AUSTRALIAN COPYRIGHT COUNCIL

COMMENTS ON SCHEME TO ADDRESS ONLINE COPYRIGHT INFRINGEMENT

MARCH 2015

The Australian Copyright Council (ACC) welcomes the opportunity to comment on the proposal for a notice and discovery scheme to address online copyright infringement.

The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. While some of our members have been directly involved in negotiations around the proposed scheme, this is the first opportunity that the ACC and the majority of its members have had to comment on the scheme. A full list of our members is attached at Appendix 1.

The ACC congratulates the industry participants who have been involved in drafting the proposed notice and discovery scheme. As we noted in our submission in response to the Government's Discussion Paper last year, it was always envisaged that the intermediary liability provisions in the *Copyright Act 1968* be underpinned by an industry code of conduct.[i] It is therefore pleasing to see that a code of conduct may soon come to fruition in Australia.

Too often, online copyright infringement is portrayed as an issue remote from the interests of Australian creators. Interviews conducted with Australian creators by Professor Melissa de Zwart in late 2014 show this to be far from true. As Professor de Zwart's report indicates action is required to address the issue of online copyright infringement in Australia.[ii]

In our view, the proposed scheme takes account of the fact that addressing online copyright infringement requites a multi-faceted approach: education, availability of legal content and enforcement. The ACC supports the explicit recognition of this in the proposed code of conduct. Similarly we support the proposed approach to reviewing the scheme. As we have noted before, it is important to have a realistic measure of what success looks like.

While online copyright infringement clearly impacts individual creators, the proposed scheme is unlikely to be a realistic avenue for individuals to directly seek redress for infringement of their copyright. While the impact of the scheme on consumers is important, it is also important to consider the impact of barriers to accessing the scheme such as requirements for the accreditation of rights holders and the provision of indemnities by rights holders. As Professor de Zwart's research makes clear, creators commonly rely on third parties to enforce their rights. It is hoped that mechanisms can be developed under the proposed scheme to facilitate access by aggrieved creators, for example, through relevant industry organisations. In our view, this will be a key consideration in implementation of the scheme.

In our view, the proposed scheme demonstrates a proportionate response to the issue of online copyright infringement. It is consistent with the existing law in relation to preliminary discovery and the making of groundless threats of copyright infringement (for which sanctions exist under the *Copyright Ac*t). Further, in our view it appropriately safeguards procedural fairness and the privacy of citizens.

Finally, we note that the proposed scheme does not deal directly with costs, but that one of the core elements is that "allocation of costs incurred by Rights Hollders and ISPs should reflect the relative economic benefit derived from the scheme". In this

context we simply restate our position that rights holders and ISPs are part of the same ecosystem and that ISPs directly benefit from the distribution of copyright content on their networks. This is supported by the recent trend of ISPs moving into content production.

We hope that the parties find these comments useful. Please do not hesitate to contact us if we can provide any further assistance.

Fiona Phillips

Executive Director

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[i] Submission in Response to Online Copyright Infringement Discussion Paper
http://www.copyright.org.au/admin/cms-acc1/_images/12994922015403f214a391a.pdf

[ii] Melissa de Zwart, *Australian Creators and Online Intermediary Liability* 2015
http://www.copyright.org.au/admin/cms-acc1/_images/151881516854f3ab1a556e0.pdf
attached at Appendix 2

Appendix 1: Australian Copyright Council Affiliates

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 24 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artists' Agency
Ausdance
Australian Commercial & Media Photographers
Australian Directors Guild
Australian Institute of Architects
Australian Institute of Professional Photography
Australian Music Centre
Australasian Music Publishers Association Ltd
Australian Publishers Association
APRA AMCOS
Australian Recording Industry Association
Australian Screen Directors Authorship Collecting Society
The Australian Society of Authors Ltd
Australian Writers' Guild
Christian Copyright Licensing International
Copyright Agency|Viscopy
Media Entertainment & Arts Alliance
Musicians Union of Australia
National Association For The Visual Arts Ltd
National Tertiary Education Industry Union
Phonographic Performance Company of Australia
Screen Producers Australia
Screenrights

Appendix 2:

AUSTRALIAN CREATORS AND ONLINE INTERMEDIARY LIABILITY

A Report commissioned by the Australian Copyright Council

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THE UNIVERSITY of ADELAIDE

28 FEBRUARY 2015

ACKNOWLEDGEMENTS:
The authors would like to thank the Australian creators who gave their time to participate freely and frankly in the interviews that contributed to this Report.

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1. INTRODUCTION

'Illegal downloading is a "victimless" crime as downloaders have distance between the action and the victim' (Australian author)

'Music is no longer a treasured experience between artist and audience, people want easy consumption and access' (Australian musician/ songwriter)

a. The Problem

The internet has dramatically disrupted the creation, distribution and consumption models for copyright material. The extent and nature of that disruption varies across the creative industries, but there is no doubt that all creators from the visual, literary, dramatic, musical and audio-visual domains have been forced to change their creative and business practices. Digital delivery has opened up new audiences as well as new business models but in two fundamental ways copyright has been challenged by the internet.

First, digital consumption has changed the relationship of the audience to the creator. As Henry Jenkins has identified, we are now living in an age of participatory culture where audiences seek to actively engage in the media rather than to passively absorb it.[1] The internet facilitates and encourages cultural consumption providing a space for people to regularly post online their 'mashups' of songs, fan fiction and images 'referring' to creative icons. Online platforms such as YouTube, Pinterest, Instagram, and Facebook, as well as a vast array on online games, special interest sites and blogs, positively encourage people to 'like' and 'share' content by uploading images, videos and sound, with the onus on the user to determine the copyright status of such material. The safe harbour regime, a compromise solution introduced in the US to limit the financial liability of online service providers for the illegal postings of their users in order to encourage the development of e-commerce, resulted in the development of the notice and take down model of content management. This 'post first and ask questions later' model enabled the massive growth of online content platforms such as YouTube, and fostered the emergence of remix culture and globally distributed user-generated content. Platforms that rely upon user posts have muddied popular understanding of the concept of 'sharing'. Further, creators now encounter increased expectations that content should be provided free of charge and accessible on demand. Professional creators compete with amateurs willing to allow publication of their content for free. Creators are increasingly expected to provide work for free as a 'trial', 'audition' or 'promotion spot'.

In addition, Australians are prolific consumers of 'pirated' content[2] regularly citing the lack of accessibility, time delays and high cost of new legal creative content.[3] However, as is clear

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[1] Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture*, Routledge, New York, 1992. See further Henry Jenkins, *Convergence Culture: Where Old and New Media Collide*, New York University Press, New York, 2006; Henry Jenkins 'Rethinking Convergence/ Culture' (2014) 28(2) *Cultural Studies* 267-297.

[2] Loretta Florance, 'Game of Thrones sets piracy records as industry debates how to curb Australians' downloading habits', *ABC News* (online), 17 September 2014.

[3] Henry Ergas and Allan Fels, 'Assessment of Proposed Regulations to Address Internet Piracy' *Online Copyright Infringement Discussion Paper* (12 September 2014); *Online Behaviours: An Australian Study*, UMR

both from discussions with creators and industry submissions to the *Online Copyright Infringement Discussion Paper*, a great deal of content is now available at a range of price points through legitimate online sources and real efforts are being made to target consumer needs, such as free downloads, bonus content and variety of platforms.

Clear distinctions need to be drawn around infringing and non-infringing uses of copyright material in order to advance the debate in a meaningful manner.

Second, the nature of the internet opens up the question of who (if anyone) should be responsible for monitoring, preventing or enforcing rights against illegal online uses of copyright material?

Online platform providers such as YouTube have monetised some user generated content by selling advertising around popular channels and users and internet service providers have built business models that depend on high volumes of use, therefore, they stand to gain direct financial benefits from infringements.[4] ISPs assert that their role is not to 'police' the internet[5] however they do have a role to play in terms of responding to content owners' notification of the use of their networks for the purpose of distribution of infringing content. ISPs have contractual relationships with their customers, including terms regarding acceptable use, which place them in a position to assist in creating and managing effective responses to misuse of their network. The High Court left open the likely effect of a workable industry code upon authorisation liability in *Roadshow Films Pty v iiNet Ltd*.[6] It now appears vital that this matter be settled in order to create an appropriate and effective environment for easily accessible, diverse, well-priced and timely digital distribution models to develop and flourish in Australia for the benefit of creators and consumers alike.

b. Government responses

The Federal Government has recently considered the introduction of extended liability for online intermediaries. In July 2014, the Australian Government (via the joint offices of George Brandis, Attorney-General and the Minister for the Arts, and Malcolm Turnbull, Minister for Communications) released the *Online Copyright Infringement Discussion Paper*.[7] That paper put forward a series of proposals for public comment aimed at combating online piracy. These included:

- Expanding the scope of the authorisation liability provisions of the Copyright Act;
- Making it easier for copyright owners to obtain injunctive relief to block overseas web sites hosting infringing material;
- Extending the operation of the 'safe harbour' scheme.

Research December 2012, cited in Australian Government, *Online Copyright Infringement Discussion Paper* (July 2014). See for example, iiNet, *Online Copyright Infringement Discussion Paper submission*, 5 September 2014, 5.

[4] But see, Robert Burrell and Kimberlee Weatherall, 'Before the High Court Providing Services to Copyright Infringers: *Roadshow Films Pty Ltd v iiNet Ltd'* (2011) 33 *Sydney Law Review* 801, 820.

[5] F La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly, Human Rights Council, p13, A/HRC/17/27 (16 May 2011).

[6] [2012] HCA 16; David Lindsay 'ISP Liability for End-User Copyright Infringements: The High Court Decision in *Roadshow Films v iiNet'* (2012) 62 (4) *Telecommunications Journal of Australia* 53, 53.20.

[7] Australian Government, *Online Copyright Infringement Discussion Paper* (July 2014).

These proposals, and in particular the proposed extended authorisation scheme, attracted considerable controversy, described by Communications Minister Malcolm Turnbull as 'unanimous opposition from all sides of the debate'.[8] Key concerns raised by the proposed amendments to the authorisation provisions were that they would require ISPs to 'take more proactive steps to prevent infringement and pressuring them to enter into private enforcement deals with major rights holders'[9] including suspending the accounts of repeat infringers. Due to political pressure the proposals outlined in the Discussion Paper were abandoned by the Government in December 2014, with the announcement that ISPs and rights holders would have 120 days to negotiate and settle a Code of Conduct to be registered with ACMA, detailing how ISPs would deal with repeat infringing down loaders. If the industry players prove incapable of developing such a code by 8 April 2015, the Government has indicated that legislation would need to be introduced. A draft 'three strikes' scheme was released for public comment by Communications Alliance on 20 February 2015, however that draft does not reflect a final agreed position and many key aspects of the proposed scheme remain unresolved.[10]

In addition to the Code of Conduct, the Government has indicated that extended powers will be introduced to the Copyright Act to facilitate the granting of a court injunction to require ISPs to block access to overseas web sites which host infringing material, such as The Pirate Bay. This proposal has attracted its own criticisms, such as the claim that this will only deter the lazy or luddite infringer[11] as files are available from multiple torrent sites and it would not prevent the widespread use of virtual private networks to access material from legitimate overseas sites such as Netflix.[12] Further, there is a risk that the process of website blocking can be overbroad, blocking access to legitimate sites.

c. Outline of this project

The Government has a clearly expressed preference that 'workable approaches to tackling online copyright infringement are most likely to come from the market'.[13] Further, it has flagged the need to consider and accommodate consumer interests in the development of any revised scheme of authorisation liability. However Australian creators appear to be at a disadvantage in exploiting the potential of digital delivery. Whilst Australian creators are currently using a vast number of digital delivery services, their ability to develop new business models and hence respond to consumer demand is restricted by the fact that they are

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[8] Matthew Knott and Ben Grubb, 'No harsh penalties for illicit downloaders under copyright reform', *Sydney Morning Herald* (online), 9 December 2014, <http://www.smh.com.au/digital-life/digital-life-news/no-harsh-penalties-for-illicit-downloaders-under-copyright-reform-20141208-122rmj.html>.

[9] Rebecca Giblin, 'Authorisation in Context: potential consequences of the proposed amendments to Australian secondary liability law', *Online Copyright Infringement Discussion Paper* (August 2014) 20.

