
The Inevitable Actors: An Analysis of Australia's Recent Anti-piracy Website Blocking Laws, Their Balancing of Rights and Overall Effectiveness

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Following the High Court's decision in Roadshow Films Pty Ltd v iiNet Ltd and walking in the footsteps of countries such as the United Kingdom, in 2015 Australia introduced a website blocking injunction regime into the Copyright Act. The regime, which was expanded in 2018, allows an injunction to be brought against a carriage service provider or a search engine provider to block access to an overseas website whose "primary purpose" or "primary effect" is the infringement or facilitation of infringement of copyright. The regime has received criticism that it may amount to a form of censorship and a restriction on the freedom to access information, particularly where the website comprises both infringing and non-infringing content. This article argues, however, that these risks are low, that the regime successfully balances rights when dealing with the very real issue of online piracy, and could potentially be expanded to include other intermediaries.

I. INTRODUCTION

The illegal downloading of audiovisual material, primarily, sound recordings, films and television programs, has emerged as one of the most challenging issues for copyright owners as well as for carriage service providers (CSPs).¹ Broadly speaking this challenge springs from the ease with which an internet user can upload and download copyright protected material using streaming, *BitTorrent* and other peer-to-peer technologies.² Creators of audiovisual content (including writers, directors, actors, producers, musicians, music producers and other artists) rely on the exploitation and protection of their copyright protected works, first, to make a living and, importantly, to also enable the funding of new works.³ As Malcolm Turnbull, the then Minister for Communications said in 2015:

Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to its creators.⁴

If, as a consequence of widespread copyright infringement, there are less financial resources to create new works and consequently fewer works are created, not only do creators suffer but so too do members of the public.⁵

This economic justification for copyright protection was described recently by the Australian Competition and Consumer Commission *Digital Platforms Inquiry* as being that copyright "establishes incentives to

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¹ A CSP is defined in the *Copyright Act 1968* (Cth) as having the same meaning as in the *Telecommunications Act 1997* (Cth) (the *Telecommunications Act*). Section 87 of the *Telecommunications Act* defines a CSP as a person who supplies, or proposes to supply a listed carriage service to the public using a network unit owned by one or more carriers, or a network unit in relation to which a nominated carrier declaration is in force.

² Patrick Tyson, "Evaluating Australia's New Anti-piracy Website Blocking Laws" (2017/2018) 3 *UniSA Student Law Review* 87.

³ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) 28.

⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2015 (Malcolm Turnbull).

⁵ Tyson, n 2, 89.



create works by giving rights holders a limited monopoly over the use of their material, with certain exceptions to enable appropriate use of those works to encourage competition and stimulate innovation".⁶ In *IceTV Pty Ltd v Nine Network Australia Pty Ltd*⁷ French, Crennan and Kiefel JJ described the copyright balance where they said:

[T]he social contract envisaged by the Statute of Anne, and still underlying the present Act, was that an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.⁸

When faced with the problem of widespread online piracy, this balancing act underlies the challenge for the Australian Government and policy makers. In attempting to find a solution, the legislature opens itself up to criticism that the balancing process can be arbitrary and may lead to restrictions on free speech, access to information, and the rights of a CSP to carry on its business.⁹ This may particularly be the case where a website or online location contains a mix of both copyright infringing material and legitimate material.

However, as set out below, given the wording of the statutory regime set out in s 115A of the *Copyright Act 1968* (Cth) (the Act) and the guidance provided in the explanatory memoranda as well as the cases, these concerns have not come to pass in Australia and are unlikely to. Further, site-blocking in Australia, as well as in other jurisdictions, has been an effective, although not bullet-proof, mechanism for reducing online infringement of entertainment content as one element of a range of measures taken by copyright owners.¹⁰

As Brett Cottle, then Chief Executive Officer of APRA AMCOS stated:

We know that it is not a complete solution to the problem. We know that there is no silver bullet. But what it will do is create a practical and feasible means by which to address the problem.¹¹

Finally, as will also be discussed below, there may also be scope to broaden the regime to include not just CSPs and Internet Search Providers but some other intermediaries.

II. THE AUSTRALIAN BACKGROUND

In the period leading up to the introduction of s 115A of the Act Australia saw, as a means of reducing large-scale online piracy, a series of landmark large-scale copyright infringement cases that continued to test, in relation to sound recordings and films, the limits of liability for authorising an act of infringement, as set out in s 101(1) and (1A) of the Act.¹²

⁶ Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Final Report (June 2019) 258, quoting Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (November 2013) 59.

⁷ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; [2009] HCA 14.

⁸ *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, [25]; [2009] HCA 14.

⁹ David Lindsay, "Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness" (2017) 40(4) *UNSW Law Journal* 1507, 1512–1513.

¹⁰ Other measures include making entertainment content accessible on platforms such as *iTunes*, *Netflix* and *Amazon Prime*.

¹¹ Commonwealth, *Journals of the Senate*, No 92 (12 May 2015) 2555.

¹² See *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380; [2006] FCAFC 187 which involved a relatively simple, centralised website known as mp3s4free.net that hosted hyperlinks that allowed internet users, via the hyperlinks, to access and download copies of music files hosted on remote websites. The Full Court of the Federal Court, held that the registered owner of the site was aware of the infringements and had the power to prevent them and, accordingly, had "authorised" the copying and communication to the public of the sound recordings by remote website operators. See also *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465; [2005] FCA 1242 which involved the peer-to-peer file sharing software Kazaa which was controlled and operated by the respondents out of Sydney. The Kazaa system allowed users to share copyright protected music files with each other once they had downloaded the software (free of charge). Wilcox J, in finding that Sharman Holdings had authorised the infringement of its users, held that the operators were aware of the copyright infringement that was occurring via the Kazaa system, that there was technical measures they could have taken to curtail the amount of infringement occurring and, not only did the operators have the power to reduce the amount of copyright that was occurring via their system, they encouraged it.

The series of cases, which had largely seen successful outcomes for copyright owners, came to an end in April 2012 when the High Court handed down its decision in *Roadshow Films Pty Ltd v iiNet Ltd*¹³ (*iiNet*), which held that iiNet was not liable for authorising the large-scale downloading of films by its customers as iiNet did not have the direct power to prevent the infringements and that there were no reasonable steps that could have been taken by iiNet to prevent them.¹⁴ The decision came as a major blow to copyright owners as it made it unlikely that, in the future, Australian CSPs would be found to have authorised large scale infringement by their subscribers. Consequently, other solutions for reducing large-scale online piracy needed to be sought.

Additionally, as also set out in the Revised Explanatory Memorandum (the 2015 REM) to the *Copyright Amendment (Online Infringement) Bill 2015* (Cth),¹⁵ although it was possible to take direct action for primary infringement against an online location within Australia under the Act (as was the case in *Cooper v Universal Music Australia Pty Ltd*¹⁶ and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd*¹⁷) it was difficult to take action against the operator of an online location operated outside of Australia.

III. THE AUSTRALIAN GOVERNMENT RESPONSE

In July 2014, the Attorney-General, George Brandis QC and Mr Turnbull jointly released the *Online Copyright Infringement Discussion Paper* (the 2014 Discussion Paper) acknowledging that online copyright infringement by individuals has been a longstanding issue, with Australians commonly identified as having high illegal download rates.¹⁸ The 2014 Discussion Paper, referencing *iiNet*, also stated that the Government believed that where a CSP does not have a direct power to prevent a person from doing a particular infringing act, there may still be reasonable steps that can be taken by a CSP to discourage or reduce online copyright infringement.¹⁹

Two other factors are likely to have contributed to and shaped the Government's eventual response.

First, there was the decision in *Dallas Buyers Club LLC v iiNet Ltd*,²⁰ in which the owners of the Oscar-winning film of the same name sought a preliminary discovery order against a group of Australian CSPs to provide details of 4,726 subscribers who the studio asserted had downloaded copies of the film via *BitTorrent*. Although the Court did make orders requiring the CSPs to provide account holder details, Perram J's orders severely limited the steps that the studio was able to take against the individual subscribers including, in particular, his Honour imposing conditions upon the applicants so as to prevent the subscriber information disclosed being used for "speculative invoicing". In doing so, the decision highlighted this type of litigation as falling short of an effective or appropriate course of action for content owners and CSPs.

Second, although a "graduated response scheme"²¹ had also been canvassed as part of the Discussion Paper, unfortunately, an industry code between the CSPs and rights holders in relation to the scheme was unable to be brokered.²²

¹³ *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42; [2012] HCA 16.

¹⁴ *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42, [78], [146]; [2012] HCA 16.

¹⁵ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [21].

¹⁶ *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380; [2006] FCAFC 187.

¹⁷ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465; [2005] FCA 1242.

¹⁸ Attorney-General's Department, *Online Copyright Infringement, Discussion Paper* (July 2014) 1, citing UMR Research, *Online Behaviours, An Australian Study* (December 2012) which estimates this rate at 21% of all Australians over the age of 18.

¹⁹ Attorney-General's Department, n 18, 3.

²⁰ *Dallas Buyers Club LLC v iiNet Ltd* (2015) 245 FCR 129; [2015] FCA 317.

²¹ A type of scheme that generally requires the CSP to take some action against users who are identified as infringing copyright and which, in some schemes, can result in the termination of the agreement between the CSP and the user. Such measures have been adopted in the United Kingdom, New Zealand, France, Taiwan, South Korea, Canada and Ireland. See Michael Williams and Rebecca Smith, "Searching for the Silver Bullet: How Website Blocking Injunctions Are Changing Online IP Enforcement" (2014) 25 AIPJ 59.

²² See Nick Whigham, "Rights Holders Abandon Three Strikes Notice Scheme as Fresh Piracy Fight Looms", *News.com.au*, 24 February 2016 <<https://www.news.com.au/technology/online/hacking/rights-holders-abandon-three-strikes-notice-scheme-as>>

After a period of consultation with industry stakeholders, the Act was eventually amended with the introduction of s 115A via the *Copyright Amendment (Online Infringement) Bill 2015* (Cth) to “enable copyright owners to apply to the Federal Court for an order requiring a CSP to block access to an online location operated outside Australia that has the primary purpose of infringing copyright or facilitating the infringement of copyright, without having to first establish the CSP’s liability for copyright infringement or authorisation of copyright infringement”.²³

Although it was not often raised during the consultation period, the Act did already provide a mechanism for copyright owners to seek site-blocking injunctions in relation to foreign websites engaged in copyright infringement. In Div 2AA of Pt V (the “Safe Harbour provisions”), s 116AG(3)(a) provides that, where an infringement occurs in the course of carrying out a Category A activity (ie network activity such as transmitting, routing, and providing connections), a court may grant an order “requiring the service provider to take reasonable steps to disable access to an online location outside Australia”.²⁴ The key difference between this existing remedy and the new s 115A, however, is that s 115A allows a blocking injunction to be granted against a CSP irrespective of whether they are liable for infringement or authorisation of infringement. That is, it is a “no fault” remedy.

IV. THE SITE-BLOCKING FRAMEWORK IN THE UNITED KINGDOM

Given that the Australian regime was inspired largely by the United Kingdom’s (UK) site-blocking scheme (and its application in the UK courts has been referred to in the Australian cases) it is helpful to have some understanding of the UK scheme and its origin.

