



# Submission in response to the Review of the Copyright Online Infringement Amendment

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**Joint Submission from the Australian Film & TV Bodies**  
**March 23, 2018**

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# Executive Summary

The Australian Film & TV Bodies<sup>1</sup> welcome the opportunity to participate in this Review. As a number of our members have been active users of the current version of s115A of the Copyright Act (the Act), we appreciate the chance to discuss the effectiveness of the existing provision and how it can be further improved.

## **Part 1 – How effective and efficient is the mechanism introduced by the Copyright Online Infringement Amendment?**

In terms of the intended objective of reducing large-scale online copyright infringement in Australia by websites operating outside Australia, the latest report from UK research firm INCOPRO, which covers trends up to the end of November 2017,<sup>2</sup> shows that access to blocked online locations by Australian-based devices is down by 53% and overall piracy in Australia is down by 25% compared to October 2016. While efficacy in reducing online infringement can continue to be improved by means of some of the amendments recommended in this submission, these figures demonstrate that the injunctive relief offered by s115A is the most effective available tool, to date, in reducing online infringement in Australia.

In addition, the educational landing page managed by rightsholders has already received 1.97 million views since the first blocks were implemented in December 2016. This figure does not include traffic to educational landing pages hosted by the ISPs Telstra, TPG and Vocus, which, according to the Australian Competition and Consumer Commission (ACCC), cumulatively represent 76% of the market and can therefore be taken to have generated a significant number of views to their educational landing pages.<sup>3</sup> Section 115A has had an added benefit of increasing the knowledge and understanding of the public in relation to the issue of online copyright infringement.

## **Part 2 – Is the application process working well for all parties and are injunctions operating well, once granted?**

Three key factors are reducing the effectiveness of the current application process. We discuss these factors below.

- (a) Protracted process: The length of the procedure from application to final order in these cases, as well as the process for obtaining variances to the orders, promotes circumvention of blocking orders and undermines the effectiveness of the statute and its policy objectives.

Recommendation 1: Amend s115A to explicitly recognize that rightsholders may seek an interim order process to obtain immediate relief against infringing online locations in advance of case management and full court hearings.

<sup>1</sup> Further details on members of the Australian Film & TV Bodies can be found in Appendix A.

<sup>2</sup> INCOPRO, *Site Blocking Efficacy – Key Findings*, Creative Content Australia (February 2018) <[https://www.creativecontentaustralia.org.au/\\_literature\\_210629/2018\\_Research\\_-\\_Incopro\\_Study](https://www.creativecontentaustralia.org.au/_literature_210629/2018_Research_-_Incopro_Study)>.

<sup>3</sup> Australian Competition and Consumer Commission, *Competition in the Australian telecommunications sector: Price changes for telecommunications services in Australia* (February 2017) <[https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202015-16\\_web.pdf](https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202015-16_web.pdf)> 25, figure 2.10.

Recommendation 2: Implement a notification system by which new domains/IP addresses/URLs providing access to online locations already subject to an order under s115A of the Act are simply notified by those carrying out the order, who then quickly implement it against those new domains/IP addresses/URLs.

- (b) Costs of compliance prevent rightsholders from targeting all online locations and ISPs. Australia is the only country where a court has required rightsholders to pay a per-ISP cost for an ISP to implement a site blocking order. This cost effectively limits the number of ISPs against which a rightsholder will seek blocking orders in Australia, working against the purpose of the statute – to effectively reduce piracy.

Recommendation 3: Ensure that intermediary service providers will bear their own costs of complying with orders under s115A.

- (c) The “primary purpose” requirement, as opposed to a “substantial purpose or effect” requirement, potentially provides a loophole through which pirates can evade the law, thereby reducing the effectiveness and efficiency of s115A by allowing certain platforms to avoid the reach of the mechanism.

Recommendation 4: Substitute “substantial purpose or effect” for “primary purpose” as a threshold factor.

### **Part 3 – Are any amendments required to improve the operation of the Copyright Online Infringement Amendment?**

In addition to the changes suggested above, there are two specific changes to the scheme which we believe would significantly improve the efficacy of the Amendment in reducing copyright infringement in Australia. They are:

Recommendation 5: To increase the effectiveness of the current statute and make it technologically neutral, replace all references to “carriage” in s115A with “intermediary” and create a new definition of “intermediary service provider” which extends to relevant service providers involved in the identification and delivery of content.

Recommendation 6: To remove all references to “outside Australia” in s115A to allow rightsholders to choose a no-fault approach against targets located in Australia, avoiding a two-speed system that encourages pirate services to base themselves in Australia.

We look forward to discussing these issues and recommendations with the Department in more detail.

# Introduction

The Australian Film and TV Bodies thank the Department of Communications and the Arts for the opportunity to provide a submission to the Review of the Copyright Online Infringement Amendment.

This amendment, which was passed with support from both major political parties, has been effective in achieving its intended purpose of reducing online piracy and making space for legitimate services. Australia is now one of over 40 countries which have or are obliged to have site blocking processes in place, either court-ordered or administrative.<sup>4</sup>

When this amendment was originally considered, opponents claimed it would break the Internet and would not be effective.<sup>5</sup> Two years after its inception in Australia, site blocking has proven effective; with access to blocked online locations down over 50%, and overall access to sites enabling online infringement down by 25%, while consumers can surf to all legitimate web-pages with continued ease.<sup>6</sup>

Movies and TV shows are licensed to a wide variety of legal digital services at globally competitive prices,<sup>7</sup> sparking innovative new businesses, such as Stan and Fetch TV locally, and Netflix, iTunes and Amazon globally, and allowing them to thrive, thanks in part to the reduction in access to infringing content. As the provision of content to consumers increasingly occurs through the Internet, the importance of effective mechanisms to curtail or eliminate online piracy will become increasingly critical, especially given that prior to the latest wave of court-ordered blocks, 21% of Australians still identified as active pirates.<sup>8</sup>

There remains scope for the Government to increase the effectiveness and efficiency of the s115A mechanism in achieving its intended objectives, and align it with international best practices. As a number of our members are among the most frequent users of the mechanism in this submission we show how some amendments could make a material difference to this end.

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<sup>4</sup> See infographic for further details: Motion Picture Association – International, *Site Blocking in the World* (May 2015) <<http://www.mpa-i.org/wp-content/uploads/2016/02/Site-Blocking-October-2015.pdf>>.

<sup>5</sup> See, for example, submissions made by ACCAN (submission 20), Choice (submission 34), the Electronic Frontier Foundation (submission 36), Google (submission 27) and the Pirate Party (submission 32) when the Bill was reviewed by the relevant Senate Committee in 2015, available at <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Copyright\\_Bill\\_2015/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Copyright_Bill_2015/Submissions)>.

<sup>6</sup> A comprehensive report which reviews these issues in detail can be found at Nigel Cory, *How Website Blocking Is Curbing Digital Piracy Without “Breaking the Internet”* (August 2016) Information Technology & Innovation Foundation <<http://www2.itif.org/2016-website-blocking.pdf>>.

