



**Australian Government**

**Department of Communications and the Arts**

# Review of Copyright Online Infringement Amendment

February 2018

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## Consultation process

The Department of Communications and the Arts (the Department) is seeking views from stakeholders on the questions put forward in this paper. The Department welcomes single, consolidated submissions from organisations or parties, capturing all views on the *Copyright Amendment (Online Infringement) Act 2015* (Online Infringement Amendment).

The Department intends to meet with stakeholder groups affected by the Online Infringement Amendment, such as peak bodies and their members, by the middle of March, and will arrange these meetings shortly. After consultation, the Department will advise the government on the issues covered in this paper.

## How to make a submission

Please send questions about the submission process to:

[copyright.consultation@communications.gov.au](mailto:copyright.consultation@communications.gov.au).

The Department invites submissions by **5.00 pm AEST on Friday 16 March 2018**. Submissions may be lodged in the following ways:

|         |   |
|---------|---|
| Website | <a href="http://www.communications.gov.au/have-your-say">www.communications.gov.au/have-your-say</a>                  |
| Email   | <a href="mailto:copyright.consultation@communications.gov.au">copyright.consultation@communications.gov.au</a>        |
| Post    | The Director, Copyright Law Section<br>Department of Communications and the Arts<br>GPO Box 2154<br>Canberra ACT 2601 |

Submissions should include your name, organisation (if relevant) and contact details. The Department will not consider submissions without verifiable contact details.

Submissions will be treated as non-confidential information, and can be made publicly available on the Department's website, unless a respondent specifically requests its submission, or a part of its submission, is kept confidential, and provides acceptable reasons. An email disclaimer asserting confidentiality is not sufficient.

The Department reserves the right not to publish a submission, or any part of a submission, at its absolute discretion. The Department will not enter into any correspondence with respondents in relation to any decisions not to publish a submission in whole or in part.

The Department is subject to the *Freedom of Information Act 1982* and may be required to disclose submissions in response to requests made under that Act.

The *Privacy Act 1988* establishes certain principles regarding the collection, use and disclosure of information about individuals. Any personal information respondents provide to the Department through submissions will be used for purposes related to considering issues raised in this paper, in accordance with the Privacy Act. If the Department makes a submission, or part of a submission, publicly available the name of the respondent will be included. Respondents should clearly indicate in their submissions if they do not wish their name to be included in any publication relating to the consultation that the Department may publish.



## About this review

### Context for this review

This review supports the Australian Government's commitment to review the operation of the Online Infringement Amendment 18 months after it commenced on 27 June 2015. The Department has deferred the review until now to provide time for evidence to emerge.

### What is the Online Infringement Amendment?

The Online Infringement Amendment provides a targeted mechanism to help reduce online copyright infringement.<sup>1</sup> The mechanism is intended to disrupt large-scale online copyright infringement by websites that operate outside Australia and distribute (or facilitate the distribution of) infringing material to Australian consumers. It enables copyright owners to apply to the Federal Court of Australia (the Federal Court) to block access to an online location meeting certain conditions. The location must be operated outside Australia and have the primary purpose of infringing (or facilitating infringement of) copyright content.

After considering several factors, the Federal Court may grant an injunction to require a carriage service provider (CSP) to take reasonable steps to disable access to such an online location. The factors help to target only those online locations that flagrantly disregard the rights of copyright owners by facilitating access to infringing copyright content. The factors the Federal Court considers are:

- the flagrancy of infringement or its facilitation
- whether disabling access is a proportionate response
- the impact of the injunction on any person likely to be affected by the injunction
- whether it is in the public interest to disable access.

### What are the known impacts?

The Productivity Commission had noted a variety of stakeholder experiences with blocking websites.<sup>2</sup> One stakeholder pointed to the UK experience with blocking orders as an example of successful blocking. However, some concerns were raised that some parts of the scheme were not sufficiently defined, creating uncertain impacts (for example, the lack of statutory definitions for 'primary purpose' of an online location and whether infringement is 'flagrant'). There were also concerns that website blocking might be ineffective where the block was avoided by changing the online location. Other concerns already raised included the potential impact on access to legal content and bypassing of blocks implemented by carriage service providers (CSPs).

Case law and survey data suggests the Online Infringement Amendment has enabled copyright owners to work with CSPs to reduce large-scale online copyright infringement. So far, it appears that copyright owners and CSPs find the current arrangement acceptable, clear and effective. At the time of writing this paper, there have been four applications for injunctions through the Federal Court, with more applications expected to reach the Federal Court shortly. The Department will monitor applications to see whether the current arrangements are refined as more applications are made.

Since December 2016, the Federal Court has handed down several decisions requiring CSPs to begin blocking specific infringing websites.

<sup>1</sup> *Copyright Act 1968* (Cth), s 115A

<sup>2</sup> Productivity Commission (2016), *Intellectual Property Arrangements*, pg.567–568



Early cases have established some initial precedents for these arrangements.<sup>3</sup> One precedent establishes the use of a landing page to inform internet users of a court order and the costs of a CSP complying with a court order. Either a copyright owner or a CSP can establish a landing page. If a CSP wishes to avoid the cost of its own landing page, it can redirect customers to one that the copyright owner would provide. Another precedent allocates responsibility for compliance costs. Cases to date have required copyright owners to pay all or a significant proportion of compliance costs. They have also calculated costs proportionate to the number of domain names.

The Department is aware of evidence correlating a reduction in copyright infringement in Australia with the introduction of the Online Infringement Amendment. Kantar Public conducted research for the Department showed that downloading fell slightly from 2015 to 2017.<sup>4</sup> The same research showed a five to 10 per cent decrease from 2015 to 2017 in individuals consuming any unlawful content across movies, music and television, although there was a slight increase for video games.<sup>5</sup>

The Department is aware that other factors—such as the increasing availability of television, music and film streaming services and of subscription gaming services—may also contribute to falling levels of copyright infringement. The Kantar Public research showed consumption of digital content by streaming is rising across all categories, particularly in television and film.<sup>6</sup> The findings of the Kantar Public report are broadly consistent with other research into this area.<sup>7</sup>

## Questions

The following questions are provided for consultation.

### Question 1

How effective and efficient is the mechanism introduced by the Online Infringement Amendment?

### Question 2

Is the application process working well for parties and are injunctions operating well, once granted?

### Question 3

Are any amendments required to improve the operation of the Online Infringement Amendment?

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<sup>3</sup> [Roadshow Films Pty Ltd v Telstra Corporation Ltd \[2016\] FCA 1503](#), [Universal Music Australia Pty Limited v TPG Internet Pty Ltd \[2017\] FCA 435](#), [Roadshow Films Pty Ltd v Telstra Corporation Limited \[2017\] FCA 965](#), [Foxtel Management Pty Limited v TPG Internet Pty Ltd \[2017\] FCA 1041](#)

<sup>4</sup> Kantar Public (2017, for Department of Communications and the Arts), [Consumer Survey on Online Copyright Infringement 2017](#), pg.4

<sup>5</sup> [Ibid](#), pg.5

<sup>6</sup> [Ibid](#), pg.5

<sup>7</sup> See Sycamore (2017, for Creative Content Australia), [Project Harrison: Australian Piracy Behaviours and Attitudes](#). See also CHOICE (2015), [Research update: CHOICE Digital Consumers Paying for Content Behaviour & Attitudes](#).

