



**Submission by
Free TV Australia**

Attorney-General's Department

*Online Copyright Infringement – Discussion
Paper*

5 September 2014

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EXECUTIVE SUMMARY

- Online piracy is a serious issue in Australia. It undermines content investment, content industry business models, employment and innovation. Free TV supports the moves by Government to address this issue and take steps to reduce piracy and its detrimental effects on content owners.
- As noted in the Discussion Paper, a number of other jurisdictions have introduced schemes targeted at changing consumer behaviour to reduce rates of online piracy. This is a timely opportunity to consider how Australia's copyright law framework can be updated so that it effectively deals with piracy in the online environment.
- Free TV is, in principle, supportive of the proposals outlined in the Government's Discussion Paper, including:
 - amendments to the authorisation infringement provisions in the Copyright Act so far as they are necessary to ensure that service providers are required to take reasonable steps to prevent copyright infringements on their services, in-line with the intention of those provisions;
 - the development of an industry code of practice between ISPs and content owners setting out what actions should constitute 'reasonable steps' required to be taken to avoid authorisation liability. Free TV is in favour of a 'graduated response' style system similar to the one that exists in the US.
 - extended injunctive relief to allow content owners to apply for a court order requiring ISPs to block access to internet sites hosted overseas where those sites are making available illegal content; and
 - the extension of the safe harbour scheme to all service providers engaged in the activities that the scheme was set up to capture (as set out in sections 116AC to 116AF), but only if authorisation infringement is similarly extended.
- Free TV looks forward to engaging with the Government further in relation to the detail of the proposals and their implementation.

Introduction

Free TV Australia (**Free TV**) welcomes the opportunity to respond to the Attorney-General's Discussion Paper, '*Online Copyright Infringement*' ("Discussion Paper").

Free TV is the peak industry body representing all of Australia's commercial free-to-air television broadcasting licensees. At no cost to the public, our members provide nine channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. In 2012-13, Free TV members invested \$1.36 billion in Australian content. On any given day, free-to-air television is watched by more than 14 million Australians.

Free TV members are major owners, licensors and licensees of copyright material. A robust and effective copyright regime is one that fosters creativity and innovation, and supports the creative industries and those who invest in them. As both content owners and content users, commercial free-to-air broadcasters recognise the importance of a fair and balanced copyright system to all Australians.

Free TV strongly supports measures to address online piracy and has addressed each of the proposals in the Discussion Paper in more details below.

The problem of online piracy

Free TV members put significant time and resources into making their products and services available legitimately to viewers for free.

This has involved significant investment in a range of new and innovative delivery mechanisms to meet consumer demand. For example:

- Catch-up services Plus7, 9Jump-in and TENplay, which are available across a range of platforms and devices;
- Making available advance previews of television shows such as X Factor and premiering episodes of first run drama such as Puberty Blues and Love Child online before broadcast; and
- Fast-tracking content from overseas so it is made available to viewers here at the same time as or only a few hours after airing in the original market.

Despite legal content being readily available for free, Australians continue to use illegal avenues to access television content. Recent research for the Intellectual Property Awareness Foundation indicates that around 25% of Australian adults and 24% of Australians aged 12-17 illegally download movies and TV shows.¹

A report prepared for the Australian Content Industry Group in 2011, "*The impact of Internet Piracy on the Australian Economy*",² estimated that over the period 2010-2016:

¹ Based on independent research conducted by Sycamore, for the Intellectual Property Awareness Foundation: Intellectual Property Awareness Foundation (2013) Intellectual Property Research Summary 2013.

² Sphere Analysis, "*The impact of Internet Piracy on the Australian Economy*", Report prepared for the Australian Content Industry Group, February 2011.

- the value of lost retail to Australian Content industries would be \$5.2 billion;
- that a further 40,000 jobs could be lost in the sector as a result of internet piracy; and that
- the annual impact of internet piracy to the Commonwealth Government revenues will be \$1.1 billion.³

Online piracy undermines content investment, content industry business models, employment and innovation. The protection of copyright for content owners in Australia is also critical for ensuring a continuing vibrant and healthy local production sector. Australian content is expensive to make; Free TV members invested \$1.36 million in local content in 2012-2013. The piracy of international content will put further pressure on local markets and increasingly undermine broadcasters' ability to pay for more expensive local content.

