



Submission: Copyright Amendment (Online Infringement) Bill 2015

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Executive Summary

The Australian Digital Alliance thanks the Legal and Constitutional Affairs Legislation Committee for the opportunity to make this submission on the *Copyright Amendment (Online Infringement) Bill 2015* ('the Bill').

Our submission covers two major subjects:

- The importance of prompt rectification of the safe harbour provisions
- Essential amendments to ensure the current Bill is fit for purpose

Ensuring that copyright is fit for purpose in the digital era is an essential task. This requires adaptation of enabling frameworks, not simply enforcement. Current Australian law disincentivises local hosting of content by online intermediary platforms, especially user generated content. The third proposal from the *Online Copyright Infringement Discussion Paper 2014* ('the Discussion Paper') that **the existing safe harbour scheme be extended, should be acted upon at the same pace as the two current enforcement proposals in order to partially redress this imbalance.**¹

As well as supporting local online platforms the extension of safe harbours would increase legal certainty and consistency and help level the international playing field for intermediaries such as schools, universities and libraries.

The reduction in internet piracy is a laudable objective, and the Australian Digital Alliance is not opposed to a judicial process for issuing injunctions against overseas websites that flagrantly infringe copyright, as long as the power is **appropriately targeted in scope and has adequate safeguards that reflect each of the interests at stake.**

The Bill as presented has deficiencies in drafting that could lead to legitimate sites being blocked. In order to ensure that genuinely unlawful sites are targeted, we recommend that the **definition for infringing websites in s115A(1) is tightened and additional safeguards are added to s115A(5).** Sites that may fall under the definition as currently formulated include overseas providers of VPNs, cloud storage providers, providers of Internet Relay Chat (IRC) or Bit Torrent software, as well as some general hosting sites that may host a mixture of infringing and non-infringing works.

¹ The two enforcement recommendations from the Discussion Paper are currently being dealt with through this Bill and the industry copyright code.



Recommendations:

Overall Copyright Reform

- The extension of safe harbours proposed in the *Online Copyright Infringement Discussion Paper 2014* should be progressed as a matter of urgency
- Additional outstanding reforms, such as those from the *IT Pricing Inquiry*, the *ALRC Copyright and the Digital Economy inquiry* and the *AGD Review into Technological Protection Measures* should be moved forward.

Scope of injunctive power

- The Explanatory Memorandum ('EM') should be amended to provide examples of what would be considered an 'online location' that judges may draw upon by analogy
- Online location should be construed as narrowly as possible in order to achieve the purposes of the Bill
- The drafting in the Explanatory Memorandum around 'primary purpose' should be tightened by identifying examples of services, such as VPNs, that are not the target of the legislation
- The concept of flagrancy should be moved from s115A(5) to s115A(1)(b) to ensure that only flagrantly infringing sites fall within the scope of the injunctive power
- Consideration should be given to whether the new concept of 'facilitation' is a necessary concept or whether other copyright doctrines, such as authorisation, would suffice. If facilitation is retained it should be a defined term in Division 1 of Part V of the Act
- We recommend that s115A(1) is redrafted as follows
 - (1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:
 - (a) a carriage service provider provides access to an online location outside Australia; and
 - (b) the online location flagrantly infringes the copyright; and
 - (c) the primary purpose of the online location is to infringe copyright (whether or not in Australia).

Safeguards

- A factor to protect the right to freedom of opinion and expression and the right to take part in cultural life should be added
- The EM should expand on the matters a court should consider under the factor of proportionality
- The phrase 'categories of the means to infringe' should be deleted in Part 1 of Division V
- The court should be directed to consider any other remedies available to the rights holder, in Australia or elsewhere.
- Factor 115A(5)(j) should be removed



Procedural fairness

- The EM should draw the court's attention to the importance of allowing public advocates to appear, especially in uncontested applications for injunctive orders.
- The court should have the discretion under 115A(8) to allow an application under 115A(7) by any party the court considers should have standing
- The Bill or EM should specify that both judgments and orders should be published and be made accessible online
- ISPs should be directed to display a notice to users who attempt to access a blocked site. The notice should state that the site has been blocked by court order for reasons of copyright infringement, identify the parties and state that affected users have the right to apply to the Court to discharge or vary the order

Evaluation and Oversight

- The scheme should be overseen and evaluated (possibly by a body such as the ACMA). Any adverse outcomes should be monitored.