A. Foundation in EU Law

Site-blocking injunctions against internet intermediaries were first introduced in the European Union (EU). They spring from three EU Directives; the *Information Society Directive* (or *InfoSoc Directive*),²⁵ the *E-Commerce Directive*,²⁶ and the *Enforcement Directive*.²⁷

Article 8(3) of the *InfoSoc Directive* provides that:

Member States shall ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or a related right.

Article 8(3) is to be read with Recital 59 of the *InfoSoc Directive*, which relevantly provides:

In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases, such intermediaries are best placed to bring such infringing activities to an end.

Article 11 of the *Enforcement Directive* provides:

Member states shall also ensure that rightsholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, without prejudice to Article 8(3) of *Directive 2001/29/EC*.

And, finally, Article 15(1) of the *E-Commerce Directive*, which places a limitation upon the above directives, provides that where service providers are providing services contemplated by the E-Commerce Directive:

[fresh-piracy-fight-looms/news-story/a0590bf35b9fc1c6d0e847b12b2cacf1>](#); Claire Riley, *Three Strikes Out: Anti-piracy Scheme Shelved over “Prohibitive Costs”* (18 February 2016) CNET.

²³ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) 14.

²⁴ *Copyright Act 1968* (Cth) s 116AAG(3)(a).

²⁵ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167.

²⁶ *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market* [2000] OJ L 178.

²⁷ *Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights* [2004] OJ L 157.

Member states shall not impose a general obligation on providers ... to monitor the information which they transmit or store.

B. The UK Site-blocking Provision

In 2003 the United Kingdom introduced s 97A into the *Copyright, Designs and Patents Act 1988* (UK) (the *CDPA*) thereby implementing Art 8(3) of the *InfoSoc Directive*. Section 97A provides:

97A Injunctions against service providers

- (1) The High Court (in Scotland, the Court of Sessions) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.
- (2) In determining whether a service provider has actual knowledge for the purposes of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to –
 - (a) whether a service provider has received notice through means of contact made available in accordance with regulation 6(1)(c) of the *Electronic Commerce (EC Directive) Regulations 2002* (SI 2002/2013); and
 - (b) the extent to which any notice includes –
 - (i) the full name and address of the sender of the notice;
 - (ii) the details of the infringement in question.
- (3) In this section “service provider” has the meaning given to it by regulation 2 of the *Electronic Commerce (EC Directive) Regulation 2002*.

It would be eight years, however, until the first application was filed in the United Kingdom for site-blocking injunction orders when the six major film studios brought an application against British Telecom²⁸ which is discussed in more detail below at Part VIII(A).

V. THE STATUTORY FRAMEWORK IN AUSTRALIA

In this section, a brief summary of the statutory framework that was created in Australia by the introduction into the Act of s 115A in 2005 and its subsequent amendment in 2018 is provided.

A. The 2015 Amendments

In Australia, the *Copyright Amendment (Online Infringement) Act 2015* (Cth) came into effect on 27 June 2015.²⁹ As stated in the 2015 REM, the scheme was “deliberately prescriptive” and “intended as a precise response to a specific concern raised by copyright owners”.³⁰

Its effect was the insertion of s 115A into the *Copyright Act 1968* (Cth), the key provisions of which provided:

115A Injunctions against carriage service providers providing access to online locations outside Australia

- (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 infringes, or facilitates an infringement of, the copyright; and
 - (c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).
- (2) The injunction is to require the carriage service provider to take reasonable steps to disable access to the online location.

Importantly, s 115A(5) also set out a list of matters (including proportionality, impact on persons, and public interest factors) that may be taken into account by the Court, as follows:

²⁸ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806; [2011] EWHC 1981 (Ch).

²⁹ *Copyright Amendment (Online Infringement) Act 2015* (Cth).

³⁰ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) 2.

Matters to be taken into account

- (5) In determining whether to grant the injunction, the Court may 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.

B. The 2018 Amendments

In 2018, after another period of consultation with key stakeholders,³¹ the *Copyright Amendment (Online Infringement) Act 2018* (Cth) was introduced with the effect of amending s 115A, first, to expand the test from “primary purpose” to “primary purpose or primary effect” [emphasis added] and, second, to allow a copyright owner who has sought an injunction against a CSP to also seek additional orders against a search engine requiring it to take steps to block search results that refer users to the online location.

The key provisions of s 115A now provide:

115A Injunctions relating to online locations outside Australia

Application for an injunction

- (1) The owner of a copyright may apply to the Federal Court of Australia to grant an injunction that requires a carriage service provider to take such steps as the Court considers reasonable to disable access to an online location outside Australia that:
- (a) infringes, or facilitates an infringement, of the copyright; and
 - (b) has the primary purpose or the primary effect of infringing, or facilitating an infringement, of copyright (whether or not in Australia).
- (2) The application under subsection (1) may also request that the injunction require an online search engine provider (other than a provider that is covered by a declaration under subsection (8B)) to take such steps as the Court considers reasonable so as not to provide a search result that refers users to the online location.

There was another significant amendment included in the 2018 amendments, being the new subs (2B) which is intended to streamline the process where, after a blocking injunction has already been granted in relation to an online location, new URLs and IP addresses subsequently provide access to it. Subsection (2B) provides that copyright owners, CSPs and search engine providers can agree in writing that the CSP and search engine providers will take steps to block access to the new domain names, URLs and IP addresses that have started to provide access to the online location.

While this is a form of rolling or adaptive injunction, as set out in the Explanatory Memorandum to the *Copyright Amendment (Online Infringement Bill) 2018* (Cth) (the 2018 EM),³² it is only intended to apply to online locations that are the subject of an existing blocking order and, in order to block access to any new online locations, a copyright owner must make a new, separate application to the Court to ensure that new online locations are not blocked “without appropriate judicial scrutiny”.³³

³¹ Senate Environment and Communications Legislative Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2018*.

³² Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth) 12.

³³ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth) 13.

VI. CRITICISM OF THE AUSTRALIAN SITE-BLOCKING REGIME

This section of the article sets out some of the key criticisms that have been made of the Australian site-blocking regime.

Throughout the two consultation periods, a number of criticisms have been levelled at the regime, particularly in relation to “over-blocking”. One of the key criticisms has been that s 115A may result in blocking websites that may host non-infringing as well as infringing material and thereby impose restrictions on free speech, the right to access information, and a form of internet censorship.³⁴

In response to the 2014 Discussion Paper, the New South Wales Council of Civil Liberties summed up the concern when it said:

[W]ebsite blocking should not be undertaken in a society which cherishes the right to free speech. It is a disproportionate response to the problem of copyright infringement. To alleviate the problem of copyright infringement, the least intrusive means of achieving this end is the most preferred. A de-facto internet filter, which this legislation is, is one of the most intrusive ways to discourage piracy on the internet. It is also the method which is most prone to accidental blockages, internet censorship, scope creep or other abuse.³⁵

The Law Institute of Victoria, in its submission to the Inquiry, was similarly concerned about over-blocking, stating:

A court ordering an injunction that is too broad or an ISP inadvertently blocking access to a site that does not infringe copyright or facilitate the infringement of copyright may impact on the rights to access to information and freedom of expression, as well as potentially interfere with the property rights of owners of any websites inadvertently blocked.³⁶

During the consultation period in relation to the 2018 amendments, specific concerns were raised about the breadth of the “primary effect” test. In particular, concern was raised that some sites such as *Pinterest* might be found to have the “primary effect” of facilitating the infringement of copyright, if a copyright owner decided to make an application under s 115A.³⁷

Additionally, in relation to the list of discretionary matters set out in subsection (5), concern has been raised that, unlike the “principle of proportionality” in the United Kingdom (which is discussed further below), the Australian regime presents the Court with greater discretion because such discretion is limited only by statutory factors and “proportionality” is only an optional discretionary factor to be taken into account amid an open-ended list of discretionary factors.³⁸ Arguably, an Australian court could, therefore, place very little or no weight on each of the matters set out including whether the response is proportionate in the circumstances. That is, in theory at least, the application of discretionary factors when balancing the competing rights may be arbitrary and/or subjective.

The remainder of this article addresses the above criticisms by:

- (1) examining the principles established in the EU and UK cases;
- (2) examining the guidance provided in the Australian statute and particularly, in the secondary materials such as the explanatory memoranda; and
- (3) examining the principles established in the Australian site-blocking cases.

³⁴ Australian Digital Alliance, Submission No 16 to Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, April 2015, 4; Dr Matthew Rimmer, Submission No 44 to Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, April 2015, 27; Australian Interactive Media Industry Association Digital Policy Group, Submission No 47 to Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, April 2015, 1, 3.

³⁵ New South Wales Council of Civil Liberties, Submission No 49 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, 21 April 2015, 3–4.

³⁶ Law Institute of Victoria, Submission No 42 to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, April 2015, 2.

³⁷ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth); Department of Communication and the Arts, *Regulation Impact Statement* (2018) [63].

³⁸ Lindsay, n 9, 1526–1527.

It will be argued that, despite the above criticisms, the European Union, United Kingdom and subsequently Australia, have developed clear principles of applying “rights balancing” in the cases ordering site-blocking injunctions that have not resulted in the arbitrary curtailing of freedom of speech and access to information, while also proving effective as a means of discouraging piracy. It will also be suggested that there may be scope to broaden the regime to include not just CSPs and Internet Search Providers but also some other intermediaries.

VII. EVOLUTION OF JURISPRUDENCE FROM THE EUROPEAN UNION

Given site-blocking orders originated in the European Union, it is worth considering several key cases from the European Union which provide guidance on the EU’s approach to the proportionality principle and site-blocking. Note that, in the European Union, a CSP or internet service provider (ISP) is generally referred to as an Information Society Service Provider (or ISSP).

A. Promusicae

The question of whether the principle of proportionality, a principle used to balance rights as against other rights and as a standard for limiting State power,³⁹ must be applied in relation to the enforcement of intellectual property rights in the European Union was examined in the Spanish case, *Productores de Musica de Espana v Telefonica de Espana SAL (Promusicae)*.⁴⁰ In 2005, a collecting society for the Spanish music and recording industry brought an action against Telefonica (an ISSP), seeking preliminary discovery of the names and addresses of Telefonica’s users each of whom the collecting society alleged, were infringing copyright by using the peer-to-peer file sharing system, Kazaa, to share sound recordings.

The European Court of Justice (CJEU), in a landmark decision, stated that when applying the EU Directives, each member State must “take care to rely on an interpretation of them which allows a *fair balance to be struck* between the various fundamental rights” [emphasis added] including, in this case, between “the right to intellectual property on the one hand, and the right to private life and personal data on the other”.⁴¹

Importantly, the CJEU made clear that the Courts of member States must ensure that they do not rely on an interpretation of their national law which would be in conflict with the fundamental rights contained within the EU Directives, or with other general principles of the EU law, including, specifically “the principle of proportionality”.⁴²

B. Scarlet Extended

In *Scarlet Extended SA v SABAM (Scarlet Extended)*⁴³ the *Societe Belge des Auteurs, Compositeurs et Editeurs* (SABAM) alleged that Scarlet’s users were downloading, without permission, copyright protected works in SABAM’s catalogue using peer-to-peer software. SABAM sought an order requiring Scarlet to block or “make impossible” for its customers to send or receive files containing copyright protected musical works and which would, on a technical level, amount to a filtering system.

