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Communications Law Centre, UTS

Executive Summary

1. The Communications Law Centre (“CLC”) broadly agrees with each of the proposals made in the Online Copyright Infringement Discussion Paper.

2. In the CLC’s view, more effective copyright protection is necessary in order to create a secure, sustainable market for creative content. A secure market for content benefits not only content creators and investors, but ultimately the Australian public, as the market provides incentive to produce quality content. By way of contrast, lost revenue and a resulting reduction in incentive are features of the current market.

3. In particular, the CLC welcomes the proposal to “extend authorisation liability” under the Copyright Act 1968 (Cth) (“the Act”).

4. The CLC supports the proposals of the Australian Copyright Council (“ACC”) and Music Rights Australia to effectively extend authorisation liability.

5. If neither of these proposals is adopted, the best initial approach to developing “reasonable steps” is one of industry consultation. The CLC submits that a roundtable process involving all stakeholders would be a useful means of developing agreed standards to be considered in determining authorisation liability.

6. It is difficult to determine the best allocation of costs for implementation of “reasonable steps” in anticipation of their development. However, the CLC considers that, nominally, costs should be shared between rights holders and Internet Service Providers (“ISPs”). An equal sharing of costs is a useful starting point, to be negotiated once the “reasonable steps” are known.

7. If, in the event that development of standards is left to industry, agreement is not reached on the standards to apply, or if agreed standards fail to be sufficiently protective within a reasonable period of time, the Government power to create substitute standards in regulation or legislation should be exercised.

8. The CLC considers that any scheme developed by industry should sit within a system of co-regulation and should be required to be registered with a regulatory body. A regulatory body should have a range of sanctions available to deal with non-compliance, so that the scheme will be effective.

9. Any “reasonable steps” for ISPs should be broadly drawn, so that ISPs have scope to implement steps in different ways, promoting customer-focused competition.

10. Any scheme to be considered in an assessment of authorisation liability should allow for rights of response on the part of consumers. The legislation should mandate the participation of consumer representatives in development of industry schemes and require consumer rights of response to be included in any such schemes.
11. The CLC also welcomes the proposal to extend injunctive relief, as a practical solution to the problem of infringing overseas sites. The CLC endorses the ACC’s suggested approach to the granting of injunctions.

12. If the approach suggested by the ACC is not taken up, a “purpose” test, to be applied by courts, is a useful first threshold to a successful application for injunction. However, the CLC considers it would be too difficult for rights holders to establish the “dominant purpose” of overseas sites. Accordingly, courts should consider whether “a purpose” of a website is infringing.

13. Before granting an injunction, a court should also consider the rights of any person likely to be affected by the injunction. Whether or not the ISP had knowledge of the infringing conduct should not be a relevant factor.

14. Finally, the CLC would agree with the proposal to extend the safe harbour scheme under the Act, but only if authorisation liability under the Act is effectively and successfully extended. The CLC considers that those intended to be captured by the extended safe harbour scheme should be made clearer.

15. All proposals implemented should be subject to ongoing monitoring, to test effectiveness. Consumer surveys should constitute at least one of the impact measurements used.

16. The proposals suggested should also be accompanied by various other measures, including continued action by rights holders to improve their business models, to make content readily available globally and at attractive prices.

17. To the extent that the proposals affect ISPs, they should be considered to entail legitimate costs of operating as an ISP. The proposals should, in fact, be viewed as enhancing competition in the industry, by removing the competitive disadvantage currently experienced by those who do not countenance unlawful activity.

1. Introduction

1.1 The Communications Law Centre, UTS ("CLC") is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate this opportunity to respond to the Ministers’ consultation. In the following discussion, reference is made to the proposals and questions posed in the Online Copyright Infringement Discussion Paper ("Discussion Paper"), and the numbering used there has been adopted.

1.2 The CLC welcomes the proposals made in the Discussion Paper. The CLC considers that these proposals are not to the sole benefit of any particular interest group, but, rather, are in the public interest and national interest.

1.3 If Australia is to build a knowledge economy, a secure and reliable market for intellectual property is essential. A well-functioning market for copyright content improves content creation, production and distribution. In turn, consumers have access to diverse, quality content on a sustainable basis.