The importance of safe harbours

The goal of ensuring that copyright is fit for purpose in the digital world requires both tailored enforcement measures and support for legitimate digital activities. Safe harbour protection for intermediaries is one of the essential reforms required to strike this balance.

Safe harbour provisions ensure that intermediaries, such as online platforms, universities, schools and libraries, are protected from financial liability as long as they follow processes that protect rights holder interests. These conditions are set out in s 116AH of the *Copyright Act 1968* ('the Act'), and include steps such as disabling access or removing infringing material upon notification. Similar provisions in the *Digital Millennium Copyright Act* ('DMCA') have allowed the growth of many intermediary platforms within the United States.

The proposal to extend safe harbours in last year's Discussion Paper² was supported by a diverse range of organisations, including:

ACCAN, the Australian Digital Alliance, Australian Director's Guild, Australian Information Industry Association, Australian Libraries Copyright Committee, Australian Library and Information Association, AIMIA Digital Policy Group, Arts Law Centre of Australia, Australian Computer Society, BBC, Business Software Alliance, Communications Alliance, Copyright Advisory Group to the COAG Education Council, eBay, European Competitive Telecommunications Association, Institute of Public Affairs, Free TV,

² Attorney-General's Department [Online Copyright Infringement Discussion Paper](#) (2014)



Google, Group of Eight, iiNet, Independent Scholars Association of Australia, Law Council of Australia Media and Communications Committee, Law Council of Australia Intellectual Property Committee, Law Institute of Victoria, Law Society of NSW Young Lawyers Communications Entertainment and Technology Law Committee, Microsoft, National Archives of Australia, National Film and Sound Archives, Parke Lawyers, Queensland Law Society, SBS, Telstra, Thoughtworks, Turner Broadcasting System Asia Pacific and Universities Australia.

With action proceeding on the other two proposals in the Discussion Paper (by way of an industry code and this Bill) the third proposal, the extension of safe harbours, should not be left behind.

Meanwhile further essential reforms such as those recommended by the ALRC in its *Copyright and the Digital Economy* report should also be progressed.

Recommendations:

- The extension of safe harbours proposed in the *Online Copyright Infringement Discussion Paper 2014* should be progressed as a matter of urgency
- Additional outstanding reforms, such as those from the *IT Pricing Inquiry*, the *ALRC Copyright and the Digital Economy inquiry* and the *AGD Review into Technological Protection Measures* should be moved forward.

Scope of the Injunctions

As the EM notes, the Bill;

is intended as a precise response to a specific concern raised by copyright owners...The purpose of the scheme is to allow a specific and targeted remedy to prevent those online locations which flagrantly disregard the rights of copyright owners from facilitating access to infringing copyright content³

However website blocking is a blunt instrument. If it is not adequately confined in scope and application, it has the potential to extend beyond flagrantly infringing sites to websites with other legitimate purposes.

Overseas experience shows that scope creep is a very real possibility. In the UK the injunction process for copyright infringement has been extended to trade mark violations with no recourse to parliament,⁴

³ Explanatory Memorandum Copyright Amendment (Online Infringement) Bill 2015 (Cth) for at 1 & 6

⁴ [Cartier International & ors v British Broadcasting Limited & Ors \[2014\] EWHC 3354](#)



and in India injunctions have been issued against URL shorteners, services designed to enable the sending of large files, general storage sites and Google Docs.⁵

Given the proven scope for unanticipated expansion, it is essential that the scope of the online locations against which injunctions can be sought is narrowly defined.

We have several concerns with the definition as currently drafted.

- Online location

While understanding the desire to be technology neutral, and enabling consistency in terminology with s116AF, 'online location' has the potential to be read extremely broadly. Of particular concern is that it may apply to sub-domains of websites, which would substantially broaden what seems to be the intended scope of application.

Online location should be narrowly defined, as narrowly as possible to achieve the purposes of the bill.

Recommendations:

- The EM should be amended to provide examples of what would be considered an 'online location' that judges may draw upon by analogy
- Online location should be construed as narrowly as possible in order to achieve the purposes of the Bill

- Primary Purpose

The use of the test of 'primary purpose' is novel in the copyright context, and is not clearly defined in the legislation or EM.

