Online Copyright Infringement Discussion Paper

AIIA response

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About AIIA

The Australian Information Industry Association (AIIA) is the peak national body representing Australia’s information technology and communications (ICT) industry. Since establishing 35 years ago, the AIIA has pursued activities aimed to stimulate and grow the ICT industry, to create a favourable business environment for our members and to contribute to the economic imperatives of our nation. Our goal is to “create a world class information, communications and technology industry delivering productivity, innovation and leadership for Australia”.

We represent over 400 member organisations nationally including hardware, software, telecommunications, ICT service and professional services companies. Our membership includes global brands such as Apple, Google, HP, IBM, Intel, Microsoft, PWC, Deloitte, and Oracle; communications companies including Telstra and Optus; national companies including Data#3, SMS Management and Technology, Technology One and Oakton Limited; and a large number of ICT SME’s.

This submission

The AIIA appreciates the opportunity to provide this submission in response to the Online Copyright Infringement Discussion paper, released by the Australian Government in July 2014.

AIIA recognises the on-going impacts of online copyright infringement, which results in lost revenues for rights holders. We support the continued examination of this issue by governments, in partnership with rights holders and industry.

This submission provides:

- Our views on the three proposals in the Discussion paper.
- Additional comments on the issue of online copyright infringement.
- Direct responses to the eleven questions in the Discussion paper.

We have also consulted closely with Communications Alliance in the development of our response and strongly support key elements of their submission in particular:

- we do not support extending authorisation liability as a means to reduce the incidence of online copyright infringement - it raises a range of unintended consequences for other parties and creates additional uncertainty for ISPs;
- we acknowledge that the injunctive site blocking approach is an option but note the inherent weakness of the approach; and
- we do support the proposed safe harbour provisions.
Our views on Discussion Paper proposals

Proposal 1: Extended authorisation liability.

The AIIA does not support Proposal 1: Extended authorisation liability as a means to reduce the incidence of online copyright infringement. This position is taken on the basis on a number of concerns raised by our members.

The proposal would impact a broad range of parties outside the scope of online copyright infringement

We understand that this proposal is seeking to broaden copyright infringement authorisation liability, to overcome the limited scope of authorisation liability found by the High Court decision in *Roadshow Films Pty Ltd & Ors v iiNet Ltd*. A key flaw in this is proposal is that, while it is intended to impose greater responsibility on ISPs, the changes described are likely to have a much broader impact.

Authorisation liability is not a concept that only applies to online copyright and ISPs. It has a broader application across all uses of copyrighted materials, including a broad range of online service providers. The proposed changes would expand the authorisation liability to apply to other service providers in ways that, we believe, are not intended by government. For instance, it is not clear how these provisions would impact on online services such as cloud, social media and search services. Further, the proposal would impact on educational institutions, libraries and retailers, by extending their potential liabilities where their facilities may be used for copyright infringement. This measure, therefore, is poorly targeted and imposes compliance costs on both online and offline service providers not intended to be caught by the proposed provision.

The proposal will create uncertainty for ISPs or rights holders

While the Discussion paper suggests that the proposal would improve legal certainty, there is no evidence to suggest current arrangements are ineffective due to uncertainty. Therefore, changes to address legal certainty are not directly addressing the identified problems and barriers which currently make it difficult for rights holders to manage online copyright infringement. For instance, if rights holders are finding the court system too expensive and slow to address copyright infringement, the focus of any response should be on providing improved avenues for courts to consider these matters in a more timely, and less resource intensive manner. It is critical that any government actions align with the problems, as established by the evidence from robust analysis.

Further, we are concerned that Proposal 1 will actually erode certainty for ISPs and rights holders. Under proposal 1, the Court will now only consider:

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

The key change to current arrangements is that the ‘power to prevent’ will no longer be a primary consideration in any Court decision, instead it will be one factor for a Court to consider in deciding whether ‘reasonable steps’ have been taken. While we understand that the government is still assessing what would constitute ‘reasonable steps’, such a framework could increase uncertainty around ISPs obligations where there are different interpretation of what constitute ‘reasonable steps’.

The proposal could lead to a future graduated response scheme

Our members are concerned that the proposal for an extended authorisation scheme for ISPs opens the door for a graduated response scheme in Australia, including the termination of user accounts. This may occur where requirements for ISPs to take reasonable steps to address copyright infringement, leads to them taking action against their own clients.
A graduated response scheme would require ISPs to send multiple notices and take action against their customers (such as cutting-off a service or shutting down a website). This places ISPs in direct conflict with their customers, on the basis of allegations which may or may not be legitimate. Further, ISPs are not directly responsible for any copyright breach, but in this scenario bear the greatest responsibility for managing the response to the problem at hand.

It is our view that direct engagement between rights holders and customers will result in the most efficient and direct resolution of the problem. Further, there is international evidence that graduated response schemes don’t achieve the goal of reducing copyright infringement. A recently released econometric study conducted in France found that a graduated response approach had no impact on the decision by an individual to engage in piracy (though such a scheme may have some impact on reducing intensity of piracy efforts). The study concluded that ‘the law had not substantial deterrent effect’.

Proposal 2: Extended injunctive relief

In reviewing this proposal, while we do not have strong objections to the concepts outlined in the Discussion Paper, we do not believe that this option is the most effective approach to reducing online copyright infringement. Current international evidence on the effectiveness of site blocking suggests that it is a weak approach. Often blocked sites reappear quickly under a different domain name or web address. Statistical research comparing the effectiveness of different measures seeking to reduce online copyright infringement concluded that site blocking is not as effective as other approaches, such as financial measures (such as those which restrict advertising revenues for offending sites).

