TELSTRA CORPORATION LIMITED
ACN 051 775 556

Submission to the Attorney-General’s Department
Discussion Paper ‘Online Copyright Infringement’

1 September 2014
INTRODUCTION

Telstra Corporation Limited (‘Telstra’) welcomes the opportunity to make a submission to the Government’s Discussion Paper on ‘Online Copyright Infringement’.

Telstra is in a key position to bring a balanced and constructive perspective to this discussion. We have an extensive intellectual property portfolio, which includes copyright. We are a part owner in Foxtel and we support start-up innovators via our muru-D® accelerator program. We are Australia’s leading ISP and our customers are enthusiastic consumers of digital content.

Telstra acknowledges that online copyright infringement is a serious issue. We also acknowledge that identifying a sustainable and equitable solution (that balances the needs of all stakeholders) is particularly challenging. While Australia can learn from the measures adopted by other countries, none of these experiences appear to have been entirely successful, or without compromise. It is also important to respect and acknowledge cultural differences between countries.

In our view, a workable and sustainable solution to online infringement must be inclusive, and equitably address responsibility and participation by all stakeholders. It must also preserve Australia’s well established legal principles including protection of consumer rights and privacy, whilst encouraging innovation. The purpose and outcome of any scheme should be the sustainable growth of the digital content market, so that Australians can continue to access a diverse range of legal material, whilst respecting the Internet’s integral role in Australian modern life.

EXECUTIVE SUMMARY

Telstra acknowledges that online copyright infringement is a serious issue that cannot be justified. The challenge lies in finding a workable solution that is fair, respects consumer rights and privacy, balances the interests of other stakeholders and is cost effective.

The principal proposal in the Discussion Paper is to extend authorisation liability under the Copyright Act 1968. As explained in detail in our submission, this approach is neither desirable nor appropriate, and is not supported by Telstra. Instead, Telstra supports a multi-pronged approach which includes:

- education – about the importance of intellectual property, and respect for intellectual property laws;
- innovative delivery and availability of content, at attractive prices and in a convenient and timely manner;
- effective enforcement mechanisms; and
- a safe harbour for online service providers.

Our approach is based on a number of key principles which include:

- protection of customer rights and privacy;
- mandatory participation by all ISPs; and
- a mechanism where ISPs’ reasonable costs are met by rights holders.

This approach offers a balanced incentive for all stakeholders to participate and to work cooperatively to reduce online infringement in Australia.

**TELSTRA’S SUBMISSION**

1. **Online copyright infringement in Australia**

Online copyright infringement is a serious issue that cannot be justified on the basis of price, availability of content or otherwise.

Telstra supports the Government’s goal to introduce a legal framework within which rights holders, ISPs and consumer representatives can develop flexible, fair and workable approaches to reduce online infringement.

Telstra believes that innovation is central to the advancement of Australia as a nation and that intellectual property and respect for intellectual property laws plays a key part in fostering innovation.

2. **Overseas enforcement schemes**

A number of countries have sought to address online copyright infringement by introducing a variety of legislated and commercial enforcement schemes. Attached is a brief overview of some of these schemes.

There is mixed evidence as to the effectiveness of overseas schemes. For example, there is evidence:

- that the Korean scheme has been successful (although this success is likely to be attributable to a combination of other factors including education and increased availability of online content); and

- from Canada, the USA and France that only a small proportion of customers are repeat offenders after receiving a first notice.

There have also been criticism on the basis that these schemes are not effective or proportional, and are expensive.

Notably none of the overseas schemes have made reference, or included amendments, to authorisation liability. Instead the approach taken overseas has been implementation of an enforcement mechanism, via an industry agreed scheme, or bespoke Government regulation. The approach advocated by Telstra in this submission reflects this.
3. Multi-pronged approach

The principal proposal in the Discussion Paper to address online copyright infringement is the extension of authorisation liability. As explained in detail in section 6 of our submission, this approach is neither desirable nor appropriate, and is also out of step with international practice.

