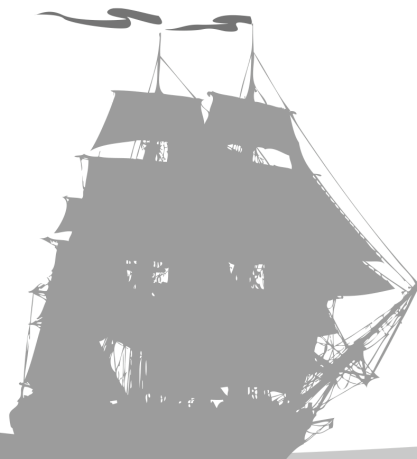




**Submission to the Senate Legal
and Constitutional Affairs
Legislation Committee inquiry
into the Copyright Amendment
(Online Infringement) Bill 2015**

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

In 2014 the Federal Government acknowledged in its 'Online Copyright Infringement' discussion paper that it is generally easier for Australians to access content through illegal channels rather than via lawful sources.¹ However, none of the Government's intended approaches outlined in the discussion paper, and which are being implemented through this legislation and a telecommunications industry code,² actually address the issue of availability of content.

The limited evidence available suggests that rather than ineffectively blocking access to infringing websites, the introduction of and improved access to streaming services and other forms of digital distribution significantly reduces instances of online infringement.³

Instead of addressing the findings of the House of Representatives Standing Committee on Infrastructure and Communications that Australians pay significantly more for digital content than consumers in other jurisdictions,⁴ the Government has deliberately ignored the Standing Committee's report. It has also failed to address the reforms recommended in 2014 by the Australian Law Reform Commission that would modernise Australian copyright law.⁵

As a consequence, copyright reform in Australia has remained one-sided

¹Commonwealth Attorney-General's Department, 'Online Copyright Infringement' (Discussion Paper, Attorney-General's Department, July 2014 1.

²Communications Alliance, 'Copyright Notice Scheme' (Industry Code C653:2015, Communications Alliance, 2015).

³'Netflix Canada: Piracy Down 50 Per Cent Since Service's Launch', *The Huffington Post Canada* (online), 18 September 2013 <http://www.huffingtonpost.ca/2013/09/18/netflix-canada-piracy-down_n_3947633.html>; Sophie Curtis, 'Spotify and Netflix curb music and film piracy', *The Telegraph* (online), 18 July 2013 <<http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>>; Leo Kelion, 'Netflix studies piracy sites to decide what to buy', *BBC* (online), 16 September 2013 <<http://www.bbc.com/news/technology-24108673>>; Ernesto Van Der Sar, 'Music piracy continues to decline thanks to spotify', *TorrentFreak* (online), 28 September 2011 <<http://torrentfreak.com/music-piracy-continues-to-decline-thanks-to-spotify-110928/>>; Ernesto Van Der Sar, 'Netflix is killing BitTorrent in the US', *TorrentFreak* (online), 27 April 2011 <<https://torrentfreak.com/netflix-is-killing-bittorrent-in-the-us-110427/>>.

⁴House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At what cost? IT pricing and the Australia tax* (2013).

⁵Australian Law Reform Commission, *Copyright and the Digital Economy*, Report No 122 (2014).

and inconsistent, with consumers being blamed for the substantial failings of copyright owners to provide adequate access to content in a timely and affordable manner. The lack of movement on the recommendations of either the House of Representatives Standing Committee and the Australian Law Reform Commission indicates a wilful blindness to copyright owners' significant contributions to the prevalence of online copyright infringement in Australia.

Digital communications certainly provide challenges for copyright owners, but they also provide new opportunities. Normal interactions such as sharing culture via the Internet should not be threatened. Creators and copyright owners should seize these new opportunities and embrace new avenues of exposure and distribution. The Pirate Party believes the law *must* account for the realities of this evolving paradigm by modernising copyright law to reflect the changing expectations of consumers and copyright users, and to promote emerging and innovative uses of copyright material.

A cautious approach must also be exercised when evaluating evidence. This is especially true given copyright owner representatives' organisations have promoted largely ineffective strategies for dealing with the distribution of child sexual abuse materials online in the hope that they can manipulate public policy in the direction of filtering the Internet so as to advance their own agenda.⁶

It is the Pirate Party's view that blocking access to websites, regardless of whether it targets child abuse material or copyright infringement, is ineffective and sweeps the problem under the carpet. Such approaches encourage the use of easily available circumvention tools and move distribution to secure, unmonitored channels.

