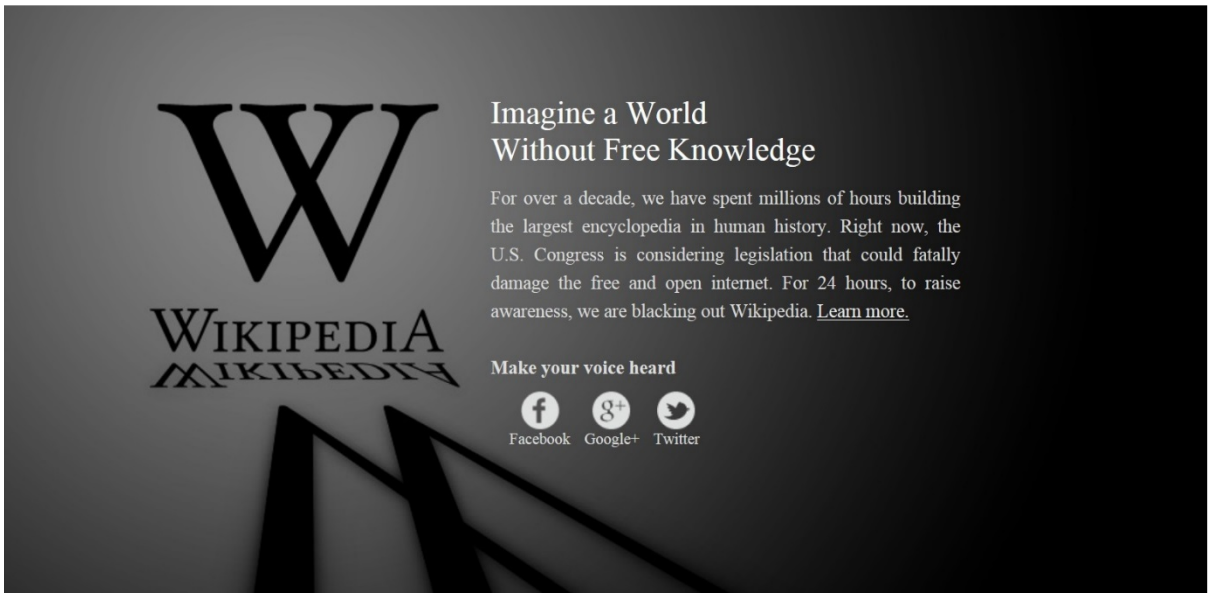
April 21, 2015

A Submission to the Senate Legal and Constitutional Affairs Committee on the Copyright Amendment (Online Infringement) Bill 2015 (Cth)

Matthew Rimmer, *Australian National University College of Law*

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

THE COPYRIGHT AMENDMENT
(ONLINE INFRINGEMENT) BILL 2015 (CTH)



The SOPA Protests over Copyright Website Blocking

DR MATTHEW RIMMER
AUSTRALIAN RESEARCH COUNCIL FUTURE FELLOW,
ASSOCIATE PROFESSOR
THE AUSTRALIAN NATIONAL UNIVERSITY
COLLEGE OF LAW

The Australian National University College of Law,
Canberra, ACT, 0200
Work Telephone Number: (02) 61254164
E-Mail Address: drmatthewrimmer@gmail.com

Executive Summary

The film company, Roadshow, the pay television company Foxtel, and Rupert Murdoch's News Corp and News Limited—as well as copyright industries—have been clamouring for new copyright powers and remedies. In the summer break, the Coalition Government has responded to such entreaties from its industry supporters and donors, with a new package of copyright laws and policies.[1]

There has been significant debate over the proposals between the odd couple of Attorney-General George Brandis and the Minister for Communications, Malcolm Turnbull. There has been deep, philosophical differences between the two Ministers over the copyright agenda. The Attorney-General George Brandis has supported a model of copyright maximalism, with strong rights and remedies for the copyright empires in film, television, and publishing. He has shown little empathy for the information technology companies of the digital economy. The Attorney-General has been impatient to press ahead with a copyright regime. The Minister for Communications, Malcolm Turnbull, has been somewhat more circumspect, recognising that there is a need to ensure that copyright laws do not adversely impact upon competition in the digital economy. The final proposal is a somewhat awkward compromise between the discipline-and-punish regime preferred by Brandis, and the responsive regulation model favoured by Turnbull.

[1] Senator George Brandis and the Hon. Malcolm Turnbull, 'Collaboration to Tackle Online Copyright Infringement', the Attorney-General's Department, and the Ministry for Communications, 10 December 2014, http://media.crikey.com.au/wp-content/uploads/2014/12/TURNBULL_BRANDIS_MR_Collaboration-to-Tackle-Online-Copyright-Infringement.pdf

In his new book, *Information Doesn't Want to Be Free: Laws for the Internet Age*, Cory Doctorow has some sage advice for copyright owners:

> *Things that don't make money:*
>
> - *Complaining about piracy.*
> - *Calling your customers thieves.*
> - *Treating your customers like thieves.*[2]

In this context, the push by copyright owners and the Coalition Government to have a copyright crackdown may well be counter-productive to their interests.

This submission considers a number of key elements of the Coalition Government's Copyright Crackdown. Part 1 examines the proposals in respect of the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth). Part 2 focuses upon the proposed Copyright Code. Part 3 considers the question of safe harbours for intermediaries. Part 4 examines the question of copyright exceptions – particularly looking at the proposal of the Australian Law Reform Commission for the introduction of a defence of fair use. Part 5 highlights the recommendations of the IT Pricing Inquiry and the Harper Competition Policy Review in respect of copyright law, consumer rights, and competition law.

[2] Cory Doctorow, *Information Doesn't Want to Be Free: Laws for the Internet Age*, McSweeney's, 2014.

RECOMMENDATIONS

Recommendation 1

The *Copyright Amendment (Online Infringement) Bill* 2015 (Cth) should be rejected by the Australian Parliament because it interferes with traditional freedoms and civil liberties, as well as an Open and a Free Internet.

Recommendation 2

In light of the copyright action by the Dallas Buyers Club, the Australian Parliament needs to address the relationship between copyright law, privacy law, and consumer rights. The Australian Parliament should legislate on the matter – rather than rely upon an ill-conceived Industry Copyright Code.

Recommendation 3

The Australian Parliament needs to update and modernise the safe harbour provisions in respect of Australia's copyright laws.

Recommendation 4

The Australian Parliament should implement the Australian Law Reform Commission's recommendations in respect of copyright exceptions.

Recommendation 5

The Australian Parliament should implement the recommendations of the IT Pricing Inquiry and the Harper Competition Review in respect of intellectual property, consumer rights, and competition policy.

Preface: The Stop Online Piracy Act 2011 (US) - SOPA

In 2011, the United States Congress considered the highly controversial *Stop Online Piracy Act* 2011 (US) – nicknamed SOPA. Amongst other things, the bill included provisions on court orders requiring Internet Service Providers to block access to websites.

Edward Black, the CEO and President of the Computer and Communications Industry Association, warned about the dangers of the bill.[3] He observed of the regime:

> H.R. 3261, the Stop Online Piracy Act, has elements of pre-emptively stopping crime reminiscent of the plot of *Minority Report*, in which the government arrested people it suspected would commit crimes. This legislation would "disappear" domains suspected of containing infringing copyright content. Leading law professors and first amendment experts think it violates the prior restraint doctrine that protects free speech. They along with Internet engineers, cybersecurity experts, legal experts, human rights advocates and thousands of Internet users have called and written to Congress warning of the dangers of this approach, but the legislation's sponsors are undaunted.[4]

Black noted that 'SOPA claims to aim at domains that deliberately offer primarily copyright infringing content'.[5] He observed: 'Many could support the purported goal, but the bill deploys the power of a nuclear weapon with little of the target-accuracy.'[6] Black was concerned: 'The collateral damage would undermine the security and functionality of the

---

[3] Edward Black, 'Internet Users, Free Speech Experts, Petition Against SOPA', Huffington Post, 13 December 2011, http://www.huffingtonpost.com/edward-j-black/stop-online-piracy-act-vote_b_1145949.html

[4] Ibid.

