

29 November 2011

## Commercial Law - e-alert

# Telcos on the front foot in the fight against piracy

Only days before the High Court of Australia is set to hear an appeal by a group representing many of the largest entertainment industry rights holders in Australia against a Federal Court Judgement in February that found Internet Service Provider ("ISP") iiNet was not responsible for copyright infringement by its clients, the Communications Alliance and five of Australia's largest ISPs have joined forces and unveiled a ground-breaking proposed scheme to combat the increasing problem of online copyright infringement.

The five signatories to the scheme are Telstra Bigpond, Optus, iiNet, iPrimus and Internode<sup>1</sup>.

The scheme is aimed to assist entertainment industry rights holders to enforce their copyright by achieving a prolonged and positive change in the behaviour of those who engage in online copyright infringement<sup>2</sup>.

Some of the key principles underlining the scheme are:

- » rights holders have primary responsibility for enforcing their intellectual property rights;
- » the fundamental principle of balance between the interests of rights holders, ISPs and consumers must be preserved;
- » consumers' rights to privacy, the protection of presumption of innocence, burden of proof, evidence, natural justice and equity and internet access are to be preserved;
- » education about online copyright infringement issues must be made available to consumers; and
- » rights holders must continue to take steps to improve the availability of legal and affordable content online to reduce the motivation to source content in ways that might be illegal<sup>3</sup>.

The core elements of the scheme are:

- » the scheme is limited to only consumer, residential and landline internet account holders;
- » the scheme is to be conducted as an 18 month 'notice and discovery' trial;
- » the allocation of costs incurred by rights holders and ISPs should reflect the relative economic benefit derived from the scheme. The reasonable costs incurred by ISPs to assist rights holders to enforce their copyright should be reimbursed, in accordance with other instances where ISPs assist third parties such as law enforcement agencies; and
- » rights holders must indemnify ISPs for the actions ISPs take in operating the scheme, provided ISPs act in accordance with the scheme rules<sup>4</sup>.

In response to evidence provided by rights holders, the scheme would require ISPs to forward education and warning notices to customers whose internet accounts have been detected undertaking activity that might infringe copyright laws. ISPs would send the 'education notices' to customers suspected or infringing copyright by uploading or downloading content such as movies, television shows, computer games and music.

If a customer was to continue with the illegal conduct after being served with an education notice, this would be followed by up to 3 warning notices in a 12 month period. If the customer continued to infringe, the copyright holder would be able to seek user details from the ISP, allowing them to institute legal action.

<sup>1</sup> "Australian Internet Service Provider (ISP) Proposal: A scheme to address online copyright infringement", Communications Alliance Limited - [http://www.commsalliance.com.au/\\_data/assets/pdf\\_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf](http://www.commsalliance.com.au/_data/assets/pdf_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf)

<sup>2</sup> "Australian Internet Service Provider (ISP) Proposal: A scheme to address online copyright infringement", Communications Alliance Limited – Pg.4 - [http://www.commsalliance.com.au/\\_data/assets/pdf\\_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf](http://www.commsalliance.com.au/_data/assets/pdf_file/0019/32293/Copyright-Industry-Scheme-Proposal-Final.pdf)

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.



The Communications Alliance says the scheme has a strong emphasis on educating consumers as many consumers are not aware that their online activity could be illegal. The scheme is also designed to assist rights holders to protect their copyright in cases where internet users persist in improper activity despite repeated warnings.

Although the scheme allows the ISPs to warn consumers and eventually report their illegal online activity, it does not allow ISPs to terminate a consumers internet accounts, nor for any punitive sanctions to be imposed on customers by ISPs and provides consumers with the right to appeal the receipt of a notice.

Following the 18 month trial of the scheme, an independent evaluation of the scheme is to be undertaken to determine its effectiveness, including whether it produces a real change in consumer behaviour and whether the scheme should be continued in its initial form or modified for improvement. The Communications Alliance says the evaluation would take into consideration the growing body of international experience in other jurisdictions such as UK, New Zealand, Canada, France and the USA where varying types of online copyright schemes were being implemented.

The Communications Alliance says the proposed scheme requires further consultation with rights holders, consumer representatives, the Federal Government and the broader ISP sector before full details and an implementation timetable could be finalised.

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