



**RESPONSE TO THE “Online Copyright Infringement” Discussion Paper
BY THE AUSTRALIAN DIRECTORS GUILD
September 2014.**

Australian Directors Guild
PO Box 211, Rozelle. NSW. 2039.
www.adg.org.au
Tel : 1300 539639

ABOUT THE AUSTRALIAN DIRECTORS GUILD

This submission is made by the Australian Directors Guild (ADG), the industry association representing the interests of film and television directors, writer/directors, documentary filmmakers, animators and independent producers throughout Australia. Formed in 1980, the ADG has over 700 members nationally. These members include directors in feature film, television drama, documentary, animation and new media. They include some of the highest profile directors in the world including BAZ LUHRMANN, PETER WEIR, GILLIAN ARMSTRONG, FRED SCHEPISI and PHILLIP NOYCE to name a few.

The ADG works to promote excellence in screen direction, to encourage communication and collaboration between directors and others in the industry, and to provide professional support for its members. It maintains a high profile and leading cultural and policy role through its efforts to address issues affecting the industry from a broad perspective.

The ADG is affiliated through the International Association of English-Speaking Directors Organisations (IAESDO) with the Broadcasting, Entertainment Cinematograph and Theatre Union (BECTU), the Directors Guild of America (DGA), the Directors Guild of Canada (DGC), Directors UK, the Screen Directors Guild of Ireland (SDGI) and the Screen Directors Guild of New Zealand (SDGNZ).

The ADG is also a member of the Australian Copyright Council.

OVERVIEW

We welcome the Australian Governments willingness to try and tackle one of the screen industries biggest problems – piracy. For many in the screen production industry this is the greatest threat to the livelihood of thousands of Australians working in our industry. From directors to producers to ushers to digital content distributors to regional cinema operators to the general public, piracy affects the many thousands of workers across Australia who rely on it for their living.

Many critics of our industry state that piracy only affects the big Hollywood Studios and has little impact on our production industry. This is completely wrong. I would like to start with a simple story about an Australian film that has experienced the destructive force of piracy recently. The Australian film “100 BLOODY ACRES” is a comedy horror film about two brothers who hit on the idea of using humans to spice up their fertiliser. It was premiered at the Melbourne International Film Festival in 2013 and received positive reviews. When it was set to screen in the US the critics there also liked it and so the signs for its success were good. But when released box office was low and one of the contributing factors was online piracy. As the producer Julia Ryan stated when asked about the issue, she stated:

“But unfortunately our film was on bit torrent sites the second day of the US release and even in Australia, people have gone up to the writer/directors to say ‘Congrats. I downloaded your film and loved it.’¹

The impact of this on an Australian film and its creators is real. The lower than expected box office due to piracy will contribute to a view of the film as being “a failure at the box office”. This will have a direct impact on the producer’s ability to raise finance for another film and the “bankability” of the director. It has an immediate and devastating effect on the careers of its creators even though the film was received favourably.

So we are not talking about some rich Hollywood Studio who maybe can afford to take a hit like this, we are talking about a fragile ecosystem that is the Australian screen industry.

But even Hollywood blockbusters can impact on Australians in the creative industries. Take the recently released “The Expendables 3”. It was downloaded over 1.5m times in the US and the box office collapsed. This was the first Hollywood feature for Australian director Patrick Hughes. Not an auspicious start for an Australian breaking into the Hollywood industry.

The education of the general public to piracy is an ongoing one and something that the industry tackles through various means but the above stories clearly show that we also need other mechanisms to make people aware that what they are doing is theft and that it has an impact on the future of the screen industry. Clearly sites that provide these “pirate” copies must be

¹ IF Magazine interview, 5th August 2013.

taken down or at least blocked but we can also have an impact by making it more difficult for people to access illegal content.

Recently the industry launched a new website called the "[Digital Content Directory](#)" to provide the general public with a way to legally access content. We do not believe that access is the real issue and that the majority of content can be legally purchased or viewed online and in cinemas. For even when content is provided online at a reasonable price people still pirate the content.