Instead Telstra supports the introduction of either an agreed industry scheme, or failing timely agreement, a bespoke Government regulation as part of a multi-pronged approach.

Telstra therefore supports the following approach, supported by a number of principles:

- education – about the importance of intellectual property and respect for intellectual property laws;
- innovative delivery and availability of content at attractive prices and in a convenient and timely manner;
- effective enforcement mechanisms; and
- a safe harbour for online service providers.

4. Principles for any industry scheme or Government regulation

Telstra considers that the following principles should apply to an agreed industry scheme, or failing timely agreement, to a Government regulated scheme:

- As copyright is a proprietary right, the copyright owner (or ‘rights holder’) must bear primary responsibility for enforcing the right. This is consistent with the responsibility of all other intellectual property owners, including patent, trade mark and design owners, who bear primary responsibility for enforcing their intellectual property rights.

- Rights holders should bear the cost of any copyright enforcement mechanism, as they are the direct beneficiaries of reduced piracy levels and increased royalty streams.\(^1\)

- All ISPs have a role to play in assisting rights holders to enforce their copyright, as it is our customers who are using our services to engage in infringing activities. A level playing field is essential. All ISPs must participate, otherwise the mechanism will be ineffective and create market distortions and churn.

- Customers’ rights must be respected and protected, in line with well established legal principles, including a right to be heard, a right of appeal, and judicial (or other independent forum) imposition of sanctions.

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\(^1\) Refer to our detailed comments on this issue in section 5.4 below.
Consistent with protection of consumer rights and well established Australian legal principles, sanctions must only be applied by a court or appropriate independent forum. It is not the role of an ISP, nor should an ISP be required, to unilaterally determine and apply sanctions to its customers. To do otherwise places a commercial enterprise, acting on the advice of another commercial enterprise, in a highly undesirable, inappropriate and unprecedented position.2

Customer privacy must be protected. ISPs must not be required to disclose customer information without robust safeguards and protections in place, and in accordance with the law.

Sanctions must not include interruption to a customer’s broadband service. Service interruption, particularly in the case of disconnection or suspension, is a disproportionate response. It also raises serious public safety, health and communication issues in the context of voice services which are facilitated by broadband technology. Such a response would also be of no effect where a customer can simply churn to another ISP, or utilise another infringing technology.

ISPs must be given safe harbour or indemnity in respect of any action taken by them pursuant to an enforcement mechanism.

The mechanism must only apply to fixed line ISP consumer customers (and not to mobile, business, or enterprise customers).

5. **Mechanisms**

Telstra supports introducing the following mechanisms to help address online copyright infringement in Australia:

- A court power to grant (overseas) website blocking injunctive relief.
- An education notice and notice scheme, for ISPs to send escalating notices to their customers.
- A streamlined procedure in an independent forum, to enable rights holders (following a ‘judicial step’) to obtain quick and effective remedies against alleged ‘repeat infringers’, and to protect Australia’s well established legal processes.
- An extended safe harbour scheme.

5.1 **Overseas website blocking injunctive relief**

Telstra agrees in principle with the Government’s proposal that Australian courts should be given a power to grant an injunction to block access to overseas websites,

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2 Refer to our detailed comments on this issue in section 5.3 below
determined by the court in all the circumstances to be facilitating online copyright infringement. Telstra notes that similar mechanisms have been successfully implemented in England and Ireland.  

Importantly, such a mechanism would directly target the source of copyright infringing content and help reduce the number of downstream customers with access to infringing content. This in turn would likely have a direct impact on the education notice and notice scheme discussed below.

The court’s power must include appropriate safeguards to protect the interests of third parties affected by any order (e.g. website operators) and to ensure that the process is not abused.

