The judge observed that the copyright infringement was flagrant: ‘By way of illustration, one of the Online Locations is accessible via the domain name ‘istole.it’ and it and many others include

¹⁴⁵ *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Roadshow Films Pty Ltd v Telstra Corporation Limited* [2017] FCA 965.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

notices encouraging users to implement technology to frustrate any legal action that might be taken by copyright owners.’¹⁵³

D. *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041

The case of *Foxtel Management Pty Limited v TPG Internet Pty Ltd* provided a consideration of the new site-blocking regime.¹⁵⁴

In this case, the applicant, Foxtel Management Pty Ltd, was the co-owner of the copyright in the television series, ‘Wentworth’. Foxtel sought orders against 49 internet service provider respondents, pursuant to s 115A of the *Copyright Act 1968* (Cth) (Act), disabling access in Australia to 127 internet locations which it alleged infringed or facilitated infringement of its copyright. Burley J granted orders.

Burley J provided some general findings, which were applicable to the relief sought against all of the online locations.

First, Burley J held that Foxtel was the copyright owner of the television series, ‘Wentworth’:

The fact that Foxtel is a co-owner of copyright with another party does not preclude it from bringing the action in its own right. One co-owner can sue for infringement and obtain an injunction, as well as damages, without joining the other co-owner(s).¹⁵⁵

The judge held: ‘By reason of these matters, I find that Foxtel has established that it is the owner of copyright in *Wentworth*, as required by the chapeaux to s 115A(1) of the Act.’¹⁵⁶

Second, Burley J noted that Foxtel had pleaded that ‘each of the respondents is a carriage service provider within the meaning of that term as it is used in s 115A of the Act.’¹⁵⁷ The judge observed: ‘Each of the respondents admit this fact in terms, and I find that it has been established for the purpose of these proceedings.’¹⁵⁸

Third, Burley J ruled that ‘Foxtel has established that each of the respondents is a carriage service provider that provides access to an online location within the requirements of s 115A(1)(a) of the Act.’¹⁵⁹

Fourth, Burley J held that ‘it is possible to make a general finding in relation to the question of the unauthorised use of the copyright material in respect of which copyright is claimed in these proceedings.’¹⁶⁰ The judge observed:

¹⁵³ Ibid.

¹⁵⁴ *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

Copyright in relation to a cinematograph film includes the exclusive right to make a copy of the film and to communicate the film to the public; s 86 of the Act.¹⁶¹

The judge observed: ‘The relevant question arising under s 115A(1)(b) of the Act is whether the online location infringes, or facilitates an infringement of, the copyright.’¹⁶² The judge held: ‘Ms Southey gives evidence that Foxtel has not licensed or authorised the operations of any of the online locations to make available, reproduce or provide access to *Wentworth*’.¹⁶³ The judge ruled: ‘In the case of online locations where she was redirected to other websites which then enabled her to stream or download torrent files and associate content for the episodes of *Wentworth* that she watched (being season 3, episode 11, or season 4, episode 1), Ms Southey confirms that Foxtel did not authorise any of those sites to make such reproductions.’¹⁶⁴

The judge then considered the investigations into the online locations. In respect of yesMovies, the judge ruled: ‘More generally, having regard to the content available via the domain name yesmovies.to, I am satisfied that the online location facilitates the infringement of copyright and that the primary purpose of the online location is to infringe or facilitate the infringement of copyright.’¹⁶⁵ The judge held: ‘In particular, I am satisfied that the website was designed and operated to facilitate easy and free access to cinematographic films made available online on such a scale and extent that, I infer, has occurred without the permission of the owners of copyright in such films.’¹⁶⁶ The judge ruled: ‘The website appears to be intended to promote, encourage and enable users to download content having no regard to the rights of the owners of copyright in that content.’¹⁶⁷

On Vumoo, the judge held: ‘In my view, the orders sought represent a proportionate response to the activities of the online location and, having regard to the content of the website, it is unlikely that persons having legitimate rights will be adversely affected.’¹⁶⁸ The judge often used as a similar stock set phrases in respect of some of the sites.

The judge noted that ‘online locations known by reference to the name ‘LosMovies’ have been blocked by order of courts in the United Kingdom’.¹⁶⁹ The judge observed: ‘Such blocked websites include; losmovies.ch, losmovies.club and losmovies.com.’¹⁷⁰ The judge commented: ‘No doubt this explains why some of the LosMovies domain names include within them the words ‘unblocked.lol’.’¹⁷¹ The judge held: ‘Having regard to the discretionary matters referred to in s 115A(5), the activities facilitated on this online location

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

include the flagrant infringement of copyright in *Wentworth* and of copyright in the cinematograph works that it promotes more generally'.¹⁷²

In respect of cartoon HD, the judge noted that the domain names were associated with IP addresses located in the United States and Iceland. As well as 'Wentworth', the judge noted that Foxtel was able to 'stream other contemporary movie content including the 2017 feature film 'Wonder Woman', and episode 3 of season 7 of *Game of Thrones*.'¹⁷³

The judge blocked 'putlocker'. The judge noted that 'the evidence of Ms Singh indicates that online locations known by reference to the name 'putlocker' may have been blocked by order of courts in the United Kingdom and Italy.'¹⁷⁴ The judge also observed: 'There is also a suggestion that blocking orders were made in Norway in respect of domain names putlocker.is and putlocker.bz.'¹⁷⁵

Foxtel also sought to block the 'Watch Series' locations. The judge held: 'The evidence concerning the Watch Series sites, whether considered individually having regard to each group listed in Schedule 2, or collectively, presents a compelling case for the grant of the injunctive relief sought.'¹⁷⁶

E. *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582

In the 2018 case of *Roadshow Films Pty Limited v Telstra Corporation Limited*. Nicholas J considered the blocking of domain names, IP addresses and URLs that provided access to the online location 'HD Subs', and other specific locations from which various files may be downloaded by certain applications that operate on the Android operating system and enable access to content by the use of certain set-top boxes.¹⁷⁷ The judge held:

In this case, the six online locations (KissCartoon, Couchtuner, MegaShare, Bitsnoop, Demonoid and Kinogo) which were unavailable in May 2017 were, at the time the proceeding was commenced in February 2017, accessible using the respondents' carriage services. There is no evidence before me to suggest that those six locations may not infringe or facilitate the infringement of copyright in the future.¹⁷⁸

The judge held: 'I am satisfied, on the evidence of Mr Fraser, Mr Kraegen and Mr Stewart, that each Online Location has infringed or facilitated the infringement of copyright subsisting in one or more of the applicants' Roadshow Films.'¹⁷⁹ The judge observed: 'In particular, I am satisfied that, by making the film 'Kingsman: The Secret Service' available to the public on the Streaming Online Location 'Kinogo' website, the copyright owner's copyright

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582.

¹⁷⁸ *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582.

¹⁷⁹ Ibid.

has been infringed.’¹⁸⁰ The judge concluded: ‘In respect of all the Online Locations, the evidence establishes that each of those locations has facilitated infringement of copyright in one or more of the Roadshow Films.’¹⁸¹

F. *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933

In the 2018 case of *Foxtel Management Pty Ltd v TPG Internet Pty Ltd*, Nicholas J of the Federal Court of Australia considered the blocking of domain names, IP addresses and URLs that provided access to 15 online locations, including ‘HDO’, ‘123Hulu’, ‘Watch32’, ‘WatchFreeMovies’, ‘SeriesTop’, ‘ETTV’, ‘Torrent Download’ and ‘Torrents.me’.¹⁸² In a short judgment, Nicholas J held: ‘I am satisfied that each of the target online locations allows users to access audio-visual material consisting of cinematograph films using either torrent technology or streaming technology that enables users to access and view such material on devices connected to the internet’.¹⁸³

The judge also noted: ‘Most of the target online locations provide internet users with a browsable and/or searchable index or directory of audio-visual content from which the user can make a selection, and categorises its index of audio-visual content by reference the title such as ‘Movies’ and ‘TV’.’¹⁸⁴ The judge also observed: ‘One of the target online locations, torrents.me, allows users to search for and download torrent files and, in addition, provides users with an index of sites from which a user can access other torrent files’.¹⁸⁵ The judge held: ‘The index of proxy sites found at torrents.me includes links to many proxies for other well-known sites that infringe or facilitate the infringement of copyright in audio-visual websites including the Pirate Bay.’¹⁸⁶

G. *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434.

In the 2018 case of *Television Broadcasts Limited v Telstra Corporation Limited*. Nicholas J considered applications for copyright site-blocking by TVB – a free to air television broadcasters based in Hong Kong, China. TVB operated five TV channels in Hong Kong – including Jade, J2, TVB News, Pearl, and TVB Finance and Information.¹⁸⁷ The application related to various online locations, which communicated with set top streaming boxes, which enabled a user to receive TVB’s television broadcasts in Australia, without having to pay a subscription fee. A1; BlueTV; EV Pad Pro; FunTV; hTV5; MoonBox C; and Unblock TV Gen 3.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

¹⁸² *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434.

Nicholas J considered the primary purpose test. The judge commented: ‘The evidence shows that TVB, TVBO and the third party copyright owners or exclusive licensees I have referred to have not given any such permission to the operators of either the target online locations or the streaming devices from which the relevant content is streamed.’¹⁸⁸ The judge observed: ‘I am also satisfied that the primary purpose of the target online locations is to facilitate the infringement of copyright by making such material available online in Australia in circumstances where this occurs without the consent of the relevant copyright owners.’¹⁸⁹

Nicholas J also took into account a number of discretionary factors: ‘As to the various considerations relevant to the exercise of the discretion in this particular matter, I think the following matters should be given most weight in determining whether to make the blocking orders sought: flagrancy of the infringements; impact on persons likely to be affected; availability of other remedies; proportionality of response; and compliance with s 115A.’¹⁹⁰ The judge held: ‘I regard as flagrant the copyright infringements of the persons who have made the TVB broadcasts available online, including those persons responsible for the establishment and maintenance of the target online locations that make it possible for users of the streaming devices to view the TVB broadcasts either in close to real time or at some later time using the VOD service.’¹⁹¹ The judge observed: ‘The unfairness inherent in this form of ‘free riding’ extends not just to the copyright owners, but also to the Australian subscribers to the authorised TVB pay-tv service operated by TVBA.’¹⁹² The judge held: ‘As the evidence shows, the operators of the target online locations, who are almost certainly based overseas, are virtually impossible to track down.’¹⁹³ In his view, ‘Obtaining any form of effective injunctive relief against them in Australia is not a realistic option.’ The judge held that site-blocking was a proportionate response: ‘I accept that access to some of content that was originally broadcast (ie. which was not pre-recorded) in which copyright does not subsist may also be blocked, but my strong impression from the evidence is that this is likely to constitute a relatively small proportion of the total content the subject of TVB’s television broadcasts in Hong Kong.’¹⁹⁴ The judge also noted that the applicants had made reasonable efforts to ascertain the identity and address of the operators of the target online operators.