<sup>7</sup> See Appendix B for further details on the rich variety of ways consumers can access content, and changes in availability and affordability.

<sup>8</sup> INCOPRO, *Site Blocking Efficacy – Key Findings*, Creative Content Australia (February 2018) <[https://www.creativecontentaustralia.org.au/\\_literature\\_210629/2018\\_Research\\_-\\_Incopro\\_Study](https://www.creativecontentaustralia.org.au/_literature_210629/2018_Research_-_Incopro_Study)>.

# Part 1 – How effective and efficient is the mechanism introduced by the Copyright Online Infringement Amendment?

The objective for which s115A was enacted was to “reduce online copyright infringement...as a precise response to a specific concern raised by copyright owners”, by introducing a no-fault mechanism that did not require copyright owners to “first establish the [ISP’s] liability for copyright infringement or authorisation of copyright infringement”.<sup>9</sup>

The Australian Film & TV Bodies submit that s115A has been effective and relatively efficient in achieving its objective. Since the Copyright Online Infringement Amendment came into force, rightsholders have filed seven cases. Five of those cases have been determined to date, and all of them have resulted in blocking orders being granted (some of which have subsequently successfully obtained variations to the orders to include blocks of new domains associated with blocked online locations). The ongoing two cases by TVB and Roadshow (along with other plaintiffs) are set to be heard on April 13, 2018, and they seek to disable access to online locations used to operate piracy apps loaded on Android-based set-top boxes and other piracy devices.

The completed court cases have presented us with an opportunity to measure the changes in the piracy landscape as a direct result of the orders that were granted.

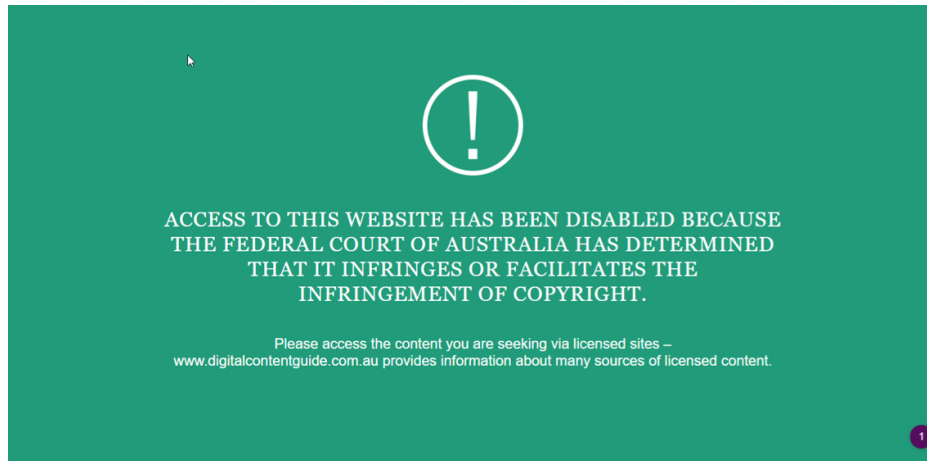
## (a) Education through landing page visits

The Court has allowed ISPs to choose whether to present their own messages (which must include prescribed content) to consumers attempting to access a blocked site, or redirect to a landing page managed by rightsholders. The page managed by rightsholders has already received 1.97 million views since the first blocks were implemented in December 2016. This figure does not include traffic to landing pages hosted by Telstra, TPG and Vocus, which according to the ACCC cumulatively represent 76% of the market and therefore can be taken to have attracted a substantial number of visits.<sup>10</sup>

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<sup>9</sup> Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015*, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5446\\_emms\\_87ada78b-8836-421e-bc2f-96cfc19d1f81%22;rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5446_emms_87ada78b-8836-421e-bc2f-96cfc19d1f81%22;rec=0)> 6, Explanatory Memorandum, 2, 1.

<sup>10</sup> Australian Competition and Consumer Commission, *Competition in the Australian telecommunications sector: Price changes for telecommunications services in Australia* (February 2017) <[https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202015-16\\_web.pdf](https://www.accc.gov.au/system/files/ACCC%20Telecommunications%20reports%202015-16_web.pdf)> 25, figure 2.10.



The educational impact of such a message delivered in such great volumes, stating that Australia’s Federal Court has deemed that a site which a member of the public is attempting to access infringes or facilitates infringement of copyright, cannot be underestimated.

The graph below shows how these landing page impressions were distributed by month since the first orders were granted in December 2016. This clearly shows the significant effect of the orders granted in August 2017 in the Roadshow and Foxtel cases, with another smaller spike in December when Foxtel was granted a new set of variations.

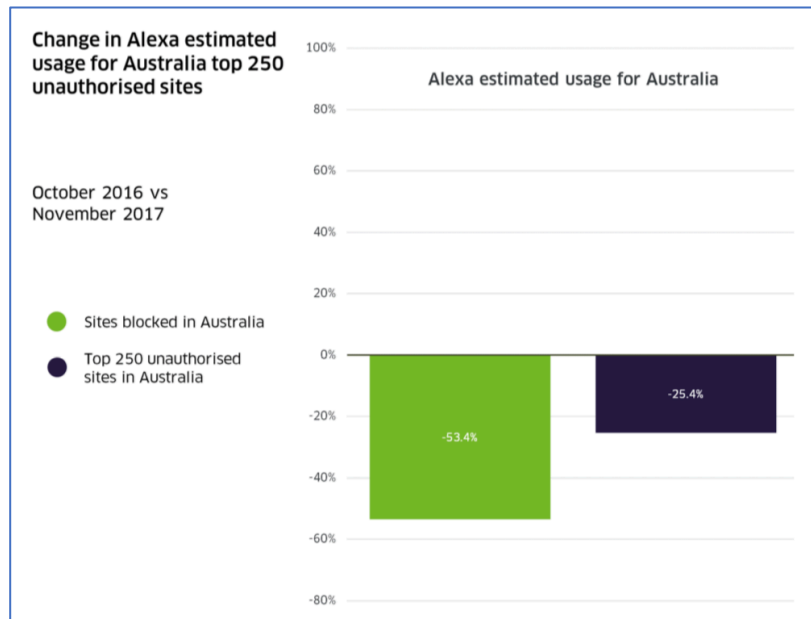


## **(b) Access to blocked online locations is down over 50%, and overall piracy is down by 25%**

UK firm INCOPRO has conducted research into the impacts of site blocking in many countries in the world, including Australia. Their February 2018<sup>11</sup> report shows that access to blocked online locations from Australia dropped by 53% from October 2016 to November 2017 following the August 2017 blocking orders. INCOPRO found that overall online piracy in Australia is down by

<sup>11</sup> INCOPRO, *Site Blocking Efficacy – Key Findings*, Creative Content Australia (February 2018) <[https://www.creativecontentaustralia.org.au/\\_literature\\_210629/2018\\_Research\\_-\\_Incopro\\_Study](https://www.creativecontentaustralia.org.au/_literature_210629/2018_Research_-_Incopro_Study)>.

