

Fox Studios FSA 74
38 Driver Avenue
Moore Park NSW 2021
Toll Free: 1800 251 996
Email: info@afact.com.au

BY EMAIL: convergence@dbcde.gov.au

10 February 2012

**Convergence Review Secretariat
Department of Broadband, Communications and
The Digital Economy
GPO Box 2154
CANBERRA ACT 2601**

**AFACT/AHEDA/MPDAA/NACO'S SUBMISSION TO THE DEPARTMENT OF BROADBAND,
COMMUNICATIONS AND THE DIGITAL ECONOMY CONVERGENCE REVIEW INTERIM REPORT**

The Australian Federation Against Copyright Theft (**AFACT**), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA) and the National Association of Cinema Operators appreciate the opportunity to make a submission in response to the Convergence Review Interim Report released on 15 December 2011 (**Report**).

Our members are in the business of producing , distributing, and exhibiting feature films, made for television films and dramatic and non-fiction serial programming in Australia and overseas. We have chosen to comment only on certain aspects of the Chapters of the Report, and in particular the importance of the need for measures to address illegal content in the online environment.

We have actively followed all aspects of the Convergence Review process and have been pleased to participate in each call for submissions by the Committee.

We commend the Government for its ongoing work in this area and for its intention to implement a more effective regulatory framework that stimulates Australia's digital economy, delivers a vibrant content and communications industry and services the interests of all Australians.

About Australian Federation against Copyright Theft

AFACT was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims. AFACT acts on behalf of the 50,000 Australians directly impacted by copyright theft including independent cinemas, video rental stores and film and television producers across the country.

AFACT members include: Village Roadshow Limited, Motion Picture Association, Walt Disney Studios Motion Pictures Australia, Paramount Pictures Australia, Sony Pictures Releasing International Corporation, Twentieth Century Fox International, Universal International Films, Inc., and Warner Brothers Pictures International, a division of Warner Bros. Pictures Inc.

Australian Home Entertainment Distributors Association

The AHEDA represents the \$1.3 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as: intellectual property theft and enforcement; classification; media access; technology challenges; copyright; and media convergence. AHEDA currently has 12 members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment, Hopscotch Entertainment, Fremantle Media Australia and Anchor Bay Home Entertainment.

Motion Picture Distributors Association of Australia

The MPDAA is a non profit organisation formed in 1926 by a number of film distribution companies in order to promote the motion picture industry in Australia. The organisation represent the interests of motion picture distributors before government, media and relevant organisations, providing policy and strategy guidance on issues such as classification, accessible cinema, copyright piracy education and enforcement and industry code of conduct.

The MPDAA also acts as a central medium of screen-related information for members and affiliates, collecting and distributing film exhibition information relating to box office, admissions and admission prices, theatres, release details and censorship classifications. The MPDAA currently represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros.

National Association of Cinema Operators

NACO is a national organisation established to act in the interests of all cinema operators. It hosts the Australian International Movie Convention on the Gold Coast, this year in its 66th year.

NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, Reading Cinemas Pty Ltd as well as the prominent independent exhibitors Dendy Cinemas, Grand Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners representing over 100 cinema screens.

Our Submission

We welcome the Convergence Review Committee's stated aim to create a new convergent framework by:

- Providing reduced, better targeted, more effective regulation,
- Reducing compliance costs for industry and
- Ensuring consistent content standards across platforms.

As part of the discussion on Content Standards (Chapter 11), we are pleased to see the Report acknowledge the importance of balancing the individual rights of Australians to read, hear, see and produce content of their choosing within the parameters of intellectual property law, particularly in the online environment.

1. Focussed explicit government regulation

We continue to maintain that a key policy underpinning the regulation in Australia's converged media environment must be to encourage a thriving digital economy where intellectual property rights are respected and digital theft discouraged. We reiterate that the most effective way to achieve this is through explicit regulatory protection of these rights.