The Discussion Paper does not set out the procedural aspects of applying for, granting or implementing an injunction. Telstra’s preference is for a simple, streamlined process (similar to that in Ireland) which does not require an ISP to have ‘knowledge’ of infringement, or to take part in the substantive proceedings. In our view, a court would simply hear a rights holder’s standard application and a standard court order would be served on ISPs. Each ISP would then have a specified period to decide whether or not to object to the making of the order, or the form of the order. In the absence of any objection within a specified period the order would take effect and then be implemented by the ISP.

We agree with the Government’s proposal that rights holders should be required to meet any reasonable costs associated with an ISP giving effect to an order, and to indemnify the ISP against any damages claimed by a third party. We believe the obligation to meet the ISPs reasonable costs should extend to steps associated with the court procedure and compliance with the order. This is consistent with the approach in other areas, such as interactions between ISPs and law enforcement.

5.2 Education notice and notice scheme

To support the injunctive relief discussed above, Telstra proposes an education notice and notice scheme, which in turn is supported by a streamlined procedure in an independent forum (such as the Federal Circuit Court) for the imposition of sanctions and the hearing of customer appeals. Ideally such a scheme can be agreed, but if timely agreement cannot be reached, the Government should legislate a scheme based on industry consultations.

An education notice and notice scheme would include the following elements:

- For ease of administration and clarity for ISPs and customers, rights holders would establish a single point of contact (‘RH Entity’).

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3 Section 97A Copyright Designs and Patents Act 1988 (UK) and Statutory Instrument No 59 of 2012, European Union (Copyright and Related Rights) Regulation 2012 (Ireland).
Individual rights holders would collect appropriate evidence of infringement (to a determined standard). The RH Entity would then provide an ISP with an infringement report relating to an IP address allocated to that ISP. The report would contain standard form information (e.g. identifying the copyright material, the infringement, the IP address, etc) and educational information.

The ISP would then match the IP address with a customer and would send a standard form notice on behalf of the RH Entity to the customer, containing a copy of the infringement report and educational information. The notice would also include contact details for the RH Entity, so customer queries can be directed straight to the RH Entity and not to the ISP.

The ISP would send up to three notices if multiple infringement reports are received from the RH Entity for one customer within a specified time. The notices would escalate in severity. The ISP would keep a record of the number of notices sent to each customer.

If a third notice is required, it would include advice that a notification will be made by the ISP to the RH Entity for any action. The ISP would also notify the RH Entity. Importantly, in doing this the ISP would not disclose any customer information so that customer privacy is maintained.

A customer that receives a notice would have an opportunity to challenge the allegations it contains through a dispute resolution mechanism.

An ISP that complies with the procedure would be indemnified by the relevant rights holder from any action taken by the ISP pursuant the notice scheme. The ISP would also have a statutory safe harbour from liability for any legal action including authorisation of copyright infringement.

5.3 Streamlined procedure for rights holder claims against alleged ‘repeat infringers’ in an independent forum

We agree with the Government’s comments on page 4 of the Discussion Paper that sanctions must not be imposed without due process. In our view, due process must include access to a court (or other independent forum). Further, before any sanction is imposed, a customer must have an opportunity to respond to the allegation of infringement, and to be heard on other questions such as whether the customer is responsible for the infringement and whether a defence applies.

It is consistent with Australian legal principles and due process that both appeals and the imposition of sanctions are dealt with by an independent body, with appropriate powers. It is not appropriate for an ISP to unilaterally make these decisions. To do otherwise disregards customer rights and Australian legal principles.
This approach is consistent with how overseas countries have dealt with the right of appeal and the imposition of sanctions as part of their online copyright enforcement schemes; for example:

- **New Zealand** – A sanction against a customer may only be imposed by the Copyright Tribunal.

- **United States** – The Independent Review Program is run by the American Arbitration Association. A customer is offered an opportunity to ask for a review at the mitigation stage.

- **France** – Sanctions in the form of fines may only be imposed by a court.

