

**COMMUNICATIONS  
ALLIANCE LTD**



**COMMUNICATIONS ALLIANCE RESPONSE TO  
ONLINE COPYRIGHT INFRINGEMENT CONSULTATION  
PAPER**

29 AUGUST 2014

## TABLE OF CONTENTS

---

<b>INTRODUCTION</b>	<b>2</b>
<b>1. SUMMARY</b>	<b>3</b>
<b>2. EXAMINATION OF THE PROPOSALS IN THE DISCUSSION PAPER</b>	<b>7</b>
<b>PROPOSAL 1: TO AMEND SS 36(1) AND 101(1) – AUTHORISATION LIABILITY</b>	<b>7</b>
<b>PROPOSAL 2: EXTENDED INJUNCTIVE RELIEF TO BLOCK INFRINGING OVERSEAS SITES<sup>9</sup></b>	
<b>PROPOSAL 3: EXTENDED SAFE HARBOUR SCHEME</b>	<b>10</b>
<b>3. THE OVERSEAS EXPERIENCE</b>	<b>11</b>
<b>4. RECENT AUSTRALIAN ATTEMPTS TO AGREE AN INDUSTRY-BASED SCHEME</b>	<b>12</b>
<b>5. THE COST ISSUE</b>	<b>15</b>
<b>6. AUSTRALIA’S INTERNATIONAL OBLIGATIONS</b>	<b>17</b>
<b>ATTACHMENT 1</b>	<b>18</b>
<b>ATTACHMENT 2</b>	<b>20</b>

---

## **INTRODUCTION**

Communications Alliance appreciates the opportunity to provide a submission in response to the Government's Online Copyright Infringement Discussion Paper.

Communications Alliance and its Internet Service Provider (ISP) Members have engaged in constructive discussions with Government, rights holders and consumer groups over a number of years to try to develop an industry-led approach to this complex issue. While a solution has not yet been found, we remain willing to continue to work towards an approach that balances the interests of all stakeholders.

## **ABOUT COMMUNICATIONS ALLIANCE**

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

## 1. SUMMARY

Communications Alliance, whose members include Australia's major Internet Service Providers (ISPs), have welcomed the release of the Government's discussion paper on online copyright infringement, but have urged caution around several of the reform proposals, as is outlined in more detail in this paper.

The Communications Alliance ISP Members provide the internet services that millions of Australians rely on every day to connect with family and friends, conduct business, study and share knowledge and spend their leisure time. We do not condone online copyright infringement and do encourage the lawful use of the Internet. We would not support legislative changes that impede the ability of our customers to access legitimate content and sites on the internet or impose onerous regulations and costs on our businesses.

The central questions that arise upon examination of the proposals in the discussion paper are: **"Is this the best way to tackle the problem?"** and **"Who should bear the cost of any new measures?"**

In summary, the Communications Alliance position detailed in this submission is that:

- we do not support the proposed amendments to extend authorisation liability in the Copyright Act – in part because of the likelihood of serious unintended consequences for consumers and businesses;
- we do support the proposed amendment to extend the safe harbour provisions of the Copyright Act;
- we believe that the proposed site-blocking mechanism has weaknesses and limitations, but nonetheless have proposed safeguards and features that, if incorporated, mean that site-blocking could play a useful role in addressing online copyright infringement in Australia;
- we and our ISP members stand ready to engage in good faith discussions with rights holders on a potential industry-agreed scheme to combat infringement. We are by no means convinced that a graduated response scheme would be effective. In any event a range of issues – including who pays for such a scheme - need to be addressed, as spelled out in this summary and Section 4 of the submission. It is crucial that such negotiations be given an opportunity to conclude before any amendments are made to the Copyright Act;
- we recommend that the Government consider closely the **"Follow the Money"** strategies being pursued in the United Kingdom; and
- we believe that any package of measures must include continued efforts by rights holders to make lawful content accessible to Australian consumers in a timely and affordable way.

It should be remembered that ISPs and rights holders reached substantial agreement more than two years ago on the central elements of a trial notice-and-notice scheme (which did not involve sanctions). One of the reasons why those discussions were ultimately unsuccessful was the failure to agree on funding arrangements for the trial.

The Government appears reticent to provide consistent, direct advice or prescription on the questions of whether rights holders should reimburse the reasonable costs incurred by ISPs when undertaking activities to counter online copyright infringement.

Further – if the amendments proposed are made in advance of agreement on a scheme, this will militate against such agreement being reached, because it will remove any incentive

for rights holders to negotiate reasonably - they may instead seek to rely on the principle of "reasonable steps" to force ISPs to undertake rights-enforcement on their behalf.

It is also questionable whether a 'graduated response' scheme is the most sensible way to proceed. As outlined in this submission, there is little or no evidence to date that such schemes are successful, but no shortage of examples where such schemes have been distinctly unsuccessful. Nonetheless, Communications Alliance remains willing to engage in good faith discussions with rights holders, with a view to agreeing on a scheme to address online copyright infringement, if the Government maintains that such a scheme is desirable. Accordingly, we have outlined in this submission what an appropriately funded and structured scheme might look like.

As outlined herein, it can be reasonably argued that, rather than pushing for the introduction of a graduated response scheme, better results might be obtained by focusing on:

- ensuring greater availability of timely, lawful and affordable content; and
- adopting elements of a **"Follow the Money"** approach to reduce the economic basis for online copyright infringement. ATTACHMENT 1 provides insights into the Follow the Money strategies being pursued in the United Kingdom.

Neither of these two initiatives would appear to require any amendment to the Copyright Act.

