



**Submission to the Australian Government's Online Copyright Infringement
Discussion Paper**

5 September 2014

1. Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Australian Government's Online Copyright Infringement Discussion Paper ('the Discussion Paper').

2. About ASTRA

ASTRA is the peak industry body for subscription television (STV) in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major STV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations. A list of ASTRA members is attached to this submission.

3. ASTRA's position on online copyright infringement

3.1 Economic contribution of Australia's content industries

The creative industries are an increasingly important driver of investment and economic growth in Australia. As noted in the Discussion Paper, the 2012 PwC report *The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11* found that for the year 2010-11, Australia's copyright industries:

- employed 906,591 people, which constituted 8.0 per cent of the Australian workforce;
- generated economic value of \$93.2 billion, the equivalent of 6.6 per cent of gross domestic product (GDP);
- generated just over \$7 billion in exports, equal to 2.9 per cent of total exports.¹

The previous Federal Government's *Strategy for Creative Industries*, published in August 2011, noted that, in 2008-09, the creative industries made a larger contribution to GDP than a number of traditional industry groups, such as agriculture, forestry and fishing.²

In 2012-13, the Australian STV industry invested around \$700 million in Australian content production, employing 6600 Australians and adding \$1.6 billion to the Australian economy.³

3.2 Need for effective measures to combat online copyright infringement

The impact of convergence and the digital economy has the potential to create synergies across once separate industries to drive innovation in the communications environment, however this potential cannot be realised if content producers and distributors are not able to effectively monetise the content they produce or acquire. The ability for content producers and distributors to extract fair monetary returns for their investment in developing or acquiring

¹ PwC, *The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11*. Report prepared for the Australian Copyright Council, 2012, available at: <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>.

² Australian Government, *Creative Industries, a Strategy for 21st Century Australia*, August 2011, p.5.

³ ASTRA STV Production & Employment Survey 2012-13.

content is essential for the ongoing sustainability of media and communications enterprises and for the continued investment in Australian content production.

There is growing evidence of the impact of copyright piracy on media sales.⁴ A 2011 study undertaken by Ipsos and Oxford Economics to quantify the economic impact of movie piracy in Australia found that, in the 12 months up to Q3 2010:

- 6,100 Full Time Equivalent (FTE) jobs were forgone across the entire economy including nearly 2,300 forgone directly by the movie industry and retailers;
- allowing for effects on other industries, \$1.37 billion in Gross Output (Sales) was lost across the entire Australian economy – equivalent to a loss of GDP of \$551 million across the Australian economy.⁵

ASTRA recognises that combating online copyright infringement requires a multi-faceted approach that involves the cooperation of ISPs, content rights holders, government, regulators and, ultimately, consumers of online content. This multi-faceted approach includes:

- a content industry responsive to the ways consumers want to access and view content through new and innovative content offerings;
- continuing education and information on the increasingly important contribution to the Australian economy of the content industry, and the impact of content piracy on future content production;
- effective cooperation between content owners and ISPs to identify and reduce instances of online copyright infringement; and
- strong, swift, cost-efficient and effective copyright infringement enforcement measures.

3.3 Initiatives by content industries to combat online copyright infringement

While a strong and effective legislative framework is essential to reduce online copyright infringement, ASTRA recognises the importance of ensuring the availability of legitimate online digital content, and continued consumer education from industry and government regarding the impact of content piracy. The content industries are continuing to develop new and innovative means to satisfy consumer demand for legitimate online digital content, and have invested (and will continue to invest) significantly in initiatives to increase consumer awareness of the threat to future content production from content piracy.

Availability of legitimate online content

There is now a multitude of ways for consumers to access legitimate digital content online. Foxtel, for example, has invested heavily to expand the means by which its subscribers can access content. In addition to its cable and satellite services, Foxtel makes its content available on tablets, mobile phones and other mobile devices, as well as broadening the on-demand and catch-up services available through its set-top boxes:

⁴ See, for example, Smith & Telang, "Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales" (August 19, 2012). Available at SSRN: <http://ssrn.com/abstract=2132153> or <http://dx.doi.org/10.2139/ssrn.2132153>. The authors reviewed the academic literature investigating the effect of piracy on media sales, noting almost all demonstrated piracy having a detrimental impact.