The CJEU held that, while entitled to apply for an injunction aimed at reducing copyright infringement, an order of this type should not violate Art 15(1) of the *E-Commerce Directive* which prohibits measures that require “an ISP to carry out general monitoring of the information that it transmits on its network”.⁴⁴

³⁹ Lindsay, n 9, 1512.

⁴⁰ *Productores de Musica de Espana v Telefonica de Espana SAL* (C-275/06) [2008] ECR I-271.

⁴¹ *Productores de Musica de Espana v Telefonica de Espana SAL* (C-275/06) [2008] ECR I-271, [63].

⁴² *Productores de Musica de Espana v Telefonica de Espana SAL* (C-275/06) [2008] ECR I-271, [70]; see also Fanny Courdert and Evi Werkers, “In the Aftermath of the Promusicae Case: How to Strike the Balance” (2010) 18 *International Journal of Law and Information Technology* 50.

⁴³ *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959.

⁴⁴ *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959, [35].

And, in relation to the order sought, not only would it include the monitoring of information of users who are infringing copyright in sound recordings, it would also include those who are not.⁴⁵

Citing *Promusicae* the CJEU noted that the fundamental right to property, which includes the protection of intellectual property rights “must be balanced against the protection of other rights”.⁴⁶ In this instance, the order sought would not only limit Scarlet’s right to conduct business, it could also infringe the fundamental rights of the internet users, namely, the rights to the protection of personal data and freedom of expression respectively guaranteed under the EU Charter of Fundamental Rights. This, it was held, would amount to a “disproportionate interference with the freedom of internet users”.⁴⁷

Although *Scarlet Extended* makes it clear that an order seeking the general, unlimited filtering of the traffic of an ISSP would be disproportionate, this does not exclude a more targeted blocking order, as was the case in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH (Telekabel)* below.

C. Telekabel (the Kino Case)

Kino.to was a notorious website that allowed users to download or stream a large library of movies. In *Telekabel*⁴⁸ two film companies, Constantin and Wega, sought an injunction requiring Telekabel, an Austrian ISSP to block access to kino.to but without specifying the precise steps that the CSP would be required to take. The matter was referred to the CJEU to determine a number of questions including the proportionality of such an injunction.

In allowing the application, the CJEU held that an injunction of this kind would not infringe upon the fundamental right to conduct business because such an injunction would allow the CSP to decide upon the measures to put in place to protect against this type of copyright infringement.⁴⁹

In doing so, however, the CJEU also said that:

[T]he measures adopted by the internet service provider must be *strictly targeted*, in the sense that they must 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. Failing that, the provider’s interference in the freedom of information of those users would be unjustified in the light of the objective pursued.⁵⁰

The theme that emerges from *Telekabel* is that a website blocking injunction is likely to be permissible as long as it is “strictly targeted”, and does not unnecessarily deprive internet users of freedom to access the material lawfully.

VIII. THE UK EXPERIENCE

As mentioned at Part IV(B) above, although s 97A of the *CDPA* was introduced in 2003 it was not until eight years later in 2011 that copyright owners availed themselves of site-blocking injunctions against UK intermediaries, notably in the *Twentieth Century Fox Film Corp v British Telecommunications Plc (BT Case)*.⁵¹

Since then there has been a significant number of cases determined in the United Kingdom, which have settled many of the key principles in the United Kingdom at least, and which have been influential in the Australian cases.⁵²

⁴⁵ *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959, [37]–[39], [50].

⁴⁶ *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959, [44].

⁴⁷ *Scarlet Extended SA v SABAM* (C-70/10) [2011] ECR I-11959, [50]–[52].

⁴⁸ *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union, C-314/12, 27 March 2014).

⁴⁹ *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union, C-314/12, 27 March 2014) [63].

⁵⁰ *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union, C-314/12, 27 March 2014) [56] (emphasis added).

⁵¹ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806; [2011] EWHC 1981 (Ch).

⁵² As mentioned in *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806; [2011] EWHC 1981 (Ch) many of the applications under the UK regime are now uncontested, and based on papers. See *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, [7]–[15]; [2011] EWHC 1981 (Ch).

A. Twentieth Century Fox v BT

In the *BT Case* six major film studios had previously sued the operators of a well-known UK-based BitTorrent site called *Newzbin* for large-scale copyright infringement.⁵³ The *Newzbin* website ceased operating but, soon afterwards, a new website known as *Newzbin2*, commenced operation at the same address and in the same manner as the original; but the operation appeared to have moved offshore, the site being hosted by servers in Sweden.⁵⁴

The studios sought an application against British Telecom, the largest ISP in the United Kingdom, seeking an order under s 97A of the *CDPA* that, in broad terms, was intended to block or at least impede access to the *Newzbin2* website.⁵⁵ BT presented a number of reasons as to why the studios' case could not succeed including, as far as they are relevant to this article, the following.

First, BT argued that the making of a site-blocking order of this type would contravene Art 15(1) of the *E-Commerce Directive* which prohibited imposing a general obligation to monitor the information that they transmitted. Arnold J held, however, that a distinction can be drawn between imposing a general obligation to monitor and monitoring obligations that are specific. The order sought by the applicants did not require the respondent to engage in active monitoring, but to simply block (or at least impede) access to the *Newzbin2* website by automated means that did not involve detailed inspection of the data of BT's subscribers.⁵⁶

Citing the CJEU's decision in *Scarlet Extended*, BT also argued that the order was likely to have a negative impact on the enjoyment of rights and freedoms under the EU's Charter of Fundamental Rights, in particular, the right to privacy of electronic communications (Art 7), the right of personal data protection (Art 8) and the right to freedom of expression (Art 11). Unlike *Scarlet Extended*, however, the applicants were not seeking to introduce a system of filtering of all electronic communications for all its customers. On the contrary, the order sought by the studios was:

[C]lear and precise; it merely requires BT to implement an existing technical solution [known as *Cleanfeed*] which BT already employs for a different purpose.⁵⁷

BT also argued that any order would be ineffective as it would be possible for BT's subscribers to circumvent the blocking required by the order. Importantly, however, Arnold J held that, in relation to the question of efficacy, the order would be justified:

[E]ven if it only prevented access to *Newzbin2* by a minority of users.⁵⁸

Finally, BT contended that it was incumbent on the applicants to satisfy the Court that the interference with the Art 10 rights of the respondent's subscribers (freedom of expression) was proportionate having regard to the applicant's equivalent freedom of expression rights. Arnold J held that, in these circumstances, the rights of copyright holders "clearly outweigh" the rights to freedom of expression of the operators of *Newzbin2* as well as BT's, noting:

The order is narrow and a targeted one, and it contains safeguards in the event of any change of circumstances. The cost of implementation to BT would be modest and proportionate.⁵⁹

⁵³ *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 (Kitchin J); [2010] EWHC 608 (Ch).

⁵⁴ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, 856, [H4]; [2011] EWHC 1981 (Ch).

⁵⁵ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, 856; [2011] EWHC 1981 (Ch).

⁵⁶ *The Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, [177]; [2011] EWHC 1981 (Ch).

⁵⁷ As discussed in *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, [H11]; [2011] EWHC 1981 (Ch) in 2004, BT launched a system known as *Cleanfeed* with the aim of disrupting access by its subscribers to URLs listed on the Internet Watch Foundation (IWF) list. *Cleanfeed* was a hybrid system of IP address blocking and DPI (deep packet inspection) based URL blocking which operated as a two-stage mechanism to filter specific internet traffic. The IWF remit was to minimise the availability of child sexual abuse images hosted anywhere in the world, criminally obscene adult content hosted in the United Kingdom and non-photographic child sexual abuse images hosted in the United Kingdom.

⁵⁸ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, [194]–[198]; [2011] EWHC 1981 (Ch).

⁵⁹ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, [200]; [2011] EWHC 1981 (Ch).

Ultimately, Arnold J was satisfied that the order was proportionate and granted the first site-blocking orders in the United Kingdom.

Additionally, a specific issue raised by BT was that the order should require the studios to identify, in the form of a list, individual URLs corresponding to the individual files indexed by Newzbin2 being infringing copies of individual copyright works. In Arnold J's judgment, such a requirement would not have been proportionate or practicable since, given the great number of files, it would require the studios to expend considerable effort and cost in notifying long lists of URLs to BT on a daily basis. He did say in *obiter*, however, that the "position might be different if Newzbin2 had a substantial proportion of non-infringing content, but that is not the case".⁶⁰ It does suggest, therefore, at least one avenue, that might be pursued where a site does contain a mix of infringing and non-infringing content (discussed further at Part XI(D)).

B. Cartier

Site blocking in the United Kingdom undertook a major development with *Cartier International AG v British Sky Broadcasting Ltd (Cartier)*.⁶¹ The applicants in *Cartier*, who were companies in the Richemont group, sought orders against the UK's five main ISPs requiring them to block or at least impede access by their subscribers to six websites that Richemont claimed were infringing their registered trade marks, including CARTIER and MONTBLANC, by advertising and selling counterfeit goods via the sites.

As this was a trade mark infringement case rather than copyright and there was no equivalent of s 97A for trade marks, the case raised jurisdiction questions and was vigorously opposed by the ISPs. The Court determined that it was, however, entitled to make the orders pursuant to its inherent injunction power under s 37(1) of the *Senior Courts Act 1981* (UK) but also so as to comply with Art 11 of the *Enforcement Directive*.⁶²

At first instance Arnold J took the opportunity to set out several principles to be taken into account when considering the proportionality of making a site-blocking order and, in the present case, the following considerations were particularly important:⁶³

1. The comparative importance of the Charter rights engaged and the justifications for interfering with those rights;
2. The availability of less onerous measures, such as take-down notices;
3. The efficacy of the measures required to be adopted;
4. The costs associated with those measures, particularly the costs of implementing them;
5. The dissuasiveness of those measures; and
6. The impact of those measures on lawful users of the internet.

Additionally, Arnold J held it was relevant to consider the substitutability of other websites for the target websites, stating that "blocking access to a target website was less likely to be proportionate if there was a large number of alternative websites likely to be equally accessible and appealing to the interested user".⁶⁴ And finally, that it was also necessary to ensure that the relief sought provided for safeguards against abuse.⁶⁵

When considering the comparative rights engaged, Arnold J observed that the applicants had a legitimate interest in curtailing infringement because it was damaging to them, and that there was a public interest

⁶⁰ *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806, 864; [2011] EWHC 1981 (Ch).

⁶¹ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949 (Arnold J); [2014] EWHC 3354 (Ch).

⁶² Article 11 of the *Enforcement Directive* requires member states to ensure right holders able to seek an injunction against intermediaries whose services are used by a third party to infringe "intellectual property rights". See *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [128]–[132]; [2014] EWHC 3354 (Ch); See also *Marleasing SA v La Comercial Internacional de Alimentación SA* (C-106/89) [1990] ECR I-4135.

⁶³ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [189]; [2014] EWHC 3354 (Ch).