We believe that for any scheme designed to address online copyright infringement to be sustainable it must also stimulate innovation by growing the digital content market, so Australians can continue to access and enjoy new and emerging content, devices and technologies.

The ISP members of Communications Alliance remain willing to work toward an approach that balances the interests of all stakeholders, including consumers.

It should not be forgotten that rights holders have the ability under existing domestic law to take action through the Courts against any Australian who infringes copyright (online or otherwise) – a right that they have seldom exercised in the case of online copyright infringement. The Court can award damages and issue injunctions.

Some of the key issues addressed in this submission include:

**Greater uncertainty:** As outlined in section 2 of this submission, when deciding if a person should be held liable for infringing the copyright of another, under Proposal 1, the Court will now only consider two factors:

- the relationship between the parties; and
- whether reasonable steps were taken.

The extent of a person's "power to prevent" the infringements will no longer be a factor considered by courts when deciding liability. Rather it will be merely one of four factors for a Court to consider whether "reasonable steps" have been taken.

In this context, organisations subject to allegations of authorisation will face higher risk of legal liability and greater uncertainty. As explained in Section 2, this risk and uncertainty may lead to innocent consumers being at risk of having their internet service compromised or terminated. These fundamental concerns must be addressed before any further steps are taken such as an industry scheme or prescribed measures.

**International Obligations:** As outlined in Section 6, we do not share the view in the discussion paper that the High Court's decision in *Roadshow Films Pty Ltd v iiNet Ltd* (April 2012) undermines Australia's international obligations, nor that there is any obligation in Australia's free trade agreements that requires the Copyright Act to be amended to extend authorisation liability.

**Timing of Any Agreed Amendments:** We believe that if the Government does ultimately decide to amend the Copyright Act, this should take place only after timely agreement on an industry scheme is reached, because:

- reaching agreement on an industry-based scheme may become more difficult if amendments are put in place mid-negotiation; and
- the detail of a scheme, if such can be agreed, might materially impact the extent to which amendment of the Act is considered necessary.

**Potential Unintended Consequences:** We urge careful consideration of the proposal to extend the authorisation liability within the Copyright Act, because such an amendment has the potential to capture many other entities, including schools, universities, internet cafes, retailers, libraries and cloud-based services in ways that may hamper their legitimate activities and disadvantage consumers.

**Potential Sanctions:** Communications Alliance notes and supports the Government's expectation, expressed in the paper that an industry scheme, if agreed, should not provide for the interruption of a subscriber's internet access.

On the question of potential sanctions being imposed on end-users in response to third party allegations, ISPs have been consistent in their view that any actions in response to allegations of copyright infringement must have robust safeguards in place including independent oversight to protect the interests of consumers – and that any sanctions should only be imposed with regard to due legal process, through the courts, or by a judicial/regulatory body – not by ISPs.

**Issues for an Industry Scheme to Address:** Communications Alliance and its ISP Members have identified the following key matters that we believe should be addressed in a graduated response scheme, should one be agreed:

- a holistic end-to-end approach, supported by Government, rights holders, ISPs and consumers;
- stronger efforts by rights holders and Government to ensure that consumers can access lawful, affordable content when they want it, accompanied by public education on how and where to access such content;
- the need for a level playing field involving all ISPs and rights holders, so as not to distort the market;
- recognition that technology is moving very quickly and any solution may be quickly redundant as online content markets continue to evolve;
- the desirability of independent (judicial or regulatory) oversight;
- consultation with, and protections for, ISP customers and consumer groups including in areas such as privacy and access to an appeal mechanism;
- the need to enshrine legal protections for ISPs;

- resolution of funding for any scheme, consistent with enforcement of other intellectual property rights, and consistent with how ISPs assist other parties (particularly law enforcement agencies) to address other digital content issues;
- a reasonable burden of certainty and accuracy upon rights holders when they allege an infringement has been perpetrated via a specified IP address; and
- the need to encourage innovation in, and growth of, the digital content market.

The potential shape of such a scheme is discussed further in Section 4.

**A Role for Site Blocking?:** In Section 2 of this submission we examine the potential efficacy of the injunctive relief/site blocking proposal contained in the Government's discussion paper. Although such an approach has weaknesses and limitations, we conclude that – provided appropriate safeguards are in place and the question of costs is adequately dealt with – such a proposal might be able to play a useful role in addressing online copyright infringement in Australia.

Responses by Communications Alliance to the eleven questions raised in the Government discussion paper are at ATTACHMENT 2

## 2. EXAMINATION OF THE PROPOSALS IN THE DISCUSSION PAPER

### PROPOSAL 1: TO AMEND ss 36(1) and 101(1) – AUTHORISATION LIABILITY

The Discussion Paper proposes to amend ss. 36(1) and 101(1) of the Act (the authorisation liability provisions) to change the factors a court must consider in assessing whether a person has authorised a copyright infringement committed by someone else.

At a high level, this would be achieved by expanding the factors a court would need to consider in determining whether someone took reasonable steps to prevent the infringement.

There appears to be a fundamental problem with the approach set out in the paper. That is, the changes will not just apply to ISPs; they will have a serious impact on many sectors of the economy.

#### **The overhaul of the authorisation test – greater uncertainty and risk**

Currently, in assessing whether someone has authorised a copyright infringement, a court is required to consider three factors. These factors were introduced by the Digital Agenda Act in 2000, and were stated to simply codify the factors set out in the (then) leading High Court case on authorisation in Australia.

