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AUSTRALIAN INTERNET SERVICE PROVIDER (ISP) PROPOSAL:

**A SCHEME TO ADDRESS ONLINE
COPYRIGHT INFRINGEMENT**

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1 Executive Summary

Over the past decade, the digital economy has enabled extraordinary technological innovation and evolution. The growth of the internet as a global distribution channel has also facilitated an explosion in the range and volume of content available online - from movies to music, books, software, games and much more.

Australian consumers' ability to legally access this content in a timely and affordable manner does, however, vary significantly from sector to sector (eg; release of TV programs and movies in Australia can lag months behind US releases). This difficulty, combined with a proliferation of access technologies, such as file-sharing software, has reportedly seen a growth in the frequency of unauthorised access to online content and therefore copyright infringement.

Content rights holders (described as 'Rights Holders' in this paper) have lobbied for a number of strategies to address online copyright infringement, most recently focussing on a graduated response scheme designed to compel Australian Internet Intermediaries, (particularly Internet Service Providers), to forward notices and apply sanctions against users the Rights Holders allege are engaging in copyright infringement, via peer to peer (P2P) file sharing.

The scheme sought by Rights Holders is without judicial or independent oversight and its purpose is to enforce a private property right that generates a royalty stream to Rights Holders. No similar scheme - compelling an intermediary to sanction an internet user on the allegation of a third party - exists.

The Internet Service Providers ('the ISPs') who are signatories to this paper are Telstra Bigpond, Optus, iiNet, iPrimus and Internode. The ISPs do not approve, condone or authorise any person engaging in copyright infringement by any means, including through the use of file sharing technologies. The majority of the ISPs in fact offer their customers legal content downloads and are therefore directly affected by copyright infringement in their own right.

Over the past year, Communications Alliance and the ISPs have been engaged in constructive discussions with Rights Holders and the Australian Government in an attempt to identify a way to address online copyright infringement that is **efficient, fair** and **cost-effective** for all parties, including consumers. This paper outlines for discussion by all stakeholders a proposal to achieve that outcome.

The proposal is for an expeditious and cost-effective 18 month 'notice and discovery' trial. Importantly, the trial would be followed by an independent evaluation of its effectiveness, including whether the trial caused a demonstrable change in user behaviour and the relative costs, benefits and impacts of the trial to ISPs and Rights Holders. The evaluation would also be informed by the growing body of international experience in this area (eg: UK, NZ, Canada and France).

The proposal is outlined at a high level and requires consultation with consumers and Government representatives, as well as Rights Holders and the

broader ISP community, before its details can be finalised and an implementation timetable set.

2 Internet Service Provider (ISP) Proposal – An Industry-Led Scheme to Address Online Copyright Infringement

Aim, Principles & Core Elements

Aim of the scheme

The Aim of the scheme is to assist Rights Holders to enforce their copyright by achieving a prolonged and positive change in the behaviour of those who engage in online copyright infringement.

Principles underpinning the scheme

- Rights Holders have primary responsibility for enforcing their intellectual property rights, including responsibility for establishing primary infringement to a requisite standard.
- The fundamental copyright principle of balance between the interests of Rights Holders, ISPs and consumers must be preserved.
- Protection of consumer rights to:
 - privacy;
 - the usual protections afforded under Australian law, such as the presumption of innocence, burden of proof, evidence, natural justice and equity; and
 - Internet access.
- Education about online copyright infringement issues must be made available to consumers.
- Independent oversight is required, particularly in relation to the assessment and imposition of any punitive sanctions.
- Rights Holders must continue to take steps to improve the availability of legal, affordable content online, to reduce the pressure on and/or temptation for consumers to use improper means to obtain content.

Core Elements of the scheme

- The scheme is limited to consumer, residential, landline internet Account Holders only.
- The scheme is conducted as an 18 month 'notice and discovery' trial.
- After the 18 month trial, the scheme's effectiveness would be independently evaluated.
- The allocation of costs incurred by Rights Holders and ISPs should reflect the relative economic benefit derived from the scheme. The reasonable costs incurred by ISPs to assist Rights Holders to enforce their copyright should be reimbursed, in accordance with other instances where ISPs assist third parties; eg, law enforcement agencies.
- Rights Holders must indemnify ISPs for the actions ISPs take in operating the scheme, provided ISPs act in accordance with the scheme rules.

