

Encouraging legitimate use of Online Content
An iiNet view



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Introduction

This paper is published in an effort to generate a more productive public discussion about both the provision of legitimate online content and also a possible model for policing copyright infringement. It may also assist in raising awareness of the general public on the rights of content owners. As an innovative and customer focused company, iiNet prides itself on leading discussion on important matters for our industry, the broader economy and our community.

We believe the desire of rights holders to police infringements must also be matched by a concomitant effort to improve access to legitimate content, including by the use of new business models. iiNet does not support or encourage any breaches of Australian law, including infringement of the Copyright Act.

iiNet has always been, and will continue to be, a good corporate citizen. We hope that this discussion paper forms a useful input for an eventual solution to a growing problem.

The availability issue

There are two aspects to this topic:

1. The creation of demand;
2. Access to content.

Creating demand

In simple terms, Hollywood studios spend a massive amount on marketing their product. In fact the reports available indicate a scale of marketing budgets that are difficult to absorb, with suggestions that marketing budgets for single movies exceed \$100 million (the 'Avatar' marketing budget was reportedly \$150m²) and the studios' total expenditure is measured in the billions³.

¹ <http://www.vanityfair.com/online/oscars/2009/12/how-much-did-avatar-really-cost.html>

² [http://en.wikipedia.org/wiki/Avatar_\(2009_film\)](http://en.wikipedia.org/wiki/Avatar_(2009_film))

³ Based on calculations using data reported at the site below. In 2010, \$525.93million total online expenditure represents just 8% of the total, suggesting that more than \$6.5 billion was spent on all advertising by all studios, combined. [http://www.emarketer.com/\(S\(pltufjfnrxvnmq450ber5x3k\)\)/Reports/All/Em_hollywood_nov06.aspx](http://www.emarketer.com/(S(pltufjfnrxvnmq450ber5x3k))/Reports/All/Em_hollywood_nov06.aspx)

Total advertising spend by Hollywood studios

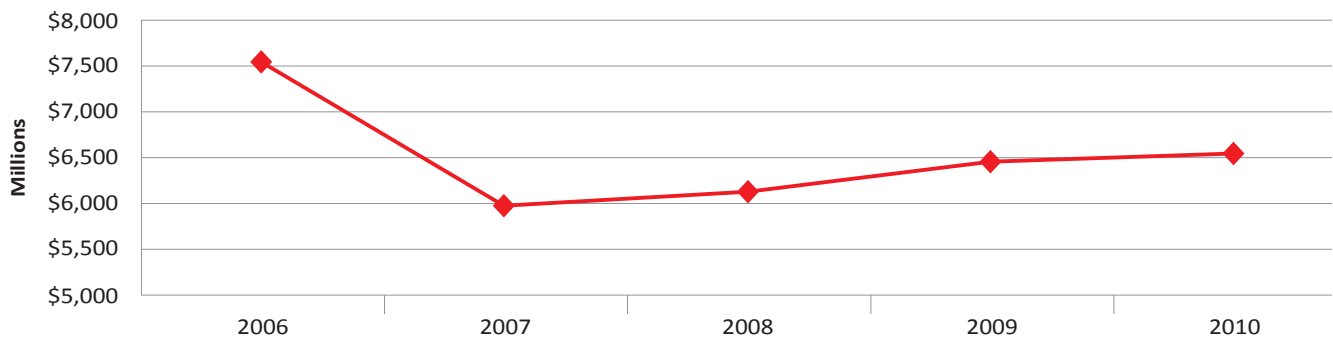


Figure I: Advertising spend by Hollywood studios

We don't criticise the studios for this expenditure, we simply point out that their desirable content is promoted, without stint, to create maximum demand. A level of demand though, that is not met by maximum supply.

Availability

After successfully creating great demand, it seems irrational to some, that studios then limit availability. It appears to be a contradiction in objectives. The current business model of 'windowing' (staggered release dates and queuing distribution channels) creates a frustrated and unsatisfied market. An approach that does not meet with universal acclaim.

