

Submission to the Standing Committee on Industry, Science and Technology (Copyright Act Review)

In light of the [decision of the CRTC](#) to decline to exercise its jurisdiction with regard to the establishment of a mechanism to review and recommend “site blocking” in Canada¹, it would appear that Canada will need to resort to a process of court review in order to avail itself of the benefits of this anti-piracy measure that has proven so successful in a number of other countries in curtailing piracy while encouraging greater access to legitimate sources of content. Given this necessity, as part of the review of the Copyright Act, the committee is urged to recommend the enactment of amendments to the Act that will permit rights-holders to obtain injunctive relief against internet intermediaries (platforms and internet service providers). Specifically the Act should be amended to allow copyright owners to be able to obtain injunctions, including site blocking and de-indexing orders, against internet intermediaries whose services are used by third parties to infringe copyright.

In support of this recommendation I would like to refer to the success of some other countries that have successfully employed site blocking orders, in particular Australia and the UK.

I am the author of a weekly blog on international copyright issues, (www.hughstephensblog.net) and the issue of site blocking is one on which I have written extensively. Examples of some specific blogs touching on site blocking are listed below;

<https://hughstephensblog.net/2016/08/29/blocking-offshore-pirate-websites-it-can-be-both-effective-and-manageable/comment-page-1/> (August 29, 2016)

<https://hughstephensblog.net/2017/04/18/disabling-access-to-large-scale-pirate-sites-site-blocking-it-works/> (April 18, 2017)

<https://hughstephensblog.net/2017/10/07/would-site-blocking-disabling-access-to-copyright-infringing-websites-work-in-canada-quite-possibly-it-works-well-in-australia-and-the-uk/> (October 7, 2017)

The thrust of all these articles is that site blocking in Australia and the UK (and elsewhere) has proven to be an effective tool in combatting streaming piracy where it is applied consistently to a wide range of pirate websites. The objective of site blocking is to discourage casual users of such websites and to redirect them to sources of legitimate content. A recently released [study](#)² by Carnegie Mellon University (CMU) examined the effectiveness of internet site blocking to control copyright piracy in the UK. The authors (Brett Danaher, Michael D. Smith and Rahul Telang from CMU’s School of Public Policy and Management) compared their latest work to earlier research they had done where Pirate Bay—but only Pirate Bay—had been blocked in the UK (in 2012). The earlier action led to little change in total piracy and no change in paid legal streaming, suggesting that the blocking of a single site, when many

¹ more accurately described as disabling access to offshore websites streaming pirated, (i.e. copyright infringing), content to Canadian consumers

² Danaher, Smith and Telang, April 18, 2016, “Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior”; SSRN; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795 (accessed December 10, 2018)

alternatives remain available, is ineffective. This time, they examined the consumer response when 53 piracy websites were blocked in the UK in November 2014. To quote from their abstract,

“We found that these blocks caused a 90% drop in visits to the blocked sites while causing no increase in usage of unblocked sites. This led to a 22% decrease in total piracy for all users affected by the blocks (or a 16% decrease across all users overall). We also found that these blocks caused a 6% increase in visits to paid legal streaming sites like Netflix and a 10% increase in videos viewed on legal ad-supported streaming sites like BBC and Channel 5.”

Research indicates that site blocking will not deter all streaming piracy nor will it prevent a determined user from finding a way around the blockage, using proxy servers and other means. But it is effective against the vast majority of consumers who take the road of least resistance. If pirate sites are easy to find and easily accessible, some consumers will access them because they prefer, unfortunately, to access “free” pirated content rather than pay the modest subscription fees that would provide them access to a wide range of legitimate content. However, if a pirate website is not easily accessible, research indicates that most consumers seeking to access pirated content will turn to the next most easily-available source of content, legitimate providers. In Canada there is a plethora of content available from many legitimate sources in many languages at an affordable price and the excuse that legitimate content is not available is not valid in the Canadian context. Rather the motivation for most piracy in Canada is either habit, laziness or a preference not to pay if it is easy to access content without payment.