⁵ Ipsos Media CT/Oxford Economics, *Economic Consequences of Movie Piracy: Australia* (January 2011, Report on behalf of AFACT), available at:

http://www.screenassociation.com.au/uploads/reports/IPSOS_Economic_Consequences_of_Movie_Piracy_-_Australia.pdf

- *Foxtel Play* is an IPTV service with live and catch-up TV, and movies on demand, and is available on PCs and Macs, Xbox 360, Sony PlayStation 3 & 4, a selection of Samsung and LG Smart TVs and Samsung Blu-Ray players;
- *Foxtel Go* is a companion app provided at no extra charge to Foxtel cable, satellite and Play account holders, providing both live and catch-up TV;
- *Presto* is a stand-alone on-demand movie service, delivered via PC, Mac, iPad, Android and Google Chromecast.

Foxtel also seeks to fulfil the demand for fast access to the latest US and UK television series, for customers who might otherwise seek content illegally. Programs 'Express from the US' (with similar arrangements for key programs from the UK) are available to Australian subscribers within seven days of being premiered in the US, and in many cases within hours. These include *Game of Thrones*, *House of Cards*, *True Detective*, *Sons of Anarchy*, *Breaking Bad*, *Dexter*, *True Blood*, and *Boardwalk Empire*. In 2012-13 our members expressed 18,657 hours of content from the United States, United Kingdom and Canada.⁶ ASTRA notes that, despite these programs being available as soon as possible to Australian audiences, many are still among those most frequently pirated online by Australian users.

More generally, the content industries both in Australia and internationally are actively providing information to help consumers more easily find and access legitimate digital content:

- Australia: Digital Content Guide

A collaboration between APRA AMCOS, the Australian Recording Industry Association (ARIA), the Australian Screen Association (ASA), Copyright Agency Ltd., News Corp Australia, Foxtel and Village Roadshow Limited, the Digital Content Guide⁷ was launched on 5 August 2014. The Digital Content Guide website directs visitors to information about different services, providing a wide choice of licensed digital services for a variety of content across different devices and platforms.

- Overseas initiatives to promote availability of legal online content

Internationally, a number of similar initiatives have commenced or are being established to direct consumers to legitimate sources of digital online content:

- In the United States, the Center for Copyright Information (CCI) provides links to a range of legitimate sources of music, movies and television programs online;⁸
- In July 2014, representatives from the UK's creative industries and major ISPs, with the support of the UK government, announced the launch of *Creative Content UK*, intended to boost consumer awareness of the wide array of legitimate online content services and help reduce online copyright infringement. *Creative Content UK* will include two key components:
 - a major multi-media education awareness campaign, led by content creators and part-funded by government, that aims to create wider appreciation of the value and benefits of entertainment content and copyright (to be launched in the first half of 2015); and
 - a subscriber alerts system that will be co-managed and co-funded by ISPs and content creators, under which participating ISPs will alert and advise subscribers when their accounts are believed to have been used to infringe

⁶ Expressed content is content that is broadcast in Australia before the next episode of the same series is broadcast in its home market.

⁷ <http://digitalcontentguide.com.au/>

⁸ <http://www.copyrightinformation.org/a-better-way-to-find-movies-tv-music/>

copyright, and offer advice on where to find legitimate sources of entertainment content.⁹

Cost of legitimate online content

The cost of accessing legitimate digital content online is often cited as a justification for the downloading of unauthorised content.¹⁰ Indeed, consumer research suggests that while the majority of Australians do not engage in content piracy (despite the view that ‘everybody does it’), the primary motivation for accessing pirated content is that it is free of charge, even though most users who do access unauthorised content are aware of legitimate alternatives.¹¹

Content owners and distributors are responding to consumer demands in relation to content pricing. For example, for the duration of Series 4 of *Game of Thrones*, Foxtel’s Movies and Premium Drama Pack – which includes *Game of Thrones* and other premium programs – was available on its IPTV service Foxtel Play for \$35 per month, with the first 14 days free to new subscribers. Further, since 17 August 2014, Foxtel’s stand-alone online movie service *Presto* has been available for \$9.99 per month.¹²

On 4 September 2014, Foxtel announced that from 3 November 2014 it will be reducing **by almost half** the price of the entry level package its main cable and satellite broadcast product:

- The price of Foxtel’s entry level pack will be reduced from \$49 per month to just **\$25 per month** (on a 12 month plan). This base pack will feature more than 40 channels.
- From the \$25 base pack, customers will be able to pick and choose genre packs of channels of their interest, including sport for an extra \$25 per month, movies for an extra \$20 per month, and a premium drama pack for an extra \$20 per month.
- This means, for example, that the premium drama pack that includes showcase, which broadcasts programs such as *Game of Thrones*, *Orange is the New Black*, *House of Cards*, *Ray Donovan*, *Girls* and *Looking* – and all within hours of the US broadcast – will be \$45 dollars a month on a 12 month plan, with full set-top-box functionality.

