



Copyright Amendment (Online Infringement) Bill 2015

Submission by the Australian Communications Consumer Action
Network to the Senate Legal and Constitutional Affairs Committee

April 2015



About ACCAN

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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Introduction

The Australian Communications Consumer Action Network (ACCAN) is supportive of effective and proportionate efforts to prevent online piracy. Consumers stand to benefit from a vibrant creative industry which is adequately compensated for its intellectual effort. Blocking access to online locations which infringe or facilitate the infringement of copyright is one step rights holders can take to prevent piracy from continuing undisturbed. However, we have a number of concerns about the reach and effectiveness of the proposed legislation. We also maintain that without adequately addressing problems with access and affordability to content the problem of piracy will persist regardless of regulation.

ACCAN's submission will highlight the impact this Bill may have on consumers if it exceeds its intended scope and explore possible ways to make it fit for purpose.

ACCAN notes that the Standing Committee on Infrastructure and Communications is currently dealing with similar concerns around website blocking. We believe much could be gained from reviewing submissions made to that Committee in developing policy targeted at curbing online piracy. This is particularly relevant to ensure proper processes are in place to minimise problems with blocking at the technological level.

'Facilitate infringement'

Our first concern relates to the scope of activities that may be picked up by an interpretation of an 'online location' which 'facilitates an infringement' of copyright.¹ Without clear legal precedent, there is ambiguity under the *Copyright Act* about what constitutes infringement in relation to the use of a Virtual Private Network (VPN) to gain access to geo-blocked products and services. If this ambiguity is not cleared up, this amendment may have the unintended consequence of blocking these services and in turn harm competition and consumer choice.

Under the *Copyright Act* it is an offence to provide a circumvention service for a technological protection measure.² A technological protection measure (TPM) can be used by a copyright owner to prevent, inhibit or restrict the doing of an act comprised in the copyright.³ During the IT Pricing Inquiry, Mr Minogue of the Attorney-General's Department explained that:

*"... general geoblocking devices that allow market segmentation would not of themselves be a technological protection measure...to the extent that the Copyright Act allows an owner or assignee of property to impose a TPM over the content, that is not the same thing as geoblocking."*⁴

This position is apparently supported by Malcolm Turnbull, who on his website states:

*"The Copyright Act does not make it illegal to use a VPN to access overseas content."*⁵

¹ *Copyright Amendment (Online Infringement) Bill 2015* section 115A(1)(b)

² *Copyright Act 1968* section 116AP

³ *Copyright Act 1968* section 10

⁴ Standing Committee on Infrastructure and Communications, 2013, 'At what cost? IT pricing and the Australia tax', p.97

However, this is not an interpretation shared by rights holders. The Australian Copyright Council states in its information sheet on 'Geo-blocking, VPNs & Copyright':

*"If someone in Australia uses a VPN to download a copy of material from an overseas website and they do not have permission from the copyright owner to download the material in Australia, it is likely to be an infringement of copyright in Australia."*⁶

While this ambiguity exists there is a risk that rights holders will attempt to use this injunctive power to block VPN websites and limit consumer access to paid content overseas.

Geo-blocking stifles competition

The legality of bypassing geo-blocking is particularly important in a discussion about reforms to the *Copyright Act*. Many of these reforms have been proposed in the context of treaty obligations designed to promote globalisation and free trade. The benefit for Australian consumers from these efforts is access to greater choice of products and services. However, this choice is curtailed if the *Copyright Act* is used as a tool to erect new trade barriers based on exclusive geographic licences. Geo-blocking better serves geographic market segmentation rather than the goal of copyright protection, which is to enable creators to receive compensation for their intellectual effort.

By-passing geo-blocking in no way impinges on the right of content creators to be compensated. Consumers still pay for content, but they have a choice about where they make that purchase. This greatly enhances competition and all of the positives a competitive market delivers. Increased choice may however impact the quantum of compensation currently being received, in the same way the introduction of competition in the market impacts the profitability of a monopoly provider.

The website blocking bill is an opportune time to clear up this lingering doubt about the legality of by-passing geo-blocking. Not addressing this issue now may have an impact on consumer choice if rights holders successfully apply to have access to geo-blocking bypass services shut down.