1.4 If they achieve their aims, the proposals made in the Discussion Paper will be a significant step towards the creation of such a market, without being a complete solution to the problem of online copyright infringement in Australia.
1.5 The changes can be expected to be of benefit to content creators and investors, for the harm of online copyright infringement (lost sales, royalties and licence fees) is to their direct detriment.

1.6 When the value of copyright is eroded, there are clear implications for content creators – particularly those individual, independent creators of content who work full-time in creative industries – who may lose the ability to sustain their livelihoods by means of selling their original creative works on the market.

1.7 Whilst grants, prizes and other similar avenues of income are welcome, their ability to support an individual’s work as a full-time creator is limited, as they tend to be few and awarded only periodically. By their nature, grants and prizes cannot sustain entire creative industries, for they are only occasional. Certain recipients only will be graced with grants and prizes, and if professional creators must rely on grace and favour, this limits diversity of expression. Conversely, effective copyright law and management allow creators to work with direct reward from the market, and without having to rely on patronage or seek advertising revenue, which might limit independence. In this way, copyright encourages freedom of expression and a sustained plurality of voices, which are essential to democracy.

1.8 A secure and reliable copyright regime is essential not only to creators but to those, such as individual and independent publishers, producers, and distributors, who invest in the creation and distribution of copyright works. Unsurprisingly, investors need to be confident that they will receive a return on investment – without this expectation, they will not invest in creative industries or individual original works. Confidence of this nature can exist only if copyright is managed effectively in a secure and reliable market.

1.9 Whilst consumers have been calling for rights holders (who are often also investors) to adopt new business models offering access to content, investment in the development of such models will be constrained whilst content copyright is, due to prolific infringement and piracy, a commodity of uncertain value. This creates a “vicious circle” of under-investment in new business models, which fuels consumer dissatisfaction with copyright offerings.

1.10 A secure and reliable copyright system is also of benefit to consumers. If copyright returns are protected, this encourages sustainable investment by creators and producers in the creation of quality content for the public. More effective copyright protection does not, however, preclude those who wish to make their content freely available online, without cost or access barriers, from continuing to do so. Access to quality content of a professional standard through lawful, trustworthy channels is of clear benefit to consumers.

1.11 As recognised in the Introduction to the Discussion Paper, any response to online copyright infringement requires action from industry stakeholders, as well as Government. The CLC considers that the Discussion Paper proposals should be accompanied by action by rights holders, to be ever more responsive to consumer demand to make content available more quickly and at attractive prices. The “best case” outcome is a high volume, low cost market for quality creative content, to the mutual benefit of creators, creative industries, and consumers.
2. Proposal 1 – Extended authorisation liability

2.1 The CLC welcomes the Discussion Paper’s proposal to amend subsections 36(1) and 101(1) of the Copyright Act 1968 (Cth) (“the Act”).

2.2 In particular, the CLC endorses the proposed amendment to subsections 36(1) and 101(1), which would remove “power to prevent” as a separate element and would include this as one of the factors to be considered in the assessment as to “reasonable steps”. We understand that this change is proposed with a view to ensuring that the absence of a direct “power to prevent” does not determine the authorisation question.

2.3 In the CLC’s view, it is appropriate that “power to prevent” is only one of a number of equally important factors, including compliance with any regulation or industry schemes, so that Internet Service Providers (“ISPs”) may (depending upon consideration of other factors) be required to take “reasonable steps” to avoid authorisation liability, even if they do not have the power to prevent infringement.

2.4 The CLC is in favour of the proposed amendment as it would foster co-operation between ISPs and rights holders, who are partners in the supply chain for creative content. The CLC considers that, in circumstances of widespread online copyright infringement, co-operation between ISPs and other interested parties must be part of any feasible and practical solution. Moreover, co-operation is essential for a flourishing market for creative content, which also serves consumers.

2.5 To the extent that the changes proposed would affect entities other than ISPs, the view of the CLC is that:

- the reduced emphasis on “power to prevent” should apply in consideration of whether a non-ISPs entity has authorised infringement, just as in consideration of whether an ISP has authorised infringement; and
- the application of amended sections 36 and 101 to non-ISPs entities would not otherwise materially alter the assessment currently made under those provisions in respect of non-ISPs.

Question 1

2.6 The CLC understands that Government is looking to industry to reach agreement on what might constitute “reasonable steps” for ISPs under new subsections 36(1) and 101(1).

