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20 YEARS

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Online Copyright Infringement Consultation
Commercial and Administrative Law Branch
Attorney-General's Department
3–5 National Circuit, BARTON ACT 2600

Via email to: copyrightconsultation@ag.gov.au

5th September 2014

Dear Sirs/Madams,

Re: online copyright infringement—public consultation

EFA welcomes the opportunity to provide input into this consultation. Please find our submission on the following pages. Please do not hesitate to contact me should you require any further information.

About EFA

Celebrating its 20th anniversary in 2014, Electronic Frontiers Australia, Inc. (EFA) is a national, membership-based non-profit organisation representing Internet users concerned with online freedoms and rights.

EFA is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties. EFA members and supporters come from all parts of Australia and from diverse backgrounds.

Our major objectives are to protect and promote the civil liberties of users of digital communications systems (such as the Internet) and of those affected by their use and to educate the community at large about the social, political and civil liberties issues involved in the use of digital communications systems.

Yours sincerely,

Jon Lawrence
Executive Officer

Submission in relation to online copyright infringement

Introduction

EFA is pleased to have the opportunity to contribute to this consultation about the appropriate means to address copyright infringement in the online context. The discussion paper mentions a number of options for how this could be done.

Firstly, EFA is unconvinced that online copyright infringement is a major issue in Australia.

EFA is particularly concerned about the quality of evidence that the Attorney-General and others, mainly from the entertainment industry, are using to support their arguments that Australians are responsible for a disproportionately high incidence of copyright infringement. Almost all of this evidence comes from research commissioned by the entertainment industry, is not peer-reviewed and nor is its methodology open to scrutiny. Thus this evidence cannot be taken to be an authoritative and independent account of Australian consumers' conduct. This also goes for many of the statements made by the entertainment industry regarding copyright and piracy internationally.

There is, however, conflicting information even within this evidence-base - indeed, despite significant availability issues and the so-called 'Australia tax' which sees Australian consumers routinely charged a premium for digital goods when compared with consumers in other comparable countries, Australians are second only to the US on a per capita basis in terms of revenue from sales of digital consumer goods, according to an industry source.[1]

The popularity of Netflix among Australian consumers, despite the requirement to implement technical solutions to circumvent the service's geoblocking demonstrates that many Australian consumers are not only keen to pay reasonable prices for timely access to quality content, but are willing to go to some lengths to do so.

EFA therefore believes that addressing issues of availability and pricing are far more likely to result in effective reductions in the rate of online copyright in Australia than the introduction of new legal sanctions. Furthermore, EFA submits that any policy- or law-making on this topic should be based on robust, independent evidence that demonstrates that (a) there is a significant problem with copyright infringement in Australia in the first place and that (b) what is being proposed is a necessary and effective means of solving it. EFA does not believe that either of these issues is adequately addressed by the Discussion Paper.

EFA is well aware of the experience of other countries that have introduced graduated response schemes, website blocking and other mechanisms designed to combat online copyright

[1] Australian Home Entertainment Distributors' Association, 'Digital film and TV sales up 22% to $144 million in 2013', available at: http://www.aheda.com.au/_literature_159930/AHEDA_2013_Digital_Data_Release

infringement, and, in accordance with the available academic research on this point,[2] is unconvinced that such approaches are effective in achieving their stated aims.

EFA is also seriously concerned that the introduction of new legal sanctions, particularly the proposal to give rightsholders the ability to obtain injunctions to block offshore websites, represent a threat to entirely legitimate content sharing activities and to freedom of expression more generally. Such attempts to block websites are also easy to circumvent and are therefore likely to achieve little other than providing additional work for the legal profession and imposing an additional burden on court time and costs.

EFA is further concerned that the costs of imposing any new legal sanctions may be borne by service providers and/or consumers, and not by rightsholders. Given that the justification for such sanctions is to increase the revenue of rightsholders, EFA believes that the only defensible and equitable approach is for rightsholders to bear these costs alone and in full.

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

EFA is fundamentally unconvinced that ISPs need to take any further 'reasonable steps' than what they must do under the current law to avoid authorisation liability. EFA does not see convincing evidence that the current steps ISPs must take are inadequate and that further measures are necessary, and advocates an evidence-based approach to policy-making in this area.