H. Music Rights Australia

In 2019, Music Rights Australia – and other music industry members – have sought site-blocking orders against Australian internet services providers to block their customers from accessing ‘stream-ripping’ services.¹⁹⁵ ‘Stream-

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434

¹⁹⁵ Rohan Pearce, ‘Australian Music Industry Wants ISPs to Block ‘Stream Ripping’ Sites: Music Labels Launch New Legal Action’, *Computerworld*, 9 January 2019,

ripping' sites enable users to record and save audio streamed from a service such as YouTube or Spotify. A Music Rights Australia spokesperson was quoted by *Computerworld*: 'We use this effective and efficient no fault remedy to block the illegal sites which undermine the many licensed online services which give music fans the music they love where, when and how they want to hear it'.¹⁹⁶ Barrister Rob Clark appearing for the applicants said that the action is 'somewhat different' to past site-blocking cases 'in so far as the online locations don't themselves provide content or the means to get content [such as] BitTorrent or streaming sites.'¹⁹⁷

The music industry was successful in their efforts to obtain court orders.¹⁹⁸ Perram J issued orders instructing Telstra, Foxtel, Optus, TPG and Vodafone to take reasonable steps to stop their customers from accessing four 'stream ripping' services.

I. International Media Distribution and New TV

In March 2019, representatives of International Media Distribution and Lebanese TV station New TV (Al Jadeed) appeared before the Federal Court of Australia, bringing a copyright action seeking to block the use in Australia of the Reelplay set-top box.¹⁹⁹ The judge told the legal representatives to expect scrutiny of their attempt to block online services associated with an IPTV set-top box. Burley J stressed said that he would pay 'particularly close attention' to proof of service and that the applicants should ensure that 'all the requirements' of Section 115a of the Copyright Act were met.²⁰⁰ In August 2019, the coalition of three international distributors dropped its action to block online services used by the Reelplay set-top box.²⁰¹

J. Subtitling case

In late 2018, the Federal Court of Australia has granted an application for site-blocking. The application was brought by a large group of entertainment companies including Roadshow Films and major movie studios.²⁰² Other

<https://www.computerworld.com.au/article/656069/australian-music-industry-wants-isps-block-stream-ripping-sites/>

¹⁹⁶ Ibid.

¹⁹⁷ Rohan Pearce, 'Music industry tackles illicit challenge to streaming services' *ComputerWorld*, 5 February 2019,

<http://www.computerworld.com.au/article/657102/music-industry-tackles-illicit-challenge-streaming-services/>

¹⁹⁸ Rohan Pearce, 'Telcos Block Stream Ripping Services', *ComputerWorld*, 16 May 2019, <https://www.computerworld.com.au/article/661708/telcos-block-stream-ripping-sites/>

¹⁹⁹ Rohan Pearce, 'TV companies told to have their ducks in a row for set-top box case - TV distributors target Reelplay IPTV set-top box', *Computer World*, 22 March 2019, <https://www.computerworld.com.au/article/659154/tv-companies-told-to-have-their-ducks-in-a-row-for-set-top-box-case/>

²⁰⁰ Ibid.

²⁰¹ Rohan Pearce, 'TV companies ditch effort to sabotage set-top box: Attempt to block Reelplay withdrawn', *Computerworld*, 14 August 2019, <https://www.computerworld.com.au/article/665279/tv-companies-ditch-effort-sabotage-set-top-box/>

²⁰² Corinne Reichert, 'Subtitle Piracy: Will It Be Enforced in Australia?', *ZDNet*, 14 December 2018, <https://zd.net/2UBOs7A>; and Rohan Pearce, 'Unauthorised subtitle services to be

participants included Television Broadcasts (TVB) Limited and its local subsidiary, as well as Australian distributor Madman Entertainment Pty Limited and Tokyo Broadcasting System Television, Inc. In addition to standard sites, the application targeted Addic7ed, Yifysubtitles, Opensubtitles.org and Subscene, which provide subtitle downloads that can be used with copies of films and TV shows. The question of whether subtitles constitute a literary work was debated in the Federal Court of Australia. Nicholas J granted the application.²⁰³ There has been a discussion of the scope of the order.²⁰⁴

K. Madman cases

In 2019, group of companies led by Village Roadshow and including major film studios as well as Australian distributor Madman sought orders against sites that allegedly offer illicit streaming or downloads of copyright material, or link to other locations that provide streaming or download services.²⁰⁵ The application listed 21 movies (including *The Lego Movie*, *Cinderella*, *Toy Story*, *Tron: Legacy* and *Kingsman: The Secret Service*), as well as episodes of 'The Big Bang Theory', 'Shameless' and 'Dagashi Kashi'. According to the application for injunction, the target sites offer streaming or downloads of copyright material, or they link to other services that provide streaming or downloads. This provided a test case for the new regime passed in the *Copyright Amendment (Online Infringement) Act 2018* (Cth).

There has already been efforts to test the efficacy of the new regime in June 2019.²⁰⁶ Nicholas J granted the site-blocking orders.²⁰⁷ The interesting part of this dispute was that Dr Socrates Dimitriadis, the operator of Greek-Movies.com website, questioned the orders. Nicholas J held:

The facilitation of the copyright infringement is in my opinion flagrant. Dr Dimitriadis does not deny that many of the films catalogued on his website are protected by copyright and that visitors to his website who download such films using the links he has created will do so in breach of copyright. Dr Dimitriadis has authorised the infringement of

blocked: Court grants largest siteblock injunction', *Computerworld*, 20 December 2018, <http://www.computerworld.com.au/article/651054/unauthorised-subtitle-services-blocked-court-grants-largest-anti-piracy-injunction/>

²⁰³ *Roadshow Films Pty Ltd v Telstra Corporation Limited* NSD1246/2018 (20 December 2018)

<https://www.comcourts.gov.au/file/Federal/P/NSD1246/2018/3828446/event/29683063/document/1312463>

²⁰⁴ Ernesto, 'Australian Court Orders ISPs to Block 181 'Pirate' Domains, Including Subtitle Sites', *TorrentFreak*, 20 December 2018, <https://torrentfreak.com/australian-court-orders-isps-to-block-181-pirate-domains-including-subtitle-sites-181220/>

²⁰⁵ Rohan Pearce, 'Nine entertainment companies have joined forces in the latest push to block Australians from accessing websites allegedly associated with online copyright infringement', *Computerworld*, 9 January 2019, <http://www.computerworld.com.au/article/656058/film-studios-continue-waging-war-piracy/>

²⁰⁶ Rohan Pearce, 'Judge Rejects Plea To Spare Website from Anti-Piracy Block', *ComputerWorld*, 12 June 2019, <https://www.computerworld.com.au/article/662796/judge-rejects-plea-spare-website-from-anti-piracy-block/>

²⁰⁷ *Roadshow Films Pty Limited v Telstra Corporation Limited* [2019] FCA 885 (12 June 2019).

copyright in films that are catalogued on his website where such films are downloaded by Australian users using links he has created. The fact that Dr Dimitriadis does not host the copyright material on his own website or server is not inconsistent with that proposition.²⁰⁸

The judge observed that ‘Dr Dimitriadis has not proposed any alternative remedy or resolution of the applicants’ complaints with respect to his website’ and ‘he has not offered to remove links to infringing content or to take any other step that might lessen the amount of infringing material that may be accessed using the facilities made available at his website’.²⁰⁹ Moreover, he ruled: ‘Nor has he identified any hardship or inconvenience that will be suffered by any users of his website in Australia if a blocking order is made.’²¹⁰

In August 2019, Thawley J handed down a judgment in a matter involving Roadshow, TVB Applicants, and Madman.²¹¹ Amongst other things, the case involved the work, *Tokyo Ghoul*, distributed by Madman. The judge held: ‘I am satisfied, having regard to the matters mentioned and the volume and flagrancy of the infringements and the facilitation of infringements, that disabling access to the various Target Online Locations is a proportionate response and that it is in the public interest.’²¹²

Strikingly, Netflix’s production arm, Netflix Studios, has backed legal action in respect of site-blocking in 2019.²¹³ The company has been concerned about copyright infringement of episodes of *Santa Clarita Diet* and *Stranger Things*.

Part 3 The Copyright Amendment (Online Infringement) Act 2018 (Cth)

The last 44th Australian Parliament hosted a ‘Parliamentary Friends of the Internet’. Apparently, the aim of this bipartisan Group was ‘to support the development, innovation and use of the internet for the benefit of all Australians’. The key contacts of this organisation were Senator Chris Ketter; Mrs Jane Prentice MP; and Senator Scott Ludlam. The ‘Parliamentary Friends of the Internet’ seems to have been dissolved in the 45th Australian Parliament. The disappearance of this organisation perhaps reflects a new hostility towards information technology in the Australian Parliament. The Australian Parliament seems to have de-friended the Internet.

It has been troubling times in respect of internet policy in Australia. While promising digital transformation, the Australian Parliament has enacted rather dystopian laws of late. Privacy-grabbing data retention laws have been passed. As predicated, such surveillance laws have been expanded in their

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ *Roadshow Films Pty Limited v Telstra Corporation Limited* [2019] FCA 1328 (19 August 2019)

²¹² Ibid.