At the same time Foxtel will increase the value of a Foxtel subscription for existing cable and satellite subscribers. Existing residential customers will be provided with enhanced benefits, at no extra charge. Changes include:

- giving the vast majority of subscribers access to all general entertainment channels;
- giving all customers who take the Premium Movies and Drama tier access to some pay-per-view movies at no extra cost; and
- giving all existing Essentials customers, who do not currently have it, access to Foxtel’s award winning premium drama channel, showcase.

Foxtel is also launching a new BoxSets channel and video on demand service that gives access to the best of television from producers such as HBO to most of its current customers at no extra cost.

⁹ <http://www.bpi.co.uk/home/uk-creative-industries-and-isps-partner-in-major-new-initiative-to-promote-legal-online-entertainment.aspx>

¹⁰ See, for example, research conducted for the Intellectual Property Awareness Foundation (IPAF) by Sycamore Research in partnership with Newspoll at: <http://www.ipawareness.com.au/research/2013>

¹¹ IPAF, *Research into the online behaviour and attitudes of Australians in relation to movie and TV piracy* (2013). Available at: <http://www.screenassociation.com.au/uploads/ipaf/IPAF%20research%20summary%202013.pdf>

¹² Presto was previously available for \$19.99/mth. See: <http://www.foxtel.com.au/about-foxtel/communications/hey-presto-for-9-99-per-month-218129.htm>

In spite of this significant reduction in the price of Foxtel services, the reality is that there are a significant proportion of consumers who will continue to pirate notwithstanding the availability of content in a legal, convenient manner and at a very reasonable price. For example, the *Washington Post* has recently reported that *Orange is the New Black*, which has been produced for and is available on Netflix worldwide (and on Foxtel in Australia), was the second-most-pirated TV show in the world on a daily basis after HBO's *Game of Thrones*.¹³

Consumer education and attitudes to online piracy

Industry associations and participants have, for many years, undertaken a concerted effort to inform consumers on the impact of piracy on content production. For example, the Intellectual Property Awareness Foundation (IPAF) is an initiative of the Australian film and television community with a broad membership of film and television organisations committed to educating people about the value of screen content, by highlighting the role of copyright and how the choices consumers make can contribute to the future of the film and television industry in Australia. The Foundation conducts consumer awareness campaigns – produced and distributed with significant involvement and support from the film and television community involving in-kind contributions from actors, crew, producers, distributors, exhibitors, television networks and online businesses – to further educate Australians about online content theft.¹⁴

Various studies of consumer attitudes to online copyright infringement demonstrate that a significant majority of Australians are concerned about the impact of online piracy on the Australian content industry, and would support enhanced enforcement measures to combat the problem.

2012 Consumer research¹⁵ commissioned by a number of content industry groups and companies found that:

- A significant majority of Australians believe creators should be paid for their work, regardless of whether it is made available online;¹⁶
- 71% of Australians would support legislation involving the blocking of websites where a court has determined that their purpose is the illegal distribution of movies, TV shows, games, music or books;
- Only 23% of Australians would oppose a copyright alert notice scheme.

Similarly, research commissioned by ASTRA in October 2013 found that:

- 71% of Australians are concerned about the impact of piracy on local jobs;
- Two thirds are concerned about the impact on investment in the local television production industry;
- Three in five Australians believe those who supply pirated content should be prosecuted and punished;
- More than half believe the government should do more to prevent TV content piracy.

¹³ http://www.washingtonpost.com/business/technology/orange-is-the-new-black-is-now-the-second-most-pirated-tv-show-in-the-world/2014/08/24/4b9a4bf2-2977-11e4-8593-da634b334390_story.html

¹⁴ See, for example, the 2012 IPAF 'Thank You' Campaign: <http://www.ipawareness.com.au/campaigns/2012-thankyou>

¹⁵ UMR Research, *Online Behaviours: An Australian Study*, research commissioned by AHEDA, APRA, ARIA, ASA, Foxtel, IGEA, MPDAA, NACO & News Limited, available at: http://www.screenassociation.com.au/uploads/reports/UMR_digital1.pdf

¹⁶ 83% of Australians believe creators should be paid for their work when it is made available online, and 85% when available in physical form.