If the government were to progress with this option, we would suggest that the definition of ‘ISP’ to which this new regulation would apply needs to be clarified. We would suggest that the definition should be limited to ‘carriage service providers’ as defined by the Telecommunications Act 1997 (Cth), and not providers of other online services, such as cloud, social media and search services.

Proposal 3: Extended safe harbour scheme

Currently, Australia’s copyright infringement remedy safe harbour scheme only applies to protect ‘carriage service providers’, as narrowly defined under the Telecommunications Act. This proposal would expand the scope of that safe harbour scheme to also apply to four categories of online activity. AIIA supports this proposal.


Additional comments

AIIA received further comments from our members on the issue of online copyright infringement, which, while not specific to the proposals presented in the Discussion Paper, are relevant to the broader management of online copyright infringement.

Government action needs to be evidence based and targeted on the key drivers of the problem of online copyright infringement

It is critical that any policy or legislative response reflects:

- A clear understanding of ‘the problem’ - including identifying the key factors which are driving infringement activities;
- The available responses to the problem; and
- The relative effectiveness of these responses - which should also include assessment of costs to industry and community, taking into account international experience.

The Discussion paper presents three proposals (which may be implemented separately or together), however it does not include a detailed assessment of the key drivers of online copyright infringement, nor does it provide an assessment of effectiveness of the proposals. Further, the paper does not include a clearly articulated objective against which options may be assessed.

The greatest responsibility for addressing online copyright infringement should not rest with the ISPs

Much of the analysis in the Discussion Paper is premised on the need for increased ISP responsibility for responding to online copyright infringement. While ISPs may have indirect association with offending sites, they are not directly responsible for copyright infringement, and do not gain from that practice. Further, the benefits of reducing online copyright infringement would flow directly to rights holders. While there is a great deal of focus on how ISPs can address the problem they neither benefit from the infringement, nor benefit from reducing infringement. It is critical that this is acknowledged, in particular when considering which parties should bear the costs of any response.

Australia’s trade obligations do not require extended authorisation liability

We note the Discussion Paper includes an analysis of Australia’s international trade obligations, such as under the AUSFTA. The paper makes the case that Australia must make legislative changes to its copyright law to ensure it meets these international obligations. AIIA considers that this analysis is misguided. In particular, we do not support the position that the iNet case decision places Australian in a position where it has not met its AUSFTA obligations. The AUSFTA contains no provision which requires the ISPs be liable for copyright infringement in these circumstances.
Response to Discussion paper questions

**Question 1: What could constitute ‘reasonable steps’ for ISPs to prevent or avoid copyright infringement?**

AIIA response: As noted earlier in this submission, AIIA does not support Proposal 1 – Extended Authorisation Liability. The concept of reasonable steps is a key component of this Proposal. Therefore, we do not support the development of a set of ‘reasonable steps’ through this consultation process. Further, we consider these questions presume a solution which is only in the early stage of consultation with key parties.

**Question 2: How should the costs of any ‘reasonable steps’ be shared between industry participants?**

AIIA response: We noted in our submission overview that rights holders are the recipients of economic benefits where there is a reduction in the volume of online copyright infringement (through increased sale revenue). It is therefore reasonable that rights holders contribute to the costs associated with measures which reduce infringement.

**Question 3: Should the legislation provide further guidance on what should constitute ‘reasonable steps’?**

See our response to Question 1.

**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 that?**

See our response to Question 1.

**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?**

AIIA response: While we do not support Proposal 1, we would affirm the need for consumers to maintain natural justice rights. For instance, they should have the right for any reported infringement against them independently investigated, the right of appeal of decisions, and for their access to services preserved in this period where any allegation has not been substantiated.

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

AIIA response: A court should have satisfied itself that the primary or dominant purpose of a website is to distribute infringing works.
Question 7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

AIIA response: We agree that the proposed definition adequately and appropriately expands the safe harbour scheme.

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

AIIA response: It is essential that any measures are fully assessed using best practice cost benefit analysis methods. This should be conducted by an independent body with sufficient expertise in this type of analysis. We would support a Regulation Impact style analysis which considers costs and benefits across the economy (over a 10 year timeframe). The analysis should review all the available international evidence of the comparative effectiveness of measures to reduce online copyright infringement.

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

AIIA response: There are a number of measures not considered in the Discussion Paper which the government should consider more closely. As noted above, financial measures have been shown to be effective, and should be considered in more depth. Further, we note that the Discussion Paper does not include a proposal for an industry scheme, in partnership with rights holders. While this option has had difficulties in the past, it should be included in further analysis.

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

AIIA response: We note that this question is included in the Discussion Paper in relation to the need for Regulatory Impact Analysis of any changes to the Copyright Act. The proposals being considered are currently very high level, and therefore detailed understanding of compliance costs for industry of these proposals is premature. However, we would expect that if Proposals 1 or 2 were implemented, there would be considerable costs to business (primarily ISPs) in meeting obligations for reporting, monitoring and setting up compliance systems and processes. We would be happy to assist further with any future cost benefit analysis, should these proposals progress to the RIS stage.

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

AIIA response: As noted above, we believe that Proposal 1 - Extended Authorisation Liability, would have considerable unintended consequences. If the test for authorisation were expanded, it would affect entities such as universities, schools, libraries and retailers (for instance, those that provide copy services). Many of these entities may not be equipped to comply with changes to their obligations, and these changes are likely to impose significant compliance costs (with no corresponding benefit from reduced online copyright infringement).