



# **Inquiry into Australia's Intellectual Property Arrangements**

Submission by the Australian Communications Consumer Action  
Network to the Productivity Commission

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## **About ACCAN**

The Australian Communications Consumer Action Network (ACCAN) is the peak body that represents all consumers on communications issues including telecommunications, broadband and emerging new services. ACCAN provides a strong unified voice to industry and government as consumers work towards availability, accessibility and affordability of communications services for all Australians.

Consumers need ACCAN to promote better consumer protection outcomes ensuring speedy responses to complaints and issues. ACCAN aims to empower consumers so that they are well informed and can make good choices about products and services. As a peak body, ACCAN will represent the views of its broad and diverse membership base to policy makers, government and industry to get better outcomes for all communications consumers.

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## Introduction

The Australian Communications Consumer Action Network (ACCAN) thanks the Productivity Commission for the opportunity to contribute to its Inquiry into Australia's Intellectual Property Arrangements.

Access to affordable digital content is an issue of increasing importance to Australian communications consumers. We are concerned that recent changes to the Australian copyright regime are focused more on punitive measures, which may add cost and barriers to consumer access without delivering substantial benefits to rights holders. At the same time we are seeing the market delivering unprecedented access to online content for consumers. However, we believe more can be done to facilitate value creation online for rights holders while better balancing the needs of consumers.

Our response will focus on key questions from the Issues Paper which are of particular relevance to communications consumers.

## Making Australia's copyright regime more effective

**Is licensing copyright-protected works too difficult and/or costly? What role can/do copyright collecting agencies play in reducing transaction costs? How effective are new approaches, such as the United Kingdom's Copyright Hub in enabling value realisation to copyright holders?**

**What have been the impacts of the recent changes to Australia's copyright regime? Is there evidence to suggest Australia's copyright system is now efficient and effective?**

Copyright collecting agencies have developed either through copyright law or private agreements to license works and collect royalties. This is recognised as a more efficient method for ensuring remuneration for rights holders in situations where enforcement against individual members of the public would be impractical and to realise the efficiencies of managing the rights of multiple parties through a single agency.

Recent changes in Australia's copyright regime have focussed on punitive enforcement measures to tackle online copyright infringement. Despite years of high profile enforcement action in Australia and around the world infringement has remained a problem.

ACCAN maintains that it would be more effective to focus on facilitating processes which target unmet consumer demand and enable value realisation for copyright holders. The research indicates that it was not until the recent launch of on demand services, such as Netflix and Stan, that there was a noticeable downturn in online copyright infringement. Choice research found a 26% drop in the number of people who said they regularly download pirated movies or TV shows since the launch of these services.<sup>1</sup> Broadly these findings were supported by research conducted by rights holder representative body, the IP Awareness Foundation. This research confirmed that all but the most persistent pirates claimed they were pirating less. The number one reason for the downturn in pirating behaviour given was the availability of legal alternatives.<sup>2</sup> Given this research there is clear

<sup>1</sup> Choice, 2015, 'Desperately Seeking Streaming' Research update: Choice digital consumers paying for content behaviour and attitudes p.4

<sup>2</sup> IP Awareness Foundation, 2015, 'Australian Piracy Behaviours, 2015 – Wave 7 Adults'

evidence that market based solutions, rather than the current punitive focus will deliver a more efficient and effective copyright regime.

However, these new services have their limitations; online content distribution has delivered unprecedented access to content on demand. This has heightened consumer expectations and caused problems for copyright holders that have not adapted, particularly so for rights holders who continue to issue exclusive content licences or delay the release of digital content.

Research into online copyright infringement highlights the problem caused by restrictive licensing practices. For example, Choice found the main reasons people say they pirate is related to the price and timeliness of content, the top five reasons given are:

1. Price of content is too high – 50%
2. Timeliness – 41%
3. Convenience – 28%
4. Don't want to subscribe to a whole service – 25%
5. Availability/can't find what I want elsewhere – 23%

This is where copyright law could play a bigger role in incentivising the use of more responsive solutions such as the UK Copyright Hub and the work of collecting agencies. The UK Copyright Hub is a good example of the technological solutions that can be utilised to manage licensing at relatively low transaction costs.

In many respects peer-to-peer file sharing represents a highly efficient way for consumers to deliver content, far more so than traditional broadcast and distribution chains which rely on centralised platforms and servers for distribution. What has been missing from peer-to-peer has been a mechanism for rights holders to be adequately remunerated when the 'sharing' of this content takes place. Programs like the UK Copyright Hub and the technology it is developing, which digitally tags content and links it to payment processes, has the potential to both realise the benefits of peer-to-peer sharing without the negatives of copyright infringement.

The Copyright Hub's aim of "building technology to help copyright work the way the internet works" is laudable and any measures to incentivise its use by rights holders and consumers should be investigated further.

Recommendation 1: Investigate legal incentives to the use of schemes such as the Copyright Hub for rights holders and consumers.