2.7 Whilst industry agreement on a code of conduct has long been discussed in this context, it has not yet been achieved. Accordingly, the CLC considers that each of the two proposals made by the Australian Copyright Council (“ACC”), as alternatives to Proposal 1 of the Discussion Paper, are preferable to Proposal 1. One of the ACC’s proposals is a scheme submitted by Music Rights Australia (“MRA”), which seeks to address instances in which ISPs have actual knowledge of infringing uses of their services, and effectively obliges ISPs to take action in these instances.

2.8 If sufficient support for the ACC’s proposals cannot be achieved, then the CLC endorses the development of industry schemes that set out agreed, broadly-drawn, steps to prevent infringement.
The CLC submits that this might be achieved by means of a roundtable process, in which all stakeholders (industry, rights holder and consumer representatives, and representatives of both the Attorney-General’s and Communications Department) are invited to participate.

2.9 An advantage of co-operative development of standards would be a likely reduction in the instance of costly disputation and litigation, as some matters of dispute would have been resolved by the parties at the consultation stage.

2.10 If industry consultation on standards were pursued, a time limit should be imposed for the completion of the roundtable process and development of schemes or arrangements. Following this, as anticipated in the *Discussion Paper*, the Government power to regulate could be exercised in the absence of a workable industry solution. The CLC considers that the Government power to legislate might alternatively be exercised if industry efforts to develop workable standards failed, or if standards were not sufficiently protective to allow a secure and active market for creative content to develop. Please see our further comments on this in paragraphs 2.23 – 2.26, below.

2.11 The CLC notes that the actions described by Emmett J in *Roadshow Films Pty Limited v iiNet Limited* (2011) 194 FCR 285 at 333, as steps that might reasonably have been taken by iiNet with respect to its customers in that case, provide a useful starting point as to what might be considered “reasonable steps” in determining ISP authorisation liability. Whilst Justice Emmett foresaw that suspension and then termination of a user’s service might be reasonable final responses to ongoing copyright infringement, we are respectfully of the initial view that these particular steps are not desirable, except as a last resort.

2.12 The CLC also respectfully adopts Justice Emmett’s suggestions as to the information that should have been provided, and action that should have been taken, by rights holders before it would have been reasonable for iiNet to suspend or terminate a customer’s account. In the CLC’s view, these suggestions provide useful guidance as to the circumstances that should exist before an ISP takes any “reasonable steps”.

2.13 The CLC considers that, in formulating “reasonable steps”, regard should also be had to overseas experience, in particular, the experience of those comparable jurisdictions raised in the *Discussion Paper*, and to the levels of success achieved by those jurisdictions. We acknowledge that any assessment of success in other jurisdictions will necessarily be limited by the difficulty of measuring the impact of steps to address online copyright infringement (please see our further comments on this in paragraph 5.2, below).

2.14 Broadly, the CLC submits that “reasonable steps” might include:

- provision to the account holder of a first, educational, notice giving links to sites where content may be accessed legitimately;
- provision to the account holder of a warning that internet service speed will be reduced if infringing conduct continues;
- temporary reduction of internet service speed;
- provision to the account holder of a warning that subscriber details will be forwarded to the relevant rights holder(s) if infringing conduct continues; and
- provision to the rights holder(s) of account details, for the purpose of direct enforcement.
In implementing these or similar steps, the CLC submits that due process should be accorded, so that consumers have a right to respond to notifications received. Please see our further comments on this in paragraphs 2.32 – 2.35, below.

Question 2

2.16 The CLC considers that, if the alternative proposals made by the ACC are not adopted, the development of “reasonable steps” would be most appropriately left, in the first instance, to industry stakeholders.

2.17 As it is difficult to anticipate with accuracy the “reasonable steps” that would be developed in a roundtable process, we consider that costs allocation should be determined only once the scope and detail of any industry scheme or arrangement is known.

2.18 Nonetheless, the CLC submits that costs of any “reasonable steps” should be shared between rights holders and ISPs. Without prejudicing the outcome of stakeholder discussions, the CLC considers that a reasonable notional starting point would be an equal (50 per cent) sharing of the costs of implementation. This is suggested as a starting point only, and there should be the capacity to change this allocation of costs once the nature of the “reasonable steps” is known in further detail.