[10] Communications Alliance Ltd, *C653:2015 Copyright Notice Scheme Industry Code Public Comment Draft - February 2015*, <http://www.commsalliance.com.au/__data/assets/pdf_file/0005/47570/DR-C653-2015.pdf>, see further, Adrian Storrier 'Explainer: Australia's "three-strikes" plan to curb illegal downloads' *The Conversation*, 25 February 2015, <https://theconversation.com/explainer-australias-three-strikes-plan-to-curb-illegal-downloads-37967>.

[11] Dan Hunter, *Blocking piracy websites is bad for Australia's digital future* (25 November 2014) The Conversation <https://theconversation.com/blocking-piracy-websites-is-bad-for-australias-digital-future-34418>.

[12] Ibid.

[13] Australian Government, above n 7.

competing with entrenched consumer practices and, in particular, the ready accessibility of free, unauthorised content.

One of the purposes of this Report is to identify the attitudes and experiences of Australian creators to unauthorised online distribution and use of their creations, and to consider the impact of these online practices upon Australian creativity. In this way it is hoped that the voice of creators will be heard in the development of an effective Code of Conduct.

In order to contribute to the current industry negotiations over the formulation of a Code of Conduct this Report comprises the results of in-depth interviews with seventeen Australian creators from various creative industries, a review of current industry attitudes to the issues raised by the *Online Infringement Discussion Paper* as evidenced by submissions in response to that Discussion Paper and in other channels, a literature review and a comparison of existing intermediary liability models from a number of jurisdictions.

d. Interests of creators

> *'Piracy does have a personal effect on people in the industry, it is disrespectful and devalues their work' (Australian entertainer)*
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> *'Artists invest a lot of time and money to deliver a product for consumers to enjoy, but receive no money because consumers feel entitled' (Australian songwriter/ music artist)*
>
> *'If creative people have more financial security, they will be able to create more works' (Australian songwriter/ music artist)*
>
> *'Some music will not be made because creators cannot afford to make a living' (Australian producer)*

It is clear that Australian creators have been severely impacted both financially and creatively by the widespread use of digital distribution models.[14] Interviews conducted with a variety of creators in late 2014 revealed that whilst creators have been prepared to engage with various new models of distribution, such as Spotify and Flickr, they still encounter widespread digital misuse of their material which is impacting their ability to create further new material. This unauthorised and unremunerated use is impacting them financially and emotionally.

Debates have focused primarily on key issues for Australian consumers in accessing content as a reasonable time and price. Significant coverage has been given to the claims that Foxtel was price-gouging consumers over access to *Game of Thrones* (the television show most likely to top lists of most pirated television show) by making it available only on its premium channel, with no access by any other legal platform such as iTunes.[15] Arguments based on

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[14] See Chapter 2 - Views from the Creative Industries of this report. Original notes kept on file with the authors.

[15] Florance, above n 2. See further, Nick Ross 'Game of Thrones and the case for piracy', *ABC The Drum* (online), 9 April 2014 <http://www.abc.net.au/news/2014-04-08/ross-game-of-thrones-and-the-case-for-piracy/5375758>. Note that Foxtel has recently announced that *Game of Thrones* will be made available on its online streaming service, Foxtel Play, with no lock in-contracts, making it more accessible to those who want to access the series without purchasing other content. Max Mason 'Foxtel adds Game of Thrones, House of Cards to Australian streaming service' Sydney Morning Herald (online) 24 February 2015, <http://www.smh.com.au/business/foxtel-adds-game-of-thrones-house-of-cards-to-australian-streaming-service-20140224-33bto.html#ixzz3SztGi4Pk>.

consumer preferences, whilst persuasive in the context of price and geographic segmentation, tend to disregard the thousands of hours that are required to create even small (but valuable) elements of such works (for example, five and half months for 90 brilliant seconds in *X-Men Days of Future Past* produced in an Adelaide studio).[16] Nor does the argument that any use of digital distribution models should give carte blanche to free range infringement make any sense given the ubiquitous nature of digital content delivery. [17] Furthermore, the focus solely on consumer demand completely disregards any rights or any reasons that the owner of copyright has to determine when and how they make their content available.

Asked if they had experienced loss of revenue to digital piracy, nearly every creator interviewed stated that they had. Realistically however they also acknowledged that in many cases illegal downloads did not equate directly to lost sales. Illegal downloading may create new audiences and lead to sales of associated merchandise, touring revenue etc, but these alternative income streams have their limits. Some musicians are limited in their ability to tour[18] and successful tours are no guarantee of financial success.[19] Further, the copying of certain content, such as a photograph, or a movie can effectively destroy the value of that content and thus the creators' ability to gain revenue from that content. For example, a veteran photojournalist reported 42,000 unauthorised uses of a single image. Many of these uses were for commercial purposes.[20]

Most creators had also tried various alternative distribution models, such as making free songs available, providing additional or exclusive content or making content available for a period of time. Several had also adopted completely new approaches to their creative works, one author now deliberately produces shorter works, rather than one blockbuster every couple of years. And the effort of the creative process should not be underestimated: a well-known songwriter described the process as having to 'come up with twelve new inventions every year'.

The creators interviewed were realistic about the ability to address these problems. None of them were in favour of suing the end user, and most were against imposing obligations on the ISPs as mere conduits (although several high profile musicians have supported ISP liability)[21], but all were keen to highlight the need to educate consumers that infringement was not in fact a victimless act. Some of those interviewed had been involved in infringement actions brought on their behalf but do not regard monitoring and enforcing their copyright rights as part of their role. Many authors in particular are vigilant regarding the piracy of their works but rely upon online intermediaries and corporate content distributors to intervene on their behalf.

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[16] Paul Verhoeven, *Behind the incredible kitchen scene from X-Men: Days of Future Past* (14 October 2014) The Vine <http://www.thevine.com.au/entertainment/tech/behind-the-incredible-kitchen-scene-from-x-men-days-of-future-past-20141014-288286/>.

[17] Mark Pesce, 'Studios take copyright hypocrisy to the mad max', *ABC The Drum* (online), 12 December 2014 <http://www.abc.net.au/news/2014-12-12/pesce-studios-take-sharing-hypocrisy-to-the-mad-max/5963340>.

[18] Ben Grubb, 'ISPs should police web pirates: Tina Arena', *Sydney Morning Herald* (online), 27 November 2104 <http://www.smh.com.au/digital-life/digital-life-news/isps-should-police-web-pirates-tina-arena-20141127-11uhbu.html>.

[19] Jack Conte, 'Pomplamoose 2014 Tour Profits (or Lack Thereof)' on *Medium* (24 November 2014) <https://medium.com/@jackconte/pomplamoose-2014-tour-profits-67435851ba37>.

[20] See *Tylor v Sevin* [2014] FCCA 445.

[21] Grubb, above n 18.

What became very clear from the interviews was that our Australian creative people are under financial pressure, which is impacting on their capacity to create, many having to supplement their creative work, such as songwriting, with other jobs, such as teaching. Others spend time they would otherwise be writing or making artistic works tracking down misuses of their work. Other creative workers are moving overseas in order to find work. Whilst many joked that even if they didn't receive any money they would still go on creating, those who had been in the industry longest made it clear that significant personal investment was required to continue in the creative industries. The question we have to ask is do we want to foster an Australian creative industry and provide a fair reward to those who work in the industry or are we prepared to sacrifice our culture for cheap downloads?

e. What role should intermediary liability have in Australia?

Based on an examination of current overseas models it appears appropriate for Australia to move quickly to complete the reforms intended to be implemented by the Digital Agenda reforms in 2000 and the reforms to the safe harbour regime in 2005. Both of these legislative revisions to the Copyright Act contemplated and intended the development of ISP industry codes of practice which would detail how end user infringements should be dealt with.[22] The ISP Industry would now appear sufficiently mature to manage the processes necessary to give effect to such a Code of Conduct (and to bear some of the associated costs). Further, it would provide much greater certainty for the development of new cost-effective digital distribution models, to the benefit of copyright creators and consumers alike.

It must be remembered that copyright legislation in Australia 'strikes a balance of competing interests and competing policy considerations. Relevantly, it is concerned with rewarding authors of original literary works with commercial benefits having regard to the fact that literary works in turn benefit the reading public'.[23] Copyright creators appear to have lost out in the shift to the digital economy. It is also appropriate for the obligations imposed upon ISPs to be situated within copyright. The relevant sections of the Copyright Act already contemplate the existence of codes of conduct and once implemented, they should be interpreted in this context, rather than in contract or tort.

Some academic commentators have argued that the imposition of liability on ISPs goes beyond the current scope of authorisation law[24] and that the effect of any graduated response regime is unpredictable, with the costs having the potential to exceed the benefits.[25] However, Australia is in a position to design a Code of Conduct firmly based within the principles of copyright law which draws upon the best of overseas models.

This paper concludes that the best elements of the overseas models of so-called graduated response should be examined and drawn upon in developing a Code of Conduct which will establish guidelines for effective responses to copyright infringement. Any scheme implemented in Australia should be easy and effective, accessible to individual copyright owners as well as corporate copyright owners. Key elements of such a system would include:

- Requiring the creation and enforcement of industry codes of conduct, as already contemplated by ss36(1A) and ss101(1A) of the Copyright Act, placing such codes of

[22] Lindsay, above n 6, 53.2.

[23] *Ice TV Pty Ltd v Nine Network Australia Pty Limited* [2009] HCA 14 [22]-[26] (French CJ, Crennan and Kiefel JJ); [71] (Gummow, Hayne and Heydon JJ).

[24] Giblin, 'Authorisation in Context', above n 9.

[25] Ergas and Fels, above n 3.

conduct squarely within the context of copyright law, and ensuring the codes include clear steps which will be taken by the service provider in response to notifications of copyright misuse by end users; and

- Confirming access by copyright owners to injunctive relief to block access to overseas web sites hosting infringing material.

It is recognised that such measures if introduced will not provide a silver bullet, bringing an absolute end to unauthorised online distribution. This is not the measure of success. Rather, it will send a clear message of maturity within the online marketplace. As one of the music artists interviewed for this Report stated: 'The internet is where we live our lives now, we buy things, we meet and breakup online, we communicate there, there should be some sense of law and order.'

2. CONSULTATION WITH REPRESENTATIVES FROM THE CREATIVE INDUSTRIES

a. Common themes

> *'Illegal downloading is a "victimless' crime as downloaders have distance between the action and victim' (author).*
>
> *'Pirates think they are stealing from wealthy people' (musician).*

All the creative workers interviewed as part of this project stated that they (or people working with them) had had their work illegally downloaded and are frustrated by consumers' attitudes towards illegally obtaining online content, asking: 'Why is it ok to steal a song?' (music artist/ songwriter)

Creators want to enforce their rights but are unable to afford the costs of litigation and penalties for infringers are low: 'If I want to chase an infringement, it costs $20,000 to go to court and there are no punitive damages in Australia' (photojournalist). Further, they are reluctant to pursue actions against the end user, the majority of them regard responsibility for misuse to rest with those making money from the provision of unauthorised content, such as the ISPs or the hosts of such content.

It is clear that creators are responding to consumer demand for cheaper, faster and easier access to online content, exploring a range of digital platform and options, including providing free content, trial access to content before purchase and additional digital content. Creators are also adapting the availability and presentation of their creative content to decrease the incentives to access it through unauthorised downloads by providing more 'immediate and accessible' content online: 'If they can't get it easily and immediately legally, they will look for it illegally' (writer/blogger). However, it is extremely difficult for creators to compete with free and freely accessible unauthorised content. As has recently been argued by the Communications Law Centre the emergence of new business models is significantly impeded by the existence of entrenched consumer access to free unauthorised material.[26]

Creators want their rights enforced and would prefer this to be done by an independent 'corporate' body to which they could notify and enforce their rights: 'No action would ever be taken if it is up to the artist because it is too hard for artists to track it [infringements]' (song writer). The difficulty for creators is the extensive cost involved in litigating with respect to enforcement of their rights, many of whom may not have a publisher, record label or other corporate partner with whom to enforce such rights. Further many creators express a marked unwillingness to litigate against their own end users. Creators are however exploring other avenues to notify websites and individuals when they encounter misuse of their material, such as online clearinghouses.