3.4 Effectiveness of enforcement mechanisms

The STV sector, like other sectors involved in the production and distribution of content, relies on a strong legislative framework to protect the substantial investments made in creative content, and to provide certainty for content producers that they can receive a fair return on this investment. Copyright law must reflect an appropriate balance between the ability for consumers to use copyright material and the right of the copyright owner to manage exploitation of the content that the owner has invested economic and other resources to create.

Technological advances in the digital era have enabled significant increases in copyright infringement, posing a significant threat to the viability of content production and distribution. Any dilution of the copyright owner's capacity to exploit rights will reduce the incentive to invest in creative content, reducing the potential for increased Australian content production into the future. Producers will only invest the many millions of dollars required to produce high quality television content such as *Devil's Playground*, *Wentworth* and *Tim Winton's cloudstreet* if they can be assured that a regime is in place that allows them sufficient control over the use of that content for a fair and appropriate return on that investment.

As noted in the Discussion Paper, a range of enforcement measures to combat online copyright infringement have been introduced in various overseas jurisdictions. While some of these measures have only recently been introduced, early evidence suggests that, in conjunction with information initiatives from industry and government regarding the impact of piracy on the content industries and the availability of legitimate digital content online, such enforcement measures are effective in reducing online copyright infringement.

Graduated response schemes

Graduated response schemes to combat online copyright infringement have been established in a number of countries overseas, including legislative-based schemes in New Zealand, France, Taiwan and South Korea, and private agreements between rights holders and ISPs in the United States and Ireland. Evidence from a number of these jurisdictions strongly suggests that ISP-based graduated response schemes are an effective tool in the fight against online copyright infringement:

- the vast majority of notifications under these schemes occur only at the initial stage;
- there is evidence of significant decreases in peer-to-peer (P2P) activity after the introduction of such schemes;
- there is also evidence of increased sales of digital content from legitimate online sources after the introduction of graduated response schemes.

While there are some differences in administration and application, most graduated response schemes work with education as the primary goal of the first stage notification. Typically, the first stage is focused on providing information regarding the effects of illegal downloading and the availability of legitimate online content. The vast majority of notifications are made at the first stage, with few subscribers requiring second-level notification and even less reaching the stage where remedial action may be required. This strongly indicates that most people will change their infringing behaviour when it is brought to their attention, and are made aware of the impacts of unauthorised downloading and of the many sources of legitimate online content now available.

ASTRA acknowledges that there may be other factors that contribute to low levels of second- and third-tier notifications (such as users turning to alternative, less detectable means of accessing unauthorised content), however it would seem highly unlikely that these factors could

be the primary reason why the proportion of notifications at the more advanced stages of graduated response scheme is so small.

ASTRA also recognises that there is always likely to be a small group of users who are determined to continue to download content illegally. However, as detailed below, the evidence from overseas would suggest that the vast majority of users will willingly modify their online behaviour once it has been brought to their attention.

Example of a private agreement between content owners and ISPs: United States

As noted in the Discussion Paper, content owners and major ISPs in the United States, through the Center for Copyright Information (CCI), established the Copyright Alert System (CAS) in February 2013. The CAS is a tiered notice and response system with three levels of alerts – Educational, Acknowledgement and Mitigation – with up to two alerts at each stage.

The CCI has reported that, during the first ten months of the CAS's operation, more than 2 million notices of alleged infringement were sent to ISPs and more than 1.3 million Alerts were sent to 722,820 customer accounts. The vast majority of those alerts were Educational Alerts (72%), while a very small fraction were Mitigation Alerts (8%), with less than 3% at the final (or second) Mitigation level.¹⁷

While the scheme is in its early stages, the CCI considers that the early evidence suggests that the CAS scheme is likely to make a material difference in influencing the behaviour of digital content consumers. The CCI notes that account holders presented with alerts are, in meaningful numbers, not being seen again engaging in P2P copyright infringement; and that when presented with clear, concise information about the problems associated with P2P file sharing of copyrighted content and information about how to find content from licensed sources, many ISP subscribers will begin to change their behaviour.