25% over the same period.<sup>12</sup> This makes the injunctive relief offered by s115A of the Copyright Act the most effective tool to date in reducing online infringement in Australia.



The results closely align with a peer-reviewed study by Carnegie Mellon University based on the actual browsing behaviour of a large sample of ISP users in the United Kingdom, which showed that although blocking one piracy website had a minimal effect on overall piracy traffic, blocking 19 major piracy sites at once reduced overall piracy by 22% and increased traffic to legal services (such as Netflix) by 12% on average.<sup>13</sup> A causal interpretation of the results is further strengthened by the findings that the lightest users of the blocked sites (who are thus the users least affected by the blocks, other than the control group) increased their clicks on paid streaming sites by 3.5% while the heaviest users of the blocked sites increased their paid streaming clicks by 23.6%.<sup>14</sup>

### (c) Overall comments on effectiveness and efficiency

The data set out above supports a conclusion that, in line with the experience in other jurisdictions such as the UK and Europe, the no-fault remedy of an injunction blocking access to overseas locations facilitating online copyright infringement has been effective in reducing this type of infringement.

The cooperation that has been established between rights owners and ISPs – avoiding more costly and complex disputes over liability of service providers – supports this conclusion as to the effectiveness of such a remedy. In particular, we are not aware of any examples in which Internet users have been unnecessarily deprived of access to legitimate content or webpages as a result of the blocking orders implemented by the Federal Court.

<sup>12</sup> INCOPRO, *Site Blocking Efficacy – Key Findings*, Creative Content Australia (February 2018) <[https://www.creativecontentaustralia.org.au/\\_literature\\_210629/2018\\_Research\\_-\\_Incopro\\_Study](https://www.creativecontentaustralia.org.au/_literature_210629/2018_Research_-_Incopro_Study)>.

<sup>13</sup> Brett Danaher et al., 'The Effect of Website Blocking on Consumer Behaviour' (2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2612063](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063)>.

<sup>14</sup> Ibid.



Despite these positive findings, the above research demonstrates that online infringement in Australia still remains a significant problem. Below are a number of refinements to the s115A mechanism that are likely to assist in enabling it to more effectively and efficiently achieve its objective of reducing infringements.

## Part 2 – Is the application process working well for all parties and are injunctions operating well, once granted?

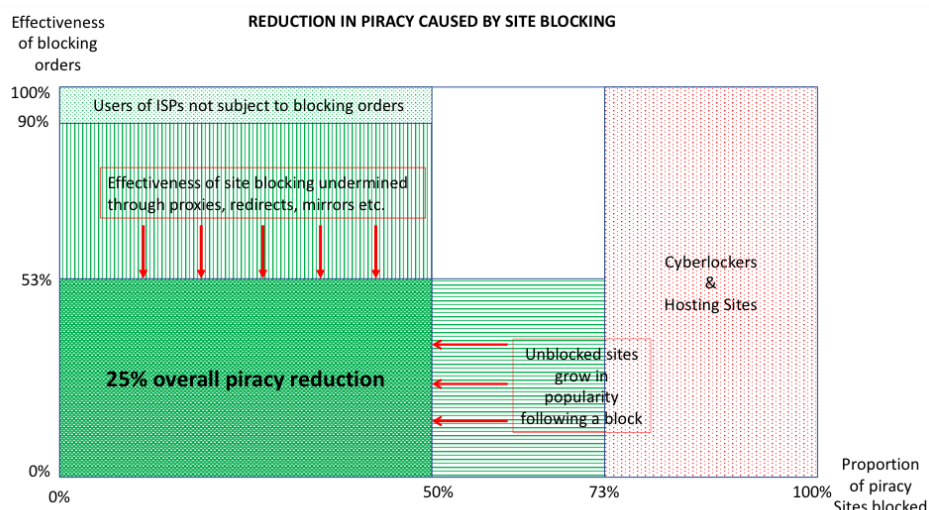
As noted above, overall, site blocking has been effective in reducing online copyright infringement in Australia and is currently the most effective tool available to rightsholders to achieve this goal. However, three key factors are reducing the effectiveness of the current application process:

- (a) Protracted process: The length of the procedure from application to final order in these cases, as well as the process for obtaining variances to the orders, promotes circumvention of blocking orders and undermines the effectiveness of the statute and its policy objectives;
- (b) Implementation costs charged to rightsholders on a per-ISP basis prevent rightsholders from targeting all ISPs; and
- (c) The “primary purpose” requirement, as opposed to a “substantial purpose or effect” requirement, potentially provides a loophole through which pirates can evade the law, thereby reducing the effectiveness and efficiency of s115A by allowing certain platforms to avoid the reach of the mechanism.

These factors limit the effectiveness of the law, and some factors (e.g. cost) may also act as deterrents for many local rightsholders who (without this additional evidentiary burden) may otherwise consider bringing (more) cases against substantial commercial infringers.

**(a) Protracted process: The length of the procedure from application to final order in these cases, as well as the process for obtaining variances to the orders, promotes circumvention of blocking orders and undermines the effectiveness of the statute and its policy objectives.**

The below graph is a visual representation of the INCOPRO study. It shows the traffic reduction to infringing sites achieved so far as a product of the proportion of sites subject to blocking injunctions multiplied by the effectiveness of those blocks.



The most committed pirates may also avoid blocks by a combination of changing DNS server settings, or using proxy, redirect or mirror sites, or using smaller ISPs not subject to site blocking orders, or by switching to new online locations not yet subject to blocking orders. These factors cause a reduction in the effectiveness of the blocks to 53%.

Australia's 53% traffic reduction is significant, but still relatively low, compared to other countries, and the main cause of this appears to be the period of time that lapses between when a user finds an alternate infringing domain and when that alternate domain is blocked.<sup>15</sup>

Country	Efficacy	Method of blocks	Avg. # of day application – result	Process
Australia	-53%	DNS	255 <sup>16</sup>	Court-ordered.
United Kingdom <sup>17</sup>	-77%	IP/DNS/ Cleanfeed	77 <sup>18</sup>	Court-ordered for blocked online locations; variances handled via notification.
Portugal <sup>19</sup>	-69%	DNS	27 <sup>20</sup>	Monthly waves of blocks administered by governmental body IGAC (Inspeção Geral das Atividades Culturais).

<sup>15</sup> The method of blocking may also play a role, although no conclusive data is available on this point.

<sup>16</sup> Data sourced from Federal Court of Australia, *Digital Law Library Search* <<http://www.fedcourt.gov.au/digital-law-library/judgments/search>>.

Case Nr	Applicant	Judge	Filing Date	Hearing	Judgement	Days
NSD239/2016	Roadshow	Nicholas	16/2/16	23/6/16	15/12/16	303
NSD241/2016	Foxtel	Nicholas	18/2/16	23/6/16	15/12/16	301
NSD545/2016	Universal	Burley	18/4/16	25/10/16	28/4/17	375
NSD269/2017	Roadshow	Nicholas	24/2/17	10/5/17	18/8/17	175
NSD663/2017	Foxtel	Burley	4/5/17	8/8/17	1/9/17	120
AVERAGE						255

<sup>17</sup> INCOPRO, *Site blocking efficacy study in the United Kingdom* (November 2014) <<http://www.incoproip.com/wp-content/uploads/2016/11/Site-Blocking-Efficacy-UK-revised-19-03-2015.pdf>>.

