



**Australian
Privacy
Foundation**

<http://www.privacy.org.au>

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<http://www.privacy.org.au/About/Contacts.html>

5 September 2014

Attorney-General's Department

Dear Attorney

Re: Online Copyright Infringement Discussion Paper

The Australian Privacy Foundation (APF) is the country's leading privacy advocacy organisation. A brief backgrounder is attached.

As a privacy advocacy organisation the APF welcomes the opportunity to comment on the Online Copyright Infringement Discussion Paper as it relates to the privacy rights of Australians. Please find our submission attached.

Thank you for your consideration.

Yours sincerely

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Question 1:

“What could constitute ‘reasonable steps’ for ISPs to prevent or avoid copyright infringement?”

APF response to Question 1:

- Any consideration of ‘reasonable steps’ must take into account that certain methods for preventing copyright infringement would introduce adverse privacy implications for consumers.
- Many systems that are in wide use will present difficulties for service providers in preventing copyright infringement without introducing adverse privacy implications for consumers. As noted by Geoff Huston, steps used to identify individuals in certain IPv4 environments, especially in mobile phone networks and multi-user Wi-Fi systems, would require comprehensive logging of the activities of all users on a network¹; such logging would adversely impact the privacy rights of users of these systems.
- Every individual who has entered into a contract with an ISP has a reasonable expectation of privacy as a customer; any unilateral change to existing contracts would be unfair, especially without the consent of customers in such contracts. It is for this reason that any proposed legislation must operate by way of court order.

Question 3:

“Should the legislation provide further guidance on what would constitute ‘reasonable steps’?”

APF response to Question 3:

- The APF contends that it is not an acceptable consumer protection for rights holders to self-regulate their own information gathering processes.
- Legislation must directly provide a framework for ‘reasonable steps’ that does not allow privacy-invasive practices to occur.

¹ Huston, G. (2014). What is Metadata, and Why Should I Care?. Retrieved from <http://www.potaroo.net/ispcol/2014-08/metadata.html>

Question 4:

“Should different ISPs be able to adopt different ‘reasonable steps’ and, if so, what would be required within a legislative framework to accommodate this?”

APF response to Question 4:

- Legislative framework must require strict controls on the release of account details, metadata, traffic types and other intercepts to rights holders.
- Any release of such information must only follow a court order.
- A court order must only address an individual. ‘John Doe’ personal information trawls significantly increase the likelihood of information gathering of innocent individuals.

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?”

APF response to Question 5:

- Legislative framework must factor in the privacy rights of consumers.
- The framework must ensure that ISPs are not required or allowed to perform warrantless monitoring or deep-packet inspections on consumers. A court order must be received by an ISP before an ISP is allowed to perform monitoring on an individual.

Question 11:

“Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?”

APF response to Question 11:

- Depending on the terms of legislation, regulations and industry codes, both service providers and rights holders may be burdened with the unintended consequence of creating databases of retained records without providing adequate security and privacy protections for consumers, in contrast with existing legal obligations for organisations to keep personal information of individuals secure.

Australian Privacy Foundation

Background Information

The Australian Privacy Foundation (APF) is the primary national association dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues that pose a threat to the freedom and privacy of Australians. The Foundation has led the fight to defend the right of individuals to control their personal information and to be free of excessive intrusions.

The APF's primary activity is analysis of the privacy impact of systems and proposals for new systems. It makes frequent submissions to parliamentary committees and government agencies. It publishes information on privacy laws and privacy issues. It provides continual background briefings to the media on privacy-related matters.

Where possible, the APF cooperates with and supports privacy oversight agencies, but it is entirely independent of the agencies that administer privacy legislation, and regrettably often finds it necessary to be critical of their performance.

When necessary, the APF conducts campaigns for or against specific proposals. It works with civil liberties councils, consumer organisations, professional associations and other community groups as appropriate to the circumstances. The Privacy Foundation is also an active participant in Privacy International, the world-wide privacy protection network.

The APF is open to membership by individuals and organisations who support the APF's Objects. Funding that is provided by members and donors is used to run the Foundation and to support its activities including research, campaigns and awards events.

The APF does not claim any right to formally represent the public as a whole, nor to formally represent any particular population segment, and it accordingly makes no public declarations about its membership-base. The APF's contributions to policy are based on the expertise of the members of its Board, SubCommittees and Reference Groups, and its impact reflects the quality of the evidence, analysis and arguments that its contributions contain.

The APF's Board, SubCommittees and Reference Groups comprise professionals who bring to their work deep experience in privacy, information technology and the law.

The Board is supported by Patrons The Hon Michael Kirby AC CMG and The Hon Elizabeth Evatt AC, and an Advisory Panel of eminent citizens, including former judges, former Ministers of the Crown, and a former Prime Minister.

The following pages provide access to information about the APF:

- Policies <http://www.privacy.org.au/Papers/>
- Resources <http://www.privacy.org.au/Resources/>
- Media <http://www.privacy.org.au/Media/>
- Current Board Members <http://www.privacy.org.au/About/Contacts.html>
- Patron and Advisory Panel <http://www.privacy.org.au/About/AdvisoryPanel.html>

The following pages provide outlines of several campaigns the APF has conducted:

- The Australia Card (1985-87) <http://www.privacy.org.au/About/Formation.html>
- Credit Reporting (1988-90) <http://www.privacy.org.au/Campaigns/CreditRpting/>
- The Access Card (2006-07) http://www.privacy.org.au/Campaigns/ID_cards/HSAC.html
- The Media (2007-) <http://www.privacy.org.au/Campaigns/Media/>