⁶⁴ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [175]–[176]; [2014] EWHC 3354 (Ch).

⁶⁵ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [189]–[191]; [2014] EWHC 3354 (Ch).

in preventing trade mark infringement, particularly where counterfeit goods were involved.⁶⁶ As for the ISPs, the orders sought would not impair the substance of their freedom to carry on business. The main effect of such orders would be to impose additional operating costs on them.⁶⁷

In relation to the freedom of internet users to receive information, his Honour said this did not extend to the right to engage in trade mark infringement.⁶⁸ Since the target websites appeared to be exclusively engaged in infringing activity, with no lawful component to their business, the operators themselves had no right requiring protection.

Thus, the key consideration was the impact of the orders on users of other lawful websites. If the orders were properly targeted and had sufficient safeguards built in, such users should not be affected.⁶⁹

In dealing in more detail with striking a “fair balance”, Arnold J noted that a key question was whether the benefits of website blocking justified the costs, particularly the implementation costs and that this question was central to the issue of proportionality.⁷⁰ Notably, the question of whether the ISPs ought to pay the costs of the implementation of the site-blocking orders was the subject of an appeal to the Court of Appeal⁷¹ and, again to the Supreme Court where that part of Arnold J’s decision was ultimately overturned.⁷²

IX. GUIDANCE IN THE AUSTRALIAN SECONDARY MATERIALS

In Australia, the 2015 REM and the 2018 EM provide valuable guidance in relation to how s 115A is intended to be interpreted and applied in relation to both the threshold test of “primary purpose or effect” of infringement and, particularly, in relation to the questions of proportionality. It should be noted that these are not, however, mutually exclusive considerations.

A. The Threshold Test Is Intentionally High

Both the 2015 REM and the 2018 EM set out a number of statements and give examples that, cumulatively, provide clear guidance that the threshold test that is whether an online location has the primary purpose or primary effect of copyright infringement, is intended to be very high.

In considering the *primary purpose* test, significant guidance as to the regime’s intended targets is given at para 20 of the 2015 REM, where it states that s 115A would:

[O]nly capture online locations that have the primary purpose of infringing or facilitating copyright infringement. This *excludes* online locations that are mainly operated for a legitimate purpose but may contain a small percentage of infringing content.⁷³

The 2015 REM goes on to state that the intentionally high threshold is a safeguard against any potential abuse and, in giving examples, that:

[T]he 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. ... Thus a website such as www.youtube.com or www.blogger.com would not *prima facie* satisfy the test as being an online location that infringes or facilitates infringement of copyright.⁷⁴

That is, websites with a legitimate purpose but that may have some infringing content are clearly not the intended targets of the regime.

⁶⁶ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [193]–[196]; [2014] EWHC 3354 (Ch).

⁶⁷ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [195]; [2014] EWHC 3354 (Ch).

⁶⁸ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [196]; [2014] EWHC 3354 (Ch).

⁶⁹ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [196]; [2014] EWHC 3354 (Ch).

⁷⁰ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [201]–[204]; [2014] EWHC 3354 (Ch).

⁷¹ *Cartier International AG v British Sky Broadcasting Ltd* [2017] 1 All ER 700; [2016] EWCA Civ 658.

⁷² *Cartier International AG v British Telecommunications Plc* [2018] 1 WLR 3259; [2018] UKSC 28.

⁷³ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [20] (emphasis added).

⁷⁴ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [6].

In 2018, when the threshold test was expanded by the addition of the words *primary effect*, the 2018 EM specifically touched on sites that are operated for a primarily legitimate purpose, reiterating that:

[t]his new threshold is sufficiently high to exclude online locations that are primarily operated for a legitimate purpose but may contain a small proportion of infringing content.⁷⁵

Rather, in terms of the kinds of activity the regime was intended to target, the 2018 EM further characterises the intended target activity as large-scale copyright infringement, stating that the scheme is:

aimed at disrupting access by users located in Australia to locations that facilitate *large-scale* infringement of copyright.⁷⁶

Given that *YouTube* and *Pinterest* had been specifically raised as examples of sites that could be blocked under the expanded regime, the Regulatory Impact Statement attached to the 2018 EM, provides further guidance as to the scheme's intention stating that, in relation to these kinds of sites:

[C]opyright owners would be more likely to seek cooperation from the operators of popular websites to address online infringement issues (e.g. removing pay-per-view content appearing on *Facebook Live*) rather than seeking a Court injunction.⁷⁷

This would not preclude a copyright owner from making such an application in relation to this kind of platform. However, given the strong guidance in the examples provided in the explanatory memoranda, without more, it would be unlikely to meet the threshold test. Rather, the scheme is intended to ensure that Australian consumers will be able to continue to access legitimate websites while only targeting the “worst offenders”.⁷⁸

B. Specific and Targeted

As mentioned in the discussion of *Telekabel* and the *BT Case* above, a strong theme emerges from these cases, being that a website blocking injunction is likely to be proportionate if it is “strictly targeted” and does not unnecessarily deprive internet users of freedom to access material lawfully.

Similarly, the 2015 REM states that 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 content.⁷⁹

The implication of this, therefore, is that the scheme is not intended to be applied in a broad or general way to online locations which, while they may have some infringing material being made available, do not flagrantly disregard the rights of copyright owners.

The 2015 REM also makes clear the intention that the orders be appropriate, specifically citing the *BT case* where the Court “issued detailed orders in relation to the technical means to be adopted by the CSP to block the relevant site”.⁸⁰ That is, the 2015 REM expresses an intention that the orders be targeted, no matter which technical means is adopted to impede access.

The logical extension of this, it is argued, is that the more legitimate material that is able to be accessed by users at a particular online location, the more targeted any blocking orders would need to be for the orders to be regarded as proportionate in the circumstances. Such targeted orders might include, for example, specific URL blocking of individual files as per Arnold J's *obiter* in the *BT Case* (rather than, say, domain name blocking that may disable access to an entire domain). But, even so, this remains within the framework of a threshold test that is, intentionally, very high.

⁷⁵ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth) 10.

⁷⁶ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth) 9 (emphasis added).

⁷⁷ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth); Department of Communication and the Arts, n 37, [75].

⁷⁸ Department of Communication and the Arts, n 37, [83].

⁷⁹ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [6].

⁸⁰ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [42].

C. Proportionality

Unlike the requirement in the United Kingdom and European Union that the Court must, when considering website blocking injunctions, apply the proportionality principle which requires that a “fair balance” be struck between fundamental rights,⁸¹ the 2015 REM states that the Australian courts would have discretion as to which of the factors listed in s 115A(5) to consider and the appropriate weight to place on each factor.⁸² In this regard, Australian courts appear to have a greater discretion than the UK and EU courts. Nevertheless, the 2015 REM provides examples as well as strong guidance as to how these might be taken into account.

When discussing the discretionary factors, the 2015 REM states that the:

Court would also be required to consider, for example ... whether disabling the access to the online location is a proportionate response. For example, the Court may consider the percentage of infringing content at the online location compared to the legitimate content, or the frequency in which the infringing material is accessed by subscribers in Australia.⁸³

And, in relation to whether disabling access to the online location would be a proportionate response in the circumstances, the 2015 REM states:

For example, the Court may decide that a website has a substantial or significant non-infringing purpose, so blocking that particular website is unlikely to be a proportionate response. The Court may also wish to consider the frequency in which infringing material is accessed by consumers in Australia from that particular online location.⁸⁴

As such, although the wording of s 115A(5) does not state that each of the discretionary factors must be taken into account, or the weight to be given to each, it is clear that they are intended to form part of the overall scheme as a form of balancing process to ensure that the granting of a particular site-blocking order is both appropriate in the circumstances and in the public interest.

Further, as is set out below, the Australian cases have taken the discretionary matters into account where they are relevant which, now that they have been applied and there is a body of jurisprudence, makes it very difficult for a Court to ignore them in any future proceedings.

X. THE AUSTRALIAN CASES

Since the introduction of s 115A there have been 13 reported applications to the Federal Court of Australia for site-blocking injunctions under s 115A. Seven of these were decided prior to the 2018 amendments coming into force,⁸⁵ and a further six have been decided on s 115A in its current form.⁸⁶ Importantly, all 13 applications for site-blocking orders have been successful.

Consistent with the intention of the Australian regime, copyright owners have, thus far, been motivated to target only the worst offenders. Nevertheless, clear principles emerge from the cases in relation to the threshold test and application of discretionary factors.

Before proceeding to a broader synthesis of the Australian cases it is perhaps helpful to first look at how the terms “primary purpose and effect” and “facilitates” have been interpreted in the Australian cases.

⁸¹ Lindsay, n 9, 1514, 1515.

⁸² Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [48].

⁸³ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [21].

⁸⁴ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [53].

⁸⁵ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178; [2016] FCA 1503; *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493; [2017] FCA 435; *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2017] FCA 965; *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* (2017) 349 ALR 154; [2017] FCA 1041; *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2018) 358 ALR 59; [2018] FCA 582; *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933; *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296; [2018] FCA 1434.

⁸⁶ *Australasian Performing Right Association Ltd v Telstra Corp Ltd* (2019) 369 ALR 529; [2019] FCA 751; *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2019) 144 IPR 1; [2019] FCA 885; *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2019] FCA 1328; *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* (2019) 148 IPR 432; [2019] FCA 1450; *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449; [2020] FCA 507; *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2020] FCA 1468.

Despite the fact that they are central to the regime under s 115A, there has been relatively little discussion as to their precise meaning. However, this may be explained by the practical reality that copyright owners have thus far targeted online locations where the threshold test is quite easily met and, hence, the two key elements of the test have not really been at issue.

A. “Primary Purpose or Effect”

Almost exactly one year after the 2015 amendments came into operation, the first application for site-blocking injunctions under s 115A, *Roadshow Films Pty Ltd v Telstra Corp Ltd*⁸⁷ (*Roadshow (No 1)*) was heard before Nicholas J in Sydney. The hearing involved two sets of proceedings heard together.

The first, the Roadshow Proceedings, was brought against 50 Australian CSP respondents in relation to *solarmovie*,⁸⁸ an overseas website that allowed users to stream from an enormous library of the applicants’ films. The second, the Foxtel Proceedings, was brought against substantially the same respondents, and sought injunctions in relation to *The Pirate Bay*, *Torrentz*, *TorrentHound* and *IsoHunt* which were overseas websites providing torrent files for films and television shows.

Nicholas J laid out the statutory framework and how it was intended to operate including, in regard to the “primary purpose” test, that:

If the court is satisfied that the *principal activity* for which the online location is used or designed to be used is copyright infringement or the facilitation of copyright infringement, then it will be open to conclude that the primary purpose of the online location is to infringe or facilitate the infringement of copyright.⁸⁹

Further, that:

[T]he fact that a particular website makes some unlicensed copyright material available online or is routinely used by some users to infringe copyright does not establish that the primary purpose of the website is to infringe or facilitate the infringement of copyright.⁹⁰

Subsequently in *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd*⁹¹ Burley J affirmed Nicholas J’s comments in *Roadshow (No 1)* and clarified them slightly by noting that:

[I]t is necessary for the applicants to establish that the primary purpose of the online location is to infringe copyright generally, not the applicant’s particular copyright.⁹²

It is worth bearing in mind, however, that because copyright owners have so far only targeted online locations where the threshold test has been relatively easily met, other than Nicholas J’s discussion of “primary purpose” in *Roadshow (No 1)*,⁹³ the precise meaning of “primary purpose” and “primary effect” in s 115A remain largely untested. This may, of course, change as conceptually new and unforeseen types of online locations evolve for which the purpose or effect is not so clear, and copyright owners may be forced to test the breadth of “primary purpose” or “primary” effect as well as the meaning of “facilitation”.