<sup>18</sup> Data on file with ASA. This figure excludes the first case, which was contested.

<sup>19</sup> INCOPRO, *Site blocking efficacy study in Portugal: September 2015 to October 2016* (May 2017) <<http://www.incoproip.com/wp-content/uploads/2017/07/Site-Blocking-and-Piracy-Landscape-in-Portugal-FINAL.pdf>>.

<sup>20</sup> Data on file with ASA.

Due to the time that lapses between the original identification of sites targeted for injunctive relief to evidence gathering, filing of the case and hearing through final order, as much as nine months can transpire before a court order is issued. For instance, in the second Roadshow case, the target site selection began even before the order in the first case was issued in December 2016. The second case was filed in February 2017, heard in May 2017, and orders were granted in August 2017. Over this period, users migrated to new online locations.

In Australia, rightsholders currently have a procedure through which they can file an application in court for an extension of the orders to cover alternative or proxy sites. All extensions requested by rightsholders have so far been granted (Foxtel – June 2017, December 2017, February 2018, and Roadshow – February 2018). This process usually takes about two to four weeks from start to finish and the ISPs then have up to 15 working days to implement the blocks.

While it is anticipated that the speed of obtaining the first blocking order against a new service will improve somewhat now that a process for obtaining orders has been established in the Courts, the Australian Film & TV Bodies remain concerned that the effectiveness of the first blocking order is being promptly undermined by the infringing site almost immediately moving to new online locations. The current process for extending blocking orders moves too slowly to allow rightsholders to properly address this blatant circumvention of Court orders. To address this challenge, we propose the following two recommendations.

Recommendation 1: Amend s115A to explicitly recognize that rightsholders may seek an interim order process to obtain immediate relief against infringing online locations in advance of case management and full court hearings.

Section 115A is currently silent on whether an application could be made on an interlocutory basis. While the issue has not directly arisen to date, at least one of the judges who has presided over site blocking has proffered a view that an interlocutory application could not be made under s115A of the Act.

This ambiguity should be resolved to permit an application to be made on the same basis which other relief may be sought on an interlocutory basis. The principles applicable to interlocutory relief in other contexts are equally as applicable to an order under s115A of the Act, namely that:

- a) The applicant must make out a prima facie case;
- b) In many circumstances there will not be a disputed question of fact or a difficult question of law;
- c) The balance of convenience will usually favour rightsholders, in that Carriage Service Providers (CSPs) will usually not be significantly concerned with the making of an order under s115A of the Act;
- d) Damages will be an inadequate remedy as the infringements which occur through the operation of the online locations between filing of an application and the making of an order will be unconstrained and it is unlikely that the rightsholders will be able to recover damages from the ultimate perpetrators of the infringements – the operators of the overseas online locations who often cannot be identified.

The need for the ability to bring an application under s115A of the Act on an urgent basis is best illustrated by the circumstances of the transmission of a live sporting event. The value of these

transmissions is primarily in the fact that they are live and committed fans will wish to watch the relevant game or match in such a manner. Accordingly, the primary value of the ability to prevent unauthorised transmissions is on an urgent basis.

A remedy which comes into effect in six months, in this context, is really no remedy at all.

Provided applicants for an order under s115A of the Act satisfy the Court that it is appropriate to grant an interlocutory order on the established grounds that such orders are made in other circumstances, there does not appear to be any policy reason for preventing such an order.

Recommendation 2: Implement a notification system by which new domains/IP addresses/URLs providing access to online locations already subject to an order under s115A of the Act are simply notified by those carrying out the order, who then quickly implement it against those new domains/IP addresses/URLs.

Operators are now able to circumvent blocking orders within a matter of hours by changing domains/IP addresses/URLs. A notification system is the emerging international best practice, and would align Australia with the United Kingdom, the Netherlands, Ireland and Denmark, among others.<sup>21</sup> This process of including new domains that resolve to the same infringing online locations under existing orders has worked particularly well to ensure proper and timely coverage. It also avoids over-coverage, since ISPs can also be quickly notified of domains which no longer resolve to infringing sites, or IP addresses which no longer are pointing in a dedicated way to infringing sites.

As evidenced by the huge spike in traffic to the landing page when users attempt to access a blocked site,<sup>22</sup> the most pressing need is to ensure that operators of infringing sites are not able to effectively circumvent blocking orders by changing the location of their online offerings in circumstances where the new location remains accessible for any tangible period of time. Reducing the time taken to extend the online locations covered by existing site blocking orders would therefore increase the effectiveness of the blocks. This can be achieved by implementing a speedy, cooperative system for rightsholders to notify ISPs of new domains that resolve to the same online locations which have been the subject of a block order. The Court could implement such a system by making an appropriate order giving effect to this notification procedure as part of the initial blocking order, which could follow express statutory guidance to this effect in s115A.

It is worth noting that, under each of these recommendations, rightsholders still bear the primary responsibility for monitoring ongoing infringing activity, gathering evidence, bringing cases and monitoring and identifying new online locations hosting infringing sites which are subject of existing blocking orders. Continued maintenance from rightsholders is required to address new domains or proxies as they arise, along with entirely new online locations that facilitate infringement – as well as to ensure the proportionality and effectiveness of the system by notifying ISPs of online locations that are no longer dedicated to infringing sites. Facilitating and regularising the variance procedures would substantially improve the efficacy of the existing mechanism.

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<sup>21</sup> See *Twentieth Century Fox v British Telecommunications* (No 2) [2011] EWHC 2714 (Ch) 32, 200 (United Kingdom); *Ziggo v XS4ALL Internet* [2017] C/09/535341/KG ZA 17-89 (Netherlands); *Twentieth Century Fox v Eircom* [2017] 24 COM 913 (Ireland); *Koda v Telenor A/S* [2017] BS FOR-2317 (Denmark).

<sup>22</sup> See “Visits to Rightsholder Landing Page Site by Month” graph on page 7 of this submission.

## **(b) Costs of compliance prevent rightsholders from targeting all online locations and ISPs**

Site blocking is a self-help system for rightsholders that requires rightsholders to bear a significant proportion of the enforcement burden simply in obtaining the blocking order (by way of Court and other legal costs, such as evidence preparation). The Explanatory Memorandum makes it clear that s115A was designed to be “an efficient mechanism to disrupt the business models of online locations...that distribute infringing copyright material to Australian consumers.”<sup>23</sup> After over two years of operation, it is worth reconsidering whether the costs of compliance imposed on rightsholders who bring site blocking actions are helping to achieve this aim.

