
From Little Things Big Things Grow: Australia's Evolving Copyright Site-Blocking Regime

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Australia's website-blocking regime, introduced in 2015 and expanded in 2018, permits injunctions requiring internet service and search engine providers to block access to overseas websites that have the "primary effect" or "primary purpose" of facilitating copyright infringement. Furthermore, the injunction may be "adaptive" in nature – rightsholders may by agreement with internet service or search engine providers extend the injunction to apply to mirror locations online, without returning to court. In this article, we critically analyse the trajectory of this so-called "no fault" enforcement regime, and highlight the lack of transparency fostered by the regime. We challenge the conception of the regime as a form of proprietary protection and the resulting uncritical reliance by lawmakers on private ordering as a keystone of online copyright enforcement. Finally, we provide recommendations for addressing the flaws in the current design of Australia's copyright site-blocking regime.

I. INTRODUCTION

Australia's website-blocking regime, introduced in 2015 and expanded in 2018, is a work in progress. Under s 115A of the *Copyright Act 1968* (Cth), rightsholders may seek injunctions requiring internet service and search engine providers to prevent the Australian public from accessing or finding overseas websites that have the "primary effect" or "primary purpose" of infringing or facilitating the infringement of copyright.¹ Further, rightsholders and service providers may by agreement extend the injunction to new web addresses that provide access to the same online location without returning to court.² The evolution of the Australian regime falls within a global trend in internet regulation in which law-makers are seeking to increase the regulatory responsibilities of online services providers.³

When nations around the world first sought to develop copyright regimes for the growing digital environment, it was recognised that the nascent internet industries required some protection from copyright liability so that they could continue to grow unencumbered by prohibitive legal risks and responsibilities.⁴ Providers of online services were valued as important for social progress and were seen to require legal protection in order to flourish.⁵ Intermediary safe harbours provided the key model for

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¹ See *Copyright Act 1968* (Cth) s 115A(1), (2), which states: "(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 ... to take such steps as the Court considers reasonable so as not to provide a search result that refers users to the online location."

² *Copyright Act 1968* (Cth) s 115A(2B).

³ See Annemarie Bridy, "Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement" (2010) 89(1) *Oregon Law Review* 81.

⁴ See Jonathan Zittrain, "The Generative Internet" (2006) 119 *Harvard Law Review* 1974, 1987–1990.

⁵ Zittrain, n 4, 1996. Zittrain explained that we started with a highly adaptable "generative internet", a system that could be leveraged for multiple purposes and easily adopted by a broad audience. Zittrain also recognised that it was vulnerable to misuse, and that the pressure for increased regulation needed to be balanced against minimal impact on generativity.

limiting the remedies flowing from copyright liability and enforcement responsibilities of online service providers, and the safe harbour model was propagated throughout the world via a range of international treaties.⁶

Today, however, dominant internet intermediaries are at the centre of law and policy debates over content moderation and intellectual property enforcement. The unprecedented control that certain platforms or facilities have over the flow of information in digital media and communications environments makes them a natural target for law-makers. The size and position in the digital environment provide these organisations with unmatched capacity for determining what members of the public can see and share online. Certainly, their copyright enforcement capabilities are far greater than that of any traditional law-enforcement or judicial institution.

Policies that seek to place responsibilities upon internet intermediaries to safeguard third-party proprietary interests may appear a logical response to an ever-expanding and evolving internet. However, as the social and economic importance of the digital environment continues to increase exponentially, regimes giving effect to such policies risk inhibiting technological and social progress if they are not carefully designed and deployed. This article argues that s 115A is evolving into a regime aimed specifically at facilitating the regulation of access to the internet in Australia by private entities. In devising this regime, Australian law-makers have primarily taken a proprietary view of copyright, which in turn has led to an uncritical reliance on private ordering. Consequently, measures to safeguard the public interest in innovation and access to information are not adequately built into the regime. This article makes several recommendations for improving Australia's site-blocking regime. First, it is proposed that the "primary effect" standard is flawed and should be removed as a ground for the s 115A injunction. Secondly, law-makers and the courts must recognise both the proprietary and regulatory functions of copyright, and the public interest impacts of this regime. Finally, law-makers must implement measures aimed at enhancing transparency so as to properly safeguard the public interest and to prevent the regime from becoming a tool primarily for advancing private interests.

II. AUSTRALIA'S SITE-BLOCKING REGIME

As introduced in 2015, the objective of Australia's website-blocking regime was to address the difficulties of finding the proprietors of websites infringing or facilitating infringement in overseas locations and obtaining legal remedies against them.⁷ Rightsholders may obtain an injunction from Australian courts to block access in Australia to foreign websites. In its initial form, s 115A only applied to Internet Service Providers (ISPs),⁸ and required that the online location outside Australia had the "primary purpose" of infringing or facilitating infringement of copyright. In granting the injunction, courts are to take into

⁶ *Copyright Act 1968* (Cth) ss 116AA–116AJ. The safe harbour provisions were introduced in 2005 as part of the implementation of the Australia–US Free Trade Agreement: *US Free Trade Agreement Implementation Act 2004* (Cth). In contrast to Australia, the US safe harbour provisions are much broader and are not limited to ISPs: *Digital Millennium Copyright Act of 1998*, Pub L No 105-304, 112 Stat 2860; *Copyright Act of 1976*, 17 USC § 512(c) (2016). The Australian provision has been expanded to cover other entities such as libraries, educational institutions and organisations assisting persons with a disability, but the scope of its application remains relatively narrow: see *Copyright Amendment (Service Providers) Act 2018* (Cth).

⁷ See Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth) 9, which states that it "provides a more effective and efficient alternative to seeking to locate and take direct enforcement action against operators of the overseas online locations". Australia's site-blocking regime was originally proposed as copyright policy by the Australian government in Attorney-General's Department, "Online Copyright Infringement – Discussion Paper" (Australian Government, 2014) <<https://apo.org.au/sites/default/files/resource-files/2014-07/apo-nid40630.pdf>>. The discussion paper provided three proposals: (1) an expansion of the authorisation liability doctrine that would increase the scope through which ISPs could be found liable for the copyright infringement of users; (2) extended injunctive relief against ISPs to allow rightsholders to block overseas infringing websites; and (3) an extension of the safe harbour regime providing limitations on copyright by removing the reference to "carriage service provider" and replacing it with "service provider". Of the three policy proposals, site blocking ultimately proved to be the most politically feasible.