As will be discussed below, the types of online locations targeted has already graduated from relatively straightforward streaming and torrent websites such as *Pirate Bay*⁹⁴ to more conceptually elusive locations such as those that were the subject of *Roadshow Films Pty Ltd v Telstra Corp Ltd (Roadshow (No 3))*,⁹⁵

⁸⁷ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178; [2016] FCA 1503.

⁸⁸ *Solarmovie* was accessible via a number of URLs including solarmovie.is, solarmovie.com, solarmovie.eu and solarmovie.ph.

⁸⁹ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [49]; [2016] FCA 1503 (emphasis added).

⁹⁰ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [48]; [2016] FCA 1503.

⁹¹ *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493; [2017] FCA 435.

⁹² *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493, [74]; [2017] FCA 435.

⁹³ See *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [49]; [2016] FCA 1503 where Nicholas J described a location’s *primary purpose* as being akin to its *principal activity*.

⁹⁴ Which was the subject of site-blocking orders in *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178; [2016] FCA 1503.

⁹⁵ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2018) 358 ALR 59; [2018] FCA 582.

which were not websites as such, but locations that allowed a type of file to be downloaded which, when used with an application known as the *HD Subs+ App* (ie preinstalled in some Smart TVs), allowed users to stream films and TV programs.

B. “Facilitates”

As set out (Part V) above the threshold test in applying s 115A(1) is whether an online location’s primary purpose or effect is to infringe, or *to facilitate* the infringement of copyright.

Despite the importance of the word “facilities” in the threshold test, like the term “primary purpose or primary effect”, its meaning has received relatively little discussion in the Australian cases to date. In *Roadshow (No 1)*, Nicholas J made clear that “facilitates” was intended to be broader than strict infringement and, to this end, he referred to the *Macquarie Dictionary* definition, being “to make easier or less difficult”.

Nicholas J said:⁹⁶

The language used is deliberately broad. The word “facilitate” means “to make easier or less difficult; help forward (an action or process etc)”: *Macquarie Dictionary* (6th ed, 2013) at 525. In determining whether an online location facilitates the infringement of copyright, the Court will seek to identify a species of infringing act and ask whether the online location facilitates that act by making its performance easier or less difficult. An online location may both infringe and facilitate the infringement of copyright by making an electronic copy of a work or other subject matter available online for transmission to users. But it may also facilitate the infringement of copyright merely by making it easier for users to ascertain the existence or whereabouts of other online locations that themselves infringe or facilitate the infringement of copyright.

XI. ANALYSIS

In addition to clarifying the meaning of “primary purpose or effect” and “facilitates”, clear principles emerge from the cases in relation to the application of the threshold test and the discretionary factors.

A. Practice Reflects the Intention

The choices of target online locations by copyright owners have, in each of the thirteen Australian cases, been online locations that facilitate large scale copyright infringement with little or no evidence of non-infringing material also accessible via the location.

The first observation to make is that the choice of targets, therefore, reflects the intention that the threshold test in Australia be very high and not include popular sites that provide access to audiovisual content with a genuine non-infringing purpose or effect such as *YouTube* or *Pinterest*. Put simply, the principal activity of these kinds of sites is not copyright infringement and, under the current regime, even if there were a significant amount of copyright infringing material on the site, the clear intention is that they would not satisfy the threshold test and targeting these types of sites will likely fail.⁹⁷ Rather, the Australian cases demonstrate that the intention of s 115A is to allow rights-holders to seek an injunction against the worst offenders⁹⁸ and, in practice, these are indeed the locations that are being targeted.

B. Balancing Process Applied

The second observation to make is that, given the worst offenders have been the targets, rights balancing has not been front and centre of the Australian judgments. This does not mean, however, that the

⁹⁶ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [47]; [2016] FCA 1503.

⁹⁷ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2015* (Cth) [6]; Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth); Department of Communication and the Arts, n 37, [66], [75]. See also the discussion of “principal activity” in *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [49]; [2016] FCA 1503.

⁹⁸ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth); Department of Communication and the Arts, n 37, [83].

discretionary factors (including that the orders be a “proportionate response” in the circumstances) have been ignored by the Court or have been applied arbitrarily.

With this in mind, it is worth noting that in the 2018 EM, the proportionate response and public interest considerations (s 115A(5)(e) and (g) respectively) are described as examples of “built-in safeguards”.⁹⁹ While these do not amount to an attempt by the Australian legislators to strictly codify the proportionality principle, these two discretionary factors are clearly intended to replicate the balancing of fundamental rights required by the proportionality principle and as applied by the EU and UK courts.

The characterisation of these two discretionary factors as “safeguards” reflects a regime that contemplates blocking orders being made in relation to large-scale copyright infringements where there will be few competing interests but, where competing rights *do* arise (such as the freedom to access lawful information, or the freedom to operate a business), there are safeguards built-in to ensure that a “balancing” does take place in relation to the competing rights.

In Australia, because each of the applications for site-blocking orders has, without exception, been in relation to online locations that facilitate large-scale copyright infringement with little or no evidence of non-infringing material also accessible via the site, few competing interests have arisen. Nevertheless, the Australian courts have considered the discretionary matters set out in s 115A(5) where a question has arisen that is relevant to one of them. In doing so, a body of Australian jurisprudence has evolved in relation to each of the discretionary matters.

Given that the discretionary factors are not intended to strictly codify the proportionality principle, and yet they include “public interest” and “proportionate response” considerations, the body of Australian jurisprudence that has evolved has, at some times, drawn directly from the proportionality principle as applied in the UK cases¹⁰⁰ while, at other times, applied an altogether different emphasis.¹⁰¹ The application of these considerations by the Australian is discussed below.

1. The Impact on Persons Likely to Be Affected

At least four of the Australian cases have dealt with s 115A(5)(f) being the impact on any person, or class of persons, likely to be affected by the grant of the injunction.

In the first, *Roadshow (No 3)*,¹⁰² the film studios sought to extend site-blocking orders from traditional streaming or Torrent websites to smart TV boxes. More specifically, as mentioned above (Part X(A)), the target online locations were not websites, but online locations that allowed files to be downloaded that, when used in conjunction with a software application known as the *HD Subs+ App*¹⁰³ (which is preinstalled on the X-96 Smart TV Box), enabled users to stream films and TV programs.

Nicholas J held, in apparent consideration of s 115A(5)(e) which deals with “persons likely to be impacted”, that the making of the site-blocking orders sought:

will not have any impact on the use of the X-96 boxes except with respect to the streaming of copyright material using the HD Subs+ Apps.¹⁰⁴

The second case to deal with “parties likely to be impacted”, *Television Broadcasts Ltd v Telstra Corp Ltd*,¹⁰⁵ was brought by a Hong Kong based group of television and pay-TV companies. Similar to *Roadshow (No 3)*, it also involved online locations that allowed users to download software that, when

⁹⁹ Explanatory Memorandum, *Copyright Amendment (Online Infringement Bill) 2018* (Cth) 15.

¹⁰⁰ Such as whether other less onerous measure could have been taken.

¹⁰¹ Such as a lack of emphasis on effectiveness.

¹⁰² *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2018) 358 ALR 59; [2018] FCA 582.

¹⁰³ As discussed at *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2018) 358 ALR 59, [9]; [2018] FCA 582, the HD+ Subs App also has updated versions including “Press Play Extra App”.

¹⁰⁴ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2018) 358 ALR 59, [25]; [2018] FCA 582.

¹⁰⁵ *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296; [2018] FCA 1434.

used with certain Android compatible set top boxes, would enable users to receive the applicants' TV programs via the internet without having to subscribe to the applicants' pay-TV service.¹⁰⁶

In considering the impact on persons likely to be affected under s 115A(5), Nicholas J colourfully stated that:

[T]here will be some people who use the streaming devices to view television programs which they may have grown accustomed to watching for free by viewing TVB free-to-air channels in Hong Kong. It may rankle some of these people that they might no longer be able to watch these TVB broadcasts in Australia free of charge or, at least, that the Court is being asked to make orders that may make it more difficult for them to do so. However, the suggestion that this would impose an undue burden or hardship on users of the streaming devices is really no different from saying that they should be permitted to enjoy the same content for free that other users of TVB Australia's pay-tv service are required to pay to view. The unfairness 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.¹⁰⁷

The subject matter inevitably raised the question of whether blocking access to the apps would impact on the *Google Play* app. The evidence, however, had shown that blocking access to the apps (or the "facilitating applications" as Nicholas J referred to them) would have:

[N]o impact on the ability of a user of the streaming device to install or use the Google Play app, or other applications made available at the Google Play Store.¹⁰⁸

In considering the proportionality of the orders sought Nicholas J held, as a matter of fact, that the blocking orders would not:

prevent the users of the streaming devices from using them to download other applications which they may use to stream content that is made available online in Australia by or with the permission of the relevant copyright owner.¹⁰⁹

In *Foxtel Management Pty Ltd v TPG Internet Pty Ltd*¹¹⁰ the applicants sought to block access to 127 online locations via which the applicants' shows, including *Wentworth*, were able to be downloaded or streamed by users. Burley J considered the evidence of the flagrancy and scale of the infringements and, having regard to the discretionary matters referred to in s 115A(5), including persons likely to be affected, concluded that the orders sought represent a proportionate response to the activities of the online location(s) and it is unlikely that persons having legitimate rights will be adversely affected.¹¹¹

And fourthly, in *Foxtel Management Pty Ltd v TPG Internet Pty Ltd*¹¹² which concerned 28 target locations that allowed users to stream, or download via *BitTorrent*, the applicants' programs as well as a large number of film and television broadcasts belonging to other copyright owners, Nicholas J noted that:

[T]he only persons likely to be interested in communicating with the target online locations are those who seek instant access to movies and television programs without having to pay for it.¹¹³

2. The Impact on an Operator of a Website

The impact of site-blocking orders on the operator of a website has expressly been dealt with in two Australian cases.

¹⁰⁶ *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296, [1]–[14]; [2018] FCA 1434.

¹⁰⁷ *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296, [45]; [2018] FCA 1434.

¹⁰⁸ *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296, [25]; [2018] FCA 1434.

¹⁰⁹ *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296, [48]; [2018] FCA 1434.

¹¹⁰ *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* (2017) 349 ALR 154; [2017] FCA 1041.

¹¹¹ See Burley J's reasons in *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* (2017) 349 ALR 154, [61]–[148]; [2017] FCA 1041.

¹¹² *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933.

¹¹³ *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2018] FCA 933, [21].