There is a real question as to the subjective nature of the factor, as online locations per se cannot have a 'purpose'. This may lead courts to adopt a mechanical approach where, for example, if 51% of content hosted is infringing, then the assumption is made that the site's primary purpose is to infringe, as other purposes must be secondary. The test is even more concerning when combined with the (again novel) concept of 'facilitation', as discussed below. A preferred approach may be to adopt the reasoning of the US Supreme Court in *Sony Corp of America v Universal City Studios*, and exclude online locations that are capable of substantial non-infringing uses.⁶

We support the EM's clarification that the:

⁵Nikhil Pahwa [World Cup 2014: 219 websites blocked in India, after Sony complaint](#) Medianama (July 7 2014) In the Indian case the High Court issues an injunction to block access to 472 sites, the order was hurriedly amended to block a mere 219 sites after concerns were raised about the dual purposes of many of the sites blocked.

⁶ 464 US 417 (1984).



primary purpose test would also prevent an injunction to block an online location operated overseas that provides legitimate copyright material to individuals within another geographic location, but are not licensed to distribute that copyright material in Australia.⁷

This should ensure that sites that were legitimate in their home jurisdiction would not be blocked in Australia due to differences in copyright term, exceptions, limitations or licensing. However the clarification would be stronger if 'primary purpose' was defined in the Bill, especially if defined to exclude sites with a substantial non-infringing use.

For sites with anything more than a 'small percentage' of infringing content in their home jurisdiction the EM seems to indicate a wider scope, noting that online locations 'mainly operated for a legitimate purpose' but which may 'contain a small percentage of infringing content' would not be covered⁸ and that the 'primary purpose' test would prevent an injunction to disable access to an art gallery website operated outside of Australia that may contain 'an unauthorised photograph.'⁹

Both of these suggest that sites with more than a small, or one piece, of infringing content could fall under the scope of the primary purpose test. This seems to be a much lower bar than the stated intention to block sites with a 'flagrant disregard' for copyright.

In order to provide a safeguard for sites containing some infringing content that are less than flagrantly infringing sites, a definition of 'primary purpose' should be added to the Bill, and the EM amended to clarify the sorts of considerations a court should look to.

In addition, the concept of flagrancy should be moved from a mere factor for the court to consider in s115A(5) to being part of the test for an infringing website in s115A(1)(b) 'the online location flagrantly infringes, [or flagrantly facilitates an infringement of], the copyright'.¹⁰

- The drafting in the Explanatory Memorandum around 'primary purpose' should be tightened by identifying examples of services, such as VPNs, that are not the target of the legislation
- The concept of flagrancy should be moved from s115A(5) to s115A(1)(b) to ensure that only flagrantly infringing sites fall within the scope of the injunctive power

- Facilitation

The concept of facilitation is again novel, and it is extremely unclear what it would cover. The concept is used in the recently adopted Singaporean legislation,¹¹ but there the site itself must be infringing, not merely facilitate infringement. As there have been no published injunctions issued under the Singaporean legislation, there is no case law on how facilitation has been approached. The concept is

⁷ Explanatory Memorandum Copyright Amendment (Online Infringement) Bill 2015 (Cth) for at 39

⁸ Explanatory Memorandum Copyright Amendment (Online Infringement) Bill 2015 (Cth) for at 20

⁹ Ibid at 38

¹⁰ We recommended the removal of facilitation from s115A(1)(b) as is discussed below

¹¹ Copyright Act (Cap 63 1968) s193DDA Singapore



not used in European jurisdictions, which are contained to actual infringement, whether direct, secondary (equivalent of Australia's authorization liability) or as joint tortfeasors¹² with infringing users.

We understand the Government's policy intention is to catch sites that have the primary purpose of facilitating access to infringing content. The EM states that the intention is:

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

Our concern, however, is that the concept of "facilitating" infringement is not currently part of Australian copyright law. As a result, in its current form, the Bill could lead the proposed site blocking regime being **found to apply to conduct that would not amount to an infringement of copyright under Australian law**. This is a wide and dangerous precedent, and out of step with other jurisdictions that have adopted site blocking. It would also create enormous legal uncertainty.

