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Digital Rights Watch submission to Review of the Copyright Online Infringement Amendment

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About DRW: Digital Rights Watch (DRW) is a nonprofit charity that supports, fosters, promotes and highlights the work of Australians standing up for their digital rights: <http://digitalrightswatch.org.au>. For more information about this submission please contact Nicolas Suzor, Deputy Chair of Digital Rights Watch: n.suzor@qut.edu.au.

Executive Summary

There is little evidence that the website blocking scheme in s 115A of the Copyright Act 1968 (Cth) is effective. We suggest that it be repealed. Instead, Government should focus on encouraging the further development of new markets for digital content, and should ensure that markets for digital content are fair and competitive.

In particular, the Government should immediately act on the Productivity Commission's 2016 recommendation to repeal Section 51(3) of the *Competition and Consumer Act 2010* (Cth).² In the short to medium term, the Government should continue to monitor the performance of digital media markets, seek to ensure that Australians are being fairly served, and ensure that established interests are not able to restrict competition from innovative new entrants in media distribution.

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² See Productivity Commission, 'Intellectual Property Arrangements' (2016) 78 <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report>>. The Government supports this recommendation: see Department of Industry, Innovation and Science, 'Australian Government Response to the Productivity Commission Inquiry into Intellectual Property Arrangements' (August 2017) <<https://www.industry.gov.au/innovation/Intellectual-Property/Documents/Government-Response-to-PC-Inquiry-into-IP.pdf>>.

Question 1: How effective and efficient is the mechanism introduced by the Online Infringement Amendment?

The effectiveness of website blocking is difficult to assess. The fact that the system is relatively cumbersome and extremely easy to circumvent means that it is unlikely to impose any significant deterrent to the set of consumers who are highly motivated to infringe. For the bulk of ordinary users who we know would prefer to pay for content if it is available,³ we believe that it is vastly inferior to changes in the marketplace that make legitimate access to content easier and cheaper.

Methodological limitations make it hard to track the effectiveness of website blocking in deterring copyright infringement. The Kansar report surveyed only 31 participants (out of an overall sample of 2,442 respondents) who reported encountering a blocked site, and it is difficult to draw general inferences from this small group. Other reports, like Incopro's report for the ASA,⁴ claim to show a decrease in traffic to blocked sites; but they do not measure any increase in traffic to blocked sites from Australians using VPNs, or whether Australians have moved to seek out other (not monitored) channels for illicit content. Since this is not tracked, it is impossible to say with any degree of precision that traffic to sites with infringing content has dropped. Most importantly, these reports tell us little about whether aggregate levels of infringement have reduced.

There is no technical solution to copyright infringement. Website blocking techniques can always be circumvented, even for users who are not technically sophisticated. It is trivial for a blocked site to register a new domain or move IP addresses within a matter of minutes.⁵ Countless proxy sites, too many to ever keep up with, emerge specifically to circumvent blocking regimes. Users can avoid DNS blocking techniques with one quick change to their computer's settings, or can avoid other blocking techniques by downloading an encrypted browser or signing up to a VPN within minutes.⁶ Any system that seeks to develop more effective technical blocking can only do so at a massive and unacceptable cost to freedom of speech and innovation on the internet.⁷

³ Dootson, Paula & Suzor, Nicolas P. (2015) 'The game of clones and the Australia tax: divergent views about copyright business models and the willingness of Australian consumers to infringe.' *University of New South Wales Law Journal*, 38(1), pp. 206-239 <<https://eprints.qut.edu.au/75933/>>.

⁴ Incopro, 'Site Blocking Efficacy: Australia' (Australian Screen Association 2018) <<http://apo.org.au/node/133806>>.

⁵ Productivity Commission, Australian Government, *Intellectual Property Arrangements* (2016) 568; Allie Coyne, *The Messy Mechanics of Blocking Piracy Sites in Australia* (9 March 2016).

⁶ See Spandas Lui, 'How To Bypass ISP Blocking Of The Pirate Bay And Other Torrent Sites For Free' (16 December 2016) Liferhacker Australia <<https://www.liferhacker.com.au/2016/12/how-to-bypass-isp-blocking-of-the-pirate-bay-and-other-torrent-sites-for-free/>>.

⁷ More controlled networks are less 'generative' in that they create less room for innovation: See Jonathan Zittrain, *The Future of the Internet and How to Stop It* (Yale University Press 2008).

Question 2: Is the application process working well for parties and are injunctions operating well, once granted?

Regardless of whether the application process is working well for the parties, we are concerned about whether it is working well for those who are not represented before the Court. Website blocking systems impact more than ISPs and copyright owners; they are fundamentally aimed at altering user behavior, and are therefore a matter of significant public interest. As a blunt restriction on speech, website blocking is inherently dangerous, and the public interest must be carefully protected. This is difficult to do in an adversarial system where neither users nor the target website is represented.

