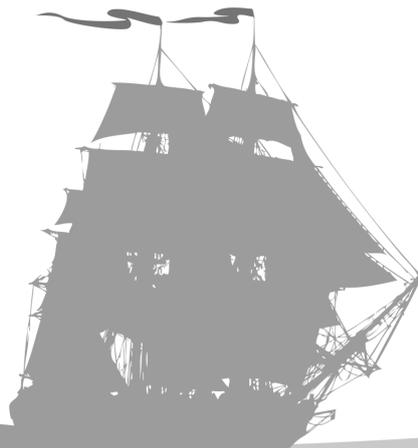




Submission to the *Department of Communications and the Arts* review of the *Copyright Online Infringement Amendment*

Tom Randle [REDACTED]
John August [REDACTED]
Peter Lawler [REDACTED]

21 March 2018



Contents

1	Executive summary	3
2	About Pirate Party Australia	4
3	Introduction	4
4	Review of the scheme	6
4.1	Burden of proof	6
4.2	Economic, legal and social context	6
4.3	Known impacts	8
4.3.1	Is the scheme actually targeted?	8
4.3.2	Case law and the secure internet	8
4.3.3	Humans are not machines	10
4.3.4	Summation of known impacts	11
5	Question 1: How effective and efficient is the mechanism introduced by the Online Infringement Amendment?	12
5.1	Efficiency	12
5.2	Effectiveness	13
5.2.1	Consumer Survey on Online Copyright Infringement - TNS and Kanter Public surveys. 2015, 2016, and 2017.	13
5.3	Efficacy	15
5.4	Human rights	15
5.4.1	Freedom of opinion, expression, and the right to take part in cultural life	15
5.4.2	Right to a fair hearing	16
6	Question 2: Is the application process working well for parties and are injunctions operating well, once granted?	17
7	Question 3: Are any amendments required to improve the operation of the Online Infringement Amendment?	17
8	Conclusion	18

Executive summary

The *Copyright Amendment (Online Infringement) Act 2015* (the scheme) commenced on 27 June 2015 after quick passage through the Commonwealth Parliament with bipartisan support from the Labor and Liberal parties, both of which receive substantial donations from intellectual property rights-holders¹.

Pirate Party Australia opposed the scheme at the time. It was our view that the legislation represented a blatant internet censorship scheme created for vested interest groups with a copyright maximalist agenda, whilst also representing a betrayal of certain democratic principles and public interest values. The scheme created a new obligation on carriage service providers (CSPs) to censor the internet for intellectual property rights-holders. It represented a dramatic change in internet policy in Australia.

The Pirate Party has the following key observations:

- The scheme is a disproportionate response to copyright infringement concerns.
- The scheme unjustifiably censors access to public domain works, Creative Commons licensed works and other open or permissively licensed works.
- Industry funded analysis, in our view, in fact suggests the scheme is ineffective.
- The scheme as implemented breaks internet trust models, which is increasingly flagged to internet users as malicious interference.
- The scheme's censorship will become less effective over time, for a variety of reasons.

¹iTnews, *Village Roadshow boosts donations amidst copyright crackdown* <<https://www.itnews.com.au/news/village-roadshow-boosts-donations-amidst-copyright-crackdown-399933>>.

About Pirate Party Australia

Pirate Party Australia (the Pirate Party) is a political party based around the core tenets of freedom of information and culture, civil and digital liberties, privacy and anonymity, government transparency, and participatory democracy. It formed in 2008 and is part of an international movement that began in Sweden in 2006. Pirate Parties have been elected to all levels of parliaments worldwide.

Introduction

The Pirate Party would like to thank the Department of Communications and the Arts (the Department) for the opportunity to contribute to the review of the Copyright Amendment (Online Infringement) Act 2015. The Pirate Party has been an active participant in debates around digital issues in Australia for some time and regularly contributes submissions to inquiries and reviews on matters relevant to our members and the policy platform the Pirate Party takes to elections. This review covers an area of foundational importance to the Pirate Party. The Pirate Party represents a new political movement for the digital age spawned as a reaction to the corrupt rent-seeking encroachment on the free and open internet by intellectual property maximalists.

