

Submission to the
Attorney-General's Department on the
Online Copyright Infringement
Discussion Paper

Pirate Party Australia

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1 Opening remarks

1.1 Analysis of the 'Online Copyright Infringement' Discussion Paper

Although the 'Online Copyright Infringement' Discussion Paper ('the Discussion Paper') begins by identifying 'the availability and affordability of lawful content' as a significant factor contributing to online copyright infringement in Australia,¹ it does not actually propose any measures to promote improvements in either availability or affordability of content in Australia. The Discussion Paper indicates an understanding that accessibility of content is significantly easier through unlawful sources than legal channels and that 'consumer awareness of legitimate services' could be improved. In response to this, it appears that the expansion of services such as Spotify and Netflix into new markets significantly reduces instances of online copyright infringement. Such services have been linked to reductions in BitTorrent traffic in Canada, Norway and the United States,² and warrants greater investigation.

The Discussion Paper acknowledges that Australians are 'commonly identified as having high illegal download rates,³ a claim taken from UMR Research's 'Online Behaviours: An Australian Study' commissioned by the Australian Home Entertainment Distributors Association (AHEDA), the Australasian Performing Rights Association (APRA), the Australian Recording Industry Association (ARIA), Australian Screen Association (ASA) (formerly the Australian Federation Against Copyright Theft (AFACT)), Foxtel, the Interactive Games and Entertainment Association (IGEA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators (NACO) and

¹Commonwealth Attorney-General's Department, 'Online Copyright Infringement' (Discussion Paper, Attorney-General's Department, July 2014) 1.

²'Netflix Canada: Piracy Down 50 Per Cent Since Service's Launch', *The Huffington Post Canada* (online), 18 September 2013 <http://www.huffingtonpost.ca/2013/09/18/netflix-canada-piracy-down_n_3947633.html>; Sophie Curtis, 'Spotify and Netflix curb music and film piracy', *The Telegraph* (online), 18 July 2013 <<http://www.telegraph.co.uk/technology/news/10187400/Spotify-and-Netflix-curb-music-and-film-piracy.html>>; Leo Kelion, 'Netflix studies piracy sites to decide what to buy', *BBC* (online), 16 September 2013 <<http://www.bbc.com/news/technology-24108673>>; Ernesto Van Der Sar, 'Music piracy continues to decline thanks to spotify', *TorrentFreak* (online), 28 September 2011 <<http://torrentfreak.com/music-piracy-continues-to-decline-thanks-to-spotify-110928/>>; Ernesto Van Der Sar, 'Netflix is killing BitTorrent in the US', *TorrentFreak* (online), 27 April 2011 <<https://torrentfreak.com/netflix-is-killing-bittorrent-in-the-us-110427/>>.

³Commonwealth Attorney-General's Department, 'Online Copyright Infringement' (Discussion Paper, Attorney-General's Department, July 2014) 1 (citation omitted).

News Limited.⁴ The Pirate Party is cautious of accepting as evidence claims provided by copyright lobby sponsored research.

Regardless of this dubious claim, the Discussion Paper does not address the findings of the House of Representatives Standing Committee on Infrastructure and Communications.⁵ That Inquiry found that Australians were paying significantly more for digital content than consumers in other jurisdictions. However, the Attorney-General's Department has deliberately excluded issues considered by the Standing Committee, as well as those considered by the Australian Law Reform Commission, as though the issues are not inextricably linked. This perpetuates the fragmented approach to copyright law reform in Australia, which *must* end.

It is of course appropriate to avoid duplicating work that other bodies are conducting or have conducted, however this is likely to cause the law to advance in some areas and fail to progress in others, especially as the *Copyright Act* already covers significant ground. Copyright needs to meet contemporary needs as a whole, and future proof to some extent. The lack of consistent approach towards copyright reform is a serious concern. Online copyright infringement has many contributing factors, most of which have been the subject of different reviews, the recommendations of which are yet to be implemented.

The single-minded nature of the Discussion Paper is disappointing. The lack of movement on the recommendations put forward by the Standing Committee and the Australian Law Reform Commission in favour of the proposals being put in the Discussion Paper indicates that the Attorney-General's Department is concerned with targeting consumer and not copyright holder behaviours, despite the latter having been identified as significant contributors to the issues the Discussion Paper seeks to resolve.

The assertion that '[o]nline copyright infringement remains relatively strong in Australia, but is falling internationally'⁶ correlates with the reality that internationally services are significantly more accessible and legitimate content is available overseas in a much more affordable and timely fashion. This may be countered with the argument that legal services are improving: while this is true, it has been a slow process, services and content remain limited and more expensive, and little has been done to advertise their availability. The Pirate Party suggests

⁴UMR Research, 'Online Behaviours: An Australian Study' (Research summary, commissioned by the Australian Home Entertainment Distributors Association et al, 2013).

⁵House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At what cost? IT pricing and the Australia tax* (2013).

⁶Commonwealth Attorney-General's Department, 'Online Copyright Infringement' (Discussion Paper, Attorney-General's Department, July 2014) 1.

that copyright holder behaviours be addressed first so as to gain an understanding of online copyright infringement in Australia that is not influenced by market failures.