This proposal would change the existing authorisation factors, and expand the reasonable steps element to require the court to have regard to:

- a) the extent (if any) of the person's power to prevent the doing of the act concerned
- b) whether the person or entity was complying with any relevant industry schemes or commercial arrangements entered into by relevant parties
- c) whether the person or entity complied with any prescribed measures in the Copyright Regulations 1969; and
- d) any other relevant factors.

The fundamental change to the authorisation test is that the 'power to prevent' will no longer be a primary consideration. It will be only one factor for a court to consider in deciding whether 'reasonable steps' have been taken. This step is said to 'clarify' that '*the absence of a direct power to prevent a particular infringement would not, of itself, preclude a person from taking reasonable steps to prevent or avoid an infringing act*'.<sup>1</sup>

This proposal will shift the balance that copyright seeks to achieve (between providing an incentive and reward for creative endeavour, and allowing access to information) in favour of rights holders - which may result in greater uncertainty and litigation.

The proposal also fails to recognise that Australia's authorisation provisions are already broader than those of other countries (e.g.; UK, Canada, US).

It is also out of step with how other countries have addressed the issue of online infringement – while a number of countries have adopted measures to address online copyright infringement (e.g.; legislated website blocking; court orders to identify alleged infringers; educational notice schemes and graduated response) none of them have changed their authorisation provisions.

---

<sup>1</sup> Australian Government [Online Copyright Infringement Discussion Paper](#) (2014)

In the context of infringements using P2P technology, the proposal will enable rights holders to demand "reasonable steps" of ISPs even though the ISPs have no "power to prevent" these infringements. Adding to the uncertainty and risk is the fact that "reasonable steps" is not defined.

For Carriage Service Providers (CSPs) there is protection against financial penalties for copyright infringement (including authorisation) in respect of some acts if they have complied with the conditions of the safe harbour scheme. One of these conditions is to "adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers".

A conservative approach to the uncertainty and risk flowing from the proposed change to the authorisation test may lead some ISPs to implement their repeat infringer policies to get the benefit of the safe harbour scheme. For example, in a scenario where rights holders ask that they take "reasonable steps" in relation to alleged repeat P2P infringements.

In these circumstances consumers face the very real risk of having their connection to the internet compromised or terminated as a result of allegations that they have infringed, and in circumstances where they might not be responsible for any improper activity whatsoever.

This greater legal uncertainty, risk and consequent practical shift in power to the rights holders provides no incentive for rights holders to work with stakeholders including industry and consumers to negotiate a workable and fair industry scheme. Instead, they can in effect demand "reasonable steps".

The genuine concerns flowing from this fundamental reshaping of authorisation law must be addressed before any change is made to the Copyright Act.

### **The changes to authorisation liability will impact on a wide range of players**

There is a number of problematic aspects to the Government's proposed approach, further to those discussed above:

- despite the paper stating that the proposal only affects the liability of ISPs, this proposal has serious implications for a much wider range of entities
- the paper's interpretation of the iiNet decision and international obligations is questionable (refer S.6 of this submission)
- the Government proposal would not simply overturn the iiNet decision, but the law of authorisation liability more generally, which has been largely settled in Australia since 1975. (i.e., the Government proposes to overturn two High Court decisions, not one)
- linking authorisation liability to a power to make regulations opens the possibility for the legal liability of every organisation in the country to be subject to a standard set in regulations.

Authorisation liability is not just something that applies to ISPs. It applies to everyone. In the same way that a rights holder can sue for direct copyright infringement, they can sue a person for authorising infringement. The court can award damages (including an account of profits and additional damages) and issue injunctions. Any changes to authorisation liability in the Copyright Act will not just affect ISPs - the effects will be felt across the economy and will impact libraries, galleries & museums, schools & universities, internet cafes, operators of cloud storage services, public wi-fi operators, anyone who owns or hosts a website, even retailers such as Officeworks, Big W and Harvey Norman, who provide copying equipment (e.g. photo copying and enlarging machines supplied for customers to use in store).

In other words, in proposing to make changes to the law of authorisation, the Government would not just be regulating rights holders and ISPs – rather it would potentially change the legal liability of every school, university, library, public institution, technology company or retailer in the country.

The consultation paper does not seem to have grasped this fundamental point. It is written as if the authorisation changes are limited only to ISPs.

## PROPOSAL 2: EXTENDED INJUNCTIVE RELIEF TO BLOCK INFRINGING OVERSEAS SITES

The proposal would enable rights holders to seek a court order requiring carrier level ISPs at the wholesale level to block access to websites that are operated outside of Australia and whose dominant purpose is to infringe copyright.

Although site blocking is a relatively blunt instrument and has its share of weaknesses and limitations, we believe that an appropriately structured and safeguarded injunctive relief scheme could play an important role in addressing online copyright infringement in Australia.

Site blocking has the potential to extend outside original intentions (see the example of ASIC using s313 of the Telecommunications Act in 2013, when it inadvertently blocked thousands of legitimate websites in Australia). Such 'collateral damage' needs to be carefully guarded against, but can be difficult to avoid, particularly when legitimate content is hosted alongside infringing content on the same domain name or IP address. (e.g. blocking [streamingmusic.blogspot.com](http://streamingmusic.blogspot.com) will result in every other blogspot account being blocked).

It should also be recognised that site blocking might be little more than a temporary solution in some instances, because blocked sites may reappear quickly under a different domain name or web address.

If the Government proceeds down this path, therefore, careful safeguards should be built into the process, to ensure that it is not abused, or become akin to any form of censorship – e.g.; the type of safeguards suggested by the Government on page 6 of the Discussion Paper.