Because of this scheme, Australia now has an internet censorship mechanism created entirely for the private for-profit vested interests of large rights-holders, primarily those corporate entities controlling large sections of mass media and content distribution in Australia. It is a scheme which has human rights implications and when effective in censoring online locations the scheme can be a serious prior restraint on lawful dissemination and communication of knowledge, culture, and information by law abiding citizens going about their daily lives.

Outrageous claims were made by some rights-holders at the time the legislation for this scheme was proposed. For example, Village Roadshow in its submission to an inquiry in to the scheme's legislation claimed that:

"continued rampant online piracy means: ... The Australian film and television drama production industry would be shut down."²

Further, the Department's review discussion paper explains why the review is

²Village Roadshow, *Submission 11 Legal and Constitutional Affairs Copyright bill*, p.1 <<https://www.aph.gov.au/DocumentStore.ashx?id=241f55fc-7dbd-47cf-b034-9ab6874c8f28&subId=350330>>.

more than one year overdue:

"The Department deferred the review until now to provide time for evidence to emerge."³

As such, there can be no excuse for the Department or rights-holders who support this scheme being unable to clearly demonstrate the extent to which the scheme has saved the "46,000 Australian jobs in jeopardy and the \$5.8 billion benefit to the Australian economy by the film and television industry"⁴.

Rights-holders obtained what they wanted: a censorship scheme that they claimed would save their industries from destruction in Australia. Now rights-holders must prove that outcome or be held accountable for their exaggerations.

The Pirate Party's submission responds to the questions posed by the discussion paper. However, it is important at the outset to question the Department's approach in formulating this review. None of the questions posed by the Department, individually or in totality, sufficiently seeks to quantifiably determine whether the scheme has accomplished its primary purpose: "... to reduce on-line copyright infringement."⁵ Question 1 of the discussion paper is overly broad in this regard, as it also encapsulates the operational processes of the scheme and seeks information on the effectiveness of various techniques for site-blocking. What is not covered specifically is whether the legislation has actually accomplished the purpose it was written for: reducing online copyright infringement. The Pirate Party is concerned this review will continue the trend of Australian copyright law being largely an evidence free zone based upon the feelings of rights-holders. Furthermore, none of the three review questions actually addresses whether the scheme has overreached its bounds to create harmful unintended consequences.

³Department of Communications and the Arts, *Review of Copyright Online Infringement Amendment Discussion Paper*, p.4 <<https://www.communications.gov.au/file/34391/download?token=NCWMCMeI>>.

⁴Village Roadshow, *Submission 11 Legal and Constitutional Affairs Copyright bill*, p.1 <<https://www.aph.gov.au/DocumentStore.ashx?id=241f55fc-7dbd-47cf-b034-9ab6874c8f28&subId=350330>>.

⁵Commonwealth Attorney-General, *Revised explanatory memorandum - Copyright Amendment (Online Infringement) Bill 2015*, p.2 <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf>.

Review of the scheme

Burden of proof

The Pirate Party suggests the Department adopt three additional criteria in its advice to government regarding the efficacy of the scheme:

- Whether the scheme had a causal effect in significantly reducing online copyright infringement in Australia.
- Whether rights-holders can demonstrate a dramatic turn around in revenue that they claimed was being lost to online copyright infringement as a causal effect of this scheme.
- Whether the scheme has avoided creating harmful unintended consequences.

If the answer is not in the affirmative to all of these criteria, then the merits of this scheme remaining law must be questioned by the Department. If the Department fails to address these additional criteria sufficiently, any advice given to the Minister regarding the scheme's efficacy could be considered misleading.

Recommendation 1: The Department should significantly improve the criteria used in the review when seeking to determine the efficacy of the scheme.

Recommendation 2: The Department should set in place a range of measurements tied to the review criteria, such that on next review, actual quantitative data will be available.

Economic, legal and social context

This scheme created for the first time in Australian law an internet censorship mechanism which allows intellectual property rights-holders to demand and enforce the blockading of foreign online locations, it represented a major shift in Australian internet policy. Despite Australia previously having had a long and public debate regarding the merits of the Labor party's Cleanfeed mandatory content filtering system, which was also considered a censorship system by many, this scheme passed in to law rather quickly with bipartisan support from the Labor and Liberal parties.