Example of a legislative-based scheme: New Zealand

As also noted in the Discussion Paper, New Zealand introduced a statutory graduated response scheme in September 2011. Under the scheme, content rights holders send notices of alleged infringement to an ISP which are processed by the ISP and then forwarded on to the relevant subscriber. Three escalating notices are sent to repeat infringers, with a new notice for each infringement—a detection notice, a warning notice and lastly an enforcement notice. After the enforcement notice has been issued, the ISP will provide a copy to the rights owner so they can seek redress. The main penalties available are financial, which the infringing user may be ordered to pay by the NZ Copyright Tribunal on application from the rights holder.

A 2012 University of Waikato study of internet activity found a strong correlation between the introduction of the new laws and a decrease in P2P activity:

- P2P downloads decreased to less than half the level they had been prior to the new laws coming into effect in September 2011;
- P2P uploads also decreased significantly following the introduction of the new laws, with P2P uploads in January 2012 a quarter of the amount transmitted in January 2011;

¹⁷ See Center for Copyright Information, *The Copyright Alert System: Phase One and Beyond*, 28 May 2014, available at: http://www.copyrightinformation.org/wp-content/uploads/2014/05/Phase-One-And_Beyond.pdf

- The researchers also noted an increase in use of alternative file sharing mechanisms by a small group of subscribers (suggesting attempts to avoid detection), but that the decrease in P2P traffic was much greater than the increase in the alternatives.¹⁸

Industry studies on the effectiveness of the New Zealand scheme noted that:

- the introduction of the new laws in September 2011 saw the number of major US films shared by New Zealand users each month effectively halved when the laws came into operation, before increasing slightly and then plateauing;¹⁹
- P2P use in NZ fell 16% with the introduction of the new law.²⁰

However, the effectiveness of the New Zealand scheme is limited by excessive costs that must be incurred by right holders to initiate a notice of infringement letter from an ISP; the requirement for a rights holder to pursue infringers through the NZ Copyright Tribunal, which has proven to be very slow; and the Tribunal's reluctance to impose penalties that would have a broader deterrent effect.²¹

In addition, the New Zealand Scheme does not provide a graduated response scheme that extends to those accessing infringing streaming sites offering, for example, illegal live streams of sporting events.

Site blocking

Evidence from the United States suggests that restricting access to websites that enable online copyright infringement can lead to an increased uptake by consumer of legitimate online content. In January 2012, following a US federal grand jury indictment, the US Department of Justice shut down the 'cyberlocker'²² site Megaupload, seizing the servers and assets on which all of the Megaupload content was stored, preventing all content from being available for users to download. A 2013 study showed that the shutdown of the Megaupload site caused an increase in digital motion picture sales and rentals leading to an increase in digital revenues of 6.5-8.5%, strongly suggesting that "some consumers will turn to legal channels when a major filesharing site is shut down, and by extension that illegal filesharing displaces digital movie sales".²³

4. Responses to specific proposals

All ASTRA members agree that copyright infringement is a serious problem that needs to be addressed and, in general, ASTRA strongly supports the overall approach proposed in the Discussion Paper. However, ASTRA has a broad membership encompassing different

¹⁸ Alcock & Nelson, "Measuring the Impact of the Copyright Amendment Act on New Zealand Residential DSL Users", WAND Network Research Group, 2012 (<https://secure.wand.net.nz/sites/default/files/caa.pdf>)

¹⁹ New Zealand Federation Against Copyright Theft, Submission to the Copyright (Infringing File Sharing) Regulations – Fee Review Discussion Paper, March 2012, available at: http://www.screenassociation.co.nz/uploads/submissions/NZ%20122%20fee%20review_%20NZFACT%20submission.pdf

²⁰ International Federation of the Phonographic Industry, *IFPI Digital Music Report 2013*, p.29, available at: <http://www.ifpi.org/content/library/DMR2013.pdf>.

²¹ See Caddick, C., "Three Strikes and You're Out: How Effective are the Infringing File Sharing Provisions in the Copyright Act 1994? – The Argument For", *New Zealand Intellectual Property Journal*, November 2013, pp.34-35. The Copyright (Infringing File Sharing) Regulations 2011 (NZ) imposes a fee of NZ\$25 per infringement letter posted to Internet account holders by ISPs.

²² 'Cyberlocker' sites enable users to store files remotely. While such sites have legitimate uses, Megaupload enabled users to share files, providing an easy means for illegal content to be shared and downloaded.