A final note the Pirate Party wishes to add is that the Discussion Paper is poorly supported by evidence, with no actual evidence justifying why any of the approaches outlined are either necessary or in fact will work. The Discussion Paper cites a number of legislative and judicial sources, but does not refer to independent reports or peer-reviewed studies or articles in support of its claims. It indicates that measures have been taken globally, but provides no evidence of the efficacy of those measures, making a number of flawed assumptions. This includes the assertion that 'Online copyright infringement remains relatively strong in Australia, but is falling internationally,'⁷ the implication that Australia is currently not meeting its international obligations with regard to several free trade agreements⁸ and the statement that 'Extending authorisation liability is essential' to achieving the Government's aims,⁹

The Pirate Party would like to draw attention to the Government's *Ten principles for Australian Government policy makers*, Principle 7: 'The information upon which policy makers base their decisions must be published at the earliest opportunity.'¹⁰ The Pirate Party is not convinced that in this instance the Attorney-General's Department has published the information on which it has made the decisions in the Discussion Paper: certainly much of the discussion paper appears to be informed by non-published sources. The Pirate Party has attempted to gain access under the *Freedom of Information Act* to documents used to inform the policy-making process behind the Discussion Paper, but has, as of yet, been unsuccessful.¹¹

1.2 The Pirate Party's position on copyright in the context of online copyright infringement

The Pirate Party recognises that copyright is a statutory monopoly on 'original' expression, intended to encourage creative output and thus benefit society by aiding cultural development. However, it is the Pirate Party's position that a combination of increased copyright duration (from a maximum of 28 years in 1710 to the maximum

⁷Ibid.

⁸Ibid 3.

⁹Ibid.

¹⁰Australian Government, *Ten principles for Australian Government policy makers*, Cutting Red Tape <<https://www.cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers>>.

¹¹Brendan Molloy, *Copyright legislation working group documents* (29 May 2014) Right to Know <https://www.righttoknow.org.au/request/copyright_legislation_working_gr>.

life plus 70 years currently in Australia) and the application of the monopoly beyond commercial endeavours has significantly reduced copyright's efficacy in promoting cultural development. Less material enters the public domain each year, and less material is available for legal non-commercial use and dissemination.

As this submission will expand upon, the Pirate Party does not believe that copyright should be allowed to impinge upon basic rights and freedoms, such as privacy (such as through monitoring Internet usage to identify copyright infringement), participation in the free market (such as giving rights holders unilateral powers to blockade or shut down websites they claim are infringing copyright), the presumption of innocence (such as requiring alleged infringers to defend against accusations in graduated response schemes), freedom of speech (by limiting the ability of creators, in both commercial and non-commercial contexts, to reuse existing works), access to cultural heritage (especially as a result of the perpetual extension of copyright which makes it difficult to legally distribute and reuse culturally significant materials) or consumer rights (particularly through the legislative protection afforded to 'technological protection measures' which make it difficult and illegal for consumers to back up or time and format shift content). Culture sharing, including file sharing, is an innate human characteristic, and predictably continues to grow in defiance of attempts to control it. People have always shared poetry, music and other forms of culture. Modern copyright laws fail because they attempt to prohibit this innate human behaviour. A modern approach to copyright reform must reconcile the 'balance' of the past with the contemporary situation we are faced with.

Digital communications provide challenges and opportunities. Normal interactions, such as sharing culture via the Internet, should not be threatened. Creators should seize the new opportunities provided and embrace new forms of exposure and distribution. The Pirate Party believes the law should account for the realities of this continually emerging paradigm by reducing copyright duration, promoting the remixing and reuse of existing content, and legalising all forms of non-commercial use and distribution of copyrighted materials.

1.2.1 Purpose of copyright

Copyright exists to promote creation and dissemination of cultural, educational and artistic materials, at the cost of partially restricting freedom of expression for a period of time in order for the creator to enjoy the fruits of their labour. This sentiment has been at the

core of copyright law from the start.¹² Reforms should keep in mind this ultimate purpose. Copyright must not serve copyright holders to the detriment of the public benefit. Copyright is not a natural right — it is conferred by elected representatives who serve their electorate as a whole, and requires equal, if not greater, consideration of social aspects as economic concerns.

Evidently, infringement, even on the exaggerated estimates provided by the lobbyists, is not having an impact on the creation of works, and therefore the argument for this can only be to protect the 'assets' of an industry who refuses to adapt to new, workable business models, as they may be less lucrative as the control is no longer entirely in their hands.

1.3 The read-write cultural economy

It is worth considering that the digital era has caused a paradigm shift in how people interact with media. Unlike the physical world, the production of a digital asset does not cost more than the initial cost of production for the asset itself, and perhaps the initial cost of distribution (which in itself is generally negligible). It is inherent in the nature of files that they may be infinitely duplicated without quality being diminished and without depriving anybody of the 'original' file. This means that, in effect, digitally stored information experiences infinite supply. In such situations, traditional business models have two options: adapt or perish. The value of the digital 'asset' has therefore shifted. The value is no longer placed on the infinitely duplicable asset itself, but the value is found in the mechanism of access. Providing an efficient, convenient, reliable, fast and reasonably-priced mechanism for accessing content is vital for the longevity of creative business models going forward.

Regulatory efforts to stop online copyright infringement is regulation trying to find a problem to solve. In order to function appropriately in the digital economy, one must recognise that you are, and always will be, competing with free. One must also recognise that there has been a significant shift from the historical 'read-only' culture that was apparent in the mid to late 20th century, and is being replaced with a 'read-write' culture in which ordinary consumers are taking advantage of technological advancements, and interacting with their preferred media in ways previously held unimaginable. This comes in a variety of forms including Internet memes, remixes and combining pre-recorded audio with self-produced videos (and vice versa). The move away from passive consumption towards active interaction and production should

¹²*Statute of Anne 1710*, 8 Anne c 19; *United States Constitution* art I §8.

be encouraged as it heightens culture participation and promotes development of artistic skills. Efforts such as this discussion paper work to undermine the cultural advances that have been made by trying to protect anachronistic business models that have no place within the digital economy, instead of moving towards business models that embrace the new read-write culture of the Internet.

