COPYRIGHT IN THE INTERNET AGE

Current copyright laws are stuck in the age of the fax machine—but more regulation is not the answer.

The digital era has created a paradigm shift in how people interact with media, and business models that were previously effective no longer stand. Rather than the creation and distribution of physical copies of creative content (e.g. music, film, literature), producers now deal in digital files that can be duplicated almost infinitely without the original file being diminished or destroyed. This technological development has removed the need to physically own content. It has also brought with it the possibility for users to share files though the entirety of the internet to whoever seeks them, at no cost.

Here in Australia, more and more end users are avoiding all payment for creative services, primarily through online downloading facilitated through peer-to-peer (P2P) servers. There are many reasons online piracy has grown so rapidly: delayed or limited access to content from outside Australia, high price of legal content, and some users' unwillingness to pay for any entertainment services. A genuine solution to the problem of online piracy will address these fundamental root causes.

The anti-piracy reforms that have been proposed by the current government do not do this. Instead, they attempt to stop online copyright infringement through regulatory enforcement. Current proposals aim to reduce piracy by expanding the scope of responsibility for copyright infringement to include companies who provide internet service. The government also aims to regulate Australians' internet access by blocking certain sites deemed to be facilitating infringing activities. As I hope to show, these regulations would be more burdensome than beneficial.

In order to ensure that creative industries continue to flourish in this country, Australia's stringent copyright laws must be updated in a way that preserves the free market and an open Internet and also encourages private companies to adapt their business models to the digital economy. This can only come from content-creating industries working together with internet service providers (ISPs) and government to provide a balanced approach to copyright reform.

Purpose of Copyright Law

Copyright is not an unlimited right. It is a limited monopoly granted by the government that gives the content creator exclusive rights over their 'original expression' for a limited amount of time, usually defined as the length of the author's life plus a certain number of years (under current law, 70). It allows for control over the reproduction and public dissemination of the original expression, along with the benefits that flow therefrom. Copyright is distinct from other forms of intellectual property in that it does not require registration. Protection is provided under relevant laws as soon as the original expression is made.

Copyright is granted with the aim of incentivising investment in the production of creative works and in turn aiding

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cultural development. As such, copyright law must find a balance between the private interests of rights holders, who want revenue as well as further investment, against the public interest of sociocultural development, a product of the ability to disseminate content. Leaning too far toward the former or the latter creates economic and cultural issues respectively.

As it currently stands, Australian copyright law does not strike the right balance. The Abbott government's recent attempts at reform have had the beneficial effect of bringing the relevant stakeholders into dialogue with each other. However, the proposed reforms themselves are critically flawed and overly stringent. The most restrictive of the proposed regulations are the changes to authorisation liability and the website blocking injunctions.

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Extended Authorisation Liability

Authorisation liability, as defined by the High Court in *University of New South Wales v. Moorhouse* (1975), refers to when an entity has under its control a means by which copyright may be infringed, is aware or has reason to suspect that the means could be used to infringe, and fails to take reasonable steps to limit the ability to infringe.

Central to establishing authorisation liability is 'control'. Mere facilitation or knowledge that there is a likelihood of infringing conduct is insufficient, as Justice Bennett stated in *Australasian Performing Right Association Ltd v. Metro on George Pty Ltd* (2004).

The government's reforms would involve an extension of liability, shifting a greater burden onto ISPs. The proposals state that 'even where an ISP does not have direct power to prevent a person from doing a particular infringing act, there may still be reasonable steps that can be taken by the ISP to discourage…infringement'.

This essentially seeks to remove the 'control' element. The significance of 'control' to finding authorisation liability is that it provides a way to distinguish between those who have the ability to control infringement but decline to do so, and those who are simply intermediaries to infringement actions. Removing control as a necessary element of liability means that this distinction will be lost, changing the legal landscape for all parties involved.

The implications of such an amendment have not been experienced in practice, so there is potential for unforeseen confusion—especially considering the strong precedent against authorisation reforms in the judgement in *Roadshow Films Pty Ltd v. iiNet*. The *iiNet* judgement found that ISPs have no direct control over the actions of their users on torrent networks. The level of control exercised by iiNet over the P2P site BitTorrent.com was insufficient to constitute a reasonable exercise of power, and as such, there was no expectation or statutory obligation for iiNet to remove infringing material. This precedent is consistent with national and international case law, so the decision is likely to hold into the foreseeable future.

From a practical point of view, the burden on ISPs under the government's proposed scheme would be significant. A precautionary example can be seen in the case of New Zealand, which enlisted ISPs in its anti-copyright-infringement notice scheme. Under the New Zealand scheme, rights holders can issue warnings to users through ISPs, and after three warnings the case can be brought before the Copyright Tribunal, which can require users to pay up to NZ$15,000 in damages and can also suspend users' accounts for up to six months. Rights holders have not made much use of this scheme, citing the charge of $25 per infringement notice as a deterrent. That price covers only a fraction of the ISPs' costs.