[26] Communications Law Centre, UTS, *Submission in Response to the Online Copyright Infringement Discussion Paper*, 1 September 2014, 1.8-1.9.

Creators recognise the consumer mindset that all content on the web is free and express the need to increase understanding of copyright law and value for creative work: 'Why would you think the web would supply you with free stuff unless it is advertised as free?' (artist).

There are also perceptions that Australian cultural contributions are being devalued by unauthorised online distribution: 'We need to support Australia's cultural identity and protect the financial interests of artists who develop and provide assets for the country' (artist). Others creators discussed the harm that unauthorised distribution had on them personally: 'piracy does have a personal effect on people in the industry, it is disrespectful and devalues their work' (musical entertainer).

Further, despite suggestions such as that made by Ergas and Fels that the 'vast bulk of the increased revenues [flowing from stronger copyright enforcement] will flow to overseas rights holders'[27] creators observed the actual harms already inflicted on the Australian creative industries by digital distribution: 'I have seen drastic changes in the industry, record companies have dropped two thirds of their artists over time, across all labels. I know people who have lost their jobs, I have seen my own income severely affected by it, music is haemorrhaging. People are moving away from Australia to London and LA to access a bigger pool of work' (music producer/writer/performer). Others noted that their income has fallen significantly as a result of digital distribution and that they have to produce more creative works to attain the same level of income.

b. Specific industry concerns

Music

> *Case study:*
> A is a songwriter and producer who has been working in the music industry for over fifteen years. He has made a significant shift to online content, and has had music included in television promo spots, YouTube videos, iTunes, Spotify, Facebook and other social media. He stopped making CDs three years ago and now distributes his music entirely through digital channels. A now needs to supplement his income through working as a producer and songwriter as well as teaching music in schools. It is very difficult to make money as a result of songwriting and he believes that some music will not be made as creators cannot afford to make a living in Australia from songwriting. Digital delivery has meant he makes the same amount of music but makes much less money as fewer people are willing to buy whole albums due to the prevalence of streaming services. He has personally lost revenue due to unauthorised distribution of his content. Everyone seems to be making money from his music except A.

> 'The argument that artists can make their income from touring is a band-aid. . . I am a mother of a young child and touring the world constantly is just not an option.' Tina Arena, (music artist).[28]

Many music artists acknowledge the possibility that unremunerated downloads may introduce them to new audiences: 'it can introduce new people and create new fans by increasing

[27] Ergas and Fels, above n 3, 2.

[28] SBS News, *Musicians call for copyright clampdown* (27 November 2014) SBS <http://www.sbs.com.au/news/article/2014/11/27/musicians-call-copyright-clampdown>.

access' (musician/song writer). However, arguments that musicians should be willing to distribute their content for free, as a marketing tool for touring, merchandise sales or potential use of their music in film and television, greatly overstates the homogeneity of the music industry and the availability of such opportunities.[29] Again musicians we interviewed noted common experiences such as 'I have had TV syncs on HBO, Channel 7 and in short films but I didn't receive any money as my work was given "exposure"' (songwriter/ music artist).

Music artists already make extensive use of online distribution models: 'There are over 30 licensed online music services in Australia. These services offer every genre of music across a variety of platforms and devices at a range of price points, including free on some streaming services with advertising.'[30] The music artists we interviewed discussed a broad range of online uses and distribution platforms for their work including Spotify, YouTube, Sound Cloud, iTunes, blogs, and engaging with audiences through Twitter, Facebook and other social media. However, they were also very aware of the extent of unauthorised use of their own music but are at a loss as to how to combat such use. 'Despite a huge range of licensed online music services, easy access to illegal streaming and download services, including by use of P2P technologies, continues to impact the local and international music market.'[31] This really comes down to a question of being unable to compete with 'free'.

Music artists tend to rely on others such as their record label or APRA to enforce the copyright of their work: 'It is part of their job' (music artist/song writer).

Writing

Case Study:

B is a writer and blogger, with more than 25 years experience in the creative industries. He has published several books and made them available as eBooks, all of which he has discovered are available illegally online. He has tried different publication models in order to respond to customer demands, for example, making certain works available for free for a limited time, and then available for purchase. He now publishes shorter works, more frequently in order to satisfy consumers' demands for immediate access to content. He has experimented with the use of DRM, but generally people merely regard it as a challenge and strip it out before placing the work on a file sharing site.

Piracy is changing the nature of literature; writers are adapting their availability and presentation of their creative content ('business models') hoping to satisfy consumer expectations of immediacy, availability and low price: 'I used to write a 110,000 word long form novel in 3 years, now I write 3 short books per year' (writer).

[29] See further, Communications Law Centre, UTS, above n 25, 1.7: 'Whilst grants, prizes and other similar avenues of income are welcome, their ability to support an individual's work as a full-time creator is limited, as they tend to be few and awarded only periodically. By their nature, grants and prizes cannot sustain entire creative industries, for they are only occasional. Certain recipients only will be graced with grants and prizes, and if professional creators must rely on grace and favour, this limits diversity of expression.' Similar arguments may be made with respect to merchandising and syncs. Many of the music artists interviewed stated that their musical styles did not appeal to audience demographics that purchased merchandise.

[30] Music Rights Association, *Music Rights Australia's submissions in response to Online Copyright Infringement Discussion Paper*, 1 September 2014, 3.

[31] Ibid 5.

Authors reported numerous instances of the unauthorised digital distribution and use of their works, including copying and reproduction of their works, some involving alteration or removal of their name. Various responses have been adopted by authors, many of whom do not have a publishing house to assist in enforcement of copyright. These measures include websites such as the UK Publishers Association online Copyright Infringement Portal and the Facebook group 'Authors vs. Pirates' used to share information about unauthorised online distribution and what to do about it.

Film and television

Case Study:

C works in the film industry and is aware that most of the films he has worked on are available illegally online. He recognises the obligation rests with the copyright owner to protect their digital assets, but is concerned that consumers who access these films online for free do not realise the vast number of people whose income is dependent upon the work that they have done for that film. He feels he has the right to earn a wage for the work he does and not give it away for free.

The widespread unauthorised downloading of television shows and movies is ubiquitous and well-known.

Due to the nature of consumption of the content, piracy can have extremely detrimental effects: 'the movie was leaked online before released to the public and no one went to see it [on opening weekend]' (film maker).

Again, arguments that film and television producers should now use their digital downloads as 'advertisements' for further projects, and seek funding though crowdsourced platforms such as Kickstarter are equally problematic.[32]

Art

Case study:

D is a visual artist who has been working for 35 years in the creative industries. She has a website promoting her work but does not sell any work online because the web makes it too accessible and easy to rip off creative content. She has successfully used litigation for copyright breaches; notably the first time an Australian court recognised 'cultural damages'. She believes that Creative Commons is undermining individual copyright. D suggests that it is an individual's responsibility to prevent copyright infringements and creators should not rely on the Government to prevent copyright infringements. Prevention is better than litigation and it is important to educate from primary school the importance of creative work having integrity and copyright protection. D also noted the difficulty for an individual creator of tracking infringements online, '[we] don't sit trawling the web looking for breaches'.

[32] See Evgeny Morozov, 'Kickstarter Will Not Save Artists From the Entertainment Industry's Shackles', *Slate* (online), 25 September 2012 <http://www.slate.com/articles/technology/future_tense/2012/09/kickstarter_s_crowdfunding_won_t_save_indie_filmmaking_.html>; Inge Ejbye Sørensen 'Crowdsourcing and outsourcing: the impact of online funding and distribution on the documentary film industry in the UK' (2012) 34 *Media, Culture & Society* 726.

The submission from the Arts Law Centre of Australia states that their client data from 2013/14 'establishes that out of a total of 177 requests for advice as to copyright infringement, 61 queries related to online infringement.[33] Whilst potential opportunities of online licensing and streaming are acknowledged by visual artists, some particular risks also arise, including use of artwork for advertising/unauthorised purposes and, for indigenous artists and communities, inappropriate use of their cultural expressions.[34] Many established artists choose not to sell online as they perceive it to be vulnerable to piracy: 'Artists participate [online] at their own peril' (artist).

Photography

Case study:

E is a photojournalist with over 50 years experience as a photographer. He is required to submit his photographs through sites such as Flickr in order to participate in content distribution and licensing agencies. Photos he has uploaded to Flickr are regularly copied, used and distributed without his consent or any remuneration, including one particular image which has been reproduced without permission over 40,000 times. E has taken preventative steps to protect his work, such as through the use of low-resolution images. He also uses a US based service to assist him (at significant cost) to pursue copyright breaches.

The industry's business model is experiencing a cultural shift as corporations seek free content and take advantage of crowd generated content: 'There are national media organisations who have a policy to not pay for external online content and use Flickr to find photos for their news stories' (photographer). Once photographs are placed online they can be readily copied. Sites such as Pinterest strip the metadata out of the photo, making it very difficult for authorship to be acknowledged or traced. Photographers are frequently sole operators and thus do not have the support of publishers, agencies or studios to assist them with detecting and preventing copyright infringements, yet their work is readily reproducible. One photographer interviewed pursues copyright breaches for himself, writing to the website hosting the infringing photograph and requesting its removal or payment for its use.

[33] Arts Law Centre of Australia, *Online Copyright Infringement, A submission in response to the Discussion Paper* (July 2014), 5 September 2014, 3.
[34] Ibid 6.

3. INTERMEDIARIES' LIABILITY FOR INFRINGEMENT IN AUSTRALIA AND OTHER JURISDICTIONS

Many countries have adopted various responses to address online copyright infringement, targeting either (or both) online intermediaries and individual subscribers.[35] Sanctions can include: graduated response schemes ('warning' letters escalating in severity); take down and blocking of sites; slowing down the speed of the internet connection of accounts; judicial measures (such as injunctions) and termination of access. Several countries such as Canada, France, South Korea, United Kingdom and United States combine punitive sanctions with a strong emphasis on educative and preventative measures.[36] Additionally, South Korea and Brazil impose criminal liability (including imprisonment) on infringing end users.[37] This section will provide an overview of some of these many approaches in order to consider the strengths and weaknesses of these varying schemes.

A way to compel ISPs to work with copyright owners is 'to establish that ISPs can be held legally responsible for acts of copyright infringement committed by their users'.[38] Various jurisdictions have adopted different responses to the problems created by online infringement. The nature of these responses is dictated both by cultural practices and relevant law, in many cases further determined by trade agreements and treaties.[39] The two key responses adopted internationally have been imposing obligations on ISPs to implement a graduated response system and strengthening powers of injunction to block access to sites hosting illegal content. Both of these models have been considered by Australian lawmakers.

A graduated response system, often known as the 'three strikes' rule, features escalating responses to allegations of copyright infringement.[40] France, New Zealand, South Korea, Canada and Taiwan have enacted public laws which place a responsibility on ISPs to respond to evidence presented by rights holders regarding infringements by their end users.[41] In

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[35] BOP Consulting and DotEcon, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (Report commissioned by the Intellectual Property Office (U.K.) No 2015/40, February 2015) 2-3. See also Urs Gasser and Wolfgang Schulz, *Governance of Online Intermediaries: Observations from a Series of National Case Studies* (February 18, 2015), Berkman Center Research Publication No. 2015-5, <http://ssrn.com/abstract=2566364 or http://dx.doi.org/10.2139/ssrn.2566364>.

[36] BOP, ibid, 3.

[37] *Chojakkwonbop* [Copyright Act] (No. 11110, 2013) (Republic of Korea) art 136 & 137. See Ministry of Culture, Sports and Tourism, *Copyright Act* (30 December 2013) Korea Legislation Research Institute <http://elaw.klri.re.kr/kor_service/lawView.do?lang=ENG&hseq=25455>; Brazil treats copyright infringement the same as property theft, see *Código Penal* de 7.12.1940 (amended Lei No. 10895 de 1.3.2003) (Brazil) art 184. Available at: <http://www.jusbrasil.com.br/topicos/10615003/artigo-184-do-decreto-lei-n-2848-de-07-de-dezembro-de-1940>.

[38] Burrell and Weatherall, above n 4, 802.

[39] Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37:2 *Columbia Journal of Law & the Arts* 147, 153.

[40] Anna Spies, 'Balancing the rights of copyright holders, internet users and ISPs in an internet age: Recent developments in ISP liability in Australia, Canada and New Zealand' (2011) 16 *Media and Arts Law Review* 241, 373.