- **South Korea** – Only the Minister of Culture, Sports and Tourism can order the suspension of a customer’s account. The Copyright Commission can make a ‘recommendation’ that an account be suspended.

- **United Kingdom** – Customers have the right to appeal a notice to an independent appeals body.

Telstra proposes the introduction of a streamlined procedure in a dedicated independent forum (e.g. a dedicated list of the Federal Circuit Court, or a dedicated tribunal like the Copyright Tribunal) to deal with customers alleged to be continuing infringing conduct, after receiving a third notice within a specified time.

It is anticipated that the website injunction process would reduce the number of websites facilitating access to infringing content, and the notice scheme would be effective in deterring the vast majority of customers from accessing infringing content. Therefore the need to invoke this streamlined procedure would be limited to an increasingly small number of alleged repeat infringers only.4

The streamlined procedure would involve the following steps:

- Following advice from an ISP that an IP address had received three education notices, a rights holder would commence proceedings (in a dedicated independent forum) by filing an application supported by evidence of infringement.

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Rebecca Giblin identifies that after almost three years of operation, the total number of allegations that had been acted upon reflected only 12% of the infringement allegations made in the scheme’s first eight months - Rebecca Giblin, ‘Evaluating Graduated Response’ 37(2) *Columbia Journal of Law & the Arts* 147, 157.
At the same time, the rights holder would obtain a court subpoena requiring the relevant ISP to provide the customer’s identity and address.

On receipt of the customer details pursuant to the court subpoena, the rights holder would serve copyright infringement proceedings on the customer.

If the case against the customer is proved, the dedicated forum would order effective remedies to the rights holder and sanctions against the customer. To be effective, the remedies and sanctions must be of a sufficiently serious nature. They could include fines, damages, costs and injunctions to prevent future infringements.

Such a streamlined procedure has a number of clear advantages:

- Customer privacy, customer rights and issues of natural justice are safeguarded by the decision maker.
- Proceedings are brought by rights holders only against alleged ‘repeat infringers’ (i.e. only after three notices have been sent to, and ignored by, the same customer within a specified time).
- The remedies available to the decision maker are far more effective. For example, where a court orders an injunction to prevent a customer from continuing to access infringing content, if the customer breaches the injunction the customer would be in contempt of court and at risk of severe penalties, including fines and imprisonment.
- Costs lie with the appropriate party (i.e. with the court held infringer).

Telstra agrees with the Government’s comments on page 4 that sanctions should not include ‘any measures that would interrupt a subscriber’s internet access’.

5.4 Principled approach to costs

As discussed in section 4, an underlying principle of any copyright enforcement mechanism should be that as copyright is a proprietary right, the copyright owner (or rights holder) must bear primary responsibility for enforcing its rights. It should be borne in mind that it is the rights holder that receives the benefit of a notice scheme, by way of a reduction in online infringement and increased revenue.

A general principle of intellectual property enforcement across copyright, patents, trade marks and designs is that the intellectual property owner bears the costs of enforcing their rights. However the costs of any enforcement process may be recoverable following a successful enforcement action (e.g. by way of court ordered costs and damages).
Any decision to introduce a notice scheme must take into account both reasonable capital and operational costs. These costs will vary according to the particular measures included in any scheme. The potential economic benefits that may be achieved through a reduction in online infringement must be weighed against the costs of achieving that reduction through a notice scheme.

The above principles apply to any copyright enforcement mechanism, but are especially relevant to the consideration of a notice scheme, given the likely costs involved. Further, specifically for a notice scheme:

- Rights holders should bear the costs of enforcement and seek recovery of those costs following a successful streamlined procedure.

- The costs of development and implementation of an automated notice scheme, or a manual notice scheme, will be incremental to ISPs as new systems and processes will need to be implemented. ISPs cannot simply use existing architecture.

- The cost per notice will depend upon the number of notices received.

- The cost of complying with a notice scheme may be proportionally greater for smaller ISPs.

