

4 September 2014

Screen Producers Australia's response to the Online Copyright Infringement Discussion Paper, July 2014

Screen Producers Australia was formed by the screen industry to represent small-to-medium enterprises across a diverse production slate of feature film, television and interactive content.

As an employers association, we consult with a membership of almost 300 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and appointed Policy Working Group representatives. These members employ hundreds of producers, thousands of other practitioners and account for more than three-quarters of a billion dollars worth of annual production activity.

On behalf of these businesses we are focused on delivering a healthy commercial environment through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes this opportunity to provide input to the *Online Copyright Infringement Discussion Paper 2014* (the Paper). This response addresses the following:

- **Extended Authorisation Liability**
- **Extended Injunctive Relief**
- **Extended Safe Harbour Scheme**
- **Implementation costs**

Contact details

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Recommendations

- Screen Producers Australia strongly supports measures to mitigate sharing of screen content in violation of copyright. Such measures should include a code of practice to enforce a light touch graduated response framework to address peer-to-peer online piracy.
- Amendments proposed in the Paper regarding Extended Authorisation Liability provide an important incentive to develop such a code.
- Screen Producers Australia supports the proposal that the Copyright Act be amended to enable rights holders to apply to a court for an order to block access to an internet site operated outside Australia. As in other jurisdictions ISPs would be required to block access to illegal sites.
- Reduced revenues to Australian distributors and broadcasters as a result of piracy will ultimately translate into less investment in local production that in turn reduces benefits to consumers.
- Screen Producers Australia notes that issues raised in response to the Attorney-General's Department 2011 consultation paper Revising the Scope of the Copyright 'Safe Harbour Provisions' regarding the extension of Safe Harbour provisions to educational institutions have yet to be addressed. There is no need to extend Safe Harbour provisions to educational institutions and to do so may have unintended consequences.
- The measures outlined in the Paper to address online piracy are sensible and necessary. However they should not impose unreasonable or unsustainable financial burdens on screen producers. To do so will threaten the well-being of the local production sector, undermine the efficacy of the scheme and may ultimately be to the detriment of the screen production industry.

Specific comments on recommendations

Australia's independent producers work in a highly competitive industry. Competition both domestically and from international providers is fierce. Unlike other parts of the world there are no natural or regulatory barriers to entry into the Australian audiovisual marketplace. In response to this fierce competition and to realise certain worthy cultural outcomes the Australian Government intervenes to support Australian content makers through several policy levers: direct subsidy, tax incentives, content standards on commercial television licensees and appropriations to national broadcasters.

The ecology of screen industry in Australia draws a fine balance between these government interventions and commercial investment and competition. This has contributed to a thriving industry of innovative, highly creative and successful professionals. However, due to the relatively small size of the local production industry and intense competition from foreign providers, the local market cannot operate and thrive entirely without intervention. In fact, intervention on a range of fronts is essential to the continued success of the screen content industry and the realisation of key cultural outcomes.

In this context, copyright infringement and online piracy represent a real concern for Australian producers. Intervention on piracy to protect the rights of local producers and creators is as important as

other market support measures. Without such intervention the future success of the local screen production industry is threatened.

In addition, investment from distributors and broadcasters into Australian productions is an essential part of any Australian production plan. Reduced revenues to Australian distributors and broadcasters as a result of piracy will ultimately translate into less investment in local production that in turn reduces benefits to consumers.

Finally and perhaps most importantly not only is online piracy a threat to the success of the local production sector it is a clear infringement of content creators' rights. Putting aside arguments about the mechanism and means of addressing online copyright infringement, it is clear that the basic rights of individuals to their creative works are violated by online piracy.

In light of this, Screen Producers Australia supports the measures outlined in the Paper as sensible and necessary to the extent that they do not impose unreasonable or unsustainable financial burdens on producers. Action must be taken to implement effective and practical measures to address online piracy and support content creators by protecting, as far as practicable, creators' rights. But these benefits should not be undermined by unsustainable costs to the production sector.

The significant and ongoing changes to the consumption and distribution of screen content as a result of technological advances will naturally disrupt markets. Such changes will inevitably mean that existing regulatory and legal protections for content products and content makers will also be disrupted and potentially outdated.

Piracy is having a significant impact on creators' ability to realise a fair return on their works. The widespread pirating of music and the significant fall in revenues for the music industry is one obvious example. The Australian Recording Industry Association's wholesale figures for 2013 showed a net decline of 11.7 per cent in sales compared to 2012¹. Other markets report similar declines, such as the Recording Industry Association of America. While it is difficult to draw a definite conclusion about the scale of piracy's impact in the face of changing business and delivery models, it is highly likely piracy has played a significant role in music sales decline.

It has been suggested that if screen content was made available more widely, on more platforms and at a lower price then consumers would be less likely to pirate content. Music content is, and has been, available on a wide range of legal platforms at accessible prices for some time and yet piracy remains a significant issue for the industry.

Similarly, a brief assessment of streaming figures provided by TorrentFreak, and widely quoted in media to demonstrate Australian's appetite for piracy, shows that even in markets where content is available almost immediately after its first broadcast and at accessible prices piracy remains an issue.

According to TorrentFreak, Australians topped the list for illegal downloads of the finale of Breaking Bad making up 18 per cent of the total. However, the United States came in second at 14.5 per cent and the

¹ ARIA: <http://www.aria.com.au/pages/documents/YE12-13-V2-subscriptionadjustment.pdf>

UK third at 9.3 per cent² and in both of those markets the episode was available on other platforms within 12 hours (i.e. iTunes, Amazon and Netflix).