The Macquarie dictionary defines 'facilitation' as:

1. to make easier or less difficult; help forward (an action, a process, etc.).
2. to assist the progress of (a person): to facilitate the customer to find the right product.¹³

This could conceivably cover a number of online locations offering products that have legitimate uses, but which *may* also be used assist in copyright infringement. VPNs, cloud storage providers, providers of Bit Torrent or Internet Relay Chat ('IRC') software, browser plug ins or conversion tools may all be covered, as may blogs or subreddits discussing techniques or sites that may be used to infringe. A project such as Open Rights Group's attempt to transparently list the sites that have been blocked under the UK legislation may have a primary purpose of facilitating copyright infringement if the majority of users used the list to find sites with infringing content.

Virtual Private Networks

Many Australians use Virtual Private Networks (VPNs) for a range of reasons. These include personal and business security and to bypass geoblocks to access content not offered in the Australian market.

While the Australian government has for some time taken the view that the use of a VPN to bypass geoblocks does not amount to an infringement¹⁴ some doubt about this issue has recently been raised by the ACC who suggest that in some circumstances, this activity could amount to a copyright

¹² [1967 Ltd & Ors v British Sky Broadcasting Ltd & Ors](#) [2014] EWHC 3444 (Ch) (23 October 2014)

¹³ *Macquarie Dictionary Online* (2014)

¹⁴ See for example Matt Minogue from AGD giving evidence to the House of Representatives Standing Committee on Infrastructure and Communications for the IT Pricing (13 February 2013) to the effect that geoblocking is not a technological protection measure under the Copyright Act 1968 (pp4-10).

Also compare [statements](#) made by the Hon. Malcolm Turnbull MP, Minister for Communications, on his website that circumventing a geoblocks in order to access an overseas service like US Netflix is not illegal under the Copyright Act.



infringement.¹⁵

While this is a contentious position, in an injunctive case with no contradictor an assertion to this effect may not be properly contested. If a court accepted the claim of underlying infringement, any VPN services that are used by Australians to bypass geoblocks, especially if they advertise themselves as being able to bypass geoblocks, may be found to have a primary purpose of facilitating copyright infringement.

With current action from rights holders in New Zealand against VPN services on copyright grounds¹⁶ there would seem to be more than a theoretical risk that overseas hosted VPN services may be successfully targeted under this legislation.

Given the gravity of site blocking as a remedy, it is imperative that the Bill is drafted with sufficient clarity to ensure that VPNs are not targeted under the scheme.

Recommendation:

- Facilitation should be removed from 115A(2) and 115A(2) so that only sites that infringe copyright, either through direct infringement or authorisationsation, authorisedconcept in this context and should be

Following from the above, we recommend a redrafted s115A(2) as follows.

- (1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:
 - (a) a carriage service provider provides access to an online location outside Australia; and
 - (b) the online location flagrantly infringes the copyright; and
 - (c) the primary purpose of the online location is to infringe copyright (whether or not in Australia).

Safeguards

The direction to the court to consider a list of factors in deciding whether to grant the injunction is strongly supported by the ADA.

Experience in other jurisdictions, such as the UK, suggests that most applications for an injunction will be uncontested.¹⁷ As it's likely that there will be no contradictor to the rights holder's evidence and case, it is important that there are adequate safeguards to protect the public good and the interests of those

¹⁵Australian Copyright Council [Geo-blocking, VPNs and copyright](#) (G127v01) (2015)

¹⁶ Josh Taylor [NZ Media Companies Order ISPs to stop 'Global Mode' access](#) (April 2015)

¹⁷ [Cartier International & ors v British Broadcasting Limited & Ors \[2014\] EWHC 3354](#) at 4



affected. The EM notes that ‘factors to be taken into account set an intentionally high threshold test for satisfaction by the Court’.

The ADA support the majority of the safeguards, albeit with some suggestions for improving their efficacy. We urge the introduction of a safeguard to specifically protect freedom of expression.

- Human Rights Considerations

Unlike the regimes in the UK and Ireland, which have strongly influenced this Bill, Australia does not explicitly require human rights considerations to be taken into account in the implementation of the law.

As the CJEU has stated

In order to assess whether an injunction such as that at issue in the main proceedings, taken on the basis of Article 8(3) of Directive 2001/29, is consistent with EU law, it is therefore necessary to take account in particular of the requirements that stem from the protection of the applicable fundamental rights, and to do so in accordance with Article 51 of the Charter of Fundamental Rights of the European Union¹⁸

The main EU human rights considerations are broadly those recognized in the human rights statement of the EM.

