109 年度委託學者專題研究案

—境外侵害著作權網站攔截—

研究成果報告

委託機關：司法院行政訴訟及懲戒廳
執行期間：108 年 7 月至 109 年 1 月
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司　　法　　院

中　華　民　國　１　０　９　年　６　月　印　製

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第一章前言

網際網路（internet；以下簡稱網路）於 20 世紀 90 年代以驚人的速度風行全世界。網路跨國界、匿名性、互動性、及快速的特性普獲社會各階層的歡迎，而其所提供的多樣化的資源服務，更蘊含著無限的商機。網路可以全球性規模，對人類提供資訊、教育及進行商務活動。大量的資訊得以相對低廉的成本散布到全世界。在社會面，網路更可使公民權進一步伸張。蓋暢通的網路使政府與公民間得以密切聯繫，資訊傳遞的障礙亦相對減少。從而，個人及團體得以較低的成本發表及出版其言論。在文化面，網路對於文化的營造及語言多元化（linguistic diversity）的促進貢獻鉅大。網路所隱藏的機會既然如此鉅大，其重要性，自然無庸置疑。

然而，就如同其他產業，網路固然可以被用於正途，亦可能被少數人濫用。對於著作權人權益的侵害，即屬其一。文明社會對於著作權的保護超過百年的歷史。有關著作權之內涵、範圍、合理使用及救濟制度等亦已獲得國際共識。對於著作權的侵害，應提供各種管道之救濟及賠償，也毋庸置疑。

因此，即使法律禁止及處罰未獲著作權人同意之散布行為，亦不構成違反憲法對言論自由之保障。網路的特性，使著作的違法散布，更形嚴重。理論上，權利人固然得對散布者提出法律上之救濟，但事實上可行性卻不高。蓋散布者若在他國，涉及國際管轄權，往往必須到國外起訴，金錢及時間上的耗費過高。

另外，此種傳統的救濟途徑仍無法阻止著作在網路上的違法流通。換言之，救濟的成本、時效及效果皆不如預期。比較可行的方式，是由權利人向當地法院提出聲請，要求頒發禁制令（injunction），直

接攔截或封鎖違法散布著作的境外網站，以控制損害。惟此種手段的運用，不但可能傷及無辜，更有侵犯網路言論自由之虞。這其間究應如何拿捏？應掌握何等原則？對 20 餘年來網路世界所逐漸成形的規範（如技術中立原則）構成何種挑戰？凡此皆為國家重要且急迫之問題。

立法院第 9 屆第 7 會期 2019 年 3 月 25 日司法及法制委員會第 9 次全體委員會議中，亦有立法委員特別針對此一議題提出質詢，並要求司法院就此實務上之難題進行研究。是以，本研究擬就境外侵害著作權網路攔截所涉及的法律問題，參考外國之立法及實踐，作一探討。所謂他山之石，可以攻錯，本研究透過理論及國外具體案例之分析，希冀能就此一議題，提出可供我國未來運作之參考。

第二章網路世界中之言論自由

所謂言論自由，係指人民有表達或不表達意見之自由，且不受檢查之意。言論自由亦稱為表意自由（freedom of expression），其定義尚可延伸至人民利用不同媒介接受與傳遞資訊及意見之權利。回顧歷史，人類社會過去數千年並沒有所謂的言論自由。歷朝統治者為鞏固其地位，不但運用武力壓制反抗者，更多方嘗試箝制思想，使人民不敢心生二意。例如，17 世紀當印刷品在歐洲開始風行時，英王查理二世即對出版品嚴厲管制，對印刷人採證照制（licensing system）。1712 年國會通過的印花稅法（Stamp Act）甚至對每張印刷品課以一便士（one Pence）的稅金，以限制發行量[1]。到了現代，言論自由已為民主憲政國家不可或缺之一環。自 1948 年世界人權宣言第 19 條揭櫫人之言論及意見應被尊重後，言論自由已成為人類的普世價值之一，沒有人會質疑。

言論自由雖然係人民憲法上不可剝奪的基本權，但其並非絕對權。觀諸英美法，人民的言論在涉及國家利益、公共利益及個人權利保障的情況下仍可依法予以限制，甚至禁止。然為兼顧憲法上言論自由，美國聯邦最高法院在許多情形會以嚴格審查標準（strict scrutiny standard），對系爭法律進行違憲審查。所謂嚴格審查標準，係指法院只有在系爭法律對言論自由的限制具有國家迫切介入的利益（compelling governmental interest）、該法律已嚴密的予以限定（narrowly tailored），及以手段的最低性（least restrictive means）來限制言論時，始不構成言論自由之侵害。

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[1] John Thompson, “The Trade in News,”in David Crowley & Paul Heyes (eds.), *COMMUNICATION IN HISTORY: Technology, Culture, Society*, p.121(1991).

網路興起後，網路世界的言論自由亦開始成為重要議題。歐洲人權公約（European Convention on Human Rights; ECHR）第 10 條及歐盟憲章（EU Charter）第 11 條關於表意自由的保障被認為包括資訊的傳授權（right toimpart information）及公眾的接收權（right of the public to receive it）。此二項權利逐漸演化為所謂的「網路近用權」（Right to Internet access）。而受此近用權保護者包括網路的使用者（internet users），以及網路服務提供者（Internet Service Provider; ISP）。2012 年聯合國人權委員會關於網路上表意自由之保護決議（U.N. Human Right Council Resolution on Protection of Freedom of Expression on the Internet）[2]正式予以確認。基此，任何對於網路上言論的攔截，不但可能侵犯憲法對表意自由的保障，亦屬違反國際公約之行為。

[2]A/HRC/32/L.20

第三章言論自由與網路著作權保護之平衡

著作權法之立法目的為（一）保護著作權人之權益及（二）促進國家文化發展。此二者相輔相成。對前者的保護欠缺或過度，皆可能影響後者。此所以著作權法雖然訂有詳細之權益保護事項，但亦設有「合理使用」之規範。換言之，著作權亦非絕對權，在與其他法益相衝突時，亦須由司法予以權衡。從言論自由的面向觀之，對他人著作之散布，在著作權法上雖屬侵權行為，但亦屬對言論之限制。惟著作權法規定凡非屬合理使用範圍內之散布他人著作，基於對著作權人之保障，應予以制裁。易言之，此種言論，不在憲法言論自由的保障範圍內。

在世界貿易組織（World Trade Organization；WTO）的與貿易有關之智慧財產權協議（Agreement on the Trade-Related Aspects of Intellectual Properties Rights; TRIPs）下，會員國承諾應以國內法保護其他會員國之智慧財產權。基此，外國人之著作權，自亦受我國著作權法之保障。[3]

網路無遠弗屆，侵害著作權之行為若發生在虛擬世界，則其對權利人的傷害豈止倍增！基於對權利人的保障，理論上，出現在境外網站上的違法重製及散布行為皆應予制裁。而其中最直接的方法，即為命令網站接取提供者（Internet access provider）攔截或封鎖違法內容，使使用者無法觀覽。此種做法近年在歐洲及澳洲等正快速增加。推其

[3]著作權法第 4 條：「外國人之著作合於下列情形之一者，得依本法享有著作權。但條約或協定另有約定，經立法院議決通過者，從其約定：一、於中華民國管轄區域內首次發行，或於中華民國管轄區域外首次發行後三十日內在中華民國管轄區域內發行者。但以該外國人之本國，對中華民國人之著作，在相同之情形下，亦予保護且經查證屬實者為限。二、依條約、協定或其本國法令、慣例，中華民國人之著作得在該國享有著作權者。」

原因，不外係因著作權人無法直接對侵權人及境外網站提出有效及快速之救濟，權利人退而求其次，使其著作不致於被違法擴散，以降低其損害。

但另一方面，此種以強制手段命業者下架違法著作無疑地涉及對網路使用者資訊近用權（user's rights of access to information），及網路服務業者之營業自由權（ISP's ability to freely conduct their business）之限制，不可不慎。2007 年歐盟執委會甚至認定攔截的措施必然意味著對人權的限制（necessarilyimplies a restriction of human rights）。如何維持其間平衡，有賴於細緻的立法及具說服力的司法裁決。

根據歐盟執委會 2001 年所頒布的資訊社會關於某些著作權及相關權利和諧化指令（Directive on the harmonization of certain aspects of copyright and related rights in the information society；簡稱 InfoSOC）[4] 第 8 條第 3 項規定：會員國應確保權利持有人得對提供第三人侵害著作權或相關權利之中介業者（intermediaries）聲請禁制令。此項規定，提供了攔截侵權網站的法源依據。比較令人遺憾的是，該指令並未臚列攔截的標準及條件，而僅概括地委諸各會員國自行決定。所幸，歐洲的兩個主要法院，即歐洲人權法院（European Court of Human Rights；ECHR）及歐盟法院（Court of Justice of the European Union；CJEU）在近年來透過一連串的判決，逐漸建立了所謂比例原則（principle of proportionality）的考量因素，限制攔截侵權網站無限上綱的可能。

根據學者 Geiger 及 Izyumenko 的整理分析[5]，於涉及言論自由限

[4] Directive 2001/29/EC.

[5]Christophe Geiger & Elena Izyumenko, " The Role of Human Rights in Copyright Enforcement Online: Elaborating a Legal Framework for Website Blocking," in 32 American University

制之層面，對於侵害著作權違法網站的攔截，在判斷是否符合比例原則時，至少應考量下列因素：

(一)該網站係主動或被動(active or passive)地被使用；

(二)攔截後對該網站附隨合法內容的負面效應；

(三)有關資訊取得之公共利益；

(四)獲取資訊之其他替代可能；及

(五)ISP 的表意自由(刊登客戶之意見自由)；

再者，在人民營業自由的層面，以禁制令攔截違法網站，是否符合比例原則，則應考量下列：

(一)攔截的成本及複雜性；

(二)其他合理替代方法的可能性；及

(三)禁制令與法律責任的關連性；

上述所謂比例原則之考量，實已涵蓋手段的必要性及公共利益等因素。至於在個案上應否准予攔截違法網站，則由法院酌情判斷。歐盟成員國法院透過判決所型塑的各種考量因素，有些頗具獨到見解。例如歐盟法院在 2014 年的 Telekabel 案中即認定，攔截措施的禁制令在原則上雖然可以接受，以保護權利的持有人，但該措施本身應嚴格地瞄準（strictly targeted）於違法內容，且應讓使用者於事後有向法院主張其表意自由及營業自由權利之餘地，始屬恰當。[6]另外，

International Law Review 43, p.19(2016).

[6] Court of Justice EU, 27 March 2014, UPC Telekabel v Constantin Film In Case C-314/112 (available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=94EE91874AB3F634432D648EEF65B5

德國聯邦最高法院則更明確地指出：不能夠僅僅因為某網站上出現違法內容，即予以攔截，法院仍應進行衡量該網站就整體而言合法及違法內容所佔的比重，以及合法內容是否僅占有微不足道的分量。[7]其他歐盟成員法院亦認為，有時整個網站的移除並不符合比例原則，若僅將違法部分攔截，較具正當性。[8]又不論係以 Domain Name System(DNS)[9]或 Uniform Resource Locator(URL)[10]的方式攔截違法網站，皆有可能造成過度攔截（overblocking）及過高成本的問題。尤其就後者而言，若要求小型業者利用“Deep Packet Inspection”[11]之攔截技術，以監控網站流量及違法內容，則被認為耗費過高，且太過複雜。[12]

這些見解雖然來自不同法院，但似乎都指向一個共同的結論，即攔截措施，應僅限於惡名昭彰的違法網站，以避免造成過度攔截的後果，從而侵害網路使用者之表意自由及業者之營業自由。

FC?text=&docid=149924&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7326908 最後瀏覽日：2020 年 6 月 15 日)。

[7]Recited from Geiger&Izyumenko, supra note 5, at 6.

[8]Id.

[9] DNS，即網域名稱系統，係將人們可讀取的網域名稱 (例如，www.amazon.com) 轉換為機器可讀取的 IP 地址 (例如，192.0.2.44)。參考自 https://aws.amazon.com/tw/route53/what-is-dns/ (最後瀏覽日期:2020 年 1 月 30 日)。

[10]URL，即統一資源定位器，正確的中文學術名詞為網域名稱(Domain name)，而白話的說法為網站地址，亦即大家熟知的網址。參考自 https://www.design-hu.com/web-news/domain.html (最後瀏覽日期：2020 年 1 月 30 日)。

[11]深度封包檢測技術(Deep Packet Inspection；DPI)係相對於一般封包分析而言的一種新技術，一般封包檢測僅分析 IP 封包第四層以下的內容，包括來源位址、目的位址、來源埠、目的埠以及協議類型，而 DPI 則在此基礎上增加了應用層分析，可辨識別出各種應用及其內容。參考自 https://archive.eettaiwan.com/www.eettaiwan.com/emag/1306_17_DC.html (最後瀏覽日期:2020 年 1 月 31 日)。

[12]Recited from Geiger&Izyumenko, supra note 5, at 11.

第四章境外攔截執行層面之探討

如前所述，因為網路的資訊傳播速度快，加上不受國界之限制等特性，使得關於在境外網站上侵害著作權之資訊也容易大量且快速地傳播，一般大眾皆可輕易地瀏覽或轉傳，如此情況對著作權人之權益勢必造成重大影響，而對於這類境外網站進行攔截，使大眾無法接觸侵害著作權之資訊，便成為維護著作權的有效手段。

因此，本研究報告特別針對上開議題，參考澳洲實際案例，從實務運作的觀點，提出可能的解決方法。

第一節核發禁制令予 ISP 業者，命 ISP 業者封鎖惡意侵權網站之可行性

第一項對「科技中立原則」的挑戰

科技中立原則最早是美國最高法院在 *White-Smith Publishing Co. v. Apollo Co.*[13]一案中所提出的概念。該案之重要爭點係關於著作權法對著作權保護之範圍，是否擴大到當時的新科技（piano rolls）所衍生的重製問題。美國最高法院判決指出，被告生產的 piano rolls 並沒有侵害原告之著作權，因為 piano rolls 並非如同人類可讀的樂譜，它只是一種操作自動鋼琴裝置而已。此項見解對於科技發展與著作權之保護，具有重要之指標意義，但畢竟是法院針對個案表示之見解，而著作權法在美國已是成文法，則釐清新科技與著作權衝突之方法，仍是透過立法程序為之，美國國會也因為最高法院上開判決，在修改美

[13] 209 U.S. 1 (1908).

國著作權法時，接受「媒介中立」（media neutrality）原則。[14]

以網路發展之初始目的而言，網路的誕生是在冷戰時期，為了國防安全之需由美國國防部所屬之先進研究計畫單位（the Advanced Research Projects Agency, ARPA）負責設計發展，[15]既然是為了作戰目的而設計的溝通工具，網路設計的本質即展現在兩個方面：(一)讓不同研究機構之間可以透過網路溝通（communicate）；(二)讓參與網路活動者可以分享（share）彼此的資源。[16]

遺憾的是，在網路科技日新月異以及使用網路人口不斷增加的情形下，我們看到了部分網路使用者混淆了「分享」與「侵權」的界線，也就是提供他人所有受法律保護的資訊供大眾分享。雖然網路網路術提升了分享數位內容的方便性，但是也造成了使用者高舉網路分享的大旗，實質上可能是侵害他人權利的行為。因此，區別分享與侵權是所有參與網路活動者應首先建立之重要觀念。換言之，如果未經著作權人同意或授權，而提供他人擁有著作權的數位內容，在網路上大量傳輸或交換，可能已經逾越了分享的界線，這也是科技使用者應特別注意的地方。

由此可見，網路網路無國界的特性，提供了去中心化的傳輸架構，有了它我們更容易實現跨越政治、經濟的溝通平台，但是如果以「科技中立」為論述，透過網際網路傳輸侵害他人著作權，顯然誤解了的網路科技中立原則的精神。

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[14] Deborah Tussey, *Technology Maters: The Courts, Media Neutrality, and New Technologies*, 12 J. INTELL. PROP. L. 427, 431 (2005).

[15] 關於網際網路之起源及發展過程，請參閱：JAMES SLEVIN, THE INTERNET AND SOCIETY28-54 (2001)。

[16] *Id*. at 29.

第二項網際網路管制與網路服務提供者（Internet Service Provider, ISP）之重要性

因為網際網路無國界的特性，使得各國政府在管制上難依循實體世界的模式而為處理。因此，如何找到最有效率的管制節點，才是問題的核心。依我國著作權法第 3 條第 1 項第 19 款之規定，所謂網路服務提供者，指提供下列服務者：（一）連線服務提供者：透過所控制或營運之系統或網路，以有線或無線方式，提供資訊傳輸、發送、接收，或於前開過程中之中介及短暫儲存之服務者。（二）快速存取服務提供者：應使用者之要求傳輸資訊後，透過所控制或營運之系統或網路，將該資訊為中介及暫時儲存，以供其後要求傳輸該資訊之使用者加速進入該資訊之服務者。（三）資訊儲存服務提供者：透過所控制或營運之系統或網路，應使用者之要求提供資訊儲存之服務者。（四）搜尋服務提供者：提供使用者有關網路資訊之索引、參考或連結之搜尋或連結之服務者。由此可見，ISP 業者包括連線服務提供者、快速存取服務提供者以及資訊儲存服務提供者，所有網路使用者都必須特過 ISP 業者才能連上網路。可見對於 ISP 業者的管制，應該是最有效率的節點。

申言之，在網路侵權的結構中，涉及第三人——即直接侵權者——以及被害人、網路服務提供者等，多方的法律關係；而且網路侵權者常為匿名者，於實際發生侵權行為後，不僅難以對直接侵權者求償，也不易估算損害額。因此，對於網路侵權的預防與損害賠償責任的分配，自應從「最低成本預防者」（The least cost avoider）的角度思考。換言之，由交易結構中最有可能，而且承擔的成本最低者，負擔防止侵權行為發生的責任，可稱之為特定的預防責任（specific

preventive responsibility）。[17]

所謂最低成本預防者的判斷標準應是：由一般理性人之想法考量，何人對於損害之發生具有通常因果關係與責任。[18]從網路結構而言，由於 ISP 居於守門人的位置，所有網路活動——無論合法與非法——均須透過 ISP 才能進行，由 ISP 負責預防網路侵權的發生成本最小，但是效益最大。[19]以境外網站侵害著作權之情形為例，在境外架設網站侵害他人著作權之不法行為，必須透過 ISP 業者提供之服務才能進行傳輸，如果由 ISP 業者負責防止侵害他人著作權行為之發生，應屬最有效率的損害預防方法，亦是有效率的管制節點。

而應特別加以說明的是，我國侵權行為法係以自己責任之規範為中心，例外始有「代負責任」之規定，但是在美國侵權行為法則中，另有針對第三人責任所規定之「參與侵權責任」（contributory liability）與「侵權代位責任」（vicarious liability）。我國侵權行為法既無類似之規定，如何適度參考他國之法律規定、司法判決或學說理論，討論網路侵權行為在我國之適用即屬重要之課題。應加以說明的是，即使不是論及 ISP 業者應共同負擔侵權責任，而是在發現侵權內容之時，就必須加以封鎖，亦應思考 ISP 業者在主觀上之注意義務為何。

基於網路侵權之特殊性，對於 ISP 應負之注意義務，在法律政策上，如果以一般侵權行為之要件為標準，則必須證明 ISP 對於第三人侵權行為在主觀上有故意或過失之歸責事由，否則無法課以 ISP 業者一般侵權行為責任。但如果要求 ISP 必須對第三人之侵權行為，負「無

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[17]MICHAEL A. EINHORN, MEDIA, TECHNOLOGY AND COPYRIGHT—INTEGRATING LAW AND ECONOMICS, 80-81 (2004).

[18] Stephen G. Gilles, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, 78 VA. L. REV. 1291, 1374 (1992).

[19]*Id*. at 1316.

過失責任」、「推定過失責任」或英美法之「嚴格責任」，則可能妨礙網路社群之發展，亦有可能因此傷及言論自由之保障。[20]如何在顧及固有經濟分析概念下之侵權行為法則與網路結構之特殊性，界定 ISP 之侵權行為主觀歸責要件，應係法學界必須重視之課題。

第三項網路世界的邊境管制

根據國際唱片業協會（International Federation of Phonographic Industry, IFPI）的調查，2014 年約有 40 億個音樂檔案經由 BitTorrent/P2P 檔案交換方式被下載，其中絕大多數是未經授權的，如果再加上透過網路空間（cyberlocker）及社群網路（social network）等其他管道非法下載的數量，遭到侵權的檔案一定更多[21]。這些侵權內容並無法透過現行著作權法 ISP 責任條款被移除。而目前遭遇的難題即在於，大多數侵權網站都是建置在國外，我國缺乏司法管轄權，權利人難以在境內直接針對侵權行為尋求司法救濟，因此，網路邊境管制即有其必要性及迫切性。

如同本研究前述所言，境外侵害著作權網站攔截，亦即網路世界的邊境管制，涉及網路上通訊自由（言論自由）之限制問題的探討，其內容包括限制之急迫性、必要性，及是否合乎比例原則。必須在保護著作權與維護網路上通訊自由之間取得平衡，更重要的是，如何在具體個案中落實執行。

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[20]Michael L. Rustad, Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 389-390 (2005).

[21]請參閱臺灣唱片出版事業基金會網站：https://www.rit.org.tw/index.php/6-0/6-1（最後瀏覽日期：2020 年 1 月 30 日）。

第四項具體案例分析

著作權人 Roadshow Films 等公司主張其等為電影所有權人及專屬被授權人，境外網站 Gomovies、RARBG，1337x 及 EZTV 等非所有權人，未經授權而重製電影，並在境外透過相對人 Telstra 等傳輸服務業者，使境內網路使用人得以接取該網站內容。上開境外侵權網站在澳洲以電子方式散布未經授權之重製物，已侵害電影所有權人及專屬被授權人著作權，著作權人遂依澳洲著作權法第 115A 條相對人提出聲請，請求法院就上開境外網路位置入口為假處分。澳洲聯邦法院於 2017 年 8 月 18 日，依聲請人之聲請，命上述相對人封鎖境外侵害著作權的網站[22]。

法院裁定內容如下：

1.要求相對人(Respondent/網路服務提供者)於收到裁定 15 天內封鎖境外侵權網站，其方式包括但不限於以下：

(1) 使用 DNS(網域名稱系統) 攔阻方式

(2) 攔阻 IP 位址或 re routing

(3) 攔阻 URL

(4) 任何聲請方與相對人間書面約定的其他有效攔截境外侵權網站的方式

2.相對人必須將連結到境外侵權網站的使用者，重新導向到聲請者(權利人)或相對人建立的新網頁，該網頁須顯示境外侵權網站被拒絕訪問係因法院認定其有侵權事由。

[22] Roadshow Films Pty Ltd v Telstra Corporation Limited [2017] FCA 965.