The existing Australian copyright framework does not provide sufficient protection for content owners. Steps can be taken to substantially reduce piracy by improving consumer education (including through an alert or notice regime), providing incentives to comply with the law and by ensuring that our copyright framework is updated to deal with the online environment.

Proposal 1: Extended authorisation liability

Free TV strongly supports the Government's stated goal, '*to provide a legal framework within which rights holders, ISPs and consumer representatives can develop flexible, fair and workable approaches to reducing online copyright infringement.*'⁴

The current legal framework in Australia does not adequately deal with online copyright infringement. As noted in the Discussion Paper, the decision in *Roadshow Films v iiNet*,⁵ found that the ISP iiNet had no direct technical power to prevent its customers from using the BitTorrent system and that it could not be inferred from iiNet's inactivity after receiving AFACT notices that iiNet had authorised copyright infringement infringements of its subscribers.⁶ Subsequent negotiations to achieve an industry code to address the failings in the legal framework also broke down.⁷

Authorisation liability under the *Copyright Act 1968* ("the Copyright Act") should operate in a manner that ensures that ISPs and other service providers are required to take reasonable steps to ensure that their online services are not being used for the purposes of copyright infringement. This is consistent with the purpose of ss 36 and 101 of the Copyright Act.⁸ Free TV agrees with the Government's view as stated in the Discussion Paper that there are further reasonable steps that ISPs can take to discourage or reduce online copyright infringement.

³ Ibid at 3.

⁴ Discussion Paper at 3.

⁵ *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16.

⁶ Ibid.

⁷ For example see: <http://blog.iinet.net.au/iinet-withdraws-notice-notice-scheme/>

⁸ Revised Explanatory Memorandum, *Copyright Amendment (Digital Agenda) Act 2000* at 57.

Free TV therefore supports, in principle, any necessary amendments to achieve technologically neutral authorisation liability provisions which operate effectively in the online environment, consistently with the purpose of those provisions and with Australia's international obligations.⁹

We would note the comments made by a number of other submitters such as Music Rights Australia that the drafting proposed in the Discussion Paper may require further consideration to avoid unintended consequences and to ensure that the new extended authorisation liability operates effectively. We support these views.

FreeTV is also of the view that the authorisation liability provisions should mirror any extension to the safe harbour provisions in the Copyright Act, and that in particular these provisions should operate in a technologically neutral manner to encompass not just ISPs but also service providers and other intermediaries.

1.1 Reasonable steps – an industry code of practice

What constitutes 'reasonable steps', required to be taken to avoid authorising copyright infringement will differ depending on the circumstances and the relevant service provider.

In relation to ISPs, Free TV supports, in-principle, the development of an industry code of practice setting out the detail of what actions constitute 'reasonable steps'. Free TV envisages that such 'reasonable steps' will involve a 'graduated response system' as suggested in the Discussion Paper.¹⁰ Free TV's support is provided subject to further consideration of the detail of the scheme; in particular, the costs, management and enforcement procedures of the proposed scheme. Graduated response systems enable content owners to take practical steps in protecting their intellectual property, and rely on a cooperative effort between ISPs, content owners and consumers.

Content owners who become aware that their content is being accessed illegally can send a notice of the alleged copyright infringement to the relevant ISP. The ISP is then required to send the subscriber whose IP address corresponds with the infringement, an appropriate copyright notice. Each new infringement from the same internet account can result in a new notice in-line with the graduated response approach adopted.

Such systems already exist in many other jurisdictions.¹¹ For example, in the US, the first two notices are 'educational notices'. Educational notices inform the subscriber of the alleged infringement, steps that the account holder can take to prevent further infringement, and sources which provide access to legal content. If further infringement occurs on the account, the next stage is the provision of 'acknowledgement' notices which require a user to acknowledge that they have received the alerts. Finally if those measures are ineffective, the ISP can implement 'mitigation measures', also requiring acknowledgement, as well as employing

⁹ For example, see Australia US Free Trade Agreement Article 17.4.

¹⁰ Discussion Paper at 1-2.