While rights-holders claim an economic worth in enforcing copyright, the claims made by rights-holders are regularly extreme. The Pirate Party routinely notes these extremes. For example, the standard use of video cassette recorders (VCRs) was copyright infringement until 2006, even though over half of Australian households had a VCR in 1987⁶. The fact that it took Australia's accession to the Marrakesh Treaty⁷ before blind, visually impaired and otherwise print disabled people had reasonable rights to participate in and enjoy cultural works without breaching copyright law was shameful. These examples demonstrate how copyright law has become incredibly broken in many areas, they are examples of the ambit claims of rights-holders being somewhat wound back years after damage has been done.

It is worth noting that many rights-holders are not using the scheme's injunction powers and are able to operate profitably without invoking the scheme's censorship powers. There has been no stampede to the Federal Court by rights-holders. This is because, rather than trying to control the market through further monopolistic legislative protection, many rights-holders are in fact providing both original and licensed material in an affordable, timely and accessible way, and so negating the impact of copyright infringement on their businesses.

The Pirate Party wishes to highlight the likely probability that this scheme has resulted in the censorship of the constitutionally protected political speech of Australian citizens, but that a lack of effective monitoring and controls by the Department are preventing this from being directly observed at this point in time. The Pirate Party is an organisation made up of members at the forefront of digital technologies and internet policy. Were we to invoke our rights to distribute the political ideas within our party's Constitution and Policy Platform in a way this scheme currently censors, the scheme could be in serious legal trouble.

The Pirate Party expects the scheme will not achieve even what rights-holders genuinely expected and they will seek to further increase their powers under the legislation. We warn the Department against scope creep of this scheme.

Recommendation 3: That the scheme's prior restraint effects be independently reviewed by a third-party.

⁶Choice, *CHOICE says it is time to fast forward copyright past the VHS era* <<https://www.choice.com.au/about-us/media-releases/2013/august/choice-says-it-is-time-to-fast-forward-copyright-past-the-vhs-era>>.

⁷Multilateral agreement - World Intellectual Property Organization, *Marrakesh Treaty* <<http://www.wipo.int/treaties/en/ip/marrakesh/>>.

Recommendation 4: That the scheme's potential censorship of Australian citizens' constitutionally protected political speech be independently reviewed by a third-party.

Recommendation 5: The Department should publish and maintain an online registry of all applications for injunctions by rights-holders and the details of the online locations they seek to blockade. This registry should be in machine readable form, such that it may be routinely searched, reported upon, and validated.

Known impacts

Is the scheme actually targeted?

The Pirate Party considers it somewhat erroneous to claim the scheme "provides a targeted mechanism"⁸ for rights-holders. In our view, a website blocking or take down regime which targets single resources hosted at individual online locations could be considered a "targeted" scheme e.g. a single Google search result for the location of specific copyright infringing content. This site-blocking scheme is far removed from such limitations and specifically allows for industrial scale blockading of online locations. The language of the scheme's legislation provides no real limitation on the size or scale of resources at an online location which can be blockaded by each injunction.

Case law and the secure internet

Internet security developments in recent years is increasingly challenging the scheme's practicability. Emerging standards such as the Domain Name System Security Extensions (DNSSEC)⁹ and DNS-based Authentication of Named Entities (DANE)¹⁰ specifications provide internet users with the tools to understand whether CSPs

⁸Department of Communications and the Arts, *Review of Copyright Online Infringement Amendment Discussion Paper*, p.4 <<https://www.communications.gov.au/file/34391/download?token=NCWMCMeI>>.

⁹Internet Engineering Task Force, *Domain Name System Security Extensions* <<http://www.dnssec.net/>>.

