



BY EMAIL: copyright@ag.gov.au

22 November 2011

**Assistant Secretary
Business Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600**

REVISING THE SCOPE OF THE COPYRIGHT "SAFE HARBOUR SCHEME" RESPONSE TO ADG CONSULTATION PAPER

Introduction

1. 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 Australasia (**NACO**) provide this submission in response to the Attorney-General's Consultation Paper titled "Revising the Scope of the Copyright 'Safe Harbour Scheme'" dated October 2011 (the **Consultation Paper**).
2. 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 Bros. Pictures International, a division of Warner Bros. Pictures Inc.
3. 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.

4. 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.

5. 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.

Internet infringement in Australia today

6. Our members include all the major international and independent film production and distribution companies, as well as cinema exhibitors through to Australian companies. They are amongst the industries that are most affected by internet based infringements of their content. See, for example, the IPSOS and Oxford Economics study.¹
7. There is an increasing body of research into the extent of internet based infringement of copyright content, including films and television programs. In January 2011 Envisional Ltd, a leading UK-based internet research company,² reported that 23.7% of global internet traffic was likely to be infringing,³ with BitTorrent accounting for half of this traffic (11.4%) and the other half accounted for by a combination of Cyberlocker/content hub traffic (7%), Video Streaming (5%), and other P2P and file sharing networks (7%).

¹<http://www.afact.org.au/pressreleases/pdf/IPSOS%20Economic%20Consequences%20of%20Movie%20Piracy%20-%20Australia.pdf>

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 This estimate excluded all pornography as it was unable to clearly confirm its whether it was legitimate or not.

8. Cyberlockers/content hubs and associated linking sites are amongst the most popular sites for Australian internet users and are a growing source of infringing content on the internet.⁴
9. In the last several years, there has been extensive research into the nature of BitTorrent traffic in Australia. A 2010 research from the University of Ballarat⁵ found that: BitTorrent technology enables access to and use of a wide range of content without regard to the ownership of this content; at least 89% of all files traded on BitTorrent were infringing;⁶ and 72.4% of all content available on BitTorrent was motion pictures or television shows, none of which was legitimate motion picture or television content of AFACT members. A subsequent report dated 13 September 2011⁷ found the proportion of infringing files was higher (97.25%) and that 60% of the torrents were movie based content. In addition, the infringing use of BitTorrent by Australian internet users is the subject of legal proceedings initiated by AFACT members which will be heard by the High Court.
10. These infringements continue to occur notwithstanding the existence of a wide range of online legitimate channels within Australia for obtaining movie and television content.⁸ These include iTunes, Telstra T-Box, ABC iView, FetchTV, BBC iPlayer and QuickFlix, to name a few.
11. This background is relevant to the possible expansion of the safe harbours regime, in order that intermediaries which operate solely, primarily, or specifically to facilitate widespread copyright infringement⁹ do not receive the benefit of the extended protection. By way of example, if the definition was widened to “service provider” it would remain open for service providers such as those in *In Re Aimster*¹⁰, *Napster*¹¹ and *Isohunt*¹² (all of which were found liable for contributory infringement of copyright) to claim that they qualified for protection under the safe harbours. We consider it essential that the Attorney-General’s Department consider the impact towards content owners of

⁴ By way of example, as of 17 October 2011 (according to their Alexa ranking) isohunt.com is the 76th most popular site in Australia (#111 most popular site in the UK and # 593 in the USA), Mediafire.com ranks as the 96th most popular site in Australia. (#127 in the UK and #159 in the USA), filesonic.com is the 126th most popular site in Australia (#170 most popular site in the UK and # 277 in the USA).and megaupload.com is the 135th most popular site in Australia (#218 in the UK and # 262 in the USA).

⁵ Layton, Robert and Watters, Paul, “*Investigation into the Extent of Infringing Content on Bit Torrent Networks*”, (Internet Commerce Security Laboratory, University of Ballarat 2010), posted at http://www.afact.org.au/research/bt_report_final.pdf.