The first, *Roadshow Films Pty Ltd v Telstra Corp Ltd (Roadshow (No 5))*¹¹⁴ involved a large number of online locations including Greek-Movies.com, a site that hosted links to a large number of the applicants' films that were dubbed in Greek. Nicholas J was satisfied that the primary purpose or primary effect of the target online locations was to infringe or facilitate the infringement of copyright.¹¹⁵ In considering the discretionary factors, his Honour noted that the operator of Greek-Movies.com, Dr Socrates Dimitriades, had contacted the Court expressing his view that the site was not copyright infringing, although gave very little explanation as to why that was the case.

Nicholas J held, however, that Dr Dimitriades' facilitation of copyright infringement was flagrant, he had not proposed any alternative remedy or resolution of the applicants' complaint, and nor had he identified any hardship or inconvenience that will be suffered by any users of his website in Australia if a blocking order is made.¹¹⁶

The second case, *Roadshow Films Pty Ltd v Telstra Corp Ltd (Roadshow (No 6))*¹¹⁷ concerned 86 target online locations that allowed the streaming, linking, and downloading of films and television programs, but also other types of online locations including:

- (1) Subtitling sites;¹¹⁸
- (2) Popcorn Time sites;¹¹⁹ and
- (3) Proxy portal sites.¹²⁰

Burley J held that each of the groups of online locations satisfied the threshold test.

In relation to one online location however, *animelon.com*, the applicants' solicitors had received communication from its operator which, in essence, stated that the site was a not-for-profit educational entity for the purposes of users to learn the Japanese language, and that it operates in countries where copyright permits "fair use" for educational purposes.¹²¹ Although there is currently no "fair use" defence in Australia, Burley J considered the issue in light of s 103C of the Act (fair dealing for the purpose of research or study). However, given that, on its face, the website encouraged the wholesale streaming of copyright films, it was not apparent to him how a defence under s 103C could succeed.¹²²

In relation to *animelon.com*, he noted:

I am not satisfied that users of the target online location who access the website do so only for educational purposes. Rather I consider, having regard to its content and form, that it provides a vehicle for users to copy copyright material, without recourse to the owner of that material, for their own purposes, educational or otherwise.¹²³

3. Whether Other, Less Onerous Measures, such as Take Down Notices, Could Have Been Taken

In considering whether or not site-blocking orders were proportionate the Federal Court, in *Roadshow (No 1)*, picked up on one of the considerations set out by Arnold J in *Cartier* that is whether other less onerous measures, such as take down notices, could have been taken.

¹¹⁴ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2019) 144 IPR 1; [2019] FCA 885.

¹¹⁵ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2019) 144 IPR 1, [13]; [2019] FCA 885.

¹¹⁶ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2019) 144 IPR 1, [28]; [2019] FCA 885.

¹¹⁷ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449; [2020] FCA 507.

¹¹⁸ Subtitling sites allowed users to download subtitles to a particular film and, with the use of software such as VLC Player, watch the film with the subtitles.

¹¹⁹ Popcorn Time sites allow a user to download a piece of software known as "Popcorn Time" through which users can stream movies or television shows.

¹²⁰ Proxy portal sites provide links to other sites that allow the downloading or streaming of content.

¹²¹ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449, [65]; [2020] FCA 507.

¹²² *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449, [69]; [2020] FCA 507.

¹²³ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449, [70]; [2020] FCA 507.

In *Roadshow (No 1)*, Nicholas J said:

Further evidence was provided by Mr Southey, the Technology Development Manager – Security and Compliance at Foxtel. ... It also demonstrates that the TPB sites investigated by him do not include any effective facility which may be used to communicate with the operator or to deliver a “take down” notice.¹²⁴

The implication being that, in this case, such a measure was not available but, if it had been, whether or not the applicants had issued take down notices may have been a relevant factor.

Subsequent to *Roadshow (No 1)*, this issue has not been raised in any of the Australian cases.

4. Whether the Response Is Proportionate in the Circumstances

Each of the Australian cases considered the question of whether the granting of the orders sought is “a proportionate response” in the circumstances, pursuant to s 115A(5)(e).¹²⁵ Although, understandably, because of the overwhelming evidence of large-scale copyright infringement in each case, the consideration has been more akin to a conclusion reached after considering the evidence rather than, for example, a detailed balancing process such as would be the case if the balancing process required by the proportionality principle were being applied.

However, other discretionary matters set out in s 115A(5) that, in a general sense, go to the seriousness of the infringing within the question of proportionality, have been discussed in the Australian cases including:

- (1) the scale of the infringement;
- (2) whether there is a disregard for copyright generally; and
- (3) whether blocking orders having already been made in other jurisdictions.

In *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd*¹²⁶ (*Universal Music*) Burley J, when considering the Court’s discretion under s 115A(5) listed these three factors together. Specifically, he commented that the amount of popular film and television content made available for download and the large numbers of visits to the *Kickass* website “indicate that the infringements can be described as flagrant and reflect an open disregard for copyright” and, additionally, that the site had been the subject of blocking orders in a number of jurisdictions including the United Kingdom, Ireland, Denmark, Italy, Finland and Belgium.¹²⁷

The orders made by Burley J in *Universal Music* required, among other things, that the CSPs take steps to disable access to the *Kickass* website by adopting domain name system (or DNS) blocking whereby a user attempting to access the site via one of the nominated domain names (seven in total) will be redirected to another location. In Burley J’s view this was a “proportionate” response in the circumstances.¹²⁸

5. Effectiveness as a Consideration of Proportionality

As discussed above in relation to *Cartier*, in the United Kingdom “effectiveness” is a factor that is usually taken into account when engaging in a rights balancing under the proportionality principle.¹²⁹ In the Australian cases, however, the likely effectiveness of site-blocking orders has not featured nearly as prominently as in the United Kingdom.

¹²⁴ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [92]; [2016] FCA 1503 (emphasis added).

¹²⁵ See *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493; [2017] FCA 435; *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* (2017) 349 ALR 154; [2017] FCA 1041; *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2019] FCA 1328; *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449; [2020] FCA 507.

¹²⁶ *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493; [2017] FCA 435.

¹²⁷ *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493, [76]; [2017] FCA 435.

¹²⁸ *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493, [78]; [2017] FCA 435.

¹²⁹ Also see *Nintendo Co Ltd v Sky UK Ltd* [2020] 3 All ER 83; [2019] EWHC 2376 where the principles were summarised as follows: “The injunction must be (i) necessary, (ii) effective, (iii) dissuasive, (iv) not unduly costly or complicated, (v) avoid barriers to legitimate trade, (vi) a fair balance between the fundamental rights engaged, (vii) proportionate and (viii) safeguarded against abuse.”

In *Universal Music* Burley J accepted the applicants' submission that:

[T]he 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.¹³⁰

Arguably, this is a slightly more stringent test than that applied in the *BT Case* in relation to effectiveness where Arnold J concluded that the site-blocking order in that case would be justified "even if it only prevented access to Newzbin2 by a minority of users".¹³¹ Further, the "efficacy of the measures required to be adopted" is one of the six principal considerations laid out by Arnold J in *Cartier*.

This is discussed in more detail below in Part XI(C).

6. Free Speech Does Not Extend to Copyright Infringement

Thus far no respondent or impacted party to an application under s 115A has specifically raised the question of whether the orders sought would impact on the freedom of internet users to receive information. Consequently, the Australian courts have not been as express as, say, Arnold J was in *Cartier* where, he said in relation to this issue:

[I]n relation to the freedom of internet users to receive information, this plainly does not extend to the right to engage in trade mark infringement. Since the Target Websites appeared to be exclusively engaged in infringing activity, with no lawful component to their business, the operators had no right requiring protection.¹³²

However, it is clear from the Australian cases that, while the right to free speech is a right that ought to be balanced against others, the right to free speech does not extend to copyright infringement. In addition to the comments made by Nicholas J in *Television Broadcasts Ltd v Telstra Corp Ltd*,¹³³ in the most recent site-blocking decision delivered in relation to s 115A, *Roadshow Films Pty Ltd v Telstra Corp Ltd* (*Roadshow (No 7)*),¹³⁴ Rares J commented that:

Among others, the consequences of such an order can be interference with the freedoms of expression and communication that are essential characteristics of a constitutional democracy, such as Australia, and the right of a citizen to access information freely.

However, part of the context in which our democracy works is that it provides laws for the protection of, among other rights, intellectual property, such as copyright.

This is, of course, a different question to whether site-blocking orders made in order to protect intellectual property rights may infringe on access by users to legitimate that is non-copyright infringing material which is discussed further below.

C. Difference in Emphasis between UK and Australian Cases

Unlike the EU and UK cases, when it comes to the question of "persons likely to be impacted", in the Australian cases there appears to have been comparatively little evidence presented on this issue, while the evidence of infringement has in most cases been overwhelming. Similarly, in the Australian cases, there has been comparatively little discussion of the overall "effectiveness" of site-blocking injunctions.

Consequently, compared to the UK cases, the *balancing of rights* by the Australian courts in seeking to strike a *fair balance* has not been as prominent, nor has it been required to be.

In the European Union and United Kingdom, arguably because these regimes do not have the same high threshold test as the Australia regime, and because their Courts are required to apply the principle of proportionality, the cases have considered the balancing of rights, including the opportunity of users to

¹³⁰ *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* (2017) 348 ALR 493, [77]; [2017] FCA 435.

¹³¹ *The Twentieth Century Fox Film Corp v British Telecommunications Plc* [2012] 1 All ER 806; [2011] EWHC 1981 (Ch).

¹³² *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [196]; [2014] EWHC 3354 (Ch).

¹³³ *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296, [45]; [2018] FCA 1434.

¹³⁴ *Roadshow Films Pty Ltd v Telstra Corp Ltd* [2020] FCA 1468, [15], [16].

gain lawful access to available information, in much greater depth (including in the cases discussed in this article, namely, *Promusicae*, *Scarlet Extended*, *Telekabel*, the *BT Case* and *Cartier*).

In a recent decision from the Amsterdam Court of Appeal in *Ziggo & XS4AA v Brein (Ziggo)*¹³⁵ which concerned dynamic injunction orders against two CSPs in relation to *The Pirate Bay* website, the evidence was that 90% to 95% of the 3.5 million torrents made available via the site were copyright infringing, while there was a small amount of non-infringing material (albeit mostly information about *The Pirate Bay*).

Bearing this in mind, the Court of Appeal held that:

[T]he denial of access to lawfully available information which results for the subscribers from blocking of the website of [*The Pirate Bay*] is proportionate to the extent and seriousness of the copyright infringement committed on this website.¹³⁶

It is clear, therefore, that in Europe when attempting to strike a balance where there is a real question of access to lawfully available information, significant weight will be given to the scale of the infringement and, as was the case in *Ziggo*, other factors such as the attempts of *The Pirate Bay* to evade enforcement.

By comparison, in Australia, in *Foxtel v TPG (No 1)* which also concerned *The Pirate Bay*, there was no discussion in Nicholas J's judgment in relation to access to lawful material on the site. Rather, based on the evidence, his Honour was satisfied that the *primary purpose* of the site was copyright infringement (ie that the Australian test had been met) and that this:

was clear from the statements appearing on the primary site (to which I have referred) and the nature and extent of the copyright material that is available for download using the magnet links and/or torrent files found there.¹³⁷

Nicholas J was also satisfied that the infringement was flagrant, that the operator had shown a blatant and wilful disregard for copyright and blocking orders had already been made in other jurisdictions.¹³⁸

Despite the different tests and difference in emphases between the Australia and the UK cases, as things currently stand, it does not appear that the orders made in Australia have in any way curtailed freedom of expression or the freedom of users to access lawful information and certainly not in any way greater than in the United Kingdom.