¹⁰Internet Engineering Task Force, *DNS-based Authentication of Named Entities* <<https://tools.ietf.org/html/rfc6698>>.

are interfering with their internet connections, including for the purpose of implementing injunctions under this scheme. Through the use of encryption and cryptographic signing of data queries, the internet is becoming more secure every day. These developments are creating improved chains-of-trust between network peers across the internet, which helps to keep everyone safe online. This evolution of the technology underpinning internet communications is further ensuring that internet users' requests for resources from an online location can be verified as to whether the response returned is genuine or whether it was intercepted and manipulated by entities other than those intended. Such surety is essential to the global digital economy and unravelling such advances should be considered impossible without also destroying the economic value inherent in a safer more secure internet.

The Pirate Party warns the Department the scheme will increasingly become automatically flagged to internet users as malicious interference of their internet connections, in the same way that authoritarian government interference or other malicious actors are recognised and displayed to internet users. For people with the political viewpoint that governments should not be allowing internet censorship for copyright related aims, the scheme is likely to exacerbate a continuing erosion of trust between citizens and government.

It should also be recognised that landing pages are essentially protocol dependent. Landing pages will only work as intended by the scheme for unsecured and unverified responses to an internet user's web browser when requesting resources from a censored online location. Web browsing (formally known as the Hypertext Transfer Protocol or HTTP) is but one networking protocol available on the Transmission Control Protocol (TCP) / Internet Protocol (IP) stack. There is potentially an unlimited number of alternative protocols which could be on the receiving end of an injunction. Whether a TCP/IP protocol allows for the concept of a landing page is entirely for the authors of each protocol and in many cases it is technologically impossible to display a landing page for most protocols. This is already relevant to current cases before the courts. For example, in *ROADSHOW FILMS PTY LTD ACN 100 746 870 & ORS v TELSTRA CORPORATION LIMITED & ORS (NSD269/2017)*¹¹ the rights-holders are seeking injunctions against online locations which are not only related to web browser accessible online locations, they involve other protocols and non-web browser based access to those online locations. Whilst rights-holders wanted quick judgements, the cases have been delayed from February until April 2018, with Justice Nicholas of the Federal Court warning rights-holders:

¹¹Federal Court, "*ROADSHOW FILMS PTY LTD ACN 100 746 870 & ORS v TELSTRA CORPORATION LIMITED & ORS*" <<https://www.comcourts.gov.au/file/Federal/P/NSD269/2017/actions>>.

"I will need to be satisfied by evidence so that I have a good understanding of how it works, I know what the precise relationship is between this box, the apps, and the site from which [content is] downloaded,"¹²

Justice Nicholas continued:

"I don't want the evidence in any respect to be scant on those issues; otherwise, you might find the orders won't be made."¹³

Humans are not machines

A further issue arises from initial cases brought before the Federal Court, in that it is not currently a requirement that injunctions publish the online locations censored by an order in machine readable formats. In the judgement for the first case brought under the scheme, *Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016]* (FCA1503)¹⁴, some of the online locations of the injunction order are included as image files, which must then be manually transcribed to computer textual data by CSPs. This is problematic because the domain name registration system and the Uniform Resource Locator (URL) specification¹⁵ allows for internationalised domain names¹⁶, which in part uses the Unicode text encoding specification¹⁷ for representation of these online locations. This means the domain name:

`https://thepiratebay.org`

is not the same as:

`https://thepiratebay.org`

In the second domain name above, the 'a' characters are in fact replaced with Unicode decimal 1072 characters. Whereas in the first example (which was the

¹²Corinne Reichert, ZDNet, *Judge warns Roadshow against providing 'scant' alleged piracy evidence* <<http://www.zdnet.com/article/judge-warns-roadshow-against-providing-scant-alleged-piracy-evidence/>>.

¹³Ibid.

¹⁴Federal Court, *"Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016]"* <<http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2016/2016fca1503>>.

¹⁵Web Hypertext Application Technology Working Group (WHATWG), *URL Standard* <<https://url.spec.whatwg.org/>>.

¹⁶Internet Corporation For Assigned Names and Numbers (ICANN), *Internationalized Domain Names* <<https://www.icann.org/resources/pages/idn-2012-02-25-en>>.