¹¹ Free TV understands that systems are in place in the US, UK, Canada, France, Ireland, Japan, NZ, South Korea, Taiwan, Chile.

measures such as re-direction to a landing page or a temporary reduction in internet speed.¹²

This type of 'graduated response' system is based on research that indicates that most consumers will take corrective action if alleged copyright infringement involving their internet account is brought to their attention.¹³

A graduated response system will provide an important pathway to educating users about copyright laws and to encourage legal use of content, while at the same time protecting the privacy of consumers. It will operate as an important mechanism to combat online piracy and Free TV is willing to participate in any discussions or negotiations to achieve an agreed outcome in the interests of rights holders, ISPs and consumers.

In order for any scheme to be effective, that the costs of using the scheme must not act as a deterrent for content owners. In other jurisdictions, the costs of the scheme are generally shared between ISPs and content owners. In the United Kingdom, the Government has agreed to bear the cost of a consumer education campaign about online copyright infringement.

1.2 Evidence that an industry code of practice works

US Copyright Alert System Progress Report

The first progress report regarding the operation of the US Copyright Alert System ("CAS"), was released on 28 May 2014, "*The Copyright Alert System: Phase One and Beyond*".¹⁴ The CAS has been operating since February 2013 and is designed to engage and educate consumers.

The Report found that:

- the CAS sent more than 1.3 million Copyright alerts to account holders across the USA;
- the vast majority of the Copyright Alerts delivered (more than 70%) occurred at the initial education stages; and
- less than 3% of the copyright alerts were sent at the final mitigation stage.¹⁵

These statistics indicate that educational copyright alerts effectively discourage users from engaging in further infringing activity, with only a minority of users continuing to engage in infringing activities after receiving educational alerts.

The Centre for Copyright Information in its report noted that:

*"While we are only now ready for full operation, we believe the program has already made significant strides in reaching consumers and is beginning to see progress towards its goals."*¹⁶

¹² Centre for Copyright Information, *The Copyright Alert System: Phase One and Beyond*, 28 May 2014.

¹³ Centre for Copyright Information, *The Copyright Alert System: Phase One and Beyond*, 28 May 2014 at 6.

¹⁴ Centre for Copyright Information, *The Copyright Alert System: Phase One and Beyond*, 28 May 2014.

¹⁵ *Ibid* at 1-2.

¹⁶ *Ibid*.

Other Jurisdictions

The evidence available from European jurisdictions suggests that graduated response systems have also worked well in European countries.

IFPI, the International Federation of the Phonographic Industry, in its 2014 Digital Music Report, noted that:

“In recent years, courts in 10 EU countries have ordered ISPs to block users’ access to specific services that structurally infringe copyright law. Courts and authorities in other countries including India, Indonesia, Malaysia, Mexico, Norway, South Korea and Turkey have made similar orders.

...

Website blocking measures implemented by ISPs have been effective. Between January 2012 and July 2013, European countries where blocking orders are in place saw BitTorrent use decline by 11 per cent, while European countries without such orders saw BitTorrent use increase by 15 per cent (comScore/Nielsen).”¹⁷

Furthermore, an independent study on the effects of graduated response anti-piracy laws in France (“the HADOPI law”), found that the law was responsible for the following effects:

- iTunes song sales and album sales increased by 22.5%;¹⁸
- iTunes album sales increased by 25%;¹⁹ and
- sales increases were much higher in genres that, prior to HADOPI, experienced high piracy levels (for example rap), compared with sale increases for less pirated genres (for example, Christian music and Jazz).²⁰

The findings of the study apply to the first two notices (of the three stage process), again indicating that the potential penalties are sufficient to change user behaviour.²¹

Proposal 2: Extended Injunctive relief

Free TV is supportive, in principle, of amending the Copyright Act to enable rights holders to apply for a court order requiring ISPs to block access to internet sites hosted overseas, where those sites are making available illegal content.

This is particularly important in circumstances where different jurisdictions take varying approaches to dealing with copyright enforcement. In the online environment, piracy is an international issue. Illegal content hosted on overseas websites can be accessed in Australia, disrupt Australian markets and thwart measures to combat online piracy domestically.

¹⁷ IFPI Digital Music Report 2014 at 41. See <http://ifpi.org/downloads/digital-Music-Report-2014.pdf>

¹⁸ Danaher, Smith, Telang and Chen, The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France, 2012 at 14 -15.

¹⁹ Ibid.

²⁰ Ibid at 14, 19.

²¹ Ibid at 19 – 20.

Currently, while content owners can take action against infringers directly under the Copyright Act (including by way of injunction), the practical difficulties of taking enforcement action against entities located overseas means that these provisions are ineffective in dealing with overseas-hosted sites.