1.4 Flawed comparisons of online copyright infringement and child sexual abuse materials

The Government should be cautious about accepting evidence from those who attempt to draw comparisons between online copyright infringement and the production or distribution of child sexual abuse material. Rights holders' organisations and representatives have promoted largely ineffective strategies for dealing with the distribution of child sexual abuse materials online in the hope that they can manipulate public policy directions towards filtering the Internet to push their own agenda.¹³ This plays on a highly sensitive issue and the need for leaders to give the impression they are doing something to 'protect the children.' It is the Pirate Party's view that this approach merely sweeps the problem under the carpet by encouraging distribution to move to secure, unmonitored channels. Blockades will prevent, at best, inadvertent access to child sexual abuse materials, while presenting no significant deterrent to determined and deliberate access: the alternative and more effective method is to target production and distribution centres. This ineffectiveness will be discussed further on in relation to online copyright infringement. These comparisons also serve to conflate two very different types of illegal behaviours: the production, distribution and consumption of child abuse materials are criminal offences, while online copyright infringement encompasses both civil and criminal law penalties. To lump the file sharing of music, films and similar works in with the distribution of child sexual abuse materials is an entirely inappropriate and disingenuous tactic.

2 Extending ISP liability

It should not be the responsibility of Internet service providers ('ISPs') to monitor the communications of their subscribers beyond what is reasonably necessary for the purposes of providing that service. The

¹³Christian Engström, 'IFPI's child porn strategy' on Christian Engström, *Christian Engström, Pirat* (27 April 2010) <<http://christianengstrom.wordpress.com/2010/04/27/ifpis-child-porn-strategy/>>.

Pirate Party believes that the High Court's decision in *Roadshow Films Pty Ltd v iiNet*¹⁴ sets down appropriate principles in those circumstances, and that an ISP should not be liable in any way for the actions of its subscribers, no more than, for example, a car manufacturer should be liable for motorists exceeding the speed limit (despite the fact that the vehicle has been manufactured in a way that makes it capable of exceeding the maximum speed limit). It should not be the responsibility of an ISP to enforce third party copyrights.

High usage of peer-to-peer ('P2P') technologies is often considered an indication of online copyright infringement. However, an approach that recognises P2P traffic and uses the presence of P2P connections as a basis to limit services ignores the myriad of legal uses of P2P technologies. Skeptics may consider this a poor defence, however there are a number of legitimate uses that are easily identified. For example:

- BitTorrent Inc has a wide range of recorded audio and video materials available legally from its website.¹⁵
- DGM Live distributes music through BitTorrent.¹⁶
- Blizzard Entertainment (creator of the video game *World of Warcraft*) uses BitTorrent to deliver content.¹⁷
- In 2012 eBay was using BitTorrent for index distribution and was 'exploring the potential benefits of incorporating peer-to-peer transport technologies into [eBay's] network topology.'¹⁸
- Facebook and Twitter both use BitTorrent to distribute server updates.¹⁹

The Attorney-General's Department has asserted 'Australia is obliged under its free trade agreements with the United States, Singapore and Korea ... to provide a legal incentive to ISPs to cooperate with rights holders to prevent infringement on their systems and networks.'²⁰ The Pirate Party cynically contemplated in its submission to the Joint Standing Committee on Treaties on the *Korea-Australia Free Trade Agreement* ('KAFTA') that art 13.9(29)(a) of KAFTA 'may be a tactical move by the Federal Government to place an obligation on Australia so as to pro-

¹⁴[2012] HCA 16 (20 April 2012).

¹⁵<https://bundles.bittorrent.com/>

¹⁶<http://www.dgmlive.com/help.htm#whatisbittorrent>

¹⁷<http://us.blizzard.com/en-us/company/about/legal-faq.html>

¹⁸<http://www.ebaytechblog.com/2012/01/31/bittorrent-for-package-distribution-in-the-enterprise/#.VALDa2S1Za8>

¹⁹Ernesto Van Der Sar, 'Facebook uses BitTorrent, and they love it', *TorrentFreak* (online), 25 June 2010 <<http://torrentfreak.com/facebook-uses-bittorrent-and-they-love-it-100625/>>; Ernesto Van Der Sar, 'Twitter uses BitTorrent for server deployment', *TorrentFreak* (online), 10 February 2010 <<http://torrentfreak.com/twitter-uses-bittorrent-for-server-deployment-100210/>>.

²⁰Commonwealth Attorney-General's Department, 'Online Copyright Infringement' (Discussion Paper, Attorney-General's Department, July 2014) 3.

mote the introduction of either or both a graduated response ('three strikes') scheme or an Internet filtering regime, administered by Internet service providers.²¹ The introduction to the Discussion Paper indicates that extending ISP liability would likely involve the introduction of a graduated response scheme.

Although the Pirate Party has devoted a considerable amount of this submission to examining graduated response schemes in detail, it notes that the Discussion Paper states: 'The Government would not expect any industry scheme or commercial arrangement to impose sanctions without due process, or any measures that would interrupt a subscriber's internet access.'²² The Pirate Party is having difficulty reconciling this statement with the impression that the Discussion Paper gives that the Government is considering the implementation of a graduated response scheme,²³ as a graduated response scheme would necessarily involve interruption to subscribers' Internet access.

Important policy decisions, such as that to introduce a graduated response scheme, must be supported by evidence. Although HADOPI (the French graduated response law) was intended to reduce infringement while increasing legitimate consumption,²⁴ the 2013 'Lescure Report', commissioned by the French Ministry of Culture and Communication, 'concluded that, while [HADOPI] had perhaps brought about some reduction in P2P infringement, traffic had been diverted to other infringing sources rather than to the legitimate market.'²⁵ Dr Rebecca Giblin has noted that in relation to HADOPI 'none of the four decided cases attempted to prove that the account holder actually engaged in the infringement.'²⁶ It can be drawn from the 'Lescure Report' that the graduated response scheme implemented in France has not been particularly effective.

In regard to the private arrangements in Ireland, where there is no legislative framework for a graduated response scheme, the High Court of Ireland noted in *EMI Records (Ireland) v Eircom* that only the defendant

²¹Pirate Party Australia, Submission No 67 to Joint Standing Committee on Treaties, *Treaties tabled on 13 May 2014*, 20 June 2014, 8-9.

²²Commonwealth Attorney-General's Department, 'Online Copyright Infringement' (Discussion Paper, Attorney-General's Department, July 2014) 4.