The court process should be simple & standardised – e.g.; standard application and standard orders. An ISP's 'knowledge' of infringement would not be relevant – as is the case in the Irish system.

We agree with the Government's observation on page 6 of the Discussion Paper that rights holders should bear the cost of *implementing* any orders, but would also suggest that rights holders bear the cost of the court procedure itself (the costs of which should be kept to a minimum, if the process is streamlined).

- If the Government is intent on proceeding with site blocking, then at a minimum, we recommend that it should:
  - only apply to websites that are operated outside Australia;
  - only apply to clearly, flagrantly and totally infringing websites;
  - only apply to websites that are using infringement as their main source of revenue;
  - clearly define what a 'website' is, for example, to ensure that entire domains such as [www.blogspot.com](http://www.blogspot.com) are not blocked due to a concern with [www.streamingmusic.blogspot.com](http://www.streamingmusic.blogspot.com);
  - only be available when notice and takedown has failed; and
  - require that rights owners should indemnify ISPs against false claims.

Irrespective of the final outcome regarding site blocking, we encourage the Government to consider the implementation of other potentially effective measures, such as elements of a **“Follow the Money”** strategy, as outlined in Attachment 1 – e.g. measures that act to restrict the amount of advertising revenue that infringement-focused sites receive.

The City of London Police this year have created an “Infringing Website List” and are working with brands, media agencies and ad networks to seek to ensure that advertising revenue is not directed to the websites.

In July 2014 the Police announced they had begun replacing legitimate brand advertisements on the targeted websites with official police force pop-up banners that inform visitors that the site is under investigation for copyright infringement.

Some ISP members of Communications Alliance already have policies in place which prevent any of their advertising spend being directed to sites that promote or facilitate improper file sharing.

Discussions are underway as to whether a united approach could be adopted by ISPs whereby the industry generally agrees on measures or policies to ensure the relevant websites do not benefit from any of the industry’s advertising revenues.

There is, however, a risk such a united stance might contravene section 45 of the **Competition and Consumer Act, 2010 (CCA)**, which prohibits contracts, arrangements or understandings which have the purpose, effect or likely effect of lessening competition or contain exclusionary provisions. Industry will need to take legal advice and/or explore the possibility of obtaining, from the Australian Competition and Consumer Commission (ACCC), an exemption from these provisions if we wish to go further down this path.

### PROPOSAL 3: EXTENDED SAFE HARBOUR SCHEME

Extending the safe harbour scheme to organisations such as online service providers and universities is a welcome move.

There are some concerns about how this proposal is implemented (the drafting is complex and circular and steps away from the more simple approach recommended by the Attorney-General’s Department in 2011, which was supported by the internet industry, education sector and others). However the proposal can be supported in principle.

There is scope for the Government to go further and replace the existing safe harbour provisions with conditional immunity for carriers/CSPs, hosts and online service providers. The current situation is that cached content kept to manage overseas downloads is “infringing” but subject to a safe harbour defence. There is no good reason why electronic caches should be copyright infringing. Nor for that matter why data hosts and service providers should have primary liability for third party content subject only to the safe harbour.

Ideally the position should be that the carrier/CSP, host or service provider is immune until put on notice of infringement and then obliged to take reasonable steps.

### 3. THE OVERSEAS EXPERIENCE

- France, New Zealand, Taiwan, South Korea, the US and the UK have laws which place some degree of responsibility on ISPs to police their users' alleged copyright infringements.
- There are numerous models in place overseas to fund the activities required by ISPs. In France the Government has met the costs of the HADOPI scheme, although it has been largely wound back in recent years, due to concerns over its effectiveness. In the USA ISPs have agreed to meet the costs they incur from such a scheme. In New Zealand rights holders pay a fee of \$NZ25 to ISPs each time they ask an ISP to match an IP address to an end-user account and send a notice to the account holder. The MPAA are not participating in this process due to the requirement to pay ISPs a fee, which they say should be a matter of pennies.
- In the UK a voluntary scheme dubbed Creative Content UK was launched in July 2014 – some 3 years after legislation was passed there. The scheme involves the sending of up to four notices to alleged infringers, but no further action. The UK Government has also pledged \$3.5 million to support the public education aspects of the scheme. The detail of any cost-sharing arrangements between ISPs and rights holders in the UK has not been announced.
- There are also private commercial arrangements in Ireland and the US.

Those who support the adoption of 'graduated response' regimes argue that they are successful and effective, but evidence to support these claims is inconsistent and confusing. In the iiNet case, the High Court was concerned with the burden that would be placed on ISPs in reviewing and sending notices [74].

In her comprehensive 2013 research paper: *Evaluating Graduated Response*, Dr Rebecca Giblin highlights:

- The evidence that graduated response actually reduces infringement is extraordinarily thin.
- There's little evidence that graduated response does anything to increase the size of the legitimate market.
- In some cases the evidence suggests that graduated response has largely had the effect of shifting individuals to other infringing sources, rather than leading to an increase in the legitimate market. Particularly clear examples come from the French and New Zealand experiences.

The success, or otherwise, of online copyright enforcement schemes overseas is mixed. There also appears to be some evidence that these schemes have been very expensive to implement and have not demonstrably reduced online infringement. Early indications from the commencement of a scheme in the US, which came after Dr Giblin's research was published are said to have shown signs of making an impact on the rate of infringement. Instances of improper use of P2P technology in the US have been on the wane in recent years in any event – a trend that has been attributed to the wider availability of lawful and affordable content in that country.

