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Impact of government's copyright reforms would be far-reaching

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WHILE the content industries and internet service providers get ready to battle it out over the government's planned reforms to address illegal downloading, another important issue has almost been overlooked.

There has been little if any discussion of the fact that the changes outlined in the government's online copyright infringement discussion paper would have much broader implications than appear to have been considered.

For those who haven't been following the debate, the government last week released a discussion paper that set out reforms it says are needed to address online copyright infringement. The paper has generated a great deal of controversy, not helped by the fact that the two ministers responsible for it, Communications Minister Malcolm Turnbull and Attorney-General George Brandis, have publicly adopted slightly different positions on the nature of the problem and the most appropriate solution.

So far, most commentary has focused on the impact the reforms would have on commercial ISPs, in particular the question of whether ISPs should be required to "do more" to address copyright piracy.

That's not surprising: the discussion paper itself says the changes it outlines are intended to force ISPs to play a more active role in preventing customers from downloading content illegally.

But the changes the government has flagged would have much broader implications. That's because the law the government plans to amend — the provisions in the Copyright Act that determine when one person can be said to have "authorised" another person's copyright infringement — are not confined to ISPs. They apply to anyone who provides a service or equipment that might be used by another person to

in a digital environment, that's a pretty long list.

Any change to the law dealing with authorisation liability would potentially expose not just ISPs, but also schools, universities, libraries, cloud-based service providers, and many businesses to a much greater risk of being sued for copyright infringement.

To understand the background, you need to go back a few years. In 2012, the High Court was asked to decide whether ISP iiNet had "authorised" infringements that had occurred when some of its customers used file-sharing software to illegally share and download films.

The movie companies that had sued iiNet argued the ISP had effectively "authorised" these infringements when it refused to disconnect customers after being told by the movie companies that those customers were repeat infringers.

The High Court found in iiNet's favour. It did not, as some have suggested, say that an ISP could never be liable for the infringements of its customers. What it did say was that in circumstances where iiNet had no direct control over whether its customers were infringing, it was not reasonable to expect it to disconnect them in response to notices received from rights holders alleging these customers were infringing.

Its refusal to do so in these particular circumstances — which included that the notices alleging infringement were not particularly detailed — did not make it liable for the unlawful conduct of its customers.

Fast-forward to 2014. Attorney-General Brandis says he wants to effectively "overturn" the High Court's decision that led to iiNet avoiding liability.

Where the existing law leaves it up to the court to decide whether a party has taken "reasonable steps" to prevent its systems being used to infringe copyright, the government is proposing to amend copyright law to direct a court as to the matters it must take into account.

The present nuanced, fact-sensitive approach would be replaced by a list of factors, to be set out in copyright regulations, against which the reasonable-ness or otherwise of a

party being sued would be measured. By definition, these changes would impose obligations that most likely would be considered "unreasonable" by a court hearing the case today. If that were not the case, there would be no need to change the law.

And that's where the unintended consequences kick in. The impact of the proposed changes would be felt across the economy, potentially exposing schools, universities, libraries, and just about anyone else who provides users or customers with a service or equipment that can be used to make copies, to a greater risk of being sued.

The Australian government is not alone in feeling the need to co-opt ISPs in the battle to address online infringement, but tinkering with the law of authorisation is not the way to go. The last word should go to the High Court judges who heard the iiNet case: "... the statutory tort of authorisation ... (is) not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing".

I couldn't have put it better.

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