We believe that, where there is timely access to legal content, customers will readily pay or access advertising funded content. While the Hollywood studios are late to the party, the music, print, software, computing and gaming industries have made great use of online digital distribution. The world's biggest music retailer is online, the largest bookstore on the planet is online and the software and gaming companies would find it difficult to survive without online distribution.

None of the industries embracing digital distribution use anything like 'windowing' or geographic discrimination. Their markets are global, their distribution is largely uniform.

Internationally, the demand for online video content is growing exponentially with the latest figures for the United States of America alone indicate that time spent viewing video on PC/Mac/laptops from home and work locations increased by 45% over the past year. The level of this kind of activity was up as viewers streamed 28% more video and spent 45% more time watching. Total video streams also saw significant year-over-year growth, up 31.5% to 14.5 billion streams.

Table I - Top Online Video Brands by Total Streams (January 2011, U.S.)

Video Brand	Total Streams (000)	MoM Change in Streams (%)
YouTube	8,460,419	-2.6%
Hulu	813,169	3.3%
VEVO	346,764	N/A
MSN/WindowsLive/Bing	246,675	36.3%
Netflix	200,223	37.5%
Yahoo!	186,606	7.6%
Facebook	159,075	-1.5%
Nickelodeon Family & Parents	136,555	7.4%
Megavideo	135,925	4.2%
MTV Networks Music	133,535	79.1%

Source: The Nielsen Company

Apple's iTunes has also demonstrated the high-level of demand and successful provision of content available online. According to Apple, its iTunes Store has a catalog of over 12 million songs, over 55,000 TV episodes and over 8500 movies. This includes over 2500 in high definition video. In October 2008, the iTunes Store has sold more than 200 million TV episodes, including more than one million HD episodes since the launch of its HD programming just one month earlier.

In February 2010 the ten billionth song was downloaded. Following this trend, some video copyright holders, including Australian television networks, are increasingly making their content available online in Australia.

Most notably ABC's iView has led this development with significant demand and success in delivering 'catch-up' TV. As of March 2011 ABC's iView had 200 programs, most with multiple episodes, available online.

All other free-to-air Australian television networks are now providing some form of 'catch-up' TV, with a range of current prime-time programs, web specials and archival programs. This online content is provided free of charge.

The Seven Network currently has 58 programs with multiple episodes available on their 7Plus online service. The Ten Network currently has 35 programs with multiple episodes available online. The Nine Network's Fixplay online service has multiple episodes and seasons of at least 50 programs currently available. SBS similarly has a vast number of its programs available free of charge online

iiNet's own 'Freezone' is very popular with customers and provides a wide range of legal content, increasingly patronized by a growing customer base. Movie content though is rarely current or recent.

In our opinion one of the most effective ways to reduce piracy is to make the content legally available in a timely fashion, at an attractive price. The Federal Court also recognized the effectiveness of this strategy, with Justice Cowdroy highlighting this in his Judgment, citing supportive comments from the studios and AFACT:

*"Mr Phillipson, Mr Kaplan and Mr Perry (three of the studio witnesses) gave evidence to the effect that it was their hope that the provision of legitimate means to gain access to copyright material online would reduce the consumption of copyright infringing material. Mr Gane gave similar evidence."*⁴

In 2010, iiNet's customers legitimately downloaded more than 4300 terabytes of content via the iiNet Freezone⁵ service.

The infringement issue

Regardless of the availability of timely, reasonably priced content, some individuals will still decide to source content illegally, thus we should turn our attention to enforcement.

Online copyright infringements, typically people sharing unauthorised digital copies of files containing copyright content, are a growing concern in countries the world over.

The industries affected by this concern include those involved in the creation and selling of:

- printed works
- photographs
- software programs
- games
- music and
- video productions.

With the shift to digital formats, the availability of portable, compact devices and the expansion of broadband networks, traditional policing and enforcement methods are failing to keep pace. There has been a proliferation of globally accessible, internet based, file-sharing options available to anyone wishing to avoid the costs, or other restrictions (such as windowing or geographic limits) associated with legitimate acquisition of content.

An entire sub-culture, sourcing and distributing unauthorised content using sophisticated software, has extended its reach to non-technical internet users. The comprehensive services provided by some websites and user forums often dishonestly promote themselves as a source of 'legal' content. They have been very successful in attracting subscribers who also spread, by word of mouth, access to content either normally difficult to find and/or at no charge to the consumer.