[41] See *Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet* [HADOPI] (France); *Copyright Act 1994* (N.Z.); *Copyright (Infringing File Sharing) Amendment Act 2011* (N.Z.); *Copyright (Infringing File Sharing and Cellular Mobile Networks) Order 2013* (N.Z.); *Copyright (Infringing File Sharing) Regulations 2011* (N.Z.); *Chojakkwonbop* [Copyright Act] (No. 11110, 2013) (Republic of Korea); *Enforcement Decree of the Copyright Act* (Presidential Decree No. 22003, 2010) (Republic of Korea); *Copyright Modernization Act*, SC 2012, c 20 (Canada); *Copyright Act 2007* (Taiwan); *Regulations Governing Implementation of ISP Civil Liability Exemption 2009* (Taiwan).

comparison, Ireland and U.S. have private arrangement schemes between selected rights holders and ISPs to monitor user misconduct. The UK has legislation before Parliament to enact a public scheme as well as a private industry code.

a. Australia- Proposals

As noted above, the 2014 *Online Copyright Infringement Discussion Paper* proposed that the Copyright Act would be amended to clarify the application of authorisation liability under sections 36 and 101 of the Copyright Act. As currently drafted sub-sections 36(1A) and 101(1A) provide that three factors must be taken into account in determining the question of whether a person has authorised an infringement:

> (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
> (b) the nature of any relationship existing between the person and the person who did the act concerned;
> (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

At the time when the Copyright Act was amended through the insertion of sub-sections 36(1A) and 101(1A) it was envisaged that ISPs would develop a code of conduct which would amplify and clarify how these provisions were to be interpreted in the scope of online infringement.[42] However, no codes of conduct ever eventuated and the meaning of these sections was left up to the High Court to ponder in *Roadshow Films Pty Ltd v iiNet Ltd*. In that case, which concerned the question of whether an ISP could be made liable for the infringing conduct of its subscribers in creating, using and sharing torrent files, the High Court concluded that iiNet was not liable for authorising the copyright infringement by its subscribers, as the system was not operated or controlled by iiNet and there was no reasonable steps that iiNet could have taken to reduce infringement.[43]

In the *Online Copyright Infringement Discussion Paper*, the Government expresses the view that 'there still may be reasonable steps that can be taken by the ISP to discourage or reduce online copyright infringement.'[44] The *Discussion Paper* proposed that the Copyright Act be amended to provide that in making an assessment of the 'reasonable steps' element, the court must have regard to:

> (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
> (b) whether the person or entity was complying with any relevant industry schemes or commercial arrangements entered into by relevant parties;
> (c) whether the person or entity complied with any prescribed measures in the Copyright Regulations 1969; and
> (d) any other relevant factors.

[42] See Lindsay, above n 6, 53.2. See also *Copyright Regulations 1969* (Cth) Reg 20B; *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 [25] and Australian Government, above n 7.
[43] [2012] HCA 16.
[44] Australian Government, above n 7.

The consideration of 'power to prevent' would be subsumed in the overall assessment of the reasonableness of the steps taken by the ISP to prevent infringement. This means that the lack of a direct power to prevent the infringing act, as was the finding of the Court in *iiNet*, would not be determinative of liability and may require the ISP to take more active steps to deter or reduce infringing conduct. Further input was sought by the *Discussion Paper* on the possible scope of reasonable steps and the matter of how any costs of those reasonable steps would be shared between copyright owners and service providers (and end users).

The Second Proposal in the Discussion Paper was to amend the Copyright Act to grant copyright owners a right to apply for an injunction to block access from Australia to an internet site 'the dominant purpose of which is to infringe copyright', akin to s97A of the *Copyright, Designs and Patents Act* (UK).[45] In determining whether to grant such an order the court would be required to consider matters of cost, proportionality, what interests would be affected by such an order and freedom of expression. The Third Proposal was to extend the current safe harbour scheme by amending the application of the provisions to 'service provider'.

After announcing an intention for Copyright Law reform earlier in the year, on 10 December 2014 Federal Attorney-General Brandis and Communications Minister Turnbull wrote to industry leaders of ISPs and rights holders asking them to work together on an industry code to be registered with the communications regulator, ACMA.[46] The code will need to provide a Graduated Response system that: meets the requirements of 'reasonable steps'; provides safeguards for consumers; allocates costs fairly; protects smaller industry participants and includes a process to notify consumers when a copyright breach occurs. If they fail to reach a binding agreement within 120 days, the Government will impose arrangements.[47]

A draft Copyright Notice Scheme industry code[48] was released on 20 February 2015 and is open for public consultation until 23 March 2015.[49] That draft scheme provides for rights holders to submit reports to ISPs detailing IP addresses that the rights holder alleges have been used to infringe copyright. The ISP will then send a notice to the relevant (matched) account holder informing them of the alleged infringement. The scheme provides for a series of notices: 'education', 'warning' and 'final'. Where an account holder receives three notices within 12 months:

- the account holder may seek an independent review;

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[45] See also *European Union (Copyright and Related Rights) Regulations 2012* (Ireland) SI 59/2012 which implements *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167/10.

[46] Brandis, George, Attorney-General & Minister for the Arts and Malcolm Turnbull, Minister for Communications, 'Collaboration to Tackle Online Copyright Infringement' (Media Release, 10 December 2014) <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/10December2014-Collaborationtotackleonlinecopyrightinfringement.aspx >.

[47] Ibid.

[48] Communications Alliance Ltd, *Draft Industry Code c653:2015 - Copyright Notice Scheme* (20 February 2015). Note that the draft Code 'reflects certain input of Rights Holders and consumer representative organisations but is not a final agreed position and discussion continue with these stakeholders' at (i).

[49] Adam Turner, 'ISPs to dob in movie pirates under proposed three-strikes rule', *The Sydney Morning Herald – Digital Life* (online), 21 February 2015 < http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/isps-to-dob-in-movie-pirates-under-proposed-threestrikes-rule-20150220-13kc2c.html>.

- the rights holder may apply to the ISP for assistance in an expedited discovery process to assist the rights holder to enforce copyright.

Issues such as the allocation of costs under the scheme and extent of application remain to be settled.

b. Other jurisdictions

Canada

Summary of Scheme

On 2 June 2010 the Canadian Government introduced significant reforms to the copyright law including ISP safe harbour and notice regimes.[50]

These new laws came into force on 2 January 2015 after using an informal 'notice-and-notice system' for several years. [51] The laws entitle copyright owners to send infringement notices to ISPs, who will be legally required to forward the notifications to their users. The notices must include: a) details on the sender, b) the copyright works and c) the alleged infringement.[52] If the ISP fails to forward the notification, it may face paying damages up to C$10,000.[53] Also, it must retain information on the user for six months (or 12 months if court proceedings are filed) but if copyright owners want to proceed with legal action, they need to obtain a court order requiring the ISP to reveal the identity of the user.[54]

Additionally, a notice can be sent to search engines and they are expected to remove any copies they may have generated within 30 days.[55] If the copies are not removed, copyright owners can pursue damages after 30 days.[56]

This system does not have any legal penalties; the notices are only intended as 'educational tools' designed to 'increase awareness' of infringement allegations.[57] However, damages are capped at C$5,000 for all non-commercial infringements.[58]

The Canadian Government has not issued any additional regulations under s41.26(2) therefore ISPs are unable currently to charge for performing their duties under the reforms.[59]

Results

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[50] *Copyright Modernization Act*, SC 2012, c 20.

[51] Canada Gazette, *Archived — Vol. 148, No. 14 — July 2, 2014* (2 July 2014) Government of Canada <http://gazette.gc.ca/rp-pr/p2/2014/2014-07-02/html/si-tr58-eng.php>.

[52] *Copyright Modernization Act*, SC 2012, c 20, ss 41.25 – 41.27.

[53] Michael Geist, 'Notice the Difference? New Canadian Internet Copyright Rules for ISPs Set to Launch' on *Michael Geist* (22 December 2014) <http://www.michaelgeist.ca/2014/12/notice-difference-new-canadian-internet-copyright-rules-isps-set-launch/>.

[54] *Copyright Modernization Act*, SC 2012, c 20, ss 41.25 – 41.27.

[55] Government of Canada, 'Notice and Notice Regime' (Backgrounder, 17 June 2014) <http://news.gc.ca/web/article-en.do?nid=858069>.

[56] Ibid.

[57] *Copyright Modernization Act*, SC 2012, c 20, ss 41.25 – 41.27; Geist, 'Notice the Difference?', above n 49.

[58] *Copyright Modernization Act*, SC 2012, c 20, ss 41.25 – 41.27.

[59] Ibid ss 41.25 – 41.27; Thomas Dillon, 'Canada' on *Graduated Response Org* <http://graduatedresponse.org/new/?page_id=414>.

In 2006, Telus was voluntarily forwarding an average of 4,000 notices every month and the Business Software Alliance sent out about 60,000 'notice and notice' e-mails.[60] Data from the Entertainment Software Association of Canada for 2010 found that 71 per cent of notice recipients did not place an infringing file back on BitTorrent systems.[61] Rogers Communications presented data that the system was effective to House of Commons Committee in 2011; it processed 207,000 notices in the previous year: of the households that received notices, only 1/3 receive a second notice and of those that received a second notice, only 1/3 of those received a third notice.[62]

Summary of key elements

Retention of user information - Intermediaries must retain the user information for 6 – 12 months

Scope includes search engines - copyright owner can send a notice to a search engine

Repeat infringement rates – only 11% of people receiving first notices received a third and final notice

Mandatory review - Parliament to conduct a review of the *Copyright Act* every five years

The lack of legal penalties – the notices are only 'educational'

Costs - ISPs are unable to charge for performing their s41 duties

Damages – capped at C$5,000 for non-commercial (household) infringements

30 day rule for search engines – too long for the rapid and dynamic nature of online environment

Chile

Chilean law states that in order for service providers to enjoy the benefit of safe harbor provisions, they must have reserved the power to terminate subscriber accounts where a judge has declared the account holder to be a repeat infringer of copyright.[63]

France

France implemented graduated response law known as HADOPI and the government agency that administers the policy is also called Hadopi.[64]

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[60] 'E-mail warnings deter Canadians from illegal file sharing', *CBC News* (online), 15 February 2007 <http://www.cbc.ca/news/e-mail-warnings-deter-canadians-from-illegal-file-sharing-1.689596>.

[61] Michael Geist, 'Rogers Provides New Evidence on Effectiveness of Notice-and-Notice System' on *Michael Geist* (23 March 2011) <http://www.michaelgeist.ca/2011/03/effectiveness-of-notice-and-notice/>.

[62] Ibid.

[63] *Modifica La Ley n° 17.336 Sobre Propiedad Intelectual 2010* (Chile) art 85-O. See Ministerio de Educación, *Modifica La Ley n° 17.336 Sobre Propiedad Intelectual 2010* (4 May 2010) Biblioteca del Congreso Nacional de Chile / BCN <http://www.leychile.cl/Navegar?idNorma=1012827&idVersion=2010-05-04>.

Originally HADOPI-1 was to set up an administrative body that would issue warnings to alleged infringers and have the power to suspend their Internet access up to twelve months if the behaviour continued.[65] However, this was overturned after the French Constitutional Council held that an administrative body does not have the power to suspend or terminate internet access.[66] Hence, the legislation was revised and HADOPI-2 was passed in September 2009.

Summary of Scheme

Accredited rights holders inform Hadopi (the administrative agency) of an infringement which is reviewed by the Commission of the Protection of Rights. After reviewing the allegations the Commission may contact the user via their ISP. If there are two infringements within the year of a second notification, the Commission prepares a report regarding whether the user's internet connection should be suspended and then the case file can be forwarded to a prosecutor to present before a judge to determine any sanctions against the user.

French law separately imposes liability on users who were found to have negligently failed to secure their Internet connections but did not commit the resulting infringements themselves.[67]

Possible penalties include suspension of Internet access for up to twelve months and a fine of up to 1500€.[68] Users whose access was suspended have to keep paying subscription fees and they could not switch ISPs to avoid the sanction.[69]

The majority of these enforcement costs have been carried by the French Government and ISPs. Rights holders pay for and investigate the grounds for making an infringement allegation but they do not have to contribute towards the costs of administering the scheme or issuing notices.[70]

Results

The most recent HADOPI figures released in July 2014 showed that: there were 3,249,481 first notices; 333,723 second notices; 1502 third notices; 116 files have been transferred to court and 8.9% of all internet subscribers have received a first notice since HADOPI started in October 2010.[71]

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[64] See *Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet* [HADOPI] (France).