²³ Danaher & Smith, "Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales" (14 September 2013). Available at SSRN: <http://ssrn.com/abstract=2229349> or <http://dx.doi.org/10.2139/ssrn.2229349>

legitimate views and voices, and some members such as Telstra have made their own submissions in response to the Discussion Paper.

In ASTRA's general view, the proposed measures would enhance existing efforts to combat online copyright infringement, by encouraging cooperation between content owners and ISPs (and other services providers such as search engines), while ensuring that such entities are provided sufficient protection from liability for authorisation of copyright infringement where they take reasonable steps to ensure their systems and services are not used to infringe copyright.

At the same time, ASTRA recognises the need to ensure that the legitimate rights and concerns of consumers are taken into account in any legislative framework to address online copyright infringement. As noted above, the content industry has been highly proactive in developing innovative and affordable means by which consumers can access digital content legitimately.

ASTRA's responses to specific proposals in the Discussion Paper follow. The preferred approach of some ASTRA members in relation to specific proposals diverge from the view of our membership generally. Where this is the case, the differences are noted in our comments below.

Proposal 1—Extended authorisation liability

The Government proposes to amend sections 36 and 101 of the Copyright Act to extend liability for authorising copyright infringement to circumstances where an ISP fails to take reasonable steps to discourage or reduce online copyright infringement, even where that ISP does not have a direct power to prevent a person from doing a particular infringing act. 'Reasonable steps' could include whether the ISP was complying with 'any relevant industry schemes or commercial arrangements' to prevent online copyright infringement.

ASTRA agrees with the Government that "even where an ISP does not have a direct power to prevent a person from doing a particular infringing act, there still may be reasonable steps that can be taken by the ISP to discourage or reduce online copyright infringement", and that, as a general principle, extending authorisation liability to clearly encompass service providers will be a positive step towards establishing an effective legal framework that encourages industry cooperation to combat online copyright infringement.²⁴ (ASTRA notes that Telstra has a different view in relation to extended authorisation liability).

However, ASTRA is concerned that the Government's proposed amendments to sections 36 and 101 of the Act are not limited to the issue of online copyright infringement. They may therefore have unintended consequences and are likely to upset an established body of law in relation to authorisation liability as it applies in other contexts.

Accordingly, ASTRA believes that the Government's objectives could be better met through a specific amendment to clearly establish liability for authorising copyright infringement where an ISP or other service provider fails to take the 'reasonable steps', as set out in an industry code, to prevent or avoid copyright infringement.

Q1: What could constitute 'reasonable steps' for ISPs to prevent or avoid copyright infringement?

In ASTRA's view 'reasonable steps' must include, at a minimum, a requirement for service providers to send account holders notices once the service provider has been notified by a rights holder of an alleged infringement. We note that most ASTRA members also support a

²⁴ Discussion Paper, p.3.

requirement for service providers to implement a mitigation measure once it has sent an account holder at least 3 notices (ASTRA notes that Telstra has a different view in relation to mitigation measures).

ASTRA supports ongoing discussions between content owners and ISPs to develop an agreed mechanism for cooperation to reduce online copyright infringement. If agreement cannot be reached via these discussions, then a scheme must be mandated by the Government following industry consultation.

Q2: How should the costs of any 'reasonable steps' be shared between industry participants?

How costs are shared between content owners and ISPs would be the subject of negotiations between industry participants in the development of appropriate infringement prevention measures for the purposes of 'reasonable steps'. As such, ASTRA does not propose to make recommendations in relation to cost sharing at this stage.

Q3: Should the legislation provide further guidance on what would constitute 'reasonable steps'?

Ideally, ASTRA considers that further guidance should be provided in the legislation on what would constitute 'reasonable steps' – for example, the elements to be included in an industry code – but with the detail set out in the code to be developed (ideally) by industry participants. In our view, the proposed effect of such an amendment would provide an incentive for ISPs to develop, in cooperation with content owners, appropriate detail in an industry code as to how service providers will implement these 'reasonable steps'.

There may also be a need for an agreed scheme to be modified over time, to take into account new technologies or means by which online copyright infringement occurs. The legislation should provide maximum flexibility to enable industry participants to adjust the operation of the scheme to changing circumstances.

Q4: Should different ISPs be able to adopt different 'reasonable steps' and, if so, what would be required within a legislative framework to accommodate this?

