Australian Government

Online Copyright Infringement

Discussion Paper

July 2014

There are good reasons why all Australians should be concerned about online copyright infringement.

According to a 2012 report, Australia's copyright industries employ 900,000 people and generate economic value of more than $90 billion, including $7 billion in exports.[1] Digitisation means that these industries are particularly susceptible to harm from online copyright infringement with the potential to directly impact on the Australian economy and Australian jobs. Online copyright infringement can hurt consumers as well. Consumers accessing material unlawfully are not covered by consumer protection laws and may be exposing themselves to the risk of fraud and other forms of cybercrime. Further, children may be exposed to material that is not age appropriate.

The Australian Government believes that everybody has a role in reducing online copyright infringement. Rights holders can ensure that content can be accessed easily and at a reasonable price by their customers. Internet Service Providers can take reasonable steps to ensure their systems are not used to infringe copyright. Consumers can do the right thing and access content lawfully.

However, the Government recognises that this is not an issue that is susceptible to easy solutions, as international experience demonstrates. No set of measures is likely to eliminate online copyright infringement. Moreover, in the dynamic environment of the digital economy, the Government believes that workable approaches to tackling online copyright infringement are most likely to come from the market.

The role of the Government in this context is to provide a legal framework that facilitates industry cooperation. The Government's *Online Copyright Infringement Discussion Paper* seeks public views on proposals to establish such a framework. In developing these proposals, the Australian Government is mindful of not creating a competitive advantage (or disadvantage) for particular industry participants and of ensuring that industry and consumers can continue to take full advantage of the legitimate opportunities to create and enjoy content in a digital environment.

The Government seeks your feedback on the proposals and on other approaches to addressing this issue.

Senator the Hon George Brandis QC
Attorney-General
Minister for the Arts

The Hon Malcolm Turnbull MP
Minister for Communications

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[1] PWC, *The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11: Prepared for the Australian Copyright Council (2012)*, accessed on 17 July 2012 at http://www.copyright.org.au/pdf/PwC-Report-2012.pdf.

Introduction

There are a number of factors that contribute to online copyright infringement in Australia. These factors include the availability and affordability of lawful content, the ease with which consumers can access unlawful material and consumer awareness of legitimate services. Accordingly, any response to online copyright infringement cannot just come from government. Action is also required from rights holders, Internet Service Providers (ISPs) and ultimately consumers as well.

Online copyright infringement by individuals has been a long standing issue, with Australians commonly identified as having high illegal download rates.[2] Infringement has been facilitated on a commercial scale through dedicated websites, predominantly based overseas.

Australia also has international obligations to provide protections for copyrighted material. These include bilateral free trade agreements with countries like the United States and Singapore, and multilateral treaties made under the World Intellectual Property Organization and the World Trade Organization.

This paper outlines the Government's proposed approach to amending the *Copyright Act 1968* to provide a legal framework within which rights holders, ISPs and consumer representatives can develop flexible, fair and workable approaches to reducing online copyright infringement. This framework aims to provide certainty as to legal liability, streamline the process by which rights holders can seek relief from the courts to block access to websites providing infringing material, and provide an incentive for market participants to work together to address online copyright infringement.

Online copyright infringement remains relatively strong in Australia, but is falling internationally. This paper therefore seeks views on other actions that may assist in reducing online copyright infringement in the future.

Overseas experience

Australia is not alone in trying to address this issue. There is much to be learned from overseas experience, particularly in the United States, the United Kingdom and New Zealand.

In the United States, the Center for Copyright Information (CCI), an industry body comprised of representatives of rights holders and ISPs, established by a voluntary industry agreement called the Copyright Alert System. The Copyright Alert System is a scheme where rights holders send notices of alleged copyright infringement to participating ISPs. The ISP matches the allegedly infringing internet protocol (IP) address with the relevant subscriber and sends the subscriber the appropriate copyright alert. Each repeat infringement from a subscriber account will result in a new notice. The first two notices are 'educational' notices, which inform subscribers of the alleged infringement, remind them of copyright rules and encourage them to seek content through legitimate sources. The third and fourth notices are 'acknowledgment' notices which, in addition to the education notice, require acknowledgment from the subscriber, for example, by clicking on a pop-up notice. The final two notices advise that a 'mitigation measure' will be applied. The particular mitigation measure is decided by the ISP, and may include, for example, reduction of internet speed, or redirection to a landing page until the subscriber contacts the ISP. The costs of the Copyright Alert System are divided equally between rights holders and ISPs.