⁸ The legislation refers to Carriage Service Providers (CSPs), but it has been recognised that "for all relevant purposes a CSP is the same as an ISP": *Roadshow Films Pty Ltd v iiNet Ltd (No 3)* (2010) 263 ALR 215, [512]; [2010] FCA 24. A CSP is defined in *Telecommunications Act 1997* (Cth) ss 7, 16, 87, and refers to the supply of "a service for carrying communications by means of guided and/or unguided electromagnetic energy" to the public; see also *Copyright Act 1968* (Cth) s 10.

account a range of matters, including the flagrancy of the infringement/facilitation of infringement, whether blocking had been ordered in other countries for copyright infringement,⁹ whether disabling access was a proportionate response in the circumstances, the impact on persons/classes of persons, and whether it is in the public interest to block access to the online location.¹⁰ The legislation was designed to provide rightsholders with “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”.¹¹

In 2018, the regime was expanded to also cover search engine providers and online locations that have the “primary effect” (and not just primary purpose) of infringing or facilitating the infringement of copyright.¹² Further, under the 2018 amendments, after an injunction has been granted, the rightsholder and the ISP or search engine provider (collectively referred to here as “online service providers”) can by agreement extend the injunction to new addresses that provide access to the online location subject to the injunction (described as “adaptive” injunctions).¹³ Often, when a site is blocked, the same infringing content will reappear across the internet at different locations. This is known commonly as the “whack-a-mole” problem. The 2018 amendments sought to encourage a wider range of online service providers to cooperate with rightsholders and voluntarily agree to block a broader range of sites hosting infringing content or facilitating infringement, thereby increasing the effectiveness of the regime.¹⁴

The 2018 Bill was referred to the Senate’s Environment and Communications Legislation Committee for reporting with a tight two-week deadline.¹⁵ The regime is due for review in 2020 as recommended by that Committee.¹⁶ The government should take this opportunity to address the flaws and risks inherent in the current design of Australia’s copyright site-blocking regime.

III. THE EXPANSIVE FRAMEWORK ESTABLISHED BY S 115A

The full potential of the Australian regime has yet to be tested. Nevertheless, cases applying the regime so far indicate that the definition of “facilitating an infringement” will be interpreted broadly, shifting the regime away from the 2015 stated objective of establishing a “targeted and specific” remedy. In addition to pursuing injunctions against clearly infringing websites, rightsholders have sought injunctions to block sites providing tools used to support infringement.¹⁷ As the language of the legislation is broad,

⁹ Rimmer notes that “site-blocking has become much more mainstream in copyright jurisprudence” with a reported 4,000 sites blocked around the world for copyright infringement in 2019: Matthew Rimmer, “Australia’s Stop Online Piracy Act: Copyright Law, Site-Blocking, and Search Filters in an Age of Internet Censorship” (2019) 16(1) *Canberra Law Review* 10, 12, citing Ernesto Van der Sar, “Nearly 4,000 Pirate Sites Are Blocked by ISPs Around the World” (TorrentFreak, 10 February 2019) <<https://torrentfreak.com/nearly-4000-pirate-sites-are-blocked-by-isps-around-the-world-190210/>>.

¹⁰ *Copyright Act 1968* (Cth) s 115A(5). In contrast to these fairly broad considerations, subpara (b) also refers to “whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright”.

¹¹ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 2.

¹² Note also the presumption introduced in 2018 that the online location is outside of Australia, which shifts the burden of proof in favour of rightsholders: *Copyright Act 1968* (Cth) s 115A(5A).

¹³ See Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth) 12. The injunction may require the online search engine provider to take reasonable steps to “not provide search results that include domain names, URLs and IP addresses that the online search engine provider and the owner of the copyright agree, in writing, have started to provide access to the online location after the injunction is made”: *Copyright Act 1968* (Cth) s 115A(2B) (emphasis added).

¹⁴ See Department of Communication and the Arts, “Regulation Impact Statement: Copyright Amendment (Online Infringement) Amendment Bill” (2018), annexed to Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth).

¹⁵ The Bill was referred to the Committee on 13 November 2018 for reporting by 26 November 2018: Senate Environment and Communications Legislation Committee, Parliament of Australia, *Copyright Amendment (Online Infringement) Bill 2018* (2018) 1. Criticisms related to this tight deadline have been that the provision is “poorly drafted” and was passed into law in “reckless haste”: Rimmer, n 9, 13.

¹⁶ Senate Environment and Communications Legislation Committee, n 15, 19 (Recommendation 1).

¹⁷ See the discussion of cases under Part IIIB, below; for example, *Australasian Performing Right Assn Ltd v Telstra Corp Ltd* (2019) 369 ALR 529; [2019] FCA 751.

any limitations are likely to arise through judicial discretion, in the weighing of the non-exhaustive list of matters in s 115A(5).¹⁸ The list is not in any order of priority and, notably, whether it is in the public interest to disable access or omit search results to the online location is but one factor among many.¹⁹ There is also no guidance beyond this list of matters that the legislation says courts *may* take into account. It is worth expanding on a number of key elements of the legislation that cause the regime to be expansive rather than targeted. These are: (1) the “adaptive” injunction; (2) the inclusion of “primary effect” (in addition to primary purpose) of infringing or facilitating infringement; and (3) the coverage of online search engine providers.

A. The “Adaptive” Injunction

An “adaptive” injunction under s 115A requires the blocking of access to or omission in search results of online locations that the rightsholder and the relevant service provider *agree*, in writing, “have started to provide access to the online location *after the injunction is made*”.²⁰ The aim of this 2018 amendment was to empower the Federal Court to “make more responsive blocking orders” that would address attempts by overseas website operators to thwart an injunction “by creating new pathways to online locations”,²¹ also known as “mirror sites” hosting the same content via a different web address.²²

On its face, it is a simple solution that enables private parties to agree, subsequent to the injunction, to include other relevant domain names, URLs and IP addresses. Yet, the provision leaves a number of questions unanswered. For instance, who is to determine whether the particular address is indeed a “mirror site” of the online location specified in the injunction? As a matter of agreement, these questions would be determined by the parties. But another question looms large: how likely is it that a service provider would be motivated to expend resources to dispute the claims of the rightsholder? In practice, where a rightsholder seeks to extend the scope of an injunction the online service provider is likely to have little incentive to question or push back against the request, as it is not their material that is being blocked from public access.²³ This in effect leaves the determination of what websites will be blocked to the discretion of rightsholders.²⁴

Under the expanded regime, private ordering is explicitly encouraged, with service providers incentivised to act on the demands of rightsholders. The role of the adaptive injunction in encouraging private ordering was explicitly recognised by law-makers. In the Second Reading Speech in the House of Representatives, Paul Fletcher MP stated:

None of these measures will impede or affect the capacity for carriage service providers or search engine providers to voluntarily block or remove links to copyright infringing online locations. Indeed, if these voluntary arrangements are effective, injunctions are unlikely to be needed. However, these legislative changes provide an important fallback should industry initiatives prove to be inadequate or ineffective.²⁵

¹⁸ See *Copyright Act 1968* (Cth) s 115A(5).

¹⁹ Moreover, it is the eighth factor in a list of 13, in *Copyright Act 1968* (Cth) s 115A(5)(g).

²⁰ *Copyright Act 1968* (Cth) s 115A(2B)(a)(ii), (b)(ii) (emphasis added).

²¹ Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth) 10.

²² See Electronic Frontier Foundation, “Mirroring Your Site” (30 August 2017) <<https://www EFF.org/keeping-your-site-alive/mirroring-your-site>>.

²³ For a more detailed discussion of private incentives, see Part V below.

²⁴ There is a critical difference between a private agreement among two parties and an agreement backed by a court-ordered injunction. Each carry different consequences. If simply an agreement between the parties for the online service provider to block certain content, breach of the agreement does not lead to tangible consequences for either party unless the breach is litigated in court and an order of enforcement of the agreement is sought. On the other hand, if a party ignores an injunction, that party could be held in contempt of court, which is punishable by either fines, sequestration of property, imprisonment or a combination of these: see *Federal Court of Australia Act 1976* (Cth) s 31; *Federal Court Rules 2011* (Cth) rr 41.04, 41.08, 42.01.

²⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 2018, 10397.

The legislation was designed with the expectation that the parties would be bargaining in the shadow of the law.²⁶ It ensures that the threat of injunctive relief (although not a finding of liability)²⁷ sits in the background nudging online service providers towards agreements that primarily protect rightsholder interests.²⁸

B. A Lowered “Effects” Test

A second point of expansion, and a significant one, is the inclusion of a “primary effect” of copyright infringement or facilitating infringement as a ground for obtaining an injunction to block a web location. An example given in the Explanatory Memorandum is online file-hosting services such as cyberlockers. Cyberlockers may be widely used as tools for sharing infringing copyright content but do not necessarily, as designed, have the “primary purpose” of facilitating infringement of copyright.²⁹ In considering the effect rather than purpose, the intent of the website operator or its users is no longer a conclusive factor.³⁰ This has broad implications for the scope of the regime.

Non-infringing online locations, when combined with the use of tools such as virtual private networks (VPNs), could lead to what is *effectively* copyright infringement in Australia. An example would be the Netflix United States (US) website, which contains content authorised only for a US-based audience. Using a VPN to disguise one’s geographic location would enable a user to gain access to Netflix US content from Australia without the rightsholders’ authorisation. Netflix US may not have the primary purpose of infringing copyright in Australia, but when combined with the use of VPNs, could be said to have the primary effect of infringing the right to communicate to the public in Australia.³¹ Law-makers have claimed that the regime does not apply to VPNs and websites such as Netflix US but, as Rimmer points out, the text of the legislation does not clearly state this.³² Under the current legislation it is unclear whether two or more online locations that have the combined effect of infringing copyright fall within the scope of s 115A.³³

²⁶ This notion was established in Robert H Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88(5) *Yale Law Journal* 950.

²⁷ The implications of a “no fault” regime are discussed further in Part IV, below.

²⁸ So far only one adaptive injunction has been issued and this decision was not contentious as the applicant simply sought to make a minor change to the form of an existing injunction to take the 2018 amendment into account (ie permitting the extension of the injunction by agreement): *Foxtel Management Pty Ltd v TPG Internet Pty Ltd* [2019] FCA 1450.

²⁹ Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth) 10. The “purpose” aspect has also been subject to criticism, with Rimmer arguing that the legislation “does not provide an adequate test of what is a ‘primary purpose’”, as “online sites can serve an amazing profusion of purposes”: Rimmer, n 9, 18.

³⁰ Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth) 10.

³¹ The right to communicate to the public encompasses the mere “making available” of copyright content: *Copyright Act 1968* (Cth) s 31(1). As public accessibility is occurring in Australia, it is arguable that the right is being infringed. See Cheryl Foong, *The Making Available Right: Realizing the Potential of Copyright’s Dissemination Function in the Digital Age* (Edward Elgar, 2019), for an in-depth discussion of this “making available” right.

³² Rimmer, n 9, 17, citing Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 2015, 28 (Malcolm Turnbull). It should be noted that *Copyright Act 1968* (Cth) s 115A refers to infringement or facilitation of infringement of copyright “whether or not in Australia”, and this has been criticised as giving the regime unnecessary extra-territorial application: Cory Doctorow, “SOPA.Au: Australia Is the Testbed for the World’s Most Extreme Copyright Blocks” (Electronic Frontier Foundation, 1 November 2018) <<https://www.eff.org/deeplinks/2018/11/sopaau-australia-testbed-worlds-most-extreme-copyright-blocks>>. However, this arguably reflects the unrefined nature of the drafting of s 115A (and its emphasis on effective enforcement), and the regime should be interpreted to address infringement occurring only in Australia. A finding of infringement of the right to communication to the public (discussed above) makes such extra-territorial application of s 115A unnecessary, provided the applicant of the injunction holds that right in Australia.

³³ One could argue that the wording of the legislation is limited to “an online location” in the singular, and therefore could not be read as an online location in conjunction with a VPN. However, that limitation is not clear on the face of the legislation. Further, *Acts Interpretation Act 1901* (Cth) s 23(b) provides that “words in the singular number include the plural”. Therefore, *Copyright Act 1968* (Cth) s 115A could be read to cover online *locations* that have the primary effect of facilitating infringement of copyright, covering both the website and the VPN.

Therefore, the lower “primary effect” threshold presents another avenue for expansion.³⁴ Arguably, this example is unlikely to be litigated, but it nevertheless illustrates the breadth of the “effects” test.

What is clear is that the *effects* test, combined with the threshold of *facilitating* infringement (as opposed to infringing copyright), significantly widens the scope of s 115A with the potential to capture online tools with non-infringing functions. Indeed, certain online tools that can be used for non-infringing purposes, but which tend to be used to infringe copyright or to make infringing content more accessible, have been blocked under s 115A. For example, in the *Roadshow Films Pty Ltd v Telstra Corp Ltd* decision of 2018, the Federal Court granted an injunction requiring online service providers to block websites that provide subtitles to unauthorised film recordings.³⁵ Under a broad interpretation of “facilitate”, one could view the subtitles as expanding the potential audience for the infringing copy or communication of the film, by making the film accessible to audiences of different countries. Alternatively, as was argued by the rightsholders and apparently accepted by the Court,³⁶ the subtitle websites directly infringed the copyright in the screenplay or literary work of the subtitles by making a copy of the subtitles available online without permission.³⁷

Another example are ripping services – that is, online tools that enable the recording and saving of audio visual content from publicly accessible streaming platforms.³⁸ When used in relation to a music video, for example, one would be creating a copy of the cinematograph film, sound recording and musical work embodied within the streamed music video. In addition, the provision of the tool could arguably be interpreted as making available to the public online a copy of a sound recording or cinematographic film.³⁹ Websites making these tools available may be deemed to have the primary effect of facilitating infringement if, for example, they are used to download a copy of videos posted on YouTube. In the case of *Australasian Performing Right Assn Ltd v Telstra Corp Ltd*,⁴⁰ the applicant was able to show that a recording tool had the primary effect of facilitating infringement. On the basis of the high number of visits to the websites, it was held that the stream-ripping sites in question were responsible for music piracy from music videos “on an industrial scale”.⁴¹ There may be a prominent copyright infringement narrative in this instance, but it should nevertheless be recognised that such tools do have non-infringing applications – for example, they can be used to download audio from public domain videos uploaded to YouTube.

In a context where infringing use of a website or tool is unclear or uncertain, courts should be cautious in accepting a narrative of infringement at face value. New technologies might at one stage in their development and application have the primary effect of infringement, before evolving into a commercially

³⁴ It should be noted that even with the prior wording of “primary purpose”, Senator Scott Ludlam expressed concern during the Second Reading Speech in the Senate that it could extend to the use of VPNs: Commonwealth, *Parliamentary Debates*, Senate, 22 June 2015, 4023–4024.

³⁵ *Roadshow Films Pty Ltd v Telstra Corp Ltd* (Unreported, Federal Court of Australia, Nicholas J, 20 December 2018). Among the list of infringing streaming websites were subtitle sites such as “opensubtitles.org” and “yifysubtitles.com”.

³⁶ See Corinne Reichert, “Subtitle Piracy: Will It Be Enforced in Australia?” (ZDNet, 14 December 2018) <<https://www.zdnet.com/article/subtitle-piracy-will-it-be-enforced-in-australia/>>. It should be noted that the order is available via the Commonwealth Courts Portal, but the reasons for the decisions have yet to be issued by Nicholas J.