The case for legislative reform

The judiciary may come to an interpretation of the *Copyright Act* which protects circumvention of geo-blocking as it did in the similar case of *Stevens v Sony* in relation to CD ROM region coding.⁷ However, even the threat of legal action may be enough for some services to shut down. This has already occurred in New Zealand where subsidiaries of telecommunications provider CallPlus have been threatened with legal action from content owners Sky TV, Spark, MediaWorks and TVNZ over the use of its 'global mode' technology.⁸ The technology allows customers of these ISPs to bypass geo-blocks in order to pay for and access content overseas. ISP Lightwire has already confirmed that it will cease providing the service because it does not have the resources to challenge the claims in a legal setting. The cost of litigation to defend a website blocking request is likely to be very costly

⁵ Turnbull, M., 2015, 'Online copyright infringement FAQs', available at: <http://www.malcolmturnbull.com.au/policy-faqs/online-copyright-infringement-faqs>

⁶ Australian Copyright Council, 2015, 'Information sheet - Geo-blocking, VPNs & Copyright', available at: http://www.copyright.org.au/admin/cms-acc1/_images/20793403354c18ad7cf0d7.pdf

⁷ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58

⁸ Stuff.co.nz, 2015 'CallPlus responds to Global Mode warning', available at: <http://www.stuff.co.nz/business/67598136/callplus-responds-to-global-mode-warning>

especially for smaller ISPs and geo-blocking bypass businesses, some of which are based overseas. Due to these cost barriers, without legislative guidance, it is less likely this ambiguity will be cleared up through the courts.

The Minister for Communications, Malcolm Turnbull, dealt with this issue in part in the second reading speech for the Bill. He clarified that:

“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.”⁹

This clarification goes far enough to protect legitimate overseas content services from being blocked. However, it does not extend far enough to protect virtual private network (VPN) service websites. These websites may be seen as facilitating infringement by giving consumers access to geo-blocked content. Websites, such as Getflix, Unotelly and Unblockus, sell VPN services specifically for bypassing geo-blocks on content from providers like BBC iPlayer, Netflix, Hulu, Amazon Prime and HBO Go.¹⁰ If it were found that these types of geo-blocks were TPMs, then websites which primarily exist to facilitate circumvention could be targeted by rights holders.

Recommendation 1: The ambiguity around the legality of using VPNs be cleared up to prevent unintended consequences and a curtailing of competition.

Assessing the public interest

We acknowledge that a public interest test was added following feedback to the Online Copyright Infringement Discussion Paper. However we remain concerned that a judge in an *ex parte* hearing will not have the requisite evidence at hand to weigh the public interest against those of rights holders. The Australian legal system is founded on adversarialism. It is rare that a judge will stray from this role and draw on evidence not presented before the court.

The amendment creates no right for legitimate users of a site to present evidence on any adverse consequences of an injunction. We acknowledge that the *Federal Court Rules 2011* allow for a person to apply for leave to intervene in a proceeding, alternatively a court may appoint an *amicus curiae*.¹¹ We believe this is more likely to occur if the amendment creates a presumption in favour of allowing parties to become interveners or *amicus curiae*.

A cautious approach has been taken to the use of interveners and *amicus curiae* in Australian courts with regular reference to the comments of Sir Owen Dixon in *Australian Railways Union v Victorian Railways Commissioners*:

I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by

⁹ Turnbull, M., 2015, ‘Second reading: Copyright Amendment (Online Infringement) Bill 2015’

¹⁰ Getflix: <http://www.getflix.com.au/>; Unotelly: <https://www2.unotelly.com/home>; Unblockus: <https://www.unblock-us.com/>

¹¹ *Federal Court Rules 2011* Rule 9.12

*a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which are under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.*¹²

In contrast Einfeld J noted in *Re United States Tobacco Company* the value of *amicus curiae*, particularly as subjects of increasing complexity come before the courts:

*The variegated complexity of modern life and technology, increasing materialism and the possible risks to the public of otherwise lauded scientific advances, have brought consequent significant legal challenges. These have been amplified not minimally by the burgeoning of statutory law expressing vague general principles and requiring the exercise of broad undefined judicial discretions. For the just resolution of these issues, the resultant mix beckons, if not requires, whatever assistance and expertise the Courts can reasonably muster.*¹³

The introduction of a public interest test in the Bill acknowledges that there are important interests outside of those held by the parties to an action. However, without a clear avenue for these interests to be introduced it is likely they will be left to the judge alone to decide.