[5] Ibid.

[6] Ibid.

Internet.'[7] He warned: 'By ordering tech and telecom companies to "disappear" domains suspected of infringing content, many legitimate domains and virtually all domains that allow user-generated content like Facebook, Twitter, and YouTube, would be snared in the dragnet.'[8] Black observed: 'This would dramatically change the speed, utility, and freedom of the Internet as we've come to know it.'[9] He stressed: 'Ironically, [SOPA] would do little to stop actual pirate websites, which could simply reappear hours later under a different name, if their numeric web addresses aren't public even sooner'.[10] Black observed: 'Anyone who knows or has that web address would still be able to reach the offending website.'[11]

David Segal of Demand Progress highlighted the opposition to the various Internet Blacklist Bills – including COICA, PIPA, and SOPA:

> COICA would've created a list of "rogue" websites that the government could block access to with minimal due process. Perhaps even worse: it would create a second accounting of sites that wouldn't formally be blocked—because the Feds only had much weaker cases against them, even by the bill's lax standards—but would be put on a separate, public, list of sites that the U.S. government wasn't very happy with. Internet Service Providers would then be encouraged to steer users clear of them.[12]

---

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

11 Ibid.

12 David Segal, 'Now I Work for Demand Progress' in David Moon, Patrick Ruffini, and David Segal (ed), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet*, OR Books, 2013, 59-61.

In the end, the overwhelming community opposition to the legislative proposals led to them being dropped.

Mike Masnick observed that the bill engaged in copyright censorship, and raised larger constitutional issues about freedom of speech.[13] He commented:

> The bill would have allowed the Justice Department to take down an entire website, effectively creating a blacklist, akin to just about every Internet censoring regime operated by the likes of China or those Axis-of-Evil-style foreign states our politicians are prone to shaming and using as evidence of American civil libertarian exceptionalism. Now, it is true that there was sometimes to be a judicial process involved in website blocking under COICA: the original bill had two lists, one that involved the judicial review, and one that did not. The latter was a "watch list" of sites which law enforcement would encourage ISPs and registrars to block, meaning they would block them; you just don't go out of your way to step on the Attorney General's big toe.[14]

Masnick noted that 'Case law around the First Amendment is clear that you cannot block a much wider variety of speech just because you are trying to stop some specific narrow speech'.[15] He observed: 'Because of the respect we have for the First Amendment in the U.S., the law has been pretty clear that anything preventing illegal speech must narrowly target just that kind of speech.'[16] The regime raised obvious problems in respect of prior restraint.

---

[13] Mike Masnick, 'COICA/ PIPA/ SOPA Are Censorship', in David Moon, Patrick Ruffini, and David Segal (ed), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet*, OR Books, 2013, 54-57.

[14] Ibid.

[15] Ibid.

[16] Ibid.

In response, there was a huge public outcry over SOPA – with opposition from both progressives and libertarians, civil society and the new economy.[17]

SOPA was a bad idea. It seems extraordinary that the Australian Government should want to resurrect a site-blocking copyright regime like SOPA. Crude site-blocking copyright laws were profoundly discredited during the debates in the United States Congress. While no doubt copyright owners are enthusiastic about gaining such incredible powers, there remains deep concerns about how site-blocking regimes impact upon Internet freedom, innovation, and competition.

[17] David Moon, Patrick Ruffini, and David Segal (ed), *Hacking Politics: How Geeks, Progressives, The Tea Party, Gamers, Anarchists and Suits Teamed up to Defeat SOPA and Save the Internet*, OR Books, 2013.

1. *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)

The proposal to give copyright owners the power to block websites and online locations is highly controversial.[18] The Australian Government have devised a local version of the *Stop Online Piracy Act* — nicknamed #SOPA. There is a concern that such a power will interfere with civil liberties, traditional freedoms, and Internet rights. There is also an anxiety that copyright trolls will abuse such a scheme. The Australian Government has not crafted adequate and sufficient safeguards and protections for consumer in respect of the bill.

Malcolm Turnbull has been super-sensitive to criticisms of the copyright regime. He was incensed by questions from the Fairfax journalist Ben Grubb about whether the legislation was an internet filter:

> That's nonsense Ben. There's no internet filter here at all. What on earth are you talking about… What we're, look, what we are simply doing is proposing to amend the … we're going to amend the Copyright Act to make it more straightforward for rights owners to do what they can do now, which is to seek an order that access be prevented' to a site that is … infringing content. Now the reason for the legislative provision … is to make it available, is to enable you to get a remedy against an ISP = in other words to get an order against an ISP whose costs would have to be covered and so forth to block access to an overseas illegal download)…, uh, pirate site. I'll just use the word pirate because it's easy we understand what we're talking about. So if you have, you know, bengrubbdownloads.com.au in Australia and you are happily streaming, you know, unlicensed copies

[18] Josh Taylor, 'Stop the torrents: ISPs to block piracy websites, send warnings', *ZD Net*, 10 December 2014, http://www.zdnet.com/article/australian-isps-forced-to-block-piracy-websites-send-warnings/

> of movies, then this amendment would have no relevance to you because the rights owners can go after you directly.[19]

Critics of the regime have been unconvinced by such sophistry, and have been of the view that blocking websites amounted to an internet filter.

Professor Dan Hunter from Swinburne University has commented that blocking websites is bad for Australia's digital economy.[20] He observed that 'a poorly drafted law will inevitably be used to threaten Australia's nascent cloud computing industry, because cloud storage is where a large number of infringing files are found these days.'[21]

A. The Goals and Objectives of Copyright Law

In his second reading speech, the Minister for Communications, the Hon. Malcolm Turnbull introduced the bill, with these prefatory remarks: 'The *Copyright Amendment (Online Infringement) Bill* 2015 amends the *Copyright Act* 1968 to provide an effective new tool that rights holders use can then use to respond to commercial scale widespread copyright infringement on websites operated outside Australia.' [22] Obviously, there is much

---

[19] 'Malcolm Turnbull Discusses Piracy Crackdown', Transcript, 10 December 2014, http://www.scribd.com/doc/249750674/Malcolm-Turnbull-discusses-piracy-crackdown

[20] Professor Dan Hunter, 'Blocking Piracy Websites is Bad for Australia's Digital Future', *SBS*, 25 November 2014, http://www.sbs.com.au/news/article/2014/11/25/blocking-piracy-websites-bad-australias-digital-future

[21] Ibid.

[22] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

controversy over whether such a measure will be an 'effective new tool'.[23] There is also much debate over whether the measure is particularly well-adapted or specific to addressing commercial scale copyright infringement on websites operated outside Australia.