Based on a simple analysis of the number of ISPs in Australia, it is evident that asking for orders against all ISPs would be cost prohibitive.<sup>24</sup> The court actions in Australia to date have targeted the top three or four ISP groups (with Foxtel targeted as an additional respondent in the case brought by music’s rightsholders).<sup>25</sup> This leaves the users of smaller ISPs able to access these infringing locations through those ISPs’ services. Over time, there is a risk that these smaller ISPs could become ‘safe havens’ for pirates. This could place the major ISPs, currently subject to blocking orders, at a disadvantage and undermines the purpose and efficacy of the statute.

The Federal Court has generally accepted the ISPs’ submissions that they should be paid something for complying with orders under s115A.<sup>26</sup> Rather than a question of how to ascribe blame, lawmakers should look at the pragmatic implementation of the statute.

The CMU study referenced earlier<sup>27</sup> demonstrates that identifying the more popular infringing sites is key to achieving an effective remedy that yields a change in consumer behaviour. Imposing costs of compliance on rightsholders creates an unnecessary hurdle to achieving such effectiveness, deterring rightsholders from seeking blocking by the large number of smaller ISPs not currently subject to these orders.

Further, best practice in the impositions of regulatory burdens is to ensure that the costs of those burdens are minimized where possible. In this context, clearly the ISPs are in the best position to minimize the costs of implementing the orders.

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<sup>23</sup> Explanatory Memorandum, *Copyright (Online Infringement) Amendment Bill 2015* (Cth) 2.

<sup>24</sup> According to the ABS, there were 419 ISPs in 2013. Unfortunately there is no more recent information available. Assuming the 2013 ISP count is still accurate, it would cost rightsholders in excess of \$7 million to have all other ISPs block access to online locations which the four major ISPs have already been requested to block.  $(419-4) \text{ ISPs} \times 378 \text{ domains} \times \$50/\text{domain} = \$7,843,500$ . Even if there are now considerably fewer ISPs in 2018, the costs are undoubtedly prohibitive. Australian Bureau of Statistics, *8153.0 - Internet Activity, Australia, June 2013* (October 2013). <[http://www.abs.gov.au/ausstats/abs@.nsf/Products/8153.0~June+2013~Chapter~Number+of+Internet+Service+Providers+\(ISPs\)?OpenDocument](http://www.abs.gov.au/ausstats/abs@.nsf/Products/8153.0~June+2013~Chapter~Number+of+Internet+Service+Providers+(ISPs)?OpenDocument)>.

<sup>25</sup> *Universal Music Australia Pty Limited v TPG Internet Pty Ltd* [2017] FCA 435.

<sup>26</sup> In *Roadshow Films I*, the court “generally accept[ed] the respondents’ submissions in relation to compliance costs,” and alluded to respondents’ arguments that they are to be treated as innocent parties against whom relief is sought not by reason of any wrongdoing on their part, but in order to assist the applicants in their efforts to prevent the operators of the relevant online locations from infringing or facilitating the infringement of their copyright.” However, the Court left the door open to the applicants to provide evidence that “respondents benefited commercially from online copyright infringement.”

<sup>27</sup> Brett Danaher et al., ‘The Effect of Website Blocking on Consumer Behaviour’ (2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2612063](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612063)>.

## Examples of international practice requiring ISPs to bear costs of implementation

Eliminating costs of compliance on rightsholders for site blocking would also align Australia with international best practices. For example, in the UK, although Section 97A of the UK's *Copyright, Designs and Patents Act 1988* does not address the costs of compliance, as noted above, the Courts to date have ordered that those costs be borne by ISPs, in particular because "the costs of implementing" anti-piracy measures (which are "modest and proportionate") should "be regarded as a cost of carrying on business."<sup>28</sup> This is because the ISP "is a commercial enterprise which makes a profit from the provision of the services which the operators and users of the website use to infringe the rights owner's copyright."<sup>29</sup>

As a further example, in Ireland, the ISPs have agreed to bear the costs of compliance notwithstanding that the relevant legislation is silent on costs.<sup>30</sup> In July 2017, France's Cour de Cassation or Supreme Court (France's highest Court) affirmed that both ISPs and search engine intermediaries should bear the costs of site blocking. The lower courts had held:

*"The economic balance of the professional [copyright] associations, already threatened by these infringements, can only be aggrieved by the commitment to pay additional expenditures, which they cannot control, for the blocking of infringing website... whereas the ISPs... are at the origin of providing access to those websites; they gain economically from said access (particularly from advertising displayed on their pages) and it is therefore legitimate and in conformance with the proportionality principle for them to contribute financially to the blocking... by opting to put into place the most appropriate measures."*<sup>31</sup>

On appeal, the French Supreme Court agreed with the lower court, holding that neither the ISPs nor the search engine providers demonstrated that the implementation of the site blocking/delisting measures ordered upon them were unbearable sacrifices, nor that the cost thereof would imperil their economic viability. The Court was thus able to infer that requiring said intermediaries to bear the costs of the blocking and delisting measures ordered was strictly necessary for the preservation of the rights in question.<sup>32</sup>

Recommendation 3: Ensure that intermediary service providers will bear their own costs of complying with orders under s115A.

<sup>28</sup> *Twentieth Century Fox v British Telecommunications* (No 2) [2011] EWHC 2714 (Ch) 32, 200.

<sup>29</sup> *Ibid.*

<sup>30</sup> *EMI Records Ireland Ltd v UPC Communications Ireland Ltd* [2013] IEHC 274 13.

<sup>31</sup> *Association des Producteurs de Cinema (APC) v Orange SA*, Paris Ct. App. 15 March, 2016.

<sup>32</sup> *See SFR and Others v Association of Cinema Producers and Others*, Cour Cass, Civ 1, 6 July 2017, No 16-17.217, 16-18.298, 16-18.348, 16-18.595, ECLI:FR:CCASS:2017:C100909.



**(c) The “primary purpose” requirement, as opposed to a “substantial purpose or effect” requirement, potentially provides a loophole through which pirates can evade the law, thereby reducing the effectiveness and efficiency of s115A by allowing certain platforms to avoid the reach of the mechanism.**

In 2015, opponents of site blocking warned of the risk of over-blocking, by blocking sites that also had a legitimate purpose. To alleviate these concerns the Government set “an intentionally high threshold test for satisfaction by the Court” given that the scheme was intended to target “those online locations which flagrantly disregard the rights of copyright owners”.<sup>33</sup> In our 2015 submission we already shared our concern that raising the level of proof to a “primary purpose” standard could compromise the effectiveness of the bill.

