

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank, dedicated to preserving and strengthening the foundations of economic and political freedom. Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

The IPA is funded by individual memberships and subscriptions, as well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

About the Authors

Chris Berg is a Senior Fellow at the Institute of Public Affairs. He is a regular columnist with ABC's The Drum, and an award-winning former editor of the IPA Review. His latest book is In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt. A monograph, The Growth of Australia's Regulatory State, was published in 2008. He is also the editor of 100 Great Books of Liberty (with John Roskam) published by Connor Court Publishing in 2010, and The National Curriculum: A Critique (2011).

Executive summary

The Copyright Amendment (Online Infringement) Bill 2005 is an internet censorship bill. It creates a new and potentially dangerous power for courts to censor websites. This power is not proportional to the harm it is intended to ameliorate.

The bill enables copyright holders to apply for court orders against internet service providers to block access to websites whose “primary purpose” is to facilitate the infringement of copyright. This amounts to a form of judicial censorship of the internet in the private interests of copyright holders. It is inappropriate in a free society.

In a submission to the September 2014 Discussion Paper into Online Copyright Infringement, the IPA argued that proposed copyright reforms will “do nothing to tackle the underlying dynamics” that have enabled a shift in social attitudes as to the desirability of copyright enforcement.¹ This submission is substantially drawn from the arguments made in that previous submission. The previous submission, which outlines many of the arguments below in greater detail, is attached.

Copyright is not an unlimited right. Copyright enforcement needs to be carefully counterweighed against the rights that such enforcement might limit. Intellectual property enforcement is not a sufficient justification for the abrogation of a more central right: the right to freedom of expression. The Australian government does not censor websites that can encourage much more serious harm than copyright infringement. Internet censorship for the purposes of copyright enforcement constitutes a serious and disproportionate overreach of government power and a consequent threat to freedom of speech.

Copyright is a limited right

Copyright is a strictly limited right to reproduce and prevent others from reproducing artistic work. Like all intellectual property, governments grant copyright holders a limited monopoly in which they can enforce their ownership. Unlike traditional property ownership, the intellectual property monopoly has a strict utilitarian purpose. It is assumed that artistic production has some public good characteristics and in the absence of government intervention the market will undersupply artistic works. Intellectual property monopolies are instituted to offer an incentive for new production. The 2000 Ergas Review into intellectual property argued that:

It is ... a fallacy to suggest that policies conferring more income on copyright owners are in and of themselves socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort. This requires that compensation flowing to rights owners be enough to encourage investments whose social benefits exceed their costs.

¹ Chris Berg and Simon Breheny, "Submission to Australian Government Online Copyright Infringement Discussion Paper," (Institute of Public Affairs, 2014). <http://ipa.org.au/publications/2321/submission-to-the-senate-standing-committee-on-environment-and-communications-inquiry-into-enhancing-online-safety-for-children-bill-2014>

Over-compensating rights owners is as harmful, and perhaps even more harmful, than under-compensating them.²

The proper extent of copyright privilege is an empirical question. Copyright imposes costs – limiting access to artistic works – in order to encourage the creation of new artistic works in the future.³ The consequences of enforcement is one of those costs. The costs of enforcement need to be lower than the benefits in order to justify the strategy. This is a discussion which the government has not had.

Freedom of speech needs to be maximised

While copyright is a strictly limited ‘right’, and needs to be justified on strict consequentialist grounds, the same does not hold true for freedom of speech, which underpins liberal democracy and human freedom. The IPA has argued that freedom of speech is one of the most important liberties – fundamental to the structure of our political community and the development of our individual intellectual development. It is a liberty that should be maximised, and limits on free speech minimised.⁴

The American scholar Eugene Volokh, considering United States’ jurisprudence on ‘crime facilitating’ speech, describes some speech as *dual-use*. Speech that may be harmful might also have valuable uses, and “banning the material will prohibit the valuable uses along with the harmful ones.” Often these valuable uses are not immediately obvious.⁵ Volokh’s analysis concerns some speech which could lead to potentially serious crime: weapons manuals, guides to drug production, and so forth. Copyright enforcement is well below the bar for speech limitation. The vast bulk of the websites that are likely to be blocked are dual use websites: offering links to both copyrighted and non-copyrighted material.

The last decade has seen a substantial debate about the justifiable limitations on freedom of speech. The Rudd Labor government sought to institute an internet filter to deal with child pornography and extreme violence online. The debate over section 18C of the Racial Discrimination Act has concerned ‘hate speech’. We have also engaged in serious debates over the limits of freedom of speech in an age of anti-terrorism, concerning terrorism advocacy and the reporting of Australian Federal Police and Australian Security and Intelligence Organisation operations. Whichever side one falls on each of these debates, they raise substantial questions about serious harm to security and dignity. The existence of websites facilitating copyright infringement does not meet this bar.

The harm these websites cause is speculative. The censorship of a website that facilitates infringement is not censoring the infringement. When somebody is sued under the Racial Discrimination Act, that concerns an act that has actually, already occurred. However, the existence of a website hosting torrent files does not constitute, in and of itself, an unlawful act. Furthermore,

² Intellectual Property and Competition Review Committee, "Review of Intellectual Property Legislation under the Competition Principles Agreement," (2000).

³ Finn E Kydland and Edward C Prescott, "Rules Rather Than Discretion: The Inconsistency of Optimal Plans," *The Journal of Political Economy* (1977).

⁴ Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (Institute of Public Affairs; Mannkal Economic Education Foundation, 2012).