We recommend that there be a presumption in favour of allowing parties to become interveners or *amicus curiae* in the context of these injunction applications. This should apply both in circumstances where parties may have their interests affected by an injunction and where they wish to present public interest arguments against the granting of an injunction. We would also support any other legal mechanism through which opposing arguments can be heard and considered by the court.

Recommendation 2: There should be a presumption in the Bill in favour of allowing parties to become interveners or *amicus curiae* in the context of these injunction applications.

Cost/benefit of website blocking

Dutch research has attempted to measure the effectiveness of blocking access to torrenting website *The Pirate Bay*. The research made use of two different methods, consumer surveys which were self-reports on torrent use before and after blocking as well as BitTorrent monitoring, which mapped the number of Dutch torrent users before and after blocking.¹⁴ The research did not find a strong

¹² *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319 at 331. Gavan Duffy, Rich and Starke JJ agreed that leave should be refused. Only Isaacs CJ was of a contrary view. The views expressed by Dixon J are referred to in *R v Ludecke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 520-1 per Gibbs CJ (Dawson J agreeing), 522 per Mason J and 530 per Deane J. See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 182 and *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391.

¹³ *Re United States Tobacco Company v the Minister of Consumer Affairs and the Trade Practices Commission* [1988] FCA 241 at 68 per Einfeld J

¹⁴ Poort, J., Leenheer, J., van der Ham, J., Dumitru, C., 2013, 'Baywatch: two Approaches to Measure the Effects of Blocking Access to The Pirate Bay' (August 22, 2013). Available at SSRN: <http://ssrn.com/abstract=2314297>

indication of a long-lasting effect of website blocking in preventing piracy. This research confirmed the findings in other studies which found that legal action against file sharing often has an immediate effect, but this typically fades out after a period of six months as new sources for pirated content emerge.¹⁵ ACCAN's concern is that this website blocking bill may devolve into an expensive game of 'whack-a-mole', which consumers will end up paying for through higher internet bills.

This is particularly concerning in the context of a number of recent government policies which have added significant cost to the telecommunications industry. The un-costed Copyright Notice Scheme Code and metadata retention legislation are expected to add hundreds of millions to operating costs across the industry.¹⁶ Industry, which has an obligation to maintain profits for shareholders, has no choice other than to recoup these costs from their customer base. The affordability of connecting to the internet should be a paramount concern in light of the Government's goals of creating digital engagement and service delivery through the Digital Transformation Office (DTO).¹⁷

The cost to ISPs of maintaining any scheme will ultimately fall on consumers in the form of higher internet access charges. The rate of households without internet is currently 17%, with access falling to just 57% for households with income less than \$40,000.¹⁸ Rises in internet cost, even slight, are likely to further exacerbate this digital divide.

To minimise impact on consumers it is our preference that the cost of this amendment be kept to an absolute minimum. We believe the most equitable cost allocation would see rights holders pay for the ISPs costs of implementing and maintaining the blocking capability. This is equitable because it shifts costs onto those who derive benefit. In contrast, costs on ISPs are likely to be passed on to consumers equally, regardless of ability to pay.

The cost of implementing this amendment will be \$130,825 to ISPs on an annual basis.¹⁹ There is no clarity on how this figure is arrived at, but given how low it is we can assume it only covers a single staff member and ancillary costs of an ISP implementing a technological block. It is unlikely to cover the legal costs if an ISP chose to enter an appearance or take part in the proceedings in order to challenge a website block. As already mentioned this cost barrier will prevent some businesses from appearing before the court and may limit the evidence a judge can consider when assessing the public interest and other mitigating factors in deciding if to grant an injunction.

An application for injunction which only targeted ISPs with more than 1,000 customers would pick up 71 businesses.²⁰ Based on this number, and assuming ISPs do not make an appearance in a case, the scheme would add an additional \$9.3 million to customer internet bills each year, or an

¹⁵ Poort, J., Leenheer, J., van der Ham, J., Dumitru, C., 2013, 'Baywatch: two Approaches to Measure the Effects of Blocking Access to The Pirate Bay' (August 22, 2013). Available at SSRN: <http://ssrn.com/abstract=2314297>

¹⁶ ABC, 2015, 'Metadata: Cost of mandatory data retention yet to be revealed with Senate expected to pass bills soon', available at: <http://www.abc.net.au/news/2015-03-25/government-yet-to-reveal-costs-of-mandatory-data-retention/6345742>