ASTRA's preferred outcome would be for a mechanism that operates uniformly across ISPs and other key service providers (such as search engine providers), to ensure that all stakeholders – content owners, ISPs and other service providers and consumers – have certainty regarding how such measures would be administered. However, we accept that ISPs and service providers should have a certain level of flexibility as to how they implement 'reasonable steps'.

Q5: 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?

ASTRA agrees that any scheme for the purposes of 'reasonable steps' should include a credible disputes and appeals mechanism for consumers identified under the scheme as engaging in online copyright infringement. Such mechanisms are a feature of both statute-based and privately-agreed graduated response schemes developed overseas.

ASTRA notes, however, that the Government's proposals are not targeted at consumers, but are designed to encourage cooperation between ISPs and content owners to develop effective means to reduce online copyright infringement. As such, consumers who engage in infringing

activities remain subject to civil or criminal action under the Copyright Act, and any recognition of the rights of consumers in relation to ‘reasonable steps’ should not affect existing liability under the Act for acts of copyright infringement by consumers.

Proposal 2—Extended injunctive relief

The Government proposes to amend the Copyright Act to enable rights holders to apply to a court for an order against ISPs to block access to an internet site operated outside Australia, the “dominant purpose” of which is to infringe copyright. The onus would be on rights holders to establish this evidentiary threshold. The Discussion Paper notes that the Court would also be required to consider factors such as the rights of any person likely to be affected by the grant of an injunction, whether an injunction is a proportionate response, and the importance of freedom of expression.

Q6: What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?

ASTRA considers that the approach taken in the United Kingdom – where ‘actual knowledge’ by an ISP of another person using its service to infringe copyright is required for the Court to grant an injunction – is unnecessary and would be inconsistent with the Government’s proposed amendments in relation to extended authorisation liability. Evidence provided by rights holders that establishes the identity of an infringing internet site operated outside Australia should be sufficient for a Court order against ISPs to block access to that site.

ASTRA also believes that Courts should not be required to consider factors such as the importance of freedom of expression, which would be a requirement unique to Australia in the context of measures to combat online copyright infringement.

ASTRA submits that the legislation must be broadly drafted to ensure it captures ISPs and other key service providers, such as search engine providers.

Proposal 3—Extended safe harbour scheme

Q7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

Provided that amendments to the Act are introduced to clearly establish the circumstances in which service providers will be liable for authorising copyright infringement, ASTRA is not opposed to extending the safe harbour regime to cover such entities.

Building the evidence base

Q8: How can the impact of any measures to address online copyright infringement best be measured?

There is unlikely to be one single authoritative measure of the impact of measures to address online copyright infringement. There are a number of indicators that are likely, over time, to provide solid evidence of effectiveness, such as in relation to:

- a graduated response scheme developed for the purposes of ‘reasonable steps’:
 - the volume of cases that go beyond the initial notification stage;
 - the number of repeat offenders;
- internet activity:

- the amount of infringing material being downloaded/shared after the introduction of any new measures;
- online content sales:
 - the volume and value of legitimate online content sales, subscriptions etc. after the introduction of any new measures.

Other approaches

Q9: Are there alternative measures to reduce online copyright infringement that may be more effective?

ASTRA considers that strengthened copyright laws as outlined in this submission are likely to prove highly effective in reducing online copyright infringement, in conjunction with continued consumer education on the effects on the creative industries of unauthorised downloads, and increasing means to access legitimate online content.

Regulation Impact Statement

Q10: What regulatory impacts will the proposals have on you or your organisation?

Q11: Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?

ASTRA has a broad membership that includes content rights holders and entities that provide internet services. ASTRA refers the Government to submissions by individual members in relation to any potential regulatory impacts of these proposals on their operations.

ATTACHMENT: ASTRA MEMBERS

Distribution platforms

Foxtel
Telstra

Content providers

Aurora Community Channel
Australian Christian Channel
Australian News Channel (SKY NEWS)
BBC Worldwide Channels Australasia
Discovery Networks Asia Pacific
Eurosport
Foxtel Channels Group
FOX International Channels
FOX SPORTS Australia
NBCUniversal
SBS Subscription Television
Setanta Sports Australia
SKY Racing Channel Pty Ltd
Thorough Vision Channel (TVN)
Turner International Australia
TVSN & Expo Channel
Viacom International Media Networks Australia NZ (MTV Networks Australia & Nickelodeon)
Walt Disney Company Australia Pty Ltd (Disney channels & ESPN)

Other members

Ai Media
CASBAA
Multi Channel Network (MCN)