It is also necessary to refute some arguments that too much recourse to remedies such as those proposed in this discussion paper will be detrimental to the consumer. We feel this does not recognise the real world that all consumers inhabit. The contracts and obligations that ISP's and other providers place upon the consumer are designed to limit their risk in all possible ways. This is a natural part of doing business. We believe that just as the consumer has an obligation to the provider of these services, the provider also has an obligation as part of the business relationship and this obligation is to ensure it is acting legally. If the consumer does not agree to follow the rules of the supplier then they cannot use the service. The same should apply to suppliers of such services.

We therefore support changes to the copyright act to assist with enforcement. It should be noted that there has been a regime in place since 2000 when the Copyright Amendment (Digital Agenda) Act 2000 was legislated. The act was supposed to be informed by an industry code of conduct that would allow the ISP's to deal with the issue of copyright infringement. This code was never developed. This has created uncertainty for ISP's as to what steps they can take to stop unauthorised copyright infringement.

The government needs to act to protect copyright holders, as the ISP's seem incapable of devising any code of conduct for its industry. The High Court's decision in the Roadshow Films v iiNet Limited case has taken away any potential for a negotiated code with the industry.

So it is clear that we need leadership in this area from the government and that is why we strongly support the government's wish to tackle the issue through this discussion paper.

EXTENDED AUTHORISATION LIABILITY

It is clear to us that the inability of the industry to agree on a code of conduct means there has been substantial industry failure. Therefore the government must step in to mandate a code. Fourteen years is long enough to wait for the industry to act and the increase in piracy and access to digital devices to facilitate this piracy is increasing daily.

When content creators have attempted to remedy copyright infringements through the courts, as is the Roadshow Films v iiNet they have failed thus leaving the content creation industry open to widespread piracy.

We also support Music Rights Australia's (MRA) proposal to develop a scheme based on the concept of willful blindness as put forward in their submission to this review. This proposal would mean that carriage service providers who have had infringements drawn to their attention would be obliged to act. We refer to and support the alternative proposal put forward by the MRA.

Question 1: What could constitute 'reasonable steps' for ISP's to prevent or avoid copyright infringement?

We believe that ISP's have a responsibility to act if copyright infringement is drawn to their attention. There have been a number of successful "steps" outlined in a number of other jurisdictions that have successfully reduced copyright infringement. The government should copy best practice from international examples.

As outlined in the opening section of the discussion paper a number of jurisdictions have opted for notices to users followed by a variety of sanctions. These should be studied and then most relevant to our situation used.

Question 2: How should the costs of any 'reasonable steps' be shared between industry participants?

As with many ISP's, systems have been developed to notify customers of a range of issues or options that they have when they engage the services of a company to deliver internet services. This includes billing, data usage and new opportunities. It is clear that each of the ISP's are well resourced in this area. We therefore believe that the cost of any 'reasonable steps' will be minimal.

As with other jurisdictions we believe that this cost could be shared between content creators and ISP's. There would be no doubt that the ISP's will pass on this cost to consumers. But this should not be an argument to not proceed with system of notification.

Question 3: Should legislation provide further guidance on what should constitute 'reasonable steps'?

As we have indicated above the mandating of an industry code of conduct should alleviate any need further guidance in the legislation. However, there may be a requirement for further guidance if we are unable to negotiate a successful code.

Question 4: *Should different ISP's be able to adopt different 'reasonable steps' and, if so, what would be required within a legislative framework to accommodate this?*

It is logical to assume that different ISP's should be able to adopt different 'reasonable steps' depending on their circumstances.

Question 5: *What rights should consumers have in response to any scheme or 'reasonable steps' taken by ISP's or rights holders? Does the legislative framework need to provide for these rights?*

We would assume that both consumers and ISP's would have recourse to the legal system and be able to respond accordingly. We do not feel their needs to be any new legislative framework to provide for these rights.

EXTENDED INJUNCTIVE RELIEF TO BLOCK INFRINGING OVERSEAS SITES

We agree with proposal 2 that would enable rights holders to apply to a court for an order against ISP's to block access to an Internet site operated outside of Australia, the dominant purpose of which is to infringe copyright.

This will enable rights holders to avoid costly litigation that would require engaging legal counsel outside of Australia. We hope that a streamlining of the process would be possible so that ISP's will not contest any injunction taken out by rights holders.