²¹³ Rohan Pearce, ‘Netflix Backs Efforts to Block Pirate Sites’, *ComputerWorld*, 3 June 2019, <https://www.computerworld.com.au/article/662385/netflix-backs-efforts-block-pirate-sites/>

application, soon after their enactment. The Census was bedevilled by problems in respect of privacy and information security.²¹⁴ There have been concerns about the cruel and capricious RoboDebt laws.²¹⁵ The opt-out system for My Health Record has faced criticism for its disrespect for privacy, medical confidentiality, and information security.²¹⁶ The Australian Government has also been seeking to pass anti-encryption laws in a so-called ‘War on maths’.²¹⁷ There has been a strange effort to regulate e-commerce and the internet through the means of a regional trade agreement in the *Trans-Pacific Partnership*.²¹⁸ There have been radical new criminal laws passed in respect of the sharing of abhorrent violent material.²¹⁹ To top it off, the Australian Government sought to expand rather draconian site-blocking laws in respect of copyright law, with little time for scrutiny or consideration or consultation surrounding the bill. Given the recent disastrous experiences with internet policy, perhaps the Australian Parliament should have exercised some due diligence in subjecting the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)* to some close and rigorous examination.

Instead, there was a short review conducted in-house by the Department of Communications and the Arts.²²⁰ There were submissions from stakeholders – such as APRA, AMCOS, the Australian Copyright Council, Australian Copyright Council, the Australian Digital Alliance, Australian film and TV bodies, Australian music industry bodies, the Coalition of Major and Professional Participation Sports, the Communications Alliance, Digital Rights Watch, Fetch TV, Foxtel, Free TV Australia, Optus, Pirate Party Australia, Screenrights, Telstra, the Law Society of New South Wales, and Village Roadshow.

²¹⁴ Monique Mann and Matthew Rimmer, ‘Submission to the Senate Economics References Committee on the 2016 Census’, Australian Senate, 2016, <https://eprints.qut.edu.au/99687/>

²¹⁵ Luke Henriques-Gomes, ‘Centrelink Cancels 40,000 Robodebts New Figures Reveal: Robodebt Faces Landmark Challenge Over ‘Crude’ Income Calculations’, *The Guardian*, 6 February 2019, <https://www.theguardian.com/australia-news/2019/feb/06/robodebt-faces-landmark-legal-challenge-over-crude-income-calculations> and Luke Henriques-Gomes, ‘Centrelink Drops Woman’s Robodebt in Second Case Set to Challenge Legality of Scheme’, *The Guardian*, 5 September 2019, <https://www.theguardian.com/australia-news/2019/sep/06/centrelink-wipes-robodebt-in-second-case-set-to-challenge-legality-of-scheme>

²¹⁶ Senate Community Affairs References Committee, *My Health Record System*, Canberra: Australian Parliament, October 2018, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/MyHealthRecordsystem/Final_Report

²¹⁷ *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 (Cth)*; and Stephanie Palmer-Derrien, ‘IT Will Essentially Put Them Out of Business’: Aussie AA Bill a Threat to Local Startups’, *Smart Company*, 10 December 2018, <https://www.smartcompany.com.au/startupsmart/news/encryption-aa-bill-threat-startups/>

²¹⁸ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, <https://dfat.gov.au/trade/agreements/in-force/cptpp/pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.aspx>

²¹⁹ George Nott, ‘Terror Streaming Bill ‘Rams Through’ Parliament’, *Computerworld*, 4 April 2019, <https://www.computerworld.com.au/article/659660/terror-streaming-bill-rams-through-senate/>

²²⁰ Department of Communications and the Arts, *Review of the Copyright Online Infringement Amendment*.

The House of Representatives only provided cursory consideration of the *Copyright Amendment (Online Infringement) Act 2018* (Cth). There was no committee inquiry into the topic. The speeches given in the House of Representatives on the legislation lacked any depth of analysis of the legislative changes proposed, or their larger public policy implications. It is remarkable that the Environment and Communications Legislation Committee provided only a week for stakeholders to comment upon the complex and radical *Copyright Amendment (Online Infringement) Act 2018* (Cth). It was equally surprising that the Environment and Communications Legislation Committee spent two weeks investigating the topic, before reporting to the Australian Parliament.

A. The Discourse of ‘Piracy’

In a press release, the Minister for Communications and the Arts Senator Mitch Fifield commented upon the *Copyright Amendment (Online Infringement) Act 2018* (Cth):

Online piracy is theft. Downloading or streaming a pirated movie or TV show is no different to stealing a DVD from a shop. The government is providing enormous support to creative industries, including through small business tax relief and our Location incentive program. We can't have that good work undone by allowing local creators to be victims of online piracy. We are always looking at what more we can do, and we want copyright owners to have the right tools at their disposal to fight online piracy.²²¹

Including the title, this press release mentions ‘piracy’ eleven times. The Ministry press release asserted: ‘Online piracy hurts Australia’s creative industries and is particularly damaging to our local film and television production sector.’²²² The curious thing about the press release is that echoes the language and the discourse of the copyright industries in the debate over site-blocking.

This statement confuses and conflates property law and intellectual property law. There is a significant difference between physical property and intangible property. This statement also mixes up civil and criminal law. Although the Minister invokes the language of theft, the *Copyright Amendment (Online Infringement) Act 2018* (Cth) does not relate to criminal sanctions in respect of copyright infringement. The legislation concerns civil remedies. The High Court of Australia in the *Stevens v Sony* litigation expressed its concern about loose language around piracy, theft, and misappropriation in copyright matters.²²³ The judges expressed their preference for the much more neutral language of copyright infringement.

The Hon. Graham Perrett from the Australian Labor Party also lacks precision in terms of his discussion of the topic, using the terms ‘copyright

²²¹ Senator Mitch Fifield, ‘Taking the Fight to Online Pirates’, Minister for Communications and the Arts, 18 October 2018.

²²² *Ibid.*

²²³ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

infringement', 'piracy' and 'theft' interchangeably.²²⁴ His speech confounds and conflates terms related to property law and intellectual property law. The Shadow Attorney-General Mark Dreyfus is also careless in his use of language. He lumps the 'theft of intellectual property' together with a whole range of other unrelated regulatory issues: 'We in Labor understand the importance of effective regulation in this area, whether it's to stop the selling of illegal weapons, to shut down the vile trade in child pornography, to prevent online radicalisation of Australians by terrorist groups or, as this bill does, to prevent the theft of intellectual property.'²²⁵ The copyright bill under discussion, though, relates to civil remedies, not criminal offences. The copyright bill before the Parliament is unrelated to the selling of illegal weapons, matters of pornography, or terrorist offences.

The Hon. Ed Husic MP has taken issue with the exaggerated rhetoric employed by copyright industries:

Some of the arguments these rights holders use are incredible. Graham Burke, from Village Roadshow, likened Google to big tobacco. That's what Graham Burke said as a rights holder. It's embarrassing that that is the level of advocacy by rights holders. But this is what these people think.²²⁶

As William Patry has observed, copyright owners have often deployed rhetoric to create a moral panic in order to push policy-makers towards passing new laws.²²⁷

B. Legislative Drafting

The original *Copyright Amendment (Online Infringement) Act 2015* (Cth) was rushed through Parliament before the end of the winter sitting.

The Federal Court of Australia has considered the parameters of the current site-blocking regime in a series of cases.²²⁸ Such judicial consideration of the legislation has not necessarily resolved some of its uncertainties and ambiguities.

The High Court of Australia has been critical in the past of poor legislative drafting in respect of digital copyright. In the case of *Stevens v. Sony*, Gleeson,

²²⁴ The Hon. Graham Perrett, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10907.

²²⁵ The Hon. Mark Dreyfus, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10894.

²²⁶ The Hon. Ed Husic MP 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.

²²⁷ William Patry, *Moral Panics and the Copyright Wars* (Oxford University Press, 2009) and William Patry, *How to Fix Copyright* (Oxford University Press, 2012).

²²⁸ See for instance: *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041; *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582; *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933; and *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434.

Gummow, Heydon and Hayne JJ commented on the difficulties of engaging in the statutory interpretation of the Digital Agenda Act: ‘Copyright legislation, both in Australia and elsewhere, gives rise to difficult questions of construction.’²²⁹ In the same case, Kirby J reflected upon the difficulties of making sense of the legislation:

‘Copyright’, it has been rightly declared, ‘is one of the great balancing acts of the law. Many balls are in play and many interests are in conflict.’ To the traditional problems of resolving such conflicts must be added, in the present age, the difficulties of applying the conventional model of copyright law to subject matters for which that model is not wholly appropriate; adjusting it to the ‘implications of the online environment’; and adapting it to international pressures that may reflect economic and legal interests that do not fit comfortably into the local constitutional and legal environment. ‘The dance proceeds’, as Professor Ricketson has observed; but the multiplicity of participants and interests now involved in its rhythms inevitably affect the contemporary judicial task of resolving contested questions of interpretation of the Copyright Act.²³⁰

No doubt the High Court of Australia may encounter similar problems if it were to interpret the *Copyright Amendment (Online Infringement) Act 2015* (Cth) and the *Copyright Amendment (Online Infringement) Act 2018* (Cth) (which have been much less carefully designed than the Digital Agenda Act). Indeed, the problem with the *Copyright Amendment (Online Infringement) Act 2015* (Cth) and the *Copyright Amendment (Online Infringement) Act 2018* (Cth) has been that the regime has been designed to please a narrow group of copyright owners – rather than take into account what Kirby J describes as ‘the multiplicity of participants and interests now involved in its rhythms’.²³¹

C. The Efficacy of Site-Blocking

The *Copyright Amendment (Online Infringement) Act 2018* (Cth) radically expands the availability of site-blocking orders. The proposed threshold of ‘primary effect’ is a much lower threshold than ‘primary purpose’. Copyright holders will be able to much more easily obtain site-blocking orders – even against sites, which have mixed purposes.

The Minister for Communications and the Arts, Senator Mitch Fifield, argued that the regime had sufficient safeguards to discourage overreach by copyright owners. He contended:

Some also expressed concern about the primary purpose or primary effect test—that it would enable sites such as Pinterest and Google Translate to be captured by a copyright-blocking injunction. This is highly unlikely to occur, particularly as the court may consider, under subsection 115A(5), a number of factors when determining whether to grant an injunction, including proportionality and public interest. It’s

²²⁹ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

²³⁰ *Ibid.*

²³¹ *Ibid.*

difficult to imagine that legitimate websites with other purposes or effects, such as social media websites and translation websites, would satisfy this test.²³²

Fifield argued: ‘The website-blocking scheme simply provides a fallback if voluntary measures prove to be insufficient or are not implemented broadly across the industry.’²³³

Seeking to justify the new legislative amendments, Minister Paul Fletcher has pointed towards the film industry’s own evidence in respect of site-blocking: ‘Research commissioned by the film industry shows that traffic to blocked sites in the months after blocking dropped by around 50 per cent.’²³⁴

Associate Professor Nicolas Suzor noted: ‘The report said traffic to blocked sites has gone down, but there's no way of knowing if people are just accessing proxy sites or using a VPN.’²³⁵ In any case, industry self-reporting seems to be weak evidence upon which to base new copyright policies.

