



VILLAGE ROADSHOW LIMITED

FILE No:
DOC:
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Web Site: www.villageroadshow.com.au

29 August 2014

Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

AUST. COMPETITION & CONSUMER COMMISSION
01 SEP 2014
CANBERRA

Attention: Mr Rod Sims, Chairman

Dear Sirs,

Allegation of Misleading and Deceptive Conduct against iiNet Limited

I am the Co-Chairman and Co-Chief Executive Officer of Village Roadshow Limited ("VRL"). I seek an investigation into the behaviour of iiNet Limited ("iiNet"), which I consider to be misleading and deceptive.

The Australian Competition and Consumer Commission ("ACCC") is an independent statutory authority responsible for enforcement of the Australian Consumer Law, contained in Schedule 2 of the *Competition and Consumer Act 2010*, which among other things, prohibits corporations from engaging in false, misleading or deceptive conduct. I believe that iiNet has breached the Australian Consumer Law.

I am writing to you specifically in relation to material circulated by iiNet titled "Fighting For Our Customers". I attach a copy of this material for your information. This iiNet propaganda defines disingenuous and should be headed "Misleading Our Customers".

Most people are of goodwill and assume what they are told is the truth. iiNet's arguments are transparently and patently untrue.

- (a) "that Hollywood studios dictate to the Australian government" – when in fact it is representatives of the 900,000 Australians that stand to lose their jobs, and Australian taxpaying companies which are the principal players;
- (b) "invasion of privacy" – which is, of course, untrue as someone using peer to peer software to share infringing content makes their IP address available for everyone to see;
- (c) allegations of "censorship of the internet" – which is equally false as copyright owners provide evidence to a court for a no-fault injunction to block access. They even throw in North Korea and Cuba!
- (d) iiNet has also been calling for feature films to be made available simultaneously and on low prices (like in music with Spotify) arguing that this is the solution to the problem – but this is not the solution, as music continues to be illegally downloaded and in June 2013 alone in Australia there were 1.3 million illegal music downloads, just on The Pirate Bay. Furthermore iiNet ignores the fact that music costs are significantly lower than feature films, which cost \$5M to \$200M, with attendant major employment. For there to be an economic viability so any feature films are made, a brief window for cinema release is mandatory.
- (e) They claim legislation and industry initiatives don't work. This is akin to saying abandon policing drunken and high-speed driving on our freeways. Of course there will be people that will continue to infringe but the problem can be addressed. Korea was the first country to get high speed internet and the piracy problem while, like theft in retail, will never be

completely eliminated is now under control. In the USA there is the recent dramatic example of ISPs and copyright owners working together being successful.

- (f) iiNet claims a lack of evidence about graduated response doing anything to curtail piracy or lead to increased sales. In this regard, the report they refer to (flawed though its approach may be) does not actually support that proposition – at most it indicates that graduated response schemes do not eliminate piracy, but the report does not claim that graduated response schemes do nothing. There is significant public material showing the positive impact of a graduated response scheme in Korea, which is a powerful example of graduated response operating in practice. In France and the USA, notices issued to ISP customers have a significant positive impact on behaviour.
- (g) They claim that on average customers use 20% of their download quota, but customers who download new release movie or TV shows use closer to 100% of their quota – the business model of ISP's is to "up sell" such customers to higher bandwidth, making them more profitable. iiNet incorrectly assumes that all customers are on the same quota arrangements. While Village cannot investigate iiNet's actual underlying information on which it bases these statements, it does not accord with our understanding of how the industry works.
- (h) iiNet states that it is an "acknowledged fact" that the American market has seen a reduction in file sharing at the same time that content has become available. iiNet provides no support for this "acknowledged fact"! Indeed, if there is a reduction in file sharing, the "acknowledged fact" is more likely to be attributable to the increase in measures against piracy in the US, including a graduated response scheme that iiNet so quickly writes off earlier in its material.