In any event, EFA has various concerns about Australia following a similar approach to other countries which have implemented a 'graduated response' approach to alleged online copyright infringement, involving passing on warnings to users and restricting or disconnecting the services of alleged repeat infringers.

EFA is seriously concerned that the implementation of such a scheme would involve the constant monitoring of all Internet users' conduct by their ISPs, and that this would be a disproportionate interference with individuals' privacy and the confidentiality of their communications. This is of particular concern given that the overwhelming majority of users do not engage in any illegal activity whatsoever. Indeed, this was the conclusion of the Court of Justice of the European Union in the *Scarlet v SABAM* case, that such a comprehensive monitoring scheme was, *inter alia*, a disproportionate invasion of individuals' privacy.[3]

EFA is therefore seriously concerned that Australia may follow an approach that is so invasive of privacy and which has been already discredited elsewhere. EFA is also concerned about the potential 'chilling effect' on users' free expression that such total monitoring could have. EFA is further concerned about the privacy implications of information about users (including their

[2] Giblin, Rebecca, Evaluating Graduated Response. 37 Columbia Journal of Law & the Arts 147-209 (2014); Monash University Faculty of Law Legal Studies Research Paper No. 2013/56.
[3] Case C-70/10 *Scarlet Extended v Societe belge des auteurs, compositeurs et editeurs (SABAM)* [2012] ECDR 4

personal details, Internet usage, websites visited, etc) being passed on to rightsholders by ISPs on the grounds of a suspected infringements, and urges the involvement of the courts in this process to ensure that there are appropriate procedural safeguards in this process including for the protection of individuals' privacy.

EFA asserts that access to the Internet is a fundamental necessity for effective engagement in contemporary society and believes that such access should be considered a basic human right, or at least a component of the right to free expression. Indeed, the UN Special Rapporteur Frank La Rue considers that cutting off users from Internet access, regardless of the justification provided, including on the grounds of violating intellectual property rights law, to be disproportionate and thus a violation of article 19, paragraph 3, of the International Covenant on Civil and Political Rights.[4] Australia, of course, is a signatory to this treaty and has ratified it.

EFA therefore absolutely rejects any proposal that would result in the disconnection of an individual's Internet connection in response to allegations of copyright infringement. Further, it is important to note that the majority of home-based Internet connections are used by multiple individuals, which many involve unsecured (or poorly secured) wireless connections, and that individual devices are subject to compromise. Each of these issues means that even where a case can be made that a connection has been used to conduct copyright infringement, that does not mean that the account holder is the individual involved, or that they have any knowledge that such activity has occurred.

EFA also opposes measures short of disconnection which will degrade the quality of an alleged infringer's Internet connection for the same reasons as above, and also due to the fact that Australians already suffer from relatively slow Internet speeds compared to other developed countries. These relatively slow speeds are another factor undermining the development and growth of legal online content streaming services in Australia and it would therefore be entirely counter-productive to introduce measures that will result in the further slowing of download speeds.

EFA is not necessarily opposed to a programme involving ISPs passing on 'educational' notices to their customers that are suspected of repeated copyright infringement, though the effectiveness of such programmes is questionable at best. As a review of France's HADOPI programme found, although peer-to-peer file sharing was seen to decrease, this statistic disguised the fact that many offenders simply moved to unmonitored channels.[5] As noted above, EFA believes it is critical that the full costs of implementing and operating any such programme must be borne by rightsholders.

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[4] *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue*, Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly, 16 May 2011

[5] Arnold, Michael A. and Darmon, Eric and Dejean, Sylvain and Pénard, Thierry, Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law (May 28, 2014). Available at SSRN: http://ssrn.com/abstract=2380522 or http://dx.doi.org/10.2139/ssrn.2380522

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

EFA does not support the costs of any 'reasonable steps' being shared between industry participants. Any activities intended to reduce online copyright infringement are, by definition, designed to increase rightsholders' revenues. The only equitable approach is therefore that the costs of implementing and operating any such activities be borne by rightsholders, alone and in full. EFA is concerned about any costs imposed on ISPs being passed on to users. EFA is also strongly against these costs being borne by the public purse.