Digital Rights Watch has questioned the efficacy of the *Copyright Amendment (Online Infringement) Act 2015 (Cth)*. In consultations with the Department, Digital Rights Watch commented:

The effectiveness of website blocking is difficult to assess. The fact that the system is relatively cumbersome and extremely easy to circumvent means that it is unlikely to impose any significant deterrent to the set of consumers who are highly motivated to infringe. For the bulk of ordinary users who we know would prefer to pay for content if it is available, we believe that it is vastly inferior to changes in the marketplace that make legitimate access to content easier and cheaper.²³⁶

A number of journalists have pointed out in the course of site-blocking copyright litigation that such action seemed futile given the protean nature of the Internet.

²³² Senator Mitch Fifield, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, Australian Senate, 28 November 2018, https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/c213941c-eb14-4c54-a8dc-11b938aad7dc/&sid=0000

²³³ Ibid.

²³⁴ The Hon. Paul Fletcher, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, the House of Representatives, 24 October 2018, 10911,

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F4fa4c3cb-5541-4547-98c1-81b998c56718%2F0038%22>

²³⁵ Nicolas Suzor cited in Triple J, ‘Pirating Films and Shows in Australia is About to Get a Little Harder’, ABC, 18 October 2018,

<https://www.abc.net.au/triplej/programs/hack/pirating-films-and-shows-in-australia-about-to-get-little-harder/10393216>

²³⁶ Digital Rights Watch, ‘Submission to Review of the Copyright Online Infringement Amendment’, Copyright Consultation, Department of Communications and the Arts, 19 March 2018,

https://www.communications.gov.au/sites/g/files/net301/f/submissions/digital_rights_wat.ch.pdf

The Hon. Ed Husic MP doubted that site-blocking and search-filtering will be effective means of addressing copyright infringement:

The problem is that the bloated, greedy, resistant-to-change rights holders will always refuse to reform in this space. Copyright reform is used as their way to shield themselves from the modern era, to shield themselves from new ways of doing things. The internet is not a challenge to rights holders; the mentality of rights holders to move with the times is the biggest challenge to rights holders in this country. Piracy is their go-to lever—'We're all about fighting pirates.' Apparently there are pirates all over the place who we have to be watching out for, who are ready to rip people off, who are demonising these hardworking rights holders. We get this argument all the time. These rights holders think that, by constantly using legal mechanisms through this place and elsewhere, piracy will disappear. The reality is that piracy is a reflection of a market failure.²³⁷

He observed: 'What we are providing for with these types of bills, which the rights holders all champion, support and claim credit for, is a form of regulatory hallucinogen, where they think that, if they get this type of regulatory reform through, piracy will disappear. No, it won't.'²³⁸ Husic concluded: 'When rights holders get serious about the consumer offering and the way in which they're helping consumers access content in a much more affordable way, that will have a bigger impact.'²³⁹

In the House of Representatives, a number of MPs sought to suggest that the amendments to Australia's copyright laws were only minor or small or modest. The Hon. Julie Owens maintained that the *Copyright Amendment (Online Infringement) Act 2018 (Cth)* 'is actually quite a small but sensible change to our copyright law, which seeks to protect rights-holders in a time of incredible transition.'²⁴⁰ This seems to be a serious understatement of the powers provided by the legislation. Cory Doctorow has highlighted how the legislation radically expands the scope of the site-blocking power:

The current Australian censorship system allows rightsholders to secure court orders requiring the country's ISPs to block sites whose 'primary purpose' is to 'is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).' Under the new proposal, rightsholders will be able to demand blocks for sites whose 'primary effect' is copyright infringement.²⁴¹

²³⁷ The Hon. Ed Husic MP, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ The Hon. Julie Owens, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10909.

²⁴¹ Cory Doctorow, 'SOPA.au: Australia is the Testbed for the World's Most Extreme Copyright Blocks', *Electronic Frontier Foundation*, 1 November 2018, <https://www.eff.org/deeplinks/2018/11/sopaa-australia-testbed-worlds-most-extreme-copyright-blocks>

Cory Doctorow has worried about what the operation of the ‘primary effects’ test in practice. He observed that copyright owners could seek to use such site-blocking powers against sites, with mixed purposes – such as YouTube: ‘This is the norm that the entertainment industry is pushing for all over the world: a service’s ‘primary effect’ is infringing if there is a significant amount of infringement taking place on it, even if ‘a significant amount’ is only a small percentage of the overall activity.’²⁴²

Cory Doctorow has also highlighted the dangers of private copyright owners being able to filter search engine results. He noted: ‘What’s more, rightsholders will be able to secure injunctions against search engines, forcing them to delist search-results that refer to the banned site.’²⁴³ Cory Doctorow observed:

The new Australian copyright proposal allows rightsholders to dictate search-results to the likes of Bing, DuckDuckGo, and Google... The copyright industry’s 2015 position was that blocking worked. The 2018 position is that blocking doesn’t work: you have to keep the existence and location of infringing files a secret, too.²⁴⁴

Doctorow notes that such a regime is ineffective: ‘Users can still use VPNs to see search-results that are censored in Australia, and also use the VPNs to bypass their ISPs’ blocks.’²⁴⁵ He also comments that such a regime can also be deceptive: ‘But because search-results are blocked in Australia, ordinary Australians trying to do legitimate things will not be able to know what is blocked in their country, and will thus not be able to push back against abusive or sloppy overblocking.’²⁴⁶ The support of the Coalition and the Australian Labor Party for such an Internet filter does create cognitive dissonance. Having espoused the importance of civil liberties and free speech and the rule of law, it seems surprising that the Liberal Party would countenance such a broad Internet Filter. It also appears that the Australian Labor Party has not learnt from its past lessons of pursuing an ill-fated Internet Filter under the direction of Stephen Conroy.

The *Copyright Amendment (Online Infringement) Act 2018* (Cth) enables copyright owners to filter search engine results by compelling search engines to de-index results. Such a proposal is far too broad and wide in its intent and its impact. There could be dangers involved in respect of abuse of such copyright powers. The *Copyright Amendment (Online Infringement) Act 2018* (Cth) also seeks to target cyber-lockers. Such a proposal could have a negative impact upon cloud computing and storage services.

Cory Doctorow also observes that the extra-territorial nature of the site-blocking regime is extremely problematic given the diversity of copyright regimes throughout the world. He notes that there is a lack of harmonisation in respect of copyright term and duration: ‘But it gets worse: the 2015 and 2018 censorship systems don’t limit themselves to censoring sites that

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

infringe Australian copyright: they also ban sites that violate any copyright in the world'.²⁴⁷ This particular aspect of the legislation seems open to challenge – as there may be no clear nexus between Australia and the copyright infringement being complained of.

The *Copyright Amendment (Online Infringement) Act 2018* (Cth) lacks appropriate safeguards to address the problem of copyright abuse. Research by Professor Jennifer Urban from Berkeley Law School has highlighted the problems of abuse of takedown notices in respect of the *Digital Millennium Copyright Act 1998* (US).²⁴⁸ Similar problems could arise in respect of the radical new powers of site-blocking, search-filtering, and controlling cyber-lockers. Cory Doctorow noted: 'The final piece of the new copyright proposal is to allow rightsholders to demand blocks for sites, services, addresses and domains that 'provide access to' blocked sites, without a new court order.'²⁴⁹ He observed: 'This language is potentially broad enough to ban VPNs altogether, as well as a wide range of general-purpose tools such as proxy servers, automated translation engines, content distribution networks - services that facilitate access to everything, including (but not only) things blocked by the copyright censorship orders.'²⁵⁰ Doctorow noted: 'If this power is wielded unwisely, it could be used to block access to major pieces of internet infrastructure'.²⁵¹ He commented: 'So this is the kind of order that you'd want used sparingly, with close oversight, but the new rules make these blocks the easiest to procure: under the new proposal, rightsholders can block anything they like, without going to court and showing proof of infringement of any kind, simply by saying that they're trying to shut down a service that 'provides access' to something already banned.'²⁵²

The Shadow Attorney-General Mark Dreyfus is prone to talking up minor safeguards in the face of the introduction of radical new technology legislation. In respect of this copyright legislation, he maintains: 'We in Labor are satisfied that the bill contains adequate safeguards to prevent its misuse.'²⁵³ However, he can identify little in the way of actual substantial safeguards. Dreyfus observes that 'this bill includes a measure that will enable a minister, by disallowable instrument, to declare that particular online search engine providers or a class of those providers are exempt from the scheme.'²⁵⁴ He insists: 'This last measure is essentially a safeguard to ensure that

²⁴⁷ Cory Doctorow, 'SOPA.au: Australia is the Testbed for the World's Most Extreme Copyright Blocks', *Electronic Frontier Foundation*, 1 November 2018, <https://www.eff.org/deeplinks/2018/11/sopaaau-australia-testbed-worlds-most-extreme-copyright-blocks>

²⁴⁸ Jennifer Urban, Brianna Schofield, and Joe Karaganis, 'Notice and Takedown in Everyday Practice', https://works.bepress.com/jennifer_urban/34/

²⁴⁹ Cory Doctorow, 'SOPA.au: Australia is the Testbed for the World's Most Extreme Copyright Blocks', *Electronic Frontier Foundation*, 1 November 2018, <https://www.eff.org/deeplinks/2018/11/sopaaau-australia-testbed-worlds-most-extreme-copyright-blocks>

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² The Hon. Mark Dreyfus, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10894.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*

injunctions are directed only against larger service providers facilitating the infringing of copyright.²⁵⁵ Much like Dreyfus' limited, weak and ineffectual safeguards for the data retention regime, this measure seems speculative and hypothetical. Protection against site-blocking orders should not be at the discretion of a Minister.

In her second reading speech, the Shadow Minister for Communications Michelle Rowland refers to the work of Professor Kathy Bowrey, Professor Kim Weatherall and Professor Lawrence Lessig in her speech in favour of site-blocking.²⁵⁶ She neglects to mention that all these scholarly authorities have been critical of site-blocking as a measure to regulate copyright law.