¹⁷Inc Unicode, *Unicode Standard, Version 10.0.0.* <<http://www.unicode.org/versions/Unicode10.0.0/>>.

original Pirate Bay's first domain name and presumably the intended online location currently under an injunction order) the 'a' characters are standard ASCII decimal 97 or Unicode decimal 97 characters. These are different domain names and URLs. They may look the same to humans (which is a known risk in relation to malicious websites masquerading as other legitimate websites, e.g. PayPal, Google, etc.), but the fact remains the scheme's legislation does not consider this point. Though it is a technical point, it again illustrates the digital illiteracy of major party politicians when it comes to legislating internet policy.

Summation of known impacts

It is therefore the Pirate Party's view this scheme is creating bad case law precedents which ignore the technical reality of the internet, as an inevitable consequence of the legislation. We are pleased to see the Federal Court fulfilling its role in thoroughly interrogating the claims made by rights-holders and also demanding solid evidence before making determinations, which is something the Pirate Party routinely notes is missing from much government policy. The scheme risks embedding in Australian case law requirements which will in the future become increasingly challenging for CSPs to implement. Case law precedents requiring landing pages for censored online locations will likely become invisible to internet users in the future and will instead be automatically replaced with prominent warnings that users' internet connections are being interfered with by some other untrusted entity. Internet protocols are increasingly implementing improved security standards, such as DNSSEC and DANE, which can prevent the loading of landing pages injected in to internet users' connections by a requirement of an injunction order. This also means internet users can automatically route around the censorship of this scheme, since users' software will be advanced enough to know the online location they are trying to directly access is censored within Australia. They can instead route their internet connections via other locations first. For example, via a virtual private network (VPN) to an online location outside Australia, before then connecting to their intended online location.

Because the scheme is internet censorship, it breaks established internet trust models put in place by the experts responsible for the architecture of the internet. There is no practical way for the scheme to be modified to avoid this reality, other than repealing the scheme.

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

Efficiency

The Pirate Party would agree with assessments that the scheme is not efficient, we don't think it can be. The scheme came in to force on 27 June 2015, the first injunction was not issued until 15 December 2016. It is important to note the practical implementation of internet censorship is a highly technical challenge and it is very easy to make serious mistakes. The Australian Securities and Investments Commission (ASIC) learned this the hard way when it ordered blocking of an on-line location under a different legislative power and accidentally took down some 250,000 websites¹⁸. Given the complexity of censorship done-well (an oxymoron in our view), the Pirate Party considers the time taken by the Federal Court to hear applications for injunctions is completely reasonable.

Many lawful online streaming and download services appear to be adapting to the emerging digital economy without the demand for internet censorship seen coming from some old 20th century rights-holders. A more efficient approach to reducing online copyright infringement, as has been suggested by many previous copyright reviews and submissions, would be to provide incentives for rights-holders to evolve their business models and join the rest of us in the digital age. The Productivity Commission has determined the "Timely and cost effective access to copyright content is the best way to reduce infringement"¹⁹.

This scheme is another example of government policy extending the monopolistic powers of rights-holders instead of improving consumer rights to access copyrighted works with fair terms. The balance is still one sided in favour of rights-holders.

Recommendation 6: The Department should advance consumer rights to access copyrighted works with fair and reasonable terms.

¹⁸Ben Grubb, Sydney Morning Herald, *How ASIC's attempt to block one website took down 250,000* <<https://www.smh.com.au/technology/how-asics-attempt-to-block-one-website-took-down-250000-20130605-2np6v.html>>.

¹⁹Productivity Commission, *Intellectual Property Arrangements*, p.2 <<https://www.pc.gov.au/inquiries/completed/intellectual-property/report/intellectual-property.pdf>>.

Effectiveness

A key issue going to the heart of the effectiveness of the scheme is that it addresses the narrow desires of one particular sectional interest group within all rights-holders, primarily large corporate and multi-national copyright owners. The entire scheme is essentially either a burden or irrelevant to other users of copyright materials.

The Pirate Party reviewed available analysis on the public record regarding the scheme, including:

- Consumer Survey on Online Copyright Infringement —A marketing research report. 2015, 2016, and 2017. TNS and Kanter Public.
- Consumer Survey on Online Copyright Infringement —Summary of Research Findings, 2017. Kanter Public.
- Australian Site Blocking Efficacy Report, May 2017. INCOPRO.
- Australian Site Blocking Key Findings, February 2018. INCOPRO.