The inclusion of the “primary purpose” as one of the threshold requirements has resulted in rightsholders taking a conservative view when selecting target online locations for enforcement action under s115A. This requirement sets a high evidentiary threshold for a successful application under this section, and rules out many large-scale infringers on the basis that (for example) their sites also host some legitimate content, in circumstances where direct proof of purpose is not available, given that the targets are illegal sites whose operators and records are based overseas, and therefore generally outside of the compulsive powers of the Courts in civil cases. An example of one such site was cyberlocker Hotfile, which in 2013 was found to have infringed copyright in the United States to the extent that it was required to pay rightsholders \$80 million.<sup>34</sup>

The results to date are starting to show that the exclusion of these types of infringing sites from s115A applications has resulted in lower effectiveness in reducing piracy. For example, of the locations enabling access to piracy, 27% of total usage has been classified by research company INCOPRO as coming from cyberlockers or hosting sites. These hosting sites constituted 17 out of the Top 50 online locations. The U.S. Trade Representative’s 2017 Out-of-Cycle Review of Notorious Markets Report classifies three of these sites as “prominent and illustrative examples of online and physical marketplaces that reportedly engage in, facilitate, turn a blind eye to, or benefit from substantial piracy”.<sup>35</sup> These three sites are openload.co (ranked No. 6 in Australia’s top 250 infringing sites according to INCOPRO), rapidgator (ranked No. 31) and uploaded.net (ranked No. 33).<sup>36</sup>

Whilst some of these sites claim also to serve legitimate purposes, that alone should not be enough to disqualify them entirely as targets if they are contributing substantially to online piracy in Australia. Other jurisdictions do not impose similar requirements. The closest parallel is Singapore, where a primary purpose to commit or facilitate copyright infringement is a matter

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<sup>33</sup> Revised Explanatory Memorandum, *Copyright Amendment (Online Infringement) Bill 2015*, <[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5446\\_emms\\_87ada78b-8836-421e-bc2f-96cfc19d1f81%22;rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr5446_emms_87ada78b-8836-421e-bc2f-96cfc19d1f81%22;rec=0)> 6.

<sup>34</sup> *Disney Enterprises, Inc. v Hotfile Corp.* [2011] 11-20427.

<sup>35</sup> Office of the United States Trade Representative, 2017 Out-of-Cycle Review of Notorious Markets (January 2018) <<https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>>.

<sup>36</sup> INCOPRO, *Site Blocking Efficacy – Key Findings*, Creative Content Australia (February 2018) <[https://www.creativecontentaustralia.org.au/\\_literature\\_210629/2018\\_Research\\_-\\_Incopro\\_Study](https://www.creativecontentaustralia.org.au/_literature_210629/2018_Research_-_Incopro_Study)>.



to which the Singapore High Court must have regard, it can be given “such weight as the High Court considers appropriate” and it does not function as a minimum threshold.<sup>37</sup>

The Australian Film & TV Bodies submit that the Government should follow the example of overseas jurisdictions and provide that, once an applicant for a s115A order has established evidence of substantial copyright infringement by an online location, an order can be granted without the need for the additional burdensome (and ultimately irrelevant) enquiry as to whether such infringement is the “primary purpose” of the site. The test should focus on the material issue, which is the substantial purpose and effect of the site. The expansion to “effect” is consistent with the approach taken by the Harper Review’s Final Report in replacing the purpose-based provisions of the Competition and Consumer Act 2010 with “purpose, effect or likely effect”, a recommendation that has now been enacted into law with Section 2 of the *Competition and Consumer Amendment (Competition and Policy Review) Act 2017* (Cth). We submit that the same approach would be appropriate in the context of the *Copyright Act*.

Recommendation 4: Substitute “substantial purpose or effect” for “primary purpose” as a threshold factor.

Altering the “primary purpose” text in s115A(1) to “substantial purpose or effect” would be consistent with the intent of the Government in achieving the policy goals being addressed by s115A. It would also continue to satisfy the Government’s objective of having an appropriately high bar given that the Court would continue to consider the discretionary matters set out in s115A(5).

These matters provide ample protection for the operators of online locations which may satisfy a substantial purpose test but may have countervailing legitimate uses. Furthermore, s115A(3)(c) provides that the person who operates an online location which is targeted to be blocked through court action can join the proceedings and argue their case (although we note that none have chosen to do so to date).

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<sup>37</sup> *Singapore Copyright Act 2006*, Section 193DDA(2).

## Part 3 – Are any amendments required to improve the operation of the Copyright Online Infringement Amendment?

In addition to the changes suggested above, there are two additional amendments to the scheme which we believe would significantly improve its efficacy in targeting online copyright infringement in Australia. They are to:

- (a) Expand s115A to all intermediary service providers; and
- (b) Expand s115A to online locations in Australia.

Removing these limitations is appropriate now that the effectiveness and efficiency of the scheme has been tested over the past 18 months and the concerns expressed by stakeholders (e.g. over-blocking) have not caused issues in practice. Such changes would increase the efficacy of the system while maintaining its proportionality the current high bar for obtaining relief.

We discuss these recommendations in further detail below.

### **(a) Expand s115A to all intermediary service providers**

CSPs facilitate consumers' access to illegal content; but they are not alone. A number of other intermediary service providers are also facilitating such access. As with CSPs, these other service providers have a key role to play in ensuring a modern and responsible digital ecosystem. These service providers draw from a number of categories, including: hosting providers, DNS service providers, domain registrars, proxy registration services and search engines. These intermediaries – as the facilitators to infringing sites for many Australians – have the ability to meaningfully impact the operation of and traffic to those infringing sites. Accordingly, such intermediary service providers are well-placed to reduce the overall harm caused by infringing sites – in other words, they are often the most efficient parties to prevent continuing harm.<sup>38</sup>

We note that this modern view of disabling access to infringing locations through intermediary service providers is already standard practice in a number of countries across Europe and elsewhere. As an example of this contemporary approach in implementation, under Article 8.3 of the European Union's Information Society Directive, "...right[s]holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right."<sup>39</sup> It is on this basis that rightsholders are able to obtain not just site blocking orders as in Australia's s115A, but broader, effective no-fault injunctive relief from the judiciary against intermediary service providers more generally.

Below are additional examples of intermediary service providers which currently assist in facilitating access to, or the operation of, online infringing locations, and have elsewhere been ordered to cease such facilitation to those locations. Enlisting the help of intermediary service providers to limit piracy would greatly improve the efficacy of the statute.

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<sup>38</sup> Jaani Riordan, *The Liability of Service Providers* (Oxford University Press, 1<sup>st</sup> ed., 2014) 1.89.

<sup>39</sup> Council Directive 2001/29/EC of 22 May 2001, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>> 8.3.

- **CONTENT DELIVERY NETWORK SERVICES AND REVERSE-PROXY SERVICES**
  - These service providers provide authoritative domain name system servers for customers as a means of providing content delivery network and reverse proxy services. For example, such services effectively conceal and guard the origin servers of websites while accelerating delivery of content to a website's users.<sup>40</sup>
- **FILE-HOSTING PROVIDERS**
  - Many websites engaged in massive copyright infringement depend on a file-hosting provider to provide quick access to high-quality streaming infringing video files.<sup>41</sup>
- **REGISTRIES AND REGISTRARS**
  - Websites engaged in massive copyright infringement depend on a domain name registry and/or registrar to provide them with a domain name to operate.<sup>42</sup>
- **SEARCH ENGINE PROVIDERS**
  - Search engine providers can lead users to pirated content by returning piracy sites in top results for neutral queries, and by affirmatively adding piracy terms to such neutral queries through autocomplete and related/suggested search functions.<sup>43</sup> A recent study by research firm Screen Audience Research International (SARI) found that 70% of new pirates in Australia use search engines at some point in the process of discovering an infringing source of content, with 44% of those new pirates stating they were not actively looking for infringing content when they found it.<sup>44</sup> Traffic to piracy sites will drop considerably if search platforms no longer list those sites.