The situation has reached a point where a common misconception now exists, across many communities, that illegal file sharing is actually a perfectly acceptable and reasonable way to avoid paying for a range of desirable content.

⁴ para 187 <http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html>

⁵ <http://freezone.iiNet.net.au/>

An unsatisfactory proposition

This state of affairs has created an increasing problem for the legitimate owners of the material and who for one reason or another, have failed to anticipate or keep pace with the technological changes, enabling the proliferation of widespread, unauthorised consumption.

Given iiNet's involvement in legal proceedings (fighting claims of authorisation of such infringing activity), iiNet has had much time to consider the shortcomings of remedial 'solutions' proposed by Hollywood studios (see also iiNet's paper - '[Hollywood Dreams](#)').

The 'Hollywood solution' (in very simple terms) involves the employment of private detectives, hired by content owners, to trawl the public internet and gather information. The content owner uses this information to generate notices which are sent to internet service providers. The notices demand that the ISP should terminate the service of a customer subsequently determined by the ISP (not the content owner).

Naturally, ISPs find this approach unattractive and unsatisfactory, to say the least. The solution was described by presiding judge, Justice Emmett of the Australian Federal Court, as failing to provide "... unequivocal and cogent evidence of the alleged primary acts of infringement..." and a "...mere assertion..."⁶.

The content owners' approach has a number of flaws, from the perspective of either the general public or the telecommunications industry.

Possibly the most concerning shortcoming of the studios' process is that nowhere, in the pseudo 'trial and conviction', process is there an independent body who is required to:

1. Verify the quality of the content owners' assertions and supporting information (i.e. that it is "... unequivocal and cogent evidence of the alleged primary acts of infringement by use of the ... service in question")
2. determine the severity of the infringement
3. determine the level of warning notice and/or punishment to be imposed
4. communicate with the consumer in the manner suggested by the Federal Court –
 - a. inform of the particulars of the allegations of primary infringement involving the use of that customer's account
 - b. invite the customer to indicate whether the service has been used for acts of infringement as alleged
 - c. request the customer either to refute the allegations or to give appropriate assurances that there will be no repetition of the acts of infringement
 - d. warn the customer that, if no satisfactory response is received within a reasonable time, perhaps 7 days, that penalties will apply.
5. record the number of infringements for a given party (given that consumers may use one or more ISP, over time)

⁶ Para 210 of appeal judgment

6. arbitrate disputes between the content owner and the ISP
7. arbitrate disputes raised by the consumer
8. ensure consistency and even-handedness between parties
9. handle complaints, where inaccurate information has led to false assertions and
10. indemnify participants in the scheme in respect of any liability reasonably incurred by participants as a consequence of mistakenly penalizing a customer on the basis of allegations made by the Copyright Owner.

Further, there is a need for regulation authorising the use of private details, held by ISPs.

There is so much to find fault in the studios' approach. What is termination? Is it an hour? A day? A month? Forever? If an offender has a DSL service with iiNet, an iPhone with Telstra and an iPad with Optus, all connected to the net, do they all get terminated? How could that be implemented?

Rather than simply deplore a proposal put forward by Hollywood, which :

- generates cost but no benefit to ISPs
- doesn't match the real world
- pits ISPs against their customers
- potentially penalizes people who have done no wrong
- is easily bypassed
- provides no appeal process
- finds consumers guilty without cogent and unequivocal evidence;

We believe there is a much better way.

iiNet has developed a model which it believes addresses ISP concerns and is likely to be far more effective. We believe it to be attractive to all participants and one which offers a sustainable strategy that includes an impartial referee, for resolution of disputes between the parties and the issue of penalties to offenders.

The iiNet Model

The diagram below illustrates a proposal for the addition of an independent body, into the mix.