Telstra notes that in the UK, rights holders agreed to pay £750,000 to each ISP to set up the UK scheme, or 75% of the total costs, whichever is smaller. A further £75,000 (or 75% of total costs) will be paid by rights holders each year to cover administration costs.

### 5.5 Incentives

Telstra agrees with the Discussion Paper, that it is preferable for industry to agree a notice scheme. However, Telstra believes that the Government has an important role to play in facilitating and mediating discussions between industry participants.

The Government should make it clear that if agreement by industry on a scheme cannot reached by a certain date, then the Government will introduce a scheme by way of legislation. Telstra believes this would provide all stakeholders with a strong incentive to take part in negotiations on the components of a balanced scheme.

The Government has an important role to play in facilitating industry discussions, to identify areas of agreement and disagreement between the parties. The Government could make it clear that it will make a decision on any outstanding areas of disagreement.

**If stakeholders reach agreement on a scheme** - the scheme could be embodied in a mandatory code registered under the *Telecommunications Act 1997*, binding on all ISPs, creating a level playing field. Non-compliance with the code would be a breach of
the *Telecommunications Act 1997*. This could mean a breach of the carrier service provider licence, a civil penalty of up to $250,000 or ACMA could seek a court injunction to force compliance.

**If stakeholders do not reach agreement on a scheme** - the scheme could be introduced by way of legislation. For example, amendment could be made to the *Copyright Act 1968* to introduce a code binding all ISPs. The legislation could set out ways in which the rights holder could enforce compliance (e.g. an injunction to force compliance and damages). Alternatively, an amendment could be made to the *Telecommunications Act 1997* to introduce a code binding on all ISPs with non-compliance consequences as described above.

### 5.6 Safe Harbour

Telstra supports the Government’s proposal to remove the reference to ‘*Carriage Service Provider*’ in the context of the safe harbour scheme and replace it with a definition of ‘service provider’, being any person who engages in activities defined in sections 116AC to 116AF of the *Copyright Act 1968*.

This amendment recognises that a broad range of entities provide network access and online services, including web hosts, search engines and e-commerce intermediaries.

The proposed amendment provides certainty for the legitimate operations of these type of entities, supports the balance of interests which copyright law seeks to achieve, and aligns Australian’s safe harbour scheme with comparable international schemes.

In response to the previous safe harbour consultation conducted by the Attorney General’s Department in October 2011 (“Revising the Scope of the Safe Harbour Scheme”), Telstra supported a similar proposal for a broader safe harbour.⁵

### 6. Authorisation liability

In its Discussion Paper, the Government proposes amending the law of authorisation liability to reverse the High Court’s decision in the *iiNet case*,⁶ to create an “incentive” for ISPs to negotiate and agree on a scheme. Telstra believes this approach is highly undesirable as it would be counter-productive and fail to achieve its intended goal.

As outlined, Telstra supports the introduction of a cooperative scheme between rights holders and ISPs to reduce levels of online infringement. It is not necessary to amend the authorisation provisions to achieve this goal. There are other, more effective and fairer ways in which a legal framework can be created, as discussed in section 5.5

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above. International experience shows that schemes can be implemented using specially targeted legislation, or industry agreement.

**Concerns with any extension of authorisation liability**

In Telstra’s view, extension of authorisation liability:

a) will significantly and improperly shift the balance that copyright seeks to achieve, between providing an incentive and reward for creative endeavour, and allowing access to information;

b) is based on a flawed interpretation of the High Court’s decision in the *iiNet case* and ignores comments by all judges to the effect that application of the authorisation provisions is not readily suited to addressing P2P copyright infringement, which other countries (with constitutional settings different from our own) have dealt with by specially targeted legislative schemes;

c) is based on an incorrect assessment of Australia’s international obligations;

d) may not have the effect intended by the Government of broadening ISP liability and instead, may result in further uncertainty and lengthy, expensive and indeterminate litigation; and

e) is likely to have broad and unforeseen consequences for a range of stakeholders including ISPs, schools, universities, libraries and cloud based providers.