Question 3

2.19 The second of the two ACC proposals discussed in paragraph 2.7, which adopts the MRA’s scheme for dealing with “wilful blindness” on the part of ISPs, anticipates that copyright regulation would be amended to provide some guidance on what might be considered “reasonable steps”. As indicated, the CLC endorses the two proposals made by the ACC as alternatives to Proposal 1 of the Discussion Paper, including the suggestion that regulation might provide a broad outline (or non-exhaustive list) of “reasonable steps”.

2.20 The CLC also agrees with the ACC’s view that the development of “reasonable steps” should allow for flexibility. The CLC considers that, in a digital environment, standards should in general be principles-based rather than rules-based. In a dynamic, digital environment, rules-based standards pose problems as they do not adapt well to changing circumstances. Rules-based standards also risk creating a “box-ticking” culture of strict, but not always substantive, compliance.

2.21 If neither of the ACC’s alternatives to Proposal 1 is adopted, the CLC would support an approach under which initially, there is an attempt by industry stakeholders to develop agreed “reasonable steps”.

2.22 In this scenario, neither regulation nor legislation would, initially, provide further guidance on what would constitute “reasonable steps”. Yet, the Government power to regulate might be exercised in the event that there is a failure of stakeholder attempts to develop agreed schemes or arrangements. Relevant measures prescribed in the Copyright Regulations 1969 (Cth) would then be considered as part of the assessment made under new sections 36 and 101 of the Act.
2.23 Alternatively or additionally, the CLC considers that direct amendments to the Act would be warranted in circumstances in which industry stakeholders fail to reach agreement as to what might constitute “reasonable steps”. However, as legislation might not be as responsive to changes in technology and services as industry-developed solutions, legislation as to what might constitute “reasonable steps” should be a last recourse.

2.24 As any regulation or legislation as to what might constitute “reasonable steps” will necessarily be less nuanced, and less apt, than schemes devised by stakeholders, there should be an incentive for parties engaging in any roundtable process to come to agreement by the deadline suggested in paragraph 2.10.

2.25 The Government’s continuing power to regulate or legislate should also play a role in enforcement of any schemes developed by stakeholders. It is the CLC’s view that any industry scheme developed in a roundtable process should sit within a system of co-regulation, under which the scheme would be required to be registered with a regulatory body. The Copyright Tribunal should play a role in oversight of industry-developed schemes.

2.26 If it was determined, following review after a period of operation, that the registered schemes were insufficient to meet the purposes of their development, or that those covered by the schemes were not in compliance or not in substantive compliance, the Attorney-General should have the power to deregister one or more schemes and introduce standards by way of regulation or legislation.

2.27 It would also be important for the regulatory body to have a range of sanctions available in cases of non-compliance with registered schemes – for example, undertakings, enforceable undertakings and determinations – with systems for mediation and arbitration in appropriate cases, and ultimate jurisdiction lying with the Federal Court (as under the Broadcasting Services Act 1992 (Cth)).

2.28 Such a system of enforceable industry-led schemes should facilitate the development of a market for creative content and reduce uncertainty and litigation.

**Question 4**

2.29 As stated above, the CLC considers that there are advantages to standards in this area being principles-based rather than rules-based.

2.30 One of the advantages of a principles-based approach would be that different ISPs would be able to implement agreed “reasonable steps” in different ways. The CLC endorses this approach to compliance, as it allows ISPs to adapt their own business models to standards, promoting an environment of customer-focused competition.

2.31 The development of flexible industry schemes would provide the framework to allow different market-based approaches to compliance.

**Question 5**

2.32 The CLC considers that any scheme to be considered in an assessment of authorisation liability should allow for rights of response on the part of consumers.
2.33 In paragraph 2.14, above, we suggested some steps that might be adopted as “reasonable steps” in an industry scheme (or any relevant regulation or legislation). It is our view that a right of response should accompany a first notice to the account holder (and any notice following that). Each notice should also:

- set out the grounds for the notice, providing the account holder with sufficient information to enable him or her to provide an appropriate response;
- alert the account holder to his or her right to respond, explaining the way in which this might be exercised; and
- inform the consumer of how he or she can make a complaint (discussed further in paragraph 2.35, below).