²³Ibid 1-2.

²⁴Denis Olivennes, 'Le Developpement et la Protection des Oeuvres Culturelles sur les Nouveaux Reseaux' (Report, Ministere de la Culture et de la Communication (France), November 2007) cited in Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 151.

²⁵Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 156 citing Pierre Lescure, 'Mission « Acte II de l'exception culturelle » Contribution aux politiques culturelles à l'ère numérique (Report, Ministere de la Culture et de la Communication, May 2013) 371.

²⁶Ibid 158.

ISP, Eircom, would bear the burden of the settlement.²⁷ Despite the record industry agreeing to litigate against other ISPs, no other ISPs have agreed to implement a similar approach. Charleton J ruled in *EMI Records (Ireland) v UPC Communications Ireland* that ISPs do not have a legal obligation to implement graduated response regimes.²⁸

A key concern surrounding the United States approach designed by ISPs and copyright holders is the 'independent review process' subscribers are required to go through, which involves the following limitations:

- Subscribers must wait until a restriction has been placed on their account. They cannot appeal against an earlier notification, only after action has actually been taken.²⁹
- Subscribers must pay a \$35 'filing fee.'³⁰
- Subscribers must lodge a series of documents, including evidence in support of their challenge, within 14 days of being alerted. Failure to properly submit documents by this deadline is taken as a waiver of independent review rights.³¹

The Pirate Party believes that such a system results in unreasonably onerous requirements for subscribers. A system operating similarly to that in the United States would presume that subscribers have infringed and requires them to appeal the decision in a very narrow window of time, as well as pay for the 'privilege' of appealing. The Pirate Party considers this would be an absurd state of affairs: 'there is no presumption of innocence.'³²

The independent review process in the United States was called into question when the independence of the so-called 'independent expert' initially appointed (Stroz Friedberg) was thrown into doubt after an undisclosed link between the firm and lobbying activities of the Recording Industry Association of America was discovered.³³

The Pirate Party is strongly opposed to the introduction of a graduated response regime on these grounds. The Pirate Party urges the Attorney-General's Department to consult with Dr Giblin herself. What follows is an overview of graduated response regimes globally.

²⁷[2010] IHEC 108, [10].

²⁸[2010] IEHC 377.

²⁹Center for Copyright Information, *Second Amendment to Memorandum of Understanding* (2012) 4 <<http://www.copyrightinformation.org/wp-content/uploads/2013/02/CCI-MOU-Second-Amendment.pdf>>.

³⁰Ibid 8.

³¹Ibid.

³²Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 179.

³³Jill Lesser, 'CCI Recommits to Independent Evaluation of Content Methodology', *Center for Copyright Information*, <<http://www.copyrightinformation.org/uncategorized/ci-recommits-to-independent-evaluation-of-content-methodology/>>.

2.1 The effectiveness of graduated response schemes

The Pirate Party considers that the most important criterion for determining the effectiveness of graduated response schemes is the extent to which they increase authorised consumption of content. The Attorney-General's Department states that the Discussion Paper 'outlines the Government's proposed approach to ... provide a legal framework within which rights holders, ISPs and consumer representatives can develop flexible, fair and workable approaches to reducing online copyright infringement.'³⁴ The Pirate Party questions the utility of reduced infringement if it is not matched by an increase in authorised consumption that can be causally linked to the anti-infringement strategy. As the evidence below demonstrates, it should by no means be assumed that a reduction in infringement causes an increase in authorised consumption. It should be further considered that a decrease in the use of one channel may mean traffic moves toward other, unmonitored channels.

The following subsections are an overview of graduated response schemes globally.

2.1.1 France

A significant concern with regard to the HADOPI scheme in France is the lack of independent evidence for its effectiveness: 'every figure [the HADOPI administration agency] cited in support of the claim that the French law reduces infringement was supplied by one or more organizations closely allied to the interests of major rights holders, and, in several cases, having a strong and obvious vested interest in promoting graduated response. None of them appear to have been subjected to peer review or have made their full reports or methodologies available for public scrutiny.'³⁵

In terms of increasing authorised consumption, the French 'Lescure Report' (referred to above) found that while HADOPI may have reduced infringement via P2P channels, that traffic had been mostly diverted to other unauthorised channels and not to the legitimate market.³⁶ The 'Lescure Report' considered a well-known study, 'The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France,' indicating a correlation between increased

³⁴Page 1

³⁵Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 183-184; see generally 181-189.

³⁶Pierre Lescure, 'Mission « Acte II de l'exception culturelle » Contribution aux politiques culturelles à l'ère numérique' (Report, Ministère de la Culture et de la Communication (France), May 2013) 371.

sales of singles and albums through the iTunes store, but determined that the sum of the evidence was insufficient to show any increase in authorised consumption.³⁷ On the contrary, the International Federation of the Phonographic Industry (IFPI) reported reduced sales in France of 2.7% and 2.9% in 2011 and 2012 respectively,³⁸ despite HADOPI having been in force during both of those years. Unfortunately IFPI does not provide its reports for easy public scrutiny.

Research by Arnold et al casts doubt on the efficacy of the French graduated response regime:

Our model predicts that under a graduated response policy the decision of whether or not to engage in the monitored illegal activity is independent of the probability of detection as long as the individual has not received a warning. However, an increase in the probability of detection will reduce the consumption of content through the monitored channel.³⁹

Arnold et al have identified the two key criticisms of graduated response: firstly that knowing such a system exists and is in operation is not a deterrent until a warning is received, and secondly that an increase in the probability of detection is likely to lead to an increase in consumption of content through *unmonitored* channels. However, the authors find that their initial predictions are incorrect — the perceived probability of detection does not influence the decision to share content:

The econometric results partially support the theoretical predictions. Several factors affect the perceived probability of detection under the law, and our results show that the propensity to engage in illegal file-sharing is independent of these beliefs as predicted by the theoretical model. However, the perceived probability of detection has no impact on the intensity of P2P filesharing. In addition, better information about [infringing] alternatives, as measured by the proportion of [infringers] in one's social network, increases one's propensity to violate copyright law. Our empirical results also suggest substitution effects between monitored P2P channels and unmonitored channels (e.g., direct downloads or newsgroups) for individuals who have a large number of [infringers] in their social network. Collectively our findings

³⁷Ibid 369–370 citing Brett Danaher et al, 'The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France' (2012, forthcoming) *Journal of Industrial Economics*.