⁶ See a full copy of the study, “Investigation into the Extent of Infringing Content on Bit Torrent Networks” at http://www.afact.org.au/research/bt_report_final.pdf.

⁷ See a full copy of the study, “Determining Infringing Content on BitTorrent Networks: Enhancing Sampling and Detecting Fake Files” at http://www.afact.org.au/assets/research/BitTorrent_Report_082011.pdf accessed on 17 October 2011.

⁸ http://www.afact.org.au/index.php/core/internet/where_can_i_get_movies_tv_shows_legally.

⁹ By way of example The Pirate Bay, Newzbin 2, Isohunt, Kazaa, kino.to, MiniNova, MovieX, NinjaVideo, EliteTorrents, TorrentSpy, FinReactor, ShareReactor all of whom have been recently adjudged civilly or criminally for willful copyright infringement in various jurisdictions throughout the world.

¹⁰ *In Re Aimster* 252 F.Supp. 2d 634 (N.D Ill. 2002).

¹¹ *A&M Records, Inc v Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹² *Columbia Pictures Industries Inc v. Fung* (2:2006cv05578).

providing such entities with the benefit of liability limitations originally intended for a narrower class of intermediaries.

Current scheme under the Copyright Act

12. Our members are dependent on the protections provided to them under the *Copyright Act*, particularly those that were introduced as part of the Digital Agenda reforms in 2000 and the safe harbour provisions introduced following the Australia-US Free Trade Agreement (**AUSFTA**) in 2005 as a complement to the overall Digital Agenda scheme. An understanding of the overall legislative scheme for protection of copyright in the digital environment is necessary in any consideration of the proper scope of the safe harbours and the consequences of expanding the scheme beyond carriage service providers.
13. The current scheme began with the Digital Agenda reforms in 2000. The reforms were the result of an extensive and exhaustive review of copyright law in Australia, which involved consultation with industries and the public, Parliamentary committee investigation and by-partisan support for the eventual package of reforms.¹³ The reforms radically changed the nature of the protection afforded to copyright owners in the digital environment in Australia.¹⁴
14. The Attorney-General (Darryl Williams) noted in his second reading speech that:

“The amendments provided by this bill are at the cutting edge of online copyright reform and clearly place Australia among the leaders in international developments in the area.... This bill will update Australian copyright law for the 21st century and its passage will be a key milestone in the successful development of our information economy.”
15. The centrepiece of the Bill was a new “technologically-neutral right of communication to the public”, which would replace the technology-specific broadcasting right and the limited diffusion right. The right of communication to the public would also encompass the “making available of copyright material online.”¹⁵ The role of carriers and carriage service providers (including ISPs) was also central to the scheme provided for by the Digital Agenda reforms.
16. The Explanatory Memorandum (**EM**) considered several options to address the liability of carriage service providers for direct infringement and authorisation of infringements by internet users. In

¹³ As to the process involved in developing the policy see Hansard 26.6.2000, p18341: “There has been detailed advice by committees of experts. This process was started under the Labor government but, in fairness to this government, carried through ongoing public consultation procedures. Ultimately after the bill itself has been tabled, there has been further consideration by a parliamentary committee. When you have the procedures rights, you are more likely to get the policy right”.

¹⁴ The EM observed that “The development of new communications technologies has exposed gaps in the protection afforded by the Copyright Act 1968” and that “owners of copyright do not have fully effective rights in relation to the internet, thus making it difficult for them to obtain appropriate redress or remuneration for use of their material on the Internet.” EM p 5

¹⁵ EM, p 3.

relation to direct infringement, internet users, who were responsible for determining the content of a communication to the public, would be directly exercising the communication right and liable for any infringement of that right.¹⁶ Carriers and carriage service providers (including ISPs) would “not be directly liable” for transmission over the internet because they were not responsible for determining the communication.¹⁷

