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Thank you for this opportunity to respond to the discussion paper into online copyright infringement.

It is difficult to know where to begin to address this issue. The Discussion Paper's general tone seems to indicate that the Government has already decided that it needs to act and is merely trying to judge the temperature of the waters to determine which of its stated options is least-worst.

Moreover, it is difficult to answer most of the 11 questions posed by the Discussion Paper because they rest on wholly illogical foundations. How can they be meaningfully answered without first exploring and undermining their set of underpinning assumptions?

A professionally prepared discussion paper should canvass all options, including proposals which the Coalition's (significant) funders in the "copyright lobby" find objectionable. The Government cannot possibly be seen to be fair and even-handed in presenting a Discussion Paper which presents three proposals which seek the practical effect of financially enriching the rights holder industries, and no proposals whatsoever which seek to address the interests of the electorate which the Copyright Act is supposed to serve.

THE MUSIC INDUSTRY'S CHEQUERED INTERNET HISTORY

I can recall the very last music CD I ever bought. It was called *100th Window* by the band *Massive Attack,* and was published by Universal/EMI in 2003, at the height of the battles between the music industry and filesharing services such as Kazaa and eDonkey.

The reason it was the last music CD I ever bought was because the attitude of the music industry at the time was that the Internet was an existential threat, and that filesharing needed to be stopped at all costs. This attitude informed a decision to experiment with so-called "technological protection methods" (TPMs) on music CDs.

TPMs mostly involved ways of subtly corrupting the data stored on a CD to make it difficult for CD-ROM drives on personal computers to "rip" the CD to MP3. A secondary *universal* effect of TPMs was to cause the corrupted CD to fail to play in some regular CD players, including the one in my car.

Universal/EMI hated their customers (and, by association, me) so much that they knowingly sold defective products. They continued to treat their clientele with such

derisive contempt despite the fact that TPMs never, in their entire history, made even the slightest impact upon whether the music stored on CDs was traded online.

By swearing myself off CDs for good in 2003, I avoided even more abusive behaviour by the rights holder industries targeted at their paying customers: In 2007, Sony globally distributed 22 million music CDs which they had knowingly infected with a computer virus which disabled PC CD burners. When caught-out by security researchers, they distributed a "removal tool" which knowingly failed to remove the virus (which was, itself, so wretchedly insecure that it provided a vector for other cyber-security attacks against infected PCs mounted by unrelated third parties).

The upshot of Sony's reckless misbehaviour was that they suffered adverse legal judgements in class action lawsuits in at least three jurisdictions which compelled them to pay nearly a million dollars in damages, and replace infected CDs with "clean" copies. They narrowly avoided criminal prosecution for breach of computer crime statutes by entering into a consent decree with the US Department of Justice.

One reason I am telling this story is to inform the Australian Government of the calibre of the rights holder organisations the Attorney-General's Department is now serving.

Another reason I am telling you this is because the temper tantrums of the music industry came to naught: Not only did their efforts make no difference whatsoever to the online exchange of their copyrighted products, but eventually *even they worked out* that further investments of aggressive opprobrium against their customers was a waste of time and money. At present, Apple's iTunes Music Store (iTMS) is the largest online music marketplace in the history of mankind, selling tens of billions of dollars worth of unprotected, unsecured, easily sharable MP3 files to anyone who wants to buy them: Precisely the outcome that the music industry feared and fought for nearly a decade.

Far from being an existential threat to the music industry, the internet is now providing it with previously unimagined oceans of cash, *even though* unlawful file sharing continues unabated. The music industry has learned that there is no point in attacking customers to prevent copyright infringement if annual profitability records can be routinely and repeatedly broken: To the extent that file sharing has any impact at all, it clearly is not *significantly* negative.

ENCOURAGING LAWFUL PURCHASE OF COPYRIGHTED MATERIAL

The one thing which has made an overwhelming difference to the predicament of the music industry has been the availability of lawful alternatives to copyright infringement.

The release of iTMS in Australia provided Australians with what they had always demanded from the music industry during the "copyfights," but which the music industry had never provided: The ability to purchase musical works *á la carte,* at a reasonable price, in a format which can be played on any device, on terms acceptable to the customer.

It's that simple: Offer the customer what they want, and they will buy. Make it easier to purchase than to navigate *The Pirate Bay* to find torrent files, and torrenting will stop, as if by magic.

The music industry achieved their current monstrous profitability by embracing that concept, without any copyright legislative changes.

THE MOVIE INDUSTRY'S CHEQUERED INTERNET HISTORY

Despite being comprised of many of the same companies, the film industry has not come to the same conclusions. Meanwhile, customers routinely and repeatedly entertain them with the same wholly reasonable demands.

The Australian Federation Against Copyright Theft (AFACT) fought a spectacularly unsuccessful lawsuit against ISP iiNet to attempt to make iiNet pay to secure AFACT's products. The foundation of the lawsuit was so poor that I, a legal layman with far lesser skills than AFACT's legal team, was able to predict precisely how it would turn out.