³⁸International Federation of the Phonographic Industry, 'Recording Industry in Numbers: The Recorded Music Market in 2012' (Report, 2012) 47.

³⁹Michael Arnold et al, 'Graduated Response Policy and the Behaviour of Digital Pirates: Evidence from the French Three-strike (Hadopi) Law' (28 May 2014) 3.

indicate that the Hadopi law has not deterred individuals from engaging in [infringement], but has altered the way they access content legally and illegally.⁴⁰

The results of the study by Danaher et al, referred to by both Dr Giblin and the 'Lescure Report,' are explained by Arnold et al. The finding by Danaher et al that HADOPI caused a 20–25% increase in French music sales through iTunes 'cannot be attributed to a direct deterrent effect from the law' but is instead 'likely to have been caused by public educational efforts and increased information about legal channels.'⁴¹

Arnold et al go further:

The empirical results support the prediction that a graduated response policy fails to deter individuals from [infringing]. We also find no significant deterrent effect on the level of illegal activity by those who do [infringe] which contradicts the theoretical prediction. Neither the decision to engage in illegal P2P file sharing monitored under the law nor the intensity of filesharing by those who do engage is significantly impacted by the perceived detection probability.⁴²

2.1.2 New Zealand

As with the French scheme, Dr Giblin notes that '[a]gain, the underlying studies and methodologies on which [industry] claims are based are not publicly available.'⁴³ Nevertheless, she writes:

However, independent and transparent research has been conducted by researchers at Waikato University.⁴⁴ Alcock and Nelson's study, 'Measuring the Impact of the Copyright Amendment Act on New Zealand Residential DSL Users,' suggests that although P2P traffic decreased by more than 50% after the introduction of the *Copyright Amendment (Infringing File Sharing) Act 2011* (NZ) there was a significant increase in the use of technologies that could be used to circumvent the scheme. By September 2012 the researchers found that P2P traffic had begun to recover, but further that HTTPS traffic had increased, which, being

⁴⁰Ibid.

⁴¹Ibid 4; see also 26.

⁴²Ibid 25.

⁴³Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 189.

⁴⁴Shane Alcock and Richard Nelson, 'Measuring the Impact of the Copyright Amendment Act on New Zealand Residential DSL Users' (2012) in *Proceedings of the 2012 ACM conference on Internet measurement conference* (ACM New York, 2012) 551; WAND Network Research Group, *The Impact of the Copyright Amendment Act: Update for September 2012* (25 October 2012) <<http://wand.net.nz/content/impact-copyright-amendment-act-update-september-2012>>.

encrypted, is not easily analysed and may be indicative of a shift away from P2P technologies.⁴⁵ That is, the shift may be 'indicative of illegal file sharing moving to foreign seedboxes where the user can transfer the files back to their home computer using HTTPS. The corresponding increase in VPN and remote access protocols appear to corroborate this, as these protocols would be used to access and configure seedboxes.'⁴⁶

Dr Giblin provides a summary of technologies that could be used to bypass a graduated response scheme:

Because the New Zealand scheme applies only to file sharing via P2P networks, it can be simply bypassed by switching to other tools for infringement. These include distributed online discussion systems like Usenet, and 'cyberlockers,' or online file hosting sites. Both of these technologies enable the storage and transfer of large files via a client server rather than 'peer-to-peer' network architecture. Users may also use technologies such as [virtual private networks ('VPNs')], remote access protocols and 'seedboxes' to distance themselves from P2P infringement. Seedboxes are high-speed remote servers, typically hosted in jurisdictions with less stringent copyright laws than the subscriber's home jurisdiction. Users can download desired content directly to the seedbox via BitTorrent, and then transfer it to their own computer via a HTTP or, more securely, a HTTPS connection. In exchange for a small monthly fee, this enables users to obtain content via P2P networks while falling outside the graduated response law.⁴⁷

2.1.3 South Korea, Taiwan, Ireland and the United States

The South Korean experience is often cited by stakeholders 'as an example of the success of stricter enforcement'⁴⁸ but there is little to support that claim. Yet again, the claims primarily come from the industry, which offers little to no evidence in support, and '[t]here appear to be no attempts to prove any causal connection between the

⁴⁵WAND Network Research Group, *The Impact of the Copyright Amendment Act: Update for September 2012* (25 October 2012) <<http://wand.net.nz/content/impact-copyright-amendment-act-update-september-2012>>.

⁴⁶WAND Network Research Group, *The Impact of the Copyright Amendment Act: Update for September 2012* (25 October 2012) <<http://wand.net.nz/content/impact-copyright-amendment-act-update-september-2012>>.

⁴⁷Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 199 (citations omitted).

⁴⁸Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property' (Independent report, Intellectual Property Office (UK), 2011) 78.

Korean graduated response and reduced infringement.⁴⁹ Similar issues are identified with regard to the Taiwanese implementation: despite being in operation for several years, there does not appear to be any plausible evidence among the English language materials to suggest a reduction in infringement.⁵⁰ Dr Giblin writes very curtly that although as of 2013 ‘the Irish scheme has been in operation for almost three years ... there is no evidence that the arrangement has reduced the amount of infringement.’⁵¹

The United States system has been in operation for the shortest period of time, and there may be other studies that will help determine its efficacy. The Pirate Party has decided to leave such research to the Attorney-General’s Department and other submitters, and trusts that any evidence consulted will be thoroughly scrutinised before being used to support or reject the implementation of a graduated response regime.