The current legislation makes extensive use of co-regulatory arrangements with industry codes of practice ultimately enforced by the regulator. However, we are of the view that any code-based system alone is ineffective to adequately address the issue of online intellectual property infringement. We submit the regulatory framework should contain an unambiguous statement of commitment to preventing illegal content and intellectual property infringement, for instance through a statement of objects or policy, together with clear regulatory enforcement mechanisms.

International intellectual property regulatory regimes governing content are also important, for instance the Australia-US Free Trade Agreement. Particularly in the online context as an increasingly significant amount of content will come from international brands supplying content and content services to Australians. The Report in Chapter 4 notes there are legal and financial avenues as well as strong brand and market incentives to encourage these enterprises to comply with relevant Australian regulations¹. But where our regulations do not meet expected international standards Australia stands to miss out on investment in content services and the associated economic benefits to content makers and owners.

As more content is source online via new content services such as IPTV, explicit recognition of intellectual property rights is essential in any the communications regulatory framework to ensure consumers understand

¹ Convergence Review Interim Report p. 5

their obligations in relation to illegal content. The Envisional Report², sponsored by NBC Universal in January 2011, analysed bandwidth usage across the Internet with the specific aim of assessing how much of that usage infringed copyright. It found that nearly 25% of global traffic was infringing. Content standards must be used to shape community attitudes.

In summary, we advocate:

- The removal of redundant regulation and broad reform of communications regulation³;
- A communications regulator with flexible rule making and enforcement powers including scalable sanctions⁴;
- That new technological developments submit to existing regulatory regimes for certainty and a stable environment for investment and innovation;⁵
- Community standards that are legitimate and do not infringe or misappropriate existing regulatory rights including intellectual property rights⁶;
- Content standards that emphasise the existing framework of laws including Australia's international obligations.⁷
- Introduction of measures to address illegal content in the online environment including by preserving explicit regulatory protection of intellectual property rights to ensure a thriving digital economy.⁸

We support Content Standards which include “measures to address illegal content in the online environment”. We reiterate that these measures must include clear regulatory enforcement mechanisms.

2. Non-regulatory compliance options to strengthen Content Standards

We recognise that non-legislative methods such as industry incentives and community education play an important role in compliance. As the Discussion Paper illustrates, those who do not comply with laws and codes reap positive commercial benefits. This raises real questions about the effectiveness of existing content protection measures. We believe that in addition to direct regulation, industry incentives are one effective means of ensuring content providers act in accordance with the rights of intellectual property owners.

The Discussion Paper recognises the importance of consumer education and awareness. We know that awareness of what constitutes legitimate and illegitimate content and the effect of consuming illegal content on the content industries is an extremely important factor in combating illegal content in the online environment. We invest and participate in education programs as members of the Intellectual Property

^{2 2} Envisional Ltd, *Technical report: An Estimate of Infringing Use of the Internet*, January 2011 located at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf

³ Convergence Review Interim Report, see Chapters 2, 3 & 12.

⁴ Convergence Review Interim Report, see Chapter 2 & 12.

⁵ Convergence Review Interim Report, see Chapters 11 & 12

⁶ Convergence Review Interim Report, see Chapters 11 & 12

⁷ Convergence Review Interim Report, see Chapters 11 & 12

⁸ Convergence Review Interim Report, see Chapters 11 & 12.

Awareness Foundation⁹, and believe that such initiatives are another effective supplement to direct legislative regulation. However to be most effective these consumer education and outreach programs need to be jointly sponsored by Government and industry. Branding on websites and educational collateral that evidences Government endorsement and support has worked well in the United Kingdom sponsored by OFCOM.

We support the need for non regulatory compliance options to strengthen Content Standards – particularly the involvement of Government with industry in consumer education and outreach programs on illegal content in the online environment.

3. Content Services Enterprises

We recognise that by introducing the Content Services Enterprise (**CSE**) the new communications regulatory framework becomes technology neutral and platform agnostic and achieves a degree of regulatory parity in the treatment of content providers.

We note the similarity between the CSE model outlined and the “**on demand programme service**” concept introduced in 2009/10 as part of the UK Communications Act 2003 under *Audiovisual Media Service Regulations*¹⁰ designed to create uniform rules for linear and on demand services.