3 A “Notice & Discovery” Scheme

3.1 Accreditation of Rights Holders

Any Rights Holder wishing to participate in the scheme will first pass an accreditation or 'pre-approval' process. This will involve an independent audit of the Rights Holder's infringement detection technology and processes used to generate infringement notices to be forwarded to ISPs. The categories of organisation qualified to undertake the audit will be agreed by Rights Holders and ISPs before the commencement of the scheme.

3.2 General Comments about Notices

An ISP is not required to identify itself as the sender of any notice (including an Education or Warning Notice), nor to place any of its own branding, livery or wordmark(s) on the notices.

An alternative to the scheme outlined below could be for any notices forwarded by an ISP to be in a form already prepared by the Rights Holder, such that the ISP simply passes them onto its customers under a brief cover email/letter. The email/letter would also ask the customer to refer any queries about the notices directly to the Rights Holder concerned or to the Industry Panel. This option would not require ISPs to prepare tailored notices, or to track responses.

3.3 Copyright Infringement Notice from Rights Holder to ISP

Within 14 days of a potential infringement being detected by a Rights Holder, the Rights Holder may choose to send a Copyright Infringement Notice to the relevant ISP.

The Copyright Infringement Notice will include details of:

- The Rights Holder's entitlement
- The copyright work involved
- The IP address involved
- The time and date of the alleged infringement

3.4 Education Notice from ISP to Account Holder

On receipt of a Copyright Infringement Notice from a Rights Holder, the ISP will endeavour to match the specified IP address to an Internet service and, subsequently, an account holder/customer of that ISP.

Within 14 days of the receipt of a Copyright Infringement Notice the ISP will:

- advise the Rights Holder that the ISP is unable to match the specified IP address to an Internet service; or

- send an Education Notice to the Account Holder .

The Education Notice will inform the Account Holder that:

- a Copyright Infringement Notice has been received from a Rights Holder, which states that the Account Holder's internet account may have been used to improperly access content. The Education Notice will name the involved Rights Holder, but not specify the nature of the content involved;
- such activity might be an infringement of copyright under the Copyright Act 1968 (Cth);
- the detected activity might not necessarily have been undertaken by the Account Holder him/herself, in which case the matter can be raised with the Copyright Industry Panel (contact information to be included);
- educational material is available about copyright issues; eg, how to access legal content online, how to make internet services secure from unauthorised use and how to avoid infringing activity – and will provide a link to this information;
- that failure to act on the Education Notice may result in further action by the Rights Holder;
- penalties for copyright infringement apply under the Copyright Act; and
- the Account Holder may wish to seek independent legal advice, or may wish to query or dispute the Education Notice with the Copyright Industry Panel (referred to below).

The Education Notice will come with a 21 day "Grace Period", to give the Account Holder the opportunity to receive the notice, seek legal advice (if so chosen), query or dispute the notice with the Industry Panel, and/or act on its contents. The ISP will not be required to take any action (including sending further notices) during the Grace Period.

The ISP will update its scheme database with the relevant details.

3.5 Warning Notice from ISP to Account Holder

If, after the expiration of the Grace Period, and within 12 months of an initial Copyright Infringement Notice having been received by an ISP in respect of a specific Account Holder, the ISP receives a second Copyright Infringement Notice from any accredited Rights Holder, the ISP will match the IP address from its scheme database and then send a Warning Notice to the relevant Account Holder (or a covering letter/email attaching the Rights Holder's notice).

The Warning Notice will inform the Account Holder that:

- the Account Holder has previously received an Education Notice;
- a second Copyright Infringement Notice has been received from a Rights Holder;

- identify the Rights Holder and specify the date and time of the detected activity and the nature of the content involved;
- the detected activity might not necessarily have been undertaken by the Account Holder him/herself, in which case the matter can be raised with the Copyright Industry Panel (contact information to be included);
- failure to act on the Warning Notice may result in the Rights Holder seeking access to the Account Holder's details from the ISP (via a court sanctioned process), which may lead to direct action by the Rights Holder against the Account Holder;
- penalties potentially apply under the Copyright Act; and
- the Account Holder may wish to seek independent legal advice, or may wish to dispute the Warning Notice with the Industry Panel (referred to below).

The Warning Notice will come with a 21 day "Grace Period", to give the Account Holder the opportunity to receive the notice, seek legal advice (if so chosen), query or dispute the notice with the Industry Panel, and/or act on its contents. The ISP will not be required to take any action (including sending further notices) during the Grace Period. ISPs will send up to [two] additional Warning Notices to an Account Holder in response to [third] and [fourth] Copyright Infringement Notices received from Rights Holders.