IFPI claimed in its ‘Digital Music Report 2013’ that:

The enforcement programme has, over a period of years, helped the licensed digital marketplace in South Korea significantly. The country’s music market grew by 65 per cent between 2007, when the measures were introduced, and 2011, while Korean repertoire has exploded in the region and abroad. The country has advanced from being 23rd largest market in the world in 2007 to the 11th in 2012.⁵²

This is not necessarily a result of the introduction of graduated response, as South Korea has adopted many other anti-piracy strategies. The independent ‘Hargreaves Report,’ commissioned by the UK Intellectual Property Office, acknowledged that ‘[f]urther study would be needed to understand the relative merits of the different aspects of the [South Korean] programme.’⁵³

⁴⁹Rebecca Giblin, ‘Evaluating Graduated Response’ (2014) 37(2) *Columbia Journal of Law & the Arts* 147, 190–191.

⁵⁰Ibid 191.

⁵¹Ibid.

⁵²International Federation of the Phonographic Industry, ‘IFPI Digital Music Report 2013’ (Report, 2013) 60.

⁵³Ian Hargreaves, ‘Digital Opportunity: A Review of Intellectual Property’ (Independent report, Intellectual Property Office (UK), 2011) 78.

2.2 Questions 1-5

QUESTION 1: What could constitute 'reasonable steps' for ISPs to prevent or avoid copyright infringement?

The only reasonable step an ISP can take is to include a clause in their service contracts explaining to their subscribers that the subscriber is legally responsible for how they use their connection and must abide by Australian law.

A system that requires ISPs to monitor Internet use beyond what is necessary for technical purposes places an unfair burden on the ISPs and is a disproportionate response that threatens the right to privacy, and limits freedom of expression due to the 'chilling effect'. That would not be a reasonable proposal. As demonstrated above, there is limited evidence to suggest that a system requiring ISPs to warn users of alleged infringements and 'punish' persistent alleged infringements would be effective.

QUESTION 2: How should the costs of any 'reasonable steps' be shared between industry participants?

The cost of the proposal put forward by the Pirate Party in answer to **QUESTION 1** would be negligible and able to be borne by ISPs without a significant overhead. Should the Government opt for any other actions to be taken by ISPs the cost should be wholly imposed upon copyright holders or their organisations, as they will be the sole beneficiaries of any regime.

Given the lack of independent, peer-reviewed literature demonstrating graduated response schemes have been measurably successful elsewhere in the world, implementing graduated response in Australia would be more of an experiment than anything else. Expecting the ISPs to pay the costs of another industry's experiment — both in monetary terms as well as in terms of harm to their own customer relations — is incredibly unfair and unreasonable.

QUESTION 3: Should the legislation provide further guidance on what would constitute reasonable steps?

Any industry schemes should be entered into voluntarily and not be enforced through legislation.

QUESTION 4: Should different ISPs be able to adopt different 'reasonable steps' and, if so, what would be required within a legislative framework to accommodate this?

Each ISP should be free to determine their own methods of dealing with copyright infringement within the bounds of respecting the privacy of their customers and allowing open access to the Internet.

As stated earlier, the Pirate Party supports the High Court's decision in *Roadshow Films Pty Ltd v iiNet*⁵⁴ and opposes any legislative move to make ISPs liable for the use of their services.

QUESTION 5: What rights should consumers have in response to any scheme or 'reasonable steps' taken by ISPs or rights holders? Does the legislative framework need to provide for these rights?

Should a graduated response scheme be imposed, consumers should have a right to contest any claim that they have accessed copyrighted material without authorisation, in contrast to the voluntary scheme in the United States. The onus of proof should fall upon the copyright holder that a breach has been made by the subscriber. Should a connection be used by multiple users, the copyright holder would need to demonstrate that the breach was made by the primary subscriber or someone directly in their care. It is routine for subscribers to permit visitors to use their Internet connections, and many premises have shared Internet connections.

Consider the chilling effect of these schemes on open access networks. Many shopping centres, coffee shops and other retail establishments provide free, open access wireless networking to their customers as both a courtesy as well as an inducement to spend increased time and thus money with their establishments. This has been a win-win situation for retailers and their customers. However, the proposed schemes could leave these retail establishments liable for copyright infringement conducted by any passer-by making use of their network. This would be untenable. All such networks would need to be shut down to avoid liability. A lose-lose-lose situation would be the result.

⁵⁴[2012] HCA 16 (20 April 2012).

3 Extended injunctive relief

The Pirate Party has decided to address its concerns with regard to extended injunctive relief in two separate parts:

1. Concerns relating to Internet censorship and the collateral damage that Internet filtering can cause, and
2. Concerns relating to the efficacy of extended injunctive relief.

3.1 Censorship concerns

Censorship only acts as a mechanism to prevent Internet users inadvertently accessing materials, while determined users with basic computer literacy will be able to circumvent any blocking mechanisms.

The Pirate Party opposes extending injunctive relief outright. Censoring websites because they may contain infringing material is a direct assault on freedom of speech and free access to information. File sharing sites such as the Pirate Bay, while frequently used to share torrent files and magnet links (websites such as the Pirate Bay do not themselves store any copyrighted material without authorisation), have legitimate use as a means to legally distribute content by a wide range of artists and producers.⁵⁵ The front-page of the Pirate Bay itself is used for promoting emerging artists under the title 'the Promo Bay'.⁵⁶

3.2 Efficacy concerns

The Hague Court of Appeal in the Netherlands ruled earlier this year that the blocking of websites is ineffective and unnecessary, lifting an earlier imposed injunction on Internet service providers that required the Pirate Bay to be blocked.⁵⁷ The Pirate Party itself is in the process of arranging a certified translation of the decision from Dutch

⁵⁵See eg Harry Hodgson, 'Eyes in the Dark: The Album Distributed Through the Power of the Pirate', *The Huffington Post* (online), 19 October 2012 <http://www.huffingtonpost.com/harry-hodgson/music-piracy_b_1986466.html>; Katie Dean, 'Winwood: Roll With P2P, Baby', *Wired* (online), 9 July 2004 <<http://archive.wired.com/entertainment/music/news/2004/07/64128>>; Mike Masnick, 'Counting Crows Distributes Songs And More Via BitTorrent', *TechDirt* (online), 14 May 2012 <<https://www.techdirt.com/blog/casestudies/articles/20120514/11021618915/counting-crows-distribute-songs-more-via-bittorrent.shtml>>.