¹⁷ ZDNet, 2015, 'Australians to get one login for government services', available at: <http://www.zdnet.com/article/australians-to-get-one-login-for-government-services/>

¹⁸ ABS, 2014, 'Household Use of Information Technology, Australia, 2012-13', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8146.0Chapter12012-13>

¹⁹ *Copyright Amendment (Online Infringement) Bill 2015* - Explanatory Memorandum

²⁰ ABS, 2015, 'Internet Activity, Australia, December 2014', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8153.0Main%20Features3December%202014?opendocument&tabname=Summary&prodno=8153.0&issue=December%202014&num=&view=>

additional \$0.73 per internet subscriber.²¹ These costs will be comparatively more burdensome on smaller ISPs as they represent a significant portion of operating costs and will likely harm competition.

Given these costs and the limited benefits of similar schemes overseas we recommend the proposed costs and benefits of the amendment be assessed before the scheme is introduced and a further review take place after 18 months of operation.

Recommendation 3: A cost benefit analysis of the amendment take place now and again after 18 months of operation.

Outstanding issues

Copyright and the Digital Economy Final Report

The introduction of website blocking highlights a number of ongoing concerns about the operation of the *Copyright Act*. Chief among these are the outstanding recommendations from the Australian Law Reform Commission's *Copyright and the Digital Economy Final Report*. There is potential for the blocking power to target websites which may otherwise be protected by the fair use exception proposed in the Report. We encourage the government to take active steps to adopt the recommendations of the Report which aim to make copyright relevant in the digital age.

Recommendation 4: That the Committee recommend the Government adopt the proposals of the *Copyright and the Digital Economy Final Report*, particularly in relation to the fair use exception.

Account termination provisions should be repealed

The legislative encouragement for account termination is a remaining problem in the *Copyright Act*. Account terminations are no longer accepted as sound policy by any industry party. Content industry groups have over recent years moved away from arguing that account termination is a necessary or desirable measure.

There is now a consensus among stakeholders in Australia that copyright infringement must not result in any person being disconnected from a phone or internet service. Disconnection from an essential utility service on the basis of copyright infringement is disproportionate and could result in harm to individuals who have nothing to do with the infringing acts.

As this safe harbour condition arises from the 2004 Australia – United States Free Trade Agreement (AUSFTA), it is significant that the United States has similarly seen a change in the views of stakeholders away from account termination. This is to be expected as the role the internet played in 2004 was very different from the role it plays in 2015.

²¹ ABS, 2015, 'Internet Activity, Australia, December 2014', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8153.0Main%20Features3December%202014?opendocument&tabname=Summary&prodno=8153.0&issue=December%202014&num=&view=>

The provisions in the *Copyright Act* which offer incentives for service providers to terminate accounts are based on antiquated assumptions and should be repealed. Serious consideration should also be given to repealing s116AG (3) (b) which allows a court to order the termination of an account.

Recommendation 5: The provisions in the *Copyright Act* which offer incentives for service providers to terminate accounts should be repealed.

Conclusion

The Australian Communications Consumer Action Network (ACCAN) reiterates its support for effective and proportionate efforts to prevent online piracy. However, we have a number of concerns about the reach and effectiveness of the proposed legislation. More needs to be done to target the causes of piracy and to encourage a competitive market for consumers to access affordable content locally and overseas. Addressing ambiguity around the legality of the use of VPNs to circumvent geo-blocks will go a long way to creating a market based solution to the problem of piracy.

The cost imposition of this, and other recent policies on the telecommunications industry, needs to be subject to a robust cost benefit analysis. The research from comparable overseas schemes shows the long-term impact on piracy from website blocking is limited. To prevent ISPs and ultimately consumers paying for a scheme of limited utility we maintain that setup and operation costs should be borne by rights holders.

We acknowledge the introduction of a public interest test is important. However, we think the quality of evidence could be improved if there was a presumption in favour of having an *amicus curiae* or intervener in applications for website blocking.

Finally, there are a host of recommendations in the ALRC Report which we think could make the *Copyright Act* more relevant in the digital age. In the context of introducing website blocking we think it is an opportune time to redress the balance between the private rights of copyright holders and those of the public to freedom of expression.