The following is a detailed analysis of our concerns.

*a) Shift in the balance copyright seeks to achieve*

Copyright law seeks to strike a difficult balance between competing interests. Proposal 1 shifts this balance between providing an incentive and reward for creative endeavour and allowing access to information too far in favour of the interests of rights holders.

The Discussion Paper refers to creation of legal incentives for ISPs to take reasonable steps to prevent or avoid infringement, and cooperate with rights holders. Telstra is concerned that an extension of the authorisation liability for ISPs is directed only at creating incentives for ISPs – there is no incentive for rights holders to compromise in the negotiation of a *reasonable* agreement on a scheme.
In order for a balanced industry agreement to be reached, it is important for each stakeholder to have an incentive to cooperate, to compromise and to reach a balanced and reasonable agreement.

In the US and the UK, where industry agreement was reached on an enforcement scheme, authorisation liability of ISPs was not extended in order to incentivise agreement. Telstra suggests that the Government should convene discussions on a scheme with a wide variety of stakeholders to facilitate discussion and agreement, and to ascertain the areas of disagreement. If industry fails to agree a scheme, it is most appropriate for the Government to then directly legislate or regulate the framework of that scheme.

b) Authorisation liability and the High Court’s decision in the iiNet Case

The High Court’s decision in the iiNet case was an orthodox interpretation of Australia’s well-established principles of authorisation liability. The High Court did not restrict the scope of authorisation liability but merely declined to extend it in the manner advocated by the rights holders.

The decision was an application of the 1975 decision of the High Court in Moorhouse,7 from which the test in s 36(1A) and s 101(1A) is derived.

Telstra also draws attention to the comments of the High Court in the iiNet case, to the effect that authorisation liability is not readily suited to addressing P2P copyright infringement, which other countries have dealt with through specifically targeted legislative schemes. The majority of the court said at [79]:

This final conclusion shows that the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system. The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere, in constitutional settings different from our own, by specially targeted legislative schemes, some of which incorporate co-operative industry protocols 84, some of which require judicial involvement in the termination of internet accounts, and some of which provide for the sharing of enforcement costs between ISPs and copyright owners.8

7 University of New South Wales v Moorhouse & Angus & Robertson (Publishers) Pty Ltd (1975) 133 CLR 1.
8 A similar observation was made by Gummow and Hayne JJ at [120].
Importantly, the iiNet case did not place Australia out-of-line with international law or international frameworks that govern authorisation liability for intermediaries. In contrast, Australia’s authorisation provisions are already broader and more favourable to the interests of rights holders than equivalent provisions in other countries.

In the Moorhouse case, the word ‘authorise’ was given the meaning ‘sanction, approve, countenance’ by the High Court. The leading decisions on the question of authorisation in the UK and Canada have applied narrower meanings to ‘authorise’:

- In the **UK**, the Privy Council in *CBS Songs Ltd and Ors v Amstrad Consumer Electronics Plc* [1988] 1 AC 1013 preferred the meaning - a ‘grant or purported grant, which may be express or implied, of the right to do the act complained of’. In *Philips Domestic Appliances & Personal Care BV v Salton Europe Limited UK* [2004] EWHC 2092 (Ch), Laddie J summarised the key points from Amstrad:

  > First, merely passing on something which will inevitably be used for infringement is not authorising. This was the incorrect suggestion in the First Edition of The Modern Law of Copyright. Second, as Lord Templeman said, “lenders and sellers do not authorise infringing use”. You have to do more than sell. Third, a crucial factor in a case like this is whether EE had any “control over the use” of its products “once they are sold”.