In his second reading speech, Malcolm Turnbull discusses the significance of the creative industries and copyright challenges.[24] While asserting that the bill engages in 'balancing', the content of the bill is very much tilted towards enhancing the rights and remedies of copyright owners:

> Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to creators. A part of copyright law is to strike the right balance between, on the one hand, creators and owners of copyrighted works and, on the other hand, users and disseminators of copyrighted works. However, this is never simple. Creators themselves have an interest in both protecting their rights as well as access and dissemination of content.[25]

There is also a significant slippage in the discussion of the objectives of copyright owners between the interests of creators, and the interests of major distributors, such as publishers, film studios, television networks, and newspaper empires. Notably, the remedy contemplated by the bill would be largely only accessible to copyright owners, with significant legal and financial resources. If this bill was concerned about the interests of creators, it would do more

---

[23] Professor Dan Hunter, 'Blocking Piracy Websites is Bad for Australia's Digital Future', *SBS*, 25 November 2014, http://www.sbs.com.au/news/article/2014/11/25/blocking-piracy-websites-bad-australias-digital-future

[24] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

[25] Ibid.

to enhance the rights and remedies of creators against distributors. The bill does little to enhance the quite distinct interests of copyright users, consumers, and citizens, or the much corporate interests of copyright intermediaries and disseminators. Overall, the Minister Malcolm Turnbull succumbs to the fallacy of the 'balancing' metaphor – a conceptual problem which has been highlighted in Abraham Drassinower's recent Harvard University Press book, *What's Wrong with Copying*?[26] The 'balancing' metaphor is often used for political purposes to justify the continued expansion of copyright owner rights and remedies.

The Minister comments that 'Australia possesses a proud and valuable creative sector.'[27] He observes: ''Our creative industries make a significant contribution to our national economy.'[28]

The Minister maintains: 'According to a 2012 report, Australia's creative industries employ 900,000 people and generate economic value of more than $90 billion, including $7 billion in exports.'[29] The 2012 report, though, was commissioned by a Copyright Owner organisation, and, as such, should not be considered to be a reliable source of evidence about jobs, economic value, and exports.[30] Indeed, it should be worth remembering that Australia is a net

---

[26] Abraham Drassinower, *What's Wrong with Copying?,* Cambridge (MA): Harvard University Press, 2015, http://www.hup.harvard.edu/catalog.php?isbn=9780674743977&content=bios

[27] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

[28] Ibid.

[29] Ibid.

[30] Price Waterhouse Coopers, *The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11: Prepared for the Australian Copyright Council*, 2012, http://www.copyright.org.au/pdf/PwC-Report-2012.pdf

importer of copyright works. In terms of the balance of trade, higher copyright standards will benefit the United States, with its heavy concentration of large copyright industries.

In his second reading speech, Malcolm Turnbull repeatedly makes the basic error of confusing copying with 'theft'.[31] He asserts: 'What they do, in unlawfully accessing and then profiting from the intellectual and artistic endeavours of others, is a form of theft.'[32] He also refers more generally to 'intellectual property theft'.[33] It is surprising that Malcolm Turnbull would make such mistakes, given his interest in the topic. Such an approach confuses and conflates property law and intellectual property law. There is also perhaps an underlying slippage here between civil matters under copyright law (which is what this bill is about), and criminal offences under copyright law (which the bill is not about).

The bill is quite over-reaching in its scope and its application. A copyright owner will be able to block a website – even if the infringement occurring is not in Australia. Will a judge have to assess foreign copyright laws to make such a determination? There is a great variation between copyright laws around the world. There is a lack of uniformity in respect of copyright subsistence, the nature of rights (both economic and moral rights), the test for copyright infringement, and the operation of copyright exceptions. Conduct which may be infringing copyright in one jurisdiction may be perfectly legal in another. This will lead to dizzying array of complications.

---

31 The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

32 Ibid.

33 Ibid.

RMIT's Mark Gregory notes: 'The idea that the Federal Court of Australia is to take into account copyright law for a country other than Australia when making a determination is novel, and possibly ground breaking'. [34] He wondered: 'Who would have thought the government would attempt to use the Federal Court of Australia to prevent Australians from accessing online content that does not infringe copyright in Australia?'[35]

Procedurally, the bill sets up a bizarre process. The danger, of course, is that the owners of foreign sites will be unrepresented in this process. There does not seem much in the way of representation for other interests affected by the injunctions.

B. The 'Primary Purpose' Test

The bill says that an injunction can granted where 'the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).' This seems to be an incredibly crude provision. This drafting raises a whole host of jurisdictional questions and problems.

Malcolm Turnbull maintains: 'Critically, the provisions in this bill have been carefully drafted to ensure that the new injunction power will not affect the legitimate websites and services that legally provide access to copyright material.'[36] He elaborates upon this issue:

---

[34] Mark Gregory, 'Abbott's Copyright Kowtow A Step Backwards', *Technology Spectator*, 1 April 2015, http://www.businessspectator.com.au/article/2015/4/1/technology/abbotts-copyright-kowtow-step-backwards

[35] Ibid.

[36] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

> First, the power is only as broad as it needs to be to achieve its objectives. The provision will only capture online locations where it can be established that the primary purpose of the location is to infringe or facilitate the infringement of copyright. That is a significant threshold test which will ensure that the provision cannot be used to target online locations that are mainly devoted to a legitimate purpose.[37]

Turnbull maintains that the bill does apply to virtual private networks: 'Where someone is using a VPN to access Netflix in the United States to get content in respect of which Netflix does not have an Australian licence, this bill would not deal with that because you could not say that Netflix in the United States has, as its primary purpose, the infringement or facilitation of the infringement of copyright'.[38] It is not clear that the text of the bill actually says this. The draft legislation says that one can take into account both Australian and overseas copyright infringement. There have been arguments made by Foxtel, amongst others, that Netflix has facilitated copyright infringement.[39] Notably, Sony Pictures has complained to Netflix over its unwillingness to stop Australians from using virtual private networks.[40]

---

37 Ibid.

38 Ibid.

39 Tim Cushing, 'Netflix Infringement Called Out During Australian Copyright Forum – One Major Studio Admits Windowed Releases are Stupid', *Techdirt*, 15 September 2014m https://www.techdirt.com/articles/20140915/08423728520/netflix-infringement-called-out-during-australian-copyright-forum-one-major-studio-admits-windowed-releases-are-stupid.shtml

40 Tim Biggs and Ben Grubb, 'Sony lobbied Netflix to stop Aussie VPN users, leak shows', *Sydney Morning Herald*, 17 April 2015.

Considering the bill, Ben Grubb noted that there had been debates within the Government about whether the website-blocking power might affect virtual private networks (VPNs). He noted that there had been concerns about unintended consequences in the bill:

> One of those unintended consequences, according to sources familiar with the drafting of the legislation, could have resulted in the websites of virtual private networks (VPNs) also being caught up in the blocking regime if they were deemed by a judge as facilitating copyright infringement. VPNs are often used to circumvent website filtering in countries by allowing users to "tunnel" their internet traffic through another country where there is no filtering. But some countries, such as China, have attempted to block access to them. One such VPN website, TorGuard, promotes itself as being able to "unblock any website regardless of geographical location", and it's understood there were fears in some circles that the way the legislation was initially drafted could have meant VPNs facilitating or allowing piracy could have been blocked as well.[41]

It is not necessarily clear how this issue has been addressed by the legislative drafting. If the Government wanted to exclude Virtual Private Networks from the bill, why hasn't it done so, expressly?

Unfortunately, it does seem to be the case that the bill has been carefully drafted. The bill does not provide an adequate test of what is a 'primary purpose'. It is notable that online sites can serve an amazing profusion of purposes. Search engines, such as Google and Yahoo!, have a multitude of purposes. Microblogging sites like Twitter serve many different functions. Cloud computing can be used in respect of hosting both authorised copyright

[41] Ben Grubb, 'No Limits: Rights-Holders Could Potentially Block Hundreds of Piracy Websites in Australia with a Single Strike', *The Sydney Morning Herald*, 26 March 2015, http://www.smh.com.au/digital-life/digital-life-news/no-limits-rights-holders-could-potentially-block-hundreds-of-piracy-websites-in-australia-with-a-single-strike-20150326-1m3y6c.html

content, and unauthorised copyright content. The bill does not provide adequate protection for legitimate websites and services that legally provide access to copyright material. The bill is particularly poor at dealing with websites and services, with multiples functions and purposes.