⁵ Eugene Volokh, "Crime-Facilitating Speech," *Stanford Law Review* (2005).

the harm caused by copyright infringement is a private harm. It does not constitute severe threat to safety or the social order, as child abuse or terrorism does.

Internet censorship won't solve copyright infringement

The proposed bill has many practical problems. Our previous submission outlined the many mechanisms available to internet users to bypass ISP-level blocking. As Volokh writes, "by making it easy for people to put up mirror sites of banned material as a protest against such bans, the Internet makes restrictions on crime-facilitating speech less effective, both practically and (if the restrictions are cast in terms of purpose rather than mere knowledge) legally."⁶ In the case of copyright infringement, these include the use of virtual private networks, mirrors, and the Tor system. One prominent torrent site even recommends exploiting quirks in Google's translate tool to gain access. Furthermore, it could have some substantial negative consequences for the law enforcement of more serious crime. As the IPA argued in its previous submission:

Injunctive relief could have counter-productive effects across other areas of public policy and law enforcement. Injunctive relief will encourage the adoption of VPNs and similar services, increasing anonymity online ... [E]ncouraging online anonymity might make it harder to enforce laws that society would have a *stronger* and more widely accepted need to enforce *[emphasis in original]*.⁷

Conclusion

Australian copyright law has some deep uncertainties and confusions. The absence of a fair use provision makes much desirable business practice potentially copyright infringement. Copyright is a limited right for a specific purpose. It has no moral content that would make its enforcement a trump card over other more fundamental rights.

If it chooses to proceed with such enforcement mechanisms, the government would be wise to study whether this substantial new power will materially affect the production of new artistic works – and any increase in production would have to outweigh the very real limitations on freedom of speech that such a power constitutes.

⁶⁶ *ibid.*

⁷ Berg and Breheny, "Submission to Australian Government Online Copyright Infringement Discussion Paper," 13.

Bibliography

Berg, Chris. *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*. Monographs on Western Civilisation. Institute of Public Affairs; Mannkal Economic Education Foundation, 2012.

Berg, Chris, and Simon Breheny. "Submission to Australian Government Online Copyright Infringement Discussion Paper." Institute of Public Affairs, 2014.

Intellectual Property and Competition Review Committee. "Review of Intellectual Property Legislation under the Competition Principles Agreement." 2000.

Kydland, Finn E, and Edward C Prescott. "Rules Rather Than Discretion: The Inconsistency of Optimal Plans." *The Journal of Political Economy* (1977): 473-91.

Volokh, Eugene. "Crime-Facilitating Speech." *Stanford Law Review* (2005): 1095-222.



Submission to Australian government Online Copyright Infringement Discussion Paper

Chris Berg
Simon Breheny

September, 2014

IPA Institute of
Public Affairs
THE VOICE FOR FREEDOM
ESTABLISHED - 1943

About the Institute of Public Affairs

The Institute of Public Affairs is an independent, non-profit public policy think tank dedicated to preserving and strengthening the foundations of economic and political freedom.

Since 1943, the IPA has been at the forefront of the political and policy debate, defining the contemporary political landscape.

The IPA is funded by individual memberships and subscriptions, as well as philanthropic and corporate donors.

The IPA supports the free market of ideas, the free flow of capital, a limited and efficient government, evidence-based public policy, the rule of law, and representative democracy. Throughout human history, these ideas have proven themselves to be the most dynamic, liberating and exciting. Our researchers apply these ideas to the public policy questions which matter today.

About the authors

Chris Berg is Policy Director at the Institute of Public Affairs. He is a regular columnist with ABC's *The Drum* and an award-winning former editor of the *IPA Review*.

His latest book is *In Defence of Freedom of Speech: from Ancient Greece to Andrew Bolt*.

A monograph, *The Growth of Australia's Regulatory State*, was published in 2008. He is also the editor of *100 Great Books of Liberty* (with John Roskam) published by Connor Court Publishing in 2010, and *The National Curriculum: A Critique* (2011).

Simon Breheny is Director of the Legal Rights Project and Editor of *FreedomWatch* at the Institute of Public Affairs.

Simon's work has been published in *The Australian*, the *Australian Financial Review*, the *Herald Sun*, the *Sydney Morning Herald*, the *Age*, the *Canberra Times*, the *Sunday Tasmanian* and the *Punch*. He is regularly interviewed on radio around the country in relation to fundamental legal rights, the rule of law and civil liberties. Simon has appeared on ABC1's *Q&A*, *7.30*, *Lateline*, ABC News 24's *News Breakfast*, Channel 7's *News* and *Weekend Sunrise*, Channel Ten's *News* SBS2's *The Feed* and Sky News' *AM Agenda*, *Lunchtime Agenda* and *PM Agenda*.

Simon has also appeared as a witness to give expert evidence before the Senate Standing Committee on Environment and Communications, the NSW Legislative Council Standing Committee on Law and Justice, the Senate Legal and Constitutional Affairs Legislation Committee and the Parliamentary Joint Committee on Intelligence and Security.

Table of contents

About the Institute of Public Affairs.....	1
About the authors	1
Table of contents.....	2
Introduction.....	3
Copyright is a limited right whose boundaries are determined by political considerations	4
Australian copyright law has deep uncertainties which need to be resolved before infringement reform is pursued	5
Proposal 1: Extended authorisation liability	6
Extending authorisation liability is a form of regulatory burden-shifting.....	7
The proposed regime increases legal uncertainty	9
The proposed regime gives government the power to create an entirely new copyright regime by regulation	10
Proposal 2: Extended injunctive relief to block infringing overseas sites	11
It is trivially easy to bypass ISP-level blocking.....	11
The ‘dominant purpose’ test is vague and is likely to suffer mission creep .	13
The injunctive relief power is an internet filter by another name.....	14
Proposal 3: Extended safe harbour	15
Conclusion	15
Bibliography.....	16

Introduction

The law governing copyright infringement in Australia is characterised by uncertainty and complexity. Technological change has exacerbated these problems, enabling large scale copyright infringement, which in turn has exposed a lack of social agreement on the desirability of copyright protection.