- The Supreme Court of **Canada** in *CCH Canadian Ltd v Law Society of Upper Canada* [2004] 1 SCR 339; 236 DLR (4th) 395 defined ‘authorize’ as to ‘sanction, approve and countenance’ and said that countenance ‘in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, ‘give approval to, sanction, permit, favour, encourage’. The Supreme Court expressly disagreed with the Australian Moorhouse decision:

  > Moorhouse, supra, is inconsistent with previous Canadian and British approaches to this issue. See D. Vaver, Copyright Law (2000), at p. 27, and McKeown, supra, at p. 21-108. In my view, the Moorhouse approach to authorization shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.

In the **United States**, there are two forms of secondary liability - contributory infringement and vicarious liability. Contributory infringement is the intentional

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9 (1975) 133 CLR 1 at 20 per Jacobs J (with whom McTiernan J agreed) and at 12 per Gibbs J.
10 It should be noted that the definition applied by the Supreme Court of Canada is conjunctive: to “sanction, approve and countenance”, not the disjunctive “sanction approve or countenance”.
inducing or encouraging direct infringement, and vicarious infringement is profiting from direct infringement while declining to exercise a right to stop or limit it.\footnote{Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd 545 US 913, 125 S Ct 2764 (2005) at 930.}

These examples show that Australia’s law on authorisation liability is already favourable to rights holders, when compared with equivalent international authorisation provisions. To further broaden authorisation liability would put Australia out of step with international law.

c) Australia’s international obligations

Telstra does not accept that the current law in Australia is inconsistent with Australia’s international obligations under various free trade agreements, including with the United States, South Korea and Singapore. It is particularly notable that those countries are under \textit{reciprocal} obligations, but none have been required to amend their authorisation liability legislation in order comply with the free trade agreement. Indeed, Singapore’s current authorisation provision is based on the Australian \textit{Copyright Act} prior to the introduction of s101(1A).\footnote{Section 31 and 103 of the Singapore Copyright Act 1987.}

Australian copyright law already complies with the requirement to provide legal incentives for service providers to cooperate with copyright owners, in deterring the unauthorised storage and transmission of copyrighted materials. Such incentives have been implemented by way of the safe harbour provisions, which closely reflect the equivalent provisions under the US \textit{Digital Millennium Copyright Act of 1998}. The requirement to provide legal incentives for service providers does not require extending liability of service providers for authorisation of infringements beyond the current authorisation liability, and beyond secondary liability in similar jurisdictions (as outlined above).

d) Inability to achieve the Government’s intention and further litigation

It is not clear that the Government’s proposed amendment would result in the successful creation and functioning of an industry scheme for two reasons.

First, the Government’s proposed amendment differs from the existing provision by way of considering ‘power to prevent’ as part of the ‘reasonable steps’ assessment. However, the question of whether reasonable steps have been taken will still properly involve a consideration of what steps are \textit{available} to an ISP, and whether those steps are \textit{reasonable} in all the circumstances (which will include the power of the ISP to prevent infringement). It is by no means certain, if the High Court had considered the
**iiNet case** under the Government’s proposed changes, that *iiNet* would be liable for authorising the infringements of its subscribers.

The effect of the Government’s proposed amendment on the pre-existing case law on authorisation liability is also uncertain. Clarification of amended authorisation liability is therefore likely to require lengthy, expensive and indeterminate litigation. Until such time as a body of case law emerges on the new provision, the application of the authorisation provisions will remain unclear.

Second, even if amended authorisation liability were enacted, ISPs may choose not to comply with any involving notices to customers but rather simply rely on the safe harbour scheme.

The safe harbour in section 116AG of the *Copyright Act 1968* limits the remedies that are available against a carriage service provider (which includes an ISP) provided that the ISP has met certain conditions. This means that even if an ISP is found to have authorised infringement, if the ISP has complied with the safe harbour conditions for Category A activities, the remedies available to the rights holder will be limited to an order requiring the ISP to terminate a specified account, or disable access to an online location outside Australia (s 116AG(3)). These remedies do not include an order that the ISP take ‘reasonable steps’ in the form of compliance with a scheme.