Even with the best of intentions, technology companies and rightsholders make mistakes. In 2014, Microsoft sought to take a massive botnet offline, but ended up inadvertently disrupting the internet access of millions of users in collateral damage. Their action was authorised by a court order, but nobody was able to represent the public interest and challenge the assumptions and evidence brought before the court.⁸ Pakistan Internet, in implementing an IP block scheme in 2008, similarly inadvertently disrupted video sharing site YouTube globally.⁹ In Australia in 2013, ASIC notoriously accidentally required ISPs to block access to hundreds of thousands of legitimate websites.¹⁰ Rigorous due process is critical to ensuring that website blocking is adequately tailored to avoid infringing freedom of speech and other fundamental rights.

If website blocking orders become more frequently sought in Australia, for a larger set of sites, due process issues are likely to eventually become a problem. So far, there has been little consideration of the limits of the discretion to order relief, particularly with regard to the undefined term 'facilitate' (as opposed to 'authorise', a term well established in copyright law), when a website with infringing and non-infringing content purpose will have a 'primary purpose' of facilitating infringement, and what 'flagrancy' means in this context.¹¹ The discussion of public interest in the Federal Court in hearing applications under s 115A has so far been somewhat limited.¹² It is important to note that the Federal Court is empowered to

⁸ See Nate Cardozo, 'What Were They Thinking? Microsoft Seizes, Returns Majority of No-IP.com's Business' (10 July 2014), Electronic Frontier Foundation Deeplinks blog <<https://www.eff.org/deeplinks/2014/07/microsoft-and-noip-what-were-they-thinking>>.

⁹ See Declan McCullagh, 'How Pakistan knocked YouTube offline (and how to make sure it never happens again)' (25 February 2008) CNET <<https://www.cnet.com/news/how-pakistan-knocked-youtube-offline-and-how-to-make-sure-it-never-happens-again/>>.

¹⁰ See Rohan Pearce, 'Government releases guidelines for website-blocking power' (17 July 2017) Computerworld <<https://www.computerworld.com.au/article/621872/government-releases-guidelines-website-blocking-power/>>.

¹¹ See David Lindsay, 'Website Blocking Injunctions to Prevent Copyright Infringements: Proportionality and Effectiveness' (2017) 40 UNSWLJ 1507.

¹² Currently, only three cases have considered under s 115A *Copyright Act 1968* (Cth), and while the proportionality of orders is raised as a concern, it has not yet been a major one: *Roadshow Films Pty Ltd and Others v Telstra Corporation Ltd and Others* (2016) 248 FCR 178, *Foxtel Management Pty*

consider the proportionality of the orders it makes, and can take public interest concerns into account in doing so. The problem, however, is structural. Our adversarial judicial system works best when the respondent is able and willing to contest the application. In website blocking orders, there is no party to represent the interests either of the target website or the general public. ISPs, who are motivated to reduce costs and have little interest in the availability of foreign websites, are unlikely to vigorously contest applications and ensure that the facts presented by applicants are well tested.

We suggest that this structural deficiency be addressed by investigating ways for experts representing the public interest to provide assistance to the court (potentially in a form similar to the role of *amici curiae*). This structural problem is exacerbated as the risk to ISPs increases; we also suggest that the legislation should specifically provide that ISPs should not be liable for costs for contesting applications.

Question 3: Are any amendments required to improve the operation of the Online Infringement Amendment?

Online infringement can only be addressed by understanding that consumers are motivated to infringe in large part by the lack of affordable and convenient legitimate options. While digital media markets have improved somewhat since the *IT Pricing Enquiry*,¹³ Australians still face substantial problems and disadvantages compared to other consumers. Our 2017 report shows that Australians still either cannot access a large portion of content that is available to American consumers, or they have to pay more for the same level of access.¹⁴ Only about 65 percent of popular movie titles and 75 percent of popular TV titles of the last five years that are available in the US could be accessed by Australian consumers.¹⁵ Nearly two thirds of films available to stream in the US are not available to stream in Australia, and more than half of the television seasons available to stream in the US are not available in Australia. In TV and film, the Australian market also consists of a much smaller number of distributors, both for streaming and retail. This means less competition and more limited choices available to Australians. Music markets, by comparison, are much more competitive globally. As film and TV distributors continue to move to prefer exclusive original content, we expect ongoing threats to competition and consequent consumer welfare in the future.

Strong, enforceable competition policy will become more important in digital media markets in the coming years. The Productivity Commission has recently recommended that Section 51(3) of the *Competition and Consumer Act 2010* (Cth), which excludes intellectual property

Limited v TPG Internet Pty Ltd [2017] FCA 1041 and *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435.

¹³ House Standing Committee on Infrastructure and Communications, 'At What Cost? IT Pricing and the Australia Tax' (Parliament of Australia 2013)

<http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm> accessed 7 April 2014.

¹⁴ Nicolas P Suzor and others, 'Australian Consumer Access to Digital Content' (Australian Communications Consumer Action Network 2017) Report

<http://accan.org.au/ACCAN_QUT_Digital%20Content_web.pdf> accessed 16 March 2018.

¹⁵ For summary information, see <http://digitalmediaobservatory.net.au/>.

from the scope of much of competition law, be repealed. The Australian Government has supported this recommendation, but not yet acted to give it effect. This should become a priority, and the Government should ensure that the ACCC is resourced and empowered to monitor competition in digital media markets.