Consumer groups such as ACCAN have been concerned about the impact of the new bill on virtual private networks. ACCAN observed: 'ACCAN believes consumers should have the freedom to choose where they purchase content'.[42] ACCAN stressed: 'Improved choice will also address some of the problems around access, delayed release dates and affordability which fuel piracy.'[43]

Similarly, Consumer advocacy group CHOICE has been concerned the new copyright laws could allow industry groups to block or hinder the use of VPNs. [44] Erin Turner commented: 'We know that at least 684,000 Australian households already save money and get better deals by accessing overseas content using tools like a VPN.[45] She said: 'Currently, [the proposed bill] is far from clear when it comes to whether using a VPN to access a legitimate service like US-based Hulu is legal or not'.[46]

---

42 Hannah Francis, 'Fears VPNs Could Be Blocked in Piracy Crackdown', *The Sydney Morning Herald*, 20 April 2015, http://www.smh.com.au/digital-life/digital-life-news/fears-vpns-could-be-blocked-in-piracy-crackdown-20150420-1mp4na.html

43 Ibid.

44 Tim Biggs and Ben Grubb, 'Sony lobbied Netflix to stop Aussie VPN users, leak shows', *Sydney Morning Herald*, 17 April 2015.

45 Ibid.

46 Ibid.

Such concerns are certainly pertinent, given recent copyright threats against global roaming services in New Zealand.[47]

C. The Matrix of Factors

Section 115A (5) of the bill has a laundry list of matters to be taken into account by a court in determining whether or not to grant an injunction:

> In determining whether to grant the injunction, the Court is to take the following matters into account:
>
> (a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(c);
>
> (b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;
>
> (c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;
>
> (d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;
>
> (e) whether disabling access to the online location is a proportionate response in the circumstances;
>
> (f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;
>
> (g) whether it is in the public interest to disable access to the online location;
>
> (h) whether the owner of the copyright complied with subsection (4);
>
> (i) any other remedies available under this Act;
>
> (j) any other matter prescribed by the regulations;
>
> (k) any other relevant matter.

---

[47] Jeremy Kirk, 'In New Zealand, Legal Battle Looms Over Streaming TV', *Techworld*, 14 April 2015, http://www.techworld.com.au/article/572569/new-zealand-legal-battle-looms-over-streaming-tv/ PC World http://www.pcworld.idg.com.au/article/572569/new-zealand-legal-battle-looms-over-streaming-tv/

In his second reading speech, the Minister maintains that this multi-factorial test will help the court consider 'a broad range of factors that reflect competing public and private interests.'[48] He commented:

> The court must consider the flagrancy of the infringement. This provision particularly contemplates online locations that deliberately and conspicuously flout copyright laws. The court must also consider whether blocking access to the online location is a proportionate response in the circumstances. For example, the court may consider the percentage of infringing content on the online location compared to the legitimate content or the frequency with which the infringing material is accessed by subscribers in Australia. Another consideration for the court is the overall public interest. The internet has revolutionised our ability to disseminate information and knowledge. The court must weigh the public interest in access to information against the public interest in protecting our creative industries. These competing public interests must themselves be considered in the wider context of the private interest which it is the principal purpose of the bill to protect—that is, the right of content creators to the protection of their intellectual property.[49]

However, the factors are pretty clearly tilted towards the interests of copyright owners. There are significant drafting problems as well in respect of the factors. The motley collection of factors seem vague, ambiguous, ill-defined, and over-inclusive.

It is both odd and peculiar that the first factor is the 'the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement'. As previously discussed, this will be an incredibly difficult task, given that the court is meant to consider the question of infringement, not only in Australia, but elsewhere around the world. The second factor says it is relevant 'whether the online location makes available or contains directories, indexes or

---

48 The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

49 Ibid.

categories of the means to infringe, or facilitate an infringement of, copyright.' This phrasing would make me concerned whether search engines and index sites could be swept up in the scope of this bill. The third factor is 'whether the owner or operator of the online location demonstrates a disregard for copyright generally.' This seems an incredibly vague factor. How is a court supposed to determine a general 'disregard for copyright'? That hardly seems like a precise or specific factor test. The fourth factor is 'whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement.' Given the territorial nature of copyright law, this is quite a strange way to approach this question. Moreover, it should be remembered that many authoritarian governments engage in website-blocking for political purposes. It seems to me an absurd situation for an Australian court to have to consider whether China or Iran or North Korea is blocking access to websites or online locations, on the grounds of intellectual property or otherwise.

The fifth factor is whether 'disabling access to the online location is a proportionate response in the circumstances.' If proportionality is an important factor, it should be spelt out properly. The sixth factor is vague and open-ended – 'the impact on any person, or class of persons, likely to be affected by the grant of the injunction.' The seventh factor is 'whether it is in the public interest to disable access to the online location.' Again, this is a highly vague statement. This factor fails to address whether or not questions about human rights should be taken into account by the court in an assessment of the grant of an injunction. The eighth factor is whether 'the owner of the copyright complied with subsection (4).' It is notable that there is a failure to address circumstances of copyright trolls in respect to this factor.

The ninth factor notes 'any other remedies available under this Act.' However, the Act really fails to properly explain the relationship between the blocking power and other existing remedies. Is the blocking power an exceptional remedy? Or will it be an everyday, commonplace occurrence? The tenth factor is 'any other matter prescribed by the regulations.' There has been a real problem with the Attorney-General drafting broad regulation-making powers in internet bills – like this one, and the Data Retention legislative regime. There is a real danger of political interference, with the Attorney-General of the day being able to manipulate the relevant factors for a court to consider by means of regulation. The eleventh factor is 'any other relevant matter.'

Notably, the bill does not provide proper guidance as to how a court should weigh this long list of factors. The Federal Court of Australia, and the High Court of Australia will be unhappy, having to be tasked with making sense of this confusing list of factors. On the whole, this part of the bill is an omnishambles, with its ill-thought out grab-bag of vague, ambiguous and ill-defined factors.

D. Injunction

In his second reading speech, the Minister Malcolm Turnbull also argued that the court would play a role in respect of using its discretion in respect of the injunctions.[50]

[50] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

Mark Gregory, a Senior Lecturer in the School of Electrical and Computer Engineering at RMIT University, was concerned about the technical operation of the bill. [51] He said: 'Section 9 of the Bill is likely to become known as the iiNet clause or the "shut up and do as your told" clause because it states that "the carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings."'[52] Gregory was concerned that regulations would have to illuminate the infrastructure for the bill: 'If an injunction is granted the ISPs will need to know the process that should be taken to block the online location and provide notification to their customers of the website block.'[53] He worried: 'Given that the online location may reappear with a different IP address very shortly after an injunction has been enforced, ISPs are likely to be inundated with injunctions at regular intervals and will therefore require additional staff and resources to handle the expected load.'[54]

Turnbull insists that the bill ensures 'copyright holders have access to an effective remedy without unduly burdening carriage service providers or unnecessarily regulating the behaviour of consumers.' [55] Unfortunately, the bill will place heavy burden upon internet service providers. Moreover, the regime will heavily regulate the behaviour of consumers. The bill is not an example of light-touch regulation.