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

EFA does not support legislated rules on 'reasonable steps', as such rules would likely be inflexible and quickly outdated due to the rapid evolution of technology and service provision. Any such legislation would also amount to new regulatory 'red tape' that seems entirely at odds with the government's oft-stated deregulation agenda.

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?

EFA does not consider that any further 'reasonable steps' than those currently available are necessary and so does not support their adoption by any ISP.

As a matter of principle, EFA believes that different ISPs should be free to adopt different approaches to achieve compliance or other outcomes in accordance with different business models and varying capacity and allowing for continued service innovation. To mandate otherwise would be an unjustifiable restraint on the operation of the free market that would, per above, be contrary to the stated objectives of the government and be against the interests of both the Internet industry and Australian consumers.

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?

EFA believes it is essential that consumers have a permanent, effective and truly representative voice in any discussions relating to what constitutes 'reasonable steps' and how they are implemented, if this is indeed a course of action which the government and industry is determined to pursue.

If this course of action is pursued, then EFA submits that the possibility of disconnecting consumers from the Internet or degrading their service should be explicitly excluded as outcomes of 'reasonable steps' taken by ISPs or rights holders, and this should be clearly stated in any legislative framework.

EFA urges that that the highest standards of due process are adhered to in any process in which action is taken against consumers and that they should have the opportunity to challenge any claims of infringement made against them. In this regard, EFA believes this should be achieved through the existing court system, whereby both parties to an action have an opportunity for their arguments to be heard, as well as a host of other in-built procedural safeguards such as evidentiary standards which must be fulfilled. This is significant given a lack of robust evidence that the ISPs' customers had infringed copyright seemed to be one motivation for the decision in the *iiNet* case that the ISP was not liable for 'authorisation'. EFA would be gravely concerned to see lesser standards of evidence than those used in the courts introduced as part of any new scheme.

EFA also urges that any scheme or legislative framework take adequate account of exceptions to copyright infringement such as those comprised in fair dealing, and ensure that, for instance, infringement notices are not sent to consumers engaging in conduct which would fall under 'fair dealing', or conduct not involving a 'substantial part' of a copyrighted work (as this does not constitute an infringement in the first place).

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

EFA is concerned about the adverse consequences for free expression and consumer interests that website blocking can entail, as well as the ineffectiveness of blocking injunctions in practice, which calls into question this whole process as an inefficient use of court time and resources.

EFA is concerned about the adverse consequences for free expression of blocking sites that may have a 'dual purpose' of infringing and non-infringing uses. EFA notes that peer to peer services and other forms of file-sharing do not inherently infringe copyright and are used by many Australians for entirely legitimate purposes. Thus, EFA is concerned that sites may be blocked when they do not facilitate copyright infringement, at least in part, because the material in question is already in the public domain, the copyright holder has allowed it to be uploaded (and so there is no copyright infringement), a 'substantial part' of the material is not being used, or an exception to copyright infringement such as fair dealing applies. EFA is concerned that blocking websites may infringe users' legitimate free expression right to send and receive information.

EFA is also concerned that the evidentiary threshold for a website to have a 'dominant purpose' of infringing copyright is unclear, especially how this 'dominant purpose' will be measured in practice and the kind of evidence needed to show this purpose.

EFA believes that the interests of consumers should be taken into account by a court considering whether to grant a blocking injunction. This might involve a consumer representative making a submission to the court detailing the impact of a block on consumers, which ought to include a consideration of whether the content being accessed is already available in Australia at a competitive price. In EFA's view, if this is not the case, the blocking

injunction should not be granted. Indeed, while the UK is given as an example in the discussion paper of the use of these blocking injunction, from the consumer perspective the situation there is very different from Australia. In the Newzbin case mentioned in the discussion paper, one of the critical points of that decision was that "94.3% [of material accessible through the Newzbin sites was]... commercially available content".[6] In Australia this figure would be closer to 30%.[7] This is a critical distinction because, in the UK scenario, the material *could* have been legally acquired. However, in the Australian scenario, a large volume of content is not otherwise legally available.