17. In relation to liability for authorisation, three different options were considered and the option selected was the option favoured by ISPs. That option involved the introduction of “legislative certainty about the steps they needed to take to avoid liability for authorising infringements.”¹⁸ This legislative certainty took the form of the three mandatory factors under s101(1A), which “essentially codified the principles in relation to the authorisation that currently exist at common law (see in particular *University of New South Wales v Moorhouse* (1975) 133 CLR 1)”.¹⁹ Inherent in this policy was a recognition that ISPs would need to take steps to avoid liability for authorisation, at their cost.²⁰ There is statutory recognition of the role that an industry code of practice could play (under s101(1A)(c)).
18. Within the same option the government introduced a broad based unconditional defence to infringement for the benefit of service providers, in the form of s112E. The introduction of s112E was consistent with the treaties establishing new international standards for copyright protection following the WIPO Diplomatic Conference.²¹ The EM observed²² that without such a provision:

“ISPs might find themselves liable for authorising copyright infringements by doing no more than providing facilities for persons transmitting copyright material without permission of the copyright owners.”

19. Section 112E provides a complete defence to liability for infringement and is not tied to any countervailing obligations on the part of the provider to take steps to assist in enforcement of copyright. It extends beyond the provision of physical facilities to other forms of facilities, including software and services.²³

¹⁶ EM, p 9.

¹⁷ Reversing the effect of the decision of the High Court in the *APRA v Telstra* case, which had held Telstra directly liable for music on holder services which involved transmission of music down its phone lines.

¹⁸ EM, p10.

¹⁹ EM, p54.

²⁰ EM, p14: “Under Options A, B and C, carriers and carriage service providers (including ISPs) would bear the cost of becoming aware of any new laws relating to liability for authorisation of breaches of copyright. They would also bear the cost of taking any relevant measures to avoid liability. However, the costs and uncertainty to carriers and carriage service providers (including ISPs) under Options A and B would probably be higher than under Option C.”

²¹ EM, p12. 57 countries had ratified the treaties including USA, EU countries, Japan and Canada.

²² EM, p12.

²³ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 per Wilcox J at [394].

The safe harbour provisions

20. The “safe harbour provisions” were introduced into the *Copyright Act* with effect from 1 January 2005.²⁴ The introduction of the Australian safe harbour scheme followed the successful conclusion of the AUSFTA. Article 17.11.29 of the AUSFTA requires each party to include legal incentives in their respective domestic legislation that would encourage service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyright protected materials. In exchange for this cooperation, service providers receive the benefit of limitations in relation to the scope of remedies available against them for copyright infringements that they do not “control, initiate, or direct”, that take place through systems or networks controlled or operated by them or on their behalf.²⁵
21. The term “service provider” was not defined in the AUSFTA. As is discussed in more detail below, the term “carriage service provider” is defined in s10 of the *Copyright Act* as having “the same meaning as in the *Telecommunications Act 1997*.” ISPs and network providers fall within this definition. There is no suggestion that the current definition of service provider under the safe harbour scheme puts Australia at risk of breaching its obligations under the AUSFTA
22. The voluntary safe harbour regime does not provide a defence to ISPs for infringement by authorising the infringing activity of subscribers. It operates only to limit the relief, including compensation, that an ISP would otherwise have to pay in the event that it is found liable for authorisation. In return for this benefit, ISPs are required to provide demonstrable assistance to copyright owners through a range of measures, including the implementation of repeat infringer policies for all categories of activity (under s116AH) and the processing of take down notices for certain types of activity (Category C and D activities). The safe harbour provisions have only been judicially considered on two occasions: in the *Cooper* case and the *iiNet* case, both involving ISPs.²⁶ In both instances the ISPs were found not have met the requirements for the scheme.
23. As the Consultation Paper observes, the definition of “carriage service provider” was chosen because it “was adopted from the *Telecommunications Act* because it was considered to be a suitable and technologically neutral term”. However no reference was made in the Explanatory Memorandum to the *US Free Trade Agreement Implementation Bill 2004*²⁷ to entities other than ISPs obtaining the benefit of the Australian scheme.²⁸ This is in keeping with the stated purpose of the Australian scheme, which is set out in s116AA of the *Copyright Act*, namely “to limit the remedies that are

²⁴ Part V Division 2AA of the *Copyright Act 1968* (Cth).