2.34 The CLC considers that it would be useful to provide consumers with guidance as to what might constitute a successful response to a “reasonable step”. This would not only assist consumers in understanding their rights, but would enhance the efficiency of the system by avoiding clearly inadequate responses. To assist in developing appropriate categories of response, regard might be had to the United States system of challenges, which limits available grounds for review (for example, the infringing act was by an unauthorised user of the account, whose act the account holder was not aware of and could not have prevented). The onus of establishing a successful response should be borne by the account holder.

2.35 Further, the CLC submits that consumers should have the ability to make complaints, to be resolved in accordance with Australian complaints-handling standards, if they believe that an ISP has made an incorrect decision (for example, if an ISP has not accepted an account holder’s response to a notice). In the first instance, a complaint should be made to the relevant ISP; if, following this, the parties do not reach a resolution, the complaint should be referred to an independent body with powers to resolve the complaint.

2.36 ISPs should also have the ability to engage directly with such a body, particularly to exercise their own rights of response in respect of complaints made by consumers.

2.37 The CLC considers that the legislative framework should provide for consumer rights in the following ways. First, we consider that the legislation, which foresees the development of industry schemes, should require the participation of consumer representatives in any consultative process for development of the schemes. Secondly, the legislation should require that consumer rights of response are included in any industry schemes or arrangements ultimately developed—without going as far as prescribing the exact nature and scope of those rights, which should be elaborated in the schemes or arrangements themselves.

3. Proposal 2 – Extended injunctive relief

3.1 The CLC welcomes the Discussion Paper’s second proposal, to amend the Act to enable extended injunctive relief.

3.2 Because of the jurisdictional issues involved in enforcing copyright against overseas infringers, the CLC considers that this proposal outlines a practical solution to the problem of infringing overseas sites.
3.3 Some argue that measures such as this have limited impact, for the reason that offending content will likely appear at new locations once blocked at a particular site. The CLC does not support such arguments. It may be that, in order for the proposal to be effective, the relief granted to rights holders will have to deal with the potential problem of content re-location. For example, an injunction might be extended to require other sites, found to include content the same as that which was the subject of the original complaint, to be blocked by the ISP. (Continuous monitoring and notifications to the ISP would be required). By taking preventative steps such as this, the CLC expects that over time offending conduct would be discouraged and substantially reduced.

3.4 In order for the proposed measure to have the intended effect, in the opinion of the CLC it is also necessary for the rights holder to have the ability to list a number of ISPs as respondents in a single application. Affected websites should be blocked at carrier level.

3.5 As anticipated by the Discussion Paper, the measure should extend only to websites operated outside Australia, as there are already workable avenues for rights holders to pursue primary infringers in Australia.

Question 6

3.6 The CLC agrees with the ACC’s submission that injunctions of this type could be determined according to ordinary principles, without introducing a “dominant purpose” test (or, indeed, any mandated assessment of the purpose of the website).

3.7 However, if the ACC’s submission is not adopted, the CLC would endorse a modified “purpose” test as the first threshold to a successful application for an injunction. In our view, rights holders should be required to prove only that one of the purposes of the offending site is infringement. This would relieve rights holders from the substantial evidentiary difficulty of proving that an overseas site has a “dominant purpose” of infringement. Also, if the “dominant purpose” of a site were some other unlawful activity, that should not, of itself, preclude an injunction from being granted.

3.8 As it is important to preserve legitimate uses of websites and services, and to assuage the concerns of those who foresee a system of “censorship”, the Irish model should be followed so that the court is also directed to consider the rights of any person likely to be affected by the injunction, and retains discretion to give such directions as are appropriate.

3.9 Provided that the court is so directed, the CLC does not consider it necessary to allow affected parties to be heard by the court. Australian judges are accustomed to balancing competing interests, including in the context of injunction applications, and are able to do so in the absence of direct argument as to the public or other particular interests.

3.10 Further, the CLC does not consider that it is necessary for the court to consider whether the ISP had knowledge (actual or otherwise) of the infringing conduct. If a foreign site has “a purpose” of infringement, then the granting of an injunction to block access is a practical means of dealing with the primary infringement and, in the CLC’s view, the ISP’s knowledge of the infringement (or absence thereof) is not a factor that should be relevant to the court’s considerations.
4.  **Proposal 3 – Extended safe harbour scheme**

**Question 7**

4.1 In the CLC’s view, the appropriateness of the *Discussion Paper*’s third proposal depends upon successful extension of authorisation liability under sections 36 and 101 of the Act. In the CLC’s view, the safe harbour scheme should be extended in accordance with Proposal 3 only if (and when) authorisation liability is extended, with the practical effect of significantly reducing online copyright infringement.