**How should the balance be struck between creators and consumers in the digital era? What role can fair dealing and/or fair use provisions play in striking a better balance?**

**Are copyright exemptions sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators? Does the degree of certainty vary for businesses relative to individual users?**

ACCAN's submission to the Australian Law Reform Commission (ALRC) Copyright and Digital Economy Inquiry recommended that technology neutral time shifting exemptions for private and domestic use should be developed. Limitations on the current law have hampered consumer

adoption and created legal uncertainty around the use of copyright protected material on cloud services.

ACCAN funded research into consumer adoption and use of cloud computing, conducted by RMIT, found just 18% of consumers believed there was adequate regulation around cloud computing.<sup>3</sup> Chief among consumer concerns was uncertainty around the use of copyright protected material on cloud services, particularly when it comes to the use of time and format shifted material. This concern seems justified given the research also found that most personal cloud services (eg: Dropbox, Google Drive, iCloud) suspend accounts without notice if there is a belief they are being used to infringe copyright.

Suspension without notice is also an issue that has arisen with the *Copyright Amendment (Online Infringement) Act 2015*. This Act enabled copyright owners to apply to the Federal Court to order Carriage Service Providers (CSP) to block overseas websites that infringe or facilitate the infringement of copyright.<sup>4</sup> While the Act creates obligations to inform the host of the online service, no such obligation exists for individual account holders. At worst, if granted indiscriminately, these orders could impact large numbers of consumers from accessing their accounts due to the breach of another account holder.

This kind of indiscriminate enforcement action is not without precedent in the online world. ASIC was implicated in the accidental blocking of 250,000 websites due to a 'basic' IP address misunderstanding.<sup>5</sup> This left many website operators in the dark for weeks as to why their website was not accessible.

Without clarification of these legal grey areas personal cloud services providers are likely to maintain restrictive contract terms and institute 'take-down' policies to limit potential liability under copyright law. Until then, consumers and businesses may be reluctant to make full use of the potentially transformative technology options made available through cloud computing. ACCAN recommends that fair use and/or fair dealing exceptions be created to strike a better balance between the rights of consumers and creators.

Recommendation 2: Adopt ALRC recommendations around fair dealing and/or fair use provisions which strike a better balance between creators and consumers.

## Access to copyright material for people with disability

An important consideration in any copyright debate is the impact of overly restrictive copyright laws in allowing access to material for people with disability. The *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled* (the Treaty) is an important agreement to bring forward much needed reform.

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<sup>3</sup> Molla, A, Cooper, V, Abareshi, A & Pittayachawan, S, 2015, 'Demystifying Personal Cloud Services: An investigation of Australian Consumer expectations and experience', Australian Communications Consumer Action Network, Sydney. p.v.

<sup>4</sup> *Copyright Amendment (Online Infringement) Act 2015*

<sup>5</sup> ABC, 2014, 'ASIC accidentally blocked 250,000 websites due to 'basic' IP address misunderstanding', available at: <http://www.abc.net.au/news/2014-08-27/asic-accidentally-blocked-250,000-websites-ip-address/5701734>

The market is slowly adapting to meet the needs of people with disability, for example Netflix recently released its first audio described content.<sup>6</sup> Steps such as the ratification of the Marrakesh Treaty are vital to ensuring content can be format shifted and made accessible for people with disability.

Recommendation 3: Federal Government ratification of the Marrakesh Treaty and ongoing promotion of the needs of people with disability in accessing copyright protected content.

## Enforcing IP rights

### Is the role expected of ISPs a practical option?

Recent steps in copyright enforcement have attempted to make Internet Service Providers (ISP) play a central role in enforcement of copyright. The Copyright Notice Scheme Industry Code, for example, places significant obligations on ISPs in assisting the identification and enforcement against customers believed to be infringing copyright. At the time of writing, funding for this Code process is yet to be established; however there is an expectation from rights holders that ISPs should make a significant contribution. When coupled with the recently adopted *Copyright Amendment (Online Infringement) Act 2015*, there is a growing expectation that ISPs should have an unfunded role in enforcing copyright.

ACCAN has serious concerns about the flow on impact of this approach on consumers and their ability to access affordable telecommunications services.

## Cost/benefit of ISP enforcement options

Dutch research has attempted to measure the effectiveness of blocking access to torrenting website *The Pirate Bay*. The research made use of two different methods, consumer surveys which were self-reports on torrent use before and after blocking, as well as BitTorrent monitoring, which mapped the number of Dutch torrent users before and after blocking.<sup>7</sup> The research did not find a strong indication of a long-lasting effect of website blocking in preventing piracy. This research confirmed the findings in other studies which found that legal action against file sharing often has an immediate effect, but this typically fades out after a period of six months as new sources for pirated content emerge.<sup>8</sup> ACCAN's concern is that this website blocking bill may devolve into an expensive game of 'whack-a-mole', which consumers will end up paying for through higher internet bills.