We are generally concerned to ensure that there is a very clear definition of a CSE developed. The Report does not go into detail on the features of a CSE, for instance:

- The type of audiovisual content to qualify an enterprise - linear or non linear/interactive, commercial or UGC:
- The business model - free or subscription:
- The genre of content – to include music video or games or newspapers; and
- The type of nexus with Australia?

In the UK it appears that it is not straightforward to identify an *on demand programme service*. Despite the detail in the UK Directive and associated regulation as well as the presence of a special purpose regulator¹¹, there can be surprising and unintended outcomes. For example, in 2011 publication of video content on a newspaper website – The Sunday Times - was found to constitute an on demand programme service.

We agree with the Report discussion that not all content providers should be classified as CSEs and that smaller businesses be exempt from requirements. We also have concerns that existing businesses, such as cinemas and film distributors, may be classified as CSE’s for the purposes of imposing additional regulation.

⁹ Australian Intellectual Property Awareness Foundation.

<http://www.ipawareness.com.au/>

¹⁰ The regulations were based on the *Audiovisual Media Service Directive* of the EU (2010/13/EU Directive)

¹¹ The British Authority for Television on Demand or ATVOD.

We are also concerned that registration as a CSE may inadvertently have the effect of legitimising an enterprise that is in the business of providing access to illegal content or content that infringes intellectual property rights.

One of the most popular online content services with Australians (ranked the 135th most visited website by Australians according to Internet traffic statistics group), Alexa.com, was shut down last month following an FBI and US Department of Justice investigation with assistance from law enforcement authorities from New Zealand, Holland, Germany, Canada, Australia, Hong Kong, United Kingdom and the Philippines. It was estimated that the website in question, Megaupload, caused more than \$500 million in losses to copyright holders. Could Megaupload fall within the definition of a CSE? We have provided further information on the Megaupload case in section 4.

Inevitably if a service is a CSE it will be subject to significant requirements – regulatory and financial. The UK experience shows that the converged environment will throw up a huge variety of content delivery business models. We are concerned that any enabling regulation for a CSE must ensure it does not stifle businesses with the additional requirements and does not legitimise enterprises involved in illegal enterprises wrongly – both these effects will counter the development of Australia's digital economy.

We submit there must be a clear and unambiguous definition of a CSE, for business certainty.

An additional area of concern relates to the Australian content expenditure requirements which will be imposed on a CSE, discussed in Chapter 11 of the Report. If a CSE is required to contribute such program expenditure it should be on the most effective basis for each CSE, case by case. For instance a CSE should be able to elect whether it invests in a qualifying Australian program and which program. Alternatively if a CSE contributes to a converged content production fund it should be entitled to returns from that fund or interests in the Australian programs supported. Without such choice and benefits the Australian content expenditure requirements would be more in the nature of a business licence fee or tax.

We suggest that the Review Committee consider other means of calculating the basis of Australian content expenditure requirements. One such basis could be the revenues earned from the Australian market received by the CSE.

Any content expenditure requirement for CSE must be fair and must contain a right for the CSE to elect the way in which it makes it's spend.

4. Case Study – Megaupload

In support of our position that any new regulatory framework needs to explicitly acknowledged and protect intellectual property rights, we set out below a topical example highlighting the extent and significance of damage caused by digital theft.

Megaupload was a large online storage hub with more than 1,150 servers located in the United States, Netherlands and New Zealand which allowed users to indiscriminately upload content to their vast network. The US based servers alone stored more than 25 petabytes of data. The provision of a rewards scheme for users who uploaded (in Megaupload's words) 'popular content', which was then accessed by other internet users via Megaupload or one of the alternative access methods such as Megavideo (which allowed streaming of video files) resulted in vast quantities of infringing material being placed and accessed on the Megaupload servers.

To ensure users only utilised Megaupload servers to uploaded 'popular content', such as unauthorised copies of latest movies and TV shows, non-member uploaded content which was not downloaded by anyone for 21 days was permanently deleted by Megaupload.

Premium users paid \$10 per month for unlimited access and faster download of the Megaupload and Megavideo services. The owners of Megaupload claimed that they had 150 Million registered users, 50 Million daily visits to the site and purported to have 4% of daily internet traffic.