Consumer Survey on Online Copyright Infringement - TNS and Kanter Public surveys. 2015, 2016, and 2017.

Since the first injunction under the scheme was issued 15 December 2016, the first survey of consumer behaviour covering a period with active site-blocking injunctions is only found in the latest 2017 report. This report states "Levels of infringement have remained consistent in 2017"²⁰. That is to say, injunctions thus far have not had a substantial or meaningfully noticeable impact to reduce on-line copyright infringement in Australia as reported by survey participants. The 2017 survey questions were expanded to collect information from participants regarding site-blocking. The Pirate Party is concerned the approach taken by the research is misleading. Statistics related to the site-blocking scheme are divided into two odd groups:

- A.) Consumers who **have consumed content in the past three months** were asked what **they would do** in the instance of encountering a blocked site.
- B.) Consumers who **had not downloaded or streamed content in the past three months** because they **had encountered a site that was blocked** were asked **what they did** in this instance.

²⁰Kantar Public, *Consumer Survey on Online Copyright Infringement —A marketing research report 2017* <<https://www.communications.gov.au/file/29171/download?token=JbncTHQp>>.

The first group is asked a hypothetical, what "they would do". The second group at the time of the survey no longer consume online content because "they had encountered a site that was blocked". There is an obvious missing group, responses from those still consuming online content **and** that have encountered a site-blocked online location and what they **did** following it. The survey appears to have missed an opportunity to collect metrics on whether participants stating they intend to seek alternative legal access or give up actually did so, or if in fact they ended up consuming the content later via another unauthorised source not under a site-blocking injunction.

Despite some respondents of the second group stating they would seek alternative lawful access²¹, evidently they haven't sought it online in the three months prior to taking part in the survey (a period which only just fits between the first December 2016 injunctions and the survey beginning in March 2017). The site-blocking regime for this second group which is celebrated in the Summary of Research Findings report as having "a positive impact on behaviour"²² appears to have driven these people away from cultural consumption online. So rights-holder are very unlikely to be collecting any revenue from this group and these people are also no longer consuming cultural works online as part of their daily lives. How sad.

This leads the Pirate Party to question the Department's mentioning in its discussion paper that "The Department is aware of evidence correlating a reduction in copyright infringement in Australia with the introduction of the Online Infringement Amendment."²³ There is far more meaningful evidence correlating an increase in the availability of lawful streaming services such as Netflix around this time period, than there is any evidence the enactment of this scheme has had any meaningful impact. A meaningful downwards trend in online copyright infringing behaviours appears between the 2015 and 2016 surveys, but there was not a single site-blocking injunction order in effect during the research conducted at those times.

²¹Ibid, p.68-69 <<https://www.communications.gov.au/file/29171/download?token=JbncTHQp>>.

²²Kantar Public, *Consumer Survey on Online Copyright Infringement —Summary of Research Findings 2017*, p.19 <<https://www.communications.gov.au/sites/g/files/net301/f/2017-online-copyright-infringement-summary-of-research-findings.pdf>>.

²³Department of Communications and the Arts, *Review of Copyright Online Infringement Amendment Discussion Paper*, p.5 <<https://www.communications.gov.au/file/34391/download?token=NCWMCMel>>.

Efficacy

In our submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Copyright Amendment (Online Infringement) Bill 2015 of April 2015 we asserted:

“The Copyright Amendment (Online Infringement) Bill 2015 is a legislative band-aid that will have no significant effect on reducing online copyright infringement.”²⁴

The Pirate Party, having reviewed the available evidence and analysis on the public record which we are aware of, concludes this assertion remains true. There is no evidence after almost 3 years showing any causal effect between injunctions issued under the site-blocking scheme and any significant or meaningful change in levels of online copyright infringement in Australia.

Recommendation 7: The Department should advise the government that there is no evidence showing a causal effect between injunctions issued under the site-blocking scheme and any significant or meaningful change in levels of online copyright infringement in Australia.