---

51 Mark Gregory, 'Abbott's Copyright Kowtow A Step Backwards', *Technology Spectator*, 1 April 2015, http://www.businessspectator.com.au/article/2015/4/1/technology/abbotts-copyright-kowtow-step-backwards

52 Ibid.

53 Ibid.

54 Ibid.

55 The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

E. Political Discussion of the Bill

Foxtel chief executive Richard Freudenstein asserted that there was evidence from Europe that web-blocking measures have had a significant impact upon rates of copyright infringement.[56] Foxtel chief executive Richard Freudenstein also asserted: 'This about blocking access to sites run by criminals and gangs: these are not crusaders for freedom, they are out to make money by stealing other people's intellectual property.'[57] This statement shows a poor understanding and appreciation of copyright history. Even since the inception of copyright law, there have been concerns about governments. There is a long history of governments, corporations, associations, and individuals bringing copyright action in order to censor free speech or at the very least chill free speech. Foxtel chief executive Richard Freudenstein observed: 'We are still examining the bill and if we think any improvements can be made we will be making suggestions in our submission to the committee.'[58] Again, this seems to be a curious statement. Roadshow and Foxtel seem to have played a very instrumental role in the drafting of the legislative regime. The proposal for a website-blocking copyright bill has been very much at their instigation.

A recent 2015 dissertation by Pekka Savola is highly critical of the copyright law and practice on blocking websites in the European Union.[59] Savola comments:

---

[56] Dominic White, 'ISPs Resist Website Blocking Bill', *The Australian Financial Review*, 13 April 2015, http://www.afr.com/brand/isps-resist-pirate-website-blocking-bill-20150412-1mh7t7?stb=twt

[57] Ibid.

[58] Ibid.

[59] Pekka Savola, *Internet Connectivity Providers as Involuntary Copyright Enforcers: Blocking Websites in Particular*, Faculty of Law, the University of Helsinki, 2015, https://helda.helsinki.fi/handle/10138/153602

> Enforcement proceedings are problematic because typically only the copyright holder and possibly the provider are represented in court. Nobody is responsible for arguing for the users or website operators. The court should take their interests into account on its own motion. Unfortunately, many courts have not yet recognised this responsibility. Even this dual role as both the defender of unrepresented parties and judge is less than ideal and improvement is called for.[60]

This European experience hardly sounds like a good model for Australia to emulate.

CHOICE Australia — the leading consumer rights' group in Australia — was also disappointed by the copyright proposals.[61] Alan Kirkland was wary of 'an industry-run internet filter to block 'offending' websites'.[62] He commented:

> We know that internet filters don't work. This approach has been called ineffective and disproportionate by courts overseas, and it risks raising internet costs for everyone.[63]

Kirkland said that there was a need to fix the availability, and the high prices in respect of copyright works.

The Communications Alliance has been cautious about the Coalition Government's copyright plans.[64] The Communications Alliance, whose members include iiNet and Optus, have

---

60 Ibid.

61 Luke Hopewell, 'CHOICE Slams Government Piracy Plans, Labels Site Blocking As Internet Filter in Disguise', *Gizmodo*, 10 December 2014, http://www.gizmodo.com.au/2014/12/choice-slams-government-piracy-plan-labels-site-blocking-as-internet-filter-in-disguise/

62 Ibid.

63 Ibid.

commented that the bill is vague and ambiguous and fails to specify what type of blocking should be undertaken.[65] John Stanton commented on the proposed bill:

> The bill is very generic on this. And yet there are different costs and risks associated with different types of blocking methodology. We have cautioned that website blocking is a relatively blunt tool, with risks of 'collateral damage' if not applied with precision. There is uncertainty as to how courts will interact with and interpret the requirements of the legislation when making orders.[66]

Stanton was concerned that the phrases 'online location' and 'website' were not precisely defined under the bill. Such ambiguity left open the danger of the bill being used for copyright censorship – whether that be purposely or accidentally. Moreover, the Communications Alliance was concerned about the lack of information over the costs of such prescriptive regulation. Stanton said: 'The government originally said rights holders would be responsible for meeting implementation costs and that seems to have disappeared since the government first proposed it.'[67] He observed: 'It is reasonable for us to understand what the expectations and costs are rather than agreeing to a high level bill.'[68]

In response, the Australian Labor Party has lambasted the proposal. In a powerful critique, Jason Clare MP has maintained that the Abbott Government does not understand the Internet:

---

64 Clare Reilly, '"Censorship by Internet Filter': Industry Reacts to Proposed Piracy Laws', *CNet*, 10 December 2014, http://www.cnet.com/au/news/censorship-internet-filter-industry-reacts-to-proposed-piracy-laws/

65 Dominic White, 'ISPs Resist Website Blocking Bill', *The Australian Financial Review*, 13 April 2015, http://www.afr.com/brand/isps-resist-pirate-website-blocking-bill-20150412-1mh7t7?stb=twt

66 Ibid.

67 Ibid.

68 Ibid.

> The Abbott Government has made it clear it doesn't understand the internet or its users. Senator Brandis demonstrated this with his complete inability to explain metadata earlier this year. Malcolm Turnbull is about to buy an ageing copper network because he thinks that by 2023 the median household in Australia will only require 15 Mbps.[69]

Jason Clare argued: 'It is clear that action is needed both to deter piracy, and to encourage access to legitimate content.'[70] He also wondered whether the proposals of the government would be effective: 'Site-blocking is unlikely to be an effective strategy for dealing with online piracy'.[71] Jason Clare maintained that 'the Government has passed the buck back to industry, asking rights holders and ISPs to reach an agreement among themselves'.[72] He contended: 'Any crackdown on the infringement of copyright needs to be accompanied by changes to make copyright law fairer, clearer, and more in keeping with public expectations'.[73] In his view, 'The Government should look after the interests of consumers.'[74]

The Australian Greens have also been highly critical of the copyright proposals of the Coalition Government. Senator Scott Ludlam has commented:

---

69 Jason Clare MP, 'Government Fails to Deliver on Internet Piracy', Press Release, 10 December 2014, http://www.jasonclare.com.au/media/portfolio-media-releases/1538-government-fails-to-deliver-policy-on-internet-piracy

70 Ibid.

71 Ibid.

72 Ibid.

73 Ibid.

74 Ibid.

> The Greens will not support amendments to the Copyright Act to allow rights holders to apply for a court order requiring ISPs to block access to a website. Such a move would be a defacto Internet filter and would allow rights holders to unilaterally require websites to be blocked. This kind of Internet filter would not be effective at all, due to the widespread availability of basic VPN software to evade it.[75]

Pirate Party Australia has denounced the new copyright regime.[76] President of the Pirate Party, Brendan Molloy, has commented:

> This proposal is effectively the beginning of an Australian version of the failed US *Stop Online Piracy Act*. Notification schemes, graduated response schemes and website blocking do not work. They are costly, ineffective and disproportionate, as evidenced by academia and decisions of foreign courts. Fighting the Internet itself as opposed to solving the lack of convenient and affordable access does not work, nor does propping up business models that rely upon the control of content consumption in the digital environment.[77]

Deputy President, Simon Frew, added: 'Website blocking is censorship, plain and simple.'[78] He commented: 'By ignoring the IT Pricing Inquiry and numerous submissions to different reviews that Australians are regularly paying more and waiting longer for content, the

---

[75] Senator Scott Ludlam, 'Industry Code on Copyright Will Not Address Real Problem', The Australian Greens, Press Release, 10 December 2014, http://greens.org.au/node/6800

[76] Pirate Party Australia, 'Pirate Party denounces attempt to introduce beginning of Australian SOPA-style regime', 10 December 2014, http://pirateparty.org.au/2014/12/10/pirate-party-denounces-attempt-to-introduce-beginning-of-australian-sopa-style-regime/

[77] Ibid.

[78] Ibid.

