**Online Copyright Infringement Discussion Paper**

Submission by ACCAN to the Attorney-General’s Department

September 2014

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 its broad and diverse membership base to get a better deal for all communications consumers.

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ACCAN thanks the Government for the opportunity to comment on this Discussion Paper.

## Extended authorisation liability

The Government’s proposal is to extend authorisation liability, making it easier to hold Internet Service Providers (ISPs) liable for copyright infringement performed by their customers. ACCAN is concerned that ISPs will be induced by this change into expenditure on internal systems that will be translated into higher costs for consumers and adversely impact affordability of phone and internet services in Australia. It would be expected that in order to “discourage or reduce online copyright infringement” and thereby reduce the risk of being found not to have taken “reasonable steps”, ISPs would be undertaking such expenditure.

The proposed 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”.

The primary steps in the circumstances would likely be to notify or warn an alleged infringer. It appears that this approach would lend to a notice (or graduated response) scheme a significant legal weight, with ISPs running a high legal risk if they do not participate.

We are concerned that the significant expense for ISPs in establishing a notice scheme will be borne by consumers through increased prices. Previous talks between the content industries and ISPs have demonstrated that the industries themselves are reluctant to internalise these costs.

We are further concerned that there does not appear to be any limitation of these changes to the online space. This change would appear to apply to all authorisation across all platforms and types of copyrighted material. If this is the government’s intention, there is no explanation provided in the discussion paper about the merits of such a significant change to the settled law on authorisation. Such a change would impact on a range of organisations including schools, universities, libraries, local councils, hotels and cafes.

## Recommendations:

* **The Government should ensure that the cost of implementing an industry scheme is not passed on to consumers.**
* **Any proposed extension to authorisation liability should be limited to online activities.**

## Extended injunctive relief to block infringing overseas sites

ACCAN has serious concerns about the practical application of such an injunction power. There are many websites that are conduits for both infringing and non-infringing material. It is a significant power for a court to be able to block a website armed only with arguments from an aggrieved party. We are concerned there is no mechanism for legitimate users of a site to present arguments or evidence on any adverse consequences of an injunction.

This is already evident from the experience in other countries. In proceedings brought by rights holders in the Irish High Court to block the Pirate Bay website, the Court refused an application for a civil society organisation, Digital Rights Ireland, to address the Court as *amicus curiae* because they could not be regarded as a neutral party.[[1]](#footnote-1)

Therefore, if the European model was followed in this type of injunction process, the courts generally will not have the benefit of hearing public interest arguments or arguments from those who may be non-infringing users of sites subject to a blocking application.

We would recommend that for this provision, if it were to be adopted, that there be a special presumption in favour of allowing parties to become interveners or amicus in the context of these injunction applications. This should apply both in circumstances where parties may have their interests affected by an injunction and where they wish to present public interest arguments against the granting of an injunction. We would also support any other legal mechanism through which opposing arguments can be heard and considered by the court.

## Recommendation:

* **There should be a presumption in favour of allowing parties to become interveners or amicus in the context of these injunction applications.**

## Extended safe harbour scheme

The safe harbour scheme limits the remedies available against ISPs in some circumstances, protecting the ISP industry against the award of financial damages for direct or authorised infringements. ACCAN is satisfied with the proposal to extend the safe harbour scheme to a wider range of organisations. However the safe harbour scheme continues to contain a provision for the termination of the internet accounts of repeat infringers that, as ACCAN has repeatedly argued, is unacceptable from the standpoint of consumer rights and may affect access to essential services such as Triple Zero emergency.[[2]](#footnote-2)

Account termination provisions should be repealed

The legislative encouragement for account termination is not addressed despite the Discussion Paper saying the Government would not expect an industry notice scheme to contain measures that would “interrupt a subscriber’s internet access”.

Indeed, account terminations are no longer accepted as sound policy by any industry party. Content industry groups have over recent years moved away from arguing that account termination is a necessary or desirable measure.[[3]](#footnote-3)

It has been recognised by almost all parties involved in copyright law reform discussions that access to the internet is now a practical necessity in everyday life, taking on the characteristics of a utility service. Both internet and phone services are of course often delivered over the same infrastructure and bundled into one account.