This submission argues that the Commonwealth government's proposed reforms to copyright law do nothing to tackle the underlying dynamics that have led to these developments. Instead, they seek to tip the balance in favour of copyright holders. The proposed reforms:

- Will do little to prevent copyright infringement;
- Have an unacceptable impact on freedom of speech;
- Increase, rather than decrease, the underlying uncertainties of copyright law in Australia, particularly while Australia lacks a 'fair use' exception;
- Give the government the power to create new copyright frameworks by regulation; and
- Constitute an attempt to shift the costs of copyright protection from copyright holders to internet service providers.

Furthermore, while the proposal to extend the safe harbour provisions in the *Copyright Act* is welcome, it helps illustrate the underlying uncertainties of Australia's copyright regime.

This submission first outlines the principles by which copyright law reform must be judged.

Copyright is not an unlimited right – it is granted by the government in order to provide incentives for the production of creative work. As such, copyright law has to strike a balance between the interests of monopoly rights-holders and other users of creative works. The political bargain sustaining copyright is inherently unstable, and the instability is further exacerbated by unpredictable technological change.

In Australia, the imbalance of copyright is represented most obviously by the lack of a fair use exception for copyright infringement. This creates a great deal of uncertainty in its own right, but in the context of the government's proposed reforms, weighing the copyright balance further in favour of copyright holders without introducing a fair use exception will substantially increase that uncertainty.

The submission concludes by outlining specific problems with the government's proposals.

Copyright is a limited right whose boundaries are determined by political considerations

Copyright is a monopoly granted by the government that gives the creator of a literary or creative work certain exclusive rights over their creation for a limited amount of time.

To the extent that copyright reflects an underlying intellectual property 'right', that right is a strictly limited one. As with all intellectual property law, copyright is supposed to strike a balance between private interests and public interests. The private interests concern the provision of incentives that encourage the development of new intellectual property. The public interests include the freedom of individuals to use and share ideas and knowledge. Clearly these are deeply intertwined.

That balance, however, is not determined by disinterested economists and spectators, but by a political process characterized by competing interest blocs and actors with extremely large stakes in the game. As Tom W. Bell has pointed out, the capacity for policy makers to develop the necessary 'delicate balance' between public and private interests is highly constrained by the inbuilt incentives in the political system.

[D]ue to knowledge problems, copyright and patent law has not and indeed cannot strike a delicate balance between public and private interests. Due to public choice problems, lawmakers can at best achieve only a rather indelicate imbalance between various private interests—namely, those private interests with sufficient clout to sway legislative deliberations.¹

Copyright law reform, in either direction, will inevitably favour some stakeholders over others. The question the government has to grapple with is whether those interests are proportionate to the costs of copyright. The optimal level of copyright infringement is not zero. At some margin the costs of enforcement will exceed the benefits of that intellectual property protection. As the Ergas Report argued forcefully,

It is ... a fallacy to suggest that policies conferring more income on copyright owners are in and of themselves socially desirable relative to those that confer less. Rather, the goal of the intellectual property system is to provide a sufficient incentive for socially useful investment in creative effort. This requires that compensation flowing to rights owners be enough to encourage investments whose social benefits exceed their costs.

Over-compensating rights owners is as harmful, and perhaps even more harmful, than under-compensating them²

Copyright law reform, in either direction, will inevitably favour some stakeholders over others. The question the government has to grapple with is whether those interests are proportionate to the costs of copyright.

¹ Tom W. Bell, 'Indelicate Imbalancing in Copyright and Patent Law,' in *Copy Fights : The Future of Intellectual Property in the Information Age*, ed. Adam D. Thierer and Clyde Wayne Crews (Washington, D.C.: Cato Institute, 2002).

² Intellectual Property and Competition Review Committee, 'Review of Intellectual Property Legislation under the Competition Principles Agreement,' (2000).

For example, the needs of enforcing laws against copyright infringement do not outweigh the dangers of internet censorship. The interplay between copyright law and freedom of speech is complex, and in many circumstances there is a clear and obvious trade-off between the two.³ A liberal society should have a strong presumption of freedom of speech as an essential attribute of democratic deliberation and as a basic individual right.⁴ As this submission will argue, the government's proposed injunctive relief power constitutes an unacceptable threat to free speech, reminiscent of the previous federal government's internet filter proposal.

Australian copyright law has deep uncertainties which need to be resolved before infringement reform is pursued

Australia's existing copyright regime is uncertain, creating substantial legal risks for firms and organisations.

The cause of this legal ambiguity is the long-standing absence of a fair use exception to copyright infringement in the *Copyright Act*. As Robert Burrell, Michael Handler, Emily Hudson, and Kimberlee Weatherall have argued, the existing fair dealing standard, with a defined, and technology-specific list of exceptions, are constraining, confusing, and uncertain. As they argued, despite repeated rounds of copyright reform in an effort to keep up with technological change and social practice, 'exceptions have either not worked as intended or have simply failed to keep up with changes in technology and the new uses of copyright material that these developments have facilitated'.⁵

The uncertainties surrounding copyright protection and exceptions in Australia are likely to have their own significant economic consequences. An Irish review into copyright argued that the downside risk of uncertainty ought to be as much a factor in determining the balance of copyright law as the upside risk of increased copyright protection:

If copyright law were unclear, or if there were widespread misunderstanding about its scope, then this would certainly create barriers to innovation. Moreover, as has often been observed, predictions are difficult, especially about the future ... it is important that copyright law be as technology neutral as possible. It is equally as important that it be capable of adapting or of being easily adapted to unforeseen technological innovations. These are

³ Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge Studies in Intellectual Property Rights (Cambridge, UK; New York: Cambridge University Press, 2005).