Website Blocking Injunctions

The government has also proposed a piracy site takedown regime. This amendment to the Copyright Act would enable rights holders to apply for a court order against ISPs to block access to any website operated outside of Australia that has the 'dominant purpose' of infringing copyright.

According to the government's *Online Copyright Infringement Discussion Paper*, the idea behind a 'dominant purpose' test is to determine whether the main function of a site is to provide infringing content. However, because the standard is relatively vague and arbitrary, this amendment could lead

to any site that contains more than a *de minimis* amount of copyright material being blocked by ISPs. Takedown regimes in other countries have led to numerous legitimate sites being blocked. Even here in Australia, ASIC inadvertently blocked 1,200 legitimate websites in 2012 and 2013—including the site of Melbourne Free University—using a little-utilized section of the Telecommunications Act.

It also raises censorship concerns. Many sites linked to copyright infringement also provide access to open-licence content and public domain materials. Similar problems were raised by the previous Labor government's push for an internet filter, which was perceived as a threat to freedom of speech and digital liberty.

More importantly, these internet filtering methods do not achieve their intended aims. A 2013 paper by Dutch academics examined the effectiveness of legislation in their country that required ISPs to block users from accessing Pirate Bay (a popular P2P torrent website) and other websites like it. The study found that the law had no impact on the proportion of the Dutch population engaging in file sharing.

One reason for the law's ineffectiveness was the ease with which internet users can circumvent these measures through virtual private networks (VPNs) and similar encryption and anonymising tools. Blocking injunctions have also been undermined by the proliferation of proxies and alternative websites. These work-around methods led the Hague Court of Appeal to rule earlier this year that the Dutch website blocking regime was ineffective and unnecessary.

The extension of authorisation liability and website blocking injunctions both seek to combat the natural shift of consumer demand that comes with the digital age in a free market. Such attempts to turn back the clock would not only be ineffective in addressing piracy but would also have serious unintended consequences for the very services and platforms that are part of the piracy solution.

An Open Internet for a Growing Australia

There are a few underlying notions that legislators must grasp before the reform process continues. Online piracy involves several important abstract ideas, such as property, freedom, and the human drive to share and appreciate culture. These concepts have been woven throughout the gradual development of consumer demand for creative services and the subsequent attempts to regulate this natural progression through copyright law.

The internet is the world's largest, most accessible platform for promoting ideas, discovering culture, and engaging in discussion. The free flow of information that occurs online is necessary to a free and open society, which is one reason why the attempt under Labor to impose an internet filter was widely opposed by citizens. Requiring ISPs to monitor the internet usage of their customers threatens the same freedoms.

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Current proposals do not consider that in granting rights holders the power to shut down sites that *potentially* infringe copyright, a breach of the individual's right to freedom of communication occurs. Blocking select overseas websites threatens the freedom to create, transmit, and receive information, as well as the freedom to engage in dialogue through user-generated content using websites that happen to be situated overseas. As emphasised above, the scheme can be easily circumvented. As such, the only outcome of the amendment would be the curtailment of basic liberties.

Furthermore, a free and open internet is beneficial for Australian content creators. It creates low barriers to entry and easier access to overseas markets. This makes it easier to promote Australian content abroad to a much wider audience. According to the 2012 Boston Consulting Group report *Culture Boom: How Digital Media Are Invigorating Australia*,

> International viewers consumed eight times as much Australian content as Australian viewers consumed in the second half of 2010; twice as much Australian content was watched in the US alone, while substantial amounts were also consumed in Japan.

It is true that the digital economy threatens established business models that rely on limited supply and physical distribution to gain revenue. But rights holders who refuse to adapt in an evolved market are seeking to enforce against a natural and irreversible natural shift in consumer demand.

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Finding the Pragmatic Balance

It is simply the nature of the online market for creative content that, in a digital economy, you are always competing with free. Sanctions are barely effective and, as shown above, they produce legal ramifications out of proportion to their desired effect. But this does not mean that piracy cannot be curtailed.

Historically, consumer interaction with media has been through 'read only' platforms—that is, the relationship between consumer and content creator is passive. Creators are paraded as professional sources that possess some type of authority over the particular product they release. This read-only culture has almost entirely faded, outside those rights holders who are strongly resistant to change.

'Read only' has been replaced with 'read-write'—a culture of consumer participation, as allowed through digital platforms. Consumers now take advantage of technological advances to participate in culture in ways that have never been seen before. This shift from passive consumption to consumer interaction should be encouraged. It allows for greater participation in culture and promotes artistic development. Any reform that favors businesses that operate under antiquated business models will only serve to thwart the progress of the digital economy.

Opponents of 'read-write' culture rely heavily on the moral case for copyright in their arguments. It is true that the Copyright Act 1968 (Cth) protects such moral rights as the author's right to attribution, the right not to have authorship falsely attributed, and the right of integrity of authorship (which provides against mutilation of a work and other derogatory alterations). However, the moral case for stringent copyright protection should not be overextended. Vesting total control over all manifestations of a creative work in its original author would adversely affect the creation of user-generated content, which in turn would be adverse to the 'sociocultural development' purpose of copyright law.