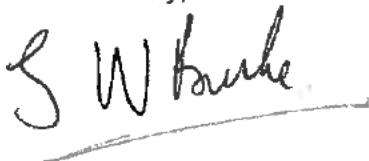
iiNet has established a regime of encouraging people to email our political leaders on a premise that is patently untrue – and this should be stopped. In the meantime it is so threatening to the livelihoods of so many Australians that Village Roadshow is referring the matter to the ACCC so that it can be investigated under the Australian Consumer Law.

The reason this issue is of such importance is that at its core, iiNet, in seeking to avoid a cost impost, is jeopardising the livelihoods of people and taxpaying Australian companies. According to a PWC study, the Australian copyright industries employ 900,000 people and generate economic activity of \$93 billion. There is, of course, no problem with protecting vested financial interest, but not in a way that is grossly misleading and deceptive when they clearly know otherwise.

Please pass this letter on to the appropriate person within the ACCC's enforcement and compliance area. The ACCC may contact the undersigned at any time for further information or they can contact Simon Phillipson, VRL's Director of Corporate Affairs and General Counsel, on Simon_Phillipson@vrl.com.au or on 03 9281 1000.

I look forward to the ACCC conducting an appropriate investigation of iiNet's behaviour.

Yours sincerely,



Graham W Burke
Co-Chairman and Co-Chief Executive Officer
Att.

FIGHTING FOR OUR CUSTOMERS



Another news cycle, and yet again we see the recycled claims suggesting Australia is the worst nation in the world for Internet piracy. This may not actually be the case, but there can be no debate that work still remains to be done to effectively combat piracy.

The Australian Government is readying legislation, if news reports are to be believed, which would require ISPs such as iiNet to send infringement notices to our customers while, at the same time, blocking certain websites which provide access for customers to download and share unauthorised content.

We believe the Government is heading down the wrong path if they're serious about protecting copyright.

Combating piracy

Just in case there is some confusion – let us state, once and for all, that we do not condone piracy in any way, shape or form.

Online piracy, apart from being a breach of copyright, affects the income of the artists and violates numerous trade agreements. Musicians, authors, film makers or game creators might be hesitant to create new content if they know that the end product will simply be stolen. How would the public feel if producers like HBO decided not to finish George R.R Martin's *Song of Fire and Ice* series due to the actions of those who simply downloaded his compelling series instead of paying for it? The outcry would be deafening – I would certainly be upset.

So, what do copyright holders want?

After the dust from the iiTrial settled, I predicted on this blog that rights holders would make "repeated calls for legislative change over time... not taking into account consumer demands". Nearly two years have passed and my comments seem to be on the mark.

The Hollywood Studios have been relentlessly lobbying the Australian Government on a range of heavy-handed solutions, from a 'three strikes' proposal, through to website filtering – none of which take consumers' interests into account (Choice has a handy [rundown](#)).

Let's take a look at their proposals:

1) ISPs issue infringement notices to customers, with Internet connections terminated upon a third strike: This 'graduated response' has been tried in countries including the US, France, New Zealand, Taiwan, South Korea and the UK and delivering an ominous lack of evidence that this response does anything to curtail piracy or lead to increased sales.

This leaves us asking why Hollywood might think this approach would work in Australia when it doesn't even work in their own patch.

Another aspect worth noting is that the studios won't pay for this scheme, instead they expect ISPs to pay for the infringement notice process, resulting in increased charges for our customers, even those who subscribe to legal sources of content.

2) The Federal Government needs to block access to torrent sites: I ask myself several questions – "Why would the Australian government let a foreign company dictate which websites our citizens can access?" "Are our legislators captured by foreign interests?" "Do those foreign interests provide irrefutable evidence of their claims?" "Should we allow American commercial interest to dictate Australian national policy?"

Let's throw some other countries into the mix here: China, North Korea, Cuba – countries that all block local access to certain sites. Furthermore, blocking websites will never be 100 per cent effective. Users will always find an alternative. When Napster was shut down, users simply switched to any one of the copycat software programs that were available at the time.