3.此禁制令為期 3 年。

4.禁制令屆期前 6 個月，若附件一所列侵權網站仍有侵權行為，聲請人得聲請再延長禁制令 3 年。

應特別說明的是，上開裁定只有針對裁定附件一所列的侵權網站核發禁制令，非附件一所列網站不受規範，若要新增都要再重新聲請。而在攔截技術上，法院並沒有提到太多專業技術層面的探討，主要都是依據專家證人的證詞來證明這些網站為何侵權以及為何可以符合澳洲著作權法第 115A 條核發禁制令的要件。

再者，上開裁定理由主要涉及法院如何解釋本案事實，是否符合澳洲著作權法第 115A 條要件，法院得據以核發禁制令予網路服務提供者。而法條解釋與應用主要均參考前案（Roadshow Films Pty Ltd v Telstra Corporation Ltd , “Roadshow No 1”）[23]。

此外，因為澳洲並沒有像美國有 Bill of rights，澳洲憲法並沒有規定基本權利，例如言論自由等等。他們的權利保障是散落在各個法規中，沒有到憲法層級。因此這個禁制令主要就是法院論述本案事實是否符合著作權法規定，並沒有探討核發禁制令對限制言論自由或是其他權利的考量。

著作權人依澳洲著作權法第 115A 條第(1)項之規定，聲請核發禁制令必須符合下列要件[24]：

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[23]*Roadshow Films Pty Ltd v Telstra CorporationLtd* (2016) 122 IPR 81 (*“Roadshow No 1”)*

[24]Copyright Act 1968 s 115A (1)

The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:

(a) a carriage service provider provides access to an online location outside Australia; and

(b) the online location infringes, or facilitates an infringement of, the copyright; and

(c) the primary purpose of the online location is to infringe, or to facilitate the infringement of,

(a) 網路服務提供者(carriage service provider, ‘CSP’) 提供連結路徑至澳洲境外網站(online location outside Australia)。

(b) 該網站侵犯或鼓勵/促使(facilitate)侵犯著作權之行為。

(c) 該網站主要設置目的(primary purpose)係為了侵犯或鼓勵/促使侵犯著作權之行為(不論是否在澳洲境內)。

而澳洲著作權法第 115A 條第 2 項亦規定，該禁制令係要求網路服務提供者採取合理措施封鎖該侵權網站[25]。

澳洲聯邦法院於前案裁定中，特別就「online location」意義加以闡明，該裁定內容表示，依據著作權法修正案的國會備忘錄，亦即法案通過前的 memorandum 中提到其定義廣泛，包括但不限於網站以及未來可能涵蓋的科技領域。國會立法備忘錄除了強調「未來可能涵蓋的科技領域」之外，更提到 115A 條文之立法目的，是為了「減少網路侵權行為之發生」，此項見解甚具前瞻性，且透過法院在具體個案中對於法條的解釋，避免「法律追著科技跑」的窘境，值得我國立法機關在相關法案修正時之參考。

在前案裁定中，法院亦認為受規範的 online location 的判定時間點，包含在聲請人聲請禁制令的過程中已出現在網路上，但在聽證過程或是核發禁制令時已移除下線的網站。此部分對於侵權網站存在時點的認定，係為了避免部分網站利用「暫時」下線數天、數周等，規避法條之規範，亦值得我國未來實務運作之參考。

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copyright (whether or not in Australia).

[25]Copyright Act 1968 s 115A (2)

The injunction is to require the carriage service provider to take reasonable steps to disable access to the online location.

前案裁定亦說明，著作權法 115A 是 2015 年修正案後新增加的條文，增訂本條文之重點在於給予著作所有權人無須證明 CSP 是否須為侵權行為負責(不論是自行有侵權行為或是授權他人進行該侵權行為)，都可直接向聯邦法院提起禁制令的權利。亦即強調核發禁制令並非本案審理，無須就 CSP 有無侵權責任進行審查，核發禁制令亦不等於 CSP 有侵權行為。更重要的是，前案裁定認為，禁制令係一無過失救濟手段(no fault remedy)，法院無庸考量網路服務提供者，對於連結境外侵權網站有無故意過失。從實務運作的觀點而言，法院僅著重在客觀事實的認定，必能加快核發禁制令，有助於攔截境外侵權網站。

而為了避免攔截特定網站之後，亦阻絕了該網站其他合法言論內容，法院必須探究該網站設置的「主要目的」（primary purpose）為何？換言之，必須該網站設置之主要目的在於進行侵權或促使侵權行為，才能通過法院審查，而其審查標準相當高。例如，藝術作品網站，如多數美術著作、攝影著作均合法取得授權，但有可能登載部分未獲授權之攝影作品，則透過「主要目的審查法」（primary purpose test）將可避免此一落入本條文規範客體而遭到攔截。故部分網站如 YouTube 或 www.blogger.com 在初步證明(prima facie)下不會受本條文規範之影響。

最後，法院再審查是否核發禁制令時，亦應考量使用者造訪該網站的主要意圖為何，作為判斷因素之一。如使用者知悉該網站設置之目的，係為了提供侵害著作權之內容，而仍透過網路服務提供者連結該網站，法院自應核發禁制令，攔截該境外網站。

第二節境外攔截之法源依據

第一項我國可適用之法源

著作權人如因權利遭到侵害或有被侵害之虞時，在權利人尚未向法院提請排除該侵害之訴訟前，可依據下列方式向法院聲請定暫時狀態處分：

首先，民事訴訟法第 538 條規定，於爭執之法律關係，為防止發生重大之損害，或避免急迫之危險，或有其他相類之情形，而有必要時，得聲請為定暫時狀態之處分。所謂定暫時狀態之必要，即保全必要性，係指為防止發生重大損害，或為避免急迫之危險，或有其他相類似之情形發生必須加以制止而言。該必要性之釋明，應就具體個案，透過權衡理論及比例原則確認之，亦即法院須就聲請人因許可定暫時狀態之處分所能獲得之利益、與因不許可定暫時狀態之處分所可能發生之損害、相對人因定暫時狀態之處分之許可所可能蒙受之不利益及是否影響公共利益為比較衡量[26]。

其次，智慧財產案件審理法第 22 條第 2 項規定：聲請定暫時狀態之處分時，聲請人就其爭執之法律關係，為防止發生重大之損害或避免急迫之危險或有其他相類之情形而有必要之事實，應釋明之；其釋明有不足者，法院應駁回聲請。

聲請人就有爭執之智慧財產法律關係聲請定其暫時狀態之處分者，須釋明該法律關係存在及有定暫時狀態之必要；其釋明不足者，應駁回聲請，不得准提供擔保代之或以擔保補釋明之不足；法院審理定暫時狀態處分之聲請時，就保全之必要性，應審酌聲請人將來勝訴

[26]最高法院 107 年度台抗字第 358 號裁定意旨。

可能性、聲請之准駁對於聲請人或相對人是否將造成無法彌補之損害，並應權衡雙方損害之程度，及對公眾利益之影響，智慧財產案件審理細則第 37 條第 1 項、第 3 項亦有明文。

第二項現行法規定不足之處

由此可知，民事訴訟法定暫時狀態處分係為防止發生重大之損害或避免急迫之危險而有必要時，於爭執之法律關係尚未經確定終局裁判前，作成暫時擴張聲請人法律地位之措施，自係以聲請人因爭執之法律關係，對相對人有提起本案訴訟之可能為前提要件。否則將使欠缺本案訴訟當事人適格之人，卻得藉定暫時狀態處分之方式，達成本案訴訟請求之目的，有違定暫時狀態處分之規範目的。

另外，依智慧財產案件審理法之規定，聲請法院定暫時狀態處分，須符合以下要件：有爭執法律關係存在；聲請人釋明有定暫時狀態之必要性。

而依上開澳洲聯邦法院之見解，攔截境外侵權網站，聲請核發禁制令，亦不等於網路服務提供者有侵權行為，此禁制令係一無過失救濟手段，聲請人無須證明網路服務提供者對於侵權行為有任何認識或意圖。則聲請人對相對人未必可以提起本案訴訟，亦即並無爭執之法律關係存在，如聲請人欠缺本案訴訟當事人適格，即不符合民事訴訟法或智慧財產案件審理法定暫時狀態之要件，法院自無法依其聲請裁定攔截境外侵權網站。

由於現行民事訴訟法、智慧財產案件審理法，有關定暫時狀態處分之規定，均非針對攔截境外侵權網站之立法。在攔截境外侵權網站之情形，相關之網路服務提供者是否有侵害著作權之行為，必須由聲

請人「釋明」與其是否有「爭執之法律關係」，換言之，權利人有無對網路服務提供者聲請定暫時狀態假處分之必要性？是否具備本案訴訟之適格？有無爭執之法律關係存在？權利人均需加以「釋明」。顯見就有效攔截境外侵權網站之觀點而言，現行法確實有不足之處。

第三項修正著作權法相關規定

由上述分析可知，民事訴訟或智慧財產案件有關保全程序之規定及處理原則均過於抽象簡化，顯不足以因應攔截境外網站之需求。可見，必須就攔截境外侵害著作權網站之保全程序，另外制訂相關規定始能妥適處理。

我國著作權法第 3 條第 1 項第 19 款就「網路服務提供者」已有相關立法定義，另在第六章之一「網路服務提供者之民事免責事由」，就網路服務提供者之民事法律責任設有詳細之規定。因此，有關攔截境外侵害著作權網站之相關規定，或可參考澳洲著作權法之規定，於我國著作權法設立專章，就「攔截網站之法源依據」、「法院應審酌之要件」、「相關費用分擔」等事項詳為規定，以應實務運作之需。

著作權法雖非司法院主管法規，然攔截境外網站如以法院裁定為之，亦有必要就著作權法之修正提出修法建議。故本研究仍提出修法建議供作參考（如後附修正草案條文對照表）。

第五章結論

網際網路的資訊傳播速度快，加上不受國界之限制等特性，使得關於在境外網站上侵害著作權之資訊也容易大量且快速地傳播，一般大眾皆可輕易地瀏覽或轉傳，如此情況對著作權人之權益勢必造成重大影響，而對於這類境外網站進行攔截，使大眾無法接觸侵害著作權之資訊，便成為維護著作權的有效手段。

本研究認為，觀諸歐盟國家的立法及實踐，對境外侵害著作權網站予以攔截或封鎖，在符合比例原則的前提下，均予以肯認。另外，網路無國界的特性，提供了去中心化的傳輸架構，有了它我們更容易實現跨越政治、經濟的溝通平台，但是如果以「科技中立」為論述，透過網路傳輸侵害他人著作權，顯然誤解了的網路科技中立原則的精神。而從網路結構而言，由於 ISP 居於守門人的位置，所有網路活動——無論合法與非法——均須透過 ISP 才能進行，由 ISP 負責預防網路侵權的發生成本最小，但是效益最大。以境外網站侵害著作權之情形為例，在境外架設網站侵害他人著作權之不法行為，必須透過 ISP 業者提供之服務才能進行傳輸，如果由 ISP 業者負責防止侵害他人著作權行為之發生，應屬最有效率的損害預防方法，亦是有效率的管制節點。

因為我國民事訴訟法及智慧財產案件審理法有關定暫時狀態處分之規定，均過於抽象簡化，不足以因應攔截境外網站之需求。則關於攔截境外侵權網站之「法源依據」、「法院應審酌之要件」、「相關費用分擔」等事項，可以參考澳洲之立法例，於我國著作權法另設專章而為規定，以應實務運作之需。

Copyright Act 1968

No. 63, 1968

Compilation No. 53

Compilation date:	23 June 2017
Includes amendments up to:	Act No. 49, 2017
Registered:	30 June 2017

Prepared by the Office of Parliamentary Counsel, Canberra

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Division 2—Actions by owner of copyright

115 Actions for infringement

(1) Subject to this Act, the owner of a copyright may bring an action for an infringement of the copyright.

(2) Subject to this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.

(3) Where, in an action for infringement of copyright, it is established that an infringement was committed but it is also established that, at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, the plaintiff is not entitled under this section to any damages against the defendant in respect of the infringement, but is entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

(4) Where, in an action under this section:
  (a) an infringement of copyright is established; and
  (b) the court is satisfied that it is proper to do so, having regard to:
    (i) the flagrancy of the infringement; and
    (ia) the need to deter similar infringements of copyright; and
    (ib) the conduct of the defendant after the act constituting the infringement or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright; and
    (ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and

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(iii) any benefit shown to have accrued to the defendant by reason of the infringement; and

(iv) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.

Consideration for relief for electronic commercial infringement

(5) Subsection (6) applies to a court hearing an action for infringement of copyright if the court is satisfied that:

(a) the infringement (the ***proved infringement***) occurred (whether as a result of the doing of an act comprised in the copyright, the authorising of the doing of such an act or the doing of another act); and

(b) the proved infringement involved a communication of a work or other subject-matter to the public; and

(c) because the work or other subject-matter was communicated to the public, it is likely that there were other infringements (the ***likely infringements***) of the copyright by the defendant that the plaintiff did not prove in the action; and

(d) taken together, the proved infringement and likely infringements were on a commercial scale.

(6) The court may have regard to the likelihood of the likely infringements (as well as the proved infringement) in deciding what relief to grant in the action.

(7) In determining for the purposes of paragraph (5)(d) whether, taken together, the proved infringement and the likely infringements were on a commercial scale, the following matters are to be taken into account:

(a) the volume and value of any articles that:

(i) are infringing copies that constitute the proved infringement; or

(ii) assuming the likely infringements actually occurred, would be infringing copies constituting those infringements;

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(b) any other relevant matter.

(8) In subsection (7):

article includes a reproduction or copy of a work or other subject-matter, being a reproduction or copy in electronic form.

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

(1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:

(a) a carriage service provider provides access to an online location outside Australia; and

(b) the online location infringes, or facilitates an infringement of, the copyright; and

(c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

(2) The injunction is to require the carriage service provider to take reasonable steps to disable access to the online location.

Parties

(3) The parties to an action under subsection (1) are:

(a) the owner of the copyright; and

(b) the carriage service provider; and

(c) the person who operates the online location if, but only if, that person makes an application to be joined as a party to the proceedings.

Service

(4) The owner of the copyright must notify:

(a) the carriage service provider; and

(b) the person who operates the online location;

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of the making of an application under subsection (1), but the Court may dispense, on such terms as it sees fit, with the notice required to be sent under paragraph (b) if the Court is satisfied that the owner of the copyright is unable, despite reasonable efforts, to determine the identity or address of the person who operates the online location, or to send notices to that person.

Matters to be taken into account

(5) In determining whether to grant the injunction, the Court may take the following matters into account:

(a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(c);

(b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;

(c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;

(d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;

(e) whether disabling access to the online location is a proportionate response in the circumstances;

(f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;

(g) whether it is in the public interest to disable access to the online location;

(h) whether the owner of the copyright complied with subsection (4);

(i) any other remedies available under this Act;

(j) any other matter prescribed by the regulations;

(k) any other relevant matter.

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Affidavit evidence

(6) For the purposes of the proceedings, section 134A (affidavit evidence) applies as if the reference in paragraph 134A(f) to a particular act included a reference to a class of acts.

Rescinding and varying injunctions

(7) The Court may:
(a) limit the duration of; or
(b) upon application, rescind or vary;
an injunction granted under this section.

(8) An application under subsection (7) may be made by:
(a) any of the persons referred to in subsection (3); or
(b) any other person prescribed by the regulations.

Costs

(9) The carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings.

116 Rights of owner of copyright in respect of infringing copies

(1) The owner of the copyright in a work or other subject-matter may bring an action for conversion or detention in relation to:
(a) an infringing copy; or
(b) a device (including a circumvention device) used or intended to be used for making infringing copies.

(1A) In an action for conversion or detention, a court may grant to the owner of the copyright all or any of the remedies that are available in such an action as if:
(a) the owner of the copyright had been the owner of the infringing copy since the time the copy was made; or

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(b) the owner of the copyright had been the owner of the device since the time when it was used or intended to be used for making infringing copies.

(1B) Any relief granted by a court in an action for conversion or detention is in addition to any relief that the court may grant under section 115.

(1C) A court is not to grant any relief to the owner of the copyright in an action for conversion or detention if the relief that the court has granted or proposes to grant under section 115 is, in the opinion of the court, a sufficient remedy.

(1D) In deciding whether to grant relief in an action for conversion or detention and in assessing the amount of damages payable, the court may have regard to the following:

(a) the expenses incurred by the defendant, being a person who marketed or otherwise dealt with the infringing copy, in manufacturing or acquiring the infringing copy;

(b) whether the expenses were incurred before or after the infringing copy was sold or otherwise disposed of by the defendant;

(c) any other matter that the court considers relevant.

(1E) If the infringing copy is an article of which only part consists of material that infringes copyright, the court, in deciding whether to grant relief and in assessing the amount of damages payable, may also have regard to the following:

(a) the importance to the market value of the article of the material that infringes the copyright;

(b) the proportion the material that infringes copyright bears to the article;

(c) the extent to which the material that infringes copyright may be separated from the article.

(2) A plaintiff is not entitled by virtue of this section to any damages or to any other pecuniary remedy, other than costs, if it is established that, at the time of the conversion or detention:

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(a) the defendant was not aware, and had no reasonable grounds for suspecting, that copyright subsisted in the work or other subject-matter to which the action relates;

(b) where the articles converted or detained were infringing copies—the defendant believed, and had reasonable grounds for believing, that they were not infringing copies; or

(c) where an article converted or detained was a device used or intended to be used for making articles—the defendant believed, and had reasonable grounds for believing, that the articles so made or intended to be made were not or would not be, as the case may be, infringing copies.

116AAA Compensation for acquisition of property

(1) This section applies if, apart from this section, subsections 22(3A) and 97(2) and (2A) would result in the acquisition of property from a maker of a sound recording of a live performance by a performer in the performance otherwise than on just terms.

(2) There is payable to the maker by the performer such amount of compensation as is agreed on between those persons, or, failing agreement, as is determined by a court of competent jurisdiction.

(3) Any damages or compensation recovered or other remedy given in a proceeding that is commenced otherwise than under this section is to be taken into account in assessing compensation payable in a proceeding that is commenced under this section and that arises out of the same event or transaction.

(4) Any compensation payable in a proceeding that is commenced under this section is to be taken into account in assessing any damages or compensation or other remedy to be awarded in a proceeding that is commenced otherwise than under this section and that arises out of the same event or transaction.

(5) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

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just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

maker of a sound recording of a live performance means a person mentioned in paragraph 22(3A)(a).

performer in a live performance means the following people:

(a) a person who becomes a maker of a sound recording under paragraph 22(3A)(b);

(b) if subsection 22(3B) applies—an employer who becomes a maker of a sound recording under that subsection.

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Division 2AA—Limitation on remedies available against carriage service providers

Subdivision A—Preliminary

116AA Purpose of this Division

(1) The purpose of this Division is to limit the remedies that are available against carriage service providers for infringements of copyright that relate to the carrying out of certain online activities by carriage service providers. A carriage service provider must satisfy certain conditions to take advantage of the limitations.

Note 1: Subdivision B contains a description of the relevant activities.

Note 2: Subdivision C contains details of the limitations on remedies.

Note 3: Subdivision D sets out the conditions that must be satisfied for a carriage service provider to take advantage of the limitations. The limitations are automatic if a carriage service provider complies with the relevant conditions.

(2) This Division does not limit the operation of provisions of this Act outside this Division in relation to determining whether copyright has been infringed.

116AB Definitions

In this Division:

caching means the reproduction of copyright material on a system or network controlled or operated by or for a carriage service provider in response to an action by a user in order to facilitate efficient access to that material by that user or other users.

copyright material means:

(a) a work; or

(b) a published edition of a work; or

(c) a sound recording; or

(d) a cinematograph film; or

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(e) a television or sound broadcast; or

(f) a work that is included in a sound recording, a cinematograph film or a television or sound broadcast.

industry code means:

(a) an industry code that:

(i) meets any prescribed requirements; and

(ii) is registered under Part 6 of the *Telecommunications Act 1997*; or

(b) an industry code developed in accordance with the regulations.

Subdivision B—Relevant activities

116AC Category A activity

A carriage service provider carries out a ***Category A activity*** by providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.

116AD Category B activity

A carriage service provider carries out a ***Category B activity*** by caching copyright material through an automatic process. The carriage service provider must not manually select the copyright material for caching.

116AE Category C activity

A carriage service provider carries out a ***Category C activity*** by storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider.

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116AF Category D activity

A carriage service provider carries out a ***Category D activity*** by referring users to an online location using information location tools or technology.

Subdivision C—Limitations on remedies

116AG Limitations on remedies

Relevant conditions must be satisfied

(1) A carriage service provider must satisfy the relevant conditions set out in Subdivision D before the limitations in this section apply.

General limitations

(2) For infringements of copyright that occur in the course of carrying out any of the categories of activities set out in Subdivision B, a court must not grant relief against a carriage service provider that consists of:
  (a) damages or an account of profits; or
  (b) additional damages; or
  (c) other monetary relief.

Category specific limitations

(3) For an infringement of copyright that occurs in the course of the carrying out of a Category A activity, the relief that a court may grant against a carriage service provider is limited to one or more of the following orders:
  (a) an order requiring the carriage service provider to take reasonable steps to disable access to an online location outside Australia;
  (b) an order requiring the carriage service provider to terminate a specified account.

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(4) For an infringement of copyright that occurs in the course of the carrying out of a Category B, C or D activity, the relief that a court may grant against a carriage service provider is limited to one or more of the following orders:

(a) an order requiring the carriage service provider to remove or disable access to infringing copyright material, or to a reference to infringing copyright material;

(b) an order requiring the carriage service provider to terminate a specified account;

(c) some other less burdensome but comparably effective non-monetary order if necessary.

Relevant matters

(5) In deciding whether to make an order of a kind referred to in subsection (3) or (4), a court must have regard to:

(a) the harm that has been caused to the owner or exclusive licensee of the copyright; and

(b) the burden that the making of the order will place on the carriage service provider; and

(c) the technical feasibility of complying with the order; and

(d) the effectiveness of the order; and

(e) whether some other comparably effective order would be less burdensome.

The court may have regard to other matters it considers relevant.

Subdivision D—Conditions

116AH Conditions

(1) This table sets out the conditions for each of the categories of activities.

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Conditions

Item	Activity	Conditions
1	All categories	1. The carriage service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers. 2. If there is a relevant industry code in force—the carriage service provider must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material.
2	Category A	1. Any transmission of copyright material in carrying out this activity must be initiated by or at the direction of a person other than the carriage service provider. 2. The carriage service provider must not make substantive modifications to copyright material transmitted. This does not apply to modifications made as part of a technical process.