⁴ For an elaboration of this argument see Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*, Monographs on Western Civilisation (Institute of Public Affairs; Mannkal Economic Education Foundation, 2012).

⁵ Robert Burrell et al., 'ALRC Inquiry into Copyright and the Digital Economy Submission in Response to Issues Paper No. 42,' (2012).

standards by which to judge both existing copyright law and any possible amendments.⁶

As an example, Google has argued that, because of the absence of a fair use standard, its core activities – ‘crawling, indexing and caching’ – which provide the foundation of its search engine, ‘may infringe copyright under Australian law’ and created ‘a significant and unacceptable level of business risk’.⁷

The ‘fair use’ standard proposed by the Australian Law Reform Commission would provide Australian law with a flexible, adaptable standard by which copyright infringement and protection could be measured. Regarding the possible uncertainty created by a flexible fair use standard, the ALRC has argued that ‘a clear principled standard is more certain than an unclear complex rule’.

It is important that the government recognises the intertwining of the debate over fair use and the potential expansion of copyright infringement liability. The uncertainty created by Australia’s fair dealing provisions are particularly pervasive in the domain of technological change. Any reform to the *Copyright Act* that this government introduces will be applied to the unpredictable technological environment of the future. The boundaries of copyright badly need to be clarified and placed on a more stable footing before extra penalties for infringing copyright are introduced.

The ‘fair use’ standard proposed by the Australian Law Reform Commission would provide Australian law with a flexible, adaptable standard by which copyright infringement and protection could be measured.

Proposal 1: Extended authorisation liability

Authorisation liability is a secondary liability regime where one individual is made liable for copyright infringement committed by a second person.

Authorisation liability has a long history in Australian copyright law. Michael Napthali argues that originally authorisation referred to the actual authorisation by a principal of an agent’s copyright infringement – that is, when an agent acted under instruction, the principal was liable. This resembles vicarious liability under American law. However, the *Copyright Act 1912* expanded the doctrine of authorisation to remove the notion of direct agency.⁸ Authorisation, following the High Court’s *Moorhouse* decision, occurs when somebody has under their control a means by which copyright may be infringed, is aware or has reason to suspect that the means could be used for infringement, and fails to take reasonable steps to limit that means from being used to infringe copyright.

In *Roadshow Films Pty Ltd v iiNet Ltd*, the High Court determined that iiNet had no direct control over the actions of its users on the BitTorrent network, and

⁶ Cited in Australian Law Reform Commission, ‘Copyright and the Digital Economy,’ (Sydney: Australian Law Reform Commission, 2013).

⁷ Google Australia, ‘Submission to the ALRC Discussion Paper Copyright in the Digital Economy (ALRC Dp 79),’ (2013).

⁸ Michael Napthali, ‘Unauthorised: Some Thoughts Upon the Doctrine of Authorisation of Copyright Infringement in the Peer-to-Peer Age,’ *Australian Intellectual Property Journal* 16, no. 5 (2005).

that their only power in this sense was the indirect power of cancelling contracts and refusing to provide internet access.⁹ The court considered that iiNet's control over BitTorrent was insufficient to constitute a reasonable exercise of power (particularly considering that the technology could be used for non-copyright infringing purposes), that there was no expectation or statutory obligation for iiNet to remove infringing material from its users, and that there was no industry-wide code of practice which would ensure users who had their service removed from iiNet would not be able to continue their copyright infringement with an alternative ISP.

The extended authorisation proposals in the discussion paper are designed to resolve what the government sees as the major issues raised by the *iiNet Case*. While it accepts the High Court's reasoning that the ISPs do not have the direct power to prevent any particular infringement, it believes that the absence of that direct power should not exclude ISPs from authorisation liability. The discussion paper says,

even where an ISP does not have a direct power to prevent a person from doing a particular infringing act, there still may be reasonable steps that can be taken by the ISP to discourage or reduce online copyright infringement.

The proposed amendments to the reasonable steps 'would clarify that the absence of a direct power to prevent a particular infringement would not, of itself, preclude a person from taking reasonable steps to prevent or avoid an infringing act'.

The discussion paper is explicit about the purpose of this amendment: to encourage ISPs to construct 'appropriate industry schemes or commercial arrangements on what would constitute 'reasonable steps' to be taken by ISPs'.

The government's proposal to extend authorisation liability is problematic for three major reasons:

- It represents a form of regulatory burden-shifting between private sector firms;
- It creates a significant degree of uncertainty; and
- It gives government the power to create an entirely new copyright regime through regulation.

Extending authorisation liability is a form of regulatory burden-shifting

In their textbook *Australian Intellectual Property Law*, Mark Davison, Ann Monotti and Leanne Wiseman point out that authorisation is designed to tackle a feature of copyright infringement where the number of infringers may be very large, and 'there are often problems and costs associated with the collection of small sums of money from a large number of users'.¹⁰

⁹ *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 ('*iiNet Case*').

¹⁰ Mark J. Davison, Ann L. Monotti, and Leanne Wiseman, *Australian Intellectual Property Law* (Cambridge: Cambridge University Press, 2008).