³⁷ Whether a site or tool is seen as primarily infringing or merely facilitating infringement will depend on the copyright subject matter in question but, in any case, *Copyright Act 1968* (Cth) s 115A merely requires that the website have the primary effect of facilitating copyright infringement.

³⁸ *Australasian Performing Right Assn Ltd v Telstra Corp Ltd* (2019) 369 ALR 529; [2019] FCA 751.

³⁹ *Australasian Performing Right Assn Ltd v Telstra Corp Ltd* (2019) 369 ALR 529, 540 [39], [41]; [2019] FCA 751. This view may be disputed, as making a tool that facilitates infringement available is not the same as making copyright content available (notwithstanding, *Copyright Act 1968* (Cth) s 115A only requires a primary effect of “facilitating infringement”): see Cheryl Foong, “Volition and the ‘New Public’: A Convergence of US and EU Judicial Approaches to Communications to the Public” (2020) 42(4) *European Intellectual Property Review* 230.

⁴⁰ *Australasian Performing Right Assn Ltd v Telstra Corp Ltd* (2019) 369 ALR 529; [2019] FCA 751.

⁴¹ The Court stated that “[t]here were 66.5 million visits to Convert2mp3.net in January 2019 and 112.4 million to Flvto.biz in January 2019 alone”: *Australasian Performing Right Assn Ltd v Telstra Corp Ltd* (2019) 369 ALR 529, 541 [46]; [2019] FCA 751.

viable and socially valuable service.⁴² In *Viacom International Inc v YouTube Inc*,⁴³ for example, the media and entertainment company Viacom provided evidence of widespread copyright infringement on YouTube in the video-sharing platform's early years. Today, however, YouTube is of value to both users and rightsholders, and has reportedly paid over US\$3 billion (or AU\$4.5 billion) to copyright owners. Under Australia's expanded site-blocking regime, there is a risk that new technologies analogous to YouTube, which in their early stages of development may have the primary effect of infringement, will be blocked from Australian internet users. In these circumstances, new technologies might be prevented from realising their full social and economic value and the Australian public may be denied access to the benefits of innovation and access to information.

C. Blocking of Search Engine Results

Another expansion under the 2018 amendments is that an injunction can be sought against an online search engine provider. If subject to an injunction, a search engine may be required to "take such steps as the Court considers reasonable so as not to provide a search result that refers users to the online location".⁴⁴ With such an injunction in place, members of the public in Australia will no longer be able to find those locations through that online search engine. The stated rationale for this additional coverage is that a search engine could disclose alternative pathways to the same infringing content.⁴⁵

Like the adaptive injunction, this amendment is aimed at improving the overall efficacy of the regime. For example, where blocking by an ISP has proved ineffective because a VPN may be used to circumvent that block, removal from a search index puts in place an additional barrier to access by preventing the public from locating the infringing site via a search engine.⁴⁶ However, as the blocked results cannot be found, the filtering of internet search results poses as a barrier to public understanding of the extent to which s 115A is being used to block content. Effectively, this element of the expanded regime represents law-makers' acceptance of the potential risk of overreach in the interest of more efficacious private property enforcement.

D. A Conflation of Public and Proprietary Interests

Section 115A provides no explicit guidance on how the public interest should be defined or measured.⁴⁷ Nevertheless, the Australian government's assessment of the regime's compatibility with Australia's human rights obligations illustrates how the broader public interests in access to technological innovation may be erroneously subsumed in the objective of protecting copyright. Both the 2015 and 2018 Statements of Compatibility with Human Rights recognised s 115A's intersection with two international human rights treaties – the *International Covenant on Civil and Political Rights (ICCPR)*⁴⁸ and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.⁴⁹ In particular, the site-blocking regime

On the unauthorised nature of the ripping, the Court observed that an uploader on YouTube could offer download functionality if they so wished: 541 [44].

⁴² Martin Husovec, "Injunctions Against Innocent Third Parties: The Case of Website Blocking" (2013) 4(2) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 116, 124.

⁴³ *Viacom International Inc v YouTube Inc*, 676 F 3d 19, 34 (2nd Cir, 2012).

⁴⁴ *Copyright Act 1968* (Cth) s 115A(2).

⁴⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 October 2018, 10397 (Paul Fletcher MP).

⁴⁶ However, Doctorow argues that one could use a VPN to carry out the search, therefore rendering the search filter equally ineffective: Doctorow, n 32.

⁴⁷ As discussed above, whether the injunction is in the public interest is one factor that the court may consider: *Copyright Act 1968* (Cth) s 115A(5).

⁴⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966; 999 UNTS 171 (entered into force 23 March 1976).

⁴⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976). See Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 4; Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2018* (Cth) 4.

engages the right to freedom of opinion and expression (Art 19 of the *ICCPR*), the right to a fair hearing (Art 14 of the *ICCPR*) and the right to take part in cultural life (Art 15 of the *ICESRC*).

Article 15 of the *ICESRC* recognises the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of moral and material interests resulting from scientific, literary or artistic work (ie intellectual property). However, in their assessment of the compatibility of the site-blocking regime with these rights, Australian law-makers effectively concluded that the public interest is served when the proprietary interests of rightsholders are advanced; the impact on society's ability to enjoy the benefits of scientific progress went largely unaddressed.

In the 2015 assessment, it was recognised that limitations on the rights in the *ICCPR* “must be prescribed by law, pursue a legitimate objective, be rationally connected to the achievement of that objective and a proportionate means of doing so”.⁵⁰ However, it was suggested that the “wide range of factors” the court is required to consider before granting the injunction (eg flagrancy, proportionality, public interest impact, other remedies available) provides sufficient safeguards.⁵¹ The Australian Senate concluded “an injunction is a reasonable, necessary and proportionate response to the problem of protecting the rights of creators”.⁵² The 2018 “primary effect” test did not change that conclusion, as it was “not intended to capture incidental infringement” and “does not seek to limit the ability of persons to access or communicate information or ideas, other than where doing so would infringe another person's copyright”.⁵³ Likewise, the extension of the regime to online search engine providers was deemed a reasonable, necessary and proportionate response.

In sum, in 2015 and 2018 Australian law-makers concluded that the site-blocking regime was wholly compatible with Australia's human rights obligations because the regime protects private property rights, and limitations on other rights in pursuance of that property protection are “reasonable, necessary and proportionate”.⁵⁴ An assumption in the human rights analysis was that the injunction as a means of protecting property rights is proportionate, provided the courts retain some discretion. However, in the context of the specific expansions discussed above, whether the regime is applied in a manner compatible with the public interest in access to knowledge and to innovative technologies depends upon a restrained interpretation of explicitly broad terms.⁵⁵

At its inception, Australia's site-blocking regime was envisaged as one that would allow “a specific and targeted remedy” to prevent access to infringing content exhibiting a flagrant disregard of owners' rights.⁵⁶ It is difficult to continue describing it as such in light of the 2018 amendments. As discussed further below, the expansions – that is, the adaptive injunction, the primary effect threshold and the inclusion of search engines – shift Australia's site-blocking regime away from a targeted and specific remedy and create problems of increased opacity and reduced accountability in the regulation of Australians' access to the internet and digital tools and services. These changes take the regime in a

⁵⁰ Under Art 19(3)(a) of the *International Covenant on Civil and Political Rights* (n 48), the right to freedom of expression includes the “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers” and can only be subject to restrictions that are provided by law and are necessary for “respect of the rights or reputations of others”.