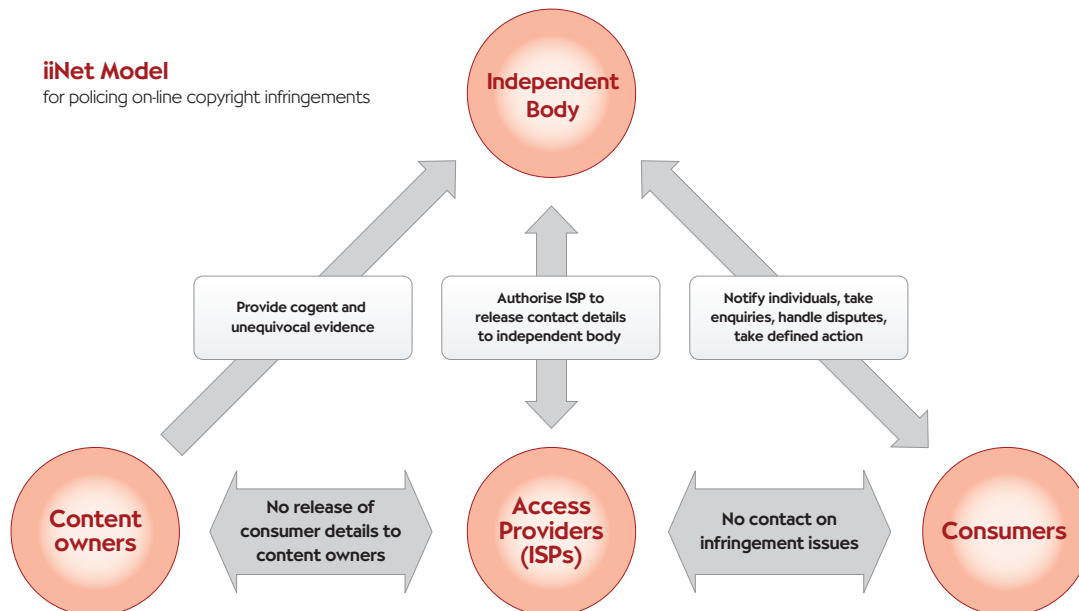


Figure 2: iiNet Model - overview

The process illustrated by the diagram, is as follows:

1. A content owner will carry out their own detective work and identify an offending computer making unauthorised copies of their content available for sharing via (typically) bit-torrent software. This will provide them with an 'IP Address' that can be traced by the issuing ISP to a specific internet service.
2. The independent body will determine whether the evidence meets a test of 'cogent and unequivocal evidence'.
3. IP addresses can be provided to an independent body who is able to identify the issuing ISP and ask that ISP for contact details for the service account holder. The ISP provides those matching contact details to the independent body.
4. Using those contact details the independent body can issue notices to the account holder informing them that they had been detected making unauthorised copies available, provide educative information, advise the consequences that may follow continued behaviour and ask the account holder to ensure that the behaviour stops.
5. The independent body keeps records of the notices and may modify the notice for a repeat infringer, or seek further sanctions. Some of those sanctions may include fines, court charges or changes to the internet service.
6. Consumers who believe the allegations are incorrect will be able to appeal the notice to the independent body. These appeals and/or complaints would be dealt with by the independent body.
7. Consumers who believe an insecure wireless access (or other technical issue) may be involved, will be referred, by the independent body, to their ISP for technical assistance.

Currently, an argument exists between content owners (or rights holders) and ISP as to which of the two industries ought to be responsible for policing copyright infringements. The current *Roadshow Films Pty Limited v iiNet Limited* case, in the Australian Federal Court, indicates the level of disagreement between the industries that exists today.

By inserting an independent body into the process, it appears to iiNet that many, if not all, of the concerns of content owners, ISPs, the government and the community can be addressed.

In this new iiNet model, Content Owners have:

- a recipient for claims of infringement, set up specifically for the purpose
- a process by which the missing components of their claims can be added
- a formal channel to ISPs for information release
- a record keeping system for offenders using more than one access provider or service
- an independent arbiter in the event of disputes arising between the parties
- a credible and independent channel for the treatment of offenders.

The Access Provider has:

- a solution which aligns with other law-enforcement protocols, currently in place
- an acceptable way of participating in the community policing rights infringements
- undisputed authorization for the release of the private details of its customers
- confidence that assertions made by content owners have been verified by an impartial body
- insulation from the complaints, disputes and enquiries resulting from the issue of notices and terminations.