The United Kingdom is adopting a similar approach. In July 2014, the United Kingdom Government announced the 'Creative Content UK' scheme. It is an industry agreement between rights holders and ISPs to forward educational notices to internet users whose accounts are being used for online copyright infringement. Creative Content UK will be part of a campaign to inform and educate the public about copyright issues and the notices will focus on educating consumers about how they can access legitimate content. This campaign will be partly funded by the United Kingdom Government.

[2] *Online Behaviours, An Australian study*, UMR Research December 2012 estimates this rate at 21 per cent of all Australians over the age of 18.

Alternatively, New Zealand provides a statutory 'graduated response scheme' which allows rights holders to send notices of alleged infringement to an ISP which are processed by the ISP and then forwarded on to their subscribers. Three escalating notices are sent to repeat infringers, with a new notice for each infringement—a detection notice, a warning notice and lastly an enforcement notice. An ISP may charge a rights holder up to $25 for each notice that it processes. After the third notice, the rights holder may make a claim to the Copyright Tribunal seeking an order for compensation. The Copyright Tribunal may award up to $15,000.

It is fair to say that there have been varying responses to the different overseas approaches. However, it is clear that a range of measures are required to effectively address online copyright infringement. Therefore, the Government wishes to establish a flexible framework that would allow for a wide variety of solutions. However, such solutions must be in the interests of all—rights holders, ISPs and consumers.

Have your say

The Government is seeking responses to the questions set out in this paper. Please note that we are not seeking comment on issues that were considered by the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy,[3] or the House of Representatives Standing Committee on Infrastructure and Communications Inquiry into IT Pricing.[4]

All submissions received will be considered by the Government in the process of finalising the proposals. We encourage those who have a view on the issues outlined in this discussion paper to make a written submission by **Monday 1 September 2014**.

The preferred method of receiving submissions is via the online form on the Attorney-General's Department website.

Written submissions can also be sent to:

Commercial and Administrative Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

or

copyrightconsultation@ag.gov.au

Submissions received may be made public on the Attorney-General's Department website unless otherwise specified. Submitters should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

[3] Final Report tabled on 13 February 2014, www.alrc.gov.au/inquiries/copyright-and-digital-economy
[4] Final Report, *At what cost? IT pricing and the Australia Tax*, tabled on 29 July 2013, www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm

Extended authorisation liability

Subsections 36(1) and 101(1) of the Copyright Act provide that a person may be liable for authorising an act that infringes copyright. Subsections 36(1A) and 101(1A) provide that three factors must be taken into account in determining whether a person has authorised an infringement:

(a) the extent (if any) of the person's **power to prevent** the doing of the act concerned;

(b) the nature of any **relationship** existing between the person and the person who did the act concerned;

(c) whether the person took any **reasonable steps** to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

Subsections 36(1) and 101(1) are 'technology neutral' provisions that apply to a broad range of situations. For example, these provisions apply to a university providing photocopiers in its library without adequate copyright warnings to users,[5] or a website operator providing hyperlinks to websites that allow infringing content to be downloaded.[6]

These provisions are intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so.

Where a person is found to have authorised an act that infringes copyright, the remedies available to rights holders are injunctions and monetary relief. In the case of an ISP found to have authorised an infringement, these remedies may be limited to non-monetary remedies if certain conditions are met (the 'safe harbour' provisions). This is discussed in more detail later in this paper.

Australia is obliged under its free trade agreements with the United States, Singapore and Korea (not yet ratified) to provide a legal incentive to ISPs to cooperate with rights holders to prevent infringement on their systems and networks.

The High Court's decision in *Roadshow Films Pty Ltd & Ors v iiNet Ltd*[7] determined that iiNet was not liable for authorising the copyright infringements of its subscribers using systems that iiNet did not operate or control, and that there were no reasonable steps that could have been taken by iiNet to reduce its subscribers' infringements. The effect of the decision is to severely limit the circumstances in which an ISP can be found liable for authorising an act by a subscriber that infringes copyright.

The Government believes that even where an ISP does not have a direct power to prevent a person from doing a particular infringing act, there still may be reasonable steps that can be taken by the ISP to discourage or reduce online copyright infringement.

Extending authorisation liability is essential to ensuring the existence of an effective legal framework that encourages industry cooperation and functions as originally intended, and is consistent with Australia's international obligations.

[5] *University of New South Wales v Moorhouse* [1975] HCA 26.
[6] *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.
[7] [2012] HCA 16 (20 April 2012).

Proposal 1—Extended authorisation liability

The Copyright Act would be amended to clarify the application of authorisation liability under sections 36 and 101 to ISPs.