Screen Producers Australia supports making its members' content available on a wide selection of platforms. Yet, making works available at a reasonable price and in a reasonable timeframe does not guarantee a solution to piracy.

For many consumers a paid service cannot compete with the ease of downloading content for free no matter how quickly content is made available. In these circumstances a measured, fair and effective regulatory framework that balances the rights of content creators, content users, Internet Service Providers (ISPs) and consumers is required; as has been implemented in other jurisdictions around the world.

1. Extended Authorisation Liability

Extending authorisation liability must be treated with careful consideration in order to avoid unintended consequences. Copyright law does not hold ISPs to be solely responsible for enforcing copyright. Responsibility is applied in specified circumstances. It should remain the case that ISPs are not forced into policing copyright on the internet. However, as discussed in the Paper subsections 36 (1) and 101 (1) of the Copyright Act 1968 (the Copyright Act) are:

“intended to create a legal incentive for service providers such as ISPs to take reasonable steps to prevent or avoid an infringement where they are in a position to do so.”

Screen Producers Australia supports measures to mitigate peer-to-peer sharing of screen content in violation of copyright. A flexible and responsive framework will provide the best means of addressing copyright creators' and ISP's concerns as well as the best mechanism for responding to technological and market changes.

Screen Producers Australia equally supports the concept of an industry code of practice developed in consultation between ISPs and content rights holders to enforce a light touch graduated response framework to address peer-to-peer online piracy. Ideally such a code would be developed on a voluntary basis however negotiations to date have failed. It appears a legislative response is required to incentivise the development of a code.

The amendments proposed in the Paper provide an important incentive to develop a code. Such a code should include graduated response measures comprised predominantly of warning notices and appropriately ascribe responsibilities between ISPs and content creators and owners.

The code should address ISPs' and content owners' concerns about brand and commercial damage associated with issuing warning notices by appropriating necessary measures from foreign markets such as the United States. It should also include specific consumer protections such as a right to appeal warning notices.

² TorrentFreak: <http://torrentfreak.com/breaking-bad-finale-clocks-500000-pirated-downloads-130930/>

2. Extended Injunctive Relief

As demonstrated in foreign jurisdictions a specific injunction power could be used to disrupt online copyright infringement from illegal sites operating outside Australia. Websites that make available copies of screen content in breach of copyright make revenue for their operators via advertising and generate significant online traffic.

Copyright owners receive no compensation for the use of their work and no share of advertising revenue. There is no practical means currently in place in Australia for copyright holders to enforce their rights or to prevent access to overseas-based content in these circumstances.

Screen Producers Australia supports amending the Copyright Act to enable rights holders to apply to a court for an order to block access to an internet site operated outside Australia. As in other jurisdictions ISPs would be required to block access to illegal sites. Impacts on ISPs could be minimised by allowing multiple filing and by encouraging the development of cooperative arrangements.

Carriage Service Providers (including ISPs) assist law enforcement agencies to handle illegal activities undertaken across networks by third parties on a regular basis. Tackling copyright infringement could be treated in a similar manner.

3. Extended Safe Harbour Scheme

Screen Producers Australia notes the concerns raised other industry bodies, including Screenrights and the Australian Copyright Council, in response to the Attorney-General's Department 2011 consultation paper *Revising the Scope of the Copyright Safe Harbour Provisions*.

With specific regard to educational institutions there would appear to be no obvious reason for extending the Safe Harbour protections as proposed. In particular, Screen Producers Australia agree with Screenrights in highlighting that further consideration needs to be given to the potential interaction between such an extension and the Part VA licence. Where there is no call for reform or problem to be addressed then there should be no need to modify the Safe Harbour scheme.

Furthermore, the specific requirement for an account termination policy that is currently a part of the Safe Harbour scheme would appear to be a poor fit for the types of access provided by educational institutions. There is always a risk that changes, such as those proposed, could have unintended consequences and hence should be treated with caution.

4. Implementation costs

To incentivise the development of efficient online copyright protection processes parties should bear their own costs. Screen Producers Australia supports implementing a framework that will not impose onerous and unsustainable cost burdens on independent producers either directly through a regulated scheme or as a cost passed on by broadcasters and distributors. Ultimately any framework to address online piracy should not be so costly to copyright holders that it is not used.

Margins for independent producers and other creators of Australian content are very thin. The sector is characterised by a high number of small businesses and the diversity of Australia screen content is in part a reflection of the diversity of the sector. Small businesses, such as those that make up the majority of the Australian screen production industry, are not well placed to bear additional cost burdens.

Should the management of an online piracy framework become another significant cost on producers it would undermine any gains of enforcing the scheme and may ultimately be to the detriment of Australian producers and consumers.

The Australian screen production sector creates diverse, high quality and culturally important output. However the high costs of screen production and the relatively small size of the local industry, characterised by a high proportion of small businesses, mean that it is vulnerable.

Online piracy represents a serious threat to the whole of the Australian screen industry and is in violation of individual creators' property rights. There is a clear need to ensure Australian producers are provided with a fair and practical recourse to deal with online piracy.

In summary, Screen Producers Australia supports the measures proposed to extend authorisation and injunctive relief and the development of a code of conduct to help address online piracy. Any scheme, however, should not impose onerous costs on producers. To do so would be to threaten the well-being of the local production sector, to undermine the efficacy of the scheme and may ultimately be to the detriment of the screen production industry and consumers.