ISPs will update their scheme databases for each Warning Notice.

3.6 Discovery Notice from ISP to Account Holder

In the event that an Account Holder is sent one Education Notice and [three] Warning Notices, the ISP will match the IP address from its scheme database and then send a Discovery Notice to the Account Holder.

The Discovery Notice will inform the Account Holder that:

- the Account Holder has previously received one Education Notice and [three] Warning Notices
- the Account Holder has apparently failed to address the matters set out in the Notices
- the ISP will notify the Rights Holder that the Account Holder has apparently failed to address the matters set out in the Notices
- the Rights Holder may then seek to apply for access to the Account Holder's details by way of a preliminary discovery or subpoena application, for the sole purpose of the Rights Holder taking direct copyright infringement action against the Account Holder
- should the ISP be served with a valid preliminary discovery order (or subpoena) the ISP will be required to comply with the order, which may require the ISP to disclose the Account Holder's details to the Rights Holder.

The Discovery Notice will come with a 21 day "Grace Period", to give the Account Holder the opportunity to receive the notice, seek legal advice (if so chosen), query or dispute the notice with the Industry Panel, and act on its contents. The ISP will not be required to take any action (including sending further notices) during the Grace Period. At the end of this period, if no response has been received from the Account Holder either by the ISP or the Industry Panel, the ISP will notify the Rights Holder that the Account Holder has apparently failed to address the matters set out in the Notices.

The ISP will update its scheme database with the relevant details.

3.7 Reset Period

If an ISP receives no Copyright Infringement Notices in respect of an IP Address matched to a specific Account Holder within any 12 month period, the status of that Account Holder will be 'reset' – i.e. treated as if that Account Holder had never been the subject of a previous Copyright Infringement Notice.

3.8 Frequency and Volume of Copyright Infringement Notices

Given the time and cost required to design and build fully automated systems to facilitate a scheme to address online copyright enforcement (e.g.: process Copyright Infringement Notices, match IP Addresses, send Education and Warning Notices, etc), the ISPs will use manual or semi-automated processes throughout the trial.

Accordingly, no ISP will be obliged to process more than 100 Copyright Infringement Notices during a given calendar month during the period of the trial. In these circumstances, Australian ISPs could process more than 10,000 Copyright Infringement Notices during the trial, which will provide a strong body of evidence for the trial's independent evaluation at the end of the 18 month period.

3.9 Copyright Industry Panel (or Independent (judicial/administrative) body)

Under the scheme, it is proposed that ISPs and Rights Holders will agree to cooperatively establish and jointly fund a Copyright Industry Panel. This is envisaged to be a small body with an independent Executive Director and members from the Rights Holder and ISP sector.

The main responsibilities of the Copyright Industry Panel will be to:

- prepare and disseminate educational material including but not limited to copyright issues, the availability of legal content online, how to make internet services secure from unauthorised use and how consumers can avoid infringing activity; and

- operate an appeals process whereby Account Holders who receive notices and believe they are not responsible for any infringing activity can query the basis of the notice and gain further information.

Alternatively, an independent judicial/administrative body could perform the functions of the Copyright Industry Panel outlined above.

Details of the structure, operations and responsibilities of the Copyright Industry Panel, or the nature of the judicial/administrative body, will be further developed with Rights Holders, with appropriate input from the Federal Government.

3.10 Evaluation Process

At the completion of the 18 month trial a thorough independent evaluation will be undertaken of its effectiveness, including a cost benefit analysis.

The evaluation will be conducted by an independent party supported by both Rights Holders and ISPs, and potentially also by the Federal Government.

The evaluation will include review of:

- the effectiveness of the scheme in reducing the volume of online copyright infringements by Australian consumers;
- the point at which alleged infringers change their behaviour (e.g.; after the Education Notice, after the 1st, 2nd or 3rd Warning Notice, etc.);
- the extent to which the scheme drives customer churn;
- the economic impact of the scheme on ISPs – including as a function of the costs incurred;
- any unintended effects generated by the scheme;
- whether the scheme should continue unchanged or be refined; and
- whether additional lessons can be drawn from the operation of similar schemes in other countries.

Details of the evaluation process and consequential steps will be further developed between ISPs and Rights Holders.