⁵⁶<http://thepiratebay.se/>

⁵⁷Gerechtshof Den Haag [The Hague Court of Appeal], ECLI:NL:GHDHA:2014:88, 28 January 2014.

to English,⁵⁸ but understands from informal translations and media reports⁵⁹ that the decision acknowledges the following points:

- Blocking access the Pirate Bay has been ineffective due to the ability of Internet users to access the website using proxy servers and other circumvention methods.
- BitTorrent usage had increased during the period that the blockade was in place.

The Pirate Party urges the Attorney-General's Department to seriously consider the implications of this decision.

James Brandes, a self-described 'anti-piracy agent,' expressed his concerns in a 2013 article published shortly after several torrent index websites began to be blocked.⁶⁰ His concerns can be summarised thus:

- Blocking websites is likely to lead to a dramatic increase in proxies and alternative sites that can be used to circumvent the blockade: it is a 'whack-a-mole policy' in which 'every single time a site is blocked at the ISP level, new URLs take their place.'
- This also reduces the efficacy of other avenues of approach, such as DMCA 'takedown' notices, as suddenly the target pool of infringing URLs increases exponentially.
- Anyone using a VPN will be able to easily evade the blockade: 'You can change your geographical location and thus circumvent ISP blocks with the click of a button.'
- Internet filtering raises serious censorship concerns, as many sites linked to copyright infringement also provide the capability to share open-license content and public domain materials.

3.3 Question 6

QUESTION 6: What matters should the Court consider when determining whether to grant an injunction to block access to a particular website?

There are no circumstances under which the Pirate Party would support website blocking in Australia, except on an opt-in, subscriber- or user-controlled basis. The free flow of information is necessary for a

⁵⁸<http://www.pozible.com/project/185899>

⁵⁹Samuel Gibbs, 'Pirate Bay ban lifted in Netherlands as blocking torrent sites ruled "ineffective"', *The Guardian* (online), 30 January 2014 <<http://www.theguardian.com/technology/2014/jan/29/pirate-bay-ban-lifted-in-netherlands-as-blocking-torrent-sites-ruled-ineffective>>.

⁶⁰James Brandes, 'Shiver me timbers! Is the torrent site blockade working or have those pesky pirates circumnavigated their way around it?', *ORG Zine* (online), 2013 <<http://zine.openrightsgroup.org/features/2013/blocking-orders>>.

free and open society and censorship regimes have the tendency to only grow over time. The proposal for blocking websites that contain infringing content is an example of just that.

The previous Labor Government proposed an Internet filter to block sites that it deemed objectionable. This was widely and rightly opposed by Internet users who understand that censorship regimes risk reducing citizens' access to information required to make informed decisions.

In fact, on the eve of the Federal Election, the Liberal Party announced, and then quickly scuppered, an ill-conceived Internet censorship plan.⁶¹ Any attempt to introduce Internet censorship is absolutely toxic, as both major parties have recognised.

Even so, website blocking is trivial to circumvent, making it practically useless for preventing access to infringing material. Although the Pirate Party believes that blockades sweep problems such as the distribution of child abuse material under the carpet, it does recognise that filtering can prevent *inadvertent* access to undesired materials in limited cases, with a large technical overhead. This will not, however, prevent access by determined Internet users, especially those who are already familiar with existing websites such as the Pirate Bay. There are a vast array of techniques and services that allow users to access content which would otherwise be blocked.

In Australia, arguably the most widespread method of accessing material otherwise blocked in Australia are VPNs. With geoblocking preventing Australians from legally accessing content otherwise available overseas, thousands of Australians already use VPNs to access services such as Netflix, and easy-to-understand guides have been published by consumer groups including Choice.⁶²

There is a demonstrated risk that website blocking will inadvertently block access to many websites that have nothing to do with copyright infringement. The Australian Securities and Investment Commission has used s 313 of the *Telecommunications Act 1997* (Cth) to block sites involved in financial fraud, and through this has inadvertently blocked

⁶¹Jonathan Swan and Lucy Battersby, 'How Malcolm Turnbull was ambushed by the Coalition's own internet policy', *The Sydney Morning Herald* (online), 6 September 2013 <<http://www.smh.com.au/federal-politics/federal-election-2013/how-malcolm-turnbull-was-ambushed-by-the-coalitions-own-internet-policy-20130906-2t9bd.html>>; James Robertson, Ben Grubb and Heath Aston, 'Coalition announces internet filter ... and immediately backs down', *The Sydney Morning Herald* (online), 5 September 2013 <<http://www.smh.com.au/federal-politics/federal-election-2013/coalition-announces-internet-filter--and-immediately-backs-down-20130905-2t7nb.html>>.

⁶²Elise Dalley, *A how-to guide to navigating geo-blocking* (5 March 2014) Choice <<http://www.choice.com.au/reviews-and-tests/computers-and-online/networking-and-internet/shopping-online/navigating-online-geoblocks/page/how-to-circumvent-geoblocks.aspx>>.

250,000 websites including Melbourne Free University, which alerted advocates for a free Internet of the misuse of the *Telecommunications Act* in this way.⁶³ Blocking websites can lead to a number of negative, unintended consequences, and are especially concerning when website operators whose websites have been inadvertently blocked are not informed.