Australia is another jurisdiction where site blocking has been employed with great effect since passage of new legislation in 2015. The first court judgment requiring ISPs to block designated pirate websites (such as Pirate Bay and Solar Movie) was handed down in December 2016. This was the initial test of new legislation, the Copyright Amendment (Online Infringement) Act, passed in 2015. The action was brought by Village Roadshow and Foxtel. Part of the challenge is that no sooner are sites taken down, than they appear under a different guise. While the courts have ruled that follow on injunctions to block mirror and proxy sites must be under court supervision, the process in Australia has become simpler and more streamlined. Blocking orders are now uncontested by the Internet Service Providers (ISPs). Agreement was reached among the parties that the plaintiffs will pay a flat fee of AUD\$50 per domain blocked to the ISPs. The question of who would pay whom and in what amount for implementing blocking orders was initially an area of contention between content producers and ISPs.

Since the first court-approved blocks were instituted in 2016, a total of eight cases have been brought to the courts, resulting in orders blocking 85 online locations and 483 domains. This has resulted in a reduction in visits to the blocked sites of over 50% and a 25% reduction in visits by Australian users to pirate sites overall.

[Research](#)³ conducted by the Australian government on consumer attitudes toward online copyright infringement conducted in March 2018 concluded that;

“there is a greater proportion of consumers that are 100% lawful in 2018 compared to previous years” and “legal streaming services are increasingly being used by digital content consumers and (are) having a positive impact on the reduction of, or need for, unlawful consumption.”

Another excerpt from the government’s survey of consumer attitudes is worth quoting;

*“It is interesting to look at the impact of blocking unlawful sites and consumers’ attitudes and actions when encountering a blocked site. When asked what they would do if they encountered a blocked site the majority of respondents (57%) said they would ‘give up’ or ‘seek alternative lawful access’ (34%) but 7% of respondents said they would try to bypass the blocked website. When those that had encountered a blocked website were asked what actions they took, 46% said that they gave up, 19% sought alternative but lawful access and 15% sought free but unlawful access.”*⁴

So successful has the Australian approach to site blocking been that it enjoys bipartisan support in the House of Representatives. The Australian Parliament has just enacted [legislation](#)⁵ that will extend site blocking legislation to search engines, such as Google. The new Copyright Amendment (Online Infringement) Bill, 2018, allows the Federal Court to require online search engine providers to block search results that refer users to online locations (i.e. offshore websites) that have been blocked pursuant to requests from rights-holders. The Bill has passed the Senate and is awaiting Royal Assent. It is expected to be in force before the end of the year and will be reviewed in two years. The new legislation was deemed necessary to close loopholes in the existing legislation and to make the site blocking process even more effective.

There has been opposition in Canada to the establishment of a site blocking regime, with accusations that it will infringe freedom of expression on the internet, undermine net neutrality and will, in addition, be ineffective. The British and Australian experiences demonstrate the inaccuracy of these criticisms. The UK and Australia, no less than Canada, value freedom of expression as a cardinal principle, yet freedom of expression does not extend to the freedom to break the law by accessing infringing content. Particularly if site blocking orders are issued by courts allowing for due process, and challenges to the orders, freedom of expression arguments do not hold water. As for the criticism that site blocking is ineffective, the experience in the UK and Australia, and the forty other countries that have similar measures implemented either through the courts or transparent administrative agencies, shows exactly the opposite. Properly implemented site blocking can be an effective and low-cost means to combat streaming content piracy.

³ “Consumer survey on online copyright infringement 2018—Report”; Government of Australia, Department of Communications and the Arts, August 7, 2018; <https://www.communications.gov.au/documents/consumer-survey-online-copyright-infringement-2018-report>; accessed December 10, 2018.

⁴ Ibid.

⁵ Copyright Amendment (Online Infringement) Act, 2018; https://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6209_first-reps/toc_pdf/18217b01.pdf;fileType=application/pdf; (accessed December 10, 2018)/

The Committee is encouraged to take action to ensure that Canada is equipped with the same tools as other countries so that the Canadian content creation and distribution industries can thrive and continue to both express Canadian culture and provide jobs and investment to workers in the cultural sector. Site blocking is an essential tool in the anti-piracy toolbox, as clearly shown by the international experience.

Thank you,

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