4.2 It is expected that, if Proposal 1 (or an alternative proposal with similar effect) is successfully implemented, the safe harbour provisions will be amended so as to make clear that an “industry code” includes an industry scheme developed under amended section 36 or amended section 101 of the Act.

4.3 Whilst it is clear from commentary in the *Discussion Paper* that the revised definition of “service provider” is intended to capture universities and online search engines, we consider that it would also be useful to have greater clarity regarding the intended scope of the category. For instance, a non-exhaustive list of examples, or specific exclusions, might be set out in the safe harbour provisions.

4.4 The Act’s current safe harbour provisions make reference, in two contexts, to the termination of users’ accounts. First, under subsections 116AG(3) and 116AG(4), the Act provides that a court may order a carriage service provider (“CSP”) to terminate a particular user account. Secondly, in order to take advantage of the safe harbour limitations, CSPs are required to “adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers”.

4.5 As indicated above in paragraph 2.11, the CLC is of the view that the termination of user accounts would not, ideally, be implemented as a “reasonable” ISP response to copyright infringement by users. This is a reserved position: termination of user accounts may need to be a last resort. However, if termination of user accounts is adopted as a necessary step after all “reasonable steps” have been taken, there is a danger that as consumers, with reason, now view internet connection as one of the services required to participate fully as a citizen of modern society, termination could prove to be counter-productive.

4.6 The CLC does not consider that the continuing application of the safe harbour provisions referred to in paragraph 4.4 is inconsistent with the initial position that termination of user accounts is undesirable.

4.7 First, courts making orders under subsections 116AG(3) and 116AG(4) are required, under subsection 116AG(5), to have regard to a number of factors, including whether any other order available would be less burdensome. Under subsection 116AG(4), courts specifically have the opportunity to make a non-monetary order that is “less burdensome” than, but “comparably effective” to, an order to terminate an account. Therefore, it can be expected that an order other than a termination order will be made in many cases where the safe harbour provisions apply.
Secondly, the first condition for application of the safe harbour limitations, as set out in subsection 116AH(1) of the Act, requires that CSPs adopt policies providing for termination of repeat infringers’ accounts “in appropriate circumstances”. To the extent that CSPs must implement such policies, they are required to do so “reasonably”. Accordingly, the CLC considers that the safe harbour provisions allow CSPs considerable latitude in deciding whether to terminate even a repeat infringer’s account (and it can be expected that they will be reluctant to do so).

As a final point, the CLC notes that if an organisation is able to attract the application of the safe harbour provisions, then in many cases – depending upon the ultimate characterisation of “reasonable steps” under the authorisation provisions – it will likely have taken “reasonable steps” sufficient to avoid authorisation liability. This may have the effect that service providers will not often have to rely on the safe harbour provisions. However, this is merely by way of observation and does not alter the CLC’s expressed view on the proposed extension of the safe harbour scheme.

5. Building the evidence base

The CLC agrees that any industry schemes or arrangements developed should be subject to ongoing monitoring and evaluation to ensure that the intended objectives are being achieved. As indicated above, we consider that in cases of clear failure, industry-developed schemes (having been registered with a regulatory body) should be deregistered and alternative standards imposed in regulation or legislation.

Question 8

The CLC considers that measurements of success with data outputs (such as lost revenue or lawful downloads comparisons) are susceptible to criticism on the basis that disputed assumptions or techniques of analysis have been adopted, or that they do not represent the whole picture.

Accordingly, whilst consumer surveys have their own limitations (for example, questions must be posed carefully to avoid bias), the CLC considers that such surveys should constitute at least one of the impact measurements used.

6. Other approaches

The CLC broadly agrees with the measures suggested by the Discussion Paper. To an extent, the CLC’s suggestions for alternative or accompanying measures have been discussed in the preceding paragraphs. Further suggestions as to accompanying measures are discussed below.