[65] See Eleni Metaxa, Miltiadis Sarigiannidis and Dimitris Folinas, 'Legal Issues of the French Law on Creation and Internet (Hadopi 1 and 2)' (2012) 3(3) *International Journal Of Technoethics* 21 – 36.

[66] See Roger, Patrick and Jean-Baptiste Chastand, 'Hadopi: le Conseil constitutionnel censure la riposte graduée', *Le Monde* (online), 10 June 2009 < http://www.lemonde.fr/technologies/article/2009/06/10/hadopi-le-conseil-constitutionnel-censure-la-riposte-graduee_1205290_651865.html >; Metaxa, Sarigiannidis and Folinas, above n 61.

[67] *Code de la Propriété Intellectuelle* [Intellectual Property Code] (France) art R335-5.

[68] See Metaxa, Sarigiannidis and Folinas, above n 65.

[69] See *Haute Autorité pour la Diffusion des œuvres et la Protection des droits d'auteur sur Internet* [HADOPI] (France).

[70] Nathan Lovejoy, *Procedural concerns with the HADOPI Graduated Response Model* (13 January 2011) Jolt Digest – Harvard Journal of Law & Technology <http://jolt.law.harvard.edu/digest/copyright/procedural-concerns-with-the-hadopi-graduated-response-model>.

[71] International Federation of the Phonographic Industry (IFPI), *Lighting up new markets - Digital Music Report 2014* (2014) <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>.

Studies show that 'awareness' of the HADOPI law caused sales of songs through iTunes in France to increase by 22.5% above the sales increase of five European countries and there was there was a 25% increase in album unit sales through iTunes.[72] The effect was greater for the heavily pirated genres like rap and smaller for less pirated genres like jazz.[73] The IFPI Digital Music Report 2014 noted that the use of unlicensed P2P networks in France had declined 27% since September 2010.[74]

The Lescure Report on cultural policy found that HADOPI-2 may reduce P2P infringement but the traffic had been diverted to other infringing sources rather than to the legitimate market.[75] HADOPI-3 was passed in July 2013 which abolished Hadopi agency and suspension penalties for a user's failure to secure its connections[76] and the French Government declared that its focus will be on commercial piracy.[77]

Summary of key elements

Separate liability imposed on negligent users - users who negligently fail to secure their Internet connections but do not commit the infringements themselves can be held liable for the infringement.

Financial penalties – fines of up to 1500€.

Allocation of costs – Enforcement costs are split between the French Government and ISPs. Rights holders pay for and investigate the grounds for making an infringement allegation but they do not contribute towards the costs of administering the scheme or issuing notices.

Removal of user suspension – previously users whose access was suspended had to keep paying subscription fees and they could not switch ISPs to avoid the sanction.

Ireland

The EU *Information Society Directive* was first passed in May 2001 and as a member state, Ireland amended its copyright law.[78] ISPs have common law duties to disclose subscriber data[79] and disable sites that 'are being used for the transmission of copyright material'.[80]

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[72] See Brett Danaher and et al, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France* (21 January 2012) <http://dx.doi.org/10.2139/ssrn.1989240>.

[73] Ibid.

[74] International Federation of the Phonographic Industry (IFPI), above n 67.

[75] Pierre Lescure, *Mission « Acte II de l'exception culturelle » Contribution aux politiques culturelles à l'ère numérique* (May 2013) Ministere de la Culture et de la Communication 371 <www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm#/1>.

[76] Marc Rees, *Aurélie Filippetti: Hadopi is too expensive, the suspension is disproportionate* (1 August 2012) Next Inpact <http://translate.google.com.au/translate?hl=en&sl=fr&u=http://www.nextinpact.com/archive/72825-aurelie-filippetti-hadopi-coute-trop-cher-supension-est-disproportionnee.htm&prev=search>.

[77] Aurélie Filippetti, La ministre de la Culture et de la Communication, 'Publication du décret supprimant la peine complémentaire de la suspension d'accès à Internet' (Communiqué de presse 9 July 2013).

[78] *European Communities (Copyright and Related Rights) Regulations 2004* (Ireland)

[79] *EMI Records (Ireland) Ltd v Eircom Ltd* [2005] IEHC 233 (8 July 2005).

[80] *EMI Records (Ireland) Ltd v Eircom Ltd* [2009] IEHC 411 (24 July 2009).

Currently, Eircom (Ireland's largest ISP) provides internet service to its customers based on a written contract [81] whereby a customer agrees to use the internet service in accordance with the acceptable usage policy such as not using the internet for illegal purposes such as 'to create, host or transmit' material which infringes copyright.[82] Hence, an account may be suspended or terminated if a customer breaches the terms of the contract.[83] In response to litigation between the Irish branches of the EMI, Sony, Universal and Warner record labels and Eircom, the parties agreed to implement a private 'three strikes' scheme.[84] Unfortunately, the terms of the arrangement are confidential but the High Court decision can provide guidance of the process. [85] The scheme only includes the parties to the settlement and Eircom does not pass on any allegations of infringement made by other rights holders.[86]

Ireland recently passed the *European Union (Copyright and Related Rights) Regulations 2012* (S.I. No. 59 of 2012).[87] These Regulations amend the *Copyright and Related Rights Act 2000* to allow an application for an injunction against an intermediary regarding copyright infringement. They were enacted as a result of the *Information Society Directive*[88] and *EMI v UPC* (2010).[89]

Additionally, Ireland provides for industry regulation under *Internet Service Providers Association of Ireland (ISPAI) Code of Practice and Ethics 2002*.[90] This Code governs the conduct of ISPAI's Members and may be amended from time to time by 75% majority vote of members of ISPAI.[91] It mandates the development of acceptable use policies for participating ISPs providing clearly set out guidelines for customers/users, including prohibitions on customers using ISP service to create, host or transmit certain material,[92] and procedures for dealing with complaints regarding third party content, illegal material and harmful material. [93] Unfortunately, while the code encourages its members to observe their legal obligations, its principles 'do not represent any legal grounds for liability'.[94]

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[81] Eircom – Terms and Conditions, *eircom broadband standard terms and conditions* (20 May 2013) Eircom <http://www.eircom.net/opencms/export/sites/default/.content/pdf/terms/standard_eircom_broadband_terms_and_conditions.pdf>.

[82] *Standard Eircom Broadband Terms and Conditions (Amendment no 9) 2013* cl 5.5.

[83] Ibid cl 7.1.

[84] *EMI Records (Ireland) Ltd v Eircom* [2010] IEHC 108 (16 April 2010).

[85] Eircom, 'Eircom Statement on Illegal File Sharing' (Press Release 8 December 2010) < http://pressroom.eircom.net/press_releases/article/eircom_Statement_on_Illegal_File_Sharing/>.

[86] Giblin, 'Evaluating Graduated Response', above n 39, 174 – 175.

[87] *European Union (Copyright and Related Rights) Regulations 2012* (Ireland) SI 59/2012.

[88] See *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167/10.

[89] *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377 (11 October 2010).

[90] Internet Service Providers Association of Ireland (ISPAI), *Code of Practice and Ethics* (11 January 2002).

[91] *Code of Practice and Ethics*, Internet Service Providers Association of Ireland (ISPAI) (September 2013), s 3.5 <http://www.ispai.ie/wp-content/uploads/2013/09/Code-of-Practice-and-Ethics.pdf />.

[92] Ibid s 5.1.1.

[93] Ibid s 11.2.

[94] Ibid s 2.3.1.

Results

EMI Ireland claimed in 2011 that Eircom had issued 29,000 individual letters and that "100 customers had reached the fourth stage of losing their access for one week and 12 customers are at the stage where they will be permanently cut off by Eircom."[95]

The Eircom scheme has not been without controversy. On 11 January 2012, the Irish Data Protection Commissioner issued a direction to Eircom instructing it to cease from operating its graduated response scheme due to violations of data processing law. However, upon application for judicial review by the rights holder parties, Justice Charleton held that the operation of a graduated response scheme did not per se violate data protection law, and quashed the direction.[96]

Summary of key elements

Costs - In the *Eircom* scheme, the costs of issuing notices and terminating users are completely borne by the ISP.

Deterrence – Under the *Eircom* scheme, users infringing copyright may have their accounts suspended for seven days (third notice) to twelve months (fourth notice).

Injunctions – The courts can order injunctions against an intermediary regarding copyright infringement.

Narrow scope – The *Eircom* scheme is a private arrangement that only applies to one ISP and the parties of right holders to the settlement.

Exclusion of majority of right holders - The *Eircom* scheme permits the ISP to only pass on any allegations of infringement made by the Irish branches of the EMI, Sony, Universal and Warner. There is no obligation owed to other right holders.

Lack of legal grounds for liability - The *ISPAI Industry Code of Practice and Ethics* clearly states its principles do not provide legal grounds for liability.

New Zealand

New Zealand first adopted a graduated response regime in 2008. The scheme was criticised for being too broad and lacking due process. It was replaced with a new framework which came into effect for fixed line internet access in September 2011 and in October 2015 for mobile providers.[97] The law applies to Internet Protocol Address Providers (IPAPs) and only captures traditional ISPs, not organisations such as universities and libraries and implements a 'three notice' system.

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[95] Eamonn Laird, *Meeting between Minister Sherlock and the Irish Recorded Music Association on Monday 5th December* 2011 (7 December 2011) <www.scribd.com/doc/83984745/ EMI-Briefing-001>.

[96] See *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2012] IEHC 264 (27 June 2012). Justice Charleton's decision was upheld by the Supreme Court in *EMI Records (Ireland) v Data Protection Commissioner* [2013] IESC 34.

[97] *Copyright (Infringing File Sharing) Amendment Act* 2011 (N.Z.) s2; *Copyright (Infringing File Sharing and Cellular Mobile Networks) Order* 2013 (N.Z.) s3.

Summary of Scheme

Firstly, a rights holder identifies a user via its IP address as belonging to a particular IPAP via its IP address, and then they contact the IPAP to make an infringement allegation. Then the IPAP identifies the individual user and issues an appropriate notice within seven days. A notice must include the name of the complainant rights holder, details concerning the infringement that triggered the notice, an explanation of the consequences, and instructions for challenging the notice should the recipient wish to do so.

The first notice is called a 'detection notice'; the second is a 'warning notice' and the third is an 'enforcement notice.' Rights holders do not need to provide evidence supporting their allegations[98] but they are required to compensate the IPAP's costs of issuing notices which is capped at NZ$25 per notice.[99]

After an enforcement notice has been issued, the IPAP will provide a copy to the rights owner so they can seek financial remedy through the Copyright Tribunal. The tribunal can issue a penalty against the infringing user for up to NZ$15,000.[100]

Results

It is questionable whether the capped charge reflects the true costs to the IPAPs for issuing notices. The Tribunal had decided thirteen cases by August 2013. All cases involved RIANZ[101] as the applicant and all the cases involved two notices for the infringement of the same song.[102] The tribunal focused on the educative purpose of the notices and ruled that the reasonable cost of the copyrighted work should be decided by the price that work is purchased, not by the number of infringements incurred by the respondent.[103]

Summary of key elements

Captures only traditional ISPs - Organisations such as universities and libraries are not included.

Financial remedies - The tribunal can issue a penalty against the infringing user for up to NZ$15,000.

Cap on enforcement costs – The compensation towards the IPAP's costs is capped at NZ$25 per notice.

Limited definition of file-sharing – the legislation only applies to cases of peer-to-peer infringement which excludes the increasing problem of 'cyberlockers' involving one-to-one user-server applications.[104]

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[98] *Copyright Act 1994* (N.Z) ss 122G(1)-(2).

[99] *Copyright (Infringing File Sharing) Regulations 2011* (N.Z.) reg 7.

[100] *Copyright Act 1994* (N.Z.) s122O(4); *Copyright (Infringing File Sharing) Regulations 2011* (N.Z.), reg 12(1).

[101] Recording Industry Association of New Zealand.