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Conditions

Item	Activity	Conditions
3	Category B	1. If the copyright material that is cached is subject to conditions on user access at the originating site, the carriage service provider must ensure that access to a significant part of the cached copyright material is permitted only to users who have met those conditions. 2. If there is a relevant industry code in force—the carriage service provider must comply with the relevant provisions of that code relating to: (a) updating the cached copyright material; and (b) not interfering with technology used at the originating site to obtain information about the use of the copyright material. 3. The service provider must expeditiously remove or disable access to cached copyright material upon notification in the prescribed form that the material has been removed or access to it has been disabled at the originating site. 4. The carriage service provider must not make substantive modifications to the cached copyright material as it is transmitted to subsequent users. This does not apply to modifications made as part of a technical process.

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Conditions		
Item	**Activity**	**Conditions**
4	Category C	1. The carriage service provider must not receive a financial benefit that is directly attributable to the infringing activity if the carriage service provider has the right and ability to control the activity. 2. The carriage service provider must expeditiously remove or disable access to copyright material residing on its system or network upon receipt of a notice in the prescribed form that the material has been found to be infringing by a court. 2A. The carriage service provider must act expeditiously to remove or disable access to copyright material residing on its system or network if the carriage service provider: (a) becomes aware that the material is infringing; or (b) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing. The carriage service provider does not, in an action relating to this Division, bear any onus of proving a matter referred to in paragraph (a) or (b). 3. The carriage service provider must comply with the prescribed procedure in relation to removing or disabling access to copyright material residing on its system or network.

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Conditions		
Item	**Activity**	**Conditions**
5	Category D	1. The carriage service provider must not receive a financial benefit that is directly attributable to the infringing activity if the carriage service provider has the right and ability to control the activity. 2. The carriage service provider must expeditiously remove or disable access to a reference residing on its system or network upon receipt of a notice in the prescribed form that the copyright material to which it refers has been found to be infringing by a court. 2A. The carriage service provider must act expeditiously to remove or disable access to a reference residing on its system or network if the carriage service provider: (a) becomes aware that the copyright material to which it refers is infringing; or (b) becomes aware of facts or circumstances that make it apparent that the copyright material to which it refers is likely to be infringing. The carriage service provider does not, in an action relating to this Division, bear any onus of proving a matter referred to in paragraph (a) or (b). 3. The carriage service provider must comply with the prescribed procedure in relation to removing or disabling a reference residing on its system or network.

(2) Nothing in the conditions is to be taken to require a carriage service provider to monitor its service or to seek facts to indicate infringing activity except to the extent required by a standard technical measure mentioned in condition 2 in table item 1 in the table in subsection (1).

(3) In deciding, for the purposes of condition 1 in table items 4 and 5 in the table in subsection (1), whether a financial benefit is otherwise directly attributable to the infringing activity referred to in that condition, a court must have regard to:

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(a) industry practice in relation to the charging of services by carriage service providers, including charging based on level of activity; and

(b) whether the financial benefit was greater than the benefit that would usually result from charging in accordance with accepted industry practice.

The court may have regard to other matters it considers relevant.

(4) An act done by a carriage service provider in complying with the prescribed procedure referred to in condition 3 in table item 4 in the table in subsection (1) does not constitute a failure to satisfy condition 2A in that item.

116AI Evidence of compliance with conditions

If a carriage service provider, in an action relating to this Division, points to evidence, as prescribed, that suggests that the carriage service provider has complied with a condition, the court must presume, in the absence of evidence to the contrary, that the carriage service provider has complied with the condition.

Subdivision E—Regulations

116AJ Regulations

(1) The regulations may provide that a carriage service provider is not liable for damages or any other civil remedy as a result of action taken in good faith to comply with a condition.

(2) The regulations may provide civil remedies for conduct by relevant parties in relation to conditions.

(3) The regulations may prescribe offences for conduct by persons issuing notices under the regulations, and prescribe penalties for offences against those regulations. The penalties must not exceed 50 penalty units.

Note: If a body corporate is convicted of an offence against regulations made under this section, subsection 4B(3) of the *Crimes Act 1914*

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allows a court to impose fines of up to 5 times the penalty stated above.

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119 Rights of exclusive licensee

Subject to the succeeding sections of this Division:

(a) except against the owner of the copyright, the exclusive licensee has the same rights of action as he or she would have, and is entitled to the same remedies as he or she would be entitled to, by virtue of section 115 or 115A if the licence had been an assignment, and those rights and remedies are concurrent with the rights and remedies of the owner of the copyright under that section;

(b) except against the owner of the copyright, the exclusive licensee has the same rights of action as he or she would have, and is entitled to the same remedies as he or she would be entitled to, by virtue of section 116 if the licence had been an assignment; and

(c) the owner of the copyright does not have any rights of action that he or she would not have, and is not entitled to any remedies that he or she would not be entitled to, by virtue of section 116 if the licence had been an assignment.

120 Joinder of owner or exclusive licensee as a party

(1) Where:

(a) an action is brought by the owner of the copyright or by the exclusive licensee; and

(b) the action, in so far as it is brought under section 115 or 115A, relates, in whole or in part, to an infringement in respect of which the owner and the licensee have concurrent rights of action under that section;

the owner or licensee, as the case may be, is not entitled, except with the leave of the court, to proceed with the action, in so far as it is brought under that section and relates to that infringement, unless the other party is joined as a plaintiff in the action or added as a defendant.

(2) This section does not affect the granting of an interlocutory injunction on the application of the owner of the copyright or of the exclusive licensee.

FEDERAL COURT OF AUSTRALIA

Roadshow Films Pty Ltd v Telstra Corporation Limited [2017] FCA 965

File number:	NSD 269 of 2017
Judge:	**NICHOLAS J**
Date of judgment:	18 August 2017
Catchwords:	**COPYRIGHT** – section 115A of the *Copyright Act* 1968 (Cth) – whether injunction should be granted requiring carriage service providers to take reasonable steps to disable access to online locations outside Australia infringing or facilitating infringement of copyright –form of orders – injunction granted
Legislation:	*Copyright Act 1968* (Cth), ss 10, 115A, 126
Cases cited:	*Roadshow Films Pty Ltd v Telstra Corporation* Ltd (2016) 122 IPR 81 *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* [2017] FCA 435
Date of hearing:	10 May 2017
Registry:	New South Wales
Division:	General Division
National Practice Area:	Intellectual Property
Sub-area:	Copyright and Industrial Designs
Category:	Catchwords
Number of paragraphs:	42
Counsel for the Applicants:	Mr J Cooke
Solicitor for the Applicants:	Baker & McKenzie
Counsel for the First to Thirteenth Respondents:	The First to Thirteenth Respondents filed submitting appearances
Counsel for the Fourteenth to Thirty-First Respondents:	The Fourteenth to Thirty-First Respondents did not appear

Counsel for the Thirty-Second to Forty-Ninth Respondents:	The Thirty-Second to Forty-Ninth Respondents filed an address for service but did not otherwise appear

ORDERS

NSD 269 of 2017

BETWEEN:	**ROADSHOW FILMS PTY LTD** **(ACN 100 746 870)** First Applicant (and others named in the Schedule)
AND:	**TELSTRA CORPORATION LIMITED** **(ABN 33 051 775 556)** First Respondent (and others named in the Schedule)

JUDGE: **NICHOLAS J**

DATE OF ORDER: **18 AUGUST 2017**

In these orders, the following terms have the following meanings:

(a) **Domain Name** means a name formed by the rules and procedures of the **Domain Name System (DNS)** and includes subdomains.

(b) **DNS Blocking** means a system by which any user of a respondent's service who attempts to use a DNS resolver that is operated by or on behalf of that respondent to access a Target Online Location is prevented from receiving a DNS response other than a redirection as referred to in order 5.

(c) **IP Address** means an Internet Protocol address.

(d) **Optus** means the fourth to thirteenth respondents.

(e) **Target Online Locations** means the Target Online Locations and New Target Online Locations referred to in Attachment A and that are or were accessible:

  (i) at the URLs listed in Attachment A to this Order (together, the **Target URLs**);

  (ii) at the IP Addresses listed in Attachment A to this Order (together, the **Target IP Addresses**); and

  (iii) at the Domain Names listed in Attachment A to this Order (together, the **Target Domain Names**).

(f) **Telstra** means the first to third respondents.

(g) **TPG** means the thirty-second to the forty-ninth respondents.

(h) **URL** means a Uniform Resource Locator.

(i) **Vocus** means the fourteenth to thirty-first respondents.

THE COURT ORDERS THAT:

1. The requirement under s 115A(4) of the *Copyright Act 1968* (Cth) that the applicants give notice of their application to the persons who operate the Target Online Locations be dispensed with in so far as any such notice has not already been given.

2. Each respondent must, within 15 business days of service of these orders, take reasonable steps to disable access to the Target Online Locations.

3. Order 2 is taken to have been complied with by a respondent if that respondent implements any one or more of the following steps:

   (a) DNS Blocking in respect of the Target Domain Names;

   (b) IP Address blocking or re-routing in respect of the Target IP Addresses;

   (c) URL blocking in respect of the Target URLs and the Target Domain Names; or

   (d) any alternative technical means for disabling access to the Target Online Location as agreed in writing between the applicants and a respondent.

4. If a respondent in complying with order 2 does not implement one of the steps referred to in order 3, that respondent must, within 15 business days of service of these orders, notify the applicants of the step or steps it has implemented.

5. Each respondent must redirect any communication by a user of its service seeking access to any of the Target Online Locations which have been disabled pursuant to order 2 to a webpage established, maintained and hosted by either:

   (a) the applicants, or their nominee, pursuant to order 6; or

   (b) that respondent or its nominee.

   The applicants' obligations pursuant to orders 6 and 7 only arise if a respondent notifies the applicants that the respondent will redirect a communication pursuant to order 5(a) and for so long as at least one respondent redirects communications to that webpage.

6. The applicants, or their nominee, must establish, maintain and host a webpage which informs users of a respondent's service who have been redirected to the webpage

pursuant to order 5 that access to the website has been disabled because this Court has determined that it infringes or facilitates the infringement of copyright.

7. Within 5 business days of these orders, the applicants will notify each of the respondents in writing of the URL of the webpage established, maintained and hosted under order 6 and, if the webpage ceases to operate for any reason, will notify each of the respondents in writing of a different URL that complies with order 6.

8. If, in complying with order 5, a respondent redirects any communication by a user of its service to a webpage established, maintained and hosted by it, that respondent or its nominee must ensure that the webpage informs the user of that respondent's service that access to that the website has been disabled because this Court has determined that it infringes or facilitates the infringement of copyright.

9. In the event that any of the applicants has a good faith belief that:

   (a) any Target URL, Target IP Address or Target Domain Name which is subject to these orders has permanently ceased to enable or facilitate access to a Target Online Location; or

   (b) any Target URL, Target IP Address or Target Domain Name has permanently ceased to have the primary purpose of infringing or facilitating the infringement of copyright,

   a representative of the applicants must, within 15 business days of any of the applicants forming such a good faith belief, notify each respondent of that fact in writing, in which case the respondents shall no longer be required to take steps pursuant to order 2 to disable access to the relevant Target URL, Target IP Address or Target Domain Name that is the subject of the notice.

10. A respondent will not be in breach of order 2 if it temporarily declines or temporarily ceases to take the steps ordered in order 2 (either in whole or in part) upon forming the view, on reasonable grounds, that suspension is necessary to:

   (a) maintain the integrity of its network or systems or functioning of its blocking system;

   (b) upgrade, troubleshoot or maintain its blocking system;

   (c) avert or respond to an imminent security threat to its networks or systems; or

(d) ensure the reliable operation of its ability to block access to online locations associated with criminal content if it reasonably considers that such operation is likely to be impaired, or otherwise to comply with its statutory obligations including under section 313(3) of the *Telecommunications Act 1997* (Cth),

provided that:

(a) unless precluded by law, it notifies the applicants or their legal representative(s) of such suspension, including the reasons and the expected duration of such suspension, by 5.00 pm on the next business day; and

(b) such suspension lasts no longer than is reasonably necessary and, in any case, no longer than 3 business days or such period as the applicants may agree in writing or the Court may allow.

11. The owner or operator of any of the Target Online Locations and the owner or operator of any website who claims to be affected by these orders may apply on 3 days' written notice, including notice to all parties, to vary or discharge these orders, with any such application to:

(a) set out the orders sought by the owner or operator of the Target Online Locations or affected website; and

(b) be supported by evidence as to:

(i) the status of the owner or operator of the Target Online Locations or affected website; and

(ii) the basis upon which the variation or discharge is sought.

12. The parties have liberty to apply on 3 days' written notice, including, without limitation, for the purpose of any application:

(a) for further orders to give effect to the terms of these orders;

(b) for further orders in the event of any material change of circumstances including, without limitation, in respect of the consequences for the parties and effectiveness of the technical methods under order 2; and/or

(c) for orders relating to other means of accessing the Target Online Locations not already covered by these orders.

13. If a website the subject of any of the Target Online Locations is at any time during the operation of these orders provided from a different Domain Name, IP Address or URL:

    (a) the applicants may file and serve:

        (i) an affidavit which:

            (A) identifies the different Domain Name, IP Address or URL; and

            (B) states that, in the good faith belief of the deponent, the website operated from the different Domain Name, IP Address or URL is a new location outside Australia for the Target Online Locations the subject of these Orders and brief reasons; and

        (ii) proposed short minutes of order to the effect that:

            (A) the definition of Target Online Locations in these orders is amended to include the different Domain Name, IP Address or URL; and

            (B) the time period in order 2 of these Orders starts to run in relation to the different Domain Name, IP Address or URL upon service in accordance with order 17(d) of the Orders as made.

14. These orders are to operate for a period of 3 years from the date of these orders.

15. Six months prior to the expiry of these orders:

    (a) the applicants may file and serve:

        (i) an affidavit which states that, in the good faith belief of the deponent, the Target Online Locations continue to have the primary purpose of infringing or facilitating the infringement of copyright; and

        (ii) short minutes of order extending the operation of these orders for a further 3 year period; and

    (b) the process contained in order 17 shall apply.

16. The affidavit referred to in orders 13 and 15 is to be given by a deponent duly authorised to give evidence on behalf of the applicants and may be given by their solicitor.

17. If an affidavit and short minutes of order are filed and served in accordance with orders 13 or 15:

    (a) within 7 business days, the respondents must notify the applicants and the Court if they object to the orders being made in accordance with the short minutes of order served by the Applicants;

    (b) if any respondent gives notice of any objection, or the Court otherwise thinks fit, the proceeding will be relisted for further directions;

    (c) if no respondent gives notice of any objection and the Court does not otherwise require the proceeding to be relisted, then the Court may make orders in terms of the short minutes of order served by the Applicants without any further hearing; and

    (d) the applicants must serve on the respondents any such orders made.

18. The Applicants pay Telstra's, Optus', Vocus' and TPG's compliance costs calculated at the rate of $50 per Domain Name the subject of DNS Blocking undertaking for the purposes of complying with order 2.

19. There be no order as to the costs of this proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

Attachment A

Target Online Location	Target URL	Target Domain Name	Target IP Address
KissCartoon	http://www.kisscartoon.se	kisscartoon.se	104.25.204.29 104.25.205.29
	http://www.kisscartoon.me	kisscartoon.me	31.220.0.199
	http://www.kisscartoon.com	kisscartoon.com	192.64.119.92
WatchFree	http://www.watchfree.to	watchfree.to	104.27.214.30 104.27.215.30
PrimeWire	http://www.primewire.ag	primewire.ag	104.23.192.30
	http://www.gxiso.com	gxiso.com	98.124.199.29
Movie4K	http://www.movie4k.to	movie4k.to	104.31.16.3 104.31.17.3
WatchSeries	http://watchseries.cr	watchseries.cr	104.25.33.99 104.25.34.99
	http://www.watchseries-online.eu	watchseries-online.eu	104.18.56.117 104.18.57.117
	http://www.watchserieshd.eu	watchserieshd.eu	104.31.70.187 104.31.71.187
Alluc	http://www.alluc.ee	alluc.ee	104.20.30.60 104.20.31.60
	http://www.alluc.com	alluc.com	104.25.108.22 104.25.109.22
	http://www.alluc.to	alluc.to	93.115.89.138
	http://www.oneclickmoviez.com	oneclickmoviez.com	149.56.126.237 174.128.248.230
	http://www.alluc.org	alluc.org	149.56.126.237 174.128.248.230
Phimmoi	http://www.phimmoi.net	phimmoi.net	125.212.241.188
123Movies	https://www.123movies.is	123movies.is	192.124.249.65
	http://www.123movies.to	123movies.to	104.27.215.28 104.27.214.28

Target Online Location	Target URL	Target Domain Name	Target IP Address
Couchtuner	http://www.couch-tuner.ag	couch-tuner.ag	104.31.17.3 104.31.16.3
	http://www.couchtuner.ag	couchtuner.ag	104.31.17.3 104.31.16.3
	http://www.couchtuner.com	couchtuner.com	50.63.202.8
FMovies	https://www.fmovies.se	fmovies.se	104.27.140.126 104.27.141.126
	http://www.fmovies.to	fmovies.to	104.27.146.62 104.27.147.62
XMovies8.tv	http://www.xmovies8.tv	xmovies8.tv	104.23.207.29 104.23.206.29
Putlockers.vip	http://putlockers.vip/	putlocker.vip	179.43.150.5
	http://www.putlocker.watch	putlocker.watch	46.19.141.2
EYNY	http://www.eyny.com	eyny.com	67.228.27.100 67.288.27.108 67.288.27.109 67.288.27.110 67.288.27.111 67.288.27.112 75.126.182.34 75.126.182.35 75.126.182.36 75.126.182.37 208.43.60.11
MegaShare	http://www.megashare.at	megashare.at	104.31.17.3 104.31.16.3
	http://www.megashare.sc	megashare.sc	104.31.17.3 104.31.16.3
	http://www.megashare.info	megashare.info	176.123.7.173
GenVideos	http://genvideos.org	genvideos.org	104.25.0.118 104.24.31.118
Spacemov	https://www.spacemov.net	spacemov.net	104.31.16.3 104.31.17.3
	http://www.spacemov.com	spacemov.com	104.31.16.3 104.31.17.3

Target Online Location	Target URL	Target Domain Name	Target IP Address
Kinogo	http://www.kinogo.club	kinogo.club	104.17.222.40
	http://www.kinogo.co	kinogo.co	104.31.82.13
Viooz	http://www.viooz.ac	viooz.ac	104.31.16.3 104.31.17.3
Hdmovieswatch	http://www.hdmovieswatch.org/	hdmovieswatch.org	104.27.186.25 104.27.187.25
	http://www.hdmovieswatch.net/	hdmovieswatch.net	104.31.16.3 104.31.17.3
Putlocker.plus	https://www.putlocker.plus	putlocker.plus	104.31.16.3 104.31.17.3
Xmovies8.org	https://www.xmovies8.org	xmovies8.org	104.24.31.118 104.25.0.118
Xemphimso	http://www.xemphimso.com	xemphimso.com	82.118.242.17
Shush	http://www.shush.se	shush.se	104.24.112.35 104.24.113.35
ExtraTorrent.cc	http://www.extratorrent.cc	extratorrent.cc	104.23.196.8 104.23.197.8
EZTV	https://www.eztv.ag	eztv.ag	104.27.208.30 104.27.209.30
	http://istole.it	istole.it	174.128.248.231 149.56.147.39
	http://www.zoink.it	zoink.it	104.31.17.3 104.31.16.3
	http://www.ezrss.it	ezrss.it	104.28.12.92 104.28.13.92
	http://www.eztv.ch	eztv.ch	104.31.17.3 104.31.16.3
Rarbg	http://www.rarbg.to	rarbg.to	185.37.100.122
	http://www.rarbg.com	rarbg.com	185.37.100.121
YTS	https://www.yts.ag	yts.ag	104.27.214.30 104.27.215.30
Yify Torrent	http://www.yify-torrent.org	yify-torrent.org	46.148.16.26

Target Online Location	Target URL	Target Domain Name	Target IP Address
Torrent Downloads	http://www.torrentdownloads.me	torrentdownloads.me	104.27.214.30 104.27.215.30
Bitsnoop	https://www.bitsnoop.com	bitsnoop.com	104.27.212.30 104.27.213.30
Demonoid	http://www.demonoid.tv	demonoid.tv	104.27.142.229 104.27.143.229
Limetorrents	http://www.limetorrents.cc	limetorrents.cc	104.27.214.28 104.27.215.28
	http://www.limetorrents.com	limetorrents.com	104.31.16.3 104.31.17.3
Tehparadox	http://www.tehparadox.com	tehparadox.com	68.169.98.219
Torrentproject	https://www.torrentproject.se	torrentproject.se	104.31.16.3 104.31.17.3
Icefilms	http://www.icefilms.info	icefilms.info	104.31.16.3 104.31.17.3
Piratebay.to	https://www.piratebay.to	piratebay.to	104.31.16.3 104.31.17.3
	https://thepiratebay.to	thepiratebay.to	104.31.16.3 104.31.17.3
	https://tpb.to	tpb.to	104.27.178.21 104.27.179.21
Putlockers.ch	http://www.putlockers.ch	putlockers.ch	104.23.204.30 104.23.205.30
	http://putlocker.is	putlocker.is	149.56.126.232
	http://www.putlocker.bz	putlocker.bz	104.31.16.3 104.31.17.3
Softarchive	http://sanet.cd	sanet.cd	104.25.107.116 104.25.108.116
	http://softarchive.la	softarchive.la	104.24.6.10 104.24.7.10
	http://softarchive.net	softarchive.net	104.27.130.106 104.27.131.106
Rlsbb	http://www.rlsbb.com	rlsbb.com	162.223.90.227

Target Online Location	Target URL	Target Domain Name	Target IP Address
Putlocker.run	http://putlocker.run/	putlocker.run	46.19.141.2
	http://www.putlocker.live	putlocker.live	179.43.150.2
Extra.to	http://extra.to/	extra.to	104.20.20.47 104.20.21.47
	http://www.extratorrent.com	extratorrent.com	104.31.17.3 104.31.16.3

New Target Online Location	Target URL	Target Domain Name	Target IP Address
GoMovies	http://www.gomovies.to	gomovies.to	104.20.64.199 104.20.65.199
xmovies8.ru	http://www.xmovies8.ru	xmovies8.ru	104.31.157.3 104.31.156.3
Putlocker1.live	http://www.putlocker1.live/	putlocker1.live	104.27.152.148 104.27.153.148
Spacemov.tv	http://www.spacemov.tv	spacemov.tv	104.24.123.37 104.24.122.37
hdmovieswatch.eu	http://www.hdmovieswatch.eu	hdmovieswatch.eu	104.31.17.3 104.31.16.3
Putlockers.ca	http://www.putlockers.ca	putlockers.ca	104.31.133.9 104.31.132.9
Putlocker.co	http://www.putlocker.co	putlocker.co	104.20.37.142 104.20.36.142
Rlsbb	http:// rlsbb.ru	rlsbb.ru	104.31.91.72

REASONS FOR JUDGMENT

NICHOLAS J:

1 Before me is an application for relief under s 115A of the *Copyright Act 1968* (Cth) (the "Act") against various carriage service providers ("CSPs") requiring them to take reasonable steps to block access to a number websites. The applicants allege that the relevant websites are situated outside Australia and that they infringe, or facilitate the infringement, of copyright in certain cinematograph films owned by the second to eighth applicants and, in respect of one of the films, exclusively licenced to the first applicant.