Authorisation liability is an established aspect of Australian copyright law but should be recognised for what it is – the shifting of the burden of civil enforcement from copyright holders to third parties. In our view, the government’s proposal is a further step in an ongoing political contest to shift who bears the costs – both financial and reputational – of copyright enforcement.

Andrei Shleifer has developed what he describes as the enforcement theory of regulation.¹¹ In this argument, there are four distinct strategies by which society can control private actors to achieve a goal: market discipline, private legal action, regulation, or state ownership. Societies choose different strategies based on their relative efficiency or their political culture.

There are several intermediate strategies. Governments can set a legal framework governing conduct and leave private parties to enforce those rules themselves. Shleifer describes this as private enforcement of public rules. This approach provides clear rules which are more explicable for courts than private contracts, yet does not rely on state action to enforce those rules.

Each of these strategies have trade-offs in terms of efficiency. They also burden different parties with different costs. Criminal violations of the *Copyright Act* are handled by the Commonwealth Department of Prosecutions. The Commonwealth government bears the financial weight of those prosecutions. By contrast, civil offenses have to be individually litigated by copyright holders. This cost is not just a financial cost but also constitutes a cost in the court of public opinion. Reputation is as much a dynamic factor in the decision to commence court action.

Public prosecutors suffer little reputation damage from prosecuting criminal offenses for two reasons. First, there is an assumption of amorality in state action, as courts and prosecutors are widely believed to be neutral. Second, the conduct which they prosecute tends to be more serious.

By contrast, for civil offenses the reputation risk is born by the plaintiff. Copyright holders are understandably protective of their reputations. Some lawyers are now advising their clients not to pursue ‘gripe sites’ through litigation – websites dedicated to collecting unhappy customer experiences – as the reputation damage from legal proceedings is often larger than the reputation damage from the existence of the sites themselves.¹²

The last decade’s experience of copyright enforcement has demonstrated that the reputation cost of legal action to enforce copyright can be substantial.

One of the early anti-file sharing legal actions substantially damaged the reputation of the band Metallica when it went after the sharing service

¹¹ Simeon Djankov et al., 'The New Comparative Economics,' *Journal of Comparative Economics* 31, no. 4 (2003).

¹² Rachael Braswell, 'Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters to Chill Protected Speech on the Internet,' *Fordham Intellectual Property, Media and Entertainment Law Journal* 17 (2006).

We do not consider it a legitimate goal of political reform to shift regulatory enforcement costs between different firms.

Napster.¹³ When the American music industry began suing individuals for copyright infringement in 2003, one of its first targets was a 12 year old girl who lived in a New York public housing estate.¹⁴ A single mother was accused of over half a million dollars' worth of copyright infringement.¹⁵ Another suit was filed against a 66 year old grandmother, which was among those subsequently dropped for apparently misidentifying the culprit.¹⁶ These actions – 'suing your customers' – were highly controversial.

Reputation cost is all the more substantial when the morality of conduct is under question. Scholars have repeatedly pointed out the lack of broad agreement on the ethics of copyright infringement.¹⁷ According to a 2013 Essential Media Communications poll, 27 per cent of Australians download copyright film, television and audio content from the internet for free.¹⁸ Geraldine Szott Moohr writes that 'the moral consensus that would condemn personal use is far from robust'.¹⁹ This lack of consensus raises the reputation cost from litigation.

We do not consider it a legitimate goal of political reform to shift regulatory enforcement costs between different firms. If it has been determined by copyright holders that the reputation cost of enforcing their copyright on the people who are actually infringing that copyright is too great, then that is a matter for those firms to resolve, not the legal system.

The proposed regime increases legal uncertainty

There is substantial risk that the extension of the authorisation regime will create further uncertainty about copyright infringement liability.

The proposed regime may create a new category of entities at risk of liability. This new category may include a number of businesses and organisations, including educational institutions, product manufacturers and storage service providers. As the CEO of the Communications Alliance, John Stanton, has pointed out,

¹³ Mike Masnick, 'Reputation Is a Scarce Good... As Metallica Is Learning,' *Techdirt*, 30 May 2008.

¹⁴ John P. Mello Jr., 'Riaa Settles First Lawsuit against 12-Year-Old Brianna Lahara,' *TechNewsWorld* 2003.

¹⁵ Associated Press, 'Minnesota Woman Caught in Crackdown on Music Downloaders,' *USA Today* 2004.

¹⁶ Joe d'Angelo, 'Riaa Drops Piracy Suit against 66-Year-Old Grandmother,' *MTV News*, 25 September 2003.

¹⁷ See for instance Kimberlee Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms,' *Melbourne University Law Review* 31, no. 3 (2007).

¹⁸ Essential Research, 'The Essential Report,' (2013).

¹⁹ Geraldine Szott Moohr, 'The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory,' *Boston University Law Review* 83 (2003).

This proposal has the potential to capture many other entities, including schools, universities, libraries and cloud-based services in ways that may hamper their legitimate activities and disadvantage consumers.²⁰

The proposed changes are also likely to result in further confusion about the existence and extent of liability. The current regime suffers from a lack of clarity, and requires a complex assessment of the legal issues in order to determine liability.²¹ Further change to the law raises questions about what constitutes 'reasonable steps' which must be taken in order to avoid liability. Libraries may, for example, have to install signage at computer terminals to warn users not to infringe copyright, or request that recording devices (such as cameras and mobile phones) be switched off upon entering the premises or even handed over to a supervisor as a condition of access.