These comparisons also serve to conflate two very different types of behaviours: the production, distribution and possession of child abuse materials are criminal offences, while online copyright infringement by end-users generally only carries civil penalties. Lumping them together as 'evils of the Internet' is entirely inappropriate and disingenuous.

The Pirate Party concedes that 'disabling access' to 'online locations'

⁶See eg Christian Engström, 'IFPI's child porn strategy' on Christian Engström, *Christian Engström, Pirat* (27 April 2010) <<http://christianengstrom.wordpress.com/2010/04/27/ifpis-child-porn-strategy/>>.

may prevent inadvertent access to particular websites. However, any feasible mechanism of doing so will not deter users who have basic computer literacy skills. It is trivial to circumvent blocking mechanisms.

In 2014 the Hague Court of Appeal in the Netherlands ruled that blocking access to websites was ineffective and unnecessary, lifting an earlier order that required two Internet service providers ('ISPs') to block access to The Pirate Bay.⁷ The Pirate Party arranged for a certified translation of this decision into English: that translation is included as an appendix for the Committee's consideration.

The first-instance court had dismissed the argument that blocking access to websites would be ineffective 'on the basis that the blockades ... mean an extra barrier, even if there undoubtedly are subscribers who will know how to by-pass them.'⁸ This echoes the words of Arnold J in the England & Wales High Court case *Twentieth Century Fox Film Corporation v British Telecom PLC*. His Honour stated that ordering ISPs to disable access to infringing websites 'would be justified even if it only prevented access ... by a minority of users.'⁹ However, the Hague Court of Appeal overturned the order in the Netherlands.

The Court in that case made several salient comments. It found that there is no adequate way to determine whether blocking websites is genuinely effective:

According to websites statistics such as Alexa and Google Trends, the decrease in visits to TPB [The Pirate Bay] is, moreover, greater than it would be in reality, in view of the fact that traffic to TPB through proxies is not counted in those statistics as traffic to TPB, but as traffic to the website of that proxy ...¹⁰

The Court considered a 2013 report of the Netherlands Organisation

⁷Samuel Gibbs, 'Pirate Bay ban lifted in Netherlands as blocking torrent sites ruled "ineffective"', *The Guardian* (online), 30 January 2014 <<http://www.theguardian.com/technology/2014/jan/29/pirate-bay-ban-lifted-in-netherlands-as-blocking-torrent-sites-ruled-ineffective>>.

⁸ECLI:NL:GHDHA:2014:88 (*Ziggo BV v BREIN Foundation*) [2014] Gerechtshof Den Haag [Hague Court of Appeal] [2.2] [Robert Francis Brian trans].

⁹*Twentieth Century Fox Film Corporation v British Telecom PLC* [2011] EWHC 1981 (Ch).

¹⁰ECLI:NL:GHDHA:2014:88 (*Ziggo BV v BREIN Foundation*) [2014] Gerechtshof Den Haag [Hague Court of Appeal] [2.18] [Robert Francis Brian trans].

for Applied Scientific Research and made the following observations:¹¹

- there had been no change in the volume of BitTorrent traffic after the blockade was ordered,
- this lack of change could not be attributed to The Pirate Bay having a smaller share in the availability of torrent files or magnet links than previously thought given directly before the blockade it was the twenty-sixth most popular website in the Netherlands,
- the blockade has been circumvented on a large scale, including the use of other torrent sites or indexers and using alternative methods of accessing The Pirate Bay, such as through proxies, and
- these simple 'avoidance methods' require no additional software or 'adaptations' to the user's computer are necessary.

The Court considered that the best test of effectiveness was whether online copyright infringement was reduced overall and determined that 'the decrease in visits to TPB ... has not led to a significant reduction in the number of copyright infringements'.¹² The Court also accepted evidence that:

The consumer survey used in the Baywatch report has also shown that after the blockades the number of consumers who were downloading from illegal sources had increased; for example: 3 months after blockade A, 22.5% of the Ziggo c.s. subscribers downloaded from illegal sources; 10 months after this blockade (therefore, on 1 December 2012) that percentage had risen to 25.2 (see page 9 and table 4 of that report).¹³

Consequently, the Hague Court of Appeals was 'lead to the conclusion that the measures sort by Brein are in conflict with the proportionality requirement/effectiveness requirement' and set aside the previous order to block access to The Pirate Bay.¹⁴

¹¹ECLI:NL:GHDHA:2014:88 (*Ziggo BV v BREIN Foundation*) [2014] Gerechtshof Den Haag [Hague Court of Appeal] [5.14] [Robert Francis Brian trans].