By requiring CSPs to disable access to infringing sites but not requiring other intermediary service providers to play a role, there remains an easy option for Internet users in Australia to access infringing sites and infringing content, working against the purpose of the original

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<sup>40</sup> An example of judicial relief involving such service providers comes from the United States. In June 2015, Cloudflare was the subject of litigation in the United States, where a U.S. District Court ordered the company to discontinue service to the defendant operator of a piracy site. The court rejected Cloudflare's defence that it was merely a "passive" provider of automated Internet services. See *Arista Records, LLC v Tkach*, 1:15-cv-03701 (SDNY June 3, 2015).

<sup>41</sup> Some examples of judicial relief involving such service providers come from Poland and Romania. On September 18, 2017, Polish courts granted local rightsholders an injunction against the operator of a popular Polish cyberlocker called Chomikuj.pl, finding that the file-hosting provider had a duty to monitor the hosted content once a notice was received, and was obligated to cancel the users' accounts upon the second instance of infringement. *VI, ACz 164/17, [2017]* (Case on file). In Romania, a court issued an injunction against the hosting provider Voxility, requiring it to discontinue service to multiple pirate websites, relying on Article 8.3 of the Copyright Directive. *Twentieth Century Fox Film Corporation v Voxility SRL* [2015] 36941/3/2013.

<sup>42</sup> Among other territories, courts in Germany, Luxembourg and the U.S. have all ordered registrars to deactivate or freeze access to infringing websites. For example, see *Belgian Entertainment Association v EuroDNS S.A.* [2016], 64/2016, 174426; *Belgian Entertainment Association v EuroDNS S.A.* [2017], 52/2017, 182.570; *Warner Bros. Ent. v Pubfilm.com*, Case No. 1:17-cv-00875-VM (S.D.N.Y. Jan. 18, 2018); *North Face Apparel v Fujian Sharing Import & Export*, Case No. 1:10-cv-01630-AKH (S.D.N.Y. Dec. 21, 2010).

<sup>43</sup> Search engines possess the technical means to delist entire websites and have done so in other contexts, such as in the case of defamation, the "right to be forgotten" and trade secrets. For example, see *Google Inc. v Duffy* [2017] SASFC 130 (Oct. 4, 2017) (defamation); *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (2014) ("right to be forgotten"); and *Google Inc. v Equustek Solutions Inc.* 2017 SCC 34, [2017] 1 S.C.R. 824 (trade secrets).

<sup>44</sup> In addition, concerning autocomplete, 50% of respondents said that they sometimes or often make changes to their searches based on autocomplete suggestions when looking for unauthorised content. SARI, *The Role of Search in Content Piracy*, Australian Survey Key Findings, March 2018, <[https://www.creativecontentaustralia.org.au/\\_literature\\_211105/SARI\\_-\\_Role\\_of\\_Search'\\_Australian\\_Survey](https://www.creativecontentaustralia.org.au/_literature_211105/SARI_-_Role_of_Search'_Australian_Survey)>.

statute, and in addition creating obvious disadvantages for those major CSPs on which blocking orders have been imposed.

Extending s115A to these other types of service providers would materially assist in achieving the objective of reducing online copyright infringements in Australia. It would result in a technologically neutral provision that does not discriminate between the technologies used by different types of service providers to allow Internet users to access infringing content, putting these service providers on a level playing field and future-proofing s115A.

The other benefits of site blocking outlined above would continue to apply to s115A as extended: in particular, as a no-fault provision, there would be no increase to the liability of non-CSP service providers under copyright law, or any other identifiable prejudice to them. A technologically neutral s115A may well also promote further cooperation between all content providers to reduce the still-high rate of online copyright infringement in Australia.

All of these intermediary service providers possess the technical means to do their part in disabling access to infringing online locations. The scope of s115A should apply to each of them, and the Court should be able to order them to disable access to adjudicated piracy websites.

Recommendation 5: To increase the effectiveness of the current statute and make it technologically neutral, replace all references to “carriage” in s115A with “intermediary” and create a new definition of “intermediary service provider” which extends to relevant service providers involved in the identification and delivery of content.

## **(b) Expand s115A to online locations in Australia**

Today’s piracy services can change or mask their locations within seconds. Thus, on top of the already evasive steps pirate operators take to mask their identities and locations, and circumvent legal procedures taken to halt their activities, it would be unjust for a rightsholder, whose rights are being infringed, to find themselves at a loss and without a remedy merely because the pirate operator temporarily (or permanently) relocated to Australia in an attempt to avoid enforcement under the current law. Rightsholders will employ the avenues that are available to them; however, to inhibit a rightsholder from being able to avail itself of s115A on this basis would be an unjust limitation from a policy standpoint. It is an additional burden and creates opportunities for mischief on the part of pirate operators.

The time spent collecting evidence to prove the site’s operator is outside Australia is an additional and unnecessary cost on the rightsholder for whose benefit the law was enacted in the first place – making it harder for local rightsholders with limited resources to bring cases. We also do not wish to encourage pirate operators to locate in Australia, which the “outside Australia” requirement arguably does.

Recommendation 6: To remove all references to “outside Australia” in s115A to allow rightsholders to choose a no-fault approach against targets located in Australia, avoiding a two-speed system that encourages pirate services to base themselves in Australia.

## Closing Remarks

The Australian Film & TV Bodies appreciate the opportunity to provide comments on these important issues. We are available to answer any further questions you may have on this and related topics.

# Appendices

## Appendix A: Full descriptions of members of the Australian Film & TV Bodies

The Australian Film & TV Bodies are made up of the Australian Screen Association (ASA), the Australian Home Entertainment Distributors Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators-Australasia (NACO), the Australian Independent Distributors Association (AIDA) and the Independent Cinemas Australia (ICA). These associations represent a large cross-section of the film and television industry that contributed \$5.8 billion to the Australian economy and supported an estimated 46,600 FTE workers in 2012-13.<sup>45</sup>


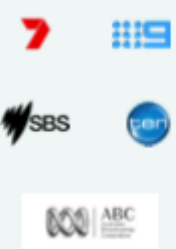
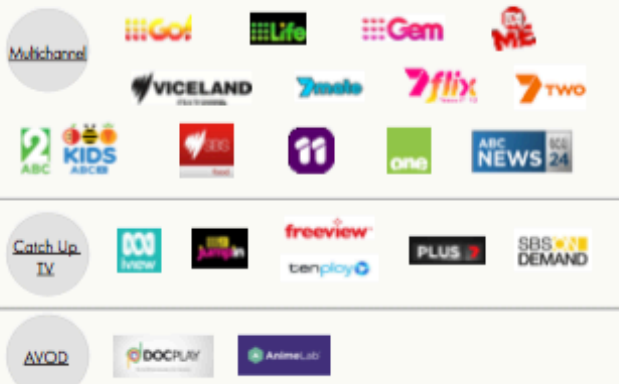