EFA would also like to draw attention to the general practical ineffectiveness of these blocking injunctions, and submits that injunctions should only be granted if they can be shown to be effective in practice. Otherwise EFA sees these blocking injunctions as a waste of court time and resources.

In practice, blocking injunctions of websites hosted offshore can be ineffective as they can be easily circumvented using simple and freely available technologies such as proxy servers and Virtual Private Networks (VPNs). Furthermore, EFA notes that in response to blocking injunctions in the UK cases, new websites appear almost instantaneously and so injunctions are likely to become nothing more than a game of administrative "whack-a-mole" which will benefit no-one, will increase ISP costs and by extension consumer Internet access charges, and will simply create work for lawyers and an additional burden on the court system and public purse. Indeed, evidence from the UK suggests that blocking injunctions aimed at The Pirate Bay were ultimately ineffective in deterring peer to peer traffic on at least one ISPs' network.[8] EFA is also concerned about any increase in costs flowing from the litigious nature of injunction applications leading to increased compliance costs for ISPs, which will in the end be passed on to consumers in the form of higher internet access costs.

EFA sees further problems arising in the actual process of blocking websites by Internet Protocol (IP) address given that the vast majority of websites are hosted using shared services including shared IP addresses. The example from 2013 of ASIC's technically inept request for websites to be blocked by IP address using section 313 of the Telecommunications Act, which resulted in hundreds of thousands of entirely innocent and legitimate sites being blocked is an important lesson in this regard.[9]

Furthermore, domain name blocking, if not implemented correctly, may result in other services being affected (email, ftp etc). In EFA's view, if blocking injunctions are approved by a court, it must be specified that the injunction be protocol-specific (eg HTTP/S for web traffic) as well as domain-name specific.

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[6] *Twentieth Century Fox Film v British Telecommunications* [2011] EWHC 1981 (Ch). at 50.

[7] https://www.caniwatchit.com.au/

[8] http://www.bbc.com/news/technology-18833060

[9] https://www.efa.org.au/2013/06/05/asic-blocked-250000-sites/

In summary, EFA considers website blocking as a problematic approach given:

- the possibility of blocking sites used for legitimate as well as allegedly illegitimate purposes;
- the ineffectiveness of blocking in practice given the possibilities for circumvention; and
- the risk of taking down other, unrelated and completely legitimate sites such as was seen in recent section 313 blocking attempts.

In EFA's view, the risks and costs associated with website blocking outweigh any supposed benefits, and EFA therefore does not support website blocking injunctions being used as a tool to attempt to address online copyright infringement.

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

EFA is concerned that 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.

In response to Question 7, EFA submits the following:

- the safe harbour scheme should be expanded to include universities, schools and other research institutions; and,
- individuals operating wi-fi networks who are the designated account holder should not be held legally responsible for the use of that network by others, such as friends, relatives or customers (e.g. of a cafe's wifi network), and especially where that network has been used without the knowledge or consent of the account holder (such as where the network is unsecured or poorly secured).

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

EFA believes that the most obvious means to determining the impact of any measures to address online copyright infringement would be through analysis of any increase in use of commercially (and legally) available material. To achieve this, when examining the impacts, EFA submits that whether more content has become available in Australia and priced closer to international parity should be also measured as this is likely to be a key determining factor.

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

EFA submits that given the lack of evidence presented that the measures proposed in the Discussion Paper are necessary and proportionate, or will be effective in practice, these measures should not be implemented without a consideration of alternatives underpinned by rigorous socio-economic analysis of each option. Indeed, as mentioned at the beginning of this submission, EFA is unconvinced that there is a disproportionate rate of online copyright infringement in Australia given the lack of rigorous independent evidence that this is the case. EFA thus sees the discussion paper as proposing (highly flawed) solutions in search of a problem.

However, even if a a disproportionate rate of online copyright infringement does exist, then EFA considers that the Government should heed the advice and recommendations of the Parliamentary Committee's IT Pricing Report from last year, and, inter alia, encourage rightsholders to improve the availability and price of content in Australia, and remove any remaining restrictions around geoblocking and parallel importation so that Australians are able to access legally, and at equivalent prices, the same range of content that is available to consumers in comparable countries. EFA considers that these measures would be the most effective methods of ensuring that rightsholders are able to realise appropriate returns.