The same principles that militate against liability being extended to ISPs also apply here. It would be inappropriate to make service providers or product manufacturers liable because of the manner in which consumers or customers may use those products and services. The extent to which such a precedent could apply in other policy areas is almost limitless: car manufacturers could be held liable for reckless driving; telecommunications companies could be made liable for threats made using their services. In the context of potential changes to copyright law, the extension of authorisation liability to intermediaries is similarly inappropriate.

The proposed regime gives government the power to create an entirely new copyright regime by regulation

The explicit purpose of the extended authorisation liability is to create an incentive for ISPs to develop a code of practice governing its approach to copyright infringement. Presumably this is the sort of code of practice that the High Court found was lacking in the *iiNet Case*.

In practice, therefore, the government's proposal simply kicks the can down the road. It seems clearly not intended to clarify existing authorisation liability – indeed, it substantially extends and muddies the existing standard – but rather to give the government a power to create by regulation any copyright framework it desires in the future. As the discussion paper says,

Under the proposal, the Government would have the power to prescribe measures in the Copyright Regulations if effective industry schemes or commercial arrangements are not developed.

This would seem to give the government the power to determine, without recourse to parliament, what it considered to be an 'effective' regulatory framework governing copyright infringement, and to impose any scheme it sees fit in the future.

It would be inappropriate to make service providers or product manufacturers liable because of the manner in which consumers or customers may use those products and services.

²⁰ Matthew Knott, 'Film companies back government crackdown on 'ill gotten gains' of online piracy' *The Sydney Morning Herald* 30 July 2014.

²¹ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 213.

While it is welcome that ‘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’ and that ‘consumer interests to be a key consideration’, this does not guarantee that these would be the case. The government’s proposal gives copyright holders a substantial advantage in negotiating the codes of practice by extending the ISPs’ liability.

Even if this government is confident that consumer interests will be a consideration, and that there will be no expectation of undue coercion of internet users, a future government may prescribe measures in the copyright regulations that fail to do so.

Furthermore, the government’s proposals will substantially increase the public choice problems raised by Tom W. Bell above. Policy by regulation is much less transparent than policy by parliamentary debate. The likelihood that the process could be captured by special interests, whether during the lifetime of this government or any future government, is unacceptably high.

Proposal 2: Extended injunctive relief to block infringing overseas sites

The discussion paper proposes inserting into the *Copyright Act* a new power for rights holders to take action in court to require internet service providers to block access to nominated websites operating outside Australia whose ‘dominant purpose’ is to infringe copyright. Should an injunction be granted, ISPs would be required to block their customers’ access to that website. Applicants would be able to apply for the injunction to be placed on a number of ISPs – not just the direct parties to litigation – in order to prevent customers from evading the injunction by shifting ISPs. The blocking would be placed at the wholesale level.

This proposal has some serious problems:

- ISP-level blocking is easy to evade, through widespread and easy to use technologies that will make injunctive relief ineffective;
- The ‘dominant purpose’ test is vague, arbitrary, and dangerous given Australia has no fair use copyright exception; and
- The policy resembles the previous Labor government’s internet filter, and, like the internet filter, represents a threat to freedom of speech and digital liberty.

It is trivially easy to bypass ISP-level blocking

ISP-level blocking is easy to bypass using widely available, low-cost, and easy to use tools. The existence of these simple methods will make the injunctive relief power ineffectual at preventing Australians from accessing sites offering copyright-infringing material.

VPNs are not complicated, nor are they a service outside the technological skills and knowledge reach of ordinary internet users.

The most prominent are virtual private networks (VPNs). VPNs allow users to access the internet through a third party service provider. By using connections outside Australia, a VPN will allow Australian users to access websites that have been blocked by Australian ISPs.

VPNs are not complicated, nor are they a service outside the technological skills and knowledge reach of ordinary internet users.

The technology is widely discussed in mainstream Australian newspapers, as a mechanism to access international content sites, to get around geoblocking constraints, and as a tool to evade state censorship when travelling through countries. The Communications Minister has spoken publically about the use of VPNs in evading mandatory data retention schemes.

VPNs are not the tools of a savvy, narrow elite. To the extent that VPNs are not widely used in Australia at the moment, that usage will be encouraged by the injunctive relief proposal. Indeed, it would be reasonable to say that VPNs are no more complex from an end-user point of view than the technology most commonly used to infringe copyright, BitTorrent.

As an experiment in preparing for this submission, Chris Berg installed a VPN on his iPhone. The only knowledge required was the name of a popular VPN service - ExpressVPN. Within 30 seconds ExpressVPN had configured his iPhone, at no cost, to access the internet in a manner that would evade the ISP-level blocking proposed by the discussion paper.

This simplicity makes one of the common claims in copyright infringement crackdowns – that the goal is not to eliminate expert, or dedicated infringers, but to raise the cost for novices – inapplicable to the injunctive relief proposal. The skill level required to use the BitTorrent protocol is as high as using a VPN, which is to say, neither require much technical knowledge at all.

VPNs are not the only mechanism by which ISP-level blocking can be evaded. The government's discussion paper specifically mentions the Irish High Court's injunctions regarding access blocking to sites such as The Pirate Bay and Kickass Torrents. The Pirate Bay is the largest site serving torrent files. Referring to The Pirate Bay underlines how ineffective the injunctive power will be in Australia. The Pirate Bay users have developed a large number of techniques for evading the Irish ISP block. A list of recommendations is available at <http://proxybay.info/alternate-methods.html>.

As well as recommending the use of VPNs, The Pirate Bay users are recommended to access the site through the Tor system, which allows users to cloak their internet activity, through a dedicated Tor based client 'The Pirate Browser', through proxy servers, through mechanisms within popular browsers designed to speed up slow internet connects, through browser extensions, and even by utilizing quirks in Google's translation tool.