The introduction of a mechanism to allow injunctive relief requiring ISPs to block infringing content will provide content owners with a practical remedy through which they can take action against illegal sites.

In determining whether an injunction should be granted, Free TV favours an approach which allows the court sufficient discretion to properly consider the circumstances of the particular case, rather than requiring the court to elicit what the 'dominant purpose' of a particular website might be. This is a very difficult test to meet and may render the proposed new provisions ineffective.

While the purpose of the website might be one consideration, this should be weighed against the other circumstances before the court when coming to a determination about whether an injunction is appropriate relief in the context of a particular infringement. A 'dominant purpose' test may give rise to protracted legal arguments in relation to the various purposes that a particular site might serve and whether one particular purpose is more 'dominant' than another purpose. This detracts from the key issue; whether or not the site is making illegal content available.

Any system should also be developed with a view to ensuring that the costs to content owners in seeking an injunction are minimised. The Discussion Paper refers to an arrangement in other jurisdictions where ISPs agree not to contest injunctions in cases where the copyright infringement is obvious.²² Free TV would support a similar arrangement in Australia.

The Discussion Paper refers to a requirement that content owners indemnify ISPs against any damages claimed by a third party. While it is not clear from the Discussion Paper whether or how this proposal would translate into a statutory obligation on content owners, Free TV notes that it does not support such requirement. In our view issues relating to costs or damages should be dealt with through the exercise of judicial discretion as is currently the case in other copyright litigation.

Proposal 3: Extended safe harbour scheme

Free TV supports, in principle, the extension of the safe harbour scheme to the extent that it is necessary to cover entities engaged in the activities that the scheme was set up to capture, as set out in sections 116AC to 116AF of the Copyright Act. However, Free TV notes that the safe harbour scheme must not operate in a way that enables service providers to circumvent the authorisation liability provisions. Before extending the safe harbour scheme, the operation of the authorisation liability provisions should be reviewed to ensure that they are properly equipped to deal with online piracy and extend to a similar range of entities.

The safe harbour scheme was introduced in 2006 to provide legal incentives for those providing the categories of activities now contained in ss 116AC - AF of the

²² Discussion Paper at 6.

Copyright Act,²³ to cooperate with copyright owners in deterring copyright infringement on their networks.

The scheme limits the remedies available against intermediaries, for copyright infringements that take place on their networks, where they do not have control over the occurrence of those infringements and provided they comply with certain conditions set out in the Copyright Act.²⁴

While the scheme is intended to apply to the categories of activities listed in ss 116AC-AH, it is currently restricted to apply to “Carriage Service Providers” (“CSPs”), as defined in the *Telecommunications Act 1997*. This definition does not appear to cover all entities conducting the activities contained in ss 116AC-AH.²⁵ An alternative term such as ‘service provider’ (as was suggested in the Department’s Consultation Paper “*Revising the Scope of the Copyright ‘Safe Harbour Scheme’*”),²⁶ might better capture the range of providers that conduct activities identified in those provisions. An extension of the safe harbour, to the extent that it is necessary to cover all entities engaged in the activities identified in the legislation, would be consistent with the underlying policy basis for the scheme. It would also be consistent with how the scheme operates in other international jurisdictions.²⁷

However, as noted above, extension of the safe harbour scheme should be subject to effective authorisation liability provisions. Extension of the safe harbour scheme without first ensuring that the authorisation liability provisions are effective and equipped to deal with online piracy risks weakening copyright protection in the online environment.

Conclusion

Free TV welcomes the proposals outlined in the Government’s Discussion Paper, which are important to ensuring that the copyright law framework continues to be relevant in the online environment.

This is a timely opportunity to consider how Australia’s copyright law framework can be updated to enable rights holders, service providers and consumers to work together to effectively deal with piracy.

We look forward to engaging with the Government further in relation to the detail of the proposals and their implementation.

²³ Introduced via the *Copyright Amendment Act 2006*.

²⁴ Section 116H.

²⁵ AGD, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’*, Consultation Paper, October 2011.

²⁶ AGD, *Revising the Scope of the Copyright ‘Safe Harbour Scheme’*, Consultation Paper, October 2011.

²⁷ For example, see *Aimster Copyright Litigation* 334 F.3d 643.