There is now a consensus among stakeholders in Australia that copyright infringement must not result in any person being disconnected from a phone or internet service. Disconnection from an essential utility service on the basis of copyright infringement is disproportionate and could result in harm to individuals who have nothing to do with the infringing acts.

As this safe harbour condition arises from the 2004 Australia – United States Free Trade Agreement (AUSFTA), it is significant that the United States has similarly seen a change in the views of stakeholders away from account termination. This is to be expected as the role the internet played in 2004 was very different from the role it plays in 2014.

The provisions in the Copyright Act which offer incentives for service providers to terminate accounts are based on antiquated assumptions and should be repealed. Serious consideration should also be given to repealing s116AG (3)(b) which allows a court to order the termination of an account.

## Recommendation:

* **The provisions in the Copyright Act which offer incentives for service providers to terminate accounts should be repealed.**

## Notice scheme consumer rights

ACCAN believes the character of review processes will be dictated by the nature of any industry notice scheme adopted. We would urge that consumer organisations be part of the development process if a notice scheme was to be developed.

In the US, the Copyright Alert System carries sanctions.[[4]](#footnote-4) Depending on the service provider, if infringement continues after notices are sent, the ISP’s range of actions may include a temporary reduction in internet speed, a temporary downgrade in service or redirection to a landing page for a period of time until a subscriber contacts the ISP or until the subscriber completes an online copyright education program.

It is therefore necessary for there to be an independent review process run by the American Arbitration Association for consumers to use if they believe they have received an Alert in error – with six grounds available to consumers to challenge a copyright alert.[[5]](#footnote-5) Importantly, a consumer’s decision not to seek an independent review will not be construed as an admission or waiver in any other proceeding.[[6]](#footnote-6)

It is also important to note that the Fair Use objection, one of the six objection grounds available to consumers under the US scheme, is unavailable in Australia. This highlights the importance of introducing the Fair Use reforms recommended by the Australian Law Reform Commission[[7]](#footnote-7) in the context of these proposed measures which could see such a scheme introduced in Australia.

On the whole ACCAN would argue against notice schemes with sanctions as they are likely to be costly to administer and counterproductive in the content industry’s efforts to build consumer goodwill and a culture of respect for copyright law.

## Recommendations:

**An industry scheme must:**

* **uphold the right to free, independent review of any allegation and must afford due process to people who have allegations made against them – even if there are no sanctions attached to those allegations.**
* **not indicate that a consumer’s decision not to seek independent review is an admission or waiver or carries other legal consequences**
* **not impose financial penalties, given that liability is difficult to establish precisely in the context of online infringement**
* **not compromise individual privacy and the right to confidentiality of online activities**
* **not contain any measure that would have the result of disconnecting any person from a phone or internet service**
* **involve consumer organisations in the development stage**

1. EMI Records (Ireland) Ltd & Ors -v- UPC Communications Ireland Ltd & Ors [[2013] IEHC 204](http://www.bailii.org/ie/cases/IEHC/2013/H204.html) [↑](#footnote-ref-1)
2. Copyright Act (1968) Section 116AH Item 1, Condition 1 [↑](#footnote-ref-2)
3. For example, [http://www.itnews.com.au/News/311143,afact-defends-french-three-strikes-regime.aspx](http://www.itnews.com.au/News/311143%2Cafact-defends-french-three-strikes-regime.aspx); <http://www.billboard.com/biz/articles/news/1158567/australias-isps-proposes-controversial-anti-piracy-plan> [↑](#footnote-ref-3)
4. <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> [↑](#footnote-ref-4)
5. <http://www.copyrightinformation.org/resources-faq/independent-review-faqs/what-are-the-grounds-for-requesting-a-review/> [↑](#footnote-ref-5)
6. <http://www.copyrightinformation.org/resources-faq/independent-review-faqs/> [↑](#footnote-ref-6)
7. [Copyright and the Digital Economy](http://www.alrc.gov.au/publications/copyright-report-122) (ALRC Report 122) [↑](#footnote-ref-7)