Human rights

Freedom of opinion, expression, and the right to take part in cultural life

The scheme remains a disproportionate response to copyright infringement concerns. Rights-holders without the scheme still have extensive protections in law for works they hold copyrights over, having been the beneficiaries of approximately 300 years worth of continuous copyright law expansion across the western world.

The Pirate Party considers it unjustifiable to censor access to public domain works, Creative Commons licensed works and other open or permissively licensed works as a consequence of the scheme’s censorship powers. The scheme is violating the rights of creators who have chosen to license works openly and build their funding models around monthly subscriptions, crowd-funding their projects, and

²⁴Mozart Olbrycht-Palmer, Pirate Party Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Copyright Amendment (Online Infringement) Bill 2015*, p.2 <https://pirateparty.org.au/media/submissions/PPAU_2015_SLCALC_Online_Infringement_Bill.pdf>.

other emerging models to fund creative efforts. Applicants seeking injunctions under the scheme have primarily included some very large and profitable companies, with business models heavily based around mass consumer consumption of single cultural creative works, i.e. the commodification of each consumer use of a song, TV show, movie, etc. for a royalty. The review should recognise the business models of large rights-holders are not the only business models available to creators. The scheme must be recognised as harming the lawful distribution of some creators' works and works in the public domain, in violation of people's right to freedom of expression and their right to take part in cultural life.

Recommendation 8: The scheme's impact on lawful distribution and access to open or permissively licensed creative works and public domain works should be seriously considered.

Right to a fair hearing

The Pirate Party considers the scheme's use of judicial review of rights-holders' censorship applications by the Federal Court to be a very important aspect of the scheme, we would object to the Federal Court's role being diminished or degraded in this regard. The scheme's legislation and explanatory memorandum recognises²⁵ the injunction powers can affect rights-holders, CSPs, online locations, and the public interest. All of which have interests which must be balanced fairly to ensure the human rights of the aforementioned stakeholders are not unjustly affected by the scheme. The use of judicial review processes by the scheme is the best way to limit potential abuses. The Pirate Party would consider any proposal to removal judicial reviews as seriously risking the scheme's ability to be compatible with international human rights law, such as the right to a fair hearing under the International Covenant on Civil and Political Rights (ICCPR) Article 14²⁶.

Recommendation 9: The Federal Court's role providing judicial review of injunctions brought under the scheme should not be diminished or degraded.

²⁵Commonwealth Attorney-General, *Revised explanatory memorandum - Copyright Amendment (Online Infringement) Bill 2015*, p.4 <http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5446_ems_87ada78b-8836-421e-bc2f-96cfc19d1f81/upload_pdf/503027%20Revised%20EM.pdf;fileType=application%2Fpdf>.

²⁶*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) art.14.

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

The Pirate Party can provide little commentary on this question as our organisation has not been party to any proceedings under the scheme. However it should be recognised this scheme is a regulatory burden on CSPs and the Australian internet generally, which in an ideal world would be unnecessary. The Pirate Party believes it should be a policy aim that this scheme is repealed as soon as possible.

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

Injunctions granted by the Federal Court should automatically expire after a maximum of six months, unless rights-holders make an application to the Federal Court for a renewal and affirm the orders of the original injunction remain correct and accurate.

The government should recognise the pointlessness of regulations created under this scheme which requires CSPs censor online locations even after those online locations are no longer used for the primary purpose of copyright infringement or facilitation of copyright infringement. This flaw in the scheme means the regulatory burden on CSPs does not automatically clean up afterwards. CSPs are required to go back to the Federal Court where an injunction order has not specified a limitation on its duration.

Recommendation 10: The scheme should be amended to specify a maximum injunction duration of six months for censored online locations, unless rights-holders apply for a renewal of the injunction and affirm the original orders remain correct and accurate.

To give effect to the Pirate Party's observations in the section 'Humans are not machines', we suggest the following.

Recommendation 11: The scheme should be amended to require injunction orders publish the online locations in machine readable formats.

Conclusion

It is the Pirate Party's view this scheme is over-reaching in terms of the balance between private and public interests in intellectual property.

Recommendation 12: The Department should recommend the repeal of the *Copyright Amendment (Online Infringement) Act 2015*.