²⁵ For the full text of Article 17.29: http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_17.html

²⁶ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972; *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23.

²⁷ Circulated by the Hon Mark Vaile MP, Minister for Trade

²⁸ Note Chapter 16 of the AUSFTA Report No. 61 by the Joint Standing Committee on Treaties also supports this submission’s view, with the relevant part of the report dealing with the Australian Scheme titled “Internet Service Provider (ISP) Liability”. No reference is made to service providers who are not also ISPs.

available against carriage service providers for infringement of copyright that relate to the carrying out of certain online activities by carriage service providers.”

24. The term CSP is defined in s10 of the *Copyright Act* as having “the same meaning as in the *Telecommunications Act 1997*.” Section 87 of the *Telecommunications Act* defines CSPs as those entities who satisfy a number of requirements including the provision of a service to the public for communications between a point in Australia and one or more other points using a link provided by a licensed carrier. Under s128 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, a CSP must enter into a Telecommunications Industry Ombudsman (TIO) scheme and this information is published and searchable by members of the public.²⁹

Justifications in the consultation paper for expanding the definition

25. The Consultation Paper identifies two categories of service provider that sit outside ISPs that are currently denied the benefit of the safe harbours. The first category of provider is described opaquely as “a range of organisations and business [that] operate servers to provide internet access to their clients, customers, students and other users, but not ‘to the public’.” It is not clear who or what entities would fall within this class. It appears to encompass providers of network access, educational institutions and the providers of access to subscribers (although not as an ISP).
26. To the extent that the justification for extending the safe harbours to these entities turns on whether the services are offered “to the public”, the justification is weak. There is no doubt under Australian copyright law that the phrase “to the public” has been interpreted broadly to mean persons other than in a private capacity. It is sufficient if they could be members of the copyright owners’ public: see the decisions of the Full Court in *Cooper* and *iiNet* and of the single judge in *Sharman*.³⁰ Were it otherwise, and such transmission not be “to the public”, then there would be no risk of liability for authorisation in any event and no liability for any safe harbour to attach to.
27. In relation to the second category of providers, the Consultation Paper states:
- “However, these providers of internet access and online services face similar problems to CSPs regarding the lack of control over the actions of their users.”*
28. If it is asserted as a justification for extension of the safe harbours it is erroneous. Providers of services that fall within all categories under the safe harbours (Categories A to D) exercise control, to different degrees, over the activities of their users. In *Cooper* the Full Court found, unanimously, that the host of the website had control over the presence of the links to the content files, the power to prevent them from being accessed and the ability to take them down.³¹ Consistently with Article 41 of

²⁹ See www.tio.com.au/aboutmembership/searchmembers.htm.

³⁰ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 275 ALR 1 at [341]-[345] and [692]; *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1 at [64]-[68].

³¹ *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187.

the TRIPs Agreement, the AUSFTA was intended to provide legal incentives for service providers to cooperate with copyright owners in deterring the unauthorised storage and transmission of copyright materials.”³²

29. What is more, the extension of the safe harbours to these providers necessarily involves a recognition of their capacity to control user activity because they would immediately become subject to the requirement to “adopt and implement a policy of terminating the accounts of repeat infringers, in appropriate circumstances” (s116AH); the take down regime that applies in respect of Category D activities; and the ability of a court to order termination of the subscriber account or disabling of access to the linked content even if the safe harbour applied. The providers could only be seeking the protection of the scheme if they were ready and willing to exercise control over what their users were intending to do.
30. All categories of providers already have the benefit of the defence under s112E, which is a defence to liability, not just to forms of relief as is the case with the safe harbours under Div 2AA. That is, they are not liable for authorising the infringing activities of users *merely* because the users have infringed using their network. Section 112E is a powerful protection for all forms of online service providers, including libraries and educational institutions. This is “an additional” protection beyond the existing safe harbours, as will be apparent from the discussion below, that their counterparts do not have in the United States or South Korea.
31. Unless a new definition is crafted which specified a much narrower class of intermediaries, expansion of the definition of service provider may cover intermediaries such as cyberlockers, peer-to-peer trackers, and linking sites (among others) which operate solely, primarily, or specifically to facilitate widespread copyright infringement.
32. Extending the safe harbours may have other unintended consequences. There are already attempts by at least one ISP³³ to adopt a policy under the safe harbour scheme (s116AH) that unilaterally impose a pre-requisite fee³⁴ on any rights holder that notifies the ISP of infringements before it is prepared to take any action as stipulated under s116AH. While this is contrary to the terms of the Act (and Australia’s obligations under the AUSFTA) and will disqualify that ISP from safe harbour protection, it sets a very unfortunate precedent that could be exploited by a wider class of services providers, such as those discussed in the para 29, if the safe harbour scheme were extended to them.