Coalition is looking to enact a legislative dinosaur that will be easily bypassed by savvy Internet users in seconds.'[79]

The Institute of Public Affairs has also expressed reservations about the proposed copyright regime.[80] Chris Berg commented:

> The government's proposal to block websites that infringe copyright is an internet filter and a threat to free speech. This is nothing more than an internet filter, of the sort which the Coalition proudly opposed when it was proposed by the Rudd and Gillard governments. There is no reason to believe that this will reduce copyright infringement in any material way.[81]

Such criticism is notable — given that the Institute of Public Affairs is often an ally and a friend of the Coalition Government, across a range of policy fields.

Recommendation 1

The *Copyright Amendment (Online Infringement) Bill* 2015 (Cth) should be rejected by the Australian Parliament because it interferes with traditional freedoms and civil liberties, as well as an Open and a Free Internet.

---

79 Ibid.

80 Chris Berg, 'The Coalition is Reviving Labor's Internet Filter with its Copyright Website Blocking Scheme: IPA', https://ipa.org.au/publications/2311/the-coalition-is-reviving-labor%27s-internet-filter-with-its-copyright-website-blocking-scheme-ipa

81 Ibid.

2. The Copyright Code

In his second reading speech, the Minister Malcolm Turnbull also promoted the Coalition Government's New Copyright Code:

> The new injunction power is one measure that the government is introducing to address online copyright infringement. International experience shows that a range of measures are needed to properly tackle the problem. The new injunction power will complement the industry code that is being developed between the internet service providers and copyright holders. When finalised, the code will create an education notice scheme that will warn alleged infringers and give them information about legitimate alternatives. An injunction provision will be even more effective if users are properly educated and warned about online copyright infringement.[82]

The combination of the new super-injunction power and the copyright code could well have adverse consequences for Australian consumers, citizens, intermediaries, and technology providers.

The Australian Government has given an ultimatum to internet service providers to co-operate with copyright owners or else. If internet service providers refuse to co-operate within four months, the Australian Government will be able to impose its own industry scheme. The Ministers explained:

> The Attorney-General and the Minister for Communications have written to industry leaders requiring them to immediately develop an industry code with a view to registration by the Australian

[82] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

> Communications and Media Authority (ACMA) under Part 6 of the Telecommunications Act 1997. The code will include a process to notify consumers when a copyright breach has occurred and provide information on how they can gain access to legitimate content. The Minister and the Attorney-General expect strong collaboration between rights holders, internet service providers (ISPs) and consumers on this issue. A copy of the letter to the industry leaders is attached. Failing agreement within 120 days, the Government will impose binding arrangements either by an industry code prescribed by the Attorney-General under the Copyright Act 1968 or an industry standard prescribed by the ACMA, at the direction of the Minister for Communications under the Telecommunications Act.[83]

Such a proposal involves a striking combination of copyright law and media law. Internet service providers face a Hobson's choice — they can either submit to an industry code with copyright owners in a short time frame, or else have the Federal Government impose an industry code upon them.

Senator Ludlam was also of the view that the ultimatum for a copyright code was unjust: 'The Australian ISP and content industries have continuously failed to successfully negotiate a shared approach to copyright infringement over a period of at least three years, due in large part to the unwillingness of copyright holders to be flexible in their position.'[84] He observed: 'In this context, the Government's requirement that a joint code be developed within 120 days is farcical.'[85] In his view, 'This is not enough time to develop a code.'[86] Senator Ludlam

---

83 Nicolas Suzor and Eleanor Angel, 'Forced Negotiations and Industry Codes Won't Stop Illegal Downloads', *The Conversation,* 11 December 2014, https://theconversation.com/forced-negotiations-and-industry-codes-wont-stop-illegal-downloads-35330

84 Senator Scott Ludlam, 'Industry Code on Copyright Will Not Address Real Problem', The Australian Greens, Press Release, 10 December 2014, http://greens.org.au/node/6800

85 Ibid.

86 Ibid.

lamented that 'the Government has not specifically allocated a role for public interest organisations to have a place at the negotiating table', even though 'users will be the ones most affected by this new code.'[87] He concluded: 'Any industry code will be easily evaded by copyright infringers and will not address the real issue: The lack of timely, affordable availability of content in Australia, which other markets such as the US already enjoy.'[88]

Dr Nicolas Suzor and Eleanor Angel have provided an incisive analysis of the regime:

> ISPs and copyright owners have 120 days (over the holiday period) to come to agreement on an issue that they have been at loggerheads over for the past five years. The government hasn't given ISPs much negotiating power, either. The clear threat is that if ISPs don't give the industry what it wants, the government will do it for them. These types of industry codes can be an effective way to regulate, but the only way they will reflect the overall public interest is if consumer groups are also given a seat at the negotiating table. We also need transparency and continual monitoring to ensure the scheme is not being abused, and public interest groups must have the power to effectively protect end users. In this proposal, consumer groups are not invited, and rightsholders hold all the power.[89]

The Coalition Government's tactics and strategies in this area are crafty. Professor Susan Sell has highlighted the use of soft power in copyright policy-making.[90] This is a classic instance of trying to use industry codes and private agreements to achieve copyright goals. There will be much debate over whether the new scheme will constitute an Internet Tax.

---

87 Ibid.

88 Ibid.

89 Ibid.

90 Phillip Adams, 'Where are the TPP Negotiations Up to?', ABC, Radio National, Late Night Live, 3 March 2015, http://www.abc.net.au/radionational/programs/latenightlive/where-are-the-tpp-negotiations-up-to3f/6275624 Featuring as a guest Professor Susan Sell.

A. The *Dallas Buyers Club* v *iiNet* (2015)

The issue has come into focus with the copyright litigation in *Dallas Buyers Club LLC* v. *iiNet Limited* [2015] FCA 317.[91] Perram J explained the nature of the dispute in his summary:

> This is an application for preliminary discovery brought by Dallas Buyers Club LLC, a United States entity which claims to be the owner of the copyright in the 2012 Jean-Marc Vallée film, *Dallas Buyers Club*, and its parent, Voltage Pictures LLC (together, 'the applicants'). The respondents are six Australian internet service providers ('ISPs'), which provide internet access to members of the public and businesses through a variety of means. Preliminary discovery is a procedure which enables a party who is unable to identify the person who it wishes to sue to seek the assistance of the Court in identifying that person. The applicants say that they have identified 4,726 unique IP addresses from which their film was shared on-line using BitTorrent, a peer-to-peer file sharing network, and that this occurred without their permission. They say that the people who did this infringed their copyright contrary to the *Copyright Act 1968* (Cth) ('the Copyright Act'). The applicants do not know the identity of the 4,726 individuals involved in this activity. The applicants do, however, have evidence that each of the IP addresses from which the sharing occurred was supplied by the respondent ISPs and they believe that the ISPs can identify the relevant account holder associated with each IP address. They do not say that the account holders and the persons infringing their copyright using BitTorrent are necessarily the same people but they do say that some of them may be and, even if they are not, the account holders may well be able to help them in identifying the actual infringers.[92]

The judge noted that the internet service providers resisted the application on many bases. In the end, the judge concluded: 'I will order the ISPs to divulge the names and physical addresses of the customers associated in their records with each of the 4,726 IP addresses'. [93]

---

91 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

92 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

93 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

The judge stressed: 'I will impose upon the applicants a condition that this information only be used for the purposes of recovering compensation for the infringements and is not otherwise to be disclosed without the leave of this Court.' [94] The judge also commented: 'I will also impose a condition on the applicants that they are to submit to me a draft of any letter they propose to send to account holders associated with the IP addresses which have been identified'. [95] The judge observed: 'The applicants will pay the costs of the proceedings.' [96]

The judge, though, was conscious of the need to protect consumers. Perram J noted that there was no doubt that Voltage had engaged in speculative invoicing in the past: 'There were a number of instances put before me of Voltage having written, in the United States, very aggressive letters indicating to the identified account holder a liability for substantial damages and offering to settle for a smaller (but still large) sum.' [97] The judge commented:

> Whether speculative invoicing is a lawful practice in Australia is not necessarily an easy matter to assess. Representing to a consumer that they have a liability which they do not may well be misleading and deceptive conduct within the meaning of s 18 of the *Australian Consumer Law* and it may be equally misleading to represent to someone that their potential liability is much higher than it could ever realistically be. There may also be something to be said for the idea that speculative invoicing might be a species of unconscionable conduct within one or other of s 21 of the *Australian Consumer Law* or s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth). In the former, however, it would be necessary to identify a supply of goods or services which may be

94 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

95 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

96 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

97 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

> difficult. In the latter, it would be necessary to identify a financial service which may also not be without difficulty.[98]

The judge ruled: 'Having regard to the likely identity of many account holders and their potential vulnerability to what may appear to be abusive practices I propose to impose conditions on the applicants that will prevent speculative invoicing'.[99] Perram J noted that this course has been taken in other jurisdictions: 'In *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch) the English High Court of Justice granted preliminary discovery against an ISP at the suit of a producer of pornographic films but required the applicant to submit to the Court for prior approval a draft of the letter which was to be sent to the identified account holders.'[100]

The judge also acknowledged that privacy concerns were a relevant matter. The judge was forced to consider the interaction of the copyright regime, with other external legislative regimes providing protection for privacy:

> Elaborate provision is made under Federal law for the protection of the privacy of individuals' telecommunications activity. The first tranche of these protections is contained in Pt 13 of the *Telecommunications Act 1997*(Cth). Division 2 establishes a set of protections entitled 'Primary disclosure/use offences'. By s 280, nothing in Div 2 prevents disclosure required by law. Thus, regardless of its contents, nothing in Div 2 prevents this Court from ordering the ISPs to disclose the information in question.
>
> The relevant provision is s 276(1)(a)(iv). Its effect is that an ISP 'must not disclose or use any information or document that ... relates to ... the affairs or personal particulars ... of another person'. It

98 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

99 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

100 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317; and *Golden Eye (International) Ltd v Telefonica UK Ltd* [2012] EWHC 723 (Ch).

> was not in dispute that, apart from s 280, this provision prevents the ISPs from disclosing their customer information. Australian Privacy Principle 6.1 (contained in Sch 1 of the *Privacy Act 1988* (Cth)) is to like effect, with 6.2(b) the analogue to s 280. Together, these provisions demonstrate that the privacy of account holders of ISPs is regarded by the Parliament as having significant value. Of course, the Parliament has also accorded significant value to the owners of copyright by enacting the Copyright Act and by giving them the right to sue for infringement. [101]

The judge noted: 'In situations where different rights clash it is usual for courts to try and accommodate both rights as best they can'. [102] The judge observed: 'Here that can be done by requiring the information to be provided but by imposing, by way of conditions, safeguards to ensure that the private information remains private, which parallels the approach to the same issue adopted in *Golden Eye*.'[103] The judge also proposed 'to constrain the use to which the information may be put to purposes relating only to the recovery of compensation for infringement'. [104] The judge said that 'those purposes would seem to be limited to three situations: (a) seeking to identify end-users using BitTorrent to download the film; (b) suing end-users for infringement; and (c) negotiating with end-users regarding their liability for infringement.'[105]

Australian privacy law, though, only provides very weak protection. There has been concern about the impact of the ruling upon the privacy of Australian consumers and internet users. Bond University's Dan Svantesson said of the case: ' With a precedent like that set by justice Perram, monetary copyright interest are given a carte blanche to continue to trump our

---

101 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

102 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

103 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

104 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

105 *Dallas Buyers Club LLC* v *iiNet Limited* [2015] FCA 317.

fundamental human right of privacy, with increased online surveillance as the tragic consequence.'[106]

There has been a great deal of public interest in the decision in the dispute between the Dallas Buyers Club and the various internet service providers.[107] It should be remembered that the decision is only a procedural one. It would be a mistake to jump to the conclusion that substantive copyright infringement has been established in this case. It is also important to properly contextualise the dispute. There have been similar actions by the owners of the Dallas Buyers Club in a range of jurisdictions – including the United States, Canada, and Singapore. There have also been threats of copyright litigation over the Dallas Buyers Club in New Zealand. All of these countries seem to be nations participating in the *Trans-Pacific*

---

[106] Dan Svantesson, 'Copyright Trumps Privacy in Dallas Buyers Club Ruling', *The Conversation,* 8 April 2015, https://theconversation.com/copyright-trumps-privacy-in-dallas-buyers-club-ruling-39801

[107] David Swan, 'iiNet Loses Dallas Buyers Club Landmark Piracy Case', *The Business Spectator*, 7 April 2015, https://www.businessspectator.com.au/news/2015/4/7/technology/iinet-loses-dallas-buyers-club-landmark-piracy-case Ben Grubb and Michaela Whitbourn, 'Pirates Beware: Hollywood is Coming After You', *The Sydney Morning Herald*, 8 April 2015, http://www.smh.com.au/digital-life/digital-life-news/pirates-beware-hollywood-is-coming-after-you-20150407-1mg2ui.html Joel Burgess, 'The Consequences for Not Buying the Dallas Buyers Club', *Tech Radar*, 9 April 2015, http://www.techradar.com/au/news/internet/policies-protocols/the-consequences-for-not-buying-the-dallas-buyers-club-1290593 Michaela Whitbourn, 'Dallas Buyers Club Judgment: The Trans-Pacific Partnership Could be Worse News for Online Pirates', *The Sydney Morning Herald*, 12 April 2015, http://www.smh.com.au/digital-life/digital-life-news/dallas-buyers-club-judgment-transpacific-partnership-could-be-worse-news-for-online-pirates-20150411-1mh6td.html?stb=twt *The Age* 12 April 2015; and Ry Crozier, 'Dallas Buyers Club Pirates Could be Told to Name a Price', *IT News*, 13 April 2015, http://www.itnews.com.au/News/402624,dallas-buyers-club-pirates-could-be-told-to-name-a-price.aspx

Partnership. The mega trade deal promises to put into place higher standards for copyright protection and enforcement, and greater regulation of online intermediaries.

B. The Industry Code

The copyright litigant Village Roadshow has played a key role in pushing for the website-blocking bill, and the copyright code.[108] Village co-chairman and co-chief executive Graham Burke has said that the company is willing to take copyright litigation if need be:

> I'm not going to stand by and see an industry that is not only about jobs in the economy, but also about culture and aesthetics and what we are, get killed by a bunch of thieves. And let's not forget that sitting right behind these thieves are guys that are making tens of millions of dollars in selling advertising, so I'm not ruling out anything. But the program [the code] that we have got, and speaking for Village, is the one that we will be pursuing.[109]

Matthew Deaner, executive director of Screen Producers Australia, said that further *Dallas Buyers Club* court actions were unlikely.[110] By the same token, he did not rule out such litigation altogether.

In the wake of the decision, the Communications Alliance published the latest draft of the Industry Copyright Code.[111] There has been a great deal of concern whether this industry

---

[108] Jared Lynch, 'Village Roadshow wants to work with ISPs instead of Suing Movie Parties', *The Australian Financial Review*, 12 April 2015, http://www.afr.com/it-pro/village-roadshow-wants-to-work-with-isps-instead-of-suing-movie-pirates-20150416-1mj8cd

[109] Ibid.