D. Regime Intended to Be Targeted and Specific

A further observation to be made in relation to the Australian cases, especially when considered with the secondary materials, is that in relation to the technical means to be adopted by a CSP to block access to a relevant location, the regime intends the orders be targeted no matter which technical means is adopted to impede access. As per *Telekabel* this may include an order that allows the CSP to determine its own technical means of impeding access.

The logical extension of this is: the greater the amount of legitimate material able to be accessed at the location, the more targeted (or the more granular) the orders sought would need to be. These might include, for example, specific URL blocking of individual files as per Arnold J's comments in *obiter* in the *BT Case* (rather than, say, domain name blocking that may disable access to an entire domain), so that legitimate material is still able to be made available.

E. Application of Established Principles

Broadly speaking, therefore, the Australian cases establish that in the case of an online location that hosts primarily copyright infringing material, the rights of the copyright owner will invariably outweigh

¹³⁵ *Ziggo & XS4AA v Brein* (HAZA 10-3184, 2 June 2020).

¹³⁶ *Ziggo & XS4AA v Brein* (HAZA 10-3184, 2 June 2020) [3.7.5].

¹³⁷ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [97]; [2016] FCA 1503.

¹³⁸ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178, [98]; [2016] FCA 1503.

the rights to freedom of expression of the users and operators of the site, as the right to freedom of expression is not absolute and does not extend to a right to infringe copyright.¹³⁹

The 2018 amendments that added “or primary effect” of infringing or facilitating infringement to the test appears to have opened the way to block sites such as “proxy”¹⁴⁰ and “stream-ripping”¹⁴¹ sites as well as sites that induce users to download an app used primarily to access infringing materials.¹⁴² Thus far, the Australian courts have not needed to delve further into striking the appropriate balance because the sites targeted, even these more “evolved” types of online locations, have been particularly clear in their intent to facilitate infringement.

Where, however, an online location hosts a significant amount of non-infringing material, a more granular approach is likely to be taken by the Courts to block access to the infringing material only. If a more granular approach is not available or feasible, then the Court will be required to delve further into the balancing of the rights of those impacted. In this situation, the Court may be required to consider each of the discretionary factors set out in s 115A(5), in particular, whether the orders are in the “public interest” and are a “proportionate response” in the circumstances. And consideration of these factors may include non-codified considerations such as, for example whether the copyright owners have attempted other, less onerous measures to prevent access to the infringing material and whether traffic to the infringing material is far greater than to the non-infringing material.

F. Risk of Curtailing Rights Is Low

Given the jurisprudence established in Australia to date, where the extent of infringement is large-scale and of a flagrant nature, it is difficult to see how the rights of users to access non-infringing material, or the right to freedom of expression, would outweigh the rights of copyright owners unless the volume of non-infringing material was also significant. And, in this latter scenario, given the onus is on the copyright owner to show that the “primary effect” is copyright infringement, query whether the threshold test will have been made out.

Indeed, it is difficult to envisage the kind of online location that, as some critics of the regime have suggested,¹⁴³ may have a legitimate purpose but could be wholly blocked because it provides access to a mix of both infringing and non-infringing copyright material. Throughout the periods of consultation with the industry, very few (if any) online locations have been identified in the submissions that comprise a mix of infringing and legitimate content that would genuinely be at risk of being subject to a targeted and specific site-blocking injunction; that is, mixed sites that also satisfy the high threshold test of being primarily for the purpose or effect of copyright infringement.

In some of the submissions in the *Inquiry into the Copyright Amendment (Online Infringement) Bill 2018* (the 2018 Review) online file hosting sites such as cyberlockers (file hosting sites that provide internet users with access to storage space allowing them to upload and download large files) were raised. Supporters of the “primary effect” test referred to cyberlockers as an example of an online location where the “primary purpose” test (as opposed to “primary effect”) may hinder or prevent the objectives of the regime.

Foxtel, for example, stated that:

It can be difficult in some circumstances to establish that some online locations have the “primary purpose” of infringing copyright (the current threshold), even though that is the practical effect of the locations. This is relevant to online file-hosting services, such as cyberlockers which are widely used to facilitate the unauthorised sharing of copyright material.¹⁴⁴

¹³⁹ Lindsay, n 9, 1521; also see text at Part XI(B)(6).

¹⁴⁰ See *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2020) 151 IPR 449; [2020] FCA 507.

¹⁴¹ See *Australasian Performing Right Association Ltd v Telstra Corp Ltd* (2019) 369 ALR 529; [2019] FCA 751.

¹⁴² See *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2018) 358 ALR 59; [2018] FCA 582; also see *Television Broadcasts Ltd v Telstra Corp Ltd* (2018) 134 IPR 296; [2018] FCA 1434.

¹⁴³ See Part VI.

¹⁴⁴ Foxtel, Submission No 19 to the Senate Environment and Communications Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2018*, 20 November 2018, 2.

On the other hand, concern was expressed by opponents of the primary effect test that because of its breadth, the primary effect test could capture “legitimate services” that also have some infringing content such as cyberlockers.¹⁴⁵ As set out below, this concern is overstated.

First, in the event that a cyberlocker did host non-infringing content as well as infringing, as already mentioned above, the onus will still be on the copyright owner to establish that copyright infringement or the facilitation of copyright infringement is its primary purpose or primary effect.

As the Department of Communications and the Arts stated in its submission to the 2018 Review:

Legitimate online locations that may have some infringing activity will not have the “primary purpose or primary effect” of infringing copyright, or facilitating the infringement of copyright. While they may have some effect in terms of infringing material, this will generally not be the intended primary purpose of the location, nor its primary effect. Rather, the injunction provisions will only capture locations that meet this threshold, such as “cyberlockers” that, in some instances, predominantly contain infringing copies of online material.¹⁴⁶

Second, the Court would still be required to consider matters relevant to the discretionary factors set out in s 115A(5) including, in particular, (1) whether less onerous measures have already been taken including take down notices or contacting the operator of the location directly, (2) the impact on persons likely to be affected, (3) whether granting an injunction is proportionate in the circumstances, and (4) whether it is in the public interest. As stated by the Australian Copyright Council in its submission to the 2018 Review:

Section 115A would still contain stringent relevant factors to be considered by the Federal Court and, accordingly, it is difficult to see that unnecessarily broad injunctive orders will be made following such an amendment.¹⁴⁷

Third, as more of an anecdotal observation, it is worth noting that the UK regime does not include a requirement that the online location’s primary purpose or primary effect be copyright infringement (as set out above, s 97A of the *CDPA* does not have a high threshold like Australia’s regime does). Despite this, there does not appear to have been instances of copyright owners seeking injunction orders against file hosting services such as cyberlockers that have a legitimate purpose but that also contain some copyright infringing content. In fact, the opposite is true.

In the recent decision of *Miles J in Capitol Records v British Telecommunications Plc*¹⁴⁸ (*Capitol Records*) the UK High Court was required to consider, for the first time, an application by the recording industry in relation to a cyberlocker, in this instance a cyberlocker known as “Nitroflare”. Nitroflare allows users to upload and download files and, on its face, has the appearance of a legitimate service. Importantly, however, as set out in *Capitol Records*, it had a number of features that suggested its purpose was copyright infringement including, for example, that it had a policy whereby files that have been uploaded by a user and are not downloaded by anyone else within 90 days would be deleted, and that it offered large limits on storage capacity (much larger than that typically offered as the basic free tier by legitimate cloud storage services).¹⁴⁹ The recording industry’s experts were able to show that over 98% of the music files on Nitroflare were commercially available and, therefore, likely to be copyright infringing.¹⁵⁰ There was little doubt, therefore, regarding Nitroflare’s purpose and intent being to facilitate copyright infringement.

¹⁴⁵ Senate Environment and Communications Legislation Committee, Parliament of Australia, *Copyright Amendment (Online Infringement Bill) 2018* (Report, November 2018) 15.

¹⁴⁶ Department of Communications and the Arts, Submission No 22 to the Senate Environment and Communications Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2018*, 20 November 2018, 2.

¹⁴⁷ Australian Copyright Council, Submission No 13 to the Senate Environment and Communications Legislation Committee, *Inquiry into the Copyright Amendment (Online Infringement) Bill 2018*, November 2018, 2.

¹⁴⁸ *Capitol Records v British Telecommunications Plc* [2021] EWHC 409 (Ch).

¹⁴⁹ *Capitol Records v British Telecommunications Plc* [2021] EWHC 409 (Ch), [15].

¹⁵⁰ *Capitol Records v British Telecommunications Plc* [2021] EWHC 409 (Ch), [17].

Finally, as a broader comment not only in relation to cyberlockers, to further reduce the risk of “over-blocking” there are two additional safeguards that have been included in each of the site-blocking injunctions granted in Australia. First, the ability for third parties who claim to be affected by the orders to have liberty to apply to vary or challenge the orders; and, second, a sunset clause making the orders finite (in each of the Australian cases, three years, with liberty for the applicants to apply to extend them). The author is not aware of any impacted or affected person (eg a user or operator), as at the date of writing, making application to the Court to vary or revoke any of the Australian site-blocking injunctions.

XII. SEARCH ENGINES

Given that the 2018 amendments to the Act allowed a blocking injunction to be brought against an internet search provider (in addition to a CSP) one would have expected to see search engines included in the applications for site-blocking injunctions from January 2019 onwards.

However, in early 2019, as reported in the Australian media,¹⁵¹ Google and Roadshow reached an agreement whereby Google would voluntarily “de-index” search results of locations that were the subject of Australian site-blocking orders. Consequently, as at the time of writing, no search engine has been included in any application for site-blocking orders under s 115A in Australia.

XIII. EFFECTIVENESS OF SITE-BLOCKING ORDERS

The effectiveness of site-blocking orders is relevant in two ways; first, as a factor when considering the proportionality of an order and, second, as a significant factor when considering policy issues in relation to the regime as a whole.

In the United Kingdom the courts have taken a relatively generous approach to the question of effectiveness. It is clear from Arnold J’s comments in the *BT Case*¹⁵² when granting the site-blocking injunctions to disable access to *Newzbin2*, that in relation to the question of efficacy, the order would be justified “even if it only prevented access to *Newzbin2* by a minority of users”.¹⁵³

And, as he said in *Cartier*:

I entirely accept that, as discussed in *20C Fox v BT* at [192] and *EMI v Sky* at [103]–[106] the likely efficacy of the injunction in terms of preventing or impeding access to the target website is an important factor in considering the proportionality of a website blocking injunction. It is evident from the CJEU’s judgment in *UPC v Constantin* that the applicable criterion of efficacy is whether the measures required by the injunction will at least *seriously discourage* users from accessing the target website.¹⁵⁴

Giving some context to his finding Arnold J stated:

Overall the conclusion that I draw from the evidence is that, in the section 97A context, blocking of targeted websites has proved reasonably effective in reducing the use of those websites in the UK. No doubt it is the casual, inexperienced or lazy users who stop visiting those websites, whereas the experienced and determined users circumvent the blocking measures; but that does not mean that it is not a worthwhile outcome.¹⁵⁵

In the Australian cases, however, as discussed in Parts XI(B)(5) and XI(C) above, effectiveness has not been argued to the same extent as in the European and UK cases. Having said that, when the Australian courts have dealt with effectiveness, they have taken an approach not entirely dissimilar from that in the United Kingdom.¹⁵⁶

¹⁵¹ See Jennifer Duke, “From Enemies to Allies”: Google Removes Piracy Websites from Search Results”, *The Sydney Morning Herald*, 13 May 2019 <<https://www.smh.com.au/business/companies/from-enemies-to-allies-google-removes-piracy-websites-from-search-results-20190510-p51m55.html>>.