In determining whether a person has authorised an infringing act, a court would still be required to consider the nature of the relationship between the person authorising the infringement and the person who did the infringing act, and whether the person took any reasonable steps to prevent or avoid the infringing act (as currently required).

In making an assessment of the 'reasonable steps' element, a court must 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 'power to prevent' the infringing act would no longer be a separate element, but would be only one of a number of relevant factors in determining whether 'reasonable steps' were taken to prevent or avoid the infringement. The amendments would 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.

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

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

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

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?

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?

The Government is looking to industry to reach agreement on appropriate industry schemes or commercial arrangements on what would constitute 'reasonable steps' to be taken by ISPs. The Government does not have fixed views on what such schemes or arrangements should look like—it expects that approaches will vary over time as new strategies and technologies are developed. Such schemes or arrangements should be of broad application and should not be a mechanism to give industry participants a competitive advantage or disadvantage or impose unreasonable costs. It may be that different industry participants choose to develop and adopt different schemes or approaches which suit their particular circumstances.

Importantly, the Government also expects consumer interests to be a key consideration in any such schemes or arrangements. The Government would not expect any industry scheme or commercial arrangement to impose sanctions without due process, or any measures that would interrupt a subscriber's internet access.

Under the proposal, the Government would have the power to prescribe measures in the Copyright Regulations if effective industry schemes or commercial arrangements are not developed.

Extended injunctive relief to block infringing overseas sites

Where online copyright infringement is occurring on a commercial scale, rights holders need an efficient mechanism to disrupt business models operated outside of Australia. A key measure to address online copyright infringement adopted in a number of European Union member countries, including the United Kingdom, is a specific injunction power directed at ISPs which requires them to block access to websites that contain infringing content. This approach recognises the difficulties in taking enforcement action against entities operating outside the relevant jurisdiction, by giving rights holders an avenue to take immediate action and provides ISPs with the certainty and legal protection of a court order. An appropriate injunction power also ensures that legitimate websites or services are not affected.

Under Article 8(3) of the *Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society* (the Directive), members of the European Union are obligated to enact laws that 'ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third-party to infringe a copyright or related right'.[8] The European Court of Justice confirmed in March 2014 that the Directive allows for third party injunctions to be made against ISPs.[9] The Directive leaves it to individual countries to implement this obligation in their national laws as they see fit.

In the United Kingdom, the Directive is given effect by section 97A of the *Copyright Designs and Patents Act 1988*.[10] Section 97A provides that the High Court can grant an injunction against an ISP where it has 'actual knowledge' of another person using its service to infringe copyright. In assessing actual knowledge, the Court must take into account whether the ISP received notice of the infringing activity together with the quality of that notice. It is otherwise open to the court to take into account what it deems necessary in the assessment of actual knowledge.

In the 2011 test case *Twentieth Century Fox Film Corporation & Ors v British Telecommunications plc*[11], the High Court ordered that British Telecom block access to the infringing website Newsbin2. In so ruling, the Court noted that British Telecom could rely upon technology it had implemented to block access to child pornography websites, and that the cost of implementing the order would therefore be 'modest and proportionate'. With regard to 'actual knowledge', the Court held that knowledge of specific individuals' infringing conduct is not required. Instead, knowledge of one or more persons using its service to infringe copyright is enough. Since this case, the High Court has continued to make orders for ISPs to block infringing websites.

The Directive was implemented in Ireland by statutory instrument in 2012.[12] The statutory instrument provides that copyright owners may apply for an injunction against intermediaries and that in considering an application 'the court shall have due regard to the rights of any person likely to be affected by virtue of the grant of any such injunction and the court shall give such directions… as the court considers appropriate in all of the circumstances'. Unlike the United Kingdom's legislation, the Irish law does not require the court to consider whether the ISP had knowledge of the infringing conduct. Since the implementation of this system, the Irish High Court has issued separate injunctions requiring ISPs to block access to the websites 'The Pirate Bay' and 'Kickass Torrents'.

A similar provision in Australian law could enable rights holders to take action to block access to a website offering infringing material without the need to establish that a particular ISP has authorised an infringement. If adopted, any proposed amendment would be limited to websites operated outside Australia as rights holders are not prevented from taking direct action against websites operated within Australia.

[8] Directive no. 2001/29/EC of the European Parliament and of the Council of 22 May 2001.
[9] *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Ors* (C-314/12).
[10] NB: Section 17 of the *Digital Economy Act 2010* also provides the UK Secretary of State with the power to make regulations for the blocking of specific infringing websites by a court. The Digital Economy Act was passed at the end of the Brown Government's term and the power in section 17 has not been used by the current Government.
[11] [2011] EWHC 1981.
[12] *European Union (Copyright and Related Rights) Regulations 2012* (Statutory Instrument no. 59 of 2012).