EFA also suggests that rightsholders (and not ISPs, the Australian Government or any other party) should consider funding effective means for Australian consumers to locate and legally access content online. An example of such a service is the Can I Stream It? website[10] which provides a sophisticated search facility for content available legally online (and in physical digital form) in the United States.

EFA notes the recently-released Digital Content Guide website which is ostensibly intended to provide such a service, but as it is little more than a directory of links to third-party sites, demonstrably failed to achieve this purpose.[11] EFA would welcome the opportunity to collaborate on such a website with rightsholders, and would be very happy to engage in discussions with them in this regard.

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

EFA does not foresee that these proposals will have a *regulatory* impact on our organisation as such, however we do anticipate increased requests for advice and help from the general public, such as confused and scared consumers who have received notices regarding alleged copyright infringement and are unsure of their rights, and from the owners of small businesses such as cafes which operate wi-fi networks and are concerned that they may be liable for their customers' use of this service. Thus EFA expects that the introduction of the proposed measures

[10] http://www.canistream.it/
[11] http://digitalcontentguide.com.au/

will create confusion among consumers and other Internet users who are likely to approach EFA requesting assistance. As a predominantly volunteer-based organisation operating on a very modest budget, EFA's capacity to respond to such requests is unfortunately limited.

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

EFA is seriously concerned about the implications of these proposals for consumers, as detailed in our responses above.

In summary, EFA is concerned about the impact of these proposals on consumers' free expression and privacy rights, as well as the additional costs to consumers of these proposals, either directly if public funds are used to fund the implementation and operation of these proposals, or indirectly if ISPs are forced to bear at least some of the costs, which will either be passed onto consumers in the form of higher prices for Internet access, or will result in reduced competition in the marketplace, with the same ultimate outcome.

EFA is also concerned that these proposals contain nothing designed to address the premium prices for digital content in Australia compared to similar countries, and the outright lack of availability of certain content in Australia, both of which have already been identified as problems for consumers here.

EFA is further concerned about the potential burdens imposed on the court system by website blocking injunctions which will in practice be largely ineffective, and which will therefore not be an appropriate use of limited time and resources.

Conclusion

In conclusion, EFA reiterates that the Attorney-General has failed to make the case that the measures proposed are necessary, proportionate and in the best interests of Australians. EFA is seriously concerned at the lack of evidence provided by the Attorney-General in this regard, and suspects that the Attorney-General is being swayed by research presented by rightsholders and their representatives which cannot be regarded as either independent or authoritative.

EFA does not consider, on the basis of the available evidence, that there is a disproportionate rate of online copyright infringement in Australia. Even if such an issue can be shown to exist, EFA does not consider that the measures detailed in the Discussion Paper are either appropriate or effective means for addressing this alleged problem.

EFA is gravely concerned about the potential for infringement of Internet users' rights, especially free expression and privacy, inherent in the proposed measures and absolutely rejects any attempt to justify such infringements in the interests of enhancing the revenue of rightsholders, many of which are multinational, foreign-owned conglomerates.

Finally, EFA is also concerned that the proposed measures will impose additional costs on Australian consumers, while failing to address what EFA believes to be a critical factor driving

copyright infringement in Australia, namely the relative lack of choice and availability of reasonably-priced, timely and convenient legal mechanisms for accessing and consuming content.

Thus, EFA urges the Attorney General to conduct a thorough review of the socio-economic impacts of any proposals in this area, as well as an assessment of the impact of the proposals on Australians' fundamental rights to free expression and privacy, before any further action is taken.

Finally, EFA regards copyright law in Australia to be in dire need of reform to reflect advances in technology and dramatic changes in how Australians create and consume content. EFA urges the Australian Government to urgently respond to the Australian Law Reform Commission's report examining 'Copyright and the digital economy' and to act promptly to enact the core recommendation in that report, that a broad, flexible fair use exemption be introduced.