¹⁵² *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [175]; [2014] EWHC 3354 (Ch).

¹⁵³ *Twentieth Century Fox Film Corp v Sky UK Ltd* [2015] EWHC 1082 (Ch), [198].

¹⁵⁴ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [175]; [2014] EWHC 3354 (Ch) (emphasis added).

¹⁵⁵ *Cartier International AG v British Sky Broadcasting Ltd* [2015] 1 All ER 949, [236]; [2014] EWHC 3354 (Ch).

¹⁵⁶ See Parts XI(B)(5) and XI(C).

As a policy issue when considering the regime as a whole, in Australia, when compared to say the United Kingdom, there have not been as many studies done in measuring the effectiveness of site-blocking in empirical terms. The studies that have been done, however, point very clearly to the fact that they have been effective, not just in relation to reducing traffic to the sites that are blocked, but also in reducing copyright infringement of films and TV programs in Australia generally.¹⁵⁷

A. The Incopro Report

A study by Incopro, which was commissioned by the Australia & New Zealand Screen Association¹⁵⁸ published its results in a July 2018 report (*the Incopro Report*). The study used forensic software to analyse traffic to target online locations the subject of site-blocking injunction orders since the first orders were made in late 2016.

The *Incopro Report's* key findings included, first, that between October 2016 (shortly before the first orders were made in *Roadshow (No 1)*) and April 2018 access or usage of the blocked online locations in Australia had reduced by 68.7%.¹⁵⁹ According to the report, Australians' use of proxy sites to access the blocked locations was very low and, as such, the combined usage of blocked locations and their dedicated proxy domains saw a reduction of 70.2% between October 2016 and April 2018.¹⁶⁰

Below is a graph from the *Incopro Report* showing the estimated traffic to the online locations that were the subject of the *Roadshow (No 1)* and *Foxtel v TPG (No 1)* site-blocking orders. As can be seen, the reduction in traffic to the sites from Australia after December 2016, when the relevant site-blocking injunctions were ordered, is dramatic.

Importantly, the *Incopro Report* also found that online piracy in Australia overall had decreased significantly over the same period (ie October 2016 to April 2018). Specifically, the Incopro Report determined that:

- traffic in Australia to the most accessed 50 pirate sites from Australia (from October 2016 to April 2018) decreased by 50.4%;¹⁶¹ and
- traffic in Australia to the most accessed 250 pirate sites (over the same period) decreased by 42%.¹⁶²

B. The IPS Report

A second, more recent study called the *Consumer Survey on Online Copyright Infringement 2019* was prepared by IPS Management Consultants on behalf of the Commonwealth Department of Communications and the Arts and was published in June 2019 (*the IPS Report*).

The *IPS Report*, which used a consumer survey to reach its findings, determined that copyright infringement in:

- television shows decreased from 33% in 2015 to 16% in 2019; and
- movies decreased from 49% in 2015 to 25% in 2019.

The IPS Report also asked what respondents did when they encounter a blocked site. The study reported that:

- 44% simply gave up;
- 18% sought alternative lawful access;
- 16% sought alternative paid for, but unlawful access; and
- less than 1% were able to bypass the blocked site.

¹⁵⁷ Australian Screen Association, *Site Blocking Efficacy – Key Findings: Australia* (July 2018) (*the Incopro Report*).

¹⁵⁸ Previously known as the *Australian Screen Association* or the ASA.

¹⁵⁹ *The Incopro Report*, n 157, 1.

¹⁶⁰ *The Incopro Report*, n 157, 6.

¹⁶¹ *The Incopro Report*, n 157, 1–2.

¹⁶² *The Incopro Report*, n 157, 1–2.

C. Analysis

Such dramatic reductions in traffic to pirate sites and infringement generally cannot but lend significant weight to the conclusion that site-blocking, as part of an overall strategy to reduce online infringement, is effective.

There is, of course, the question that is often raised by critics of site-blocking, being that the availability of legally accessible content is directly proportionate to the levels of copyright infringement of that content. There are two points to be made in this regard.

First, although there will be many internet users who, when lawful content is made available, will switch from consuming it via an unauthorised channel to consuming it in an authorised way, it appears that there are also still many users who simply do not. By way of example, when Season 5 of *Game of Thrones* was released in Australia, despite the season premiere being available on Foxtel, 32% of all Australians who watched it, downloaded it illegally.¹⁶³ There will always be some for whom, it seems, you “cannot beat free”.

Second, there is also evidence that not only does site-blocking discourage users from using blocked sites, it can also drive internet users to authorised channels. In January 2020, the Motion Picture Association published a paper called *Measuring the Effect of Piracy Website Blocking in Australia*¹⁶⁴ where it analysed the behaviour of internet users immediately before the site-blocking orders made in *Roadshow (No 4)* (in relation to 181 online locations) and afterwards; and concluded that the blocking of the target locations caused a 5% increase in the consumption of legal content among users who were previously accessing the target locations.¹⁶⁵

It appears then, that in addition to the availability of legal channels to consume films and TV programs, site-blocking orders can in fact cause at least some internet users to opt for these legal channels.

XIV. OTHER INTERMEDIARIES

Some website operators, however, continue to facilitate copyright infringement (and/or circumvent site-blocking orders) by using other internet services that would not easily fall within the definition of “CPS” or “search engine provider”, but that still would be regarded as intermediaries.

As the Court said in *Telekabel*, “the internet service provider is an ‘inevitable actor’ in any transmission of an infringement over the internet between one of its customers and a third party, since, in granting access to the network, it makes that transmission possible”.¹⁶⁶ Extending the logic from this statement in *Telekabel*, CSPs are not the only “inevitable actors” between a user and an online location whose purpose or effect is copyright infringement. They also include other providers of internet services such as, for example, reverse proxy services and domain name registrars.

A reverse proxy service essentially provides a level of privacy to websites. It does so by allowing users to type in a proxy address and then only allowing the user to access the site after converting the proxy address to the actual address. Cloudflare is an example of a reverse proxy service. As described in *Arista Records, LLC v Tkach (Arista Records)*:¹⁶⁷

In laymen’s terms, this appears to mean that when someone types a domain name into a web browser, the [website operators] have engaged Cloudflare to convert the domain name into the IP address for the website associated with that domain name so that the user can connect to the website they are trying to reach.¹⁶⁸

¹⁶³ See Hannah Francis, “Game of Thrones Pirates: Aussies Are the Worst”, *The Sydney Morning Herald*, 26 April 2016 <<https://www.smh.com.au/technology/game-of-thrones-pirates-aussies-are-the-worst-20160426-goeupg.html>>.

¹⁶⁴ Motion Picture Association, *Measuring the Effect of Piracy Website Blocking in Australia on Consumer Behaviour* (December 2018).

¹⁶⁵ Motion Picture Association, n 164, 7.

¹⁶⁶ *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (Court of Justice of the European Union, C-314/12, 27 March 2014) [32].

¹⁶⁷ *Arista Records, LLC v Tkach*, 122 F Supp 3d 32 (SDNY, 2015).

¹⁶⁸ *Arista Records, LLC v Tkach*, 122 F Supp 3d 32, [34] (SDNY, 2015).

It is clear from the decision in *Arista Records* that Cloudflare makes the transmission possible and would, therefore, also be regarded as an inevitable actor in the transmission.

Whether, a particular intermediary is an “inevitable actor” is, of course, not a straightforward question. For example, while issuing site-blocking orders against a domain name registrar would certainly be effective in blocking access to the domain, the question of whether the Domain Registrar make the “transmission possible” is not as clear. The answer is part of a bigger discussion and largely beyond the scope of this article.

In any event, in addition to CSPs and Search Engine Providers there is, therefore room in the Australian regime to expand the scope of s 115A to include other intermediaries such as, but not limited to, reverse proxy services and potentially domain name registrars.¹⁶⁹

XV. CONCLUSION

In introducing s 115A of the Act, Australia has successfully created a specific and targeted site-blocking regime that is intended to target only the worst offenders. In practice, as can be seen by the cases, this is what has transpired. There have, thus far, been no cases where application has been made in relation to an online location which comprises a genuine mix of infringing and non-infringing audiovisual content.

Although the Australian regime has drawn inspiration from the UK regime, and much guidance can be drawn from the EU and UK cases (particularly in relation to discretion), the Australian framework is unlike the UK regime in two significant ways. First, the UK regime does not have a similarly high threshold test and, second, the courts in the European Union and United Kingdom, when considering whether to grant a site-blocking injunction, must apply the principle of proportionality.

Despite this, the Australian regime also successfully balances the rights of copyright owners with the rights of persons likely to be affected, the right to free speech and the right to operate a business. And despite the criticism levelled at the regime, it has not amounted to a curtailing of free speech, freedom to access information or a form of censorship. Further, given the intentionally high threshold test and the guidance provided in the cases, it is unlikely to. In this regard, it might be argued that the preparedness of the Australian courts to consider and apply the discretionary factors set out in s 115A(5), which deal with whether the orders are proportionate in the circumstances and in the public interest (as well as any persons likely to be impacted), are as important to the proper operation of the scheme as the statutory threshold test itself.

Although it was never intended to be a silver bullet, site-blocking in Australia has been highly effective as part of a range of measures taken, with overall rates of piracy estimated to have been reduced by 42% in the period October 2016 to April 2018¹⁷⁰ and traffic to the blocked sites having been reduced by 70.2% over the same period.

Given the effectiveness of the regime and the very low risk of curtailing rights such as freedom to access lawful information, there is room for further discussion about whether other intermediaries including reverse proxy services such as *Cloudflare* and potentially domain name registrars could also be included within the scope of the regime. There is no reason, it is argued, why the scope of the s 115A could not be broadened from CSPs and search engine providers to include other “inevitable actors” who make each download or transmission possible.

In closing, it is perhaps worthwhile returning to the origin of site-blocking injunctions and the precise wording of Art 8(3) of the *InfoSoc Directive*, upon which the UK regime was based, being that rights-holders should:

be in a position to apply for an injunction against *intermediaries* whose services are used by a third party to infringe copyright.¹⁷¹

¹⁶⁹ Other internet services to consider include open DNS providers and VPN providers, both of which may play a role in users circumventing site-blocking orders.

¹⁷⁰ *The Incopro Report*, n 157, 1.

¹⁷¹ *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* [2001] OJ L 167 (emphasis added).