⁵¹ The compatibility assessment also concluded that the site-blocking regime was consistent with the right to a fair hearing because CSPs subject to an injunction would have the opportunity to contest the injunction, and online locations that are targets of an injunction could apply to be joined as a party to the proceedings: Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 6.

⁵² Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 5.

⁵³ Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2018* (Cth) 4.

⁵⁴ In 2018, the House of Representatives stressed that the amendments would promote the right to benefit from copyright protection by enabling rightsholders to “disrupt large-scale infringing online locations”: Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2018* (Cth) 6.

⁵⁵ Lindsay has argued for a principled approach to judicial interpretation of the regime. In particular, he emphasises the importance of proportionality in establishing principled limits to such site-blocking orders, and proposes that specific “rights-balancing” and “means/ends” analysis undertaken in European Union law is expressly considered by Australian courts: David Lindsay, “Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness Thematic: Cyberspace and the Law” (2017) 40(4) *UNSW Law Journal* 1507.

⁵⁶ Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 2.

direction that prioritises the efficiency of private ordering over and above other important policy and public interest considerations.

The allowance for the injunctions to be “adaptive” in nature from 2018 has explicitly and formally tied the regime to private ordering for copyright enforcement. A preference for privately ordered copyright enforcement is prevalent in other jurisdictions. For example, the 2019 Digital Single Market (DSM) Directive of the European Union⁵⁷ was effectively designed to compel online platforms to negotiate private agreements with rightsholders.⁵⁸ The DSM Directive goes further than Australian provisions on the right to communicate to the public⁵⁹ and s 115A,⁶⁰ by deeming “online content sharing service providers” to be *directly* liable for the communication of copyright content to the public by their users where certain criteria (eg the volume of visitors and of copyright content) are satisfied.⁶¹ In effect, the DSM Directive pressures online service providers to take greater responsibility in monitoring their platforms for copyright infringement and to negotiate large-scale licensing agreements with rightsholders. Although s 115A does not address primary infringement of the communication right and at this stage does not compel monitoring by platforms, it is at its core a model of private ordering backed by legislation.⁶²

Under the expanded legislation, the regime has the potential to limit Australians’ access to the benefits of digital innovation by preventing access to digital tools and online locations. Taking a longer-term view, it may also serve to limit the public’s access to the benefits of scientific progress. This is because websites that present new technologies may at one stage in their development have the primary effect of infringing content and be blocked under the regime; as a result, such nascent websites are deprived of an audience, and may be prevented from evolving into valuable non-infringing services.⁶³ Unfortunately, in its 2015 and 2018 assessment of the amendments, the Senate did not expressly consider the impact the site-blocking regime may have on innovation in Australia. Whether injunctions issued under the regime limit public access to information or the benefits of innovation will depend in part upon how the regime is interpreted and applied by the courts. It will also depend upon how it is applied by negotiation between rightsholders and online service providers operating under adaptive injunctions. For the former, we are assured some transparency; for the latter, this may be undertaken through wholly opaque processes.

⁵⁷ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 (DSM Directive). It should also be noted that the Court of Justice of the European Union has held that website-blocking injunctions are permitted pursuant to Art 11 of the Enforcement Directive, which provides that injunctions against intermediaries whose services are used by a third party to infringe IP should be available to rightsholders: *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (C-314/12) EU:C:2014:192; *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 157/5 (Corrected Version OJ L 195/16, 2 June 2004).

⁵⁸ João Pedro Quintais, “The New Copyright in the Digital Single Market Directive: A Critical Look” (2020) 42(1) *European Intellectual Property Review* 28. See also European Commission, “Frequently Asked Questions on Copyright Reform” (Digital Single Market – European Commission, 22 June 2018) <<https://ec.europa.eu/digital-single-market/en/faq/frequently-asked-questions-copyright-reform>>, stating that the new Copyright Directive “will reinforce the position of rightsholders, such as music and film producers as well as collecting societies acting on their behalf, to negotiate and be remunerated for the online exploitation of their content by user-uploaded content platforms”.

⁵⁹ See *Copyright Act 1968* (Cth) ss 31, 85–87 (setting out the right to communicate to the public). See also s 10(1), which provides that “communicate” means “make available online or electronically transmit”. For a detailed comparative discussion of the communication right and its regulation of access across Australian, European Union and US law, see Foong, n 31.

⁶⁰ It should nevertheless be noted that the Regulation Impact Statement of the Australian Department of Communication and the Arts explicitly states that the Department “will monitor the development of new enforcement mechanisms following the EU Parliament’s recent copyright proposals which will require digital platforms, including online search engine providers, to take further steps to assist with copyright enforcement”, as “this will help evaluate Australian copyright enforcement efforts in a global context and with regard to cooperation of digital platforms”: Department of Communication and the Arts, n 14, annexed to Explanatory Memorandum, *Copyright Amendment (Service Providers) Bill 2017* (Cth), cited in Rimmer, n 9, 61.

⁶¹ See DSM Directive, n 57, Art 13.

⁶² See Diane Leenheer Zimmerman, “Copyright and Social Media: A Tale of Legislative Abdication” (2014) 35(1) *Pace Law Review* 260. Zimmerman analyses examples of private ordering encouraged by law-makers in the United States.

⁶³ Husovec, n 42, 124.

A principal question raised by the expanded regime is how this concerted push to place rightsholders on a stronger footing relative to online search engine providers will alter the way in which members of the public navigate the internet and gain access to information. In our digitally networked society, search engines occupy the powerful position of information gatekeepers. They have the capacity to control the flow of information in society and thereby to influence cultural, social, political and economic conditions.⁶⁴ By asking rightsholders and online service providers to privately negotiate site-blocking arrangements, Australian law-makers have entrenched, legitimised and perhaps inadvertently expanded these providers' position of power in the digital environment.

IV. REGULATORY VS PROPRIETARY COPYRIGHT LAW

To adjust the trajectory of the regime, a shift in perspective is needed. First, law-makers must recognise the regulatory as well as proprietary aspects of copyright law. Copyright is broadly proprietary in nature, but it is not exclusively so; many industry-specific aspects of copyright law are regulatory in nature. It may not be possible to draw a clear line between regulatory and proprietary models of copyright as the copyright system has characteristics of both in different contexts, and all property rights may be described as regulated (to different extents).⁶⁵ Nevertheless, it is possible to identify key characteristics common to each model. As a proprietary system, copyright law tends to set the entitlement in a general industry and technology-neutral manner, and then "largely gets out of the way".⁶⁶ Liu explains, "the assumption is that once the entitlement is set, private ordering will ensure that the entitlement is efficiently allocated".⁶⁷ Regulatory copyright, on the other hand, tends to allocate "rights and responsibilities at a very fine-grained and particularized level", seeking "to specify the precise results and lay them out in the statute itself".⁶⁸ The benefits of a regulatory model include greater clarity for the regulated parties, and greater tailoring of the law as applied to specific industries.⁶⁹

A proprietary approach to copyright aligns with the economic or utilitarian justification for copyright.⁷⁰ Within the economic model of copyright, the role of law-makers is to provide copyright owners with private property rights so that they can participate in markets and trade their works for a profit. If they can do so, they will be incentivised to create, to the benefit of society in the aggregate. It is assumed that the private owner of the property entitlement will efficiently steward the growth of their property in a competitive market, in the interest of profit maximisation.⁷¹ The copyright owner is assumed to be in

⁶⁴ See, eg, Jean-Christophe Plantin et al, "Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook" (2018) 20(1) *New Media and Society* 293; Sheila Jasanoff, *The Ethics of Invention: Technology and the Human Future* (WW Norton & Co, 2016); Frank Pasquale, "Dominant Search Engines: An Essential Cultural and Political Facility" in Berin Szoka and Adam Marcus (eds), *The Next Digital Decade: Essays on the Future of the Internet* (TechFreedom, 2011) 401.