- Art 11 (Freedom of expression and information)
 - “(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”
- Art 16 (Freedom to conduct a business)
 - “The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.”
- Art 17 (Right to property)
 - “(2) Intellectual property shall be protected.”¹⁹

As can be seen from the *Cartier* decision, the court weighed the various rights against each other in its consideration of proportionality (‘the comparative importance of the rights that are engaged and the justifications for interfering with those rights’).²⁰

In doing so, the UK court is bound by the decision of the CJEU which held that injunctions:

- must provide a possibility **for internet users to assert their rights** before the court once the implementing measures taken by the internet service provider are known.²¹

¹⁸ C-314/12 [Telekabel](#) at 42

¹⁹ Ibid at 85

²⁰ [Cartier International & ors v British Broadcasting Limited & Ors \[2014\] EWHC 3354](#) at 196

²¹ C-314/12 [Telekabel](#) at 57



- leaves the **addressee to determine the specific measures** to be taken, balancing the result sought with the resources and abilities of the addressee.
- **Protect the fundamental right of internet users to freedom of information.**²²
- Ensure the measures adopted by the internet service provider are **strictly targeted** so that they “serve to bring an end to a third party’s infringement of copyright or of a related right but without thereby affecting internet users who are using the provider’s services in order to lawfully access information.”²³

In comparison the two safeguards most protective of human rights in the Australian Bill are

- (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;

The ADA submits that these are inadequate, especially as the Australian jurisdiction lacks the overlying human rights framework that supports the EU (and therefore UK and Irish) law.

Concern is also raised by the human rights statement, which glosses over crucial threats to freedom of expression.

subscribers would be denied access to infringing copyright material accessed from those locations such as unauthorised films, television programs and music. They would also be denied access to any programs or other tools available at these online locations that facilitate the infringement of copyright.

However, as discussed above, website blocking is a blunt tool, and the standards are not set at sites that host 100% infringing or facilitative content. **This means that subscribers may be unable to access legitimate content or legitimate tools, a potential impingement on their freedom of expression and freedom of access to information and culture, which has not been adequately recognised.**

It may be illustrative to refer the UNHCR’s Special Rapporteur’s recent report into copyright policy and the right to science and culture. The report notes that it:

received a number of contributions, which expressed the concerns of copyright holders about the threat cultural industries face due to digital piracy enabled by evolving digital technologies. Proposals to address that situation as related to the Internet include website blocking, content filtering and other limits on access to content subject to copyright, as well as the liability imposed on intermediaries for infringing content disseminated by users. In the view of the Special Rapporteur, **such measures could result in restrictions that are not compatible with the right to freedom of expression and the right to science and culture....**In the Special Rapporteur’s opinion, that important topic requires additional study from a human rights perspective.²⁴

The report’s recommendations include envisaging ‘Alternatives to criminal sanctions and blocking of

²² Ibid at 55

²³ Ibid at 56

²⁴ UNHCR [Copyright policy and the right to science and culture](#) (2015) at 51



contents and websites for copyright infringement'.²⁵

Recommendation:

- A factor to protect the right to freedom of opinion and expression and the right to take part in cultural life should be added

- Flagrancy

As noted above, the most preferable outcome would be to consider flagrancy as part of the scope for the online locations that can be blocked under the injunctive process (ie, a precondition of eligibility for a site blocking injunction, not merely one of the factors to be assessed in determining whether to make an order). The flagrancy of the infringement is frequently referred to in the EM, and is a strong safeguard to ensure that injunctions are used against the most blatantly infringing sites, such as Popcorn Time or the Pirate Bay, without catching legitimate services.

- Proportionality

Proportionality has been a key consideration in the UK case law. In *Cartier* Arnold J sets out the considerations of primary importance:

- i) The comparative importance of the rights that are engaged and the justifications for interfering with those rights.
- ii) The availability of alternative measures which are less onerous.
- iii) The efficacy of the measures which the orders require to be adopted by the ISPs, and in particular whether they will seriously discourage the ISPs' subscribers from accessing the Target Websites.
- iv) The costs associated with those measures, and in particular the costs of implementing the measures.
- v) The dissuasiveness of those measures.
- vi) The impact of those measures on lawful users of the internet.

