

Dear Online Copyright Infringement Consultation people,

Regarding the Online Copyright Infringement Discussion Paper 2014....

Copyright is a valuable legal protection for the creative industries. As a creator of (software) copyright I'm particularly keen on ensuring copyright remains a creator protected asset.

As an ISP customer and former ISP employee I have the following expectations of an ISP:

- * Deliver IP packets sent from me to their destination with very low loss (preferably none);
- * Deliver IP packets from the wider Internet destined for me with very low loss (preferably none);
- * Provide this IP packet delivery service at the agreed bandwidth connection or higher; and
- * Provide this IP packet delivery service with the minimum latency possible.

To governments, it seems that ISPs are a local based legal entity that sits between end users and the wider Internet and therefore are a particular easy target of any regulation to do with Cyber Security, spam, or any Internet based legal/moral issue. It is important that governments consider that alternate avenues are adequately explored.

The consideration of ISPs as the dominate target to prevent copyright infringement due to secret TPP "free trade agreements" without any public discourse around the agreement and the costs/benefits to Australian society and economy sets a poor undertone and unnecessary bias for this discussion.

Every regulation or act implemented in law imposing on ISPs incurs the ISP additional costs which directly get passed on to me as a consumer. These costs are passed on regardless I receive any benefit from using a "Family Friendly ISP", whether I complain about SPAM, or in this case, whether I am a copyright infringing person or not.

The distance between the IP delivery aspect of an ISP and the enforcement of copyright is a massive jump that is not achievable for any ISP. The assertions that copyright infringement may reduce the effectiveness of consumer protection laws or exposure of children to non age-appropriate material is a particularly poor argument in the environment of substantial legal copyright use that can incur similar harm.

What is achievable for an ISPs is to partner with copyright holders to deliver a high quality delivery mechanism for video (and music) at a competitive price. I achieve this already with iiNet's FetchTV. With this service I pay a very low cost for a hardware appliance (\$10 p.m.) that provides Free-to-air recording as well as Video-On-Demand service for \$3 - \$7 for a video of my choosing. The fair price model (for my level of use but not necessarily all users) and ease of use makes this an exceptionally easy service to use and significantly easier than committing copyright infringement to download a video of potentially poor quality. Despite all the benefits of the FetchTV appliance in providing video there are a number of disadvantages. FetchTV is still a quite a high cost if the consumer only wants a single video/film infrequently and more importantly the range of videos available for view at any one time are quite limited. Content providers, through arrangements with Foxtel, Telstra T-Box or other distributors, don't make the same content available for FetchTV. While these providers are quite within their right to make business decisions this way, the result is they miss out of revenue and, as this discussion paper points out, a high rate of copyright infringement amongst Australians.

In another tale of copyright infringement in the computer games industry, this has largely been reduced due to innovation in the industry; in this case by Steam. Steam (<http://store.steampowered.com/>) is a downloaded application that forms the platform for the delivery of a wide range of modern and old games. It provides users with an easy pay per game function and provides hard mechanisms to prevent the user from copying games and giving them to their friends or otherwise providing them online. In this case copyright holders (the game manufacturers) make a profit out of games to the users without expending massive dollars in copy protection technologies or political lobbying and still achieve a viable business. The consumers also benefit with an easy to browse and purchase ability even for exceptionally rare games.

iTunes achieved a similar service for the music industry.

The provision of the same content through multiple providers would be beneficial for consumers and producers as each provides different cost/benefits in the same way that Coca Cola sells the same content to Coles and Joe's Takeaway which end up as different costs however both are viable markets. The domination of Steam and iTunes does not preclude different delivery

technology or business models for producers to sell content to consumers through.

If the content providers of video had a similar commitment to innovation we wouldn't be having this consultation. The market segregation strategy that results in videos being available in the US but not Australia, or on Foxtel but not FetchTV, or in movie theatres but not on DVDs, has ultimately created sufficient barriers AGAINST access for their potential customers, and provided an easier path for consumers to find and download video content elsewhere. The site <https://www.caniwatchit.com.au/> shows the market segregation of the most pirated films that could be prevented.

In a time not too long ago, business that failed to innovate or move with the change in technology closed or otherwise ceased to exist. It is quite sad that today businesses like a multi-billion dollar movie industry that still see technology as a threat rather than an opportunity, are trying to stay alive by forcing an innovative industry like ISPs to bear their cost of lack of innovation through government who have much larger social problems still to address.

By endorsing any change in law that incurs cost for ISPs this government is imposing a cost to me as a consumer for content that I am willing to pay for online, but cannot readily access due to:

- a) excessive cost (e.g. full Foxtel subscription for watching a few videos);
- b) mobility disability - access to movie theatres hard or impossible;
- c) visual or auditory disability that isn't provided by movie theatres; or
- d) remote area - where there no video stores or theatres.