Consumers have:

- their private details protected in line with current standards and expectations
- an independent agency dealing with all parties consistently and without favour
- an avenue for impartial dispute resolution
- certainty about penalties relating to infringements.

Government outcomes include:

- involvement in design and operation of an independent scheme
- a scheme incorporating all parties, including consumers
- avoidance of significant legislative change
- retention of law enforcement accountability.

Penalties

In an age where internet access is being determined by countries such as France that “free access to public communication services online” is a right laid down in the Declaration of Human Rights⁷, or the equivalent of access to education, the notion of disconnection without judicial oversight violates the presumption of innocence. As the penalty for possibly minor economic loss (at the individual infringer level) removal of Internet access is, therefore, both inappropriate and disproportionate.

Whilst it may be important to involve government to determine penalties for infringements, we can still canvass possible options.

iiNet considers that a more appropriate scheme (when compared to termination) is one similar to that used for traffic offences. Authorities regularly equate speeding as a cause of death, injury and major economic loss to the community. In spite of the seriousness of the offence, the graduated penalty structure for speeding never culminates in the total denial of access to transport.

While the analogy is imperfect, it does provide a possible framework which could be adopted for this issue. In our opinion, a scheme which firstly, issues cautions and then moves to a range of defined penalties is appropriate. As with speeding fines, a low level infringement might attract a limited penalty, but then can ramp up to more serious penalties, depending on the level of infringement. The seriousness of the penalty is determined by a margin over a regulated limit.

These traffic infringements may attract penalties of either demerit points and/or fines. Demerit points expire after a set term. Any person found to have only a single offence, reverts to a clean slate after the term. Should the person continue to offend, the demerit points accumulate and the offender's penalty increases financially and may even result in a suspension of their licence. An option is available for some offenders to apply for an extraordinary licence while suspended, so as not to restrict their ability to earn a living.

A similar structure might be contemplated for copyright infringements. Infringements can be ranked as minor (say, single instances), major (say multiple instances of different files) or serious (at a commercial level). Each level having prescribed penalties. Repeat infringements may require further definition - say a minimum period of one week between detections, or examples of sharing multiple files.

A scale of fines can be established, relative to the economic loss represented, and demerit points could also be awarded in line with the severity of the infringements. When a defined limit is reached, other sanctions might be deemed appropriate. These could involve charges being laid for treatment by the courts or possibly shaping of peer to peer traffic.

iiNet does not believe that termination of access for an entire household, or a business, as a result of one individual's infringement, is ever appropriate or proportional. As with speeding infringements, speed cameras may permit the identification of a vehicle, via its registration plate, but not necessarily the identity of the driver. The owner of the vehicle has the option of accepting a fine, when notified by the appropriate body or, alternatively, can make a declaration to the authorities, identifying the driver for the issue of penalties.

⁷ France: http://technology.timesonline.co.uk/tol/news/tech_and_web/article6478542.ece ; and
Finland: http://news.cnet.com/830H7939_I09-I037483I-2.html

A similar arrangement could be implemented in the copyright infringement model proposed here, with an account holder able to refer the authorities to the responsible person for treatment.

Costs

The solution currently proposed by Hollywood studios is for ISPs to wear all the costs incurred by them in managing the notifications, terminations and enquiries demanded by the studios.

Returning to the model diagram, we see at least five communication flows; numbered 1 to 5.