## 4. RECENT AUSTRALIAN ATTEMPTS TO AGREE AN INDUSTRY-BASED SCHEME

Since 2005, rights holders have sought to compel ISPs to sanction customers, who rights holders allege are infringing copyright online (including through P2P file sharing).

In 2008 Village Roadshow and other rights holders brought proceedings against iiNet, alleging that iiNet was authorising copyright infringement by its customers. In 2012 the High Court unanimously held that iiNet was not liable for authorisation.

Both before and after the High Court decision, ISPs engaged with the Attorney-General's Department (AGD), consumers and rights holders to try to forge a cooperative industry-led approach to the issue.

During those discussions, ISPs proposed the following notice and notice trial:

- a capped number of notices to be sent by ISPs to ADSL consumer customers alleged by rights holders to have engaged in online copyright infringement;
- notices sent would be educational in focus; there would be no sanctions, such as 'throttling' customers' internet service or suspending services;
- matching of IP addresses with customer information and the processing and sending of notices would occur manually, with the reasonable costs incurred by ISPs being reimbursed by rights holders;
- ISPs and rights holders would jointly fund, on a 50:50 basis, the cost of establishing an office to undertake public education and to operate an appeals mechanism for customers who believed they had been wrongly accused;
- if a customer was indicated to be a persistent infringer and ignored repeated warning notices over a 12 month period, a facilitated discovery process would be available to enable RHs to gain access to the customer information and enforce their copyright; and
- an assessment of the trial's effectiveness at its conclusion.

It was intended that the trial be held over an 18 month period as a means of testing the effectiveness of the scheme as a tool to reduce infringement, and therefore to indicate whether the substantial investment of IT resources by ISPs to design and implement an automated system could be justified.

Rights holders were in broad agreement on the structure of the proposed trial, but refused to pay, or contribute to, ISPs costs, or to commit to making available more timely and affordable digital content. The discussions eventually halted pending the 2013 federal election.

The 3 key areas of disagreement between rights holders and ISPs at that time were (and remain):

- *Any scheme must include all ISPs (whole of industry approach)*

Rights holders favoured a scheme which only included the top ISPs, based on number of customers

ISPs noted that infringement is not relative to customer numbers and further, any scheme must involve all ISPs, or risk distorting the market through customers churning away from participating ISPs to non-participating ISPs.

*Who pays for any enforcement scheme?*

Rights holders were of the view that ISPs should fund the costs incurred through processing data, matching customer IP addresses to alleged infringements and sending out notices to customers.

ISPs were of the view that rights holders should have primary responsibility (including costs) for any scheme to enforce their private property rights - as is the case for any other owner of a property interest – and recognising that the economic value of such a scheme would accrue to rights holders.

- *Should any enforcement scheme include sanctions against customers?*

Rights holders have historically favoured a series of escalating sanctions (also called 'Mitigation Measures')

ISPs believe that only an Australian Court, or regulatory body, should impose sanctions or authorise discovery.

### **What Could an Australian Industry-Agreed Scheme Look Like?**

Without seeking to pre-empt any discussions between rights holders and ISPs, - and bearing in mind the 10 factors listed in the Summary of this submission – it is possible that an agreed Australian scheme could look like the following:

- an educational 'notice and notice' regime, with ISPs sending up to three notices, escalating in severity, to account holders whose account had been identified as having been used for improper file sharing;
- these notices would be sent under the right holder's brand (or that of a single rights holder entity or association, or under the Government's name);
- the notices would include contact details for the rights holder, to prevent large volumes of customer queries being directed to the front-of-house operations (contact centres) of ISPs;
- the scheme would involve all ISPs (down to a minimum size to be defined), to ensure industry-wide compliance and so as not to distort the market via customers transferring their business away from ISPs participating in the scheme to those not participating;
- the scheme would include an independent third party (e.g. a judicial/regulatory /arbitration body) to provide oversight;
- the third party body would have the power to apply meaningful sanctions (to recalcitrant 'repeat infringers' i.e. those who have received 3 notices within an agreed specified period – but such sanctions would not include interruption to or termination of internet services;
- the third party body would also operate an appeals process for customers who believe they have been wrongly accused of infringing;

- costs associated with the scheme would be borne by rights holders on the basis of the 'beneficiary' pays principle;
- an education campaign directed to both the impacts of online infringement and how to source legal content
- continuous improvement on availability and cost of online content to Australian consumers

## 5. THE COST ISSUE

While we cannot be certain that any scheme to address piracy will lead to a significant reduction in infringements, the rights holders' approach to costs deserves comment.

The Australian Content Industry Group (ACIG), which represents a coalition of Rights Holders, believes that the retail value lost to their industry sector through online copyright infringement via file-sharing by Australian consumers in 2010 was A\$900m and is growing rapidly.

The Australian Federation against Copyright Theft (now the Australian Screen Association) commissioned a study, released in January 2011, which claimed that the direct losses to the movie industry alone in Australia from copyright infringement in the 12 months leading to Q3 2010 totalled A\$575m. More recent assertions by AHEDA put the economic damage to Australian video sales at \$1.4 billion.

Using the lower two data points as a guide, it follows that if a notice scheme in Australia succeeded in changing the behaviour of even two-thirds of casual infringers, this should generate an annual economic uplift to Rights Holders at least in the order of \$420m per annum (i.e. \$900m x 70% x 2/3).

A small fraction of this economic value would be more than sufficient to fund the initial establishment and primary operating costs of the scheme.

**Australian ISPs believe that RHs, who will overwhelmingly enjoy the economic benefits of any online copyright enforcement scheme, should reimburse the reasonable costs of ISPs who assist them.** This approach is consistent with other types of assistance that ISPs provide to third parties, for example, law enforcement agencies.