[102] Giblin, 'Evaluating Graduated Response', above n 39, 163. Original decisions are available at NZLII, *2013 Copyright Tribunal of New Zealand Decisions* (2013) <http://www.nzlii.org/nz/cases/NZCopyT/2013/>.

[103] Ibid 163.

[104] Dillon, Thomas, 'New Zealand' on *Graduated Response Org* <http://graduatedresponse.org/new/?page_id=28>.

No evidence needed - Rights holders do not need to provide evidence supporting their allegations.

South Korea (Republic of Korea)

South Korea enacted a graduated response scheme in April 2009 and it provides two different approaches to terminate an infringer's access: 1) Associated Presidential Decree by the Minister of Culture, Sports and Tourism and 2) recommendation by the Korea Copyright Commission. ISPs are required to act on the Minister's orders but they have discretion whether they act on the Commission's recommendations.

Associated Presidential Decree

If the infringing copies were transmitted through 'information and telecommunications networks,' the Minister can order the online service provider to take a number of measures, including issuing warnings.[105] If the alleged infringer receives three or more warnings, the matter will be deliberated by the Korea Copyright Commission and the Minister may order an account to be suspended. [106]

The Commission must take into account certain factors such as the volume of copies reproduced and/or transmitted and the impact of the unlawful copies on legitimate distribution.[107]

Suspensions can range from less than one month (first suspension), one to three months (second suspension) and three to six months (third suspension).[108] Users can sign up with other online service providers to resume access while their accounts are suspended, unlike under HADOPI-2.[109]

Korea Copyright Commission recommendation

The Commission has the authority to make various recommendations to ISPs, including that they issue warnings to infringers, delete infringing copies or suspend accounts which have been repeatedly involved in infringement.[110] If it determines that an infringement is 'repeated', it is not *required* to give warnings prior to disconnection.[111] The suspension can cover user accounts on various services. The rights holder bears the costs of the investigation and the Commission bears all other costs associated with the scheme.

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[105] *Chojakkwonbop* [Copyright Act] (No. 11110, 2013) (Republic of Korea), art 133-2. See Ministry of Culture, Sports and Tourism, above n 36. Also described by Giblin, 'Evaluating Graduated Response', above n 39, 163.

[106] Ibid.

[107] *Enforcement Decree of the Copyright Act* (Presidential Decree No. 22003, 2010) (Republic of Korea), art 72-3. See Republic of Korea, *Enforcement Decree of the Copyright Act (Presidential Decree No. 1482 of April 22, 1959, as amended up to Presidential Decree No. 22003 of January 27, 2010)* (27 January 2010) World Intellectual Property Organisation (WIPO) <http://www.wipo.int/wipolex/en/text.jsp?file_id=200937>. Also described by Giblin, 'Evaluating Graduated Response', above n 39, 163-4.

[108] Ibid.

[109] Giblin, 'Evaluating Graduated Response', above n 39, 163.

[110] *Chojakkwonbop* [Copyright Act] (No. 11110, 2013) (Republic of Korea), art 133-2. See Ministry of Culture, Sports and Tourism, above n 36. Also described by Giblin, 'Evaluating Graduated Response', above n 39, 164.

[111] However, some argue that there are internal bylaws that mandate warnings. See Giblin, 'Evaluating Graduated Response', above n 39, 164.

Results

There were 468,446 warnings and takedown notices were issued between July 2009 and the end of 2012. During the first year of the scheme, ISPs suspended user accounts for other services, such as online file hosting, in response to 99.94% of Commission recommendations.[112] In 2013, the National Human Rights Commission of South Korea called for the three strikes law to be repealed as it 'may restrict the right to culture and information'.[113] Additionally, a bill was introduced to Korean National Assembly to repeal the law.[114]

Summary of key elements

Accountability - Under Article 104, ISPs are obliged to use 'technical measures' to prevent infringements.

Penalties – Suspension of infringing user accounts can range from one to six months.

Notification - If a user requests the resumption of their access services, the ISP must notify the right holder of their request.

Enforcement - ISPs are required to act on the Minister's orders.

User suspension is ineffective – Users can sign up with other online service providers while their accounts are suspended.

Notification - KCC is not required to give warnings to a repeat infringer prior disconnecting their account.

Enforcement - ISPs have discretion whether they act on the KCC's recommendations.

Taiwan

The *Internet Service Provider (ISP) Liability Limitation Bill* was passed on April 21, 2009, amending the principal *Copyright Act*. The Taiwanese scheme is a three strikes system and provides immunity for complying ISPs.[115] The law simply sets out the contact information an ISP must provide to an infringing user and only requires it to advise users that they will terminate their access if they infringe copyright online.[116]

Results

There are no reports of any user having his or her access suspended since the scheme was implemented.[117] However, Taiwan was removed from the USTR's 'special watch list' in 2009 (after implementing a graduated response scheme).[118]

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[112] Statistics provided in Giblin, 'Evaluating Graduated Response', above n 39, 165.

[113] Ibid.

[114] Ibid.

[115] *Copyright Act 2007* (Taiwan) art 90 *quinquies*, modified in May 2009.

[116] *Regulations Governing Implementation of ISP Civil Liability Exemption 2009* (Taiwan) art 2 – 6.

[117] Giblin, 'Evaluating Graduated Response', above n 39, 166.

Summary of key elements

Penalties - After 3 alleged infringements, the ISP will terminate the service in whole or in part.

Enforcement – Recent reports indicate a lack of application and enforcement of the scheme by the relevant agencies.[119]

United Kingdom

Public Scheme

The *Digital Economy Act 2010* (UK) outlined the legislative framework for addressing online copyright infringement.[120] It was intended to be a graduated response scheme and supplemented by secondary legislation outlining: a) the notification scheme called 'Initial Obligations Code'[121] and b) the allocation of costs under 'Costs Order'.[122] The regime is still being debated before UK Parliament and has not come into operation due to controversies such as the allocation of costs.[123]

Additionally, Courts may issue injunctions against commercial web sites that facilitate access to pirated films, music, games and books.[124] Article 8(3) of the *Information Society Directive* requires Member States to ensure 'that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right'.[125] In the UK this has been implemented in section 97A of the Copyright, Designs and Patents Act 1988, which grants the High Court the power 'to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.' Sub-section (2) provides that 'in determining whether a service provider has actual knowledge for the purpose of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to' the nature of any notice given to it regarding details of alleged infringement. [126]

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[118] Office of the United States Trade Representative, 'USTR Announces Conclusion of the Special 301 Out-of-Cycle Review for Taiwan' (Press Release, January 2009) <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/january/ustr-announces-conclusion-special-301-out-cycle-re>.

[119] Taiwan: International Intellectual Property Alliance (IIPA) 2013, *Special 301 Report on Copyright Protection and Enforcement* (8 February 2013) <http://www.iipa.com/rbc/2013/2013SPEC301TAIWAN.PDF>.

[120] *Digital Economy Act 2010* (U.K.) c 24 .

[121] Ibid ss 124D, 124E.

[122] Ibid s 124M.

[123] See Giblin, 'Evaluating Graduated Response', above n 39, 167-168.

[124] *Copyright, Designs and Patents Act 1988* (U.K.) s 97A. See eg, *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch); *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354.

[125] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* [2001] OJ L 167/10, art 8(3).

[126] See *Twentieth Century Fox Film Corporation v British Telecommunications plc* [2011] EWHC 1981 (Ch). The Court held that knowledge of infringement by specific individuals was not required, but rather what 'must be shown is that the service provider has actual knowledge of one or more persons using its service to infringe copyright. The more information the service provider has about the infringing activity, the more likely it is that

Private Arrangement

In May 2014, a program called the Voluntary Copyright Alert Programme (Vcap) was negotiated between the UK's four major ISPs (BT, Sky, Virgin Media, and TalkTalk) and industry associations for the music and film industries.[127]

Unlike the public scheme, ISPs will only send repeated 'educational' messages ('alerts') to users. A maximum of four alerts can be sent to an individual customer account. The language will 'escalate in severity' but it will not list consequences for the alleged infringing users nor take punitive measures such as suspension or termination of accounts. No further action will be taken by the ISPs after issuing four alerts.

While ISPs will keep records of the amount and recipients of alerts, they will not disclose the identities of the customers involved to the rights holders receiving their monthly break down of quantity of the alerts sent on their behalf.

Rights holders will pay the majority (75%) of the costs for setting up the system and administering it.[128]

In July 2014, the UK Government announced its support of a joint industry and government education campaign.[129] The scheme is supported by Creative Content UK and is based on Vcap.[130] It aims to send millions of educational notices to those detected by copyright owners infringing via unlawful peer-to-peer file-sharing.[131] It is suggested that households can only receive a maximum of four 'alert' letters per year.[132] Aspects of the scheme include educational notices, blocking of major piracy hubs such as torrent sites, restriction of ad revenues to those sites and providing information on alerts of where to find legitimate sources of entertainment content.[133]

Results

The 'alert system' will run for three years with regular reviews on its effectiveness and the BBC reported that 'the purpose of any campaign will be to inform and raise awareness rather

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the service provider will have actual knowledge'. See also, *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 which is a trade mark case, but also deals with relevant principles of liability, cost, effectiveness, and proportionality of granting such an injunction.

[127] Rosenblat, Bill, *UK ISPs to Implement "Educational" Graduated Response System* (14 May 2014) Copyright and Technology < http://copyrightandtechnology.com/2014/05/14/uk-isps-to-implement-educational-graduated-response-system/ >.

[128] Dave Lee, 'Deal to combat piracy in UK with 'alerts' is imminent', *BBC News* (online), 9 May 2014 < http://www.bbc.com/news/technology-27330150 >

[129] Department for Business, Innovation & Skills (U.K.) et al, 'New Education Programme Launched to Combat Online Piracy' (Press Release, 19 July 2014) <https://www.gov.uk/government/news/new-education-programme-launched-to-combat-online-piracy>.

[130] Dan Pearson, 'New UK anti-piracy scheme issues four warnings then . . . nothing' on *gamesindustry.biz* (22 July 2014) <http://www.gamesindustry.biz/articles/2014-07-22-new-uk-anti-piracy-scheme-issues-four-warnings-then-nothing>.

[131] Department for Business, Innovation & Skills (U.K.) et al, above n 130.

[132] Pearson, above n 130.

[133] Ibid.

than punitive action'.[134] However, officially ISPs will not have any obligations unless the *Initial Obligations Code* comes into effect.[135]

Summary of key elements

Disclosure of user information - A court may order an ISP to disclose the identity of the subscriber

Injunctions - Courts may issue injunctions against commercial web sites that facilitate access to pirated films, music, games and books

Educational notices - providing information on where to find legitimate sources of entertainment content

Restriction of ad revenues - sites that violate the scheme will have ad revenue restrictions imposed.

Blocking of piracy 'hubs' – prevents consumer and commercial infringement on a mass scale.

The scheme is only voluntary – it is 'supported' and funded by industry and the Government but ISPs do not have any 'official' obligations under legislation

Restriction of 'alerts' per year – only 4 letters per household will be issued.

Lack of sanctions for repeat offenders – ISPs are not required to impose sanctions against subscribers receiving continual notices

United States of America

Voluntary Scheme

In 2011, a number of ISPs and some content owners (including the Recording Industry Association of America and the Motion Picture Association of America and their members) in the U.S. agreed on a 'Memorandum of Understanding' to implement a 'copyright alert system'.[136] In early 2013, the Copyright Alert System (CAS) was officially activated to be operated by newly-formed, Center for Copyright Information.[137] The scheme involves ISPs passing on up to six notifications to users who have been identified by rights holders as having infringed copyright and implementing 'mitigation measures' in the latter stage of the

[134] Lee, above n 128.

[135] Office of Communications (U.K.), *Online Infringement of Copyright: Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012* (June 2012) OfCom - Independent Regulator and Competition Authority for the UK Communications Industries <http://stakeholders.ofcom.org.uk/consultations/infringement-implementation/summary>.

[136] See Center for Copyright Information, *About CCI* (2015) Center for Copyright Information <http://www.copyrightinformation.org >.

