

29 August 2014

Mr Andrew Walter  
Assistant Secretary  
Commercial and Administrative Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600  
Email: [copyrightconsultation@ag.gov.au](mailto:copyrightconsultation@ag.gov.au)

Dear Mr Walter

### **Discussion Paper: Online Copyright Infringement**

Thank you for giving the Telecommunications Industry Ombudsman (TIO) the opportunity to comment on the Discussion Paper released by the Attorney-General's Department on *Online Copyright Infringement* (the Discussion Paper).

The Discussion Paper outlines the Government's proposed approach to amending the *Copyright Act 1968* for the purposes of providing a legal framework to reduce online copyright infringement. Many elements of this framework, such as the proposed extended injunctive relief to block overseas sites and extended safe harbour scheme, are outside the scope of the TIO's dispute resolution role; for this reason we offer no comment upon them.

We also do not propose to comment on matters set out in respect of extended authorisation liability, other than in respect of Question 5 in the Discussion Paper, which is directly relevant to our role.

#### ***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?***

It is noted that the Discussion Paper states that Government's expectation is for '*... consumer interests ... to be a key consideration in any such scheme or schemes. The Government would not expect any industry scheme or commercial arrangement to impose sanctions without due process, or any measures that would interrupt a subscriber's internet access.*'

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**Telecommunications Industry Ombudsman Ltd** ABN 46 057 634 787

PO Box 276 Collins Street West  
Vic 8007  
Level 3, 595 Collins Street  
Melbourne 3000

Tel freecall\* 1800 062 058  
Fax freecall\* 1800 630 614  
Telephone 03 8600 8700  
Fax 03 860 8797

TTY 1800675 692  
Email [tio@tio.com.au](mailto:tio@tio.com.au)  
Web [www.tio.com.au](http://www.tio.com.au)

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### ***Key elements of due process – notice, internal review and external dispute resolution***

In our submission, key elements of any due process arrangement in a 'reasonable steps' arrangement will include:

- appropriate notice to a subscriber before any sanction is imposed
- an opportunity to resolve any dispute about a proposed sanction with the internet service provider and/or rights holder
- a right to access External Dispute Resolution (EDR) – and for the TIO to undertake this EDR role.

We note that these elements of notice, and internal and external review, are generally present in graduated response schemes adopted in other jurisdictions.

The requirements of notice, internal review and EDR also reflect other arrangements in place to balance consumer interests in respect of telecommunication services. Examples are set out below.

- The *Telecommunications Universal Service Obligation (Standard Telephone Service - Requirements and Circumstances) Determination (No. 1) 2011* provides that if the primary universal service provider believes that it is not obliged to provide a standard telephone service, it must provide notice to the consumer about its decision, and the consumer may request the provider to reconsider, and may also lodge a complaint with the TIO if they remain dissatisfied.
- The *Telecommunications (Customer Service Guarantee) Standard 2011* provides that carriage service providers must notify consumers about a decision to disconnect a CSG eligible service for non-payment of a charge, and the consumer is entitled to dispute the disconnection with provider first, and if dissatisfied with the provider's response, the consumer may make a complaint to the TIO.
- Schedule 3 to the *Telecommunications Act 1997* and the *Telecommunications Code of Practice 1997* (the Code) provide for notice to be given to land owners and occupiers (landholders) where a carrier proposes to conduct activities on land. For inspections and the installation and maintenance of low-impact facilities, the Code provides for a consultation process for the carrier and landholders to resolve any objections to these activities. Where these cannot be resolved by agreement, a landholder can request that the objections be referred to the TIO for direction.

More generally, Part 6 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSSA) and the [TIO Terms of Reference](#) provide for a similar framework:

- The TCPSSA requires that all carriage service providers who supply services (including a standard telephone service, public mobile telecommunications service or carriage service that enables end-users to access the Internet) must enter the TIO scheme, the functions of which are to include the investigation and determination of complaints by end-users.
- The TIO Terms of Reference ensure that a service provider is given an opportunity to consider the complaint before any investigation.

Telecommunication industry codes which impact on consumers (in particular the *Telecommunications Consumer Protections Code C628:2012* (the TCP Code)) also generally provide that notice, internal review and EDR are provided to consumers in circumstances where their interests are potentially to be impacted. For example, the effect of clauses 6.7 and 6.8 and Chapter 8 of the TCP Code are that suppliers must:

- give notice to customers prior to disconnecting, suspending or restricting their telecommunications service
- review any decision to restrict, suspend or disconnect a service at the customer's request
- advise the consumer, if they are dissatisfied with the outcome of the review, about how to make a complaint
- provide information about EDR including the TIO.

### ***TIO role in providing EDR services***

It is of note that the TIO is already able to review the actions of an internet service provider (ISP) in circumstances where it proposes to restrict or disconnect the services provided to a consumer. The TIO is also able to deal with consumer complaints about an interference with privacy by an ISP; in this respect the Office of the Australian Information Commissioner has recognised the TIO as an EDR scheme for the purposes of dealing with privacy complaints.

The role of the TIO in delivering such a review mechanism would also be consistent with the Productivity Commission's comments in its *Access to Justice Arrangements Draft Report*<sup>1</sup>.

In that report, the Productivity Commission noted the effectiveness of industry ombudsmen in sectors where essential services are delivered by large providers. It also highlighted the risk of an increased proliferation of ADR services such as ombudsmen leading to consumer confusion about where to go and the risk of inconsistent outcomes. For consumers of internet services, who regularly seek the assistance of the TIO, it would be a reasonable expectation that my office would also be able to review the reasonableness of service restrictions or disputed charges stemming from alleged copyright infringement activities.

We understand a consideration may be who should bear the cost of providing an EDR service. At present, the cost of the TIO's EDR service is borne by ISPs and other telecommunication service providers directly. If a 'reasonable steps' arrangement is implemented, it may be appropriate to consider whether rights holders should also contribute to some or all of the cost of the TIO's service, either directly or indirectly.

### ***Other measures to balance consumer interests***

In addition to the due process matters noted above, other elements to balance consumer interests to be considered if a 'reasonable steps' arrangement is implemented include:

- the consumer is given clear information about copyright and its application to content available online

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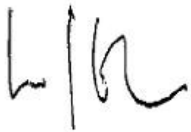
<sup>1</sup> Productivity Commission, April 2014, [Draft Report – Access to Justice Arrangements](#), page 288.

- the consumer is made aware of any new 'reasonable steps' arrangements, and given clear information about the possible consequences of online copyright infringement
- the consumer is given timely access to any relevant information that is the basis for any proposed sanction
- the consumer is given reasons for any decision that may affect them
- no sanction is applied to a consumer or their service while a dispute is being dealt with either through internal review or EDR
- any sanctions are predictable, comparable and proportionate – such that similar infringements would generally attract similar sanctions.

***Further information***

If you require further information, please contact David Brockman, the TIO Executive Director – Industry, Community and Government on 03 8600 8700 or by email ([david.brockman@tio.com.au](mailto:david.brockman@tio.com.au)).

Yours faithfully

A handwritten signature in black ink, appearing to read 'S. Cohen', written in a cursive style.

Simon Cohen  
**Ombudsman**