2 The applicants are the same applicants as those in Federal Court Proceeding No NSD 239 of 2016 (the "First Roadshow Proceeding") and rely on the same cinematograph films which they relied on in the First Roadshow Proceeding. The respondents are the same respondents or otherwise belong to the same corporate groups as the respondents in the First Roadshow Proceeding namely:

Respondents	Group
First to Third Respondents	Telstra
Fourth to Thirteenth Respondents	Optus
Fourteenth to Thirty First Respondents	Vocus (formerly M2)
Thirty Second to Forty Ninth Respondents	TPG

3 The respondents have not participated or sought to be heard in the proceeding. The Telstra and Optus respondents have filed notices of submitting appearance. The TPG respondents have filed a notice of address for service but have not otherwise participated in the proceeding. The Vocus respondents have not filed a notice of address for service.

4 As I describe further below, the applicants have taken steps to notify the operators of the relevant websites that the applicants have filed an application under s 115A of the Act. The owners or operators of the relevant websites have not sought to appear in the proceeding.

THE APPLICANTS' CASE

Overview

5 In their amended originating application dated 10 May 2017, the applicants seek orders in relation to the "Target Online Locations" and "New Target Online Locations" (together, the "Online Locations") identified in Appendix A to these reasons. The locations described in

Appendix A as New Target Online Locations are accessible by a user entering the URL or domain name for a Target Online Location, and thereafter being re-directed to a New Target Online Location. They reflect recent changes to the Target Online Locations listed in the applicants' originating application filed on 24 February 2017, and were introduced in the proceeding pursuant to leave granted at the hearing allowing the applicants to file and serve an amended originating application.

6 The applicants allege that each of the Online Locations are located outside Australia and are accessible to users of the Internet in Australia using the carriage services provided by each of Telstra, Optus, Vocus and TPG and the Uniform Resource Locations ("Target URLs") incorporating the domain names ("Target Domain Names") and Internet Protocol addresses ("Target IP Addresses") identified in Appendix A. The applicants contend that they are the owner or exclusive licensee of copyright subsisting in the cinematograph films identified in Appendix B (the "Roadshow Films"). The owners or operators of the Online Locations are alleged to have reproduced, made available or electronically transmitted copies of these works in Australia without licence or authority, and to have thereby infringed copyright in those works. It is also alleged that the owners or operators have facilitated these infringing acts in Australia. Each of the respondents is a "carriage service provider" as defined in the *Telecommunications Act 1997* (Cth).

7 In support of their application, the applicants rely on the affidavit evidence of Mr Gregory Fraser, Mr Andrew Stewart, Mr Nicholas Kraegen and Mr Simon Phillipson.

8 Mr Fraser is the Senior Manager at Australian Screen Association Ltd. He has qualifications in forensic computing and has been involved in technical investigations relating to physical and online piracy since about 1987. He affirmed two affidavits in the proceeding on 28 April 2017 and 10 May 2017 respectively. His evidence addressed the steps he took to access the Target Online Locations using Telstra, Optus and Vocus' carriage services and the Target URLs, Target Domain Names and Target IP Addresses for those Online Locations. His evidence also addressed the steps he took to access or download copies of at least one of the Roadshow Films from or via links available at these locations.

9 Mr Stewart is a partner at Baker & McKenzie and the solicitor for the applicants. He swore one affidavit in this proceeding on 27 April 2017. He gave evidence relating to ownership of copyright subsisting in the Roadshow Films, the respondents' status as carriage service providers pursuant to the *Telecommunication Act 1997* (Cth) and notification to the respondents and service upon them of the originating application and concise statement. He

also gave evidence regarding the applicants' attempts to notify the owners or operators of the Target Online Locations of this proceeding, and orders made by the courts of other countries in relation to some of the Online Locations.

10 Mr Kraegen is a solicitor in the employ of the solicitors for the applicants, Baker & McKenzie. He affirmed two affidavits in the proceeding on 27 April 2017 and 9 May 2017 respectively. His evidence addressed the steps he undertook to access the Online Locations using TPG's carriage services and the Target URLs, Target Domain Names and Target IP Addresses for those Online Locations. He also gave evidence regarding the further steps the applicants have taken to notify the owners or operators of the Online Locations of this proceeding, including the owners or operators of the New Target Online Locations.

11 Mr Phillipson is a director of the first applicant and the general counsel of Village Roadshow Ltd which controls or owns interests in the first and second applicants in these proceeding. He swore an affidavit on 12 May 2017 in which he deposed to the existence of an exclusive licence granted by the second applicant to Village Roadshow Distribution (BVI) Ltd which, through further agreements, was then granted to the first applicant in respect of copyright in the cinematograph film "The Lego Movie" in Australia.

The Online Locations

12 The applicants seek orders under s 115A in relation to 49 Online Locations which are accessible using the Target URLs, Target Domain Names and Target IP Addresses identified in Appendix A.

13 There are four categories of Online Locations:

(a) "Streaming Online Locations" which host and stream motion pictures and television programs to users of that location.

(b) "Linking Online Locations" which act as an index of hyperlinks to content located elsewhere. These hyperlinks redirect the user to a separate host site from which content can be streamed or downloaded.

(c) "Linking Searching Online Locations" which are similar to Linking Online Locations but differ in that they also provide indexes of other linking websites and sometimes enable users to search the indexes of those other websites.

(d) "P2P Online Locations" which provide access to peer to peer networks, such as the BitTorrent Network, and allow a group of computers with the same network program to connect with each other and directly access files from one another's hard drives.

14 As counsel for the applicants acknowledged during the hearing, there is a degree of cross-over between some of the functionality in categories (a), (b) and (c). For example, some of the locations categorised as "Linking Online Locations" may include embedded streaming functionality (category (a)) and search functionality (category (c)). A table identifying the relevant category designated by the applicants for each Online Location appears in Appendix C of these reasons.

15 In *Roadshow No 1* I provided some technical background relevant to the applications then before me based on expert evidence given in that proceeding. Mr Fraser adopted the technical description and definitions used in paras [7] to [24] of *Roadshow No 1* in his affidavit evidence in this proceeding.

16 There are a number of Target Domain Names and associated URLs for each location because, as Mr Fraser explained in his first affidavit, many of them are linking or secondary domain names that automatically re-direct to a single or primary domain name for the location. For example, in respect of the KissCartoon location, the domain name "kisscartoon.me" automatically re-directs the user to the primary domain name "kisscartoon.se" for that location.

17 Mr Fraser, in his first affidavit, described the steps he undertook to access each Target Online Location using Telstra, Optus and Vocus' carriage services in early 2017. He was also able to access or download at least one of the Roadshow Films from or via links available at these locations. Mr Fraser also conducted DNS queries to identify the relevant IP Addresses for the Target Online Locations and WHOIS look up searches for the Target Domain Names and IP addresses for each location.

18 Mr Kraegen, in his first affidavit, carried out the same steps in relation to the Target Online Locations as those completed by Mr Fraser using TPG's carriage services in early 2017. Mr Kraegen was able to access each Target Online Location using that service.

19 Shortly before the hearing, on 1 and 2 May 2017, Mr Kraegen attempted to access each of the locations identified in Appendix A as Target Online Locations which had been the subject of his and Mr Fraser's investigations in early 2017. In his second affidavit, he explained that, in May 2017, each of these locations were accessible by him via its corresponding Target URL with the exception of (i) certain URLs which re-directed him to new URLs and online locations (identified in Appendix A as 'New Target Online Locations') and (ii) 6 Target Online Locations (namely, KissCartoon, Couchtuner, MegaShare, Bitsnoop, Demonoid and

Kinogo) which had become temporarily unavailable. Mr Kraegen was able to view or download, via links catalogued on the New Target Online Locations, at least one of the Roadshow Films using the same steps he and Mr Fraser performed in early 2017. Mr Kraegen also performed DNS and WHOIS searches in respect of the New Target Online Locations and obtained search results indicating that each of the New Target Online Locations is located outside Australia.

20 Mr Kraegen gave evidence that the New Target Online Locations closely resemble the Target Online Locations. This is also clear from the screenshots for the New Online Locations, one of which I was taken to during the hearing. As I have explained above, the applicants sought to include the New Target Online Locations in this proceeding as result of recent changes to the Target Online Locations listed in their originating application filed 24 February 2017 which now re-direct to these new locations.

21 Mr Fraser also provided a second affidavit on 10 May 2017. In that affidavit, he explained that between 8 to 9 May 2017 he was able to access each of the Online Locations that remained available using Optus' carriage services. Save for the Rlssb.ru location (where links for the Roadshow Films were temporarily unavailable), Mr Fraser was able to view or download a copy of at least one of the Roadshow Films via those locations. Mr Fraser used the video capture software known as Camtasia to make a video record on a USB drive of what appeared on the screen of his laptop during these investigations in May 2017 which he exhibited to his affidavit.

Service of notices on website operators

22 Section 115A(4)(b) obliges the copyright owner to notify the operator of the online location of the making of an application under subsection (1), but if the Court is satisfied that the owner of the copyright is unable, despite reasonable efforts, to determine the identity or address of the operator, or to send notices to that person, the Court may dispense with notice on such terms as it sees fit.

23 Mr Stewart and Mr Kraegen gave evidence describing the applicants' attempts, through its solicitors, to notify the persons who operate each of the Target Online Locations and the New Target Online Locations of this application. I am satisfied that the applicants made reasonable efforts to ascertain contact details which would enable them to notify the owner or operator of the relevant websites by both reviewing the websites and by carrying out DNS and WHOIS searches. I am also satisfied that notifications were sent to email and postal

addresses (such as those listed on the websites or those disclosed by the WHOIS searches) which one would normally expect the operators of the Online Locations to check for communications relating to their online activities. In each case the operators: (a) did not respond, (b) provided a non-responsive or evasive response, or (c) the email address was not operational.

24 In light of this evidence I am satisfied that the applicants have made reasonable efforts to determine the identity and addresses of the persons who operate each of the Online Locations, and to send the relevant notices to those persons. In the circumstances, I propose to make orders pursuant to s 115A(4) of the Act dispensing with the requirement for the applicants to give those persons notice of the application in so far as any such notice has not already been given.

APPLICATION OF SECTION 115A

25 The requirements for the making of orders under s 115A of the Act were discussed by me in *Roadshow Films Pty Ltd v Telstra Corporation Ltd* (2016) 122 IPR 81 (*"Roadshow No 1")* at [25]-[54] and by Burley J in *Universal Music Australia Pty Ltd v TPG Internet Pty Ltd* [2017] FCA 435 ("*Universal")* at [7]-[20].

Ownership and subsistence of copyright – s 115A(1)

26 An application under s 115A(1) of the Act is required to be made by the "owner" of a copyright. Section 119 of the Act provides, inter alia, that except against the owner of the copyright, an exclusive licensee of copyright has the same rights of action, and is entitled to the same remedies, pursuant to s 115A as if the license had been an assignment.

27 In this case, the second to eighth applicants claim to be the owners of the copyright in the Roadshow Films. The first applicant, which claims standing under s 119 of the Act, claims to be the exclusive licensee of one of those films, 'The Lego Movie'. Copyright in 'The Lego Movie' is alleged to be owned by the second applicant.

28 None of the respondents put either subsistence or ownership of copyright in issue. In those circumstances, it is open to the applicants to rely on s 126 of the Act in this case. In the absence of any evidence to suggest that the second to eighth applicants are not the owners of copyright in the Roadshow Films then subsistence and ownership should be taken to be established in this case. I reached the same conclusion in respect of subsistence and ownership of copyright in the same cinematograph films in the First Roadshow Proceedings: *Roadshow No 1* at [58].

29 As regards the standing of the first applicant, Mr Phillipson gave evidence that the first applicant is the exclusive licensee of copyright in the cinematograph film "The Lego Movie" by virtue of a number of agreements entered into on 31 January 2014, including, relevantly, an agreement which involved the grant of an exclusive licence of copyright in "The Lego Movie" film in Australia to the first applicant.

Have the respondent CSPs provided access to the Online Locations outside Australia – s 115A(1)(a)

30 Subsection 115A(1)(a) requires the Court to be satisfied that the respondent CSPs provide access to "an online location outside Australia". I discussed this requirement and the term "online location" in *Roadshow No 1* at paras [36]-[40] and [53].

31 In the present case, I am satisfied that each of the respondents is a carriage service provider for the purposes of s 115A(1)(a) of the Act, and that each of them provides, or has provided, access to the Online Locations identified in Appendix A. These locations are all websites which constitute "online locations" for the purposes of the Act. Whilst it is not clear which particular carriage service provider Mr Kraegen used to access the New Target Online Locations in early May 2017, I am satisfied, in this case, that if one particular CSP provides access to those locations, then it is likely that all respondent CSPs provide such access. Mr Fraser gave evidence to that effect in his first affidavit.

32 At paragraphs [52] and [54] of *Roadshow No 1*, I discussed the meaning and effect of s 115A(1)(a) and (b) of the Act from a temporal perspective. In this case, the six online locations (KissCartoon, Couchtuner, MegaShare, Bitsnoop, Demonoid and Kinogo) which were unavailable in May 2017 were, at the time the proceeding was commenced in February 2017, accessible using the respondents' carriage services. There is no evidence before me to suggest that those six locations may not infringe or facilitate the infringement of copyright in the future. Insofar as the recent disablement of these locations is relevant to exercise of the discretion under s 115A(1), I agree with the applicants that, in this case, it is appropriate that orders be made in respect of these six online locations.

33 Having regard to Mr Fraser and Mr Kragen's evidence and the DNS and WHOIS search results obtained by them, I am satisfied that each of the Online Locations is located outside Australia. In particular, the DNS and WHOIS search results obtained by Mr Fraser and Mr Kraegen indicate that each of the Target IP Addresses for the Online Locations is located outside Australia, including, for example, in the United States of America, Belize, Vietnam and Switzerland.

Have the Online Locations infringed, or facilitated an infringement of the copyright – s 115A(1)(b)

34 Subsection 115A(1)(b) requires the Court to be satisfied that the Online Locations infringe or facilitates an infringement of copyright. I discussed the requirements of this provision at paras [42] – [47] of *Roadshow No 1*.

35 I am satisfied, on the evidence of Mr Fraser, Mr Kraegen and Mr Stewart, that each Online Location has infringed or facilitated the infringement of copyright subsisting in one or more of the applicants' Roadshow Films.

36 In particular, I am satisfied that, by making the film "Kingsman: The Secret Service" available to the public on the Streaming Online Location "Kinogo" website, the copyright owner's copyright has been infringed. In respect of all the Online Locations, the evidence establishes that each of those locations has facilitated infringement of copyright in one or more of the Roadshow Films. In particular, I am satisfied that the Online Locations have webpages which facilitate embedded streaming of one or more of the Roadshow Films and/or hyperlinks arranged by indexes, directories and catalogues that are designed to allow users to easily and quickly ascertain the existence and location of other online locations from which the applicants' copyright material may be streamed or downloaded.

Is the primary purpose of the Online Locations to infringe, or facilitate an infringement of copyright (whether or not in Australia) – s 115A(1)(c)

37 Subsection 115A(1)(c) requires the applicants to establish that the primary purpose of the Online Locations is to infringe, or facilitate an infringement of copyright. I discussed this requirement in *Roadshow No 1* at paras [48] –[49].

38 The applicants' evidence establishes that the primary purpose of each of the Online locations is to make available online and/or facilitate the making available online or reproduction of motion pictures and television programs without the licence of the copyright owner, including in respect of one or more of the Roadshow Films. The Online Locations do not appear to me to have any real purpose other than to infringe or facilitate the infringement of copyright in cinematograph films many of which are well-known, popular, and recently released titles. As I have mentioned, the locations all contain searchable indexes, directories and catalogues of popular films and/or televisions programs which enable users to browse and/or search for particular titles to view or download. Many of them also include information instructing users how to upload, view or download unauthorised copyright materials. It is clear to me that each of the Online Locations has been designed by their

operators to facilitate easy and free access to cinematograph films made available online without the permission of the owners of copyright in such films.

39 I am satisfied that the requirements of s 115A(1)(c) have been established in this case.

Discretionary factors - s 115A(5)

40 I have also had regard to the matters referred to in s 115A(5). The infringement or facilitation of infringement by the Online Locations is flagrant and reflect a blatant disregard for the rights of copyright owners. By way of illustration, one of the Online Locations is accessible via the domain name "istole.it" and it and many others include notices encouraging users to implement technology to frustrate any legal action that might be taken by copyright owners. Blocking orders have already been made in relation to many of the Online Locations in other jurisdictions. The discretionary factors in s 115A(5) strongly favour granting the relief sought by the applicants.

DISPOSITION

41 In the result, I am satisfied that the requirements of s 115A(1) have been established and that an injunction should be granted under s 115A in respect of each of the Online Locations. Save for the particulars of the Online Locations and proposed order 19 which provides that there will be no order as to the costs of this proceeding, the orders sought by the applicants in their amended originating application, which I propose to make, are in the same form as orders 1 to 18 made by me in *Roadshow No 1*.

42 There will be orders accordingly.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Nicholas.

Associate:

Dated: 18 August 2017

SCHEDULE OF PARTIES

NSD 269 of 2017

Applicants

Second Applicant:	VILLAGE ROADSHOW FILMS (BVI) LTD
Third Applicant:	DISNEY ENTERPRISES, INC
Fourth Applicant:	TWENTIETH CENTURY FOX FILM CORPORATION
Fifth Applicant:	PARAMOUNT PICTURES CORPORATION
Sixth Applicant:	COLUMBIA PICTURES INDUSTRIES, INC.
Seventh Applicant:	UNIVERSAL CITY STUDIOS LLC
Eighth Applicant:	WARNER BROS. ENTERTAINMENT INC.

Respondents

Second Respondent:	PACNET INTERNET (A) PTY LTD
Third Respondent:	PACNET SERVICES (A) PTY LTD (ACN 056 783 852)
Fourth Respondent:	OPTUS MOBILE PTY LIMITED
Fifth Respondent:	OPTUS NETWORKS PTY LIMITED
Sixth Respondent:	OPTUS ADSL PTY LIMITED
Seventh Respondent:	OPTUS SATELLITE PTY LIMITED
Eighth Respondent:	UECOMM OPERATIONS PTY LIMITED
Ninth Respondent	VIVIDWIRELESS PTY LIMITED
Tenth Respondent	OPTUS INTERNET PTY LIMITED
Eleventh Respondent	VIRGIN MOBILE (AUSTRALIA) PTY LIMITED
Twelfth Respondent	ALPHAWEST SERVICES PTY LIMITED
Thirteenth Respondent	OPTUS WHOLESALE PTY LIMITED
Fourteenth Respondent	M2 WHOLESALE PTY LTD ACN 119 220 843
Fifteenth Respondent	M2 WHOLESALE SERVICES PTY LTD
Sixteenth Respondent	M2 COMMANDER PTY LTD

Seventeenth Respondent	PRIMUS NETWORK (AUSTRALIA) PTY LTD
Eighteenth Respondent	PRIMUS TELECOMMUNICATIONS PTY LTD (ACN 071 191 396)
Nineteenth Respondent	PRIMUS TELECOMMUNICATIONS (AUSTRALIA) PTY LTD
Twentieth Respondent	DODO SERVICES PTY LTD
Twenty First Respondent	ENGIN PTY LTD
Twenty Second Respondent	EFTEL CORPORATE PTY LTD
Twenty Third Respondent	EFTEL RETAIL PTY LTD
Twenty Fourth Respondent	EFTEL WHOLESALE PTY LTD
Twenty Fifth Respondent	CLUBTELCO PTY LTD
Twenty Sixth Respondent	WHOLESALE COMMUNICATIONS GROUP PTY LTD
Twenty Seventh Respondent	2TALK PTY LTD
Twenty Eighth Respondent	VOCUS PTY LTD
Twenty Ninth Respondent	AMCOM IP TEL PTY LTD
Thirtieth Respondent	AMNET BROADBAND PTY LTD
Thirty First Respondent	NEXTGEN NETWORKS PTY LTD
Thirty Second Respondent	TPG INTERNET PTY LTD
Thirty Third Respondent	TPG NETWORK PTY LTD
Thirty Fourth Respondent	FTTB WHOLESALE PTY LTD
Thirty Fifth Respondent	CHARIOT PTY LTD
Thirty Sixth Respondent	SOUL PATTINSON TELECOMMUNICATIONS PTY LIMITED
Thirty Seventh Respondent	SPT TELECOMMUNICATIONS PTY LIMITED
Thirty Eighth Respondent	SPTCOM PTY LIMITED
Thirty Ninth Respondent	SOUL COMMUNICATIONS PTY LTD
Fortieth Respondent	PIPE NETWORKS PTY LIMITED
Forty First Respondent	INTRAPOWER TERRESTRIAL PTY LTD

Forty Second Respondent	IINET LIMITED
Forty Third Respondent	INTERNODE PTY LTD
Forty Fourth Respondent	TRANSACT CAPITAL COMMUNICATIONS PTY LTD
Forty Fifth Respondent	TRANSACT VICTORIA COMMUNICATIONS PTY LTD
Forty Sixth Respondent	WESTNET PTY LTD
Forty Seventh Respondent	ADAM INTERNET PTY LTD
Forty Eighth Respondent	AAPT LIMITED
Forty Ninth Respondent	REQUEST BROADBAND PTY LTD

