



Blocking Orders and Fundamental Rights: the Australian Experience

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The Australian experience suggests that a blocking order system can co-exist with human rights commitments.



1. The copyright “bargain” in the age of rights

The “social contract” envisaged by the first copyright Act, the Statute of Anne, was that “an author could obtain a monopoly, limited in time, in return for making a work available to the reading public.”

IceTV Pty v Nine Network Australia Pty Ltd (2009) 239 CLR 458 at [25].



Rigorous thinking about copyright requires us to consider other kinds of rights:

- **the right to freedom of expression**
- **the right to access information**
- **education rights**
- **the rights of disabled people**
- **the rights of indigenous peoples.**



Remedial innovations, including blocking orders, may engage other rights, such as:

- **the right to a fair hearing,**
- **the right to conduct a business, and**
- **the right to privacy.**



Opponents of blocking orders are correct to say that the legal power to grant these injunctions puts human rights at stake.

What is not correct is the suggestion that honouring these rights *precludes* adoption of a blocking order regime.



2. Overview of the Australian blocking order regime

The Australian *Copyright Act 1968* (Cth) allows copyright owners to apply for an injunction to require an Internet Service Provider to take the steps that the court considers reasonable to disable subscribers' access to an offshore website.

The **primary purpose** or (since 2018) primary **effect** of the location must be to **facilitate infringement of copyright**.



Blocking orders are part of the **copyright ecology**.

Blocking orders are a **tool** to help sustain **functioning markets for creative content**.

No fault regime: the ISP does not need to be at fault.

Very detailed legislation.



- **“deliberately prescriptive”**
- **“intended as a precise response to a specific concern raised by copyright owners”.**
- **“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.”**

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



- 1. The flagrancy of the infringement/facilitation of infringement**
- 2. Whether the online location makes available or includes directories**
- 3. Whether the owner or operator of the site demonstrates a disregard for copyright generally**
- 4. Whether access to the online location had been disabled by relevant orders from any foreign court**
- 5. Whether disabling access is a proportionate response in the circumstances**
- 6. The impact on any person, or class of person, likely to be affected by the injunction**
- 7. Whether it is in the public interest to disable access**
- 8. Whether the owner of the copyright complied with the requirement to notify the operator of the website**
- 9. The availability of other remedies under the Copyright Act 1968 (Cth)**



- **“only online locations that are deliberately and flagrantly infringing copyright will be captured.”**
- **“not intended to capture incidental infringement.”**

Explanatory Memorandum, Copyright Amendment (Online Infringement) Act 2018 (Cth) at 4.



3. Parliamentary analysis of human rights consistency

Parliamentary Joint Committee on Human Rights scrutinises Bills before the Australian Parliament for consistency with the international human rights instruments to which Australia is a party.

Human Rights (Parliamentary Scrutiny) Act 2011 (Cth)



- **International Covenant on Civil and Political Rights**
- **International Covenant on Economic, Social and Cultural Rights**
- **International Convention on the Elimination of All Forms of Racial Discrimination**
- **Convention on the Elimination of Discrimination against Women**
- **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**
- **Convention on the Rights of the Child**
- **Convention on the Rights of Persons with Disabilities**



In its scrutiny of the *Copyright Amendment (Online Infringement) Act 2015 (Cth)* the Committee focused principally on:

- **the right to freedom of opinion and expression; and**
- **the right to a fair hearing. (This right was engaged principally because the operators of the targeted websites did not need to be parties to the litigation.)**



A measure that limits a human right must be:

- **prescribed by law;**
- **be in pursuit of a legitimate objective;**
- **be rationally connected to its stated objective; and**
- **be a proportionate way to achieve that objective.**



The Committee accepted that

- **reducing online copyright infringement was a legitimate objective; and that**
- **blocking orders were rationally connected to the objective of reducing on-line copyright infringement.**



It wanted more information about whether the blocking order regime was a proportionate way to achieve the objective.

It sought the advice of the Attorney-General as to whether the Bill imposed a proportionate limitation on the right to freedom of opinion and expression and the right to a fair trial.



Based on the further information, the Committee concluded that the blocking order measures were a proportionate response to the problem of on-line copyright infringement when compared with other available measures.



Layers of scrutiny of human rights issues:

- **Analysis of human rights compliance in the Bill's Explanatory Memorandum**
- **Submissions from various groups drawing attention to human rights issues**
- **Scrutiny by the Parliamentary Joint Committee on Human Rights**
- **Analysis by the Attorney-General in the light of the Joint Committee's questions**
- **Further analysis by the Parliamentary Joint Committee on Human Rights, following the Attorney-General's response.**



4. The right to freedom of expression

- 1. Alternative measures, such as education, and industry codes, are complements to blocking orders but are not substitutes for measures that would disrupt the supply of infringing content.**
- 2. Disrupting the supply of infringing content steers consumers toward legitimate sources of content.**
- 3. Direct proceedings against individual infringers is not an effective way of addressing online infringement due to the large numbers of primary infringers and the low level of damages that could be recovered.**
- 4. Blocking orders do not limit access to ideas, other than in cases where doing so would infringe another's copyright.**



5. Courts have the power to tailor injunctions to specific pages or indexes, where a site includes both legitimate and infringing material. The injunction power “is not intended to capture incidental infringement.”

6. It is often impractical for copyright owners to bring infringement actions against foreign-based online locations, due to the complexities of private international law, and the costs associated with attending foreign courts to enforce their rights.

