

Forced negotiations and industry codes won't stop illegal downloads

December 11 2014, by Nicolas Suzor And Eleanor Angel



Service providers will be given more responsibility when it comes to stopping illegal downloads ... but will it be a deterrent? Credit: m01229/Flickr, CC BY

Attorney-General George Brandis and Communications Minister Malcolm Turnbull announced yesterday that they [expect](#) internet service providers (ISPs) to work with copyright owners to help police infringement.

ISPs will have to agree to a new industry code that passes on warning notices to their customers when copyright owners make [allegations](#) of infringement against them. They will also have to start handing over the [personal details](#) of subscribers who have several allegations against their name.

The government also plans to introduce an obligation for ISPs to block access to file sharing websites such as The Pirate Bay.

These announcements are better than the government's last attempt to force ISPs to negotiate, which would have made a mess out of [copyright law](#) for everyone. But there are still real problems, and the measures will probably increase the cost of internet access for little, if any, benefit.

A quick negotiation

ISPs and copyright owners have 120 days (over the holiday period) to come to agreement on an issue that they have been at loggerheads over for the past five years.

The government hasn't given ISPs much negotiating power, either. The clear threat is that if ISPs don't give the industry what it wants, the government will do it for them.

These types of industry codes can be an effective way to regulate, but the only way they will reflect the overall public interest is if consumer groups are also given a seat at the negotiating table. We also need transparency and continual monitoring to ensure the scheme is not being abused, and public interest groups must have the power to effectively protect end users.

In this proposal, consumer groups are not invited, and rightsholders hold all the power.

Three strikes and you're out?

Yesterday's press release is careful to distance itself from claims that this new scheme will include a termination regime, without actually ruling it out. But because of the way Australian copyright laws work, there is a good chance that ISPs will also start terminating access of people who have received multiple allegations of infringement.

In the recent iiNet case, the High Court ruled that ISPs were under no obligation to go out of their way to protect the rights of copyright owners. The High Court explained that there was no basis for ISPs to be certain that the allegations made by copyright owners were true.

The Court also noted that there was no evidence about whether warnings would actually deter infringements, and ruled that it would be unreasonable to disconnect people from the internet purely on the unverified allegations of copyright owners.

This announcement is the result of sustained lobbying to overturn the effects of the iiNet decision. There is a pretty good chance that if ISPs agree to a code that only requires them to warn users, not terminate their connections, then they won't be liable.

But our law already includes a provision to ensure that ISPs are not liable in these circumstances. The "safe harbours" provide ISPs with a limited immunity, on the condition that they terminate the accounts of "repeat infringers".

Smart ISPs will want some certainty that they won't be liable in a future lawsuit. Their best method of protecting themselves is to implement a policy to cut people off the internet after they receive a set number of notices.

But there are problems with notices. Allegations of infringement are just that; they're not proof. History has shown that notice-based systems get abused.

We have seen [allegations](#) that a laser printer downloaded Iron Man and Indiana Jones. The [Chilling Effects Clearing House](#) has thousands of examples of people who have used copyright threats to bully critics, silence their political opponents or shut out their business competitors.

'Speculative invoicing'

The code will include a way for copyright owners to demand the personal details of people who have received multiple allegations of infringement. Presumably, this is to stop them from having to go to the trouble of proving the reliability of their methods in court, like iiNet is [making the owners](#) of Dallas Buyers Club do now.

The problem is, nobody wants to actually sue individuals. Copyright owners want warnings first, because they're cheap to send out – particularly if they can convince the ISPs to bear the costs.

If warnings turn out not to work, the next step is not to sue individuals. The music industry found out six years ago that this was not only [largely ineffective](#), but also [a terrible PR strategy](#).

Instead, we will probably see more "speculative invoicing". This is a way to "monetise infringements" by sending legal threats directly to users.

Say a consumer is alleged to have downloaded a few movies that she otherwise would have paid for. The actual loss to the studios would probably be between US\$30 and US\$100. But the [letters that users get sent](#) ask for US\$5,000 to settle the claims. Because it would cost much more than that to go to court, consumers will often choose to settle, even

if the notice wasn't accurate to begin with.

No safeguards have been announced to regulate how copyright owners can get access to or use the personal details of Australian internet users under this scheme.

Will blocking work?

Other countries have tried getting ISPs to block websites such as The Pirate Bay before. There is very little evidence that this is effective at either reducing infringement or increasing profits of copyright owners.

Earlier this year, the Dutch Court of Appeal overruled previous orders to block The Pirate Bay, finding that website blocking was [ineffective and disproportionate](#).

The UK is still pressing ahead and currently blocks a [large list of websites](#). Even professional "anti-piracy agents" point out that not only is website blocking [not actually useful](#) for blocking access to sites such as The Pirate Bay, but it's actually creating a wasteful game of whack-a-mole that makes everyone's job more difficult.

What obligations does the copyright industry have?

The government has been careful to explain that it expects the industry to do better in providing access for Australian consumers. We currently [pay much more](#) for access to digital content, and are still faced with significant delays in getting access to both [physical goods](#) and [digital downloads](#) compared to consumers elsewhere.

This is important. The only way to fix the problem with copyright is to make it fair.

But the truth is, the industry has little incentive to do better. Often, its choices to exclusively restrict access to premium channels – such as Foxtel – are [more profitable](#) than making the same content available faster to more people at a lower price.

We are still waiting for the government to announce how exactly it plans to convince foreign copyright owners to treat Australian consumers more fairly. It has been nearly 18 months since the [IT Pricing report](#) recommended serious action. We're not holding our breath.

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