Differences between CSPs and other service providers

33. CSPs are an appropriate class of person to be covered by the safe harbour regime because they are regulated. They are required to be licensed under the *Telecommunications Act* and subject to the

³² Art 17.11(29).

³³ <http://www.iinet.net.au/legal/notice%20of%20claimed%20infringement%20of%20copyright.pdf>.

³⁴ www.iinet.net.au/legal/notice-of-claimed-infringement-of-copyright-form.pdf.

terms imposed on its licence. They are subject to the jurisdiction of the Telecommunications Industry Ombudsman (**TIO**) in relation to its dealings with customers or potential customers. CSPs are also subject to regulatory oversight by ACMA and to the industry codes that are declared by ACMA. Regulatory oversight is something lacking in relation to non-CSP service providers (and the opt-out scheme proposed with the Consultation Paper is not an adequate substitute for regulation).

34. The consultation paper refers to the US Scheme and its definition of 'service providers' which includes operators of 'instant messaging services' and 'online vendors'. That is a very broad class of providers with a very different business model and operational structures. Currently they would be treated differently under Australian copyright laws, for example an online vendor (Amazon or eBay) would be directly responsible for the supply of copyright infringing products whereas other providers' liability would be indirect should they become aware of facts and circumstances rendering use of their services infringing (search engines, social media sites etc). Each profit differently from the service and would need to take different steps to avoid being liable. Treating all of these providers as if they were a single type of business ignores these differences and creates other potential legal consequences which would be inconsistent with the purpose of the safe harbours namely to provide incentives for certain types of service providers to cooperate with copyright owners. Rights owners have elsewhere recognised the need for these types of service providers to be subject to some form of regulation, such as a code of practice which includes measures to ensure that they do not support the business models of substantially infringing web sites and that they do not themselves profit from online infringement. A code (such as provided for under 116AH) is necessary given that there may be little or no utility for such service providers (such as social media networks or email providers such as "hotmail") having a policy under 116AH allowing for the termination of repeat infringers which would invariably never be exercised (because of the mixture of services offered to the user) or never be exercised effectively (because of the manner in which the services are offered to the users). These considerations do not arise in the case of a carriage service provider.
 35. It is not as clear why other service providers should be given the same privileges. The case for doing so has not been established. There has never been a case before the Australia courts that would have been decided differently had the safe harbour scheme extended beyond the CSPs. The U.S. experience does not support calls to widen the safe harbours without taking into account the need for other legislative tools to be considered by the Attorney General's Department to combat online infringement, such as the Protect IP Act and the Stop Online Piracy Act, which seek to ensure that rogue service providers and operators cannot unfairly take advantage of any increased availability of the safe harbours.
 36. The drafting definition appearing on the last page of the Consultation Paper, which provides for the Attorney-General to exclude persons or classes of persons from the safe harbours, appears to recognise that a distinction is appropriately drawn between classes of online providers. There are risks associated with an opt-out approach. They are notoriously political and may never be exercised. The history of Regulations under the Copyright Act has been highly idiosyncratic in recent years. This
-

procedure also places considerable uncertainty around the process of copyright owners calling for such a Regulation to be passed. No mechanism is provided for a review of the provision or the reception of submissions to establish that such a person or class of persons ought be excluded from the definition of service provider. By way of example, in the United States Isohunt argued that it was merely a search engine and compared itself to Google.³⁵ By the time the Regulation is implemented, the damage may have been done to copyright owners and copyright industries.