The courts are able to grant such injunctions and can make a judgment on their merits.

Question 6: What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?

This should be a matter for the court to decide from the evidence submitted.

EXTENDING SAFE HARBOUR SCHEME

On face value we would support the proposal to extend the safe harbour scheme to entities engaged in the activities set out in sections 116AC to 116AF. We support the Australian Copyright Council (ACC) proposal that the “amendment is predicated on the basis that the safe harbour will not act as a disincentive for service providers to engage in licensing solutions”.

We like, the ACC, are wary of the impact that such an amendment might have when so many of the high profile service providers do not operate in Australia and are unlikely to submit to Australian jurisdiction.

Question 7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

We support the proposed definition.

BUILDING THE EVIDENCE BASE

Question 8: How can the impact of any measures to address online copyright infringement best be measured?

It is difficult to measure the success of any policy that is aimed to limit copyright infringement. The key to any measure is the co-operation of the major players in the industry, both the rights holders and ISP's. Agreement on a methodology and a way to measure results is essential. Without such a methodology and agreement between parties then we are doomed to fail and for the future of our content creators this is not an option.

OTHER APPROACHES

Question 9: *Are there alternative measures to reduce online copyright infringement that may be more effective.*

As we have mentioned earlier in this document the content creation industry is taking measures regularly to reduce copyright infringement and make it easier for the consumer to access the content they want when they want it. The introduction of a [Digital Content Directory](#) to provide consumers with easy access to content is a recent example.

However, we believe that the argument that content is not available legally is a furphy. Most of the arguments in regards to access usually have to do with access when the consumer wishes to access that content and not whether it can be purchased. The consumer is driving change in this area and we have seen a number of developments such as same day release of content around the world or most recently the ABC screened the first episode of the new Doctor Who series at the same time as it was screened in the UK. Over 140,000 Australians watched this episode at 4:50am on a Sunday morning. It is interesting to note that a much bigger audience waited for it to be screened that evening on the ABC (1.6m) and another audience viewed it on iView and in cinemas where they paid for the privilege. In this circumstance the content provider is bowing to consumer demand and we believe the rapid change in the delivery of content is catching up with consumer demand. But it is not always going to satisfy consumers and hence remedies need to be put in place to support those rights holders.

The other area that requires a serious approach is education. It is clear that most of the pirating habits that we see in consumers has been developed at an early age. Serious programs aimed at school age children in schools are needed. The content industry has for years run campaigns to educate consumers about the impact of piracy but this has not been well targeted or supported. It should be mandatory for schools, which on the whole are converting to a totally digital environment; to develop programs to educate young people about the impact of piracy. This has been done successfully in schools with regards to bullying and other issues. Advocacy at this level is essential.

We also support the MRA's suggestion of an advertising code that will reduce the ability of sites exploiting pirated content to profit from their illegality. It is ironic that most of the pirate sites make their money from advertising. These advertisers must be made aware of the illegality of their advertising.

REGULATION IMPACT STATEMENTS

Question 10: *What regulatory impacts will the proposals have on you or your organization?*

The regulatory impacts of any proposals will impact on our members – the directors who create content across all screens. The real impact on our members will be felt if there is no change to the current situation. As we outlined in our overview a recent Australian film felt the full impact of piracy on its potential US box office. This will impact the ability of the directors and producers to make more films. THIS IS THE REAL IMPACT ON OUR INDUSTRY IF NOTHING CHANGES.

It is ironic that the reason consumers sign up to access Internet services is to access content. Without the content my members produce there would be no market for the ISP's. We believe the onus should therefore be put on those providers who benefit from the rights holders work to support those rights holders to help maintain the production of high quality Australian content. To do otherwise would be to assist in the demise of those rights holders.

Questions 11: *Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISP's?*

We do not believe there are any unintended implications or additional burdens for entities other than rights holders and ISP's. Consumers would benefit from these changes, as it would make them less likely to fall prey to unscrupulous content providers and educate them to the issues that help us create a vibrant and exciting local culture.

Kingston Anderson
Executive Director
Australian Directors Guild
September 2014.