4 Extended safe harbour scheme

4.1 Question 7

QUESTION 7: Would the proposed definition adequately and appropriately expand the safe harbour scheme?

Pirate Party supports the expansion of safe harbour provisions to protect other organisations that provide Internet access to end users. The proliferation of free public Internet access has exposed a wide array of organisations and businesses to risk as they are excluded from safe harbour provisions which were specifically written to protect ISPs.

5 Building the evidence base

5.1 Questions 8–11

QUESTION 8: How can the impact of any measures to address online copyright infringement best be measured?

The Pirate Party is skeptical of most methods currently used to measure the success, failure or redundancy of any proposal to reduce the prevalence of online file sharing.

The first are the methods of measuring the economic impact of copyright infringement (particularly non-commercial file sharing) in general. The copyright lobby is notorious for treating every instance of copyright infringement as a lost sale, despite judicial authority in the United

⁶³Pat McGrath, 'ASIC accidentally blocked 250,000 websites due to 'basic' IP address misunderstanding', *ABC News* (online), 28 August 2014 <<http://www.abc.net.au/news/2014-08-27/asic-accidentally-blocked-250000-websites-ip-address/5701734>>.

States that this is clearly not the case.⁶⁴ There are a range of circumstances that impact file sharing behaviours which cause no loss of income for the media being shared. Firstly, it may be that people who access content before it is released in Australia are likely to buy copies once it becomes legally available in Australia. Some viewers of popular TV shows may purchase DVD box sets once they are available even though they first watched copies that infringed copyright.

Another issue glossed over by the copyright lobby is the fact that people have a finite amount of money to spend on entertainment, and may choose to not view or listen to the media should commercial costs be imposed. This is exacerbated by the 'Australia tax' where media companies charge considerably more for media to Australian consumers than comparable overseas markets.⁶⁵ Ultimately, however, it may be that there is simply too much content to consume, and people are not in fact spending less.⁶⁶

As has been stated earlier, perceptions of the size of the copyright infringement 'problem' are distorted by the reluctance of the content industries to expand services into Australia. There is an obsession with targeting consumer behaviour in order to continue propping up what are arguably becoming increasingly outdated business models. It would be far better to focus on shifting copyright holders' approaches in order to provide a clearer picture of the extent of online copyright infringement in Australia.

Further, it is likely that the measures proposed will, as has been discussed above, lead to infringement occurring through unmonitored channels, which will not be reflected in an increased market for authorised consumption. With a general shift towards encrypted traffic it will become increasingly impossible to determine how much of Australia's Internet traffic is infringing.

QUESTION 9: Are there alternative measures to reduce online copyright infringement that may be more effective?

Geographical market segmentation in terms of both staggered release dates and increased prices for Australian consumers are significant contributing factors towards Australians accessing content from other

⁶⁴*US v Dove*, 585 F Supp 2d 865 (WD Va 2008).

⁶⁵Grace Collier, 'Demolishing "The Australia Tax" should be a government priority', *The Australian* (online), 9 August 2014 <<http://www.theaustralian.com.au/opinion/columnists/demolishing-the-australia-tax-should-be-a-government-priority/story-fnkdybpm-1227018447539>>.

⁶⁶Engimax (Andy Maxwell) and Ernesto Van Der Sar, 'Swiss Govt: downloading movies and music will stay legal', *TorrentFreak* (online), 2 December 2011 <<https://torrentfreak.com/swiss-govt-downloading-movies-and-music-will-stay-legal-111202/>>.

countries by bypassing geoblocking mechanisms or using P2P or other means to obtain content. If this were to be addressed the motivation for file sharing would lessen considerably and would likely to be more effective than website blocking or graduated response proposals.

QUESTION 10: What regulatory impacts will the proposals have on you or your organisation?

Not applicable.

QUESTION 11: Do the proposals have unintended implications, or create additional burdens for entities other than rights holders and ISPs?

The Pirate Party believes that the proposals being put forward by the Government will have serious unintended consequences if enacted.

As demonstrated above in the ASIC example, website blocking can impact sites beyond the target of a blocking attempt. Sites that could be construed as facilitating file sharing often contain legitimate content which would also be blocked.

Monitoring user behaviour in order to detect file-sharing requires a serious breach of privacy. As demonstrated in the week prior to the submission period closing, the Australian Federal Police ('AFP') mistakenly published the metadata of someone under investigation.⁶⁷ Considering the ineptitude of the AFP, it is difficult to trust ISPs and copyright enforcers with the private data of Australian citizens. Monitoring Internet activity for the purposes of detecting copyright violations, is an assault on the privacy of every Australian Internet user and carries a great risk of private data being exposed.

Graduated response regimes have serious implications for users accused of sharing files. There would need to be a high threshold of evidence that the user being fined or disconnected was responsible for accessing the content, which can only be achieved by gross privacy invasions. The Pirate Party opposes any proposal that reduces or cuts off Internet access for any reason. Such draconian proposals are anti-democratic.

⁶⁷Paul Farrell, 'Federal police mistakenly publish metadata from criminal investigations', *The Guardian* (online), 28 August 2014 <<http://www.theguardian.com/world/2014/aug/28/federal-police-mistakenly-publish-metadata-from-criminal-investigations>>.

6 Conclusion

Almost all of the actions proposed in this discussion paper are onerous and ineffectual, and would make Australia appear more digitally illiterate than at present. They will not give effect to the aims of copyright, nor will they significantly improve the revenues of copyright holders. The proposals are put forward from an archaic and heavy-handed attitude towards the purposes of copyright, with a poor understanding and limited recognition of the realities of contemporary cultural behaviour.

The Pirate Party would like the opportunity to make supplementary submissions, particularly in response to those already received from industry lobbyists. If the Attorney-General's Department has any questions or comments relating to our submission, the authors of this submission are more than willing to oblige. The Pirate Party also requests that the contact details listed on the cover page of this are not removed prior to publication by the Attorney-General's Department, regardless of departmental policy on the matter.