37. The case of educational institutions and libraries to be included within the safe harbours has not been established. They have a privileged position under the Copyright Act and were the beneficiaries of a range of measures, including preferential schemes for access to copyright works with no compensation to copyright owners.³⁶ They also have the benefit of the unconditional defence under s112E. There has not been any litigation in Australia that has identified any material risks to those sectors which would justify them being treated as if they were carriage service providers. This is likely to be a reflection of the controls that those organisations already impose on the use of their internet infrastructure which have proved effective in minimising online infringement emanating from their users.
38. There would also need to be a raft of textual and other amendments made to Div 2AA if the scheme were expended beyond carriage service providers. For example, the definition of “financial benefit” in s116AH, which makes reference to the “industry practice in relation to the charging of services by carriage service providers, including charging based on the level of activity”. Services providers such as P2P operators (MovieX³⁷) and Australian based cyberlockers (eg. equivalents of the US based Hotfile³⁸) would presumably claim that they had a legitimate server space business or search engine functionality that entitled them to safe harbour protection; despite its operations being funded by infringement. Similarly, the special presumption of compliance with the scheme in favour of ISPs, set out in s116AI.³⁹ would be inappropriate if it was extended beyond regulated carriage service providers.

³⁵ Affidavit of owner of Isohunt, Gary Fung, “In many ways, isoHunt is comparable to Google Search engine. At first glance, both search engines are similar in appearance to the visitor. Neither requires accounts or subscriptions from users. At a general level both provide a searchable database of information that are locations of desired files on the Internet. Google Search engine provides information on the location of desired files. Not dissimilarly, the isoHunt Search Engine provides metadata (in the form of dot-torrent files) that provide, with one “click” by the user, the location of (Tracker)software that has information on where the desired files are. So isoHunt provides the first piece of information that leads to the second piece of information(unconnected to isoHunt) that has the location of the desired files”
<http://isohunt.com/img/legal/Affidavit%20of%20Gary%20Fung%20No.1.pdf>.

³⁶ EM, pp 13-14.

³⁷http://afact.org.au/archive_pressreleases/pdf/2008/FEDERAL%20POLICE%20CHARGE%20ORGANISERS%20OF%20ILLEGAL.pdf

³⁸ Disney Enterprises, Inc. et al v. Hotfile Corp. et al (1:11-cv-20427).

³⁹ Section 116AI states “*If a carriage service provider, in an action relating to this Division, point to evidence, as prescribed, that suggests that the carriage service provider has complied with a condition, the court must presume, in the absence of evidence to the contrary, that the carriage service provider has complied with the condition.*”

Comparisons with other copyright laws

39. The Consultation Paper cites three other jurisdictions that had implemented safe harbour schemes that extent beyond carriage service providers; the United States, Singapore and Korea. Care needs to be taken making narrow comparisons between the copyright laws of these countries and Australian copyright law, because they are likely to obscure more fundamental differences that contribute to the overall framework of liability attached to services providers in each jurisdiction. A proper comparison would be one that takes into account the overall frameworks within each jurisdiction, including any pending legislation, rather than trying to harmonise an individual provision. eg. the definition of service provider.

US copyright law

40. United States copyright law is very different from Australian copyright law. There is no statutory recognition of the liability akin to authorisation; the law of contributory and vicarious liability is based solely on common law principles developed by the US Courts from time to time.⁴⁰ There is no equivalent of “authorisation” under s101 of the Australian Copyright Act. Nor is there any equivalent of the mandatory factors under s101(1A) of the Australian Act or the recognition of an industry code in s 101(1A)(c).