There are also a large number of The Pirate Bay mirrors, which any injunctive relief would have to apply to if it was to be effective – and new ones are constantly being created.

This is just a small sample of options for bypassing ISP-level blocking, which here have focused on those already currently used widely by users seeking to access sites like The Pirate Bay in countries which have the injunctive relief powers being proposed for Australia.

Tools to bypass ISP-level blocking were one of the problems raised during the debate over the Labor government's proposed internet filter. This government's proposal is as vulnerable to those problems as the internet filter was. Even in countries with extreme levels of internet censorship – such as the 'Great Firewall' in China – there are numerous techniques to access content supposedly blocked.

Injunctive relief could have counter-productive effects across other areas of public policy and law enforcement. Injunctive relief will encourage the adoption of VPNs and similar services, increasing anonymity online. As one paper argues, surveying the experience of copyright infringement enforcement efforts in Sweden, encouraging online anonymity might make it harder to enforce laws that society would have a stronger and more widely accepted need to enforce.²²

The 'dominant purpose' test is vague and is likely to suffer mission creep

The government's proposed test for eligible websites to be blocked is that the 'dominant purpose of the website is to infringe copyright'. Factors to be taken into account are 'the rights of any person likely to be affected by the grant of an injunction, whether an injunction is a proportionate response, and the importance of freedom of expression.'

However, the 'dominant purpose' test is ambiguous and dangerous in the Australian copyright framework. It is obviously intended to capture sites like The Pirate Bay. However, under Australian law the sorts of conduct that can potentially be described as copyright infringing purposes is both broad and unpredictable.

The reason for this is the absence of a fair use copyright exemption. Because of this absence, there is an enormous range of conduct which could be considered unprotected copyright infringement. Without a fair use provision there are a large number of examples of copyright infringement that are patently ridiculous. For example, search engines, by caching and indexing websites in Australia, are at constant risk of copyright infringement. 'Ripping' a movie from a legally purchased DVD onto a tablet is also technically illegal, although transferring the same movie from VHS format is not. If a proud parent uploads to Facebook a video of their child learning to read, they may be in breach of the law if the book is in copyright. Many more examples of potential copyright infringing conduct exist due to the specific exceptions provided for under Australia's inadequate and narrow fair dealing provisions.

²² Stefan Larsson and Måns Svensson, 'Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File-Sharing,' *Policy & Internet* 2, no. 4 (2010).

Without a fair use provision there are a large number of examples of copyright infringement that are patently ridiculous. For example, search engines, by caching and indexing websites in Australia, are at constant risk of copyright infringement.

For as long as Australian copyright law does not include a fair use provision the 'dominant purpose' test will be necessarily arbitrary and vague. No exceptions or factors limiting the proposed injunctive power are likely to compensate for the essential problem that in the absence of fair use what constitutes copyright infringing behavior is over-broad.

It is unlikely that a current Australian court would decide that already existing popular services – such as Google's website caching – would be a candidate for injunctive relief. But as-yet-undreamed-of technologies, particularly in their infancy, may come under such scrutiny. As we have pointed out, the lack of a fair use exception under Australian law makes any copyright reform to reduce infringement inherently concerning.

Furthermore, many sites that a court may describe as having a 'dominant purpose' of copyright infringement will also offer users many other purposes as well. Filesharing websites typically construct large communities which create content that would not constitute copyright infringement. Blocking the entire website would constitute the censorship of that content.

The injunctive relief power is an internet filter by another name

The injunctive relief power will function in much the same way as the previous Labor government's proposed mandatory internet filter, and as such represents a clear threat to freedom of speech and digital liberties.

The various iterations of the mandatory internet filter scheme would have required ISPs to block access to a list of websites nominated on a government blacklist of URLs. The policy was first announced in 2007, and was eventually abandoned in November 2012 when the government announced that it would rely on section 313 of the *Telecommunications Act* to block the Interpol 'worst of' list.²³ (The IPA argued in 2012 that the reliance on section 313 still constitutes an effective internet filter.²⁴ The broad use by the Australian Securities and Investment Commission of section 313 suggests that this concern has been justified.²⁵)

The current government's scheme differs insofar as it relies on the decisions of courts to add sites to the 'blacklist'. Furthermore, it is intended to list 'internet sites' – presumably IP addresses – rather than more limited URLs. However, it is hard to see any significant differences between the two schemes beyond that. The previous government's policy was an internet censorship plan to limit pornography, and the proposed policy is an internet censorship plan to limit copyright infringement.

The injunctive relief power will function in much the same way as the previous Labor government's proposed mandatory internet filter, and as such represents a clear threat to freedom of speech and digital liberties.

²³ *Telecommunications Act 1997* (Cth); Phillip Hudson, 'New plan to block child abuse websites replaces Labor's online filter promise,' *Herald Sun* 9 November 2012.

²⁴ Simon Breheny, 'Gillard Government's New Censorship Regime Worse Than Internet Filter,' Media Release, 9 November, 2012.

²⁵ Chris Berg, 'When Does Mission Creep Become Censorship?,' *The Drum*, 21 May 2013.

Just because censorship is possible to evade does not make it any more tolerable. Australians would not hesitate to condemn the Chinese government's internet filter just because of the ability of Chinese citizens to use VPNs. As the Communications Minister said of the Labor government's internet filter in 2012,

No matter what view one takes of objectionable material, the filter would represent a profound weakening of online liberty in Australia.²⁶

This argument applies equally to the proposed injunctive power as it does Labor's internet filter.

