



**SUBMISSION IN RESPONSE TO THE AUSTRALIAN GOVERNMENT'S
ONLINE COPYRIGHT INFRINGEMENT DISCUSSION PAPER**

SEPTEMBER 2014

1. **BBC WORLDWIDE**

BBC Worldwide is the main commercial arm and a wholly owned subsidiary of the British Broadcasting Corporation (BBC). In Australia, BBC Worldwide owns and operates four subscription television channels -BBC First, UKTV, BBC Knowledge and CBeebies- and is also responsible for the distribution and promotion of the BBC World News channel. BBC Worldwide Australia invests substantially in the creation of original Australian content, including acclaimed television series *Top of the Lake* and *Banished*, and is forecast to spend over \$4,000,000 in the 2015 fiscal year. It also distributes close to 8,000 hours of content every year on all free-to-air and most subscription channels in Australia. For its subscription television channels, BBC Worldwide Australia acquires over 4,500 hours of content for broadcast. This content is comprised of programming created by the BBC and other third party producers. BBC Worldwide also operates iPlayer – an online video streaming service which allows Australian subscribers to watch BBC television programs over the internet.

In addition to its channels, SVOD and content distribution businesses, BBC Worldwide also brings DVDs, live events, merchandise and magazines to the local market, develops TV formats with production companies for local broadcast, and commercialises BBC's world renowned bbc.com news website.

BBC Worldwide welcomes the opportunity to provide this submission in response to the Australian Government's Online Copyright Infringement Paper. Please contact Emren Kara, Head of Legal, at emren.kara@bbc.com if you require any clarification or further information.

2. **KEY SUBMISSIONS**

- Online copyright infringement in Australia is both widespread and prevalent¹. Such activities have a demonstrable and lasting impact on the sustainability and vitality of the Australian media industry, which affects its ability to deliver high quality content and services and contribute to the wider economy. Effective and decisive action is urgently needed to address the rising tide of online copyright infringement.
- BBC Worldwide favours an integrated approach to fighting online copyright infringement encompassing twin elements of enforcement and education. To that end, BBC Worldwide supports the introduction of a co-operative scheme whereby

¹ See, for instance, International Business Times, '3m Australians download from Pirate Bay and Kickass Torrent' (20 June 2014). Available at: <http://au.ibtimes.com/articles/556454/20140620/pirate-bay-kickass-torrent-australia-piracy.htm>

both content-owners and Internet Service Providers share in the responsibility to reduce and eliminate online copyright infringement.

- BBC Worldwide strongly supports the introduction of a legislative framework designed to enshrine minimum levels of action required of Internet Service Providers, internet users and content owners and facilitate ongoing consultative discussions between these stakeholders.
- An essential part of any such scheme would involve educating the public about the real impact of online copyright infringement and sources of legal content, as well as ensuring that consumers have better access to legitimate content services on a wide range of media platforms.

3. BBC WORLDWIDE AND COPYRIGHT INFRINGEMENT IN THE DIGITAL AGE

The rapid evolution of file-sharing technologies and the increased speed of the Internet have popularised the illegal dissemination of media content and infringement of other intellectual property. Since the evolution of peer-to-peer software protocols to incorporate decentralised architectures, which has allowed users to download content from numerous host computers, the detection and prosecution of copyright violations has become a complex task. This situation is further amplified by the adoption of virtual private networks (VPNs) and proxy servers by some users, allowing them to circumvent geo-blocking technologies and further evade detection.

The overall impact of online copyright infringement on content rights holders is considerable and extensive. A 2010 joint study undertaken by IPSOS and Oxford Economics found that, allowing for effects on other industries, A\$1.37 billion in revenue was lost across the entire Australian economy as a result of movie piracy, with 6,100 jobs foregone and tax revenue losses of A\$193 million². These already concerning numbers would materially increase when piracy of television, music and other content are included.

BBC Worldwide is both a significant rights holder and a substantial rights acquirer, making a global investment in new content in 2013-14 of over £200.6 million and, in the same period, paying some £116.4 million in royalties, profit share and rights investment to independent rights holders.³ Online copyright infringement is a very real issue for BBC Worldwide and causes immeasurable economic damage. For instance, as a result of a temporary localised

² Ipsos Media CT/Oxford Economics, 'Economic Consequences of Movie Piracy: Australia' (January 2011, Report for AFACT). Available at: http://www.screenassociation.com.au/uploads/reports/IPSOS_Economic_Consequences_of_Movie_Piracy_-_Australia.pdf

³ BBC Worldwide 2013 – 2014 Annual Review. Available at: <http://www.bbcworldwide.com/media/100452/annualreview2014.pdf>

failure in BBC Worldwide's online security, unauthorised access was recently obtained to materials relating to the new series of *Doctor Who*. This material was subsequently circulated on numerous file sharing and social networking websites without BBC Worldwide's permission as a spoiler to the BBC's own global television premiere.⁴ Despite the BBC dedicating considerable resources to taking down and blocking access to these *Doctor Who* materials, there were almost 13,000 download attempts of these materials from Australian IP addresses in the period between their unauthorised access and the expiration of the usual catch-up windows.