The cost burden on ISPs to establish and operate an online copyright enforcement scheme is considerable, falling into a number of categories. These include:

- Capital Expenditure:
  - Training, employment, etc.
  - Business process/design
  - Software/hardware design and implementation
- Operating Expenditure:
  - Verification (accuracy of notices received)
  - Matching IP addresses to account holders
  - Sending notices
  - Record keeping
  - Costs of dealing with enquiries
- Additional possible costs:
  - customer appeals process
  - tracking number of notices for each customer
- Opportunity costs:
  - customer complaints, including to front-of-house call centres
  - of redeploying resources to any scheme
  - potential churn cost

While rights holders may also incur costs in some of the same categories, they will also enjoy the benefit of royalty returns recovered by virtue of any scheme to assist them enforce their private property rights.

### ***“Unwitting Facilitator” versus “Innocent Bystander”***

***Some Government commentary in recent weeks has asserted that ISPs should pay a portion of the cost of any agreed scheme because, rather than being “innocent bystanders” to online infringement, ISPs are in fact “unwitting facilitators” of such infringement.***

***Even if the “unwitting facilitator” descriptor is accurate, Communications Alliance does not agree that this logically constitutes an obligation on ISPs to fund the costs involved in helping rights holders to gain the economic reward flowing from reduced online copyright infringement. Further, there is no sound economic basis for imposing costs on a service provider for policing unlawful uses of its lawful service. Why should consumers of a lawful service pay additional costs for measures designed to prevent the wrongs of a minority?***

***If we consider the analogy of the constructor of a highway and his/her potential liability for the fact that motorists may choose to break the law by exceeding the speed limit on that highway:***

- ***the highway constructor is arguably an unwitting facilitator of the speeding that takes place on the highway and it is logical that the highway constructor may be responsible for posting speed limit signs to alert motorists to the legal boundaries of their use of the highway (this is analogous to ISPs postings informational material on their web-sites, including about the fact that improper file-sharing on the ISPs’ networks may be illegal);***
  
- ***But it is not logical to assume that the constructor of the highway should be responsible for funding a police force to catch and penalise speeding motorists (which is analogous to forcing ISPs to fund the costs of an agreed industry-based scheme.)***

## 6. AUSTRALIA'S INTERNATIONAL OBLIGATIONS

Article 17.11.29 of the AUSFTA contains the requirements for the safe harbour provisions for service providers which are stated to be consistent with the obligation in Article 41 of TRIPS to provide effective enforcement procedures. The AUSFTA requirements were subsequently implemented by new safe harbour provisions in the Copyright Act.

The AUSFTA requirements closely mirror the provisions of the DMCA which was enacted in the US in 1998. At that time peer-to-peer (P2P) technology and its use for improper file-sharing had not yet emerged as an issue. The focus was on infringing material stored on websites and on notice and takedown procedures.

The AUSFTA requirements include providing legal incentives for service providers to cooperate with copyright owners in deterring online infringement. It was considered that the safe harbour was an incentive for service providers to cooperate. One of the conditions of the safe harbour was to implement a repeat infringer policy. All this is reflected in the DMCA, AUSFTA and the safe harbour provisions of the Copyright Act. It was never contemplated by the AUSFTA that there would be a requirement to introduce a scheme to deal with P2P infringement.

In our view there is no basis for the assertion in the Government's discussion paper that the effect of the High Court decisions in the iiNet case is to place Australia in breach of Article 17.11.29

All that iiNet High Court case decided was that failure of an ISP to take action against its customers who engaged in P2P infringement did not amount to authorisation of their infringing activity. This is also the case in the UK, and quite likely the same result would pertain in the US under their doctrine of secondary liability (although there is no case law directly on point in either the UK or the US). Further, in Australia as seen from the *Cooper* case under existing authorisation law, an ISP could be held liable for authorisation contrary to the apparent suggestion in the paper. In *Cooper*, a website operator and the ISP host of the site found liable for a webpage that had links to infringing music files.<sup>2</sup>

The AUSFTA contains no provision which requires that ISP's be liable for copyright infringement in these circumstances. The same pertains to the other free trade agreements more recently executed between Australia and Singapore, Japan and the Republic of Korea.

Rights holders may legitimately argue that an online enforcement scheme should be introduced to combat online infringement. However, in our view the assertion that the lack of a scheme places Australia in breach of the AUSFTA has no basis.

---

<sup>2</sup> [Cooper v Universal Music Australia Pty Ltd \[2006\]](#)

## ATTACHMENT 1



### **City of London Police launches advert replacement on illegal websites**

The Police Intellectual Property Crime Unit (PIPCU) at the City of London Police has begun replacing advertising on copyright infringing websites with official force banners, warning the user that the site is currently under criminal investigation.

Working in collaboration with content verification technology provider, Project Sunblock, police banners are now replacing a wide range of legitimate brand adverts on infringing websites. The pop-up will inform the user that the website is under investigation by the City of London Police unit for copyright infringement and will advise the user to exit the website.

This new innovative step is the latest phase of Operation Creative, a pioneering initiative designed to disrupt and prevent websites from providing unauthorised access to copyrighted content, led by PIPCU in partnership with the creative and advertising industries.

The sites where these new banners will feature have been identified and reported to PIPCU by rights holders who provide a detailed package of evidence indicating how the site is involved in illegal copyright infringement.

Officers from the unit evaluate the websites and verify whether they are infringing copyright. The site owner is contacted by PIPCU and offered the opportunity to engage with the police, to correct their behaviour and to begin to operate legitimately.