Appendix A

Target Online Location	Target URL	Target Domain Name	Target IP Address
KissCartoon	http://www.kisscartoon.se	kisscartoon.se	104.25.204.29 104.25.205.29
	http://www.kisscartoon.me	kisscartoon.me	31.220.0.199
	http://www.kisscartoon.com	kisscartoon.com	192.64.119.92
WatchFree	http://www.watchfree.to	watchfree.to	104.27.214.30 104.27.215.30
PrimeWire	http://www.primewire.ag	primewire.ag	104.23.192.30
	http://www.gxiso.com	gxiso.com	98.124.199.29
Movie4K	http://www.movie4k.to	movie4k.to	104.31.16.3 104.31.17.3
WatchSeries	http://watchseries.cr	watchseries.cr	104.25.33.99 104.25.34.99
	http://www.watchseries-online.eu	watchseries-online.eu	104.18.56.117 104.18.57.117
	http://www.watchserieshd.eu	watchserieshd.eu	104.31.70.187 104.31.71.187
Alluc	http://www.alluc.ee	alluc.ee	104.20.30.60 104.20.31.60
	http://www.alluc.com	alluc.com	104.25.108.22 104.25.109.22
	http://www.alluc.to	alluc.to	93.115.89.138
	http://www.oneclickmoviez.com	oneclickmoviez.com	149.56.126.237 174.128.248.230
	http://www.alluc.org	alluc.org	149.56.126.237 174.128.248.230
Phimmoi	http://www.phimmoi.net	phimmoi.net	125.212.241.188
123Movies	https://www.123movies.is	123movies.is	192.124.249.65
	http://www.123movies.to	123movies.to	104.27.215.28 104.27.214.28

Target Online Location	Target URL	Target Domain Name	Target IP Address
Couchtuner	http://www.couch-tuner.ag	couch-tuner.ag	104.31.17.3 104.31.16.3
	http://www.couchtuner.ag	couchtuner.ag	104.31.17.3 104.31.16.3
	http://www.couchtuner.com	couchtuner.com	50.63.202.8
FMovies	https://www.fmovies.se	fmovies.se	104.27.140.126 104.27.141.126
	http://www.fmovies.to	fmovies.to	104.27.146.62 104.27.147.62
XMovies8.tv	http://www.xmovies8.tv	xmovies8.tv	104.23.207.29 104.23.206.29
Putlockers.vip	http://putlockers.vip/	putlocker.vip	179.43.150.5
	http://www.putlocker.watch	putlocker.watch	46.19.141.2
EYNY	http://www.eyny.com	eyny.com	67.228.27.100 67.288.27.108 67.288.27.109 67.288.27.110 67.288.27.111 67.288.27.112 75.126.182.34 75.126.182.35 75.126.182.36 75.126.182.37 208.43.60.11
MegaShare	http://www.megashare.at	megashare.at	104.31.17.3 104.31.16.3
	http://www.megashare.sc	megashare.sc	104.31.17.3 104.31.16.3
	http://www.megashare.info	megashare.info	176.123.7.173
GenVideos	http://genvideos.org	genvideos.org	104.25.0.118 104.24.31.118
Spacemov	https://www.spacemov.net	spacemov.net	104.31.16.3 104.31.17.3
	http://www.spacemov.com	spacemov.com	104.31.16.3 104.31.17.3

Target Online Location	Target URL	Target Domain Name	Target IP Address
Kinogo	http://www.kinogo.club	kinogo.club	104.17.222.40
	http://www.kinogo.co	kinogo.co	104.31.82.13
Viooz	http://www.viooz.ac	viooz.ac	104.31.16.3 104.31.17.3
Hdmovieswatch	http://www.hdmovieswatch.org/	hdmovieswatch.org	104.27.186.25 104.27.187.25
	http://www.hdmovieswatch.net/	hdmovieswatch.net	104.31.16.3 104.31.17.3
Putlocker.plus	https://www.putlocker.plus	putlocker.plus	104.31.16.3 104.31.17.3
Xmovies8.org	https://www.xmovies8.org	xmovies8.org	104.24.31.118 104.25.0.118
Xemphimso	http://www.xemphimso.com	xemphimso.com	82.118.242.17
Shush	http://www.shush.se	shush.se	104.24.112.35 104.24.113.35
ExtraTorrent.cc	http://www.extratorrent.cc	extratorrent.cc	104.23.196.8 104.23.197.8
EZTV	https://www.eztv.ag	eztv.ag	104.27.208.30 104.27.209.30
	http://istole.it	istole.it	174.128.248.231 149.56.147.39
	http://www.zoink.it	zoink.it	104.31.17.3 104.31.16.3
	http://www.ezrss.it	ezrss.it	104.28.12.92 104.28.13.92
	http://www.eztv.ch	eztv.ch	104.31.17.3 104.31.16.3
Rarbg	http://www.rarbg.to	rarbg.to	185.37.100.122
	http://www.rarbg.com	rarbg.com	185.37.100.121
YTS	https://www.yts.ag	yts.ag	104.27.214.30 104.27.215.30
Yify Torrent	http://www.yify-torrent.org	yify-torrent.org	46.148.16.26

Target Online Location	Target URL	Target Domain Name	Target IP Address
Torrent Downloads	http://www.torrentdownloads.me	torrentdownloads.me	104.27.214.30 104.27.215.30
Bitsnoop	https://www.bitsnoop.com	bitsnoop.com	104.27.212.30 104.27.213.30
Demonoid	http://www.demonoid.tv	demonoid.tv	104.27.142.229 104.27.143.229
Limetorrents	http://www.limetorrents.cc	limetorrents.cc	104.27.214.28 104.27.215.28
	http://www.limetorrents.com	limetorrents.com	104.31.16.3 104.31.17.3
Tehparadox	http://www.tehparadox.com	tehparadox.com	68.169.98.219
Torrentproject	https://www.torrentproject.se	torrentproject.se	104.31.16.3 104.31.17.3
Icefilms	http://www.icefilms.info	icefilms.info	104.31.16.3 104.31.17.3
Piratebay.to	https://www.piratebay.to	piratebay.to	104.31.16.3 104.31.17.3
	https://thepiratebay.to	thepiratebay.to	104.31.16.3 104.31.17.3
	https://tpb.to	tpb.to	104.27.178.21 104.27.179.21
Putlockers.ch	http://www.putlockers.ch	putlockers.ch	104.23.204.30 104.23.205.30
	http://putlocker.is	putlocker.is	149.56.126.232
	http://www.putlocker.bz	putlocker.bz	104.31.16.3 104.31.17.3
Softarchive	http://sanet.cd	sanet.cd	104.25.107.116 104.25.108.116
	http://softarchive.la	softarchive.la	104.24.6.10 104.24.7.10
	http://softarchive.net	softarchive.net	104.27.130.106 104.27.131.106
Rlsbb	http://www.rlsbb.com	rlsbb.com	162.223.90.227

Target Online Location	Target URL	Target Domain Name	Target IP Address
Putlocker.run	http://putlocker.run/	putlocker.run	46.19.141.2
	http://www.putlocker.live	putlocker.live	179.43.150.2
Extra.to	http://extra.to/	extra.to	104.20.20.47 104.20.21.47
	http://www.extratorrent.com	extratorrent.com	104.31.17.3 104.31.16.3

New Target Online Location	Target URL	Target Domain Name	Target IP Address
GoMovies	http://www.gomovies.to	gomovies.to	104.20.64.199 104.20.65.199
xmovies8.ru	http://www.xmovies8.ru	xmovies8.ru	104.31.157.3 104.31.156.3
Putlocker1.live	http://www.putlocker1.live/	putlocker1.live	104.27.152.148 104.27.153.148
Spacemov.tv	http://www.spacemov.tv	spacemov.tv	104.24.123.37 104.24.122.37
hdmovieswatch.eu	http://www.hdmovieswatch.eu	hdmovieswatch.eu	104.31.17.3 104.31.16.3
Putlockers.ca	http://www.putlockers.ca	putlockers.ca	104.31.133.9 104.31.132.9
Putlocker.co	http://www.putlocker.co	putlocker.co	104.20.37.142 104.20.36.142
Rlsbb	http:// rlsbb.ru	rlsbb.ru	104.31.91.72

Appendix B

Title	Copyright Owner
The Lego Movie	Second applicant
Tron Legacy	Third applicant
Cinderella	Third applicant
Spy	Fourth applicant
Kingsman: The Secret Service	Fourth applicant
Transformers: Age of Extinction	Fifth applicant
The Gambler	Fifth applicant
Spider-Man 2	Sixth applicant
This Is The End	Sixth applicant
Jurassic World	Seventh applicant
Straight Outta Compton	Seventh applicant
The Big Bang Theory: Season 7, Episode 24	Eighth applicant
Shameless: Season 4, Episode 12	Eighth applicant

Appendix C

Streaming Online Locations

Kinogo.

Linking Online Locations

KissCartoon, WatchFree, PrimeWire, Movie4K, WatchSeries, Phimmoi, 123Movies, Couchtuner, FMovies, XMovies8.tv, Putlockers.vip, EYNY, MegaShare, Spacemov, Viooz, Hdmovieswatch, Putlocker.plus, Xmovies8.org, Xemphimso, Shush, Tehparadox, Icefilms, Putlocker.ch, Softarchive, Rlsbb, Putlocker.run, GoMovies, xmovies8.ru, Spacemov.tv, hdmovieswatch.eu, putlockers.ca, putlocker.co, Rlsbb.ru and Putlocker1.live.

Linking Searching Online Locations

Alluc and GenVideos,

P2P Online Locations

ExtraTorrent.cc, EZTV, Rarbg, YTS, Yify Torrent, Torrent Downloads, Bitsnoop, Demonoid, Limetorrents, Torrentproject, Piratebay.to and Extra.to

FEDERAL COURT OF AUSTRALIA

Roadshow Films Pty Ltd and Others v Telstra Corporation Ltd and Others*

[2016] FCA 1503

Nicholas J

23-24 June, 15 December 2016

Intellectual Property — Copyright — Infringement — Remedies — Injunctions — Against carriage service providers providing access to online locations outside Australia that infringe or facilitate the infringement of copyright — Application for injunction — Time for assessing whether requirements for injunction satisfied — Costs of complying with injunction — Whether applicants should be required to pay carriage service providers' costs of complying with injunctions — Copyright Act 1968 (Cth), s 115A(1).

This decision related to two proceedings heard together. The applicants in each of the proceedings sought injunctive relief under s 115A of the *Copyright Act 1968* (Cth) (the Act) against various carriage service providers (CSPs) requiring them to take reasonable steps to block access to certain websites situated outside Australia which allegedly infringed, or facilitated the infringement of, the applicants' copyright in a large number of cinematograph films. Pursuant to s 115A(1) of the Act, the Court could, on application by a copyright owner, grant an injunction requiring a CSP to take reasonable steps to disable access to an online location if the Court were satisfied that: access to the location was provided outside Australia; the location infringed or facilitated an infringement of the copyright; and the primary purpose of the online location was to infringe or facilitate the infringement of copyright (the s 115A(1) requirements). One of the issues before the Court was whether the s 115A(1) requirements had to be satisfied at the time of granting the injunction or at some earlier point in time, such as the date of commencement of the proceeding or the date of the hearing.

Another issue was whether the CSP respondents should be required to bear their own costs of complying with the injunction, including "set-up costs" they had already incurred in configuring their systems to facilitate compliance, in a general sense, with any order that might be made under s 115A of the Act, and "compliance costs" that they would incur in blocking access to the specific websites the subject of the injunction.

Held, granting the injunctions: (1) Section 115A(1) does not require that the Court be satisfied, at the time of granting an injunction, that the respondent CSP is providing access to the online location at that moment in time or that the online location is, at the moment of granting the injunction, infringing or facilitating the infringement of copyright. However, the fact that the online location is not online or has otherwise been disabled by the time of the hearing, or at any other time at

*[EDITOR'S NOTE: Appendix A has not been reproduced in this report and is available on the Federal Court website.]

which consideration is given to the making of an order under s 115A(1), may be a matter relevant to the exercise of the Court's discretion to grant relief. [52]-[54], [110]

(2) The applicants should pay the respondents' costs of complying with the injunction, but not the respondents' set-up costs, as they are a general cost of carrying on business that the respondents would at some stage have had to incur irrespective of the existence of these proceedings. [143]-[144], [147]

Cases Cited

Cooper v Universal Music Australia Pty Ltd (2006) 156 FCR 380.

D (a minor), Re [1987] AC 317.

Roadshow Films Pty Ltd v iiNet Ltd (2012) 248 CLR 42.

Twentieth Century Fox Film v British Telecommunications plc [2011] EWHC 2714.

Application

RPL Lancaster SC and *JS Cooke*, for the applicants in NSD 239 of 2016.

AJL Bannon SC and *AR Lang*, for the first to third respondents in NSD 239 of 2016.

JM Hennessy SC and *F St John*, for the fourth to fifteenth respondents in NSD 239 of 2016.

BA Mee, for the sixteenth to twenty-ninth respondents in NSD 239 of 2016.

C Burgess, for the thirty-second and thirty-fourth to fiftieth respondents in NSD 239 of 2016.

RPL Lancaster SC and *JM Beaumont*, for the applicant in NSD 241 of 2016.

C Burgess, for the first, second and eighteenth to thirty-third respondents in NSD 241 of 2016.

JM Hennessy SC and *F St John*, for the third to fourteenth respondents in NSD 241 of 2016.

AJL Bannon SC and *AR Lang*, for the fifteenth to seventeenth respondents in NSD 241 of 2016.

15 December 2016

Nicholas J.

Introduction

1 These are my reasons for judgment in two proceedings that were heard together. In the first proceeding ("the Roadshow proceeding") the applicants ("the Roadshow applicants") seek relief under s 115A of the *Copyright Act 1968* (Cth) ("the Act") against various carriage service providers ("CSPs") requiring them to take reasonable steps to block access to a website. In the second proceeding ("the Foxtel proceeding") the applicant ("Foxtel") also seeks relief under s 115A against many of the same CSPs blocking access to various other websites. The applicants allege that the relevant websites are situated outside Australia and that they infringe, or facilitate the infringement of, copyright in large numbers of cinematograph films including motion pictures and television programs the copyright in which is owned by various applicants.

2 The respondents in each proceeding, and the corporate groups to which they belong, are as shown in the following table.

Group	*Roadshow Proceeding*	*Foxtel Proceeding*
Telstra	1st to 3rd respondents	15th to 17th respondents
Optus	4th to 15th respondents	3rd to 14th respondents
M2	16th to 29th respondents	-
TPG	32nd and 34th to 50th respondents	1st, 2nd and 18th to 33rd respondents

The M2 respondents were not respondents in the Foxtel proceeding. All other respondents were party to both proceedings.

3 None of the operators of the relevant websites applied to be joined as a party to either proceeding and none sought to appear at the hearing or to make any submission. There was affidavit evidence in the proceedings given by solicitors acting for the applicants describing attempts to notify the persons who operate each of the relevant websites of the applications now before me. In light of that evidence I am satisfied that the applicants have made reasonable efforts to determine the identity and address of the persons who operate the relevant websites, and to send notices to those persons. In circumstances where there has been no application by the persons who operate the relevant websites to be joined or any other acknowledgment by them indicating that they have been given notice of these applications, I propose to make orders pursuant to s 115A(4) of the Act dispensing with the requirement for the applicants to give those persons notice of the applications insofar as any such notice has not already been given.

4 There has been a large measure of co-operation between the applicants and the respondents. By the time of the hearing the parties were agreed upon a number of matters relating to the appropriate form of the orders that should be made in the event that the Court was satisfied that it should grant injunctive relief under s 115A of the Act. However, the respondents, who neither consented to nor opposed the grant of injunctive relief, only sought to be heard in relation to the form of orders and the terms upon which any relief under s 115A should be granted.

5 There was an order made in each proceeding that evidence in one be evidence in the other subject to any proper objections. The evidence was mostly given by way of affidavit with some brief oral evidence also given by Mr Carson, the applicant's expert witness in the Foxtel proceeding, and Mr Herps, the applicants' expert witness in the Roadshow proceeding. After the evidence was closed and submissions were completed, the applicants applied for leave to re-open to rely upon some additional affidavit evidence. None of the respondents opposed the applicants being given leave to re-open and, in the circumstances, I will grant the applicants the leave sought. In these reasons I refer to this additional evidence as the applicants' "supplementary evidence". The supplementary evidence was concerned with further inquiries made by the applicants after the close of the evidence in relation to some of the online locations the subject of their applications for orders under s 115A.

6 For reasons which I will explain I am satisfied that it is appropriate to grant an injunction under s 115A of the Act in each proceeding and to make various ancillary orders relating to its implementation.

Technical background

7 In this section of my reasons I provide some technical background relevant to

the applications that are before me. This description of the technical background is substantially based upon evidence from the applicants' expert witnesses that was not contentious.

The Internet

8 The Internet is a network of interconnected computers and other digital devices. It enables computers or other digital devices (for convenience I will refer to all such devices as "computers") to establish connections to other computers by cables or wireless technologies. These connections allow computers to communicate with other computers that are "online" using various protocols including the Internet protocol ("IP") and transmission control protocol ("TCP"). A protocol in this context is a set of rules that computers use to communicate with one another. These communications are transmitted in packets of data sent or received by computers that are identified by their IP Addresses.

Internet Protocol Address

9 An Internet Protocol Address ("IP Address") is a unique string of numbers separated by full stops that enables a computer to communicate with another computer via the Internet. A computer requires an IP Address to ensure that data sent over the Internet reaches its intended destination. Internet Service Providers ("ISPs") usually provide their customers with access to the Internet via a router to which the ISP assigns an IP Address. Blocks of IP Addresses are allocated by the Internet Assigned Numbers Authority ("IANA") to five Regional Internet Registries ("RIR") which then allocate them to ISPs and other entities.

Uniform Resource Locator

10 A Uniform Resource Locator ("URL") is a reference (an address) to a resource, such as a computer server, an electronic document, or a webpage on the Internet, and refers to the entire address used to fetch a resource from an online location. A URL has two main components, a Protocol Identifier and a Resource Name. The Protocol Identifier indicates the name of the Protocol to be used to fetch the resource. For example "https" is the Protocol Identifier which tells a computer to use a protocol known as a Hyper Text Transfer Protocol Secure ("HTTPS"). HTTPS is a secure version of Hyper Text Transfer Protocol ("HTTP"). Both protocols can be used to send data between an online computer and another online location such as a website. The Resource Name refers to the computer that contains the relevant resource, such as a webpage, together with other information (eg directory, subdirectory and file name) that may be required to locate and access the resource on that computer.

Domain Names

11 The Domain Name System ("DNS") is the system for naming computer servers and other resources connected to the Internet. A Domain Name is a complete address to a resource on the Internet. Domain Names are allocated by a Domain Name Registrar. While the Internet works with IP Addresses, Domain Names provide a more user friendly way for users to interact with the Internet. A computer's web browser works in the background to seamlessly translate typed Domain Names (eg "google.com") into an IP Address (eg 74.125.224.72). A DNS query is a process whereby a computer or networking device makes an inquiry with a DNS server to find a server that contains the IP Address for the Domain Name. The label at the end of a Domain Name (eg ".com") is the top

level domain ("TLD"). The core group of TLDs are maintained by IANA and are "com", "info", "net" and "org". There are also many different country code TLDs ("ccTLDs"). IANA is responsible for delegating the management of these ccTLDs (eg .au, .us, and .uk) to a trustee which is often required to have a local presence in the relevant country.

Domain Name System server

12 A Domain Name System server (also known as a "DNS server", a "DNS resolver" or simply "DNSS") is a server connected to the Internet that manages, maintains and processes compilations of Domain Names and other related information. A DNSS translates (or resolves) a Domain Name into an IP address. The DNSS that is assigned by the holder of a Domain Name to manage domain name lookups is an "authoritative DNSS". DNS resolution is usually performed by an ISP (using its own DNSS) as part of its service to customers.

DNS blocking

13 Usually, a user's computer will contact the DNSS operated by the user's ISP whenever the user's computer needs to resolve a Domain Name to an IP Address. In normal operation, the DNSS will return the IP Address authoritatively specified by the holder of the Domain Name. However, ISPs can block access to specific online locations entered into the address bar of the Internet browser, by configuring their DNSS to either return no IP Address so that an error message is displayed to users or so that users are directed to a predetermined IP Address that differs from that designated by the specific online location's IP Address. This is known as DNS blocking.

URL blocking

14 URL blocking works by performing a process known as "packet inspection". A "packet" is a piece of data routed between an origin and a destination on the Internet. URL blocking requires ISPs to maintain a list of URLs that are to be blocked which may then be compared against the destinations specified in packets sent across the ISP's network. If the URL for a given destination is blocked, traffic will not be sent to that destination. URL Blocking does not work for secure Internet traffic (eg using the "https" protocol) unless deep packet inspection technology is used because the packets transmitted are encrypted and cannot be inspected.

IP Address blocking

15 IP Address blocking prevents the connection between a server or website and certain IP Addresses. IP Address blocking is achieved by the ISP not routing the outbound traffic to the IP Addresses of specific online locations. IP Address blocking can be problematic as an IP Address associated with a website may also be associated with different unrelated websites that are also hosted on the same server. In particular, website hosting providers may store the content for many different websites on one host server which may share one or more IP Addresses.

Proxy servers

16 Proxy servers are intermediary computers that relay data between a sender and receiver though they may sometimes do more than this. They can be used to speed up performance by caching data that may be more quickly and reliably

accessed via a proxy server than from the originating or principal server. A proxy server often encapsulates packets passing through with its own IP Address to give the appearance that it is the originating server.

BitTorrent

The BitTorrent protocol

17 BitTorrent is a protocol designed for the efficient and decentralised sharing of electronically stored information across the Internet. BitTorrent is particularly useful for sharing large files and is therefore well suited for the sharing of music, movies and television programs. BitTorrent is known as a peer to peer ("P2P") protocol as all peers downloading data will, by design, immediately begin sharing that data with other peers by making data available online to other BitTorrent users. The sharing of electronic information using BitTorrent requires a number of essential components described further below.

BitTorrent clients

18 A BitTorrent client is a computer program that allows users to identify, download and share data. A BitTorrent client communicates with other BitTorrent clients using the BitTorrent protocol. There are several well-known BitTorrent clients. A popular BitTorrent client is called uTorrent ("uTorrent") which is user friendly and freely available for use on all popular operating systems.

Piece/torrent files/magnet links

19 BitTorrent breaks the data that is to be shared (whether a single file or a collection of many files) into "pieces" that together make up a "Payload". The Payload can then be distributed across the Internet in pieces before reassembly by a BitTorrent client. Torrent files are small files that instruct the BitTorrent client where to find a Payload consisting of data from which a copy of an entire film or sound recording can be assembled. A torrent file does not contain any of the data but does include other information relevant to file sharing operations (known as metadata) including:

- the web address or URL of the tracker (described below);
- the filename;
- the size of each piece the file is broken into;
- the cryptographic code (hash value) of each file piece;
- the hash value of the whole file.