Professor Kathy Bowrey's book *Law and Internet Cultures* is an ardent critique of the policies and practices internet censorship.²⁵⁷ The book cannot be cited as providing intellectual legitimation of a regime of site-blocking and search-filtering.

Likewise, Professor Kimberlee Weatherall has been highly critical of the model put forward in the *Stop Online Piracy Act*.²⁵⁸ She commented upon the United States regime: 'SOPA created a sweeping set of rules that allowed for 'execution' of a website on accusation, and without any real consideration of whether it was a proportional remedy in the particular case, or appropriate from the perspective of international comity'.²⁵⁹ It is a shame that her work has been misrepresented in the speech by Michelle Rowland.

Indeed, Professor Lawrence Lessig was one of the key opponents of the *Stop Online Piracy Act* in the United States.²⁶⁰ Far from endorsing site-blocking, he has been one of its most vociferous critics. Rather than supporting crude regulation of intermediaries, he has argued for a much more subtle and nuanced understanding of regulation of the internet.²⁶¹

D. Human Rights

The explanatory memorandum asserted that the *Copyright Amendment (Online Infringement) Act 2018 (Cth)* is compatible with human rights principles relating to freedom of speech.²⁶² However, copyright site-blocking

²⁵⁵ Ibid.

²⁵⁶ The Hon. Michelle Rowland, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10903.

²⁵⁷ Kathy Bowrey, *Law and Internet Cultures* (Cambridge University Press, 2005).

²⁵⁸ Kimberlee Weatherall, 'Evaluating SOPA: Who Should Enforce IP Online' (2012) 62 (4) *Telecommunications Journal of Australia* 59.1 to 59.13.

²⁵⁹ Ibid, 59.13.

²⁶⁰ Alex Fitzpatrick, 'SOPA 2.0 Why the Fight for Internet Freedom is Far From Over', *Mashable*, 6 April 2012, <https://mashable.com/2012/04/06/sopa-lawrence-lessig/#C7z6V2JU88qI>

²⁶¹ Lawrence Lessig, *Code and Other Laws of Cyberspace, Version 2.0*, New York: Basic Books, 2006; Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (Vintage, 2002); and Lawrence Lessig, *Free Culture*, and Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press, 2008).

²⁶² *Copyright Amendment (Online Infringement) Bill 2018 – Explanatory Memorandum* (Parliament of Australia)

has often been discussed as a form of censorship. Site-blocking poses challenges for freedom of speech, freedom of expression, and freedom of political communication. Cory Doctorow comments: 'Australia has become a testbed for extreme copyright enforcement and the entertainment business in the twenty-first century.'²⁶³ He observed that 'Australia may be a net copyright importer, but it is in imminent danger of becoming a net copyright censorship exporter'.²⁶⁴

The architects of the Internet – such as Sir Tim Berners-Lee, Vint Cerf, and Brewster Kahle – have been alarmed by the proclivity with which national governments have sought to interfere with the free and open architecture of the Internet. Such designers have been concerned about the impact of site-blocking and surveillance upon the operation of the Internet.

The human rights assessment of the *Copyright Amendment (Online Infringement) Act 2018* (Cth) in the explanatory memorandum in terms of a right to a fair hearing is also flawed. The litigation thus far has been involved contests between copyright owners and intermediaries.²⁶⁵ Site holders have not appeared. The site-blocking regime has lacked proper representation of community interests and public interests.

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The human rights assessment of the *Copyright Amendment (Online Infringement) Act 2018* (Cth) in terms of cultural rights is also strained. The site-blocking power has thus far been used by major corporations in the film, television, and music industries. The site-blocking power has not been deployed by creative artists. If the site-blocking power is abused, there could be censorship of artistic expression and creative freedom.

The human rights assessment of the *Copyright Amendment (Online Infringement) Act 2018* (Cth) in respect of freedom of speech and freedom of expression is inadequate. There has been a failure to consider the larger implications of this censorious legislation for a free and open Internet. Sir Tim Berners-Lee has highlighted the dangers of site-blocking and surveillance for the architecture of the Internet. Moreover, there are significant dangers of the site-blocking power being deployed in respect of copyright works – with

²⁶³ Cory Doctorow, 'SOPA.au: Australia is the Testbed for the World's Most Extreme Copyright Blocks', *Electronic Frontier Foundation*, 1 November 2018, <https://www.eff.org/deeplinks/2018/11/sopaaau-australia-testbed-worlds-most-extreme-copyright-blocks>

²⁶⁴ *Ibid.*

²⁶⁵ See for instance - *Foxtel Management Pty Limited v TPG Internet Pty Ltd* [2017] FCA 1041; *Roadshow Films Pty Limited v Telstra Corporation Limited* [2018] FCA 582; *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933; and *Television Broadcasts Limited v Telstra Corporation Limited* [2018] FCA 1434.

political content. The further expansion of site-blocking by the Australian Parliament will have larger implications for freedom of speech and expression in the digital age.

The recent work of the Australian Human Rights Commission has highlighted the various impacts of digital technologies upon political freedoms, civil liberties, and human rights.²⁶⁶ Australia does need a bill of rights to better protect the freedoms of Australian citizens. This is particularly important in the context of regulation of the Internet, search engines, and cloud computing.

E. Cultural Justifications

In his concluding speech, the Minister for Communications and the Arts Senator Mitch Fifield said that the legislation would modernise Australia's copyright regime:

The bill will ensure that website blocking remains an effective means for copyright owners to address large-scale copyright infringement by overseas operators. Together with small business tax relief and location incentives, these changes will help our creative industries to produce Australian content and tell Australian stories. They will also support investments that have made it possible for Australians to enjoy their favourite films, TV shows and music where and when they want.²⁶⁷

Senator Mitch Fifield argued: 'This bill is an important reform to Australia's copyright framework that will ensure that the Australian creative sector can continue to invest in quality content and stories.'²⁶⁸

The human rights assessment of the *Copyright Amendment (Online Infringement) Act 2018 (Cth)* in terms of cultural rights is rather hyperbolic: 'The proposed amendments would promote the right to benefit from the protection of the moral or material interests in a production, by strengthening the protection provided to copyright owners in enforcing their copyright'.²⁶⁹ A number of politicians – such as the Hon. Graham Perrett, the Hon. Julie Owens, the Hon. Mark Dreyfus, and the Hon. Nicolle Flint – also try to make idealistic romantic arguments about how site-blocking will be of benefit to creative artists.²⁷⁰ However, there is little evidence of a causal relationship

²⁶⁶ Australian Human Rights Commission, 'Protecting Human Rights in the Era of Artificial Intelligence', 24 July 2018, <https://www.humanrights.gov.au/news/stories/protecting-human-rights-era-artificial-intelligence>; Australian Human Rights Commission and World Economic Forum, *White Paper on Artificial Intelligence: Governance and Leadership*, Sydney: Australian Human Rights Commission, 2019, https://tech.humanrights.gov.au/sites/default/files/2019-02/AHRC_WEF_AI_WhitePaper2019.pdf

²⁶⁷ Senator Mitch Fifield, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, Australian Senate, 28 November 2018.

²⁶⁸ *Ibid.*

²⁶⁹ *Copyright Amendment (Online Infringement) Bill 2018 – Explanatory Memorandum* https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Ffr6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ebd4%22

²⁷⁰ The Hon. Graham Perrett, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10907; The Hon. Mark Dreyfus, 'Second Reading Speech on the *Copyright*

between site-blocking and creative artists being remunerated for their income. The site-blocking is not particularly focused upon the protection of the moral rights of creative artists. In reality, the site-blocking has been used by multinational companies – not individual creative artists. It is ultimately misleading to try to dress up giving corporations the power to block websites and filter search engines as some form of local cultural policy. If the site-blocking power is abused, there could also be censorship of artistic expression and creative freedom.

Long a champion of Indigenous intellectual property, Senator Patrick Dodson of the Australian Labor Party was a supporter of the bill.²⁷¹ He contended that the legislation would support cultural objectives: ‘Labor will be supporting this bill because it makes a number of improvements to the existing regime for protecting the rights of artists and others whose livelihoods depend on them being paid for what they create, whether that’s music, movies, television programs, books or any other form of intellectual property.’²⁷² He maintained that the legislation would address disruptions caused by the digital revolution: ‘This bill makes important improvements to the Copyright Act that will help ensure it continues to protect intellectual property rights in the digital age.’²⁷³ Dodson noted: ‘Although some companies and individuals have expressed concerns about the potential of this bill to be used inappropriately to shut down legitimate sites, we in Labor are satisfied that it contains sufficient safeguards to prevent its misuse.’²⁷⁴ Although he did not mention that site-blocking action had been taken in respect of the copyright of Indigenous artists, that perhaps that was an important factor for Senator Dodson.

After the Australian Greens had opposed the copyright site-blocking legislation in 2015, it was confusing to see the Australian Greens supporting the copyright search-blocking legislation in 2018. The departure of Senator Scott Ludlam had obviously a significant impact upon the public policy position of the Australian Greens in the Federal Parliament. In his second reading speech, Senator Jordon Steele-John explained the position of his party:

We suggest, in support of this bill, as we have contended in the past, that site blocking is not the most effective way of stopping piracy. Rather, copyright is most effectively addressed by making content available conveniently, affordably, and in a timely way.²⁷⁵

Amendment (Online Infringement) Bill 2018 (Cth), Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10894; the Hon. Julie Owens, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10909, and the Hon. Nicolle Flint, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10897.

²⁷¹ Senator Patrick Dodson, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, Australian Senate, 28 November 2018, 8788-8792.

²⁷² *Ibid*, 8788.

²⁷³ *Ibid*, 8789.

²⁷⁴ *Ibid*, 8791.

²⁷⁵ Senator Jordon Steele-John, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, Australian Senate, 28 November 2018, 8792.

Senator Jordan Steele-John concluded: 'In doing so, we'd like to make clear that we are strongly supportive of both creative and innovative industries in Australia.'²⁷⁶ The reversal of the position of the Australian Greens seemed to leave commentators a little perplexed.²⁷⁷ It seemed strange that the Australian Greens were fundamentally opposed to an internet filter in 2015 – but acquiescent to an expansion of the internet filter in 2018. This change of policy was not clearly or adequately explained or rationalised.

