Music Piracy Siteblocking Injunction Granted

Eli Fisher, Senior Associate at Banki Haddock Fiora and co-editor of the *Communications Law Bulletin,* comments on the recent music piracy siteblocking application.

On 28 April 2017, Justice Burley handed down the decision in *Universal Music Australia Pty Limited v TPG Internet Pty Limited* [2017] FCA 435 (**Music Industry case**). His Honour ordered that access to sites connected with Kickass Torrents be blocked by the respondent ISPs.

This latest judgment follows the judgments of Nicholas J on 15 December 2016 in the cases of *Roadshow Films Pty Limited v Telstra Corporation Limited* (**Film Industry case**)*; Foxtel Management Pty Limited v TPG Internet* (**Foxtel case**) [2016] FCA 1503.

The Film Industry case was brought by various film companies, including Village Roadshow, Disney, 20th Century Fox, Paramount, Columbia, Universal and Warner Bros against 50 ISP companies related to Telstra, Optus, TPG and M2. Foxtel brought its case against 33 ISP companies related to Telstra, Optus and TPG. The injunctions in those cases were in respect of The Pirate Bay, Torrentz, TorrentHound, IsoHunt and SolarMovie.

The judgments of Nicholas J were the first judicial interpretation of the siteblocking provision in section 115A of the *Copyright Act 1968*, which came into effect with the *Copyright Amendment (Online Infringement) Act 2015*.

The Music Industry case was brought by major players in the Australian music industry, including Universal, APRA, Australian Music Corporation, Sony and Warner.

These judgments are significant for their implementation of new, important and, in some respects, controversial new powers in the fight against piracy. But, except in relation to the costs aspect of the decision, there is nothing in the judgments that is particularly unusual or surprising.

Section 115A essentially provides that the owner of a copyright may apply to the Federal Court for an injunction, if the Court is satisfied that an ISP provides access to an "online location" outside Australia, and the online location infringes or facilitates an infringement of the copyright, and the primary purpose of the online location is to infringe, or to facilitate the infringement, of copyright. "Online location" is the broad but undefined term used to implicate websites but also capture other platforms developed in the future.

The injunction is to require the ISP to take reasonable steps to disable access to the online location.

In determining whether to grant the injunction, the Court may take any relevant matter into account, including: the flagrancy of the infringement; whether the owner or operator of the online location demonstrates a disregard for copyright generally; whether access to the online location has been disabled by orders from any court of another country due to copyright infringement; whether disabling access to the online location is a proportionate response in the circumstances; the impact of any person likely to be affected by the grant of the injunction; and the public interest.

To encourage rightsholders and ISPs to cooperate on orders, the legislation provides that the ISP is not liable for any costs in relation to the proceedings unless the ISP enters an appearance and takes part in the proceedings.

The siteblocking scheme is quite narrow in application, and it is extremely prescriptive. One can imagine interesting arguments being raised in relation to particular websites that facilitate the infringement of copyright but for whom such activity is perhaps not the "primary" purpose, or arguments in relation to what is and is not an "online location".

But those cases are not yet upon us. Nor is a case where the owner or operator of an implicated online location defends the application. Thus far, we have seen rightsholders apply to the Court to order ISPs to block the most obvious and flagrant infringers of copyright. The orders, which had already been mostly negotiated between the parties, were granted – broadly on the same terms of the earlier orders made by Nicholas J.

The orders themselves are exceedingly uncontroversial.

ISPs must within 15 days take reasonable steps to disable access to the specified online location. ISPs will be deemed to have complied with the orders by DNS blocking the nominated domain names – although other technical means of blocking access to the sites would also be acceptable. DNS blocking means a system by which any user of an ISP's service who attempts to use a DNS resolver that is operated by or on behalf of the respondent to access an infringing site is prevented from receiving a DNS response other than a redirection. And the redirection ordered must be to a "landing page" that notifies the user that access to the intended website has been disabled because the Federal Court has determined that it infringes or facilitates the infringement of copyright.

The injunction is to operate for a period of 3 years, but can be extended. If at any time, the infringing site is accessible via a domain name that is not nominated, an abbreviated application process for adding that additional domain name to the list has been set out. Essentially, the rightsholder can file and serve and affidavit and propose short minutes and, unless the ISP objects, the Court will make the orders without any further hearing. This would help alleviate any "whack-a-mole" problem that rightsholders can face in blocking access to an infringing site only for its operators to change its address to something unaffected by the orders.

So far, so sensible.

The main (although not only) area where the parties seemed to be in dispute was in relation to the costs of complying with the siteblocking scheme. As with the Film Industry case and the Foxtel case, the rightsholders are to pay the ISPs' compliance costs calculated at the rate of $50 per domain name, and must pay the ISPs' costs incidental to the preparation of evidence and written submissions, and the making of oral submissions, in relation to the compliance costs.