20 Groups of computers sharing the same torrent file are known as a "swarm". Each computer in a swarm is known as a "peer". A peer that has a complete copy of the Payload is known as a "seed". A "magnet link" in simple terms is a hyperlink to an associated torrent file which may be used to trigger the downloading of data from other peers.

Trackers

21 A tracker is a BitTorrent based computer program ("Tracker") running on an Internet connected computer. Magnet links usually include information about the location of one or more Trackers. Using that information BitTorrent clients will attempt to connect with the Tracker in order to access the swarm from which they will obtain the Payload. There may be several Trackers specified in a magnet link but only one active Tracker is required to gain access to a

Payload. A Tracker will provide BitTorrent clients with a directory of peers who are making data available and peers who are seeking data together with details of their IP Addresses. It will provide to a BitTorrent client requesting a specific Payload details of the IP Addresses of peers from which the Payload may be obtained.

CloudFlare/MaxMind/Whois

22 CloudFlare Inc ("CloudFlare") provides an online service that acts as an intermediary for websites. CloudFlare is known as a "reverse proxy" because it retrieves information on behalf of its customer's servers and returns this information as though it originated from a CloudFlare server. Users of CloudFlare allow the service to act as the authoritative DNS for their websites and it will often allocate two or more IP Addresses to them. CloudFlare offers its users:

(a) a large network of worldwide servers to provide efficient traffic delivery to their website using CloudFlare owned IP Addresses;

(b) no direct connection to customer IP Addresses reducing the risk of being hacked or denial of service attacks;

(c) caching of key components of a website reducing the amount of traffic required to be delivered to a given website and speeding up responses back to user requests; and

(d) an "always online" service for when the customer's website is down for maintenance during which period, CloudFlare will present cached copies of webpages.

23 It is clear that at least some of these services will appeal to a person operating a website engaged in illicit activities (including copyright infringement or the facilitation of copyright infringement) who may wish to conceal the details of any IP Addresses used by his or her computer.

24 "MaxMind" is one of a number of online services that can be used to ascertain the country code, geographical location, postal code, geographic coordinates associated with an IP Address and the name of the ISP (or other entity) to which an IP Address has been allocated. "Whois" is an online service which provides information relating to the ownership of Domain Names.

Relevant statutory provisions

Section 115A

25 Section 115A was introduced into the Act by the *Copyright Amendment (Online Infringement) Act 2015* (Cth) ("the Amendment Act") with effect from 27 June 2015. The *Copyright Amendment (Online Infringement) Bill 2015* (Cth) was first introduced into the House of Representatives where it was amended before it came to be considered by the Senate. The explanatory memorandum tabled in the House of Representatives was revised to take account of those amendments. A revised explanatory memorandum to the *Copyright Amendment (Online Infringement) Bill 2015* ("the Revised Explanatory Memorandum") was tabled in the Senate.

26 Section 115A, which is in Pt V, Div 2 of the Act, provides:

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

(1) The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that:

(a) a carriage service provider provides access to an online location outside Australia; and

(b) the online location infringes, or facilitates an infringement of, the copyright; and

(c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

(2) The injunction is to require the carriage service provider to take reasonable steps to disable access to the online location.

Parties

(3) The parties to an action under subsection (1) are:

(a) the owner of the copyright; and

(b) the carriage service provider; and

(c) the person who operates the online location if, but only if, that person makes an application to be joined as a party to the proceedings.

Service

(4) The owner of the copyright must notify:

(a) the carriage service provider; and

(b) the person who operates the online location;

of the making of an application under subsection (1), but the Court may dispense, on such terms as it sees fit, with the notice required to be sent under paragraph (b) if the Court is satisfied that the owner of the copyright is unable, despite reasonable efforts, to determine the identity or address of the person who operates the online location, or to send notices to that person.

Matters to be taken into account

(5) In determining whether to grant the injunction, the Court may take the following matters into account:

(a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(c);

(b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;

(c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;

(d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;

(e) whether disabling access to the online location is a proportionate response in the circumstances;

(f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;

(g) whether it is in the public interest to disable access to the online location;

(h) whether the owner of the copyright complied with subsection (4);

(i) any other remedies available under this Act;

(j) any other matter prescribed by the regulations;
(k) any other relevant matter.

Affidavit evidence

(6) For the purposes of the proceedings, section 134A (affidavit evidence) applies as if the reference in paragraph 134A(f) to a particular act included a reference to a class of acts.

Rescinding and varying injunctions

(7) The Court may:
(a) limit the duration of; or
(b) upon application, rescind or vary;
an injunction granted under this section.

(8) An application under subsection (7) may be made by:
(a) any of the persons referred to in subsection (3); or
(b) any other person prescribed by the regulations.

Costs

(9) The carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings.

27 The term "online location" is not defined in the Act. According to the Revised Explanatory Memorandum (at [36]):

> The term "online location" is intentionally broad and includes, but is not limited to, a website, and would also accommodate future technologies.

28 The Revised Explanatory Memorandum also includes the following observations concerning the purpose of s 115A which is to reduce online copyright infringement:

> 1. The purpose of this Bill is to introduce a key reform to reduce online copyright infringement. The scheme is deliberately prescriptive; it is intended as a precise response to a specific concern raised by copyright owners.
> 2. The Bill amends the *Copyright Act 1968* (the Act) to enable the owner of a copyright to apply to the Federal Court of Australia for an order requiring a Carriage Service Provider (CSP) to block access to an online location that has the primary purpose of infringing copyright or facilitating the infringement of copyright.
> 3. The Bill provides that copyright owners would be able to apply directly to the Federal Court for an injunction to disable access to an infringing online location, without having to first establish the CSP's liability for copyright infringement or authorisation of copyright infringement. This judicial process would be more efficient and avoid implicating CSPs unnecessarily.

29 The Revised Explanatory Memorandum also states at [6]-[7]:

> 6. The factors that the Court may take into account set an intentionally high threshold test for satisfaction by the Court. The purpose of the scheme is to allow a specific and targeted remedy to prevent those online locations which flagrantly disregard the rights of copyright owners from facilitating access to infringing copyright content.
> 7. The Bill contains a standalone injunction power which operates as a no-fault remedy. It would not affect existing laws on infringement, copyright exceptions or limitations, authorisation liability or any of the

safe harbour conditions. Further, the Court granting an injunction would not create a presumption that the CSP has infringed copyright nor authorised the infringement of copyright.

30 It is important to note that s 115A provides for a "no fault" remedy against a CSP. In particular, the entitlement of an applicant for relief under s 115A does not depend upon it establishing that the CSP against which it seeks such relief has committed an infringement of copyright either by its own acts or by authorising the acts of another person.

31 If the applicant satisfies the Court that the CSP provides access to an online location outside Australia, that the primary purpose of the online location is to infringe, or facilitate the infringement of copyright, and that the online location infringes or facilitates the infringement of the applicant's copyright, then the conditions necessary to permit the Court to grant an injunction will be fulfilled.

32 It is not necessary for the applicant to establish any element of knowledge or intention on the part of a CSP for the applicant to obtain relief against it under s 115A. Although the CSP's knowledge might be relevant to the exercise of the Court's discretion in a particular case, the scheme of s 115A, as the Revised Explanatory Memorandum makes clear, is designed to avoid the kind of factual inquiries into matters of the kind undertaken in a proceeding taken against a CSP for copyright infringement based upon "authorisation": see *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42; *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380.

33 The relief that may be granted under s 115A consists of an injunction against a CSP requiring it "to take reasonable steps to disable access to the online location." This is the sole relief provided for in s 115A(2) although it is also open to the Court to grant its injunction conditionally or by the imposition of terms requiring the applicant, for example, to indemnify (in whole or part) a CSP against whom the injunction is sought, or to provide security for a CSP's costs of complying with an injunction granted pursuant to s 115A. The Revised Explanatory Memorandum gives an example (at [42]) of an order requiring that an appropriate indemnity or undertaking be provided by a party who obtains an injunction under s 115A(2) of the Act.

34 There are also other statutory provisions found in the *Federal Court of Australia Act 1976* (Cth) ("the Federal Court Act") that enable ancillary orders to be made including, generally, s 23 and, specifically with respect to costs, s 43. Section 23 of the Federal Court Act would enable the Court in a proceeding brought under s 115A to make other orders ancillary or incidental to any injunctive relief granted under that section. Section 43 of the Federal Court Act also confers on the Court power to award costs in all proceedings before the Court subject to some exceptions that are not relevant to proceedings under s 115A of the Act. However, s 43 must be read subject to s 115A(9) of the Act which provides, in substance, that a CSP is not liable for any costs in a proceeding under s 115A unless it enters an appearance and takes part in the proceeding.

Specific requirements of section 115A(1)

35 It is now necessary to refer in more detail to the specific requirements of s 115A(1). The first point to note is that the language of the chapeau makes clear that the Court may only grant the relevant injunctive relief if it is satisfied as to the existence of the matters referred to in s 115A(1) paras (a), (b) and (c) which I shall refer to as "the s 115A(1) requirements". Whether the Court

proceeds to grant an injunction, in circumstances where the s 115A(1) requirements are satisfied, will depend on whether it determines that it is appropriate to do so in the circumstances of the particular case.

Section 115A(1)(a) — "a carriage service provider provides access to an online location outside Australia"

36 Section 10 of the Act provides that "carriage service provider" has the same meaning as in the *Telecommunications Act 1997* (Cth) ("the Telco Act"). Section 87(1) of the Telco Act states:

> 87 Carriage service providers
>
> Basic definition
>
> (1) For the purposes of this Act, if a person supplies, or proposes to supply, a listed carriage service to the public using:
>
> (a) a network unit owned by one or more carriers; or
>
> (b) a network unit in relation to which a nominated carrier declaration is in force;
>
> the person is a carriage service provider.

37 Section 7 of the Telco Act provides that carriage service means "a service for carrying communications by guided and/or unguided electromagnetic energy." A "listed carriage service" is defined in s 16(1) of the Telco Act to include a carriage service between a point in Australia and one or more points in Australia. It was not disputed that each of the respondents is a CSP as defined in s 87(1) of the Telco Act.

38 The requirement in s 115A(1)(a) that a CSP provides access to "an online location outside Australia" constitutes an important limitation on the power of the Court to make an order under s 115A(2). This limitation may reflect an assumption that other provisions of the Act provide copyright owners with adequate remedies in respect of online locations situated within Australia that have, as their primary purpose, copyright infringement or the facilitation of copyright infringement.

39 Exactly the same electronic information (eg webpage content) may be made available from more than one online location. It therefore cannot be assumed that because the information available from a number of different Domain Names, URLs or IP Addresses appears to be, or is, exactly the same, that the information is necessarily made available from the same online location.

40 This is a matter of some importance given the requirements of s 115A(1) which, by implication at least, may limit the availability of relief under s 115A(1) to situations in which (inter alia) the online location is situated outside Australia. At first glance, s 115A appears not to enable an order to be made requiring a CSP to disable access to a proxy server located in Australia even though it is a mere conduit for communications between another online location situated outside Australia and Internet users in Australia. Whether s 115A could be invoked in respect of a proxy server in such circumstances may depend, perhaps, upon whether it could be said that the CSP provides access to the primary server notwithstanding the interposition of the proxy server. It is not necessary to decide this question in the present proceedings because I am satisfied that the proxy servers referred to in the evidence are all situated outside Australia.

41 There is also a question which I need to address arising out of the use of the

present tense ("provides access") in s 115A(1)(a). A similar question arises with respect to s 115A(1)(b) which is also expressed in the present tense ("infringes or facilitates"). I will return to this topic shortly.

Section 115A(1)(b) — "the online location infringes, or facilitates an infringement of, the copyright"

42 Section 86 of the Act specifies the exclusive rights of the owner of copyright in a cinematograph film. It provides:

> For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a cinematograph film, is the exclusive right to do all or any of the following acts:
>
> (a) to make a copy of the film;
>
> (b) to cause the film, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;
>
> (c) to communicate the film to the public.

43 Definitions of "communicate" and "to the public" are contained in s 10 of the Act. The latter is defined to mean "to the public within or outside Australia". The word "communicate" is relevantly defined to mean:

> … make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter …

44 Section 22(6) to (6A) of the Act provides:

> (6) For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.
>
> (6A) To avoid doubt, for the purposes of subsection (6), a person is not responsible for determining the content of a communication merely because the person takes one or more steps for the purpose of:
>
> (a) gaining access to what is made available online by someone else in the communication; or
>
> (b) receiving the electronic transmission of which the communication consists.

45 Section 101 relates to the infringement of copyright in subject-matter other than works, which includes cinematograph films and sound recordings. Section 101(1) provides that, subject to the Act, copyright is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorises the doing in Australia of, any act comprised in the copyright. Section 101(1A) includes a list of factors that must be taken into account in determining whether or not a person has "authorised the doing" of a relevant act.

46 It is apparent from these provisions that acts of infringement are acts of persons. An inanimate object or an online location (such as a website) cannot itself infringe copyright under s 101(1) though it may facilitate an infringement of copyright. To the extent s 115A(1)(b) refers to an online location that "infringes copyright" it may be understood as referring to acts comprised within the copyright as defined, in the case of cinematograph films, in s 86 of the Act. Thus, an online location will infringe copyright in a cinematograph film in the sense described in s 115A(1)(b) if the online location performs any of the acts referred to in s 86 without the licence of the copyright owner. These include the act of making available online, or electronically transmitting, a copy of the film.

It necessarily follows that s 115A(1) permits the grant of an injunction in circumstances where it is impossible to say who is responsible for operating the online location or determining the content of any material made available online at the online location.

47 Even if the online location does not itself infringe copyright, the requirements of s 115A(1)(b) may be satisfied if the online location "facilitates" an infringement of copyright. The language used is deliberately broad. The word "facilitate" means "to make easier or less difficult; help forward (an action or process etc)": *Macquarie Dictionary* (6th ed, 2013) at p 525. In determining whether an online location facilitates the infringement of copyright, the Court will seek to identify a species of infringing act and ask whether the online location facilitates that act by making its performance easier or less difficult. An online location may both infringe and facilitate the infringement of copyright by making an electronic copy of a work or other subject matter available online for transmission to users. But it may also facilitate the infringement of copyright merely by making it easier for users to ascertain the existence or whereabouts of other online locations that themselves infringe or facilitate the infringement of copyright.

Section 115A(1)(c) — the "primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia)"

48 The requirement that the online location have as its primary purpose copyright infringement or the facilitation of copyright infringement provides an important check on the operation of s 115A. Thus, the fact that a particular website makes some unlicensed copyright material available online or is routinely used by some users to infringe copyright does not establish that the primary purpose of the website is to infringe or facilitate the infringement of copyright. The s 115A(1)(c) requirement is explained in the Revised Explanatory Memorandum as follows:

> 38. The Court must also be satisfied that the primary purpose of the online location is to either infringe copyright, or facilitate the infringement of copyright generally. This is an intentionally high threshold for the copyright owner to meet as a safeguard against any potential abuse. For example, the "primary purpose" test would prevent an injunction to disable access to an art gallery website operated outside of Australia that may contain an unauthorised photograph. Thus, a website such as www.youtube.com or www.blogger.com would not prima facie satisfy the test as being an online location that infringes or facilitates infringement of copyright. Technology and technological change is not to be chilled or targeted by this amendment.
>
> 39. The primary purpose test would also prevent an injunction to block an online location operated overseas that provides legitimate copyright material to individuals within another geographic location, but are not licensed to distribute that copyright material in Australia. For example, the United States iTunes store does not operate with the primary purpose of infringing copyright or facilitating the infringement of copyright and therefore access to this online location would not be disabled under an injunction. The test is also not intended to capture Virtual Private Networks (VPNs) that are promoted and used for legitimate purposes, or merely used to access legitimate copyright material distributed in a foreign

> geographic market. VPNs have a wide range of legitimate purposes and have no oversight, influence or control over their customers' activities.
>
> 40. *The primary purpose test would direct the Court to consider the principal activity for which the online location exists and the principal intention of users of that online location.* Purpose may be distinct from motive. An online location may have the "primary purpose" of infringing, or facilitating the infringement of copyright even if the operator of the location derives a commercial advantage or profit from the operation of the location. For example, where an online location has copyright infringement as the principal activity for which it exists and the principal reason for attracting visits to the online location, the fact that the motive or incentive of its operator is to draw profits from advertising revenue does not mean that its primary purpose is to profit from advertising rather than to infringe copyright.

(Emphasis added.)

49 The purpose of the online location may be ascertained by a consideration of the use that is or may be made of it. If the Court is satisfied that the principal activity for which the online location is used or designed to be used is copyright infringement or the facilitation of copyright infringement, then it will be open to conclude that the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright.

Temporal issues

50 The supplementary evidence raises an issue in relation to the time at which the Court must be satisfied of the matters referred to in s 115A(1) of the Act. There are three obvious possibilities: (1) the date of commencement of the proceeding; (2) the date of the hearing and (3) the time of granting the injunction. In my opinion the Court must be satisfied of the various matters referred to in s 115A(1) of the Act at the time of granting the injunction. If the Court was, at the time of giving consideration to the making of an order under s 115A(1), not so satisfied, then it should not grant the injunction.

51 Some statutory provisions, expressed in what is sometimes referred to as the continuous present, have been construed so as to require the existence of a continuum. For example, s 1(2) of the *Children and Young Persons Act 1969* (UK) provided that the juvenile court could make a care order if it was of the opinion that any one of three conditions were satisfied including that a child's "health *is being* avoidably impaired or neglected" (emphasis added). The meaning of this provision was considered by the House of Lords in *Re D (a minor)* [1987] AC 317. Lord Goff said at 350:

> The words "is being" are in the continuous present. So there has to be a continuum in existence at the relevant time […]. In cases under the subsection, this may not be established by proof of events actually happening at the relevant time. In the nature of things, it may well have to be established, as continuing at that time, by evidence that (1) the relevant state of affairs had existed in the past, and (2) there is a likelihood that it will continue into the future.

52 However, in my view, the words "provides", "infringes" and "facilitates" as they appear in s 115A(1)(a) and (b) are neutral in temporal meaning in that they may apply to past as well as to present conduct. Part V of the Act contains other instances of such usage: see, for example, s 116B(1)(a) ("a person receives"), s 132AC(1)(a) ("engages in conduct"), s 132(1)(a) ("makes an article").

53 As previously mentioned, the term "online location" is not defined. In my

view it can include a location, such as a website, that was online at the time the relevant proceeding was commenced but is not online either at the time of the hearing or at the time of granting the injunction. The Revised Explanatory Memorandum recognises that s 115A is "deliberately prescriptive" and that it provides a "precise response to a specific concern raised by copyright owners." However, when interpreting s 115A it is necessary to consider the purpose of the provision, which is to provide an efficient means of blocking access to online locations operated outside Australia that have as their primary purpose the infringement, or the facilitation of the infringement, of copyright. Too narrow a reading of the language used in s 115A(1) would deprive the section of much of its usefulness, eg if it were construed so as to allow an operator to avoid an injunction simply by taking a website off-line temporarily for a period of days, weeks or months during the course of the relevant proceeding.

54 For all these reasons I do not consider that s 115A(1) requires that the Court be satisfied, at the time of granting an injunction, that the respondent CSP is providing access to the online location at that moment in time or that the online location is, at the moment of granting the injunction, infringing or facilitating the infringement of copyright. Of course, the fact that the online location is not online or has been otherwise disabled by the time of the hearing, or at any other time at which consideration is given to the making of an order s 115A(1), may be a matter relevant to the exercise of the Court's discretion.

Section 126

55 The applicants in both proceedings relied upon s 126 of the Act in relation to the proof of subsistence and ownership of copyright in cinematograph films being either motion pictures or television programs in which they claimed to own copyright. Section 126, which is in Pt V, Div 4 of the Act, provides:

> 126 Presumptions as to subsistence and ownership of copyright
>
> In an action brought by virtue of this Part:
>
> (a) copyright shall be presumed to subsist in the work or other subject-matter to which the action relates if the defendant does not put in issue the question whether copyright subsists in the work or other subject-matter; and
>
> (b) where the subsistence of the copyright is established — the plaintiff shall be presumed to be the owner of the copyright if he or she claims to be the owner of the copyright and the defendant does not put in issue the question of his or her ownership.

56 Part V, Div 4 of the Act also includes various other provisions creating presumptions that may apply where the defendant puts in issue the question of subsistence or ownership of copyright.

The Roadshow proceeding

The Roadshow films

57 The second to eighth applicants in the Roadshow proceeding claim to be the owners of copyright in the following motion pictures and television programs ("the Roadshow films"):

Title	*Copyright Owner*
The Lego Movie	Second applicant
Tron Legacy	Third applicant

Title	*Copyright Owner*
Cinderella	Third applicant
Spy	Fourth applicant
Kingsman: The Secret Service	Fourth applicant
Transformers: Age of Extinction	Fifth applicant
The Gambler	Fifth applicant
Spider-Man 2	Sixth applicant
This Is The End	Sixth applicant
Jurassic World	Seventh applicant
Straight Outta Compton	Seventh applicant
The Big Bang Theory: Season 7, Episode 24	Eighth applicant
Shameless: Season 4, Episode 12	Eighth applicant

58 None of the respondents put either subsistence or ownership of copyright in issue in the Roadshow proceeding nor did any suggest that it was not open to the applicants to rely upon s 126 in a proceeding under s 115A. In my view it is open to the Roadshow applicants to rely upon s 126 in this case. In the absence of any evidence to suggest that the second to eighth Roadshow applicants are not the owners of copyright in the Roadshow films then subsistence and ownership should be taken to be established.

SolarMovie

59 The Roadshow applicants seek orders under s 115A in relation to the following URLs, IP Addresses and Domain Names (which are referred to in their proposed orders in the singular as "the Target Online Location"):

URLs

- https://www.solarmovie.ph;
- https://www.solarmovie.is;
- http://www.solarmovie.com; and
- http://www.solarmovie.eu;

("the SolarMovie URLs")

IP Addresses

- 185.47.10.11;
- 205.204.80.87;
- 188.92.78.142; and
- 68.71.61.168;

("the SolarMovie IP Addresses")

Domain Names

- www.solarmovie.ph;
- www.solarmovie.is;
- www.solarmovie.com; and
- www.solarmovie.eu.

("the SolarMovie Domain Names").

60 The evidence relied upon by the Roadshow applicants included an affidavit of Mr Aaron Herps who is the Senior Manager, Global Content Protection for the Motion Picture Association American Inc ("MPAA"), an association that represents the interests of the motion picture industry by (inter alia) seeking to promote and protect its members' (which includes the third to eighth applicants)

intellectual property. He has technical qualifications in computing and telecommunications engineering and experience in relation to website blocking.