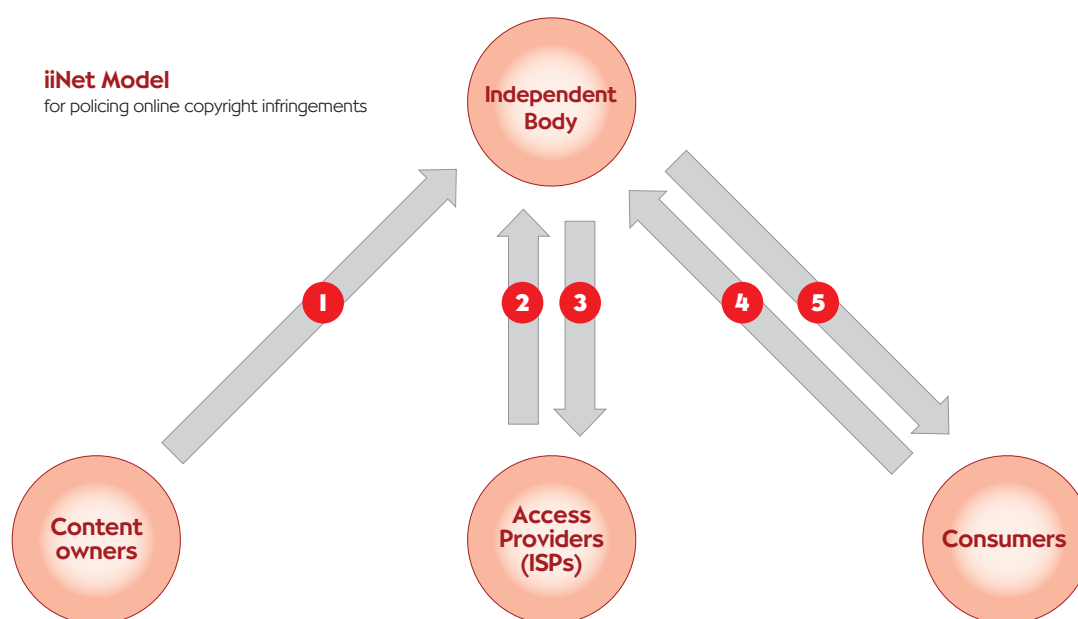


Figure 3: iiNet Model - Communications flows

Using these as a checklist of activities, we can ask the question: "Where should the cost for this activity rest?" Or, in other words, "Who benefits from this activity?"

Table 2 below, is not exhaustive, but it helps to clarify where the benefits flow and therefore where costs may be allocated.

In almost all activities listed, the benefits of enforcement activity flow to the copyright owner. In contrast, the studios' model implies that the ISP will wear the cost (both financial and reputational) of the activity.

In his judgment, Justice Emmett noted⁸

"Before the failure by iiNet to suspend or terminate its customers' accounts would constitute authorisation of future acts of infringement, the Copyright Owners would be required to show that at least the following circumstances exist:

⁸ Para257 Appeal judgment: <http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/23.html>

- *The Copyright Owners have undertaken:*
 - to reimburse iiNet for the reasonable cost of verifying the particulars of the primary acts of infringement alleged and of establishing and maintaining a regime to monitor the use of the iiNet service to determine whether further acts of infringements occur,
 - and to indemnify iiNet in respect of any liability reasonably incurred by iiNet as a consequence of mistakenly suspending or terminating a service on the basis of allegations made by the Copyright Owner.

To consider an answer to the question of "Who Benefits?" we can think about what needs to be done. Here then, is an iiNet tabulation of some of the activities foreseen and the benefits and costs flowing from those activities. No doubt these allocations will generate some argument.

Table 2 - Benefit allocation of copyright enforcement activity			
Step	Action	Benefit allocation	Cost allocation
1	Copyright Owner or Rights Holder (CO) supplies cogent and unequivocal evidence to regulator with request for action	CO	CO
2	Regulator requests customer details from ISP	CO	CO
3	ISP provides customer details to regulator	CO	CO
4	Regulator notifies alleged infringer	CO	CO
5	Regulator handles queries, disputes, enforces penalties where appropriate	CO	CO
Other (not shown on model)			
6	CO operates detection systems	CO	CO
7	ISP maintains customer records, IP records, privacy compliance	Customer	ISP
8	Code development, legislative amendments, reporting	Industries/ customers	Regulator/ industry bodies
9	General (non infringement) customer advice/education regarding scheme	ISP/Customer	ISP

iiNet knows that there is a lot of discussion yet to be had, and that there are a number of stakeholders still to be engaged.

This paper is but an effort to make our position clear. It offers a way forward and attempts to lay out an overview of one possible model. Given the approach promoted by some content owners is totally unacceptable to ISPs, it is essential that another option is sought.

Having considered the matter for some time, we believe that with good will and the support of all stakeholders, the model described here is worth serious consideration and support.

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