If a website fails to comply and engage with the police a variety of other tactical options may then be used including; seeking suspension of the site from the domain registrar, advert replacement and disrupting advertising revenue through the use of the Infringing Website List (IWL).

Head of PIPCU, DCI Andy Fyfe said: "This new initiative is another step forward for the unit in tackling IP crime and disrupting criminal profits. Copyright infringing websites are making huge sums of money through advert placement, therefore disrupting advertising on these sites is crucial and this is why it is an integral part of Operation Creative.

"This work also helps us to protect consumers. When adverts from well known brands appear on illegal websites, they lend them a look of legitimacy and inadvertently fool consumers into thinking the site is authentic."

CEO of Project Sunblock, Duncan Trigg said: "Protecting brands online is at the heart of what we do, so we're delighted to be selected to help the police tackle online piracy and bring about a safer marketplace for advertisers in the UK.

"Without realising it, advertisers are allowing their brands to be associated with illegal sites, and regrettably, this happens more often than it should. But each time it does, brands are effectively putting money in the back pocket of criminals. As advertisers funnel more money into online spend,

initiatives like this are crucial to safeguarding their brands as well as their budget.”

PIPCU is based within the Economic Crime Directorate of the City of London Police, the National Lead Force for Fraud. PIPCU is a specialist police unit dedicated to protecting the UK industries that produce legitimate, high quality, physical goods and online and digital content from intellectual property crime.

The operationally independent unit launched in September 2013 and is initially being funded by the Intellectual Property Office (IPO), which is part of the Department for Business, Innovation and Skills. PIPCU is based within the Economic Crime Directorate of the City of London Police, the National Lead Force for Fraud.

## ATTACHMENT 2

### Responses by Communications Alliance to the Questions in the Australian Government Online Copyright Infringement Discussion Paper, July 2014

**QUESTION 1:** *What could constitute 'reasonable steps' for ISPs to prevent or avoid copyright infringement?*

**Q1 Communications Alliance Response:** Reasonable steps could include a very clear statement by ISPs to their customers that the ISP does not condone improper file sharing, nor any other form of copyright infringement and that the ISP encourages the lawful use of the internet.

This could be complemented by the provision of information in an easily accessible location on the ISP's web-site, designed to raise consumer awareness about:

- the illegal nature of online copyright infringement;
- the possibility that infringing individuals could face legal action from rights holders; and
- the available sources of lawful, affordable content.

Some ISP members of Communications Alliance already have policies in place which prevent any of their advertising spend being directed to sites that promote or facilitate improper file sharing.

Discussions are underway as to whether a united approach could be adopted by ISPs whereby the industry generally agrees on measures or policies to ensure the relevant websites do not benefit from any of the industry's advertising revenues.

There is a risk, however, that such a united stance might contravene section 45 of the **Competition and Consumer Act, 2010 (CCA)**, which prohibits contracts, arrangements or understandings which have the purpose, effect or likely effect of lessening competition or contain exclusionary provisions. Industry will need to take legal advice and/or explore the possibility of gaining an exemption from these provisions if we wish to go further down this path.

Other reasonable steps may be agreed as part of any overall cooperative arrangements between ISPs and rights holders, subject to the resolution of issues such as equitable funding arrangements for any agreed actions (as outlined on page 13 under the heading "**What Could an Australian Industry-Agreed Scheme Look Like?**").

**QUESTION 2:** *How should the cost of any 'reasonable steps' be shared between industry participants?*

**Q2 Communications Alliance Response:** Given that:

- rights holders do not appear to want to take advantage of their existing rights under law, to enforce their copyright; and
- the economic benefit flowing from any reduction in the volume of online copyright infringement will overwhelmingly flow to rights holders in the form of increased sales revenue; then it is fair that rights holders should reimburse the

reasonable costs incurred by ISPs in undertaking actions – agreed in advance with rights holders - to counter infringing activity.

In earlier discussions with rights holders, the major ISP members of Communications Alliance offered to make a dollar-for-dollar contribution with rights holders to the cost of:

- establishing programs to educate consumers about the illegality of infringing activity and about the sources of lawful and available content; and
- providing a mechanism of appeal for consumers who might believe they have been falsely accused of infringement.

If agreement was reached on the reimbursement point outlined above, then a sensible discussion could be held between Government, ISPs and rights holders on how best to fund the public education elements of any program. The UK Government, for example, in July this year pledged Stg.3.5 million for public education on these issues in the UK.

**QUESTION 3:** *Should the legislation provide further guidance on what would constitute 'reasonable steps'?*

**Q3 Communications Alliance Response:** Yes, the present absence of any definition of reasonable steps creates genuine uncertainty for rights holders, ISPs and the judiciary.

It also points to a scenario where – if the Government proposals were implemented, rights holders would have little or no incentive to act reasonably and instead could simply demand that ISPs take reasonable steps along lines specified by the rights holder. This highlights the need for proper sequencing – legislation, if needed, should only be enacted after industry negotiations on a scheme.

**QUESTION 4:** *Should different ISPs be able to adopt different 'reasonable steps' and, if so, what would be required within a legislative framework to accommodate this?*

**Q4 Communications Alliance Response:** Opinion is somewhat divided on this point. Some ISPs believe that ISPs should be able to adopt a range of reasonable steps depending on their individual business and customer circumstances and taking into account, where appropriate, any agreements they may have reached with rights holders.

Other ISPs tend to feel that a uniform set of reasonable steps – a level playing field – is a better approach.