⁶⁵ As Joseph Liu notes, "[e]ven copyright legislation based on the property rights models ... regulates copyright markets, in the same way that the substantive law of real property regulates real property markets": Joseph P Liu, "Regulatory Copyright" (2004) 83(1) *North Carolina Law Review* 87, 103.

⁶⁶ Liu, n 65, 100–101. In other words, it is then up to the private parties to exploit those rights within the market, with regulation of that entitlement kept to a minimum.

⁶⁷ Liu, n 65, 101–102, citing Paul Goldstein, "Copyright" (1992) 55(2) *Law and Contemporary Problems* 79, 82–83; Robert P Merges, "Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations" (1996) 84 *California Law Review* 1293, 1301–1307. The benefit of this is that parties may bargain flexibly in response to market conditions. Thus "[a] simple property entitlement thus may do a better job of efficiently allocating resources in response to changing technology and value market conditions, particularly if the entitlement is difficult to and where future technology is difficult to predict": Liu, n 65, 136.

⁶⁸ Liu, n 65, 103. Examples given by Liu include compulsory licensing regimes, such as those enabling the US cable and satellite compulsory licences (109).

⁶⁹ Liu, n 65, 133.

⁷⁰ See William M Landes and Richard A Posner, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325.

⁷¹ Timothy Wu, "Copyright's Communications Policy" (2004) 103 *Michigan Law Review* 278, 329–330. In the context of communications policy, Wu describes this as a "stewardship" model but notes that it is similar to "prospect theory" under patent law, citing Edmund W Kitch, "The Nature and Function of the Patent System" (1977) 20 *Journal of Law and Economics* 265.

the best position to decide how their entitlement should be dealt with within the market. This utilitarian or economic theory provides a basis for assuming that private ordering will lead to optimal outcomes.⁷²

Problems arise when we take a proprietary lens to a copyright issue without considering whether the regime addressing that issue has a fundamentally regulatory function. Australia's site-blocking regime is not directly concerned with setting private property rights or with decisions by copyright owners on the exploitation of their rights. Under s 115A, platforms and search engine providers will be required to block access to, and ensure the continued blocking of, certain web locations at the behest of copyright owners. Accordingly, the expanded regime is about regulating access to the internet in order to inhibit copyright infringement. It is a form of internet regulation.

An important indicator of the regulatory nature of s 115A is its label as a "no fault" regime. The regime deliberately steers clear of existing legal principles and case law on primary infringement and secondary liability, carving out a sui generis enforcement regime designed to meet the needs of copyright owners in relation to online service providers. For example, to be subject to s 115A, a website merely has to facilitate copyright infringement regardless of whether it meets the secondary authorisation liability threshold in Australia,⁷³ and it need only have a "primary effect" of facilitating infringement.⁷⁴ These low thresholds for the application of s 115A give the provision a wide ambit. This "no fault" label ensures that co-operation by platforms and search engine providers is not inhibited by arguments around authorisation of infringement (and doctrinal uncertainty about the scope of such liability).⁷⁵ In other words, the regime is designed to regulate the conduct of specific entities – namely, rightsholders and certain internet intermediaries; it does not establish general rules on substantive copyright liability.

To be clear, the objective here is not to criticise the concept of copyright as property as a general matter (this topic has been explicated elsewhere).⁷⁶ The point is that a proprietary lens should not be applied indiscriminately and without qualification to every legal regime that relates to copyright protection. This is important because the way in which we describe a regime has an impact on how it is interpreted and applied. When we recognise that s 115A regulates the relationships and responsibilities of online service providers, and that these relationships ultimately shape the internet as utilised by members of the public, we are able to better understand the function and consequences of Australia's site-blocking regime.

V. AN UNCRITICAL RELIANCE ON PRIVATE ORDERING

Australia's expanded site-blocking regime provides a pathway for increased private regulation of Australian citizens' access to the digital environment.⁷⁷ Private entities – namely, rightsholders and

⁷² See Yochai Benkler, "An Unhurried View of Private Ordering in Information Transactions" (2000) 53(6) *Vanderbilt Law Review* 2063.

⁷³ In Australia, parties that facilitate but do not themselves exercise the rights of copyright owners without permission (eg online platforms) may be held liable under the principle that they have "authorised" the infringement of their users. Authorisation of infringement in copyright has been described as to sanction, approve or countenance the conduct of others, and "connotes a mental element": *University of New South Wales v Moorhouse* (1975) 133 CLR 1. A set of non-exhaustive factors utilised to assess ones' liability for authorising infringement has since been codified in the Act: *Copyright Act 1968* (Cth) ss 36(1A), 101(1A). Courts are to consider: "(1) the extent (if any) of the person's power to prevent the doing of the act concerned; (2) the nature of any relationship between the person and the person who did the act concerned; and (3) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice".

⁷⁴ That is, provided the other criteria are met and taking into account the factors listed in *Copyright Act 1968* (Cth) s 115A(5).

⁷⁵ In *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42; [2012] HCA 16, the High Court of Australia affirmed a finding that an ISP did not authorise the peer-to-peer file sharing conduct of the subscribers of its internet service, as it had limited control over the actual infringing conduct – namely, use of the peer-to-peer file sharing platform (among other reasons). Although a finding of authorisation liability in relation to ISPs seems unlikely in light of this case, it does not rule out ISP liability for the infringements of its subscribers as such liability would be determined on a case-by-case basis. For further discussion of ISP copyright liability in Australia, see Daniel MacPherson, "The Implications of Roadshow v iiNet for Authorisation Liability in Copyright Law" (2013) 35(2) *Sydney Law Review* 467; Kylie Pappalardo, "Duty and Control in Intermediary Copyright Liability: An Australian Perspective" in Brian Fitzgerald and John Gilchrist (eds), *Copyright Perspectives: Past, Present and Prospect* (Springer International, 2015) 241.

⁷⁶ See, eg, Jessica Litman, "What We Don't See When We See Copyright as Property" (2018) 77(3) *Cambridge Law Journal* 536.