Copyright as a statutory monopoly on 'original' expression was intended to aid cultural development by allowing content to flourish, and also to incentivise investment in the production of creative works. With so many competing interests on both sides, lawmakers can at best achieve only a rather *indelicate imbalance* between these two purposes. The government's current reform attempts tip too far in favour of the interests of rights holders, adding needless regulations that preserve the structural inertia of content creation industries.

Government efforts to halt online copyright infringement through regulation are misdirected. It places crosshairs on the end user's downloading as opposed to taking a step back and trying to understand *why* users resort to downloading.

A more realistic approach would begin with rights holders accepting that in order to tap into the unmatched potential of the internet, they must fundamentally alter their business models to address the core issues underlying participation in online piracy.

These issues are the lack of legal accessibility to content in comparison to the ease of free downloads and the obsolete distribution methods that lead to exorbitant prices that far exceed consumer demand for content. These are the two big problems that rights holders must address.

Access & Affordability

The value of the digital 'asset' has shifted. No longer is value derived from the asset itself, since it is now infinitely duplicable. Rather it 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.

Services such as Spotify, Netflix, Pandora, Google Play, Hulu Plus, and so on, have expanded precisely because they address the problems of accessibility

and affordability. Their success has significantly reduced instances of online copyright infringement:

- In Canada, Netflix and Spotify have reduced piracy by 50%.
- Piracy in Norway over the past 4 years has gone down by almost 80%.
- Netflix in the United States has gathered over 22.8 million paid subscribers

Currently, more than 200,000 Australians are subscribed to Netflix, using VPNs to circumvent geo-blocking.

Clearly, when the creative content industry responds to consumer demands with appropriate pricing, they get a positive response from consumers. As the government's discussion paper emphasises, "online copyright infringement remains relatively strong in Australia, but is falling internationally". This is consistent with the observation that legitimate sources of creative content have made successful inroads against piracy in markets abroad, precisely by providing more affordable and accessible content.

In Australia, piracy often arises when consumer demand is unmet by legitimate supply. This occurs partly due to geographic market segmentation practices—lagging release dates for films and albums, higher prices, or total lack of availability (as in the case of Netflix, which is currently unavailable in Australia due to geographic blocking practices). These practices are remnants of an obsolete system of marketing and distribution. Failing to find a reasonable legal avenue, consumers turn to P2P services. This is an issue that can be addressed by rights holders.

Government action should promote competition in the provision of online content and oppose measures such as geo-blocking. The motivation for file sharing would lessen considerably as consumers flocked to affordable and superior legal services. This would be much more effective than criminalising regulations that result in more damage to civil liberty than benefit to piracy issues.

A study on "Media Piracy in Emerging Economies" by the United States Social Science Research Council has shown that piracy is most effectively addressed through "the presence of firms that actively compete on price and services for local customers". Clearly, market-led solutions are preferable to more regulation.

Piracy may never be permanently stamped out, due to the different motivations that lead consumers to download illegally. However, this market-based approach presents a remedy that addresses the main piracy motivators and shifts revenue back towards rights holders.

A Pay Cut for Artists?

There is a perception surrounding streaming services such as Spotify that artists who make their work available through them must accept a significant pay cut. Although this is true to some extent, there are several mitigating factors that must be considered. First of all, the shifting nature of the market will necessarily involve changes to artists' compensation, one way or another. Secondly, artists can contract with multiple streaming services in order to gain revenue from as many services as possible.

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Thirdly, the new business model has many advantages over the old one based on physical distribution, including a huge increase in an artist's opportunity for exposure. In the case of music, it is the minor bands with small fan bases that rely most on album sales (rather than touring or merchandise) for revenue. These are precisely the artists who will benefit most from greater exposure.

In the particular case of Spotify, the company has recently released data on the royalties it pays to artists, and the figures can run into the millions over a twelve-month period for sufficiently popular songs. Clearly some artists *are* making significant money from streaming services—and note that Spotify's figures do not include the revenue derived from albums that would not have been sold if buyers had not been made aware of the album through a streaming service.

Conclusion

This article does not claim to offer a total solution to the extremely complicated issues surrounding online

piracy and Australian copyright law. A solution will only be found through adaptive reform and practice over time. The claim in this article is simply that increased regulation is not the road best taken.

Some artists are making significant money from streaming services.

No one has greater interest in effective piracy reduction than the relevant private interests. The Australian government should encourage rights holders to address the issues of accessibility and affordability, not impose regulation that will threaten civil liberties and cause legal uncertainty. It is fruitless for current laws to pander to content creators who refuse to adopt new methods of distribution. This structural inertia will eventually fade away, and the companies left standing will be those that have adopted modern revenue raising methods.

As the online market for creative services continues to develop and greater competition in legitimate services becomes available, online pirates will face formidable competition from affordable and far superior services offered by companies such as Spotify and Netflix. Instead of attempting to enforce against the continuing advance of the digital age, rights holders must adapt in order to survive.