Proposal 3: Extended safe harbour

The discussion paper's third proposal is to extend the *Copyright Act's* safe harbour provisions to encompass not only ISPs but other service providers such as university networks. Any extensions to safe harbour provisions are welcome. Expanding the safe harbour provision to include service providers that are not ISPs resolves some long standing uncertainty in Australian copyright law. This is consistent with the proposal of the Attorney-General's Department in 2011. In contrast to the 2011 proposal, it is also welcome that there is no suggestion in the current proposal for the minister to be able to exclude by regulation any person or class of persons from the safe harbour provisions.

Conclusion

Australian copyright law needs substantial reform. It is excessively complex and rife with ambiguities. Every side of the debate on copyright accepts that the Australian public routinely infringes copyright. However, the answer to these fundamental problems with copyright law will not be to further increase those ambiguities or to introduce a quasi-internet filter.

Whatever changes the parliament makes to the *Copyright Act* are likely to last for many years. It is easy to forget that the copyright *bête noire* of the moment – large websites offering links to BitTorrent files – is only a relatively recent technological development. The final BitTorrent protocol was released in 2008. BitTorrent itself was a response to legal action on copyright infringement.

Each side of the copyright debate acknowledges that copyright holders face unprecedented challenges in the digital age at enforcing their rights. The significance of that challenge ought not to be underestimated.

Yet copyright holders are not the only stakeholders in copyright. The government's proposals fail to strike an appropriate balance between copyright holders, internet users, and the fundamental liberty of freedom of speech.

²⁶ Malcolm Turnbull, 'Free at Last! Or Freedom Lost? Liberty in the Digital Age,' in 2012 *Alfred Deakin Lecture* (2012).

The government's proposals fail to strike an appropriate balance between copyright holders, internet users, and the fundamental liberty of freedom of speech.

Bibliography

- Australian Law Reform Commission. 'Copyright and the Digital Economy.' 1 computer laser optical disc 4 3/4 in. Sydney: Australian Law Reform Commission, 2013.
- Bell, Tom W. 'Indelicate Imbalancing in Copyright and Patent Law.' In *Copy Fights : The Future of Intellectual Property in the Information Age*, edited by Adam D. Thierer and Clyde Wayne Crews, 1-16. Washington, D.C.: Cato Institute, 2002.
- Berg, Chris. *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt*. Monographs on Western Civilisation. Institute of Public Affairs; Mannkal Economic Education Foundation, 2012.
- Berg, Chris. 'When Does Mission Creep Become Censorship?' *The Drum*, 21 May 2013.
- Braswell, Rachael. 'Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters to Chill Protected Speech on the Internet.' *Fordham Intellectual Property, Media and Entertainment Law Journal* 17 (2006): 1241.
- Breheny, Simon. 'Gillard Government's New Censorship Regime Worse Than Internet Filter.' Media Release, 9 November, 2012.
- Burrell, Robert, and Allison Coleman. *Copyright Exceptions: The Digital Impact*. Cambridge Studies in Intellectual Property Rights. Cambridge, UK; New York: Cambridge University Press, 2005.
- Burrell, Robert, Michael Handler, Emily Hudson, and Kimberlee Weatherall. 'ALRC Inquiry into Copyright and the Digital Economy Submission in Response to Issues Paper No. 42.' 2012.
- d'Angelo, Joe. 'Riaa Drops Piracy Suit against 66-Year-Old Grandmother.' *MTV News*, 25 September 2003.
- Davison, Mark J., Ann L. Monotti, and Leanne Wiseman. *Australian Intellectual Property Law*. Cambridge: Cambridge University Press, 2008.
- Djankov, Simeon, Edward L. Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer. 'The New Comparative Economics.' *Journal of Comparative Economics* 31, no. 4 (2003): 595–619.
- Essential Research. 'The Essential Report.' 2013.
- Google Australia. 'Submission to the ALRC Discussion Paper Copyright in the Digital Economy (ALRC Dp 79).' 2013.
- Phillip Hudson, 'New plan to block child abuse websites replaces Labor's online filter promise,' *Herald Sun* 9 November 2012.
- Intellectual Property and Competition Review Committee. 'Review of Intellectual Property Legislation under the Competition Principles Agreement.' 2000.
- Knott, Matthew. 'Film companies back government crackdown on 'ill gotten gains' of online piracy' *The Sydney Morning Herald* 30 July 2014.
- Larsson, Stefan, and Måns Svensson. 'Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File-Sharing.' *Policy & Internet* 2, no. 4 (2010): 77-105.
- Masnick, Mike. 'Reputation Is a Scarce Good... As Metallica Is Learning.' *Techdirt*, 30 May 2008.
- Mello Jr., John P. 'Riaa Settles First Lawsuit against 12-Year-Old Brianna Lahara.' *TechNewsWorld*, 2003.
- Associated Press. 'Minnesota Woman Caught in Crackdown on Music Downloaders.' *USA Today*, 2004.
- Moohr, Geraldine Szott. 'The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory.' *Boston University Law Review* 83 (2003): 731.
- Napthali, Michael. 'Unauthorised: Some Thoughts Upon the Doctrine of Authorisation of Copyright Infringement in the Peer-to-Peer Age.' *Australian Intellectual Property Journal* 16, no. 5 (2005).
- Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193. *Telecommunications Act 1997* (Cth).

Turnbull, Malcolm. 'Free at Last! Or Freedom Lost? Liberty in the Digital Age.' In *2012 Alfred Deakin Lecture*, 2012.

Weatherall, Kimberlee. 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms.' *Melbourne University Law Review* 31, no. 3 (2007): 967-1016.