In allowing copyright infringement to become a normal part of society by protecting the video industry's market segregation model, and in legislating that ISPs pass on copyright notices until disconnection, the government is failing to acknowledge massive copyright infringement is preventable, and it only preventable by the copyright holders taking technological steps to innovate and deliver content.

To uphold the law of copyright, and the law of the Australia generally, its a government responsibility to ensure that the infringement is processed by the independent courts rather than copyright holders having the ability to enforce imposition without independent review and potentially at no cost to them.

There has been at one case recently where the fair use provisions of the copyright act were ignored by content providers resulting in the removal of the content produced by the other producer (<https://www.eff.org/press/releases/lawrence-lessig-strikes-back-against-bogus-copyright-takedown>). This prejudicial behaviour is the reason why content producers shouldn't be given absolute rights in enforcing their own copyright infringement.

There also is no evidence presented that any ISP mechanism provides either a significant reduction in copyright infringement or an increase in copyright holder revenue. If this isn't the case, there no point in any legislative mechanism. As some contries have already done this how about a measurement of their success is performed.

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

To prevent or avoid copyright with involve massive computational resourced deep inspecting every packet before delivery and therefore isn't reasonable and probably not even techologically possible.

In terms of post-infringement actions a ISP should be able to respond to a court order which indicates that a copyright owner is willing to get the act of infringement independently reviewed.

Given the inability of successive Australian government ministers and senior legal advisors to sufficiently understand the basics of how Internet packets are delivered it would seem excessive to allow the Copyright Regulations to define adequate means. The courts have a better chance of defining this soliciting their own up-to-date information from independent experts at the time of any hearing.

The disconnection of a ISP user causes significant impediments to a users interaction with modern society and commerce and should never be considered as a penalty to apply without court judgement.

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

Should my recommendation that ISPs should only be responsive to court orders be ignored, the copyright holder is the sole detrimented party and therefore should bear all the costs in the same way that patent holders bear all the costs until the court determines an infringement has occurred.

Any cost passed to consumers can't realistically be provided to just those that infringe, those would just end up as bad debts for the the ISP. So any cost to ISP is a levelled cost to all consumers for all the infringing people on the network and is therefore unfair.

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

No. There should be no legislation as the market is in a position to fix this problem without intervention. As technologies change this balance may not always be true, however input from consumers and the entire parliamentary process is required to ensure that this power to introduce Copyright Regulation isn't extended to the whims of a minister of the day. The Human Rights Committee should be able to exercise their blocking privileges for unfair acts and instruments however they may need a more modern guide than the ICCPR.

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?

There is nothing reasonable about an IP packet delivery service like an ISP to be in anyway more responsible for the packet content than a freight company being responsible for any copyright infringement in the contents of physical packages or a phone company being responsible the copyright infringement of singing "Happy Birthday to You" over the phone. The radical imposition on an ISP of this responsibility for copyright is just as radical as the imposition on freight or phone companies previously mentioned. All ISPs offer the same package delivery service using differing technologies and differing business arrangements.

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?

Consumers have the full rights of fair use the Copyright Act which means there shouldn't be the assumption of guilt associated with any notice.

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

The court must be satisfied that any fair use of the infringing material does not apply in the situation.

The court must be satisfied that the mechanism of the injunction to block a site with not cause material damage against other parties that may also be effected by the injection. For example blocking infringement on 173.252.110.27 would seem fair until you consider its sole IPv4 address for Facebook currently served. Given the ASIC debacle in blocking IP addresses of multiple domain the court should seek its own advice on the expected detriment of any block.

Given current ISPs can't prevent spam using this reactive blocking mechanism there is no real reason to suggest a blocking mechanism for copyright infringement would achieve any meaningful result. The versatility of both providers and consumers of infringing copyright to tunnel and move content significantly exceeds the ability of an ISP to react to this threat. Its akin to blocking phone numbers of telemarketers, i.e. hopelessly efficient where the market for phone numbers is so cheap.

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

The extension of the safe harbour provisions to non-public service providers would be a welcome mechanism.

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

Only general trends in countries already implementing blocking / ISP infringement schemes with relation to market sales can show the outcome here. There need to be measured without any bias from the copyright holders.

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

Tell the copyright holders to embrace technology to deliver more convenient content at the same time in each market at a reasonable cost and deliver content via multiple intermediary mechanism.

After this occurs it would be fair to examine if there is still significant copyright infringement occuing online in Australia.

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

Added ISP costs as a consumer. Potential website inaccessibility if the blocking mechanism for copyright infringement affects other customers without consideration.

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

Shared service providers are likely to have multiple websites blocked like ASIC did without the conseration of their large number of clients that share an IP or the muliple services provided on it.

An unintended consequence is for governments who are already seen to be responsible for the protection of larger industries while large social and economic problems remain unaddressed.