Question 9

In the CLC’s view, it is essential that the proposals canvassed by the Discussion Paper are accompanied by further rights holder measures to offer content globally, on the same or similar conditions in different markets. The CLC considers that, in an era of instant global communications, when consumers are able to – and do – communicate globally with their peers, consumers in a particular market should not be expected to wait unduly for access to content, or to pay differential prices where they are not warranted.
6.3 Where consumers raise concerns about competition and consumer issues regarding access to content, these are matters which should properly be referred to the Australian Competition and Consumer Commission (“ACCC”). The ACCC will then determine whether there have been any breaches of the Competition and Consumer Act 2010 (Cth).

6.4 Rights holders who respond to consumer demand by providing timely and reasonably priced access to content encourage legitimate purchases and discourage online copyright infringement. In turn, less revenue leakage should occur and prices can be further reduced. We foresee that this will generate a “virtuous cycle”.

6.5 Rights holders should further adapt their business models to respond to the consumer demand for choice and flexibility. Provision of content through multiple channels and in granular elements (for example, single chapters, tracks and episodes), at different prices and on different terms and conditions, would provide competitive advantage. The technology is available to facilitate automated access to works and parts of works, together with the rights for downstream uses, through consolidated content- and rights- exchanges. Such online exchanges would improve the extent and depth of information about content and rights in the market, to assist in creating new and more efficient markets for creative industries.

6.6 In addition to these measures, the CLC proposes that Government should consider a system of copyright registration (as exists in the United States), where registration would provide forensic advantages to rights holders enforcing copyright. Registration of content and rights would also provide a resource for discovering content and transacting rights, becoming especially valuable in a fragmented and rapidly evolving market of creators and producers, with low barriers to entry.

6.7 Finally, the CLC sees an opportunity for the Copyright Tribunal to have an expanded role. First, as noted above, the Tribunal might be involved in the oversight of industry schemes or arrangements. Secondly, the Tribunal might offer a forum for resolution of smaller copyright disputes (on matters of infringement and not only licensing matters). In this context, the President’s and Deputy Presidents’ existing ability to refer matters to alternative dispute resolution might more readily be relied upon, to offer a less costly, less time-consuming process for rights holders and users to resolve copyright disputes. This would be particularly relevant for independent content creators, individual consumers, and small businesses limited in their practical ability to engage in copyright litigation.

7. Regulation Impact Statement

Question 10

7.1 As indicated in the introductory comments to this submission, the CLC is a research centre. The proposals set out in the Discussion Paper are unlikely to have any regulatory impact on the CLC.

Question 11

7.2 Primarily, the CLC sees the Discussion Paper’s proposals as affecting rights holders, ISPs and consumers.
7.3 To the extent that the proposals have implications for ISPs, the CLC submits that reforms facilitating a secure and efficient market for content should be considered to entail legitimate costs of operating as an ISP. All businesses are familiar with, and budget for, other compliance costs such as financial audits and occupational health and safety measures. Compliance with provisions to offer lawful access to content should be viewed as another business essential, which offers commensurable returns by creating the framework for a sustainable content market to flourish. In the CLC’s view, it would not be unreasonable for ISPs to pass on compliance costs to consumers.

7.4 The CLC considers that, if the Discussion Paper proposals are applied equally to ISPs (with some scope for variation in implementation of “reasonable steps”), then they cannot be said to impose an anti-competitive burden.

7.5 Rather, the proposals should be viewed as improving competition, by way of creating an industry-wide “level playing field”. Currently, those who do not countenance unlawful activity are at a competitive disadvantage to those who reap the benefits of such activity. Compliance with industry schemes would correct this imbalance.

8. Conclusion

8.1 The CLC considers that changes along the lines of those set out in the Discussion Paper would be of benefit to all stakeholders, by creating a streamlined, workable market for content. A secure market framework for content would protect not only creator and investor, but also consumer interests.

8.2 The current market for creative content in Australia operates with revenue leakage, of a magnitude that is difficult to quantify. The CLC contends that a further – hidden - loss flows from this, being a reduction in incentive to create, and to invest in the creation of content.

8.3 Content creators deserve to be respected for their work, and have the right to be paid for their work if they wish. The decision as to whether a rights holder charges a fee for access to content should be the rights holder’s, and not the consumer’s.

8.4 Not only this, but content creators and rights holders respond to incentives, so that a secure copyright market with the promise of returns encourages the creation of works. A secure copyright market is, therefore, of ultimate benefit to consumers.

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