3.11 Costs & Scheme Funding

The Australian Content Industry Group (ACIG), which represents a coalition of Rights Holders, believes that the retail value lost to their industry sector through online copyright infringement via file-sharing by Australian consumers in 2010 was A\$900m and growing rapidly.¹

¹ "The Impact of Internet Piracy on the Australian Economy" - Sphere Analysis for the Australian Content Industry Group, February 2011

The Australian Federation Against Copyright Theft commissioned a study, released in January 2011, which claimed that the direct losses to the movie industry alone in Australia from copyright infringement in the 12 months leading to Q3 2010 totalled A\$575m.²

Several recent research efforts have indicated that approximately 70% of infringers would change their behaviour and stop infringing copyright if they received educational or warning notices indicating that their activity is being detected and may be illegal.³

Using these data points as a guide, it follows that if a notice scheme in Australia succeeded in changing the behaviour of even two-thirds of casual infringers, this should generate an annual economic uplift to Rights Holders at least in the order of \$420m per annum (i.e. \$900m x 70% x 2/3). A small fraction of this economic value would be more than sufficient to fund the initial establishment and primary operating costs of the scheme.

In order to establish and operate a scheme, ISPs will incur costs in a number of categories. These include:

- Capital Expenditure:
 - Training, employment, etc.
 - Business process/design
 - Software/hardware design and implementation
- Operating Expenditure:
 - Verification (accuracy of notices received)
 - Matching IP addresses to account holders
 - Sending notices
 - Record keeping
 - Costs of dealing with enquiries
- Additional possible costs:
 - customer appeals process
 - tracking number of notices for each customer
 - contribution to Copyright Industry Panel
- Opportunity costs:
 - customer complaints, including to front of house call centres
 - of redeploying resources to any scheme
 - potential churn cost

While Rights Holders may also incur costs in some of the same categories, they will also enjoy the benefit of royalty returns recovered by virtue of the scheme.

The ISPs support a proposal for the Federal Attorney-General's Department to commission a study by an appropriately qualified, independent body into the costs (as outlined above) that are likely to be incurred by ISPs and Rights

² "Economic Consequences of Movie Piracy, Australia" – Ipsos MediaCT and Oxford Economics on behalf of AFACT

³ New Zealand: 2009 survey for the NZ Federation Against Copyright Theft. UK: Digital Entertainment Survey, 2008. France: July 2010 study by SNEP (Syndicat national de l'edition phonographique) found that ISP notices had a success rate of 69%.

Holders participating in an online copyright enforcement scheme. The study may include a review of the nature, quantum and apportionment of costs, particularly in the context of, and having regard to, the likely benefits such a scheme will deliver (including as between Rights Holders and ISPs).

3.12 Ability of Copyright Infringement Notices to change online behaviours, without express sanctions

There has been much discussion between ISPs and Rights Holders – and in the broader public arena - about the merits and efficacy of notice-only schemes, as opposed to schemes that incorporate stronger sanctions against Account Holders.

Indications are emerging as to the success or otherwise of overseas notice schemes. Admittedly this evidence base is limited, as the overseas schemes have only been operating for a limited period. Nonetheless, it does appear (as has been forecast in numerous research studies) that the **majority** of online infringers do change their behaviour (i.e. stop infringing activities) upon receipt of one or more educational or warning notices – even, as is the case in Canada, those notices don't expressly refer to sanctions; e.g:

- In France, only 0.1% of users who receive a 1st notice will continue their activities and receive a 3rd notice ⁴
- Canada – 11% of those who receive a 1st notice will continue their activities and receive a 3rd notice⁵

This data supports the argument that sending education or warning notices **is itself a sufficient sanction** (i.e. embarrassment for an Account Holder being told that they, or someone using their account, is potentially breaching copyright laws) to cause a change in user behaviour, for all but the minority of infringers.

It is therefore likely that more punitive sanctions will only be necessary for a **minority** of 'recalcitrant infringers' - and a subpoena/preliminary discovery process would be an effective way for Rights Holders and the court or a legislatively appointed body, to effectively and fairly deal with them in accordance with legal and equitable principles.

One of the purposes of an 18 month notice and discovery trial would be to determine what percentage of Australian online copyright infringers will cease their activities upon receipt of notices from ISPs – this would provide real evidence of how many users Rights Holders would in fact need to contact and/or the court would need to process.