3) ISPs profit from piracy and therefore won't endorse these measures: This is wrong. It demonstrates an ignorance of the way in which Australian ISPs generate revenue. In fact, the more our customers download data, the less money we make. On average, our customers use approximately 20 per cent of their monthly download quota. Customers who torrent new release movies or TV shows use closer to 100% of their limit and the inescapable fact remains that the more quota our customers use, the more it costs us to share that data. Content providers love to portray ISPs as the beneficiaries of piracy, but it's a dishonest image that they portray.

Of course, piracy also attacks products that we offer – including the latest release movie and television content available by subscription on iiNet TV with Fetch. It's just nonsense.

4) "It's impossible to compete with free": It's naïve to suggest that by changing the model by which content is delivered to customers, piracy would end and mountains of cash would flow into the coffers of all those concerned. We don't agree, however, that this means that these options should be taken off the table. It is an acknowledged fact that the American market has seen a reduction in file sharing at the same time that content has become available. The pattern of US traffic Internet now depends on what content is made available via legitimate distribution channels like Netflix, rather than on the Pirate Bay. Consumers have had decades using a mature distribution model, and it's silly to judge the success or failure of streaming services such as Spotify after only a single year of use in Australia. Giving your competitor a ten-year head start distributing a 'free' alternative is pretty stupid. No wonder the content industry is uncompetitive, with that attitude.

Copyright holders have shown us that they're not interested in new models for Australians, despite the success of services such as Netflix, Amazon and Hulu in the USA (and other markets, including a large number of Australians bypassing these restrictions using VPN).

Put simply, Australians want their content at the same time as the rest of the world. It isn't that our customers don't want to pay for content, it's that they want to be able to access content at the same time as their Facebook friends or Twitter followers. They want to be able to participate in the global

conversation, to talk about their favourite film, or the season finale of *The Walking Dead*, immediately and without having to pay through the nose to access it.

When Foxtel announced its exclusive deal with HBO to air *Game of Thrones* (or GoT) in Australia, the outrage was immediate. Whereas lovers of GoT previously could buy the whole season on iTunes for \$24, they are now being forced to be a Foxtel subscriber to view the show, paying at least \$44.95 per month for the privilege. It's no surprise they begrudge being extorted.

What does iiNet want?

We think that content should be made available to Australians at a fair price and at the same time as it is available elsewhere. *The Lego Movie* for example, was released two months after it opened to rave reviews in the USA. Village Roadshow (*The Lego Movie's* local distributors) even came out a month before its local release and complained of piracy, while probably not even looking at why it was being pirated.

And that's the fundamental difference between iiNet and the rights holders. They want to tackle **how** customers are pirating content. We want them to look at **why**, and then move forward, addressing the cause, not the symptom.

What do our customers want?

Obviously they want the content. The demand is clearly there, but they don't want to be treated like mugs. It's pretty clear that consumers don't want to be hampered by delays or excess charges any more. They want access to content immediately, and are willing to pay for it.

We've seen thousands upon thousands of Australians sign up to Spotify to satisfy their music streaming needs, with a decent chunk of those thousands signing up to Spotify's premium service. Spotify isn't the only music streaming service available to Australians, either. There are over 20 competing services which are all fighting for the ears of Australians.

What can you do about it?

Make your voice known. Write to those who are positions of power and let them know what you think. You can start by contacting Attorney-General George Brandis and Communications Minister Malcolm Turnbull. You can also send your thoughts to politicians engaged in the issue such as Shadow Communications Minister Jason Clare and Greens Senator Scott Ludlam.

In your correspondence – point to 2013's Parliamentary IT Pricing Review – and ask the government to tackle the known issues such as higher prices and lengthy delays for Australians, and if you're looking at the best ways to make sure your letter or email is read – look here!

Where to next?

We're still holding out hope that the Australian Government, the Hollywood Studios and other rights holders will deliver a positive solution to the ongoing issue of piracy. Until that time, we'll continue to push for a better future for Australian content users, one removed from the constraints being discussed in Canberra.

- Site blocking: Does it work?
- Copyright enforcement – have your say, Australia
- Copyright or copywrong? The state of copyright in Australia

Steve Dalby | **Author**

Steve is our Chief Regulatory Officer.