Awarding legal costs against the applicants might be particularly difficult for them to accept, given that while they lost on the point of compliance costs, there were other disputed aspects of the orders where they did prevail – for example, in connection with the landing page. There has been no corresponding order made that the ISPs should pay costs in connection with those submissions.

Finally, as with the previous s115A cases, the rightsholders do not have to pay the set up costs involved in the ISPs developing the infrastructure necessary to give effect to the orders.

The rightsholders argued that the ISPs should bear their own compliance costs because:

(a) these orders are simply part of a regulatory regime in which the ISPs operate, and thus should be seen as a cost of doing business. This accords with the view of Arnold J in an earlier UK siteblocking case;

(b) the respondents will also benefit from the blocking of the online location, because they too are providers of licensed copyright content and they accrue a benefit beyond that of mere bystanders or innocent third parties. Unlike in the previous s115A cases, the music industry applicants led evidence on this point. Moreover, Foxtel was one of the respondents in the Music Industry case; and

(c) the costs of the implementation are *de minimis*, and in the context of achieving a regime for blocking online locations, which is intended to be efficient and economical, it is better to avoid arguments about trivial costs.

The ISPs disagreed. They argued instead that:

(a) they are an innocent party which has not infringed any of the rightsholders' rights. The Court would usually take the position that where an innocent party against whom coercive orders are sought, and where the orders benefit another party, the benefitting party and not the innocent party pays the costs of compliance. This would be analogous to the approach taken in respect of freezing orders, subpoenas and preliminary discovery; and

(b) the injunctions are intended to serve the rightsholders' commercial interests.

Ultimately, the Court agreed with the ISPs' arguments on costs. Although $50 per domain name was less than some ISPs were seeking, and the set-up costs of the requisite siteblocking infrastructure will be paid by the ISPs, rightsholders could be expected to be disappointed with this aspect of the verdict.

Considering the impact of the judgment more broadly – that is, with reference to its efficacy in the fight against piracy – it is far too soon to know what the impact of siteblocking will be on Australians accessing pirated versus legitimate content. Many commentators have pointed to the range of easy methods of circumventing the siteblocking orders, including through the use of VPNs.

Nevertheless, some research in other jurisdictions, for example IFPI's research into the UK and Italian experiences of siteblocking, has demonstrated that educative messages, and making access to pirated content merely more inconvenient, can succeed in reducing piracy levels significantly. In the three years since The Pirate Bay and numerous other sites were blocked in the UK, there was a 45% decline (from 20.4m in April 2012 to 11.2m in April 2014) in visitors from the UK to all BitTorrent sites, whether blocked by ISPs or not. In Italy, where courts have ordered the blocking of 24 BitTorrent sites, there was a decline of 25.6% in the number of overall BitTorrent downloads in the country in the two years from January 2013.

Further evidence has suggested that changes in consumer behaviour appear, but not immediately after the first orders have been made. A critical mass of siteblocking orders against pirate sites is essential before changes in consumer behaviour are visible.

In my view, it is important to understand what section 115A is, and what it is not. No one ever suggested that it would end the fight against piracy, or that on the making of the first siteblocking orders, we would see rightsholders in some sort of *V-J Day in Times Square* kiss celebrating the end of the war. In fact, Prime Minister Turnbull stated at the time:

"There is no silver bullet to deal with internet piracy, but the Copyright Amendment (Online Infringement)

Bill 2015 provides an important part of the solution to the problem of online copyright infringement. It is vital that copyright owners have an efficient mechanism to disrupt the steady supply of infringing content to Australian internet users from overseas based websites."

It is a very useful if imperfect tool for rightsholders to reduce, if not eliminate, piracy in Australia and encourage Australian consumers to migrate from illegal platforms to legitimate ones that compensate creators. And nothing more.

For the many critics who argue that the siteblocking regime will be ineffective, and that the best method for reducing piracy is to make access to content more convenient to consumers, there is an obvious tension in their arguments. If convenient access to legitimate content is essential to consumers, then inconvenient access to illegitimate content is likely (and hopefully) to be a deterrent to consumers.

My prediction is that piracy rates will come down as a result of consumers finding it more difficult or inconvenient to access illegal content, and as a result of the law sending a clearer if long overdue message that it is unethical to access illegal content.

From the outset, the Government committed to review the operation of the regime 18 months after its commencement. That date came and went at the end of last year, and the Government has given no word as to when the review will actually take place. Industry expects the review to take place no sooner than in 2018. In the dynamic and unpredictable environment of digital technologies, it is reasonable to suspect there will be further significant developments in the area before that review is underway. Stay tuned.

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