7. When deciding whether to make a blocking order Federal Court will weigh up a number of factors before granting an injunction.



Against this background, the Committee accepted that the Australian blocking order regime “is likely to be compatible with the right to freedom of expression.”



5. The right to a fair hearing

- **There may be circumstances in which the operator of the online location simply cannot be located.**

If the right to a fair hearing meant that a blocking order could never be granted in such circumstances, copyright owners would be left with no meaningful relief.



6. The right to privacy

During the Australian Parliamentary scrutiny of the blocking order regime, the Joint Committee did not engage directly with privacy rights.

The right to privacy is recognised in the international human rights instruments against which new Australian legislation is scrutinised.

- Article 17 of the International Covenant on Civil and Political Rights prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.



The Joint Committee on Human Rights has said that if the government mandates the use of technology in a manner that limits a person's right to privacy, the approach taken must be

- **the least rights restrictive method to achieve the relevant governmental purpose, and**
- **there must be appropriate safeguards.**



Alternative 1: Direct obligations imposed on ISPs to monitor for infringing content.

Require ISPs to monitor traffic for infringing content.

- **The absence of a legal obligation to monitor for infringing content protects ISPs and lowers operating costs. It also protects subscribers' privacy.**
- **In tension with international copyright law.**



The blocking order system directs attention to content, not people.

- **The focus is the availability of the content, not the activities of an ISP's subscribers that triggers the application for an order that a website be blocked.**
- **Nothing in the Australian legislation requires anyone to see which *individual* users were trying to access a targeted website.**
- **It permits the deployment of technical solutions that direct *all* subscribers away from sources of infringing material.**
- **The flagrancy of infringement can be ascertained by “test” downloads or streams. There is no need to target subscribers' own use of the target websites: *Roadshow Films Pty Limited v Telstra Corporation Limited* [2020] FCA 507 (involving Madman Anime films).**



Alternative 2: Direct civil actions against infringers.

- **If subscribers were served with legal proceedings, or, where permitted, received a demand letter, they would immediately know that their internet browsing and download habits were being monitored.**



Alternative 3: Three-strikes regimes.

- **Low stakes/low cost, but still premised on identifying the individual infringers.**
- **Information about their personal use of downloading services is front-and-centre in the process.**

Blocking orders can be made, and put into effect, without accessing any information about individual's online activity. In such cases, the right to privacy is not engaged at all.



7. Author's human rights and the efficacy of blocking orders

The Universal Declaration of Human Rights (1948), announced:

- Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

This statement is reaffirmed as art. 15(1)(c) of the International Covenant on Economic Social and Cultural Rights (ICESCR), a binding instrument



Authors’ “material interests” include the right to earn a living from one’s intellectual property from a paying audience, assuming the author can find one.

Authors’ human rights protections and copyright law align in key respects, even if they are not identical.



The United Nations Committee on Economic Social and Cultural Rights has said that this right

- **“seeks to encourage the active contribution of creators to the arts and science and to the progress of society as a whole.”**
- **It is “intrinsically linked to the other rights, including the right to take part in cultural life, the right to enjoy the benefits of science, the opportunity to gain one’s living by work which one freely chooses, and the right to adequate remuneration.”**



The right is linked to the “right to own property, and the right to freedom of expression (including the right to seek, receive and impart information and ideas of all kinds),” and the right to the “full development of the human personality.”

Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 21: The Right of Everyone to Take Part in Cultural Life*, art. 15(1)(a), U.N. Doc. E/GC.21/2005 (Jan. 12, 2006).



This requires copyrights to be *effectively* protected.

Critics who emphasise only how protecting copyright detracts from fundamental rights, such as the right to freedom of expression, tell only half the story.



In the Australian context, it was said:

- **The proposed amendments would promote the right to benefit from the protection of the moral or material interests in a production, by strengthening the protection provided to copyright owners in enforcing their copyright.**
- **In many cases copyright infringement results in lost sales for creators and their licensees, detracting from the protection of the material interests that result from their literary or artistic productions.**

Explanatory Memorandum, *Copyright Amendment (Online Infringement) Act 2018* (Cth), at 6.



Efficacy and proportionality:

The effectiveness of blocking orders is conventionally linked to the proportionality question.

The evidence suggesting that blocking orders significantly reduce copyright piracy supports the conclusion (reached in the Australian legislative context) that blocking orders are a proportionate response to the problem of copyright piracy.



Efficacy and authors' human rights recognized in the ICESCR:

Legal protections need to be *effective* in securing for authors “the moral and material interests resulting from their productions”.

Comm. on Econ., Soc., & Cultural Rights, *General Comment No. 21: The Right of Everyone to Take Part in Cultural Life*, art. 15(1)(a), U.N. Doc. E/GC.21/2005 (Jan. 12, 2006).



8. Conclusion

- **The Australian experience suggests that blocking orders are a proportionate response to a serious social and economic problem.**
- Proportionality is reinforced by the characteristics of the scheme
- Limited judicial power to grant an injunction
- The importance of the public interest is reflected in the detailed statutory factors courts consider
- Australian experience suggests that the regime is used in serious cases.



- **Fundamental rights are not impermissibly limited by Australia's site blocking regime.**
- **The growing recognition of *authors' own* human rights – (acknowledged in the Universal Declaration of Human Rights and reinforced by the International Covenant on Social and Economic Rights) offers further support to that conclusion.**



Thank you.