In addition, it is relevant to consider the substitutability of other websites for the Target Websites.²⁶

The Singaporean legislation also directly turns the court's attention to the volume of traffic at or frequency of access to the online location a specific factor for consideration: s193DDA(2)(f).

Concerns have also been raised over the use of DNS filtering. The increase in DNS filtering is likely to lead to increased usage and sophistication of the tools used to circumvent these blocks, and cause issues for the ability to provide global naming. These wider concerns, of interest to the greater public

²⁵ Ibid at 120

²⁶ [Cartier International & ors v British Broadcasting Limited & Ors \[2014\] EWHC 3354](#) 189-190



good rather than any particular party to the injunction, should be considered under the factor of proportionality.

We recommend that the EM should expand on the matters a court should consider under the factor of proportionality drawing from the UK case law, in particular the judgment of Arnold J in *Cartier*.

Recommendation:

- The EM should expand on the matters a court should consider under the factor of proportionality

- Categories of the means to infringe

Factor 115A(5)(b) refers to whether “the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement”. The wording appears to be based on the Singaporean legislation, and is again novel in an Australian context. The phrase “categories of the means to infringe” is unclear on the face, and should be deleted.

Recommendation:

- The phrase ‘categories of the means to infringe’ should be clarified or defined in Part 1 of Division V

- any other remedies available under this Act;

As well as any remedies available under this act, the court should be directed to consider remedies available in other jurisdictions. Obviously it should not be necessary to exhaust all local remedies in each jurisdiction, especially for sites with uncertain ties to home hosting countries.

However for sites that clearly operate under existing regimes, such as the notice and takedown scheme in the USA, it would be reasonable that rights holders engage with their local process before seeking drastic legal remedy in Australia,

Recommendation:

- The court should be directed to consider any other remedies available to the rights holder, in Australia or elsewhere.

- any other matter prescribed by the regulations;

One such an important issue, other matters should be prescribed at the level of legislation. Flexibility is already granted by s 115A(5)(k), which provides that the Court is to take ‘any other relevant matter’ into account in determining whether to grant the injunction.

Recommendation:



- Factor 115A(5)(j) should be removed

Procedural issues

It is pleasing to see the injunctions restricted to the Federal Court. We would expect that similarly to the UK, a few judges would end up specializing in these orders. This would go some way to alleviating the difficulties of judges assessing uncontested applications and making highly technical orders in circumstances when they may not fully comprehend the possible consequences of the orders that are requested. The ADA supports the legislation allowing the courts to determine the exact mechanism for blocking in each case, as this will allow orders to take into account proportionality and technologies available to the parties, and allow for the orders to evolve as technologies change. Additionally, the ADA supports the court's ability, under section 23 of the Federal Court Act, to order any indemnities or undertakings to be provided by the parties when granting the injunction. These are important safeguards in an area where technical mistakes can have far reaching complications.

There are several examples of mistakes having already been made in the course of blocking websites. In Australia one ASIC request to block an IP address under the *Telecommunications Act* also resulted in access being blocked to the website of the Melbourne Free University and over a thousand other websites.²⁷

In the UK, which has had a similar injunctive process to the one proposed in this Bill, ISPs blocked access to hundreds of legitimate sites including the BBC's Radio Times while carrying out an injunction. In the UK case, the judge when making the original order in the case had noted:

the orders require IP address blocking of the IP address for FirstRow's domain name firstrow1.eu. FAPL's evidence is that this will not result in over-blocking since that IP address is not shared. The orders also require IP address re-routing and URL blocking for URLs at any shared IP addresses.²⁸

Unfortunately when updating the IP addresses provided to the ISPs the rights holders included one that was shared with other sites. The ISPs were then placed in the difficult position where the legitimate site holders were requesting their sites be made available immediately, while the rights holders who had gained the injunction were warning the ISPs they expected them to continue to implement the injunction.²⁹ This is a clear case where an order for an indemnity for damages arising from ISPs reliance on information provided by rights holders would have been appropriate.