61 In February 2016 Mr Herps connected a computer to the Internet using a number of carriage services provided by Telstra, Optus, M2 and TPG and entered into the Internet browser the SolarMovie URLs https://www.solarmovie.is, http://www.solarmovie.com and http://www.solarmovie.eu. In each case Mr Herps was automatically directed to the URL, http://www.solarmovie.ph.

62 Mr Herps conducted a DNS query to determine the IP Addresses of each of the SolarMovie URLs. By this means he established the IP Addresses for each of the SolarMovie URLs which I have referred to above as the SolarMovie IP Addresses. Mr Herps then conducted a search in respect of each of the SolarMovie IP Addresses using MaxMind to ascertain the country code, geographical location, postal code, co-ordinates and ISP associated with each of those IP Addresses. By this means Mr Herps established that each of the SolarMovie IP Addresses is located outside Australia. In particular, he established that IP Addresses 68.71.61.168 and 205.204.80.87 were located in Canada and IP Addresses 185.47.10.11 and 188.92.78.142 were located in Latvia. In oral evidence given at the hearing Mr Herps said that he believed there were four different servers currently hosting the SolarMovie site in two different countries (presumably Canada and Latvia).

63 Mr Herps also performed a search of the SolarMovie Domain Names using the Whois service. This search indicated the Domain Name www.solarmovie.com, a generic "top level" domain, is ultimately administered by a US company. The other SolarMovie Domain Names are registered in Iceland (www.solarmovie.is), the European Union (www.solarmovie.eu) and the Philippines (www.solarmovie.ph).

64 Mr Herps also carried out an exercise using Google Chrome to determine whether there were any other online locations located at any of the SolarMovie IP Addresses apart from the SolarMovie website. He did this by typing into the address bar of Google Chrome each of the SolarMovie IP Addresses which prompted the Internet browser to generate a "security error" identifying a mismatch between the IP Address entered into the web browser and what the Internet server was itself identifying as "solarmovie.is". According to Mr Herps' evidence, if other websites had been located on that sever or at that IP Address, he would have received a message which indicated that there was more than one website available on that server or for that IP Address.

65 Mr Herps' evidence establishes that the SolarMovie website provided public access to a large library of motion pictures and television programs. In particular, his evidence includes details of an analysis of the SolarMovie website undertaken by MPAA staff which indicates that there were, as at 1 February 2016, 15,644 motion pictures and 1,768 television series (138,503 episodes) located at the SolarMovie website. Mr Herps was able to access some of these after creating a user account which required him to provide a valid email address, a login ID and a password, and activating his account by means of a link sent to his email address. His evidence makes clear that becoming a registered user is a simple process which requires nothing more than a computer with an Internet connection, a web browser and a valid email address.

66 Mr Herps was also able to use search facilities on the SolarMovie website to search for particular motion pictures and television series. He was able to search

for individual titles using a free text search tool or to browse through various categories of movie titles including "New Movies", "HD Movies", "Most Popular", "Latest" and "Coming Soon" and various categories of television programs including "New Episodes", "Most Popular", "Latest" and "Coming Soon". A particular motion picture or television program could then be selected for viewing by clicking on a hyperlink leading to a webpage on which a "Play Now" button appeared. By clicking on this button the viewer was directed to a new webpage ("the streaming page"). Clicking another "play" button on the streaming page activated an embedded player which then streamed the motion picture or television program to the user's computer where it could be viewed on the computer's screen. Although streaming causes the motion picture or television program to be displayed on the user's computer screen, it does not result in the download of a permanent copy.

67 Using the search facility on the SolarMovie website, Mr Herps was able to locate and stream for viewing on his computer screen each of the Roadshow films. Though he did not view each film in its entirety, it is apparent from his evidence that each of them was made available online at the SolarMovie website from which they could be streamed.

68 I am satisfied that the motion pictures and television programs catalogued on the SolarMovie website were available for streaming to computers in Australia with an Internet connection and a web-browser operated by a registered user.

69 I am also satisfied that the primary purpose of the SolarMovie website was to infringe or to facilitate the infringement of copyright in cinematograph films.

The supplementary evidence

70 The supplementary evidence relating to the SolarMovie website consisted of further affidavits by the Roadshow applicants' solicitor, Mr Stewart, which indicated that the SolarMovie website was not accessible via any of the SolarMovie URLs, the SolarMovie Domain Names or the SolarMovie IP Addresses as at 22 July 2016 and until at least 14 November 2016 when the last of Mr Stewart's affidavits was sworn.

71 There is nothing before me to explain why the SolarMovie website was taken off-line. Nor is there any evidence to suggest that the present state of affairs as described in the supplementary evidence is permanent or that the operators of the SolarMovie website will not re-activate it at some time in the near future.

Should an injunction be granted?

72 I am satisfied that the SolarMovie website is situated on servers located outside Australia to which each of the respondents provide access.

73 Evidence from Mr Herps establishes that each of the Roadshow films was made available online at the SolarMovie website without the licence of the copyright owner. I am therefore satisfied that by making available online each of the Roadshow films to the public without the licence of the owner of the copyright in such films, the SolarMovie website both infringed and facilitated the infringement of the Roadshow copyright owners' copyright in the Roadshow films.

74 I am also satisfied that the primary purpose of the SolarMovie website is and was, at the time the Roadshow proceeding was commenced, to infringe or facilitate the infringement of copyright. In particular, I am satisfied that the SolarMovie website was designed and operated to facilitate easy and free access

to cinematograph films made available online, something which, I would infer, has almost certainly occurred without the permission of the owners of the copyright in such films.

75 On the matter of discretion, I have had regard to the matters referred to in s 115A(5). It is apparent that the SolarMovie website positively encouraged the infringement of copyright on what I am satisfied is likely to be a widespread scale. These activities involved a flagrant disregard for the Roadshow copyright owners' rights, the rights of other copyright owners whose films were made available online at the SolarMovie website, and copyright generally. Blocking orders have already been made in relation to many of the SolarMovie sites in other jurisdictions.

76 I have also had regard to the supplementary evidence. The fact that the SolarMovie website is, or at least appears to have been, off-line since July this year, is a matter relevant to the exercise of the discretion to grant relief under s 115A. However, in the circumstances, I am satisfied that there is a substantial risk that this inactivity is merely temporary and that it does not warrant refusing the Roadshow applicants' relief under s 115A to guard against the possibility that the website will be re-activated at some time in the near future.

77 In all the circumstances I am satisfied that an injunction should be granted in the Roadshow proceeding. I will say more about the terms of the injunction and related orders later in these reasons.

The Foxtel proceeding

The Foxtel programs

78 Foxtel claims to be the owner of copyright in the following television programs ("the Foxtel programs"):

- Wentworth (Season 3);
- Open Slather;
- A Place to Call Home (Season 3); and
- Real Housewives of Melbourne (Season 2).

79 None of the respondents put either subsistence or ownership of copyright in issue in the Foxtel proceeding nor did any suggest that it was not open to the applicant to rely upon s 126 in a proceeding under s 115A of the Act. In the absence of any evidence to suggest that Foxtel is not the owner of copyright in the Foxtel programs then subsistence and ownership should be taken to be established.

80 Foxtel seeks orders under s 115A in relation to 61 URLs, IP Addresses and Domain Names which are identified in Appendix A to these reasons. The relevant Domain Names, IP Addresses and URLs in respect of which such relief is sought are arranged into the following four groups:

- The Pirate Bay (Group A);
- Torrentz (Group B);
- TorrentHound (Group C); and
- IsoHunt (Group D).

The Pirate Bay (Group A)

81 When Mr Carson commenced his investigation of The Pirate Bay ("TPB") using a number of popular web browsers to search for "piratebay", his searches returned a reference to the URL "https://thepiratebay.la" which, according to Mr Carson, was one of several TPB sites that arose after the suspension of the

TPB's ccLTD for Sweden ("se"). However, by the time he finalised his expert report the primary site for TPB could be found at the URL "https://thepiratebay.se". This was the site to which Mr Carson was directed when conducting his subsequent Internet searches using popular web browsers and when accessing the Internet via the Internet services provided by Optus and Telstra.

82 Mr Carson identified in his expert report a number of secondary sites for TPB that appear to act as TPB proxy sites that pass requests through to the primary site for TPB. He was able to access these after referring to consolidated lists of TPB secondary sites made available at various TPB sites.

83 Mr Carson was able to identify these proxy sites by using popular web browsers to search for "piratebay" together with additional terms such as "proxy" or "proxies". He explained in his report that there are many such sites and that these can fluctuate between an active and inactive state.

84 The Domain Names and IP Addresses for each of the TPB secondary sites are identified in Appendix B to Mr Carson's report together with details of the:

- *Domain Name*: the website domain name, eg thepiratebay.se;
- *IP Address*: the IP Address active for the site, for the inactive TPB Sites described Mr Carson included the last known IP Address he could identify;
- *IP Owner*: the entity allocated the IP Address;
- *IP Location*: the geographic location of the entity allocated the IP Address searches and traceroute searches;
- *Domain Owner*: the entity assigned ownership of the domain name for the website; and
- *Domain Location*: the geographic location of the entity owning the domain name.

85 The Domain Name and IP Address for the primary and each of the secondary sites (37 sites in total including six which Mr Carson describes as inactive) are reproduced and numbered 1 to 37 in Appendix A, Group A, to these reasons. According to Mr Carson's evidence, Domain Names numbered 20, 25-28 (inclusive) and 31 were inactive at the time he prepared his report.

86 Virtually all of the Group A IP Addresses referred to in Mr Carson's Appendix B were, as at 5 February 2016, allocated to CloudFlare. The only exception to this is one of the inactive sites (20) which is shown to have an IP Address allocated to Search Guide Inc. In his report, Mr Carson expresses the opinion that it is highly likely that each of the primary TPB websites and each of the secondary TPB websites are located outside Australia. His opinion on this issue is largely based upon the involvement of CloudFlare which is based in the United States.

87 Mr Carson is also of the opinion that the primary purpose of each of the TPB sites is to provide users with free access to copyright material including motion pictures, television programs and computer software. This includes recently released motion pictures and television programs many of which he says are not yet available in Australia.

88 Mr Carson describes in his report how he accessed an electronic copy of an episode of the television program known as "Wentworth" using a computer on which uTorrent (a BitTorrent client) was installed. He performed a search using a web browser for "the pirate bay" which produced a search result headed

"Download music, movies, games, software! The Pirate Bay" together with a link to the URL https//:thepiratebay.se/". By clicking on this link Mr Carson was able to connect to the TPB website. He then searched for "wentworth" using a search facility at the TPB website. This search generated various search results consisting of various magnet links associated with various torrent files including torrent files used to download episodes of Wentworth, Season 3. The download information on the user's screen which is reproduced in Mr Carson's report includes details of the time and date on which torrent files were uploaded. This suggests that the TPB site allows users to upload torrent files which may then be accessed by other users.

89 The evidence includes an affidavit made by Ms Blunt, a lawyer engaged by the solicitors for Foxtel, covering a number of matters including searches she undertook of various websites and attaching various screenshots which she took. At the webpage https://thepiratebay.se/about the following statement appeared:

> The Pirate Bay is the worlds largest bittorrent indexer. Bittorrent is a filesharing protocol that in a reliable way enables big and fast file transfers.
>
> No torrent files are saved on the server. That means no copyrighted and/or illegal material are stored by us. It is therefore not possible to hold the people behind The Pirate Bay responsible for the material that is being spread using the site.
>
> The Pirate Bay was started by the swedish anti copyright organization Piratbyran in the late 2003, but in October 2004 it separated became run by dedicated individuals. In 2006 the site changed its ownership yet again. Today the site is run by an organisation rather than individuals, though as a non-profit. The organisation is registered in the Seychelles and can be contacted using the contact form.
>
> Using the site is free of charge for individuals however there are some restrictions. Please see the policy page.

(Errors original.)

90 Ms Blunt's screenshots also show catalogued indexes of many popular and well-known sound recordings, motion pictures, television programs and computer software (including well-known business applications and popular games). The television programs include episodes of Wentworth (Seasons 1, 2 and 3), Open Slather (Season 1), A Place to Call Home (Seasons 1, 2 and 3) and Real Housewives of Melbourne (Seasons 1 and 2). I am satisfied that each of these television programs, copyright in which is in some cases owned by Foxtel, can be downloaded by a BitTorrent client via a magnet link and/or associated torrent file located on the primary website found at the URL https:// thepiratebay.se and, I infer, via various secondary sites that are identified in Mr Carson's report. There is also evidence from Mr Crowley, the Director of Content and Movies at Foxtel, which satisfies me that the Foxtel programs were made available online without the licence of the copyright owner.

91 Ms Blunt's evidence also shows that blocking orders have been made in relation to various TPB sites by orders of courts in various jurisdictions, including in the United Kingdom.

92 Further evidence was provided by Mr Southey, the Technology Development Manager – Security and Compliance at Foxtel. It is not necessary to refer to all of his evidence which includes a large number of screenshots recording steps taken by him when investigating various TPB sites in January 2016 using internet services provided by Telstra, Optus and TPG. His evidence is consistent

with other evidence to which I have referred. It also demonstrates that the TPB sites investigated by him do not include any effective facility which may be used to communicate with the operator or to deliver a "take down" notice.

Should an injunction be granted?

93 As I have previously mentioned, the TPB sites in relation to which Foxtel seeks an order under s 115A include what Mr Carson described as "inactive sites" being those TPB Domain Names, IP Addresses and URLs that he established either did not resolve to a website at all or resolved to a website that appeared to be unrelated to the active websites.

94 Each of the inactive sites has a Domain Name that includes the name "thepiratebay" and, with one exception, is also shown to be associated with an IP Address allocated to CloudFlare. The one exception is the Domain Name "thepiratebay.am" which uses the country code TLD for Armenia, and an IP Address allocated to a corporation called Search Guide Inc. Although the Domain Names for the inactive sites and the CloudFlare involvement give rise to a strong suspicion that they have been used to infringe or facilitate the infringement of copyright, I do not think this provides a sufficient basis for holding that the s 115A requirements have been satisfied. There is simply no evidence before me to show that these particular online locations have ever infringed or facilitated the infringement of copyright.

95 It follows that I will not grant relief in relation to the inactive TPB sites. Of course, it is open to Foxtel to apply for a further injunction or an extension of any injunction that is granted in relation to the other TPB sites (including the inactive sites), at a later date in the event there is a relevant change in circumstances.

96 With respect to the primary site and each of the active secondary sites, I am satisfied that it is appropriate to grant an injunction under s 115A. In each case I am satisfied of the matters referred to in s 115A(1). Each site, which I am satisfied is located outside Australia, facilitates the infringement of copyright, including Foxtel's copyright in the Foxtel programs, which can be downloaded using magnet links found there. The fact that copyright material may not be stored at any of the TPB sites does not lead to any different conclusion. The TPB sites provide BitTorrent clients with what can be likened to a trigger which, when pulled, causes the swarm to download copyright material (whether it be a film, a sound recording or a computer program) to a computer running a BitTorrent client.

97 I am also satisfied that the primary purpose of each of the active TPB sites is to facilitate the infringement of copyright. This is clear from the statements appearing on the primary site (to which I have referred) and the nature and extent of the copyright material that is available for download using the magnet links and/or torrent files found there.

98 In relation to the matter of the discretion, I am satisfied that the facilitation of the infringement of copyright is flagrant, and that the operator of the TPB sites has shown a blatant and wilful disregard for the rights of copyright owners. As I have also mentioned, blocking orders have already been made in relation to many of the TPB sites in other jurisdictions. I am satisfied that it is appropriate to grant an injunction under s 115A in respect of each of the active TPB sites.

Torrentz (Group B)

99 At the time Mr Carson completed his expert report the website known as

"Torrentz" had its primary site located at http://torrentz.eu. This is the site to which Mr Carson was directed when he conducted searches for "torrentz" using well-known web browsers.

100 The secondary Torrentz sites, which are numbered 2-11 (inclusive) in Appendix A, Group B, all have Domain Names that refer to "torrentz", "torrentzmirror" or the abbreviation "tz".

101 Appendix B to Mr Carson's report shows that the primary site, http://torrentz.eu, has an IP Address allocated to CloudFlare and that the owner of the Domain Name torrentz.eu is "Majewski Karol". The owner of the IP Address associated with each of the secondary sites is an entity known as Inventoris Sp. z o. o which appears to be based in Poland. "Majewski Karol" is also shown as the owner of the Domain Name for each of the secondary sites except for two.

102 Mr Carson was able to use the search engine found at the primary site to download a copy of Wentworth, Episode 3, Series 3. He inspected each of the secondary sites and was able to establish that they also provided a search engine which enabled him to locate the relevant link for the same episode of Wentworth indicating that it was also accessible via the secondary site.

103 Ms Blunt's evidence includes copies of screenshots taken by her of various webpages at the Torrentz sites. The screenshots of the primary site includes statements indicating that it is a free, fast and powerful search engine that combines results from dozens of other search engines indexing 32,487,111 active torrent files. There are also statements indicating that Torrentz does not store copyright material, that it does not host or make available torrent files, and that it merely acts as a search engine that can be used by members to link to other search engines that might host torrent files.

104 When Ms Blunt used Torrentz to search for "Wentworth" a listing of torrent files that could be used to trigger the download to a BitTorrent client of various episodes of Wentworth appeared including episodes from Seasons 1, 2 and 3. Her searches for "A Place to Call Home" and "Real Housewives of Melbourne" produced similar listings of episodes for each of those television series. There is also evidence from Mr Crowley who conducted searches for those television programs and "Open Slather". All of these searches returned links to torrent files which could be used by a BitTorrent client to download copies of many different episodes.

105 The webpages reproduced in Ms Blunt's evidence also include a list of sites in the Torrentz index. The list includes references to about 26 other sites including "thepiratebay.se" (64,886 torrents) "thepiratebay.org" (3,363,945 torrents), "torrenthound.com" (8,321,919 torrents) and "isohunt.to" (6,159,571 torrents). It can be inferred that the motion pictures and television programs that could be downloaded from swarms using magnet links and/or torrent files available at these other sites were accessible using links appearing on the Torrentz sites.

106 There is also evidence from Ms Blunt that indicates that a Torrentz website was the subject of a blocking order made in the United Kingdom in respect of the website located at the Domain Name www.torrentz.cd, although that particular Domain Name is not one of those in respect of which relief is sought in this case.

107 The supplementary evidence indicated that, as at 10 November 2016, the Torrentz sites were still online and accessible. However, the home page of each

such site included a statement "Torrentz *was* a free, fast and powerful metasearch engine [etc]" (my emphasis) and a farewell message. In addition, the search function, though still appearing on the page, was not returning any results in response to search requests.

Should an injunction be granted?

108 In the case of the Torrentz sites I am satisfied that the requirements of s 115A(1) are satisfied. In particular, I am satisfied that each of them is located outside Australia, and that they have facilitated the infringement of copyright, including the applicant's copyright, by providing links to torrent files located on other sites, including TPB, which infringe or facilitate the infringement of copyright. This has enabled BitTorrent clients to download copyright material, including many well-known films and television programs, made available online for free and unrestricted distribution, without the permission of copyright owners.

109 I am satisfied that the primary purpose of the Torrentz sites is to facilitate the infringement of copyright.

110 I have already considered the meaning of the words used in s 115A(1)(a) and (b) from the temporal perspective when discussing the supplementary evidence relating to the SolarMovie sites. The fact that the supplementary evidence suggests that the search engine on the Torrentz sites is not currently enabled does not preclude the making of an order under s 115A in respect of the Torrentz sites.

111 On the question of discretion, I am satisfied that the facilitation of copyright infringement by the Torrentz sites was flagrant, and that the operator has shown a blatant disregard for the rights of copyright owners. I am not satisfied that the search facilities on the Torrentz sites have been permanently disabled or that the current state of affairs as disclosed in the supplementary evidence is anything other than temporary. In the circumstances, I am satisfied that it is appropriate to grant an injunction under s 115A in respect of each of the Torrentz sites.

TorrentHound (Group C)

112 At the time Mr Carson prepared his report, the primary site for TorrentHound was www.torrenthound.com which is the site to which he was directed when conducting searches for TorrentHound using popular web browsers. His investigations disclosed the existence of six secondary sites. The Domain Names, IP Addresses and URLs for the primary and each of the secondary TorrentHound sites appear in Appendix A, Group C.

113 At each of the TorrentHound sites, Mr Carson was able to use the search facility provided to locate a magnet file for an episode of Wentworth.

114 Mr Carson's report indicates that the owner of the IP Addresses for five of the TorrentHound secondary sites is CloudFlare. Other ownership information relating to the TorrentHound sites, including the primary site, reveal connections with Sweden, Estonia and the United Kingdom. All such information suggests that each of the TorrentHound sites is located outside Australia.

115 Screenshots of searches undertaken by Ms Blunt at the TorrentHound primary site indicate that it included many magnet links to torrent files for popular motion pictures and television programs including episodes of Wentworth, Open Slather, Real Housewives of Melbourne and A Place to Call Home. At least some of these programs appear to be available by direct download from the site without any need to use a BitTorrent client.

116 Mr Southey's evidence also shows that many different copies of the Foxtel programs were available for download free of charge either directly or via magnet links on the TorrentHound primary site as well as many popular motion pictures such as The Revenant, The Martian, The Intern and The Good Dinosaur. I am satisfied that all of these were being made available for download (whether directly or using a BitTorrent client) without the permission of any of the copyright owners.

117 The supplementary evidence indicated that, as at 10 November 2016, it was still possible to use the search facility to locate and download Foxtel programs from the site torrenthound.to (ccTLD Tonga).

Should an injunction be granted?

118 In the case of the TorrentHound sites I am satisfied that the requirements of s 115A(1) are satisfied. I am satisfied that each of the sites is an online location situated outside Australia that has as its primary purpose the facilitation of copyright infringement. Blocking orders have already been made in relation to many of the TorrentHound sites in other jurisdictions. I am also satisfied that the TorrentHound sites have facilitated the infringement of copyright, including Foxtel's copyright, on a widespread scale, in flagrant disregard of the rights of copyright owners generally. I am satisfied that an injunction should be granted under s 115A in respect of the TorrentHound sites.

IsoHunt (Group D)

119 Mr Carson identified the primary site for IsoHunt as that found at http://isohunt.to which is the URL to which he was directed when searching for IsoHunt using popular web browsers. CloudFlare appears to be the owner of the IP Addresses for the primary site. The primary site and each of the secondary sites appear to be located outside Australia. At each of the IsoHunt sites Mr Carson was able to use the search facility provided to locate the same magnet file as was available at each of the TorrentHound sites.