Senator Sarah Hanson-Young was also a supporter of the legislative regime.²⁷⁸ Senator Sarah Hanson-Young rather simplistically said that the bill would 'ensure Australian artists are given due credit and payment for their work and to protect them from having their work stolen, pirated or abused'.²⁷⁹ She maintained: 'It will do this by targeting those who intend to steal their work online.'²⁸⁰ However, it's not clear that the main beneficiaries of the legislation are in fact creative artists. The main beneficiaries seem to be the distributors of copyright work who would have the legal expertise and the resources to take action. Hanson-Young contended that there was a need for further cultural policy reforms in addition to the copyright changes: 'This bill creates a pathway for artists and creators to have their rights protected, but we need to do more than this to ensure that Australian artists are given strong policy backing in this country.'²⁸¹ Hanson-Young also advocated the creation of a creativity commission: 'A creativity commission would give Australian artists and creators the ability to have their contribution to the economy and to society recognised.'²⁸²

Senator Stirling Griff of the Centre Alliance also spoke in favour of the copyright legislation. He emphasized: 'Copyright protection is a crucial mechanism that provides for the viability of Australia's creators and creative industries.'²⁸³ Namechecking copyright lobbyist Village Roadshow, Senator Stirling Griff recapitulated the submission of the film industry company:

In the statistics provided in their submission, the film *Mad Max: Fury Road* had 600,000 legal downloads and a staggering one million illegal downloads. The film *Lion* was downloaded some 710,000 times, with over half of that number being illegal downloads. These are staggering numbers. Both highlight the concerns and issues

²⁷⁶ Ibid, 8792.

²⁷⁷ Rohan Pearce, 'Greens Back Government's Expansion of Website-Blocking Scheme', *Computerworld*, 29 November 2018, <http://computerworld.com.au/article/650190/greens-back-government-expansion-website-blocking-scheme/>

²⁷⁸ Senator Sarah Hanson-Young, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, Australian Senate, 28 November 2018, https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/c213941c-eb14-4c54-a8dc-11b938aad7dc/&sid=0000

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Senator Stirling Griff, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018 (Cth)*', Hansard, Australian Senate, 28 November 2018, 8792.

this bill sets out to address and exemplify the reason we need to protect copyright owners from threat of copyright infringement.²⁸⁴

Griff concluded: ‘By expanding the legislation to provide for more protection to copyright material, Australian films such as *Mad Max: Fury Road* and *Lion* will be further protected from illegal downloads.’²⁸⁵ However, it is not clear whether Village Roadshow has made political donations to the Centre Alliance – like it has with the Australian Labor Party and the Liberal Party.

It was striking that a number of other minor parties did not speak about the legislation during the Senate debate. There remained disquiet as to whether the regime would be effective in practice.²⁸⁶

F. Safe Harbours, Fair Use, IT Pricing, and VPNs

While the site-blocking amendments have been rushed through the Australian Parliament, there has been little progress in respect of the safe harbours regime in Australia. While the United States has enjoyed a broad safe harbours regime for twenty years, Australia has had a much more limited regime of benefit only to telecommunications carriers and Internet service providers. The Coalition Government extended the safe harbours regime to include educational institutions and cultural institutions. The Australian Labor Party has adopted the extreme position that search engines, social media sites, and cloud computing services should not be able to benefit from safe harbours protection. The Shadow Communications Minister Michelle Rowland has decried: ‘In the past, we’ve been concerned that some of this government’s ill-considered announcements on policies would roll back copyright protections, such as in relation to safe harbour laws’.²⁸⁷ She has insisted that ‘Labor stood with Australia’s creative industries in opposition to the government’s reckless plans to diminish copyright protections and we were pleased to see that the government backed down on those proposals.’²⁸⁸ Far from being reckless, it would seem eminently sensible for Australia to have a similar safe harbours regime to that of the United States. Australia’s lopsided copyright laws may otherwise make innovators and investors look elsewhere to establish technology companies.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Timothy Geigner, ‘Australian Parliament Moves Copyright Amendment Out Of Committee and Into Law’, *TechDirt*, 28 November 2018,

<https://www.techdirt.com/articles/20181127/13425541113/australian-parliament-moves-copyright-amendment-out-committee-into-law.shtml> and Richard Chirgwin, ‘Australia to build a pirate-proof fence: how is that going to work?’, *The Register*, 28 November 2018,

https://www.theregister.co.uk/2018/11/28/australia_to_build_a_pirateproof_fence/

²⁸⁷ The Hon. Michelle Rowland, ‘*Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)*’, Hansard, House of Representatives (Parliament of Australia, 24 October 2018) 10903.

²⁸⁸ Ibid.

The Hon. Ed Husic MP has warned that Australia's limited safe harbours regime will scare off inventors and investors alike.²⁸⁹ He observed that intermediaries such as Redbubble were vulnerable to actions for intellectual property infringement in Australia:

In the case of Redbubble, as I've previously told the House, they were challenged and taken to court by the Hells Angels because they thought their copyright had been breached by Redbubble, which was operating out of Melbourne and providing hundreds of jobs and huge economic opportunities for content generators—artists and the like. That's what exists. Redbubble was taken on by Sony because of apparent breaches to do with Pokemon. The legal case was upheld and Redbubble was charged the princely sum of \$1 as a fine by the court because Redbubble had a whole series of mechanisms in place to be able to respond to concerns about copyright breach and to ensure that artists were looked after.²⁹⁰

The Hon. Ed Husic urged his own party to see reason on the issue: 'We need to find a way in copyright reform to rightly protect artists and their income and livelihood but also to allow other innovative companies be able to generate, through innovative ideas, new ways of getting things done, to create commercial value in the growth of those firms—such as Redbubble, Bardot, 99designs and the like—and to have those firms and platforms thrive, survive and grow'.²⁹¹

There have been a multitude of public policy inquiries recommending reforms to update and modernise Australia's limited, narrow and sclerotic copyright exceptions. The Copyright Law Review Committee, the AUSFTA Parliamentary Inquiry, the IT Pricing Inquiry, the Australian Law Reform Commission, the Harper Review, and the Productivity Commission have all recommended the introduction of the defence of fair use in Australia.²⁹² In spite of this chorus for copyright law reform in exceptions, the Australian Parliament has been slow to respond to such recommendations. It is a stark contrast to the hasty efforts to rush the *Copyright Amendment (Online Infringement) Act 2018* (Cth) through the Australian Parliament before the next election. It should be noted that the site-blocking, search-filtering, and cyber-lock powers will operate in the context of a copyright regime, which lacks proper copyright exceptions.

The IT Pricing Inquiry revealed that Australian consumers were being ripped off in terms of the pricing and availability of IT products and services (including in respect of TV, film, and music). The IT Pricing Inquiry dubbed this problem 'The Australia Tax'.²⁹³ The Australian Parliament has failed to take any action to alleviate this problem. A recent study by ACCAN reveals

²⁸⁹ The Hon. Ed Husic MP, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)', Hansard, House of Representatives (Parliament of Australia, 24 October 2018) 10900,

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, 1998.

²⁹³ The House of Representatives Standing Committee on Infrastructure & Communications, *At What Cost? IT Pricing and the Australia Tax* (Parliament of Australia, 2013)

that the problems in respect of the pricing and availability of IT products and services still persist in Australia.²⁹⁴ The Explanatory Memorandum notes:

The Productivity Commission noted that timely and competitively-priced access to content appeared to limit copyright infringement, citing surveys on consumer attitudes undertaken by CHOICE and the Communications Alliance. This is an important factor that should be a key part of an overall strategy to combat online copyright infringement.²⁹⁵

Yet, the legislation does nothing to ensure that copyright owners provide access to copyright material in a timely and affordable manner – even though this may be the most effective means of combatting the problem in respect of black markets. Copyright owners have not been voluntarily changing their behaviour. Sponsor of the bill Village Roadshow Ltd has been criticised for the slow release of their works in the Australian market. The film industry has also been criticised for the high prices in respect of its products.

Over a number of years, the Hon Ed Husic MP has been concerned about the ambiguous position of virtual private networks (VPNs) under copyright law. During the IT Pricing inquiry, he expressed worry that the use of VPNs could fall foul of copyright laws and technological protection measures.²⁹⁶ In the 2015 debate, Husic worried about the expansion of site-blocking laws to include VPNs.²⁹⁷ In the 2018 discussion, Husic lamented: ‘I imagine at some point we’re going to have a debate in here about banning VPNs because they allow people to access content on other sides of the planet that are not able to be accessed here.’²⁹⁸

Likewise, Cory Doctorow has warned ‘VPNs are next’.²⁹⁹ He observed that VPNs are important to Australian consumers to ensure that they have fair access to copyright content: ‘By buying VPN service and subscriptions to overseas online services, Australians are able to correct the market failure caused by US and British companies’ refusal to deal.’³⁰⁰ Doctorow said: ‘The entertainment companies know that a frontal assault on VPNs is a nonstarter

²⁹⁴ Nicolas Suzor, Tess Van Geelen, Kylie Pappalardo, Jean Burgess, Patrick Wikstrom, and Yanery Ventura-Rodriguez, ‘Australian Consumer Access to Digital Content’, Sydney: Australian Communications Consumer Action Network, 2017, http://accan.org.au/ACCAN_QUT_Digital%20Content_web.pdf

²⁹⁵ *Copyright Amendment (Online Infringement) Bill 2018* – Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Ffr6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ebd4%22

²⁹⁶ James Hutchinson, ‘IT Price Inquiry Zeroes In On Geoblocking’, *IT News*, 31 July 2012, <https://www.itnews.com.au/news/it-price-inquiry-zeroes-in-on-geoblocking-310297>

²⁹⁷ The Hon Ed Husic MP, ‘Adjournment Debate: Innovation, Telecommunications’, Hansard, House of Representatives, 18 June 2015, 6884.

²⁹⁸ The Hon. Ed Husic MP, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.