The defeat against AFACT was so profound that they have had to change their name to the Australian Screen Association (ASA) to escape their own reputation.

AFACT/ASA is the Australian colonial outpost of the Motion Picture Association of America (MPAA), which has established an equally unsuccessful legal history in the USA. In 2008, the MPAA was famously laughed out of court after sending copyright infringement takedown notices to three WiFi access points and a laser printer. On this side of the Pacific Ocean, AFACT/ASA fared no better, with admissions in the *AFACT v iiNet* "Uncontested Findings of Fact" which agreed that the same techniques proffered by the same American companies to identify copyright infringers were little better than wild guesses, and that ISPs were under no obligation to pay any attention to them.

Having been so comprehensively caned in the courtroom, AFACT/ASA now seeks to have Australian Copyright legislation altered so that those same copyright infringement reports can have legal effect. And this Government, flush with donations from AFACT/ASA and their member corporations such as Village Roadshow, seems prepared to let them.

THE AUSTRALIAN CONSUMER'S EXPERIENCE

An Australian consumer of movies is, in global terms, a very poor second class citizen.

Movies and television programs are a cultural experience: When a new film is released, the Internet becomes abuzz with the voices of fans and critics expanding the impact of the film by simply talking about it.

Australians simply cannot participate in those conversations. The actions of rights holder organisations like AFACT/ASA and Village Roadshow conspire to make it impossible for an Australian to lawfully view a new release movie until well after the cultural exchanges it provokes have ramped-up. An Australian film consumer actually needs to invest conscious effort in *staying away from the internet* to ensure that "spoilers" are not accidentally discovered online before they see the movie.

This is despite at least a decade of consistent appeals from Australian audiences to have movies released in Australia at the same time that they are released elsewhere.

Last month, *The Reckoner* surveyed the USA's 31 most popular TV shows of 2014, and discovered that just two were legally available for purchase in Australia within 24 hours of screening. Furthermore, "52% of the TV shows surveyed *have not been made available at all on Australian digital stores.*"

I find that extraordinary: Paralleling the history experienced by the music industry, Australian consumers have spent over a decade crying out to have this situation fixed. The rectification is entirely within the hands of the Australian distributors: They can fix it if they wish. But they don't.

So how much sympathy should we have for them when their eyes fill with tears about copyright infringement?

Instead of listening to their customers, AFACT/ASA members and distributors such as Village Roadshow continue the same playbook they've been unsuccessfully deploying for years: Fume impotently about the injustice of copyright infringement whilst simultaneously withholding lawful alternatives; whinging incessantly to the Government about how much they need to be protected from their willing, paying customers; and threatening legal action.

When they finally release products, they seem to do it in the most customer-hostile ways imaginable: Why would you force someone who has paid for your BluRay to spend over five minutes watching unskippable legal warnings in several languages about acts of copyright infringement they demonstrably have not committed? Why would you force someone who wants to pay you actual money for an online download

to subscribe to a pay-TV service they don't want before they can qualify as a customer? (How is that not a breach of the "Third line forcing" provisions of Australian corporation law?) Having sold them the download, what kind of demented control-freak would provide it in a format which limits the devices upon which the paid consumer can play it?

This is all very basic. It's something these very same companies learned in the music business over five years ago, but they seem determined to ignore the lessons and treat their customers with outright contemptuous hatred.

INTERNATIONAL EXPERIENCE

Australia appears to be one of the last bastions of the hyper-aggressive rights holder industry.

In the USA, consumers can subscribe to services such as Hulu+ and NetFlix. For a small monthly sum, consumers can stream *á la carte* selections of movies and television programs to any web browser and a variety of smart-TV apps and set-top boxes, in exactly the way Australian consumers have been demanding for years.

Not coincidentally, US unlawful filesharing activity is a mere fraction of claimed measurements in Australia.

Through restrictive regional licensing agreements, these services have been blocked in Australia by the same customer-loathing organisations which have been failing to offer local equivalent services.

A PERSONAL SOLUTION

I began this submission with a personal story, and it seems fit to end it with one too.

I have already solved these problems for myself, by personally deciding to never knowingly deal with Australian content distributors again. They have spent so many years treating me and my money with such profound disrespect that I can't honestly raise the energy required to care what they think anymore: I've opted-out.

Instead, I'm following a recommendation made by the 2012 IT Pricing Inquiry, by availing myself of the means to bypass "geoblocks." For the purpose of my content consumption, I'm now American.

I buy my music on Spotify US and the US iTunes store, denying revenue to Australian distributors. I am a paying subscriber to Hulu+ and Netflix, who are both perfectly willing to take my money in exchange for the right to supply my household with a virtually infinite supply of TV programs and movies which my family wants to watch.

I have not visited an Australian cinema since the last *Hobbit* movie, which, incredibly enough, was released on the same day globally.