Such a power would clarify that a rights holder may list a number of ISPs as respondents to an application for injunctive relief. This would reduce the opportunity for people to 'evade' the operation of such orders by switching ISPs. The websites would need to be blocked by carrier level ISPs at the wholesale level, ensuring that re-sellers would be unable to make blocked sites available to subscribers.

In granting an injunction requiring ISPs to block access to a particular website, the Court would need to be satisfied that the dominant purpose of the website is to infringe copyright. The onus would be on the rights holders to establish this evidentiary threshold. The Court would also be required to consider factors such as the rights of any person likely to be affected by the grant of an injunction, whether an injunction is a proportionate response, and the importance of freedom of expression.

The Government understands that in some overseas jurisdictions, industry has worked together to streamline this process by agreeing that in obvious cases, ISPs will not contest the injunction application.

Proposal 2—Extended injunctive relief

The Copyright Act would be amended to enable rights holders to apply to a court for an order against ISPs to block access to an internet site operated outside Australia, the dominant purpose of which is to infringe copyright.

Rights holders would be required to meet any reasonable costs associated with an ISP giving effect to an order and to indemnify the ISP against any damages claimed by a third party.

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

Extended safe harbour scheme

Sections 116AA to 116AJ of the Copyright Act provide a means of limiting the remedies available against *carriage service providers* (as defined in the *Telecommunications Act 1997*) for direct or authorised infringements when they are engaging in particular *relevant activities*. Monetary remedies are precluded from being awarded where a carriage service provider meets the *conditions* set out in section 116AH (for example, adopting and reasonably implementing a policy that provides for the termination of the accounts of repeat infringers or expeditiously removing or disabling access to infringing material upon receipt of a notice from a rights holder). This is known as the 'safe harbour' scheme.

The safe harbour scheme applies to four categories of relevant activity. These categories are set out in sections 116AC to 116AF:

Category A	acting as a conduit for internet activities by providing facilities for transmitting, routing or providing connections for copyright material
Category B	caching through an automatic process
Category C	storing copyright material on a carriage service provider's systems or networks, and
Category D	referring users to an online location.

Where authorisation liability is established and the safe harbour conditions are met, the only remedy available against an ISP is injunctive relief. If an ISP does not satisfy the safe harbour conditions, the ISP will also be exposed to monetary relief, including additional damages.

Adopting the definition of carriage service provider from the Telecommunications Act has resulted in entities providing services that fall within the four categories of activity being unable to take advantage of the safe harbour scheme unless they provide network access 'to the public'. For example, the definition excludes a university as it provides internet access to students but not to 'the public', and an online search engine, as it is not a 'provider of network access'. These entities should be captured by the safe harbour scheme.

Proposal 3—Extended safe harbour scheme

The Copyright Act would be amended to extend the application of the safe harbour scheme to entities engaged in the activities set out in sections 116AC to 116AF. This would be achieved by removing the reference to carriage service provider and replacing it with a definition of 'service provider', being any person who engages in activities defined in sections 116AC to 116AF.

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

Building the evidence base

A particular challenge with addressing online copyright infringement is the absence of a commonly accepted approach for quantifying the volume and impact of such infringement. This is important for government but even more important for industry as it seeks to develop its own approaches to address the problem. It is also essential that industry schemes and commercial arrangements incorporate ongoing monitoring and evaluation to ensure that the approach is reducing online copyright infringement to a sufficient degree to justify the impact of the measures imposed. This will also enable potential future improvements to be identified, which can be implemented through revised schemes and arrangements—a key benefit of the flexibility of the proposed approach.

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

Other approaches

The Government would like to hear about any other approaches that would help reduce online copyright infringement. This could include actions by rights-holders, ISPs or other stakeholders.

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

Regulation Impact Statement

Proposals to address online copyright infringement will be subject to an Australian Government Regulation Impact Statement (RIS). The RIS process is 'designed to encourage rigour, innovation and better policy outcomes' and provides affected parties with an opportunity to explain how government proposals may affect them. The Government welcomes any estimates stakeholders may wish to provide on potential regulatory costs and savings to them that could flow from the measures outlined above. Further information on the RIS process and the Government's approach to regulation can be found in *The Australian Government Guide to Regulation*, available from www.cuttingredtape.gov.au.

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

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