41. The right of communication to the public in Australia is not replicated in the US scheme. This has a significant impact on the way that copyright is protected in the two countries and the level of protection afforded to copyright owners. Each of the occasions on which authorisation of online infringing conduct has been considered (*Cooper*, *Sharman* and *iiNet*) have involved infringements of the right of communication to the public by making available online. As indicated above, this right was intentionally introduced in 2000 to put Australia at “the cutting edge” of copyright enforcement in legislation introduced for the “21st Century”. Carriage service providers are not exposed to risks of infringing this right (as long as they do not determine the content of the communications).⁴¹

42. The US scheme does not have an equivalent provision to s112E. Unlike the safe harbours in the US, s112E is a complete defence to infringement and is not tied to any countervailing obligations on the part of the provider to take steps to assist in enforcement. This defence is not limited to carriage service providers.⁴² Any assessment of the relative need for expansion of the safe harbour provisions

⁴⁰ *Sony Corp. v. Universal City Studios*, 464 U. S., at 434, cited with approval in *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005).

⁴¹ Interestingly, the US safe harbours were introduced following the decision of the U.S. District Court in *Religious Technology Centre v Netcom* 907 F. Supp. 1361, which held that when an internet service provider “serves without human intervention, as a passive conduit for copyrighted material, it is not liable as a direct infringer” (emphasis added).

⁴² In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at 395 Wilcox J held that the “qualifying elements” of s112E applied to Sharman, although his Honour subsequently found that there were other factors that disqualified Sharman from reliance on the section.

needs to take into account the benefit that s112E provides under Australian law. The defence is available to any provider that does no more than provide facilities on which infringement occurs. Service providers that believe that this is the totality of their relationship to the infringements that might take place on their services, will have the benefit of that defence under Australian law; extending the safe harbour will not give them greater protection than they currently have.

43. On the other hand, the US copyright system has features that are not replicated in Australia copyright law. The most obvious is the administrative subpoena scheme available to copyright owners under the US safe harbours to facilitate the expeditious access to contact details of a subscriber suspected of engaging in copyright infringement without having to commence substantive proceedings to do so.⁴³ A rights holder is not required to pay a fee (other than to the Court issuing the subpoena) or provide an indemnity for the ISPs costs involved in disclosing a subscriber's details. The subpoena process was a key element in the balance struck by legislators between the rights of copyright owners and the rights of service providers, including ISPs and is integral to the safe harbour framework.
44. Australia did not adopt such a subpoena regime, despite the terms of Article 17.11(29)(xi).⁴⁴ The explanation for not doing so was said to be the availability of existing Court based processes, such as an application for preliminary discovery under O 15A of the Federal Court Rules (now known as Div 7.3). This was not a good policy outcome at the time. No sensible comparison could be made between the expeditious process of applying to a Registrar for the issuing of a subpoena and the lengthy, costly and procedurally complex process of applying to a judge for an order under O 15A, which may be contested. An ISP that claims to comply with the requirements of the safe harbours could refuse to consent to production under O 15A; Australian ISPs have already done so. There is no reason to expect that other service providers are likely to do the same.
45. The US legal copyright framework is not static and is the subject of reform, as a result of deficiencies identified in the DMCA and the safe harbour framework.⁴⁵ Two very important bi-partisan pieces of legislation are before US legislators. The first is the "Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act" (the **PROTECT IP Act**), which was introduced on May 12 2011.⁴⁶ The Bill is designed to deter, prevent and root out "rogue websites"⁴⁷ that profit from trafficking in stolen content. The second bill is the Stop Online Piracy Act (the **SOPA**) (H.R. 3261),

⁴³ See section 512(h) of the U.S. DMCA

⁴⁴ Which provides that "Each Party shall provide for an administrative or judicial procedure enabling copyright owners who have given effective notification of claimed infringement to obtain expeditiously from a service provider information in its possession identifying the alleged infringer."

⁴⁵ An example is the highly technical decision of the US District of Columbia Circuit Court of Appeals in the Verizon case (*Recording Industry Association of America v Verizon Internet Services* 351 F. 3d 1229 (D.C. Cir. 2003)) which deprived copyright owners of the capacity to issue subpoenas under the DMCA for Category A activities, including P2P infringements.

⁴⁶ <http://www.gpo.gov/fdsys/pkg/BILLS-112s968rs/pdf/BILLS-112s968rs.pdf>.