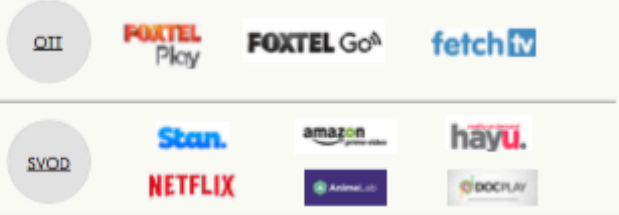



- a) The ASA represents the film and television content and distribution industry in Australia. Its core mission is to advance the business and art of film making, increasing its enjoyment around the world and to support, protect and promote the safe and legal consumption of movie and TV content across all platforms. This is achieved through education, public awareness and research programs, to highlight to movie fans the importance and benefits of content protection. The ASA has operated in Australia since 2004 (and was previously known as the Australian Federation Against Copyright Theft). The ASA works on promoting and protecting the creative works of its members. 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., and Fetch TV.
- b) AHEDA represents the \$1.1 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 13 members and associate members including all the major Hollywood film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel and Telstra.
- c) The MPDAA is a non-profit organisation representing the interests of theatrical film distributors before Government, media, industry and other stakeholders on issues such as classification, accessible cinema and copyright. The MPDAA also collects and distributes cinema box office information including admission prices, release schedule details and classifications. The MPDAA represents Fox Film Distributors, Paramount Pictures Australia, Sony Pictures Releasing, Universal Pictures International, Walt Disney Studios Motion Pictures Australia and Warner Bros. Entertainment Australia.

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<sup>45</sup> Access Economics, *Economic Contribution of the Film and Television Industry* (February 2015) Australian Screen Association <[http://screenassociation.com.au/wp-content/uploads/2016/01/ASA\\_Economic\\_Contribution\\_Report.pdf](http://screenassociation.com.au/wp-content/uploads/2016/01/ASA_Economic_Contribution_Report.pdf)> iv.

- d) 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, 2017 being its 71st year. NACO members include the major cinema exhibitors Amalgamated Holdings Ltd, Hoyts Cinemas Pty Ltd, Village Roadshow Ltd, as well as the prominent independent exhibitors Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and other independent cinema owners which together represent over 1400 cinema screens.
- e) AIDA is a not-for-profit association representing independent film distributors in Australia, being film distributors who are not owned or controlled by a major Australian film exhibitor or a major U.S. film studio or a non-Australian person. Collectively, AIDA's members are responsible for releasing to the Australian public approximately 75% of Australian feature films which are produced with direct and/or indirect assistance from the Australian Government (excluding those films that receive the Refundable Film Tax Offset).
- f) ICA develops, supports and represents the interests of independent cinemas and their affiliates across Australia and New Zealand. ICA's members range from single screens in rural areas through to metropolitan multiplex circuits and iconic arthouse cinemas including Palace Cinemas, Dendy Cinemas, Grand Cinemas, Ace Cinemas, Nova Cinemas, Cineplex, Wallis Cinemas and Majestic Cinemas. ICA's members are located in every state and territory in Australia, representing over 560 screens across 144 cinema locations.

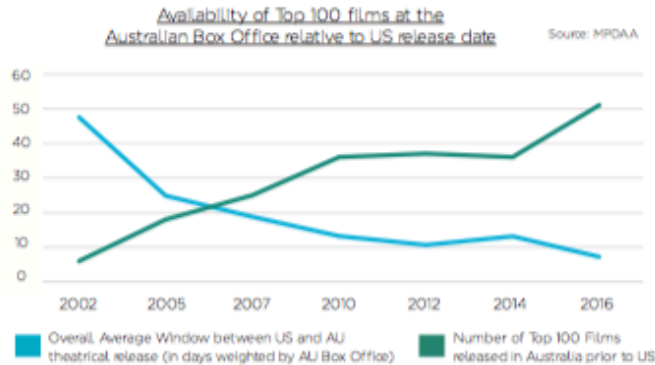
## Appendix B: Availability and affordability of filmed entertainment in Australia

	 <b>AVAILABILITY &amp; AFFORDABILITY OF FILMED ENTERTAINMENT IN AUSTRALIA</b>	
	TRADITIONAL (early 2000's)	DIGITAL (2017)
NO FEE/ AD-SUPPORTED		
SUBSCRIPTION		
TRANSACTIONAL HOME ENTERTAINMENT		
CINEMAS		<b>The Explosion of Consumer Choice in the Digital Age</b>



## 51 OF TOP 100 FILMS

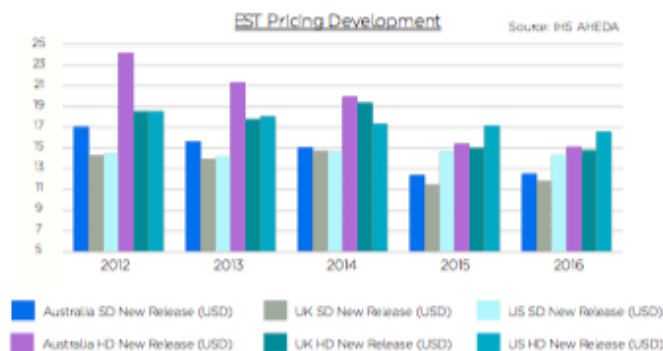
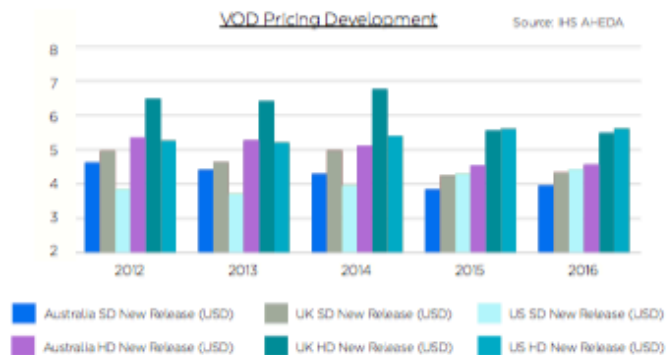
at the Australian Box Office Are Now Released  
in Australia Before the US



	SHARE OF TOP 100 B.O.	AVERAGE WINDOW BETWEEN US & AU
	12%	-19
	20%	-13
	47%	-3
	20%	-3
	1%	-22
	100%	-7

## AUSTRALIANS PAY LESS

for VOD than the  
Americans and the British  
for new releases



## EST PRICES HAVE DROPPED SIGNIFICANTLY

in Australia over the past four years, especially on HD.

Prices are now below US levels and marginally above UK prices (as a result of the weakening GBP)

## glossary

- AVOD: Advertising-supported Video on Demand
- OTT: Over The Top – i.e. internet-delivered
- SVOD: Subscription Video on Demand

- TVOD: Transactional Video on Demand
- EST: Electronic Sell-Through