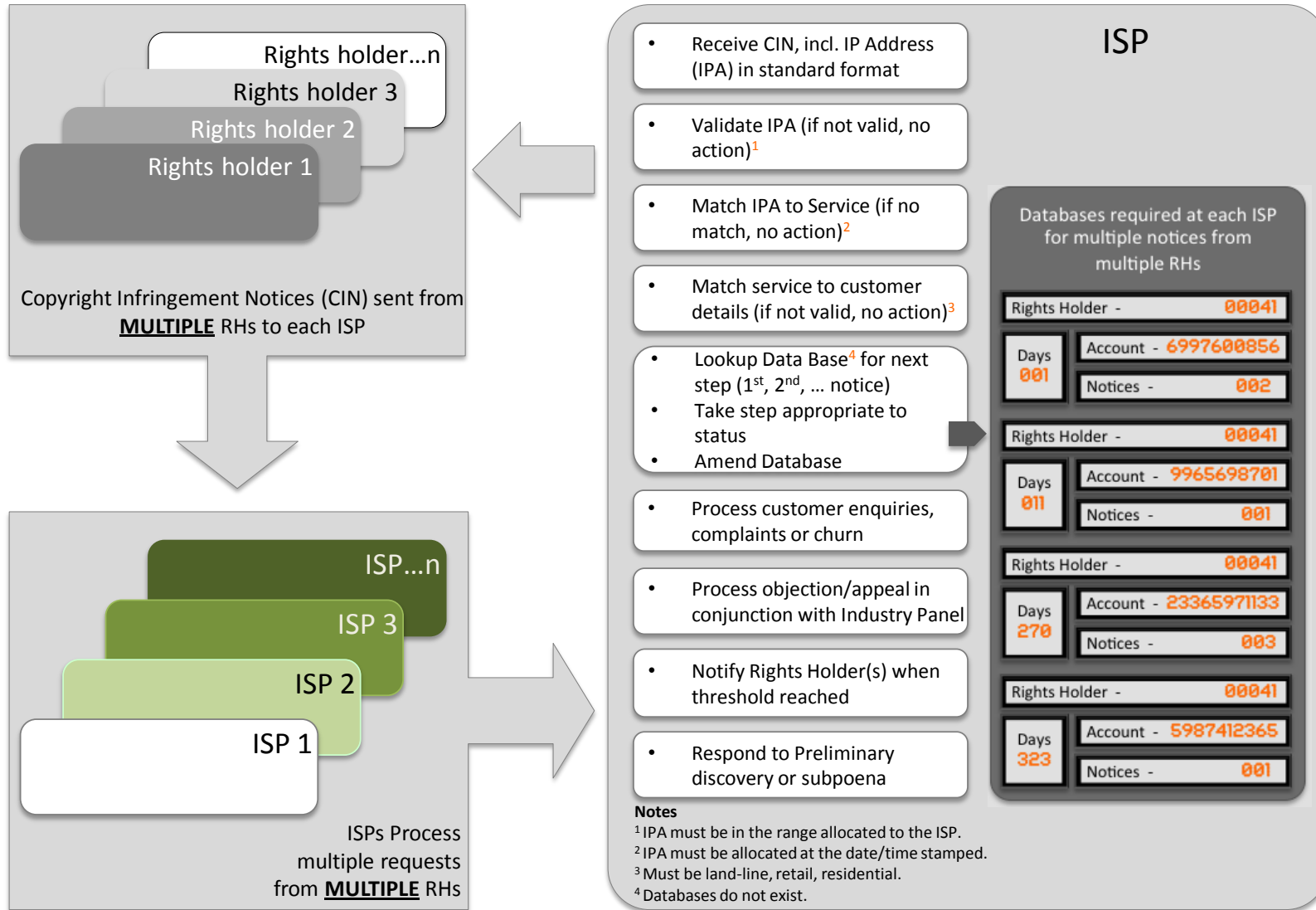
* * *

⁴ The French Press conference with these statistics is cited in a number of newspaper reports but was not reported. See *Le Monde*, (in French)

http://www.lemonde.fr/technologies/article/2011/09/29/l-offre-legale-nouveau-chantier-de-la-hadopi_1580116_651865.html. An earlier HADOPI Report with June 2011 statistics is available at <http://www.hadopi.fr/sites/default/files/page/pdf/rapport-d-activite-hadopi.pdf>.

⁵ <http://www.cata.ca/files/PDF/caip/copyright/03-September-15.pdf>

3.13 POSSIBLE PROCESS OVERVIEW – NOTICE AND DISCOVERY SCHEME





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