²⁹⁹ Cory Doctorow, ‘SOPA.au: Australia is the Testbed for the World’s Most Extreme Copyright Blocks’, *Electronic Frontier Foundation*, 1 November 2018, <https://www.eff.org/deeplinks/2018/11/sopaau-australia-testbed-worlds-most-extreme-copyright-blocks>

³⁰⁰ *Ibid.*

in Australia, but they also hate this evasion of regional release windows'.³⁰¹ He warned: 'Three years from now, after the same people who defeated blocking orders with VPNs have shown that they can defeat search-engine censorship with VPNs, the same companies will be back for Australians' VPNs.'³⁰²

It is striking that there was lobbying in Canada during the renegotiation of the *North American Free Trade Agreement (NAFTA)* and the development of the *United States-Mexico-Canada Agreement (USMCA)* to block the use of VPNs.³⁰³

Disturbingly, the film industry has been promoting this industry-dictated model for other jurisdictions. Tim Anderson, the managing director of Madman Entertainment, has argued that Japan should adopt such a regime: 'Site blocking is essential and valuable, especially when combined with legal alternatives, and it needs to be continuous.'³⁰⁴ Arguably, the Australian copyright regime is not a good template for other jurisdictions, given its impact upon consumer rights, competition policy, and internet freedom.

G. Political Donations

Professor Lawrence Lessig from Harvard Law School has shifted the focus of his work of late from copyright, cyberlaw, and the Creative Commons to the reformation of the United States political system.³⁰⁵ He has highlighted the distorting impact of political donations on intellectual property decision-making in the United States. He has argued that progressive reform of the copyright regime in the United States will be impossible unless there are stronger rules governing political lobbying and political donations. Similar problems have been occurring in Australia – with intellectual property holders lobbying for stronger, longer intellectual property rights in a range of contexts, including copyright law and the creative industries; trade mark law and tobacco control; patent law, data protection, biologics, and access to essential medicines.

Much like its predecessor, the *Copyright Amendment (Online Infringement) Act 2015 (Cth)*, the *Copyright Amendment (Online Infringement) Act 2018 (Cth)* is a piece of corporate welfare. Such legislation seems to have been dictated by political donors – most notably, the film company, Village Roadshow. Disappointed by its loss in an action for copyright infringement

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Jordan Pearson, 'Canadian Telecom Giant Bell Wanted NAFTA To Ban Some VPNs', *Motherboard*, 31 January 2019, https://motherboard.vice.com/en_us/article/d3mvam/canadian-telecom-giant-bell-wanted-nafta-to-ban-some-vpns?utm_source=mbtwitter

³⁰⁴ Patrick Frater, 'Japan Edges Slowly Towards Pirate Site Blocking', *Variety*, 27 October 2018, <https://uk.news.yahoo.com/japan-edges-slowly-towards-pirate-150136864.html?guccounter=1>

³⁰⁵ Lawrence Lessig, *Lesterland: The Corruption of Congress and How to End It*, TED Conferences, 2013; Lawrence Lessig, *Republic, Lost: Version 2.0*, (Twelve, 2015); Lawrence Lessig, *America, Compromised* (University of Chicago Press, 2018); and Lawrence Lessig, *They Don't Represent Us: Reclaiming Our Democracy* (Dey Street Books, 2019).

against iiNet in the High Court of Australia,³⁰⁶ Village Roadshow has made extensive political donations in the hope of obtaining more extensive copyright protections. Chris Duckett commented for *ZDNet*:

One of Australia's most unapologetic and enthusiastic backers of legal mechanisms to prevent copyright infringement has returned the political donation big time, as Village Roadshow parted with more than AU\$600,000 in donations to Australia's two largest political parties. Annual returns for 2015-16, released by the Australian Electoral Commission (AEC) on Wednesday, showed Village Roadshow donations skewed slightly in favour of the ruling Liberal party, with AU\$357,000 donated in comparison to AU\$279,200 to the Australian Labor Party.³⁰⁷

Duckett noted: 'Within that number for Labor, Village Roadshow gave AU\$20,000 on April 14 last year to the ALP in the seat of Shadow Attorney-General Mark Dreyfus.'³⁰⁸ He observed: 'Under a potential Labor government, Dreyfus would be responsible for overseeing many of the regulations and laws that Village Roadshow could take advantage of in its attempts to stymie online piracy.'³⁰⁹

The passage of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) and the *Copyright Amendment (Online Infringement) Act 2018* (Cth) highlights the need for further reform of the Federal system in respect of political lobbying and political donations. Queensland has introduced a new real-time electronic disclosure of political donations. Such a system would be helpful at a Federal level. In the case of the *Copyright Amendment (Online Infringement) Act 2018* (Cth), it is currently unclear whether supporters or opponents of the bill have made political donations to either the major political parties or the crossbench. The Queensland real-time electronic disclosure of political donations revealed that Roadshow donated \$50,000 to the Liberal National Party and \$50,000 to the Australian Labor Party during the period of recent state elections.

With the passage of the copyright laws, Village Roadshow reported that the Liberal Party received a \$110,000 contribution, and the ALP received a \$51,144 contribution in 2019.³¹⁰

There was also a report of gifts by Roadshow to a number of key decision-makers - Communications Minister Mitch Fifield, Shadow Communications Minister Michelle Rowland and Shadow Attorney-General Mark Dreyfus.³¹¹ The Shadow Attorney-General Mark Dreyfus donated his gift to the Human Rights Centre. Communications Minister Mitch Fifield was presented a three

³⁰⁶ *Roadshow Films Pty Ltd v. iiNet Ltd* [2012] HCA 16 (20 April 2012).

³⁰⁷ Chris Duckett, 'Village Roadshow Triples Political Donations to Surpass AU\$600K', *ZDNet*, 1 February 2017, <https://www.zdnet.com/article/village-roadshow-triples-political-donations-to-surpass-au600k/>

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ Kylar Loussikian and Samantha Hutchinson, 'Pitiable Profit Won't Tighten Burke's Pursue for Pollie Pals', *The Sydney Morning Herald* (Sydney, 4 February 2019).

³¹¹ Australian Government Information, 'Roadshow', <http://ausgov.info/interests/index.php?Entity=roadshow>

year Village Roadshow VIP Pass by the CEO, Village Roadshow Limited - 17 December 2018.

Moreover, there is a need to ensure that political donations do not distort democratic decision-making. The Hon. Ed Husic MP has commented that political donations should not dictate copyright policy-making: 'As lawmakers, just because... a political party gets a donation from a rights holder, does not mean that we should stop looking at how to make the types of reforms that balance the needs of creatives and the needs of producers versus the needs of consumers.'³¹²

Writing for the transparency project for *The Guardian*, Christopher Knaus highlighted that Village Roadshow donated millions to the major parties, while lobbying on copyright law.³¹³ He observed that such contributions seemed to peak during parliamentary debates. Speaking to Knaus, University of Melbourne academic George Rennie said donations at the scale of Village Roadshow's clearly bought access and influence: You might say that the policy is reasonable but it is that ultimate question of what is the reasonable policy that gets up.³¹⁴ He added: 'And the reasonable policy that gets up is almost always really monetarily well-backed.'³¹⁵

The passage of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) and the *Copyright Amendment (Online Infringement) Act 2018* (Cth) highlights the need for further reform of the Federal system in respect of political donations. There should be real-time electronic disclosure of political donations at a Federal level. Independent member Cathy McGowan has made a number of recommendations about how to promote public trust and confidence in the integrity of the Parliament with the *National Integrity Commission Bill 2018* (Cth) and the *National Integrity (Parliamentary Standards) Bill 2018* (Cth). A number of those measures are directed towards political donations.

Australia needs to have independent policy processes in respect of copyright law reform. The in-house Department review of site-blocking was unsatisfactory. Tellingly, the Department did not consider the policy option of repealing the site-blocking laws, even though such laws seem to be ineffectual. Instead, according to the explanatory memorandum, the Department considered three policy options. The first option would require no change. The second option would extend section 115A to online search engine providers and lower the threshold to 'primary purpose or primary effect'. The Department suggested that such a measure would only cost \$500,000 (which seems a rather low estimate of regulatory costs). The third option would be to

³¹² The Hon. Ed Husic MP, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)', Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.

³¹³ Christopher Knaus, 'Village Roadshow Donates Millions to Major Parties While Lobbying on Piracy', *The Guardian*, 2 December 2018, <https://www.theguardian.com/australia-news/2018/dec/02/village-roadshow-donates-millions-to-major-parties-while-lobbying-on-piracy>

³¹⁴ Ibid.

³¹⁵ Ibid.

extend section 115A to online service providers and lower the threshold to 'substantial purpose or effect'. The Department also suggested that this option would only cost \$500,000 (which seems a small number of regulatory costs). The Department's framing of the issue seems to mirror that of major copyright industries in film, television, and music. The Department is also selective in the comparative law, which it cites. The significance of the huge controversy over the *Stop Online Piracy Act* in the United States is ignored.

After Village Roadshow litigated against iiNet and lobbied for site-blocking and search-filtering copyright laws, there has now been consideration of Village Roadshow pulling out of the film industry altogether.³¹⁶ It is remarkable that there is a push for Village Roadshow to divest its film business - after all the copyright litigation, and political donations for site-blocking copyright laws. A former executive at the Hollywood movie studio Warner Brothers has argued that Village Roadshow has been slow to adapt to the new digital environment.³¹⁷ There was an internal struggle within the company over its control, given its dramatic loss in market value. One commentator provided the withering assessment of the share price in December 2018 - 'Burke leaves behind a carcass of a company with a share price cratered from \$7.50 three years ago to barely \$2.53 today.'³¹⁸ In the end, after Village Roadshow had lost more than \$500 million in market value over five years, Village Roadshow chief executive Graham Burke has announced his retirement in February 2019.³¹⁹ There remains speculation that Village Roadshow could be forced to offload its struggling film business, behind films such as *Zoolander* and *Ocean's 8*.³²⁰

In retrospect, it seems that Graham Burke's push for site-blocking and search-filtering copyright laws in Australia was a rather quixotic quest. Village Roadshow certainly has been successful in the legal action that it has brought for site-blocking - but that action does not seem to have been a cure for problems with its business model. Perhaps Village Roadshow would have been better off using its resources to help adapt and shift the company to a digital model of distribution in order to better challenge its competitors such as Netflix, Apple, and Amazon.