BBC Worldwide has worked hard to meet changing audience demand by providing access to content in new ways, with the goal of minimising the effects of online copyright infringement. This has included enabling a global simulcast of 'event' programming, such as the *Doctor Who* 50th anniversary special⁵ and 'fast tracking' the delivery of programs to local broadcasters within hours of UK broadcast.⁶

It is BBC Worldwide's view that a strong and effective copyright enforcement regime is the foundation of a thriving creative industry. Like others in the media production and distribution sector, BBC Worldwide looks to a robust legislative framework to protect its major investments in content production, and to ensure that creative producers receive a fair return for their intellectual property. This, in turn, will ensure that audiences can benefit from high quality content and new digital services, as well as investment in the economy.

4. ONLINE COPYRIGHT INFRINGEMENT DISCUSSION PAPER

Extended Authorisation Liability

1. *What could constitute 'reasonable steps' for ISPs to prevent or avoid copyright infringement?*

BBC Worldwide favours a 'graduated response' model combining educational messages followed by warnings and backstop punitive measures punitive measures for the most serious cases, and incorporating elements from the British, American and New Zealand schemes. Such a scheme would require Internet Service Providers (ISPs) to work cooperatively and consultatively with rights holders to combat online copyright infringement. Punitive or more serious

⁴ See "Doctor Who Series 8 Leak Update: Episode 4 *Listen Now Available*". *Combom*, 23 August 2014. Available at http://www.combom.co.uk/2014/08/doctor-who-series-8-leak-update-episode_23.html

⁵ See, for instance, "ABC to simulcast Doctor Who 50th anniversary special" *Mumbrella*, 2 October 2014. Available at <http://mumbrella.com.au/abc-simulcast-doctor-50th-anniversary-special-180854>

⁶ See, for instance, "ABC working to put new Doctor Who season on iView first while fast-tracking broadcast", *Gizmod*, 2 July 2014. Available at <http://www.gizmodo.com.au/2014/07/abc-working-to-put-new-doctor-who-season-on-iview-first-while-fast-tracking-broadcast/>

measures should be reserved for those consumers who ignore prior warnings and persist in infringing copyright material. Consumers should have the right to challenge or appeal any notification regarding alleged copyright infringement.

It is submitted that a number of features designed to reduce online copyright infringement would constitute 'reasonable steps' under such a scheme — more specifically:

- ISPs should be required to respond to notifications from rights holders who discover infringing content online to remove such content or to identify copyright infringers, and to take action to address such concerns. Any such notification must contain enough information to allow the ISPs to verify the accuracy of any allegations made by the rights holders.
- It is reasonable for ISPs to be placed under an obligation to identify user behaviour that is 'suspicious' and indicative of a user engaging in conduct that infringes copyright. Such behaviour may include the illegitimate use by internet users of IP obfuscation tools in combination with high download volumes. The determination of what an 'illegitimate' use of such tools is, and the threshold of what would be considered a 'high' download volume over a period of time, would need to take into account legitimate explanations in order to avoid false positives and to safeguard the fundamental rights of consumers — such matters would be open to further industry discussion and agreement.
- ISPs should warn any alleged copyright infringers through a graduated notification system that what they are doing is illegal and, at the same time, educate them about the law, the importance of copyright to funding content and services they enjoy and where they can access the material they want legally. This is because the ISPs are already in a direct contractual relationship with consumers and are best placed to act in this situation. However, if the consumers do not abide by the notifications then more serious action may need to be taken.
- ISPs need a policy to deal with repeat offenders. The exact parameters of what would be the agreed measures or procedures should be the subject of an ongoing dialogue between the industry and ISPs. Possible sanctions could include subjecting repeat offenders to a slowing down of their bandwidth but stopping short of cutting off the internet service, save except in the most serious and egregious circumstances, as is the case in the United States. A competent Court or authority should be involved in such cases.

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

BBC Worldwide recognises that the actual costs related to the introduction and implementation of a scheme designed to prevent and address copyright infringement will depend on the measures agreed between the relevant stakeholders. As such, it is appropriate that industry participants discuss costs and cost-sharing between the rights holders and ISPs as part of the broader dialogue on copyright infringement and enforcement measures.

Content rights holders like BBC Worldwide and its related entities have invested heavily in a number of measures to combat copyright infringement; this includes investing heavily in building legitimate online services to provide better (and legal) access to content, consumer education initiatives, as well as rights infringement detection and subsequent enforcement action.

In light of the fact that a large inducement for internet users to become customers of ISPs is to gain access to content (whether legally or illegally), it is paramount that ISPs are required to take an active role in preventing and fighting online copyright infringement by establishing and contributing meaningfully to the cost of administering some form of graduated response scheme.