¹²ECLI:NL:GHDHA:2014:88 (*Ziggo BV v BREIN Foundation*) [2014] Gerechtshof Den Haag [Hague Court of Appeal] [5.19] [Robert Francis Brian trans].

¹³ECLI:NL:GHDHA:2014:88 (*Ziggo BV v BREIN Foundation*) [2014] Gerechtshof Den Haag [Hague Court of Appeal] [5.21] [Robert Francis Brian trans].

¹⁴ECLI:NL:GHDHA:2014:88 (*Ziggo BV v BREIN Foundation*) [2014] Gerechtshof Den Haag [Hague Court of Appeal] [5.26] and 'Decision' on page 24 [Robert Francis Brian trans].

Self-described 'anti-piracy agent' James Brandes demonstrated in a 2013 article how trivial it was to bypass similar blockades in the United Kingdom. His concerns were:¹⁵

- Blocking websites leads to a dramatic increase in proxies and alternative sites with similar or identical content that can be used to circumvent the blockade. He describes this as a 'whack-a-mole policy' under which 'every single time a site is blocked at the ISP level, new URLs take their place.'
- Blocking reduces the efficacy of other avenues of approach, such as *Digital Millennium Copyright Act* 'takedown' notices that can be issued to US-based service providers, as the target pool of infringing URLs increases exponentially.
- Using a virtual private network (VPN) you 'can change your geographical location and thus circumvent ISP blocks with the click of a button.'
- Internet filtering raises serious censorship concerns, as many sites that are associated with copyright infringement also provide the capability to share open-licence content and public domain materials.

In Australia, one of the most widespread methods of accessing material that cannot be directly accessed is the use of a VPN. With geoblocking preventing Australians from legally accessing content otherwise available overseas, thousands of Australians were using VPNs to access overseas services, and easy-to-understand guides have been published by consumer groups.¹⁶

There is a demonstrated risk that attempts to block single websites will inadvertently block access to many websites that have nothing to do with copyright infringement. The Australian Securities and Investments Commission has used s 313 of the *Telecommunications Act 1997* (Cth) to force ISPs to block sites involved in financial fraud. This inadvertently

¹⁵James Brandes, 'Shiver me timbers! Is the torrent site blockade working or have those pesky pirates circumnavigated their way around it?', *ORG Zine* (online), 2013 <<http://zine.openrightsgroup.org/features/2013/blocking-orders>>.

¹⁶Elise Dalley, *A how-to guide to navigating geo-blocking* (5 March 2014) Choice <<http://www.choice.com.au/reviews-and-tests/computers-and-online/networking-and-internet/shopping-online/navigating-online-geoblocks/page/how-to-circumvent-geoblocks.aspx>>.

blocked 250,000 websites, including Melbourne Free University.¹⁷

While it will be easy to circumvent the blocking of popular websites, it will likely cause unknown damage to other websites who may not be aware that their website is no longer accessible. The technical reality is that it is common for many websites to be hosted by one company using a single Internet protocol address that, if blocked, makes hundred or thousands of websites inaccessible without warning. Blocking websites can lead to a number of negative, unintended consequences, and is especially concerning when websites operators whose websites have been inadvertently blocked are not informed.

Geographical market segmentation — staggered release dates and increased prices for Australian consumers — are significant contributing factors influencing Australians to access content from other countries by using peer-to-peer networks and similar means to obtain content. If this issue were addressed, the motivating factors would lessen considerably and it would be a far more effective approach than ineffectively ordering the blockade of websites.

¹⁷Pat McGrath, 'ASIC accidentally blocked 250,000 websites due to "basic" IP address misunderstanding', ABC (online), 28 August 2014 <<http://www.abc.net.au/news/2014-08-27/asic-accidentally-blocked-250000-websites-ip-address/5701734>>.