120 Ms Blunt's evidence includes screenshots of the IsoHunt website accessible at isohunt.to which show large numbers of torrent files on the site facilitating free and unrestricted access to popular television programs and motion pictures including The Walking Dead, The Big Bang Theory, Homeland, Three Kings, Lost in Translation, Changeling, LA Confidential, Die Hard, Blue Lagoon and many more. Her screenshots also show torrent files for Wentworth, Open Slather, A Place to Call Home and Real Housewives of Melbourne.

121 Ms Blunt's evidence shows that an order was made by the High Court of Justice in England on 19 November 2014 requiring various ISPs to take steps to block customers' access to the website accessible at isohunt.to known as IsoHunt.

122 Mr Southey's evidence shows that the IsoHunt sites provide a facility that enables users to receive a notification when particular content which they are interested in is added and available for viewing. The primary site includes the following statements:

> New category tags and TV Series. July update.
>
> Yo! Summer is at it's peak and we hope you're having a great time. We are not, because we're working to make Isohunt.to better. Some quick update this month.
>
> Some of you might know that now you can subscribe Movies and TV Shows to get notifications. If not, you can Learn more about Notifications here. We made

> this chart of a new movies that you may want to subscribe. Some of them are in theaters now, some of them will soon be. Subscribe and be the first one to watch them!
>
> […]
>
> We got tags in 4 categories Software Games Books and Music. You asked for 'em and you got 'em. Hope it'll help you to find content better and faster
>
> We added about 40,000 of TV Series! So if you had any problems with finding your favorite show, try again and maybe you're in luck this time.
>
> Now you don't need to search for your favorite content (movies and shows for the moment)! When entering the website you simply will get notifications! Or if you are a busy man, just wait for that email to come and you don't even need to enter the website before the content is uploaded
>
> For Movies you need to choose Any or Good quality you want to get notifications of
>
> With Any you will get content faster but with lower quality + good quality. With Good it takes more time but quality is a lot better
>
> For TV Shows you need to choose.
>
> What specific Season and Episode you want to start follow it Or get notifications of Any uploaded episode.

(Errors original, emphasis omitted.)

Should an injunction be granted?

123 In the case of the IsoHunt sites I am satisfied that the requirements of s 115A(1) are satisfied. I am satisfied that each of the sites is an online location situated outside Australia that has as its primary purpose the facilitation of copyright infringement. I am also satisfied that the IsoHunt sites have facilitated the infringement of copyright, including Foxtel's copyright, on a widespread scale, in flagrant disregard of the rights of copyright owners generally. I am satisfied that an injunction should be granted under s 115A in respect of the IsoHunt sites.

Terms of relief

124 As previously mentioned, the parties were agreed on most matters relating to the form of the injunctive relief that should be granted in the event that the Court was satisfied that these were proper cases for the grant of relief under s 115A of the Act. It is convenient to deal with each of the remaining issues that were not agreed in the sequence in which they are raised in Foxtel's proposed orders. The Roadshow applicants' proposed orders are not materially different except insofar as they define "Target Online Location", "Target URLs", "Target IP Addresses" and "Target Domain Names".

Orders 1 to 7

125 The applicants' proposed orders 1 to 7 are in these terms (after correction of some errors):

> 1. Each respondent must, within 15 business days of these orders, take reasonable steps to disable access to the Target Online Location.
> 2. Order 1 is taken to have been complied with by a respondent if that respondent implements any one or more of the following steps:
>
> (a) Order 1 is taken to have been complied with by a respondent if that respondent implements any one or more of the following steps:

(b) IP Address blocking or re-routing in respect of the Target IP Addresses;

(c) URL blocking in respect of the Target URLs and the Target Domain Names; or

(d) any alternative technical means for disabling access to a Target Online Location as agreed in writing between the applicants and a respondent.

3. If a respondent in complying with order 1 does not implement one of the steps referred to in order 2, that respondent must, within 15 business days of these orders, notify the applicants of the step or steps it has implemented.

4. Each respondent must redirect any communication by a user of its service seeking access to a Target Online Location which has been disabled pursuant to order 1 to a webpage established, maintained and hosted by either:

(a) the applicants, or their nominee, pursuant to order 5; or

(b) that respondent or its nominee.

The applicants' obligations pursuant to orders 5 and 6 only arise if a respondent notifies the applicants that the respondent will redirect a communication pursuant to order 4(a) and for so long as at least one respondent redirects communications to that webpage.

5. The applicants, or their nominee, must establish, maintain and host a webpage which informs users of a respondent's service who have been redirected to the webpage pursuant to order 4 that access to the website has been disabled because this Court has determined that it infringes or facilitates the infringement of copyright.

6. Within 5 business days of these orders, the applicants will notify each of the respondents in writing of the URL of the webpage established, maintained and hosted under order 5 and, if the webpage ceases to operate for any reason, will notify each of the respondents in writing of a different URL that complies with order 5.

7. If, in complying with order 4, a respondent redirects any communication by a user of its service to a webpage established, maintained and hosted by it, that respondent or its nominee must ensure that the webpage informs the user of that respondent's service that access to that the website has been disabled because this Court has determined that it infringes or facilitates the infringement of copyright.

126 There is a minor issue between the applicants and some of the respondents as to whether proposed order 4 should require each respondent to direct communications to a webpage established, maintained and hosted by either the applicants or their nominee or the respondents or their nominee. Telstra submitted that this should be optional rather than mandatory.

127 The Revised Explanatory Memorandum expressly anticipates that the Court might see fit to require the establishment of a landing page at [43]:

> … to ensure that subscribers are informed of the reason that they are unable to access a disabled online location, avoiding the need to contact their CSP for information.

128 It seems to me desirable that either the applicants or the respondents establish and maintain a landing page in accordance with the applicants' proposed orders to which each ISP's customers may be redirected when they attempt to communicate with the blocked sites and which will inform them of the reason why they are unable to establish a connection. If an ISP does not wish to incur

the cost of establishing its own landing page then its customers can be redirected to the webpage established by the applicants pursuant to proposed order 5.

Order 8

129 The applicants' proposed order 8 is in these terms:

> 8. In the event that the applicants have a good faith belief that:
>
> (a) any Target URL, Target IP Address or Target Domain Name which is subject to these orders has permanently ceased to enable or facilitate access to a Target Online Location; or
>
> (b) any Target URL, Target IP Address or Target Domain Name has permanently ceased to have the primary purpose of infringing or facilitating the infringement of copyright,
>
> a representative of the applicants must, within 15 business days of the applicants forming such a good faith belief, notify each respondent of that fact in writing, in which case the respondents shall no longer be required to take steps pursuant to order 1 to disable access to the relevant Target URL, Target IP Address or Target Domain Name that is the subject of the notice.

130 There is agreement in relation to the applicants' proposed order 8. In my view it is an appropriate order to make.

Order 9

131 The applicants' proposed order 9 is in these terms:

> 9. A respondent will not be in breach of order 1 if it temporarily declines or temporarily ceases to take the steps ordered in order 1 (either in whole or in part) upon forming the view, on reasonable grounds, that suspension is necessary to:
>
> (a) maintain the integrity of its network or systems, or functioning of its blocking system;
>
> (b) upgrade, troubleshoot or maintain its blocking system;
>
> (c) avert or respond to an imminent security threat to its network or system; or
>
> (d) ensure the reliable operation of its ability to block access to online locations associated with criminal content if it reasonably considers that such operation is likely to be impaired, or otherwise to comply with its statutory obligations including under section 313(3) of the *Telecommunications Act 1997* (Cth)
>
> provided that:
>
> (e) unless precluded by law, it notifies the applicants or their legal representative(s) of such suspension, including the reasons and the expected duration of such suspension by 5.00 pm on the next business day; and
>
> (f) such suspension lasts no longer than is reasonably necessary and, in any case, no longer than 3 business days.

132 There is a minor disagreement between the applicants and Telstra as to the terms of subpara (f). The parties agree that any suspension that is to occur pursuant to this order should not last longer than is reasonably necessary but the applicants submit that the order should expressly limit any suspension to three days. Telstra opposes this additional limitation on the basis that the requirement that the suspension last "no longer than is reasonably necessary" is reasonable and sufficient.

133 I prefer the applicants' formulation which provides a desirable measure of certainty in relation to the operation of order 9. In the event that the respondents require more than three days then it is open to them to apply to the Court for an extension of time. To that end, I propose to vary the applicants' proposed form of order by adding to the end of subpara (f) the words "or such longer period as the applicants may agree in writing or the Court may allow."

Orders 10 and 11

134 The applicants' proposed orders 10 and 11 are in these terms:

> 10. The owner or operator of a Target Online Locations and the owner or operator of any website who claims to be affected by these orders may apply on 3 days' written notice, including notice to all parties, to vary or discharge these orders, with any such application to:
>
> (a) set out the orders sought by the owner or operator of the Target Online Locations or affected website; and
>
> (b) be supported by evidence as to:
>
> (i) the status of the owner or operator of the Target Online Locations or affected website; and
>
> (ii) the basis upon which the variation or discharge is sought.
>
> 11. The parties have liberty to apply on 3 days' written notice, including, without limitation, for the purpose of any application:
>
> (a) for further orders to give effect to the terms of these orders;
>
> (b) for further orders in the event of any material change of circumstances including, without limitation, in respect of the consequences for the parties and the effectiveness of the technical methods under order 1; and/or
>
> (c) for orders relating to other means of accessing a Target Online Locations not already covered by these orders.

135 The applicants' proposed orders 10 and 11 are agreed and are in my view appropriate.

Orders 12 to 16

136 Orders 13 to 16 are essentially agreed. Order 12, in the form proposed by all respondents, is not agreed to by the applicants which seek a different order (the applicants' proposed order 12) permitting them to extend the scope of proposed order 1 to Domain Names, IP Addresses and URLs that are not presently specifically referred to by giving written notice to the respondents without any further order of the Court. Proposed orders 12 to 16, in the terms that the respondents favour, are as follows:

> 12. If the website the subject of a Target Online Locations is at any time during the operation of these orders provided from a different Domain Name, IP Address or URL:
>
> (a) The applicants may file and serve;
>
> (i) an affidavit which:
>
> (A) identifies the different Domain Name, IP Address or URL;
>
> (B) states that, in the good faith belief of the deponent, the website operated from the different Domain Name, IP Address or URL is a new location outside Australia for the Target Online Locations the subject of these orders and brief reasons therefor; and

(ii) proposed short minutes of order to the effect that:

(A) The definition of Target Online Locations in these orders is amended to include the different Domain Name, IP Address or URL; and

(B) The time period in order 1 of these orders starts to run in relation to the different Domain Name, IP Address or URL upon service in accordance with order 16(d) of the orders as made.

13. These orders are to operate for a period of 3 years from the date of these orders.

14. Six months prior to the expiry of these orders:

(a) the applicants may file and serve:

(i) an affidavit which states that, in the good faith belief of the deponent, a Target Online Locations continues to have the primary purpose of infringing or facilitating the infringement of copyright; and

(ii) short minutes of order extending the operation of these orders for a further 3 year period; and

(b) the process contained in order 16 shall apply.

15. The affidavits referred to in orders 12 and 14 is to be given by a deponent duly authorised to give evidence on behalf of the applicants and may be given by their solicitor.

16. If an affidavit and short minutes of order are filed and served in accordance with orders 12 or 14:

(a) within 7 business days, the respondents must notify the applicants and the Court if they object to the orders being made in accordance with the short minutes of orders served by the applicants;

(b) if any respondent gives notice of any objection, or the Court otherwise thinks fit, the proceeding will be relisted for further directions;

(c) if no respondent gives notice of any objection and the Court does not otherwise require the proceeding to be relisted, then the Court may make orders in terms of the short minutes of orders served by the applicants without any further hearing; and

(d) the applicants must serve on the respondents any such orders made.

137 In my view the respondents' proposed order 12 is preferable. Whether the terms of any injunction should be varied to refer to additional Domain Names, IP Addresses or URLs is a matter for the Court to determine in light of evidence.

138 The applicants submitted that notifications of the kind they propose will not amount to variations to the injunction because they will be provided for by the terms of the orders the applicants propose. However, the effect of a notice given by the applicants under their proposed orders will require the respondents to block additional Domain Names, URLs or IP Addresses which might not point to any of the same online locations in relation to which the injunction was originally granted. If the injunction is to apply to new Domain Names, URLs or IP Addresses, then these are matters which should be dealt with by way of further order in the manner proposed by the respondents.

139 Another submission made by the applicants to the effect that the costs and inconvenience involved in following the procedure outlined in the respondents' proposed order 12 would be excessive or disproportionate was in my view

exaggerated and, in any event, not to the point in circumstances where the legislature has specifically identified the matters upon which the Court must be satisfied before it may grant an injunction under s 115A in respect of an online location. In the case of a variation to an existing injunction, the Court may be willing to act on very little in the way of further evidence. Nevertheless, whether or not there should be such a variation remains a matter for the Court.

Order 17

140 The applicants propose that the respondents bear their own costs of complying with order 1. This approach is opposed by all respondents.

141 Telstra seeks to recover costs it has incurred in configuring its various systems to facilitate compliance with any order that might be made under s 115A of the Act. For the purposes of the following discussion I shall refer to these costs as "set-up costs". It appears that Telstra incurred set-up costs some time in late 2015 and early 2016 not long after s 115A of the Act came into operation.

142 None of the other respondents sought set-up costs although TPG said that if the applicants were required to pay any other respondents' set-up costs, then TPG sought them too. Telstra's set-up costs total $10,261 and TPG's total $21,195.

143 I do not propose to require the applicants to pay Telstra's set-up costs. These costs, which have already been incurred, will permit Telstra to comply with orders made not only in these proceedings, but in any future proceeding brought by the same or different applicants.

144 It seems to me that given the legislative environment in which the respondents have operated since the introduction of s 115A, it is not merely desirable but, practically speaking, essential that a CSP possess the technical capacity to comply with an injunction in the form agreed in these proceedings. Telstra's set-up costs are, in my opinion, a general "cost of carrying on business" to borrow an expression used in the English authorities that have considered this question: see *Twentieth Century Fox Film v British Telecommunications plc* [2011] EWHC 2714 (Ch) at [32] per Arnold J. Moreover, they represent costs which I am satisfied Telstra would at some stage have had to incur irrespective of the existence of these proceedings.

145 All respondents sought orders for the payment by the applicants of various other costs of complying with the proposed orders. These costs, which I shall refer to as compliance costs, essentially reflect what are said to be the costs (excluding any profit component) of making the necessary entries in their DNS Blocking Systems to ensure that DNS blocking of the designated Domain Names is achieved.

146 The respondents drew an analogy between compliance costs that will be incurred by them in complying with injunctions granted under s 115A and costs incurred by a person against whom an order is made for preliminary discovery (against whom a substantive proceeding is not commenced) or an order requiring the production of documents (eg a subpoena for production). The respondents say that they are to be treated as innocent parties against whom relief is sought not by reason of any wrongdoing on their part, but in order to assist the applicants in their efforts to prevent the operators of the relevant online locations from infringing or facilitating the infringement of their copyright.

147 The applicants submitted that this analogy was inapt because the respondents benefited commercially from online copyright infringement. This was denied by the respondents who also submitted that the applicants' submission is not supported by any evidence in these proceedings. On the latter point I think the respondents are correct. I therefore do not accept the applicants' submission that the respondents have obtained a commercial benefit by providing access to the relevant online locations or to any other websites that actively encourage copyright infringement. I generally accept the respondents' submissions in relation to compliance costs. I think the applicants should be required to pay the respondents' compliance costs or some significant proportion thereof.

148 In circumstances where each of the respondents propose to use DNS Blocking, it seems to me that it is appropriate to settle upon a uniform amount for compliance costs calculated by reference to the number of Domain Names that the respondents will be required to block. For some respondents, this may produce a figure that is slightly below their estimated compliance costs, while others might receive something slightly in excess of their estimated costs. However, the advantage of using a formula of this kind is that all parties know precisely how much they are required to pay and how much they are entitled to receive both now and in the future in the event that the number of Domain Names that the respondents are required to block increases.

149 I think an amount of $50 (exclusive of GST) per Domain Name is appropriate. This equates to $200 ($50 x 4) for each grouping of respondents in the Roadshow proceeding and $2,750 ($50 x 55) for each grouping of respondents in the Foxtel proceeding. The figure of $50 per Domain Name broadly reflects the amount sought by TPG, but is less than the amount sought by Telstra and M2. To the extent that the respondents may incur compliance costs in excess of what I have allowed then I think they should be left to bear them. In the Foxtel proceeding Optus and Foxtel agreed that $1,500 was an appropriate amount. My orders will reflect that agreement.

"No fault" notation

150 TGP submitted that the minute of the Court's orders should include a notation to the following effect:

> No allegation was made by the Applicants that any Respondent had itself infringed copyright or otherwise engaged in any wrongdoing and the Respondents submitted to the following orders without any admission of liability of their part.

151 The proposed notation is factually correct, but I am not persuaded that it should be included in the minutes of the orders.

Costs

152 The applicants did not seek any costs. Each of the respondents sought orders that the applicants pay its costs of the proceeding.

153 As I previously mentioned, the parties were able to agree on a number of matters pertaining to the form of the injunctions and the related orders. These matters of agreement were no doubt the product of extensive negotiation between the applicants and the respondents all of whom have a significant commercial interest in working out and, if possible, agreeing upon, suitable forms of orders that might be made in these and in other proceedings brought by copyright owners pursuant to s 115A of the Act. In my view the parties should bear their own costs in relation to all matters that were the subject of agreement.

154 There were two significant issues in contest between the parties upon which the respondents succeeded: the first related to the applicants' proposed order allowing for the giving of written notices with a view to extending the scope of the injunctions (the applicants' proposed order 12), and the second related to the matter of compliance costs. In my view the applicants, which were wholly unsuccessful in relation to the first of these matters, and largely unsuccessful in relation to the matter of compliance costs, should be required to pay the respondents' costs with respect to these issues.

155 The costs orders I propose to make in each proceeding will require the applicants to pay the respondents' costs of and incidental to the preparation of evidence and written submissions, and the making of oral submissions, in relation to the applicants' proposed order 12 and the issue of compliance costs (excluding set-up costs). There will also be an order in each proceeding that there be no other order as to costs.

156 There will be orders accordingly.

Orders accordingly

Solicitors for the applicants in NSD 239 of 2016: *Baker McKenzie*.

Solicitors for the first to third respondents in NSD 239 of 2016: *King & Wood Mallesons*.

Solicitors for the fourth to fifteenth respondents in NSD 239 of 2016: *Clayton Utz*.

Solicitor for the sixteenth to twenty-ninth respondents in NSD 239 of 2016: *Thomson Geer Lawyers*.

Solicitors for the thirty-second and thirty-fourth to fiftieth respondents in NSD 239 of 2016: *Aleco Vrisakis*.

Solicitors for the applicant in NSD 241 of 2016: *Minter Ellison*.

Solicitors for the first, second and eighteenth to thirty-third respondents in NSD 241 of 2016: *Aleco Vrisakis*.

Solicitors for the third to fourteenth respondents in NSD 241 of 2016: *Clayton Utz*.

Solicitors for the fifteenth to seventeenth respondents in NSD 241 of 2016: *King & Wood Mallesons*.

TAMARA BOONE

修正草案條文對照表

修正條文	說明
第ＯＯ條之一（法律依據） 著作權人對於中華民國司法管轄區外之重大侵害著作權網站，無其他權利救濟之方式時，得聲請法院以裁定命連線服務業者攔阻之。	一、本條新增。 二、著作權法第 3 條第 1 項第 19 款所定義之「網路服務提供者」，係指提供（一）連線服務提供者；（二）快速存取服務提供者；（三）資訊儲存服務提供者；（四）搜尋服務提供者。而負有攔阻境外侵權網站之義務者，係指「連線服務業者」，其他網路服務業者並不包括在內，故特予明定。 三、得聲請法院以裁定攔阻之網站，必須符合下列要件：(一)須為設置在中華民國管轄區域外之侵權網站。(二)侵害著作權之情節重大。(三)著作權人無其他權利救濟方式。
第ＯＯ條之二(聲請狀應表明之事項) 前條之聲請，應表明下列各款事項： 一、當事人及法定代理人。 二、聲請之原因事實。 三、可能造成之損害。 四、境外網站架設之國家或地區。 聲請狀未載明前項各款事由時，法院應命聲請人限期補正。 聲請之原因事實雖經釋明，法院仍得命聲請人供擔保後為裁定。	一、本條新增。 二、為儘速處理聲請案件，特明定聲請狀應表明之事項，爰規定第一項各款事項，以為依據。 三、聲請人如未載明相關事項，法院應命聲請人限期補正，不得逕予駁回，爰於第二項明訂。 三、聲請人雖已釋明原因事實，然執行攔阻網站必定產生一定之費用，為避免著作權人貿然提出聲請，法院仍得命聲請人供擔保後而為裁定，爰於第四項明訂。至於擔保金額多寡，法院可於具體個案，參考聲請人所述「可能造成之損害」，酌定相當之金額。

第ＯＯ條之三(法院應審酌之事項) 法院為裁定時，應審酌一切情狀，考量攔阻之可能性及對網路資訊流通之影響，尤應注意下列事項，以為判斷之基準： 一、該網站之主要目的是否為從事或促使侵害著作權。 二、該網站有無提供侵害或促使侵害著作權之方法、指引。 三、該網站是否曾因侵害或促使侵害著作權，而遭其他國家行政機關或司法機關攔阻。 四、以攔阻之方式禁止接近該網站，是否為最妥適之方式。 五、攔阻該網站對於網路使用者、網路連線服務、其他相關產業及公共利益造成之影響。 六、著作權人是否已窮盡其他救濟方式。 七、攔阻該網站所生之費用、技術可行性。	一、本條新增。 二、法院為裁定時，應審酌之事項為何，除由透過實務運作形成見解之外，亦可參考外國法制、網路運作之特性以及網路資訊流通自由與著作權保護之權衡，依據比例原則審慎決定，故於本條明定七款判斷基準，以為法院裁定之依據。
第ＯＯ條之四（費用之負擔） 連線服務提供者，毋庸負擔裁定所生之費用。 連線服務提供者，依法院之裁定執行攔阻網站所生之費用過鉅者，得請求法院命聲請人負擔部分費用。	一、本條為新增。 二、連線服務提供者並非侵權行為者，自毋庸負擔任何費用，為避免爭議，特於第一項明訂。 三、連線服務提供者，依法院之裁定執行攔阻相關事項，必然產生一定之費用，如費用過鉅且由連線服務提供者負擔，顯然有失公平，故於第二項規定，得請求法院命聲請人負擔部分費用。