⁴⁷ A rogue website or "internet site dedicated to infringing activity" (ISDIA) is defined as a site that: (1) has no significant use other than engaging in or facilitating copyright infringement, circumventing technology controlling access to copyrighted works, or selling or promoting counterfeit goods or services; or (2) is designed, operated, or marketed and used to engage in such activities.

which was introduced October 26 2011.⁴⁸ It also focussed on “rogue websites”⁴⁹ dedicated to commercially benefitting from intellectual property infringement.

Korea

46. Although the definition of online service provider is broader under the Korean copyright law and carriage service provider under the Australia Act, there are far more stringent requirements imposed on service providers under Korean law. Under the Korean Copyright Act 1989, amended in 2009 to address online copyright infringement more broadly, the government may order an online service provider to (1) warn an infringing subscriber; (2) delete or cease transmission of infringing copies; (3) suspend the account of repeat infringers for up to six months; and (4) suspend a bulletin board service for up to six months. Korean online service providers may be fined for non-compliance.
47. Under the amended legislation, Korean online service providers must now also register with the Korean Copyright Commission and to obtain and maintain a license they must prove they have “effective filtering systems in place”. If a Korean online service providers receives more than three fines from the government under the Copyright Law, their business license is cancelled or not be renewed. Further amendments allow for the Korean Communications Standards Commission to order ISPs to block sites that infringe copyright.

Conclusion

48. The existing scheme of the Copyright Act, including the Digital Agenda provisions and the safe harbours under Div 2AA, were introduced as a package of reforms designed to maintain the balance between the interests of copyright owners and those of users and other affected parties. Extending the safe harbours to organisations such as educational institutions and libraries would also alter the balance that was struck between their interests and those of copyright owners, when educational institutions and libraries were given a range of benefits under the Digital Agenda reforms.⁵⁰ Extending the safe harbours to a range of service providers will change the balance struck in the Act between rights holders and other parties. Carriage service providers were singled out for the additional protection of the safe harbours because they were an identified (and regulated) class that could be expected to cooperate with copyright owners to deter copyright infringements in return for the protection of the safe harbour scheme. There is no compelling case for expansion of the scheme to an undefined and unregulated class of operator, which could include “rogue sites” (see discussion above). We have identified the risks of doing so above and these outweigh any case for expansion of the class of beneficiaries of the safe harbours.

⁴⁸ <http://judiciary.house.gov/hearings/pdf/112%20HR%203261.pdf>.

⁴⁹ Defined as being sites primarily designed or operated for the purposes of, has only limited purposes other than, or is marketed by its operators for Copyright or Trade Mark infringement.

⁵⁰ CfEM, pp 13-14.

49. Narrow comparisons between the definitions of service provider under copyright laws of countries such as the US and Korea fail to take account of the other differences between the existing legislative schemes and continued developments since the safe harbours were introduced which affect the way that the laws operate. Serious consideration should be given to Australia implementing reforms which mirror those currently before legislators elsewhere⁵¹ or are already available in other jurisdictions.⁵² This will ensure that Australian copyright laws are kept up to date and allow the strategic economic goals of government as put forward in the 2009 “Australia’s Digital Economy: Future Directions” paper.⁵³
50. Given these issues, and the complexities that will be involved in a change to the definition of service provider, we believe that the appropriate course is for this issue (and other issues addressed in this submission) to be the subject of full, open and consultative review, for example by the Australian Law Reform Committee as part of its upcoming review of Australian copyright laws.

Neil Gane



**Executive 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**

⁵¹ e.g. The Protect IP Act and the Stop Online Piracy Act in the United States.

⁵²The UK 2011 case brought by the MPA against British Telecom to invoke Section 97A of the Copyright, and Patents Act to secure direct action by BT to block the pirate website Newzbin2 which distributes content without permission on a commercial basis. See <http://britishcaselaw.co.uk/twentieth-century-fox-film-corporation-ors-v-british-telecommunications-plc-2011-ewhc-2714-ch-26-october-2011>

⁵³ In which it states that “...content is the key driver of digital economy growth” (p17) and in turn “the digital economy is essential to Australia’s productivity, global competitiveness and improves social wellbeing” (p1).