⁷⁷ As structured, the regime is skewed in favour of blocking or removal as a default unless the claim for an injunction is disputed by the online service provider subject to the injunction, or the overseas proprietor of the website. Where a website proprietor is

online service providers – are empowered to determine public access to online locations. For law-makers, the attraction to private ordering is understandable: private ordering offers an efficient alternative to cumbersome and slow-moving public regulatory modes. For example, under Australia's expanded site-blocking regime, adaptive injunctions provide rightsholders with a legal basis from which to efficiently respond to the "whack-a-mole" piracy problem while avoiding time delays that seeking court injunctions impose.⁷⁸ Yet, relying on private companies to regulate the internet without sufficient oversight comes at a cost to the public interest. Private ordering in copyright governance can result in the exploitation of power imbalances to obtain unfair or biased outcomes, as well as diminished transparency, accountability and due process.⁷⁹

When self-regulating, private companies tend to prioritise their own commercial interests, and their decisions are less likely to be subject to formal public scrutiny.⁸⁰ In the context of Australia's site-blocking regime, there is real potential for private ordering to produce a system that is opaque, broad in scope, and biased towards the protection of rightsholders' interests over the public interest in access to knowledge and the benefits of innovation. The private interests of rightsholders lie in private property enforcement. The private interests of online service providers include avoiding liability for copyright infringement. As private actors, neither are directly motivated to act in the public interest.

Moreover, if pressures to enforce the site-blocking requests of rightsholders at high-speed and large-scale increase, online service providers may seek to implement automated enforcement systems. Section 115A does not explicitly require the implementation of automated systems, but online service providers have been known to implement such systems voluntarily. Google, for example, operates a variety of automated copyright enforcement systems devised through negotiation with rightsholders, including systems for removing websites from its search results quickly and at scale. In fact, Google uses automated systems to process the vast majority of copyright infringement notices it receives without human review, through its trusted member programs.⁸¹

Critically, research shows that Google's highly automated copyright enforcement systems are prone to error and bias.⁸² A study of over 108 million takedown requests undertaken in 2016 found 28.4% of these requests appeared inaccurate or invalid.⁸³ In privately ordered copyright enforcement systems, commercial interest can motivate private actors to devise and deploy highly streamlined and efficient systems. But they are also likely to prioritise efficiency over accuracy.⁸⁴ Further, automated content

not party to the dispute or is not contactable, the tasks of raising arguments regarding the public interest would tend to fall upon the intermediary (should they be so inclined). Further, in Australia's common law adversarial system, the role of the judge is to be an impartial arbiter of a dispute between the parties in the dispute. See further Ray Finkelstein, "The Adversarial System and the Search for Truth Non-Adversarial Justice" (2011) 37(1) *Monash University Law Review* 135, 136, where the author, a judge of the Australian Federal Court, explains that the adversarial model "relies on parties' self-interest to discover the truth".

⁷⁸ Lags between commencing proceedings and obtaining an injunction can be substantial – for example, in *Roadshow Films Pty Ltd v Telstra Corp Ltd* (2016) 248 FCR 178; [2016] FCA 1503, proceedings started in February and orders were not granted until December: Anita Cade and Marlia Saunders, "Intellectual Property: Content Denied: ISPS Ordered to Block Overseas Piracy Websites" (2017) 31 *LSJ: Law Society of NSW Journal* 76, 77.

⁷⁹ See, eg, Bridy, n 3; Benkler, n 72; Jennifer Rothman, "Copyright's Private Ordering and the Next Great Copyright Act" (2014) 29(3) *Berkeley Technology Law Journal* 1595.

⁸⁰ Julia Black, "Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World" (2001) 54(1) *Current Legal Problems* 103.

⁸¹ Ninety-five per cent of the take-down requests received by Google are from trusted members: Jennifer M Urban, Joe Karaganis and Brianna L Schofield, "Notice and Takedown in Everyday Practice" (Public Law Research Paper, UC Berkeley, 2016) 82. According to Google, its trusted member program is available to rightsholders who have "proven track record of submitting accurate notices and a consistent need to submit thousands of webpages each day": Google, "How Google Fights Piracy" (2018) 38 <https://www.blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf>.

⁸² Joanne E Gray, *Google Rules: The History and Future of Copyright Under the Influence of Google* (OUP, 2020).

⁸³ Urban, Karaganis and Schofield, n 81, 88.

⁸⁴ Yafit Lev-Aretz, "Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering" (2013) 27 *Harvard Journal of Law and Technology* 203; Black, n 80; Gray, n 82, 119. The imprecision of automated or algorithmic enforcement,

moderation systems, particularly those enabled by machine learning, typically operate and make decisions in a “black box”, making it very difficult to hold the system and its operators to account.⁸⁵

Essentially, the 2018 amendments to Australia’s site-blocking regime have opened up a pathway for the implementation of opaque, privately negotiated, automated systems of site blocking. This future is not inevitable. But if it were to unfold, it would move Australia’s site-blocking regime further away from its original objective of providing a “specific and targeted” remedy to rightsholders.

VI. RECOMMENDATIONS

Over the past two decades, online copyright enforcement has evolved rapidly, from the sheltering of nascent internet industries under copyright safe harbour provisions in the early days, to an extensive suite of laws designed to leverage the power amassed by the dominant online service providers. How the public interest fares in the story of online copyright enforcement as it progresses into the future depends on the conceptual clarity underpinning policy frameworks and on the implementation of appropriate public interest safeguards.

Unfortunately, in its assessment of the impact of Australia’s site-blocking regime, the Senate analysis did not recognise the potential longer-term public interest implications.⁸⁶ The proprietary interests of rightsholders are important and site blocking may be a proportionate remedy in some circumstances. But the public interest in access to information and the benefits of innovation also deserve serious consideration. It should be recognised that the public interest lies not only in ensuring that the market for the entitlement granted under a property system is protected; the public interest is broader than that and requires regulatory measures to ensure government oversight and transparency (even if governments inevitably leverage the power held by internet intermediaries for regulatory purposes). Therefore, the task of law-makers is not just to weigh these two interests at opposite ends of a scale, but to establish a legal regime that is guided by principled limits and adequate public interest safeguards.

Section 115A appears to be an example of laws designed to push powerful actors towards a private (and presumably more scalable) regulatory role without sufficient regard to broader public interest considerations. Such laws threaten to entrench the power held by the dominant internet intermediaries.⁸⁷ They also pave the way for the adoption of automated enforcement measures. Yet, when law-makers review the legislation in 2020, they have an opportunity to take action to protect the public interest in access to information and the benefits of innovation. This article makes three key recommendations for doing so: (1) reversion to a legislative “primary purpose” standard; (2) a change in perspective; and (3) practical steps for increasing the transparency of site-blocking and search-filtering practices.

A. Reverting to a “Primary Purpose” Standard

As it stands, the primary effect of infringing copyright or facilitating the infringement of copyright, as a baseline threshold, is sufficient for a court to apply its discretion and grant a blocking injunction. The

particularly in relation to the fair use exception in the US context, has also been highlighted: Matthew Sag, “Internet Safe Harbors and the Transformation of Copyright Law” (2017) 93(2) *Notre Dame Law Review* 499; Dan L Burk, “Algorithmic Fair Use” (2019) 86 *University of Chicago Law Review* 283; Niva Elkin-Koren, “Fair Use by Design” (2017) 64 *UCLA Law Review* 1082.

⁸⁵ Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard University Press, 2015); Maayan Perel and Niva Elkin-Koren, “Accountability in Algorithmic Copyright Enforcement” (2016) 19 *Stanford Technology Law Review* 473.

⁸⁶ See Part IIID above, discussing Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015* (Cth) 4; Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2018* (Cth) 4.