On the 14th October 2011, Megaupload.com was ranked the 135th most visited website by Australians according to Internet traffic statistics group, Alexa.com.

Following an investigation initiated by the FBI and US Department of Justice, a series of search warrant operations were executed on the 19th January 2012 in New Zealand, US, Netherlands, UK, Hong Kong and Canada in relation to criminal copyright infringement and copyright charges against the owner and operators of the 'Mega' series of web sites.¹²

The US Department of Justice estimated that the Megaupload site had caused more than \$500 Million worth of damage to copyright owners¹³

The owner of the site, 38 year old German born, Kim Schmitz (also known as Kim Dotcom or Kim Vestor) has a well-documented criminal history: In 1994, he served three months' jail time in Munich, and two years' probation for hacking into Pentagon computers during the 1991 Gulf War. In the mid-1990s he was given a two-year suspended jail sentence for his involvement in a stolen phone-card racket. In 2001, he was charged

¹² Department of Justice Press Release: <http://www.justice.gov/opa/pr/2012/January/12-crm-074.html>

¹³ Mega' Indictment: <http://www.scribd.com/doc/78786408/Mega-Indictment>

with the largest insider-trading case in German history, reportedly making more than \$1 million from the venture.

At the time of his arrest, Schmitz was indulging in a lifestyle supported by the wealth amassed from his file-sharing businesses at his leased \$23 million property on the outskirts of Auckland, New Zealand, allegedly the most expensive piece of real estate in the country.

Schmitz owned at least 18 luxury cars worth \$4.9 million, some with licence plates HACKER, MAFIA, STONED, COM, GUILTY, POLICE and GOD. Schmitz varied his time between his NZ residence and VIP suites in a 5 star Hong Kong Hotel which Hong Kong law enforcement agencies claim cost Schmitz an estimated \$4.7 million per annum. Thus far law enforcement agencies in New Zealand, United States, Holland and Hong Kong have seized \$8 million seized in 42 bank accounts. Between April and June 2011 Dotcom spent over \$8 million in yacht rentals on the Mediterranean.

In the 7 year life span of Megaupload, law enforcement estimate that Megaupload has made over \$150 Million from user subscriptions and a further \$25 Million from advertising revenue.

As of this date, Schmitz has been denied bail pending extradition proceedings.

After the January raids, the US Department of Justice estimated that Megauload caused more than \$500 Million in losses to copyright holders.

Schmitz and the exploits of Megaupload represent today's reality of commercial scale pillaging of copyrighted film and television content.

Addressing flagrant mass thieving of intellectual property on the Internet is not a choice, but a necessity if we desire intellectual property to retain its nominal value in the digital age – a value fully recognised by government in its report 'Australia's Digital Economy: Future Directions'. A large number of economies are relying more and more on a healthy IP sector that contributes a greater percentage of GDP to the economy year on year. Australia is one of those economies. A 2011 Access Economics report found that in 2009-10 the film and television industry in Australia contributed \$6.1 billion to the economy – a rise of 5.1% since 2006-7 – a greater contribution than that of the aviation industry. The International Property Rights Index 2011 Report found that there is a direct correlation between economic development and robust intellectual property rights.

5. Conclusion

Thank you for considering our submission in response to the Convergence Review Interim Report.

We applaud the body of work done by the Convergence Review Committee. We wish to continue to work with the Committee as it develops and implements a new communications regulatory framework for Australia to ensure the regulatory environment continues to afford rights holders intellectual property protections and assists Australia's development of a strong digital economy.

Yours faithfully


Neil Gane



Managing Director

**Australian
Federation Against
Copyright Theft**

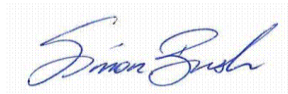
Michael Hawkins



Executive Director

**National Association
of Cinema Operators
Australasia**

Simon Bush



Chief Executive Officer

**Australian Home
Entertainment
Distributors Association**

Lori Flekser



General Manager

**Motion Picture
Distributors
Association of
Australia**