Conclusion - The Future of the Web

Australia's copyright regime is closely tied to the United States copyright system - in part as a result of the *Australia-United States Free Trade Agreement* 2004. Given the United States Congress rejected the controversial Stop Online Piracy Act (SOPA) site-blocking legislation, it is surprising that

³¹⁶ Kylar Loussikian and Samantha Hutchinson, 'A Cinematic Feud: Are the Curtains Closing On Village Roadshow?', *The Sydney Morning Herald* (Sydney, 18 January 2019)

³¹⁷ Kylar Loussikian, 'Village Roadshow Stopped at the Drive In Says Former Hollywood Exec', *The Sydney Morning Herald* (Sydney, 20 January 2019)

³¹⁸ Kylar Loussikian and Samantha Hutchinson, 'Little to Show for Village Roadshow Chief's Foray to Hollywood', *The Sydney Morning Herald* (Sydney, 18 December 2018).

³¹⁹ Kylar Loussikian and Jennifer Duke, 'Village Roadshow Boss Quits, Sparking Leadership Feud', *The Sydney Morning Herald* (Sydney, 22 February 2019,)

³²⁰ Kylar Loussikian, 'Family Behind Village Roadshow in Feud over Company's Future', *The Sydney Morning Herald* (Sydney, 14 January 2019).

the Australian Parliament should have adopted the policy options of site-blocking and search filtering. The Australian Government's copyright site-blocking and search-filtering laws will further enhance the private power of copyright owners in respect of the governance of the Internet. Bernard Keane worries: 'We've thus arrived at the fully fledged war on the internet by this government that some of us have long been predicting, a war motivated by commercial interests and the never-satisfied greed of security agencies for more powers of surveillance and control, and a deep and abiding fear of what citizens will do with communications technology that is no longer controlled by governments.'³²¹ This is disturbing. The Internet will be increasingly subject to the rule of private sovereigns. Australia's site-blocking and search-filtering regime has been presented by copyright industries as a model for other jurisdictions – such as Japan. It would be a worrying development if Australia's copyright regime became a template for the rest of the world.

Disturbingly, the explanatory memorandum suggests that the Australian Government will even contemplate the link tax and the censorship machine measures of the European Union. The EU Directive Model has been hugely controversial – particularly in respect of its impact upon an open and free Internet. There has been a concern that the Australian Government will go further than merely site-blocking and search-blocking copyright laws, and adopt some of the measures in the new European Copyright Directive. Ominously, the report of the Department of Communications and Arts – extracted with the Explanatory Memorandum – shows a consideration of this model:

The Department will monitor the development of new enforcement mechanisms following the EU Parliament's recent copyright proposals which will require digital platforms, including online search engine providers, to take further steps to assist with copyright enforcement.³²²

The passage of the European Copyright Directive in March 2019 has been highly controversial.³²³ Despite an intense debate in parliament, MEPs meeting in Strasbourg ended up passing the draft law with 348 votes in favour, 274 against, and 36 abstentions.³²⁴ The Government of Poland has initiated a legal challenge against Article 17 of the European Copyright

³²¹ Bernard Keane, 'Government's Full-Blown War on the Internet is Here at Last', *Crikey News*, 11 December 2014, http://www.crikey.com.au/2014/12/11/governments-full-blown-war-on-the-internet-is-here-at-last/?wpmp_switcher=mobile&wpmp_tp=0

³²² *Copyright Amendment (Online Infringement) Bill 2018* – Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ebd4%22

³²³ Alex Hern, 'MEPs Approve Sweeping Changes to Copyright Law', *The Guardian*, 26 March 2019, https://www.theguardian.com/media/2019/mar/26/meps-approve-sweeping-changes-to-copyright-law-european-copyright-directive?CMP=share_btn_tw; Zoe Kleinman, 'Article 13: Memes Exempt as EU Backs Controversial Copyright Law', *BBC*, 26 March 2019 <https://www.bbc.com/news/technology-47708144>; 'EU Lawmakers Back Copyright Rules Opposed by Big Tech', *The Irish Times* (Dublin, 26 March 2019).

³²⁴ Miranda Aldersley, 'Google condemns new EU copyright laws which force tech giants such as YouTube and Facebook to compensate artists and musicians - and warns it will hurt Europe', *Daily Mail Australia*, 26 March 2019, <https://www.dailymail.co.uk/news/article-6851441/European-Parliament-approves-controversial-EU-copyright-reform-blow-Google-Facebook.html>

Directive, complaining that the regime violates the right to freedom of expression and information.³²⁵ The World Wide Web Foundation warned that the new European Union laws are a threat to an open and free web: ‘The Directive will most likely lead to the mass incorporation of filters for content uploaded in Europe, putting people’s right to free speech at the mercy of an algorithmic lottery.’³²⁶ The World Wide Web Foundation noted that ‘grave concern [has been] voiced by human rights advocates, internet experts, entrepreneurs and the UN Rapporteur for Freedom of Expression’.³²⁷

Just as there was a creeping expansion of Australia’s data retention laws, there could equally be a further mainstreaming of site-blocking. The *Copyright Amendment (Online Infringement) Act 2015* (Cth) and the *Copyright Amendment (Online Infringement) Act 2018* (Cth) are an alarming precedent for other legal disciplines. There is a danger that the Australian Parliament will seek to introduce site-blocking in other intellectual property contexts – such as trade mark law,³²⁸ designs law, patent law, plant breeder’s rights, and trade secrets.³²⁹ There is also a concern that the Australian Parliament will apply site-blocking in respect of the Internet regulation and new media. Site-blocking could be sought for instance in respect of defamation law,³³⁰ privacy law, and the right to be forgotten. The Shadow Attorney-General Mark Dreyfus said: ‘We in Labor do not believe the online world should be allowed to exist as a lawless frontier.’³³¹ It is concerning that the Australian Labor Party is contemplating using crude measures such site-blocking in other contexts. There has already been radical new Australian criminal laws proposed in respect of the sharing of abhorrent violent material in the wake of the Christchurch massacre.³³²

Australia’s Parliament needs to review the tranche of rather crude Internet regulation introduced by the 45th Parliament. The problematic *Copyright Amendment (Online Infringement) Act 2018* (Cth) is but one of a host of radical legislative and administrative changes. There has also been controversy over such initiatives as data retention, the Census Fail, RoboDebt, My Health Record, and encryption. New Australian criminal laws in respect of the sharing of abhorrent violent material were passed with little parliamentary

³²⁵ *Republic of Poland v. European Parliament and Council of the European Union* (Case-401/19), Action brought on 24 May 2019.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=216823&pageIndex=0&oclang=EN&mode=lst&dir=&occ=first&part=1&cid=8371710>

³²⁶ World Wide Web Foundation, ‘New EU Law Threatens Online Rights in Europe’, Press Release, 26 March 2019, <https://webfoundation.org/2019/03/new-eu-law-threatens-online-rights-in-europe/>

³²⁷ Ibid.

³²⁸ Gareth Corfield, ‘Trademark Holders Must Pay for UK Web Blocking Orders – Supreme Court’, *The Register*, 13 June 2018,

https://www.theregister.co.uk/2018/06/13/copyright_blocking_orders_bt_cartier_supreme_court/

³²⁹ See the case of *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34

³³⁰ *Google Inc. v Duffy* [2017] SASFC 130 (Oct. 4, 2017)

³³¹ The Hon. Mark Dreyfus, ‘Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill 2018* (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10894.

³³² *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth) This legislation was passed through the Australian Parliament with only brief debate.

debate or scrutiny.³³³ Such measures are varied but share a dated instrumental approach to regulation. There needs to be a much responsive regime for regulation for the digital age.

The Electronic Frontier Foundation has highlighted the adverse impact of content-blocking on the goal of an Open and Free Internet: ‘Governments around the world block access to online content for a variety of reasons: to shield children from obscene content, to prevent access to copyright-infringing material or confusingly named domains, or to protect national security’.³³⁴

Jeremy Malcolm from the Electronic Frontier Foundation highlighted that censoring the web is not a solution for social problems.³³⁵ He observed that ‘it seems to be that it’s politically better for governments to be seen as doing something to address such problems, no matter how token and ineffectual, than to do nothing—and website blocking is the easiest ‘something’ they can do’.³³⁶ Malcolm warned: ‘But not only is blocking not effective, it is actively harmful—both at its point of application due to the risk of over-blocking, but also for the Internet as a whole, in the legitimization that it offers to repressive regimes to censor and control content online.’³³⁷

As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet—rather than a copyright crackdown.³³⁸ As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet—rather than a government web of censorship and surveillance. Sir Tim Berners-Lee reflects:

Governments must translate laws and regulations for the digital age. They must ensure markets remain competitive, innovative and open. And they have a responsibility to protect people’s rights and freedoms online.³³⁹

Berners-Lee has been working on a proposal for a decentralised, open internet.³⁴⁰ He has also keen to develop a new social contract in respect of the world wide web.³⁴¹

³³³ *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth). This legislation was passed through the Australian Parliament after only brief debate. Josh Taylor, ‘Australian Internet Providers Told to Block Websites Hosting Christchurch Terror Video’, *The Guardian*, 8 September 2019, <https://www.theguardian.com/technology/2019/sep/09/australian-internet-providers-told-to-block-websites-hosting-christchurch-terror-video>

³³⁴ Electronic Frontier Foundation, ‘Content-Blocking’, <https://www.eff.org/issues/content-blocking>

³³⁵ Jeremy Malcolm, ‘Censoring the Web Isn’t the Solution to Terrorism or Counterfeiting – It’s the Problem’, Electronic Frontier Foundation, 25 November 2014, <https://www.eff.org/deeplinks/2014/11/censoring-web-isnt-solution-terrorism-or-counterfeiting-its-problem>

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ Tim Berners-Lee, ‘A Magna Carta for the Web’, March 2014,

http://www.ted.com/talks/tim_berniers_lee_a_magna_carta_for_the_web?language=en

³³⁹ Tim Berners-Lee, ‘30 Years On, What’s Next #FortheWeb?’, *World Wide Web Foundation*, 12 March 2019 <https://webfoundation.org/2019/03/web-birthday-30/>

³⁴⁰ Zoe Corbyn, ‘Decentralisation: The Next Big Step for the World Wide Web’, *The Guardian*, 8 September 2018,

<https://www.theguardian.com/technology/2018/sep/08/decentralisation-next-big-step-for-the-world-wide-web-dweb-data-internet-censorship-brewster-kahle>

³⁴¹ Tim Berners-Lee, 'The World Wide Web Turns 30. Where does it go from here?', *Wired*, 11 March 2019, <https://www.wired.com/story/tim-berners-lee-world-wide-web-anniversary/> Soundcloud - <https://t.co/3fCHZhKVfz>