⁸⁷ In the context of the EU DSM Directive (n 57), see Bridy’s criticism that it is a “public law created to settle a private score between the music industry and YouTube”: Annemarie Bridy, “The Price of Closing the ‘Value Gap’: How the Music Industry Hacked EU Copyright Reform” (2020) 22(2) *Vanderbilt Journal of Entertainment and Technology Law* 323, 325. Referring to the copyright safe harbour provisions, Bridy states that these provisions “are essential to the internet’s interactive architecture” and are “indispensable for the wide swath of service providers that keep the internet’s application layer diverse, offering the public opportunities for creativity and conversation beyond the confines of the major platforms” (328). In the same way, laws designed with major internet intermediaries in mind would tend to sideline other service providers seeking to innovate and compete in this space.

“effects test” makes the threshold for an injunction entirely contingent on the website’s usage by third parties, irrespective of the conduct of the website proprietor. As discussed above, it also risks capturing online tools and websites that have non-infringing functions and purposes, and in the process suppressing the development of innovative digital technologies. For these reasons the effects test is neither necessary nor appropriate for Australia’s site-blocking regime.

Australia does not need a separate ground of primary effect of infringing or facilitating such infringement in s 115A, and “primary purpose” alone as set out in the pre-2018 version of the regime is sufficient. Rather than a stand-alone ground for an injunction, the primary effect of the website may be taken into account *as part of its* primary purpose. In other words, the infringing effect of that website and awareness of that effect could constitute evidence of the primary infringing purpose of the website proprietor. The infringing effect may be indicative of the type of web location that is the appropriate subject of a s 115A injunction, but the effect of the website should not be the key determinant of whether it is so.

B. A Regulatory Perspective Underscoring the Public Interest

An essential step towards improving Australia’s site-blocking regime is for law-makers and the judiciary to recognise the regulatory dimensions of the regime. As discussed above, s 115A regulates Australians’ access to the internet and internet-based tools and services, and as a result the public interest could be impeded by an expansive interpretation and application of the legislation. There is a need for principled limits to guide the courts’ assessment of injunctions sought under the regime.

One approach to achieving this would be to ensure that the impact on the public interest is weighed as a key factor, as opposed to it being one in a laundry list of factors to be considered by a court. The public interest in access to information and participation in cultural life, and the right to enjoy the benefits of online innovation should be explicit considerations. A “no fault” label does not eliminate the real-world impacts that site-blocking injunctions can have on public access to and use of online content and tools.

Section 115A could be amended to provide that such public interest considerations must be analysed by courts when they are deciding whether to grant an injunction. Alternatively, principles (and more detailed consideration of the public interest factor) might be developed by the courts over time. However, judicial advancement of the regime is contingent on these matters being adjudicated. A such, judicial consideration of the public interest will not necessarily address the problems raised by privately ordered site-blocking undertaken through voluntary agreements or an adaptive injunction.⁸⁸

C. Transparency Obligations in Private Ordering Frameworks

Private actors can only be held to account for their decisions if there is sufficient public knowledge of their activities. For this reason, another important step towards improving Australia’s site-blocking regime is to build into the regime measures to ensure its transparency. Law-makers should not assume that private entities and automated enforcement systems built within a “black box” will operate in the public interest. In an environment that empowers private actors to regulate public access to information and the benefits of innovation, specific transparency obligations are needed to encourage these private actors to act in a manner that is consistent with the public interest.

One practical approach to enhancing transparency is to mandate reporting on what websites have been blocked by ISPs or filtered out by search engines, with reporting obligations collectively applied to online service providers and the relevant rightsholder. The reported information would feed into a public database, available for public analysis and research. The Lumen Archive in the United States provides a working example of such a system.⁸⁹ Notably, a blocked website may be identified without precisely

⁸⁸ As noted, the regime encourages the relevant parties to engage in private ordering. If successful, the judiciary will have a limited capacity to develop a principled approach to the regime.

⁸⁹ See Lumen <<https://www.lumendatabase.org/>>. As Lumen was founded as a research project, take down notices are contributed to the database by recipients of those notices on a voluntary basis. Therefore, it is indicative of the scale of such notices (not only under copyright law, but also under areas such as trade mark, defamation and privacy laws) and is not a comprehensive record: see further Lumen, “About” <<https://lumendatabase.org/pages/about>>.

disclosing the web address (thus providing transparency but still limiting the possibility of circumvention and access to infringing content through the database).⁹⁰

Critically, disclosure requirements must include online locations that have been blocked or filtered pursuant to voluntary agreements or adaptive injunctions. Coverage of such websites recognises that these private agreements occur in the shadow of the law, and that as the site-blocking regime matures a large proportion of content may be blocked or filtered on a day-to-day basis without proceeding through a court process. By mandating reporting and public disclosure, even for privately negotiated blocks, Australia can achieve a level of transparency necessary to hold rightsholders and online service providers accountable for conduct that could impinge on freedom of access to information or inhibit technological innovation.

VII. CONCLUSION

This article has highlighted a problematic trajectory for the site-blocking and search-filtering regime set up by s 115A of the *Copyright Act* – that is, internet regulation that is increasingly driven by private interests and implemented using automated technologies, backed by a legislative framework focused primarily on fostering efficient systems for proprietary protection. But this future is not inevitable. Steps can be taken to protect the public interest under the existing regime. The first step is to recognise that a focus on infringing effects may deter innovation in the online environment. A “primary purpose” of infringing or facilitating infringement should be a threshold requirement.

Importantly, we need to change our understanding of the regime. An uncritical reliance on private ordering flows from the conception of site blocking as a regime exclusively for advancing proprietary protection. By recognising the regulatory nature of the regime, law-makers would be prompted to recognise the public interest, and, as a result, initiate public interest safeguards. An effective and feasible measure to foster transparency and accountability is to mandate reporting and public disclosure of all online locations made inaccessible to Australians.

Certainly, Australia’s site-blocking regime *can* be interpreted and applied in a measured and proportionate way. Such a reading, however, would require that the public interest in access to knowledge and innovation is adequately assessed on a case-by-case basis by the courts. As designed, the regime does not explicitly require this and instead pushes parties towards private agreements, with limited transparency.

The private companies that dominate the digital environment are currently afforded immense power to regulate access to digital information and services. As gatekeepers of information they can influence social and political conditions and by encouraging further privately negotiated regulation we risk extending this power.⁹¹ Unconstrained private ordering should not be considered a complete solution to online copyright enforcement because doing so risks setting up a legislative framework that leaves it to the largest industry stakeholders to determine a regulatory model that works best for them.

Where there is a mix of private and public interests in a policy, law-makers should strive to retain some capacity for oversight and intervention to protect the public interest. While the regime established by s 115A continues to be a work-in-progress, there is real opportunity for improvement. Australian law-makers have before them a valuable opportunity to fine-tune the regime so that it works not solely in the interest of private actors but to the benefit of all Australians.

⁹⁰ Lumen Team, “Lumen Announces New Features of the Database” (Lumen, 9 May 2019) <https://www.lumendatabase.org/blog_entries/803>.

⁹¹ Over the past several years, the Australian government has expressed concern about the power of entities such as Facebook and Google in the context of media economies, advertising and privacy, yet similar concern appears lacking in the copyright context: see ACCC, “Digital Platforms Inquiry – Final Report” (2019) <<https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>>.