Further discussion is warranted on this topic

**QUESTION 5:** *What rights should consumers have in response to any scheme or 'reasonable steps' taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?*

**Q5 Communications Alliance Response:** First, consumers should have a right to have any allegation of infringement against them independently investigated via an appeals mechanism, and should not face any risk of sanctions while such an appeal is underway. Consumers should also have the right to appeal to an independent body against the imposition of any sanctions, This right should be enshrined

somewhere – for example in the terms and conditions of any industry-led scheme that may be agreed – but might not necessarily need to be included in legislation.

As a general point, consumers should also have the right of ready access to lawful affordable content, rather than being placed in a position where the absence of lawful access to such content tempts them to use improper alternative means of access.

**QUESTION 6:** *What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?*

**Q6 Communications Alliance Response:** In the event that an adequately safeguarded and appropriately funded site blocking mechanism is in place, a Court should consider factors including:

- whether the injunction request, if granted, would have unintended consequences, including in the form of blocking legitimate websites or other legitimate commercial or consumer activity. (The Court might need to seek Independent guidance from a subject matter expert to determine this);
- whether the injunction request stands up to a reasonable assessment of proportionality; and
- whether granting the injunction would impose unreasonable financial burdens on ISPs or any other entity and, if so, how these should be recompensed.

**QUESTION 7:** *Would the proposed definition adequately and appropriately expand the safe harbour scheme?*

**Q7 Communications Alliance Response:** Yes

**QUESTION 8:** *How can the impact of any measures to address online copyright infringement best be measured?*

**Q8 Communications Alliance Response:** The impact of any agreed measures should be monitored by an independent body.

Trendlines in the incidence of P2P activity in a specific market, such as Australia can be tracked over time.

Other potential metrics/datapoints include:

- the pricing differentials between downloads of relevant content in Australia compared to other markets; and
- consumer knowledge of and attitudes to the illegal nature of online copyright infringement, and of the lawful alternatives.

**QUESTION 9:** *Are there alternative measures to reduce online copyright infringement that may be more effective?*

**Q9 Communications Alliance Response:** Yes.

Such alternative measures may include:

- more concerted efforts by rights holders to ensure that consumers can access lawful, affordable content in a timely fashion. This should include efforts to end geo-blocking, and remove the price differential that sometimes applies to content downloaded

lawfully in Australia, compared to prices charged for identical downloads in countries such as the USA;

- a stronger focus on programs to educate consumers about the illegality of infringing activity and about the sources of lawful and available content; and
- a Government focus on a **'follow the money'** strategy, designed to reduce the flow of advertising funds and/or other revenue to web-sites that are focused on promoting and/or facilitating improper file-sharing

**QUESTION 10:** *What regulatory impacts will the proposals have on you or your organisation?*

**Q10 Communications Alliance Response:** If ISPs are expected to put in place – at their own expense – automated or manual systems to match IP addresses and send notices to consumers at the behest of rights holders, then the cost to the ISP sector could easily top \$100m in initial capital expenditure and tens of millions of dollars in annual operating expenses. Automated systems will be heavy on capex and lighter in respect of opex. Manual systems will have broadly inverse characteristics.

As outlined in the body of the submission, ISPs will also face much greater uncertainty as to their liability for authorising infringement. This will build additional legal costs into the regulatory functions of ISPs. Cases that proceed to litigation over alleged authorisation liability will add considerable further legal and regulatory costs.

A conservative approach to the uncertainty and risk flowing from the proposed change to the authorisation test may lead some ISPs to implement their repeat infringer policies to get the benefit of the safe harbour scheme. The actions required to do this will further increase the costs on the ISP industry.

**QUESTION 11:** *Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?*

**Q11 Communications Alliance Response:** Yes.

Authorisation liability is not just something that applies to ISPs. It applies to everyone. In the same way that a rights holder can sue for direct copyright infringement, they can sue a person for authorising infringement. The court can award damages (including an account of profits and additional damages) and issue injunctions. Any changes to authorisation liability in the Copyright Act will not just affect ISPs - the effects will be felt across the economy and will impact libraries, galleries & museums, schools & universities, operators of cloud storage services, public wi-fi operators, anyone who owns or hosts a website, even retailers such as Officeworks, Big W and Harvey Norman who provide copying equipment (e.g. photo copying and enlarging machines supplied for customers to use in store).

In other words, in proposing to make changes to the law of authorisation, the Government would not just be regulating rights holders and ISPs – rather it would potentially change the legal liability of every school, university, library, public institution, technology company or retailer in the country.

The consultation paper is written as though the authorisation changes are limited only to ISPs.

A further unintended consequence may fall on consumers if ISPs implement their repeat infringer policies in response to the uncertainty and risk flowing from the proposed change to the authorisation test.

In these circumstances consumers face the very real risk of having their connection to the internet compromised or terminated as a result of allegations that they have infringed, and in circumstances where they might not be responsible for any improper activity whatsoever.



**Published by:  
COMMUNICATIONS  
ALLIANCE LTD**

**Level 12  
75 Miller Street  
North Sydney  
NSW 2060 Australia**

**Correspondence  
PO Box 444  
Milsons Point  
NSW 1565**

**T 61 2 9959 9111  
F 61 2 9954 6136  
E [info@commsalliance.com.au](mailto:info@commsalliance.com.au)  
[www.commsalliance.com.au](http://www.commsalliance.com.au)  
ABN 56 078 026 507**

Care should be taken to ensure the material used is from the current version of the Standard or Industry Code and that it is updated whenever the Standard or Code is amended or revised. The number and date of the Standard or Code should therefore be clearly identified. If in doubt please contact Communications Alliance