[137] Center for Copyright Information, *What is a Copyright Alert?* (2015) Center for Copyright Information <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/>.

notice process for repeat offenders.[138] 'Allegedly infringing content' and 'allegedly infringing material' refer to material which causes a notice submitter to have a 'good faith belief' that the use of the material is 'not authorised by the copyright owner, its agent or the law'.[139] Possible measures include temporarily reducing a user's internet speed or redirecting a user to a landing page until the user contacts the ISP regarding the matter.[140] Although there are no legislative requirements for ISPs to terminate users' accounts, ISPs will not be able to use safe harbour provisions if they do not have a termination policy for repeat offenders.[141] There is an 'Independent Review Process' run by the American Arbitration Association for users who believe that they have received an Alert in error.[142]

Legislation

US lawmakers appear concerned to ensure that legislative efforts against online piracy do not undermine innovation by large and small businesses.[143] Such measures must also respond to consumer concerns regarding censorship of access to legitimate materials, as well as the issue of access to personal data of users. Several controversial bills have been introduced in Congress to address online piracy, such as *Stop Online Piracy Act* (SOPA),[144] *PROTECT IP Act* (PIPA)[145] and *Online Protection and Enforcement of Digital Trade Act* (OPEN Act).[146]

The OPEN Act seeks to stop transfers of money to foreign websites whose primary purpose is piracy or counterfeiting and is supported by Google and Facebook.[147] It implements the United States International Trade Commission with investigatory, enforcement and costs powers.[148] SOPA and PIPA (which attracted massive hostility from the internet community) sought to require Internet providers and search engines to redirect users away from viewing the sites.[149] The appropriate balance of interests is yet to be found in US legislative efforts.

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[138] Lizzie Fuller, 'A line in the ether: attempting to find the balance of responsibility for preventing online copyright infringement' [2012] (March) *Internet Law Bulletin* 202, 203.

[139] *Digital Millennium Copyright Act* (2000) 17 USC s512(c)(3)(v).

[140] Center for Copyright Information, *What Do I Do if I've Received a Copyright Alert?* (2015) Center for Copyright Information <http://www.copyrightinformation.org/the-copyright-alert-system/what-do-i-do-if-ive-received-a-copyright-alert/>.

[141] *Digital Millennium Copyright Act* (2000) 17 USC s512.

[142] Center for Copyright Information, *What is a Copyright Alert?*, above n 137.

[143] Victoria Espinel, Aneesh Chopra and Howard Schmidt, 'Combating Online Piracy While Protecting an Open and Innovative Internet' (Official White House Response to VETO the SOPA bill and any other future bills that threaten to diminish the free flow of information, 14 January 2012) <https://petitions.whitehouse.gov/response/combating-online-piracy-while-protecting-open-and-innovative-internet>.

[144] Stop Online Piracy Act (SOPA), HR 3261, 112th Congress (2011-2012).

[145] PROTECT IP Act (PIPA), S 968, 112th Congress (2011-2012).

[146] Online Protection and Enforcement of Digital Trade Act (OPEN Act), S 2029, 112th Congress (2011-2012).

[147] Gautham Nagesh, 'Twitter, Facebook, Google endorse alternate online piracy bill', *The Hill* (online), 1 May 2012 <http://thehill.com/policy/technology/202627-twitter-facebook-and-google-endorse-alternate-online-piracy-bill?page=2#comments>

[148] Eric Engleman, *Anti-Piracy Role Added to U.S. Trade Agency in Draft Bill* (9 December 2011) Bloomberg Business <http://www.bloomberg.com/news/articles/2011-12-08/anti-piracy-role-added-to-u-s-trade-agency-under-draft-measure>.

[149] Stop Online Piracy Act (SOPA), HR 3261, 112th Congress (2011-2012); PROTECT IP Act (PIPA), S 968, 112th Congress (2011-2012). An online campaign against the bills was run by organisations such as Electronic

Results

In 2008, Google received 62 DMCA notices which increased to 441,300 in 2012 and last year it received more than 1 million each day, totalling 345,169,134 for 2014.[150]

In May 2014, the Center for Copyright Information released their first report addressing the size of the CAS program.[151] The report showed that: 1.3 million Alerts were sent out; over 70% of the Alerts were sent in the educational phases and less than 3% occurring at the final mitigation stage and only 265 challenges were filed, with no findings of false positives.[152] There were only 47 successful challenges in 2013, mainly based on an 'unauthorized use of account' defence, where a user proved that someone else had engaged in the infringing conduct.[153]

Summary of key elements

Penalties – consequences for users include temporarily reducing their internet speed and/or redirecting them to a landing page.

Independent Review Process –there is a dispute resolution mechanism run by the American Arbitration Association.

'Unauthorized use of account' defence – a user can successfully challenge a notice if they can prove someone else had engaged in the infringing conduct.

Agreement is voluntary - limited to parties to the agreement

Excessive number of notifications – users can have up to **six** notifications

c. Analysis of criticisms of graduated response

One of the key sources cited against implementation of a graduated response scheme, or otherwise imposing some obligation upon ISPs to respond to end-user infringement, is Rebecca Giblin's paper 'Authorisation in Context'.[154] Giblin identifies some key arguments against the implementation of a graduated response scheme requiring ISPs to respond to user infringement, including:

- that such a system will extend Australian law beyond its overseas equivalents;
- the possibility that any imposition of an obligation to act will extend beyond ISPs to other providers of goods and services, such as libraries, local councils and schools;

Frontier Foundation, Reddit, English Wikipedia, Google, Mozilla, Flickr and Fight for the Future. On 20 January 2012, the bills were shelved indefinitely.

[150] Mike O'Brien, 'Google's DMCA Notices Reach 345M in 2014', *Search Engine Watch* (online), 5 January 2015 <http://searchenginewatch.com/sew/news/2388720/googles-dmca-notices-increase-exponentially-year-to-year>.

[151] Center for Copyright Information, 'CCI Provides First Copyright Alert System Progress Report Highlighting Initial Accomplishments' (Press Release, 28 May 2014) <http://www.copyrightinformation.org/press-release/cci-provides-first-copyright-alert-system-progress-report-highlighting-initial-accomplishments/>.

[152] Ibid.

[153] Ibid.

[154] Giblin, 'Authorisation in Context', above n 9.

- it will create significant uncertainty, and may limit the court's discretion in determining what amounts to 'reasonable steps' in the case of authorisation liability;
- it will result in excessive terminations;
- there is no absolute evidence that the benefits of implementing such a system will outweigh the costs;[155]
- there is no need to place obligations upon ISPs to take more proactive steps to prevent infringement under principles of tort law; and
- that imposing obligations on ISPs may not be in the broader public interest and may restrict innovation.

Addressing these criticisms, the above analysis demonstrates that there are many overseas models, the best elements of which could be used as a foundation for an Australian system. There is no suggestion that implementing a Code of Conduct, long contemplated by the legislation, will place Australia out of step with other countries. Further, there is no suggestion that any Code of Conduct is intended to or will extend beyond ISPs. This can be dealt with in the drafting of relevant codes and of course in judicial interpretation of the authorisation provisions.

With respect to uncertainty and limitations on judicial discretion, it is clear from the UK cases dealing with injunctions that courts are up to the task of interpreting and applying discretions in the online context.[156] There should be no reason why a Code of Conduct would not in fact assist in the application and interpretation of authorisation liability, given the fact that this was contemplated when ss 36(1A) and ss 101(1A) were inserted in the Digital Agenda amendments. This will lead to greater certainty for creators and intermediaries alike.

With respect to the arguments based in tort law, although the relationship between tort law and authorisation liability is discussed in *Roadshow Films v iiNet*,[157] the relevance of tort liability (and in particular principles of duty of care in negligence) is overstated. Although it is correct to say that under the special duty scenario of pure economic loss that as 'a matter of general principle, Australian law does not impose obligations on unrelated organizations to take proactive steps to protect the economic interest of others',[158] these principles are only relevant to identifying a duty of care in negligence which is displaced where there is a relevant statutory regime, which effectively determines the scope of liability.[159] The statutory partial codification of authorisation under the Copyright Act is very different from the common law principles of negligence.

As Giblin correctly observes, the introduction of the additional factors was not intended to limit or curtail the development of the common law principles of authorisation established through earlier case law.[160] However the amendments introduced to the Copyright Act in the

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[155] See also, Giblin 'Evaluating Graduated Response', above n 39.

[156] See *Twentieth Century Fox Film Corporation v British Telecommunications plc* [2011] EWHC 1981, *Paramount Home Entertainment International Ltd v BskyB Ltd* [2014] EWHC 937 (Ch) and *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354.

[157] *Roadshow Films Pty Limited v iiNet Ltd* [2012] HCA 16 [107]-[110] (Gummow and Hayne JJ).

[158] Giblin, 'Authorisation in Context', above n 9, 1.

[159] Where there is a statutory or other regulatory scheme which provides for a significant degree of industry self-regulation or co-regulation the activity is unlikely to attract a duty of care under negligence as the scheme essentially covers the field. Therefore, principles of negligence do not apply, *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1.

[160] Giblin, 'Authorisation in Context', above n 9, 2.

Digital Agenda reforms in 2000 clearly contemplated the development and introduction of codes of conduct.

Practices of online distribution represent a new challenge to the principles of authorisation and the practices of creators. Research indicates that creators are endeavoring to make use of digital channels of delivery but are unable to keep up with or compete with free unauthorised channels of delivery. Some recalibration of this relationship must be reached to the benefit of both creators and the audiences who enjoy that content. Online service providers have a role to play in this marketplace. Thus any argument that imposing obligations upon ISPs is anti-innovation overlooks the impediments currently faced by those seeking to develop new legal, low-cost and consumer responsive digital distribution models.

Practical issues limiting liability, such as those identified by the High Court in *iiNet* need to be addressed. For example, the nature of information to be provided by rights holders regarding infringement clearly needs to be agreed between rights holder and service providers. The flaws identified by the High Court should not however be regarded as fatal to any finding of authorisation liability in any circumstances, nor did the Court intend them to be. It must be possible, contrary to Giblin's assertion, for rights holders and ISPs to establish what might constitute 'reasonable steps'. The internet industry is far more mature than it was in 2000, and considerably more robust and profitable than it was in 1996 when the WIPO Copyright Treaty was concluded in the context of a concern that electronic commerce should be given the opportunity to flourish, following the opening up of the internet to commercial traffic. It seems unreasonable for industry players to hide behind claims that it is all too hard to work out what rules would be fair. This is simply a cost of doing business.

The assertion that the costs of such a scheme will outweigh the benefits, will chill innovation and impose a significant cost on end users are made without evidence or foundation. However these same claims are repeated in Ergas and Fels' 'Assessment of Proposed Regulations to Address Internet Piracy'.[161] In their report, Ergas and Fels assert that the changes proposed in the *Online Copyright Infringement Discussion Paper* have the potential to impose costs on users and ISPs that greatly exceed the benefits of the scheme. They state that the imposition of authorisation liability may chill innovation. In addition, they state that it will create a gross imbalance in resources between corporate rights holders and individual end users, noting the costs of the system would fall on individual end users. Of course, this falls into the typical and false assumption that all rights holders are corporations. Many creators operate as sole traders, creating, marketing and protecting their own creations. Their key criticism is that there is little evidence of costs and benefits to the different parties, stating that it unclear whether graduated response is effective but 'there are strong grounds for questioning whether they are *efficient*'.[162] They assert that there would be no net benefit to the community as a whole from reducing online infringement, as the relevant works already exist. Of course, this completely overlooks any rights and indeed needs that a creator has to be rewarded for their creativity i.e. copyright and moral rights. It upends the copyright balance, removing any incentive to create. As noted above, it traverses the much touted suggestion that creators reap a positive benefit from downloading, and that any exposure of their work it an opportunity: 'illegal downloading means more people see the creative output and this can stimulate demand for associated products, for example, for licensed electronic games and memorabilia featuring the stars from a TV show.'[163] As noted above, this grossly

[161] Ergas and Fels, above n 3.

[162] Ibid 2.

[163] Ibid 5.

misunderstands the variety of models and markets across the creative spectrum. They also argue that a graduated response scheme would result in reduced creation of transformative works.[164] Again, this reflects a distortion of the copyright balance, which respects the rights of the original creator to be rewarded for their creativity, whilst leaving scope for new and repurposes creations. Much unauthorised online use is of course, file sharing, which does not reflect any new or innovative creativity, but rather straightforward copying in order to avoid paying for content.

Careful consideration should be given to overseas models in developing industry Codes of Conduct which address the weaknesses identified above. Appendix A gives a brief overview of some of the strengths and weaknesses of the various systems analysed above.