This is particularly concerning in the context of a number of recent government policies which have added significant cost to the telecommunications industry. The un-funded Copyright Notice Scheme Code and metadata retention legislation are expected to add hundreds of millions to operating costs

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<sup>6</sup> <http://blog.netflix.com/2015/04/netflix-begins-audio-description-for.html>

<sup>7</sup> Poort, J., Leenheer, J., van der Ham, J., Dumitru, C., 2013, 'Baywatch: two Approaches to Measure the Effects of Blocking Access to The Pirate Bay' (August 22, 2013). Available at SSRN: <http://ssrn.com/abstract=2314297>

<sup>8</sup> Poort, J., Leenheer, J., van der Ham, J., Dumitru, C., 2013, 'Baywatch: two Approaches to Measure the Effects of Blocking Access to The Pirate Bay' (August 22, 2013). Available at SSRN: <http://ssrn.com/abstract=2314297>

across the industry.<sup>9</sup> Industry, which has an obligation to maintain profits for shareholders, has no choice other than to recoup these costs from their customer base. The affordability of connecting to the internet should be a paramount concern in light of the Government's goals of creating digital engagement and service delivery through the Digital Transformation Office (DTO).<sup>10</sup>

The cost to ISPs of maintaining these two schemes will ultimately fall on consumers in the form of higher internet access charges. The rate of households without internet is currently 17%, with access falling to just 57% for households with income less than \$40,000.<sup>11</sup> Rises in internet cost, even slight, are likely to further exacerbate this digital divide.

Consumer research found that 69% of consumers surveyed were concerned that it will be costly for ISPs to take on greater responsibility for identifying, monitoring and punishing people who illegally download, and this cost will end up being passed onto consumers in the form of higher internet bills.<sup>12</sup>

We maintain that it is impractical to expect ISPs to play an unfunded role in copyright enforcement. To minimise impact on consumers it is our preference that the cost of these schemes be kept to an absolute minimum. We believe the most equitable cost allocation would see rights holders pay to enforce their rights. This is equitable because it ensures costs are borne by those who derive benefit from enforcement.

The current regime is equivalent to a regressive tax on consumer access to the internet. Costs on ISPs are likely to be passed on to consumers equally, regardless of ability to pay. As already mentioned this particularly impacts lower income consumers who are least able to afford internet access. Given the transformative impact internet access can have on the economy and the ability of individuals to access employment and education opportunities it is undesirable that these costs fall on those least able to pay.

The cost of implementing the *Copyright Amendment (Online Infringement) Act 2015* was estimated to be \$130,825 to ISPs on an annual basis.<sup>13</sup> However there is no clarity on how this figure is arrived at, but given how low it is we can assume it only covers a single staff member and ancillary costs of an ISP implementing a technological block. It is unlikely to cover the legal costs if an ISP chose to enter an appearance or take part in the proceedings in order to challenge a website block. This cost barrier will prevent some ISPs from appearing before the court and may limit the evidence a judge can consider when assessing the public interest and other mitigating factors in deciding whether to grant an injunction.

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<sup>9</sup> ABC, 2015, 'Metadata: Cost of mandatory data retention yet to be revealed with Senate expected to pass bills soon', available at: <http://www.abc.net.au/news/2015-03-25/government-yet-to-reveal-costs-of-mandatory-data-retention/6345742>

<sup>10</sup> ZDNet, 2015, 'Australians to get one login for government services', available at: <http://www.zdnet.com/article/australians-to-get-one-login-for-government-services/>

<sup>11</sup> ABS, 2014, 'Household Use of Information Technology, Australia, 2012-13', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/8146.0Chapter12012-13>

<sup>12</sup> Communications Alliance, 2014, 'Online copyright infringement research report', prepared by JWS research for the Communications Alliance November 2014.

<sup>13</sup> *Copyright Amendment (Online Infringement) Bill 2015* - Explanatory Memorandum

An application for injunction which only targeted ISPs with more than 1,000 customers would pick up 71 businesses.<sup>14</sup> Based on this number, and assuming ISPs do not make an appearance in a case, the scheme would add an additional \$9.3 million to customer internet bills each year.<sup>15</sup> These costs will be comparatively more burdensome on smaller ISPs as they represent a significant portion of operating costs and will likely harm competition.

Given these costs and the limited benefits of similar schemes overseas ACCAN recommends that existing schemes are reviewed to ensure enforcement costs are not negatively impacting consumer access to the internet.

Recommendation 4: Review the costs of placing enforcement responsibilities on Internet Service Providers on the affordability of internet access.

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<sup>14</sup> ABS, 2015, 'Internet Activity, Australia, December 2014', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8153.0Main%20Features3December%202014?opendocument&tabname=Summary&prodno=8153.0&issue=December%202014&num=&view=>

<sup>15</sup> ABS, 2015, 'Internet Activity, Australia, December 2014', available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/8153.0Main%20Features3December%202014?opendocument&tabname=Summary&prodno=8153.0&issue=December%202014&num=&view=>