Unlike most Australians, I choose to fully participate as an Australian member of global online communities constructed around the shared cultural experience of the enjoyment of film, TV and music which is simply unavailable in Australia.

THE IMPLICATIONS FOR COPYRIGHT

If you ask the rights holder industry, they will tell you that my subscriptions to offshore content services renders me a large scale infringer of copyright, even though I am paying full retail prices for the content I consume. And, despite the disagreement of the Full Bench of the High Court of Australia, they will label me a "thief."

Frankly, I don't care what they think. They have spent so many years abusing copyright law with their sociopathic behaviour, and convincing governments to support more of it, that I am convinced that copyright law in 2014 no longer matches the expectations and social norms of the Australian electorate.

THE PROPOSALS PRESENTED IN THE DISCUSSION PAPER

The proposals presented in the Online Copyright Infringement Discussion Paper will only make matters worse: There is no plausible claim that Australian voters support providing rights holders with a means to compel ISPs to preventing our access to the content we seek by extending ISP authorisation liability, or constructing a copyright-oriented duplicate of the internet censorship proposals we have repeatedly soundly rejected since 2007 (especially given that the Irish example described in the paper is viewed internationally with abject hilarity, and has not made one iota of difference to whether Irish people can access *The Pirate Bay* or *Kickass Torrents*. For God's sake, if you're going to make a proposal, why not make it an *effective* proposal?*)*.

I also oppose extensions to the Safe Harbour Scheme in Sections 116AA to 116AJ of the Copyright Act. *AFACT v iiNet* established that the Safe Harbour scheme was an irrelevant distraction, having judged that iiNet probably didn't qualify for it but even if they did, it wouldn't have made any difference to the result.

Given the history of the rights holder industries and the kow-towing genuflection Australian Governments routinely show towards them, I'm not convinced that the Government is capable of redrafting the Safe Harbours in a way that doesn't make them worse.

Regarding "Building the evidence base": It is regrettable that the standards of Australian public administration are so deplorable that we can reach the point of

making proposals for legislative amendment before "Building the evidence base" has even been considered.

The Discussion Paper is certainly devoid of evidence. For example, it lists a series of overseas attempts to address online copyright infringement without drawing attention to the manifest failure of all of them. It says, "There are good reasons why all Australian should be concerned about online copyright infringement," without illustrating any reasons or highlighting any concerned Australians. It contains thoroughly debunked "copyright-math" numbers for Australian copyright industry employment and economic impact (900,000 people must surely include the person who empties the drip-tray under the soft-serve machine in the cinema snack-bar?) It draws allusions to fraud and crime among copyright infringers, even though the broadness of copyright means virtually everyone with an internet connection is a copyright infringer in 2014, and almost none of them are fraud and crime victims. It claims that the Government "believes" that ISPs can take "reasonable steps" to dissuade online copyright infringement, even though no less than the Full Bench of the High Court of Australia has made precisely the opposite finding.

Most fancifully, the discussion paper presents an industry-driven sob-story about the terrible toll of copyright infringement and Government's obligations to protect their broken business model, ***without one single mention*** **of the responsibility of the industry to deliver services to customers upon which they're prepared to spend money.**

This is a pure example of "regulatory capture," when the agenda of a regulator is dominated by the commercial needs and desires of the industry it regulates. Normal people recognise it as a form of soft corruption, where the Department is unable to see past the commercial interests of its one stakeholder to do its job effectively. Does the Government concur?

SUMMARY

Late last week, Village Roadshow released an iPad app containing their annual financial results, in which they reported a near record profit. Astonishingly, they were able to produce this massive profitability while simultaneously telling the media and Government that the sky is falling, and that urgent legislative reform is necessary to prevent them from imploding.

If the Discussion Paper's dubious claims about employment and economic value represented by their industry are at all meaningful, that result must force me to the conclusion that the stated jobs and exports are perfectly safe for the foreseeable future

in the environment created by the legislative *status quo*. It's hard to conclude that they're under financial distress when they're making-out like bandits.

The Australian rights holder industries which are agitating for what they euphemistically call "copyright legislative reform" have a long and distinguished history of abusing their customers.

As one of the targets of that abuse, I've opted-out of dealing with them. I will continue to do so until the abusive behaviour stops, regardless of any legislative change they manage to pay the Government to enact.

Unless and until Australian copyright legislation is amended to protect the interests of end-users, I will adopt an attitude of indifference towards what it says.

In my opinion, the proposals presented in the Discussion Paper are moving us in the wrong direction. I'm not prepared to consider rights holder driven copyright reform in the absence of obligations on Australian distributors to actually distribute to Australians on a timely basis, clarification and expansion of Fair Dealing provisions, "Copyright Extinguishment" for rights holders which abuse their rights to the detriment of Australian consumers, and changes to address the fact that repeated copyright term extension makes it virtually impossible for any works to ever enter the public domain.

While I do not support any of the proposals in this Discussion Paper, I look forward to a new one which canvasses those issues.