3. *Should the legislation provide further guidance on what would constitute 'reasonable steps'?*

BBC Worldwide considers that a degree of legislative guidance, as to the nature and direction of 'reasonable steps' to be determined following consultation with the industry participants, will ensure a greater rate of adoption and compliance with the scheme. Enshrining a non-exhaustive list of steps in a legislative instrument would provide greater clarity on the minimum level of action required of ISPs and other participants. At the same time, this would allow for some flexibility over time to take into account new technologies which may facilitate online copyright infringement. The ISPs can, in turn, provide clearer educational information to their subscribers. Further, ISPs will have less of an incentive to prevaricate when considering activities that may have otherwise been classified as 'borderline'.

In the event that any matter were to proceed to litigation, the identification of 'reasonable steps' in the legislation would also provide binding guidance to the courts in interpreting the intention of the legislature in implementing such a scheme.

4. *Should different ISPs be able to adopt different ‘reasonable steps’ and, if so, what would be required within a legislative framework to accommodate this?*

BBC Worldwide strongly favours a scheme whereby ISPs will adopt a uniform set of ‘reasonable steps’. In order for a consistent edifice to be presented to the public, all ISPs must be operating under the same set of obligations. If this was not the case, this would expose loopholes to the public — many of whom are highly savvy in matters of online access — which could be exploited by having consumers ‘ISP shop’ in order to find the ISP with the least onerous obligations. There are parallels in this scenario to the current situation in the United States, where only certain ISPs are participating in the (voluntary) Copyright Alert System (CAS). Because of this, users who have received alerts under the CAS have an incentive to transfer their subscriptions to non-participating ISPs. We believe that the same situation is likely to occur in Australia. In addition, the availability of lowered thresholds may cause ISPs to lobby to be included in such designations, thereby lowering the overall standard of protection and enforcement.

5. *What rights should consumers have in response to any scheme or ‘reasonable steps’ taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?*

It is important that consumers have a right of review or appeal in the event their rights are affected under any new scheme. Consumers should have an available mechanism to challenge what are perceived to be unfair, or incorrect, ‘warnings’ issued by an ISP if a consumer is identified as having infringed copyright.

BBC Worldwide considers that any agreed ‘reasonable steps’ should not impact on the legal standing of the rights holder or a consumer under the *Copyright Act 1968* (Cth) – that is, consumers continue to be subject to civil or criminal liability for copyright infringement committed.

Extended Injunctive Relief to Block Infringing Overseas Sites

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

The possibility for rights holders to obtain a blocking injunction is very important to address types of infringement other than peer to peer in Australia (which is the focus of graduated response), such as live television streaming services and embedded streaming services, and where infringing sites are based outside of Australia. These

are growing problems.

BBC Worldwide is of the view that the proposed criteria in determining whether to grant an injunction — that is, that the rights holder can establish the identity of the infringing Internet website operating outside Australia, and the dominant purpose of the website is to infringe copyright — are both relevant and appropriate, and should be sufficient for a court to grant an injunction to the ISP to block access to the website. It is important to have the ability to get existing injunctions varied by the court when defendants reappear in different guises, a useful tool in the United Kingdom.

BBC Worldwide supports the Government's suggestion that infringing websites should be blocked by carrier level ISPs at the wholesale level to prevent the re-sellers being able to provide access to blocked websites to subscribers.

Extended Safe Harbour Scheme

7. *Would the proposed definition adequately and appropriately expand the safe harbour scheme?*

It is our view that the proposed definition is adequate and appropriate to expand the safe harbour scheme.

Building The Evidence Base

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

The success or effectiveness of any 'reasonable steps' or co-operative scheme is unlikely to be measurable by any single criterion, but meaningful insight can be gained from a number of factors over time. This would include the data relating to the number of infringers and warning notifications issued (assuming a graduated response scheme is implemented), the number of repeat offenders, the volume of legitimate online media sales and subscription numbers to content broadcast or streaming services, and the amount of infringing content available on the Internet.

In our opinion, any headway made in regards to reducing copyright infringement, regardless of volume, is beneficial to the media and content industry and ultimately to audiences by supporting investment in high quality content and digital services.

Other Approaches

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

Yes, alternate measures do exist, however BBC Worldwide is of the view that the measures proposed by the Government strike a balance between ISPs and rights holders. Any alternative measures would be supplementary to the proposed new regime. At a high level, BBC Worldwide considers it important to provide for a toolkit of enforcement measures, to effectively tackle the different types of online copyright infringement.

This is why BBC Worldwide supports the introduction of a legal framework for a graduated response model. Such a framework would initially focus on infringement via Australian-based services. And this is why we also welcome the proposals on court blocking injunctions, which are important to also address other types of service such as live television streaming or embedded streaming, including from websites located outside Australia.

In addition, it will be important to consider the question of effective collaboration between rights holders and other types of intermediary along the commercial value chain (e.g. payment processors, advertising networks, search), to address the funding of infringing services, ensure end-users are not confused about the legitimacy of websites because they carry well-known brands or feature prominently in search results, and to ensure a prompt response to notice and take down requests.

Regulation Impact Statement

10. *What regulatory impacts will the proposals have on your organisation?*

The proposals will are not likely to have any regulatory impacts on BBC Worldwide.

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

If so, BBC Worldwide believes that such implications must be factored into any consideration of 'reasonable steps'.