Telstra notes that the safe harbour in s116AG of the *Copyright Act 1968* (which was introduced following the AUSFTA and Article 17.11.29(b)(viii)) specifically limits the remedies available against an ISP in the same way as s116AG(3), to termination or blocking/disabling access. To broaden the remedies against an ISP following a finding of authorisation would be in breach of the AUSFTA.

**f) Broader implications of an amendment to authorisation liability**

The principles of authorisation liability apply broadly, not only to ISPs, but to other offline and online intermediaries and third parties who enable others to access content from the Internet.

By way of example, in the *Moorhouse case* the University of New South Wales was found liable for authorising copyright infringements by library users, who photocopied library books on the University’s photocopiers. A general amendment to the authorisation liability provisions in the *Copyright Act 1968* (s36 or s101) would apply broadly to online intermediaries, websites, educational institutions, libraries and music venues, just to give a few examples. It could broaden the liability of all these entities. It would also mean that every type of industry could potentially be affected by an industry scheme to address online copyright infringement.

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13 Category A activities are ‘providing facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections’ (s116AC of the Copyright Act 1968).
Attachment

A brief overview of how a number of countries have sought to address online copyright infringement.

- **New Zealand** – Legislated three-strikes scheme (s122A to s122U of the Copyright Act 1994). After three notices (a warning notice, an infringement notice and an enforcement notice), a rights holder can apply to the Copyright Tribunal for an order that the customer’s details be released, and for an order that the customer pay a sum (which includes compensation and costs) of up to NZ$15,000. The legislation sets out a procedure for the customer to challenge an infringement notice.

- **UK** – two separate schemes
  - Voluntary copyright alert program - A voluntary scheme that includes four alerts or ‘educational notices’. The alleged infringements are detected by a third party. The severity of language escalates with each notice and after four notices, the ISP takes no further action.
  - Legislated three-strike scheme (Digital Economy Act 2010 - not yet in force). Details of the scheme are currently set out in OFCOM’s Draft Initial Obligations Code. After a third notice to the same subscriber within 12 months, the customer is added to a ‘Copyright Infringement List’ by the relevant ISP. A rights holder can apply for a court order to identify a customer on the Copyright Infringement List. Customers can appeal a notice to an independent body.

- **US** – Voluntary (commercial) six strikes scheme (Copyright Alert System) involving educational notices, acknowledgment alerts and mitigation alerts. A ‘Mitigation Measure’ is imposed after five or six alerts, at the discretion of an ISP. Mitigation Measures can include pop-ups, temporary suspension, shaping or redirection. An Independent Review Program allows customers to challenge alerts with an independent arbitration body.

- **France** – Legislated three strikes scheme, administered by Hadopi (a Government body). On receiving an allegation of infringement from a rights holder, Hadopi considers the allegation. Hadopi then requests that the ISP send a warning notice to the customer. After the third notice, Hadopi refers the matter to the court for imposition of a fine, which increases according to the number of infringements.

- **South Korea** – Statutory scheme under which the Minister of Culture, Sports and Tourism can order that an ISP issue warnings to a customer, or suspend a customer account for a maximum of six months after at least three warnings. Before the Minister makes an order, the matter must be referred to the Copyright Commission for deliberation. The Copyright Commission can also make a ‘recommendation’ that an ISP send a warning or suspension. If the
recommendation is not followed, the Commission can request that the Minister issue an order.

- **Canada** – Statutory notice and notice scheme (*Copyright Modernization Act*),\(^1\) under which ISPs forward notices of infringement to customers. ISPs are required to alert the rights holder when the notice has been sent and to retain records for six months. The scheme will come into force in January 2015.

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14 *Copyright Modernization Act* S.C. 2012, c. 20 (“Bill C-11”) which amended the *Copyright Act*. 