[164] Ibid 5.

4. CONCLUSIONS

It is clearly understood by most creators and the creative industries generally that copyright is a private, civil right. Therefore creators are not looking for a government body to police and enforce their rights. However, it is also the case that many of the creators whose rights are being infringed by unauthorised digital downloads are facing increasingly small revenues from their creative activities and therefore have little resources to pursue infringement actions. It would be very useful for them to have a certain and predictable legal regime which would assist them with the enforcement of their rights.

We need to consider what must be achieved by such as scheme. Evidence suggests that despite the increasing availability of authorised online content, consumers still opt in large numbers for free (unauthorised) downloadable content. Clearly if this situation were to continue this is a race to the bottom. Many creators we spoke to are already supplementing their creative income in other ways, which takes time away from creation. Alternative avenues for revenue, such as patronage, merchandise sales, Kickstarter etc are useful but have limited relevance to many creative models. Copyright provides a universal mechanism for balancing the needs and interests of consumers and creators. Therefore copyright needs to remain as the foundation stone of any revised online intermediary liability scheme. It is important also to recognize that no such scheme will be 100% effective. The success of such mechanisms cannot be measured according to a zero infringement rate, there will always be ways for those willing and able to engage in infringing conduct to access content outside of legitimate markets. Rather, the measures of success should be clearly identified at the outset and may draw their benchmarks from the best of the overseas models discussed above.

The *Online Copyright Infringement Discussion Paper* asked how can the impact of any measures to address online copyright infringement be measured? It must be accepted that stakeholders will need to determine the precise nature of the scheme and its key objectives before this can be determined: there is no easy, absolute solution to online infringement. However, it is clear that there is a need for a link between copyright infringement and any graduated response system. The Digital Agenda reforms contemplated and made room for this link within authorisation liability.

Internet service providers (ISPs) are 'inevitable actor[s]' in copyright infringements online because they grant access to the online network and make the transmission of infringements possible.[165] There is a clear need for legislative reform such as website blocking injunctions and 'notice-based' graduated response system, especially as Australians rank so highly in global online infringement. This will not expand Australian law beyond its overseas counterparts as European law permits Courts to order site blocking injunctions without any prior finding of wrongdoing or liability on the part of the ISPs.[166] Additionally, Australia is obliged under various free trade agreements to implement legal frameworks to encourage ISPs to assist rights holders to deter online copyright infringement.[167] The proposed measures will need to be proportionate to the infringing activity and balance the interests of right

[165] *Gesellschaft zur Wahrnehmung von Leistungsschutzrechten v Tele2 Telecommunication* [2009] ECR I-1227 [44].

[166] Michael Williams and Rebecca Smith, 'Searching for the silver bullet: How website blocking injunctions are changing online IP enforcement' (2014) 25 *Australian Intellectual Property Journal* 59, 59.

[167] See eg, *Australia-United States Free Trade Agreement*, opened for signature 18 May 2004 (entered into force 1 January 2005), Art 17.11; *Australia-Singapore Free Trade Agreement*, opened for signature 17 February 2003 (entered into force 28 July 2003) Art 12(1); *Australia-Korea Free Trade Agreement*, opened for signature 8 April 2014 (entered into force 12 December 2014) Art 13.9(29).

holders, ISPs and internet users. [168] They will also need to take account of concerns regarding censorship and privacy. Further, although termination of subscribers is an option,[169] it is clearly not an option favoured by rights holders.

The costs borne by ISPs implementing infringement reduction schemes is now regularly recognised by the courts as 'a cost of carrying on that business.[170] Additionally, ISPs already have the technological capability as they have invested in suitable 'technical measures' with respect to blocking of illegal material, such as child-pornography; they can act without reference to the personal details or activities of individual users[171] and have processes to address occurrences of incorrect filter operation and incorrect categorisation of sites and services.[172]

In *Cartier International AG v British Sky Broadcasting Ltd*, the Court held it to be 'inimical to the rule of law' to require right holders to meet a higher test for infringements online than offline infringements.[173] The court discussed issues of enforceability, proportionality and costs for adopting blocking measures. Other factors considered were: avoidance of barriers to legitimate trade; safeguards against abuse; availability of alternative measures; efficacy and impact on lawful users. The *Cartier*[174] principles were upheld recently and it was considered 'proportionate' for ISPs to adopt blocking measures to prevent infringements.[175]

Holding ISPs accountable under industry Codes of Conduct within the context of authorisation is the best approach because other actions have not proven effective. Legislating reform such as injunctions and notices will address copyright infringement by encouraging users to access legal content while providing clear and transparent management policies for infringing users. Australian creators are losing money and leaving the industry, it is important that the copyright balance be reinstated in favour of creative activity which is beneficial to society as a whole. This should also create an environment where new cost-effective and legitimate digital distribution schemes may evolve, which are responsive to consumer interests.

[168] Williams and Smith, above n 166, 65.

[169] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 194 FCR 285 (Jagot J).

[170] See eg, *Twentieth Century Fox Film Corp v British Telecommunications Plc* [2011] EWHC 1981 (Ch); *Paramount Home Entertainment International Ltd v BskyB Ltd* [2014] EWHC 937 (Ch).

[171] Williams and Smith, above n 166, 59.

[172] *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 [36].

[173] Ibid [173].

[174] Ibid.

[175] *1967 Ltd v British Sky Broadcasting Ltd* [2014] EWHC 3444 (Ch).

APPENDIX A – RECOMMENDATIONS FOR INDUSTRY CODE:

Why should you support a Graduated Response System?

A Graduated Response Scheme will best support the concept of an open internet and promote lawful access to digital content, like music and movies.

Strengths

- It will reduce repeat infringement rates.
- It does not violate the principles of data protection law.
- It reinforces the aims of copyright law.
- It is effective and incurs low operating costs as ISPs already have invested in suitable 'technical measures' to implement other schemes, such as *The Internet Watch Foundation's* blocking regime and parental control services.
- Avoids uncertainty, delays and expense of litigation.

What Schemes to avoid?

- A scheme focused on commercial piracy at the expense of consumer piracy.
- Voluntary 'industry' scheme 'supported' by the Government but ISPs not having any 'official' obligations unless legislation comes into effect.
- A scheme based in contract or other legal regime, rather than copyright.
- Private arrangements that only apply to limited ISPs and right holders, for example the 'three strikes scheme' agreement between the Irish branches of the EMI, Sony, Universal and Warner record labels and Eircom.
- A voluntary agreement only limited to parties to the agreement.
- ISPs having discretion whether they act on industry recommendations.
- An Industry Code which clearly states its principles do not provide legal grounds for liability, for example, *ISPAI Industry Code of Practice and Ethics* (Ireland).
- An Industry Code which clearly states it does not support any violations in relation to copyright law.

Many other jurisdictions have successfully implemented graduated response schemes to address and deter online copyright infringement, below you will find a list of some features to include and discuss when making policy submissions and representations to the government and industry groups:

1. Notification
2. Penalties
3. Enforcement
4. Defences
5. Appeals
6. Costs
7. Stakeholder involvement
8. User Rights

Notification

Feature/s to include:

- The content of the notices are educational and include provisions to deter future copyright infringements.
- The content of the notices offers advice on where to find legitimate sources of entertainment content.
- The definition of ISPs should include traditional ISPs and search engines but exclude organisations such as universities and libraries.
- ISPs inform the copyright owner once a notice has been sent.
- A court granted power to order an ISP to disclose the identity of the subscriber after repeat notifications.
- Compel ISPs to pass on all allegations of infringement made by a rights holder, irrespective of size and industry.
- Require ISPs to impose sanctions (e.g. shaping, temporary suspension) against subscribers receiving continual notices.
- Ensure ISPS notify search engines to remove infringing copies in a timely manner (7 – 14 days).
- ISPs will temporarily reduce the infringing user's internet speed while an allegation is investigated.

Feature/s to avoid:

- Permitting an excessive number of notifications.
- In the definition of file-sharing include peer-to-peer infringement without including other methods such as 'cyberlockers'.
- Limiting alerts per household.

Issues to discuss:

- How to prevent over-notification for non-copyright related material?
  ISPs and operators can apply to the Court to discharge/vary orders following a change in circumstances. ISPs already have processes to address occurrences of incorrect filter operation and incorrect categorisation of sites and services.
- What evidence should rights holders need to provide to support their allegations?

Penalties

Feature/s to include:

- *Financial remedies* for rights holders against the infringing user: other countries' remedies range from 1500€ (France) to NZ$15,000 (NZ).
- *Blocking* of piracy online 'hubs'.
- *Restricting of ad revenues* for sites facilitating online piracy.

- *Sanctions* such as account suspension, temporarily reducing the user's internet speed and/or redirecting users to a landing page.
- *Suspending and/or terminating subscriber accounts* for repeat infringers of copyright. In Ireland, infringing users can have their accounts suspended from seven days to twelve months.
- Users whose access is suspended will keep paying their subscription fees and they are unable to switch ISPs to avoid the sanction (see France HADOPI 1-2).
- Courts may issue *injunctions* against commercial web sites that facilitate access to pirated films, music, games and books.
- Courts can order *injunctions* against an ISP regarding copyright infringement.
- Orders will cease to have effect after a defined period, for example two years (UK).

Feature/s to avoid:

- Excluding legal grounds for liability in the Code's principles.
- Excluding sanctions for a user who receives a notice.
- Excluding graduated sanctions for a user who receives continual notices.
- Users can sign up with other online service providers while their accounts are suspended or terminated.

Enforcement

Feature/s to include:

- ISPs required to act on the Minister for Communications' orders under the *Telecommunications Act 1997* (Cth).
- ISP to have termination policies for repeat offenders in order to benefit from any safe harbour provisions.
- Legislative requirements for ISPs to discourage online infringements by their users.
- Ensure that blocking is targeted so that lawful internet users are not adversely affected.
- Orders can be varied by rights holders to include additional IP addresses and/or URLs in response to circumvention measures adopted by the website operators which involve changing IP addresses or URLs.

Feature/s to avoid:

- Exploitation of safe harbour provisions by ISPs.
- No actual legislative requirements for ISPs to discourage online infringements by their users
- The relevant agencies are not supported to enforce the scheme despite implementing strong legislation and industry self-regulation.

Defences

Feature/s to include:

- 'Unauthorized use of account' defence – a user can successfully challenge a notice if they can prove someone else had engaged in the infringing conduct.
- Separate liability on users who only negligently fail to secure their Internet connections but do not commit the infringements themselves.

Appeals

Feature/s to include:

- Provide an Independent Review Process.
- If an appeal is lodged, users will not affected until a Review has been completed.

Costs

Feature/s to include:

- The costs of issuing notices to be borne by the ISP.
- Rights holders to pay for and investigate the grounds for making an infringement allegation.
- Rights holders contribute to educational initiatives.

Feature/s to avoid:

- ISPs are unable to charge or receive reimbursement for performing their duties.

Stakeholder involvement

Federal Parliament:

- Conduct mandatory reviews of copyright legislation such as every five years.
- Enact supporting legislation:
    1. To prevent transfers of money to foreign websites whose primary purpose is piracy or counterfeiting
    2. To require ISPs and search engines to redirect users away from viewing piracy/counterfeiting sites
    3. Safe Harbor provisions for ISPs are conditional upon ISPs implementing graduated response measures
    4. To enable rights holders to apply for injunctions against intermediaries whose services are used by a third party to infringe copyright or a related right

ISPs

- Customer contracts will include:
    1. copyright protection clauses

2. account penalty clauses for online copyright infringement.
3. temporary reduction of an infringing user's internet speed when an allegation is upheld (after second notice).
4. traffic to sites promoting or facilitating copyright infringement will be redirected to a landing page

Rights Holders

- Only inform ISPs of bona fide allegations.
- Will cooperate with ISPs to provide evidence and information.
- Will not exploit the 'alert' scheme for ulterior commercial motives or non-copyright matters.

User Rights

Feature/s to include:

- Injunctions expressly permitting affected users to apply to the Court to discharge or vary the orders.
- ISPs implementing mechanisms to minimise the impact on lawful users.
- User privacy rights implemented and protected according to the *Australian Privacy Principles* including:
    1. Retention of user information for 6 – 12 months
    2. Restrictions upon access to and use of user information

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