- Parties to the process

²⁷ At 17 Inquiry into the use of subsection 313(3) of the Telecommunications Act 1997 by government agencies to disrupt the operation of illegal online services [Submission 15](#)

²⁸ [The Football Association Premier League Ltd v British Sky Broadcasting Ltd & Ors](#) [2013] EWHC 2058 (Ch) (16 July 2013) at 56

²⁹ Leo Kelion [Radio Times caught up in Premier League's piracy fight](#) (14 August 2013)



Proposed subsection 115A(3) would provide that, in addition to the copyright owner and the CSP being parties to the proceedings, the person operating the online location may apply to the Court to be joined as an additional party. However, it is ultimately within the Court's discretion whether to join the party to the proceedings.

There seems no clear reason why the court should have the discretion to not join the party most directly affected, and this discretion should be removed.

The court should also have a general discretion to allow public interest advocates to appear as *amicus curiae*.

The overseas experience shows mixed willingness from courts to allow such parties to appear. The Court in *Cartier* found the submission from the Open Rights Group very helpful, while in Ireland, Digital Rights Ireland were not granted leave, with the judge having concerns they were not a neutral party.³⁰ As noted under the human rights discussion above, legitimate users have their rights to freedom of information and expression curtailed when sites they use are blocked. They should have standing to appear, especially in uncontested cases where there would otherwise be no genuine contradictor to test the evidence presented by the rights holder.

Even more critical is the ability for users to seek revocation or revision of an order. The CJEU has held that website blocking injunctions 'must provide a possibility **for internet users to assert their rights** before the court once the implementing measures taken by the internet service provider are known.'³¹ It may only be when a user tries to legitimately visit a site that they are made aware of the block, and the impact it has on their interests.

- Publication of orders

Due to the effect that website blocking can have on legitimate users and legitimate sites, it's important that there be transparency around the orders.

In the UK, the Open Rights Group notes:

The judgements in these in these cases are sometimes published... Court orders are separate to judgments... Court orders are generally not published.

Even though court orders are public documents, it is very difficult to get access to them. In theory anyone should be able to ask the court for a copy, but this is a very arduous process. Otherwise the only way to see the orders is for internet providers or the party making the blocking request to see them.³²

Judgments and orders should be made easily and freely accessible. It would be good if there was a category for these orders in the major online references, such as AUSTLII, but we recognise this is not a matter to be dealt with at the legislative level.

³⁰ [EMI Records \(Ireland\) Ltd & Ors -v- UPC Communications Ireland Ltd & Ors](#) [2013] IEHC 204

³¹ [Telekabel](#) at 57

³² See for example <http://www.451unavailable.org/uk-blocking-orders/>



Most users will not, of course, scan the internet for recent injunctive orders. They may however try to access a site that is blocked. In the recent *Cartier* case Arnold J agreed with the amicus submission from Open Rights Group that a page is displayed to users who attempt to access a blocked website. In his view:

the page should not merely state that access to the website has been blocked by court order, but also should identify the party or parties which obtained the order and state that affected users have the right to apply to the Court to discharge or vary the order.³³

Recommendations:

- The EM should draw the court's attention to the importance of allowing public advocates to appear, especially in uncontested applications for injunctive orders.
- The court should have the discretion under 115A(8) to allow an application under 115A(7) by any party the court considers should have standing
- The Bill or EM should specify that both judgments and orders should be published and be made accessible online
- ISPs should be directed to display a notice to users who attempt to access a blocked site. The notice should state that the site has been blocked by court order for reasons of copyright infringement, identify the parties and state that affected users have the right to apply to the Court to discharge or vary the order

Evaluation and Oversight

As with many schemes in the digital copyright arena, there are differing reports on how successful website blocking has been at deterring online piracy and supporting an increase in content production and creator incomes.

In Australia the introduction of the scheme comes at an interesting time, with the increase in streaming services, a large profile piracy case and a warning notice scheme for online infringement all occurring in a short space of time.

In order to gauge the effectiveness of the injunctions the scheme should be monitored and evaluated, perhaps in conjunction with the evaluation of the copyright code. The scheme should also be monitored for adverse outcomes, such as the accidental blocking of legitimate sites or curbs on freedom of information.

Recommendation:

- The scheme should be overseen and evaluated (possibly by a body such as ACMA). Any adverse outcomes should be monitored.

³³ [Cartier International & ors v British Broadcasting Limited & Ors \[2014\] EWHC 3354](#) at 264



About the Australian Digital Alliance

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumers, galleries, museums, IT companies, libraries, archives and charitable organisations.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.