[110] Ibid.

scheme will in fact reduce the incidence of copyright infringement by Australian Internet Users. There is much debate about whether the Industry Copyright Code will perform an educational function or a role in deterrence. There has been much worry that the regime fails to have proper checks and balances, particularly in terms of protecting consumer rights, privacy, and human rights. Moreover, the regime promises to provide significant regulatory red tape for Australia's information technology and communications network. The issues raised in the Dallas Buyers Club litigation are not necessarily well dealt with in the new industry copyright code.

There have been concerns from the consumer group ACCAN that the new copyright code will streamline 'speculative invoicing'.[112] The Chief Executive Officer of ACCAN, Teresa Corbin, has observed:

> Speculative invoicing has occurred in the US, Canada and UK where consumers have been sent intimidating letters demanding compensation for claims of illegal file sharing. The Dallas Buyers Club Federal Court decision is worrying because in the future Australian consumers may be sent threatening letters shaking them down for money or face the threat of legal action.[113]

---

[111] Communications Alliance Ltd, C653:2015, Industry Code, Copyright Notice Scheme, http://www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf

[112] ACCAN, 'Copyright Code will Streamline "Speculative Invoicing"', Press Release, 8 April 2015, http://www.accan.org.au/news-items/media-releases/1036-copyright-code-will-streamline-speculative-invoicing-accan

[113] Ibid.

Accordingly, ACCAN has argued that copyright trolls and rights holders who engage in speculative invoicing should be barred from using the industry notice scheme.

Moreover, ACCAN is concerned about the cost of the copyright code, and whether it will provide any real benefits for Australian consumers. Teresa Corbin said:

> Under the Code, internet service providers (ISPs) will be forced to keep evidence of online copyright infringement and send infringement notices to customers. The cost of running the scheme will be passed on to consumers through higher internet bills. We are calling on the Australian Communications and Media Authority to subject the scheme to a cost benefit analysis by the government Office of Best Practice Regulation and ensure it meets appropriate community safeguards.[114]

ACCAN has concerns regarding the privacy and security of consumer information that will be collected under the Code. The consumer rights' organisation is of the view that the copyright code lacks appropriate safeguards in respect of consumer rights, privacy, and security.

Recommendation 2

In light of the copyright action by the Dallas Buyers Club, the Australian Parliament needs to address the relationship between copyright law, privacy law, and consumer rights. The Australian Parliament should legislate on the matter – rather than rely upon an ill-conceived Industry Copyright Code.

[114] Ibid.

3. Safe Harbours

Australian consumers have been let down by the copyright proposals. There is no defence of fair use, as recommended by the Australian Law Reform Commission. There is no policy action on IT pricing rip-offs by copyright owners and information technology owners. Furthermore, the Government has failed to provide for a safe harbor for intermediaries. As a result, Australian consumers are third-class citizens in the digital economy — lacking the rights and privileges of their counterparts in the United States.

The Coalition Government has not extended the safe harbour for intermediaries such as search engines, social media, and internet video sites. Malcolm Turnbull noted: 'Given that this is related to broader issues than just online copyright, this proposal will not be pursued at this time.'[115] He stressed: 'The Government expects that schools, libraries, search engines and wifi providers will continue to take steps to reduce online copyright infringement on their systems.'[116] Such a decision represents a failure for Google — which had been heavily lobbying the Federal Government for an extended safe harbour. Google's Australian Digital Alliance has protested against the decision.[117] However, the Coalition Government has shown little sympathy for Google and other information technology companies — especially given the scandal over tax avoidance in the new economy. Moreover, the Coalition

---

115 Malcolm Turnbull, 'Online Copyright Infringement FAQs', http://www.malcolmturnbull.com.au/policy-faqs/online-copyright-infringement-faqs

116 Ibid.

117 Google's Australian Digital Alliance, 'Safe Harbours Still Broken Despite 10 Year Campaign to Rectify Drafting Mistake', Press Release, 11 December 2014, http://digital.org.au/media/safe-harbours-still-broken-despite-10-year-campaign-rectify-drafting-mistake-0

Government has been keen to please Rupert Murdoch — who has called Google "Kleptomaniacs" in the past.[118]

Nonetheless, such an approach to intermediary liability in respect of copyright law is of concern. It is outrageous that Malcolm Turnbull expects that schools and libraries will be copyright cops and police copyright infringement on their networks. Such a proposal will interfere with the mission of schools and libraries to provide access to knowledge.

The lack of proper safe harbours protection will be a disincentive for information technology and communications providers to invest in Australia.

Recommendation 3

The Australian Parliament needs to update and modernise the safe harbour provisions in respect of Australia's copyright laws.

[118] Stephen McDonnell, 'Murdoch Launches Scathing Attack on Content Kleptomaniacs', ABC AM, 10 October 2009, http://www.abc.net.au/am/content/2009/s2710384.htm

4. Copyright Exceptions

Fair Use Week was celebrated this year in the United States, with great gusto and enthusiasm. At Harvard Library, Kyle Courtney commented: 'Fair use is critical and important to innovation, scholarship and research in the United States.'[119] Kenneth Crews emphasized that 'the new technological ventures, like other creative pursuits, require fair use and other copyright limitations for experimentation and success.'[120] Legal director Corynne McSherry of the Electronic Frontier Foundation has highlighted the significance and the importance of the defence of fair use: 'Fair use provides breathing space in copyright law, making sure that control of the right to copy and distribute doesn't become control of the right to create and innovate.' For *Techdirt*, Mike Masnick has emphasized that fair use is a right – and not an exception or a mere defence.[121] Peter Jaszi and Pat Aufderheide have highlighted the contextual operation of fair use in particular artistic communities.[122] Molly Van Houweling of the Authors Alliance and Berkeley Law has written about the ecstasy of influence – the role

---

[119] Kyle Courtney, 'In 2015, Fair Use Week Goes National', 23 February 2015 http://library.harvard.edu/02232015-1015/fair-use-week

[120] Kenneth Crews, 'Copyright, Fair Use, and a Touch of Aristotle', Harvard Library, 23 February 2015, http://blogs.law.harvard.edu/copyrightosc/2015/02/23/fair-use-week-2015-day-one-with-guest-expert-kenneth-d-crews/

[121] Mike Masnick, 'Reminder Fair Use is a Right – not an "Exception" or a "Defense"', *Tech Dirt*, 22 February 2015, https://www.techdirt.com/articles/20150222/16392430108/reminder-fair-use-is-right-not-exception-defense.shtml

[122] College Art Association, *Code of Best Practices in Fair Use for the Visual Arts*, 2015, http://www.collegeart.org/news/2015/02/09/caa-announces-publication-of-code-of-best-practices-in-fair-use-for-the-visual-arts/

of inspiration and appropriation in all acts of artistic creation. Fair use has been celebrated as a many-splendored legal creation.[123]

While fair use has been feted and celebrated in the United States, fair use has been under attack, both in the United States, and in other jurisdictions. Fair use is in peril. Copyright owners have sought to confine the operation of fair use in litigation in the United States, and in policy debates. Political lobbyists have sought to prevent the adoption of fair use in Australia, and other countries elsewhere in the Pacific Rim. Fair use has been undermined and undercut by intermediary liability schemes, technological protection measures, and contract law. Moreover, fair use has been threatened by international trade agreements – such as the *Trans-Pacific Partnership.*

In his book *Republic, Lost*, Professor Lawrence Lessig observed that copyright reform would be unobtainable until there was substantive reform of political donations and lobbying in the United States.[124] He noted: 'Between 1998 and 2010, pro-copyright reformers were outspent by anti-reformers by $1.3 billion to $1 million – a thousand to one.'[125] Lessig emphasized that such political donations distorted policy-making in respect of copyright law in the United States across a range of topics – including the copyright term extension; copyright exceptions; and copyright enforcement. The problem has been further accentuated by the decision of the Supreme Court of the United States in *Citizens United* – which allowed for

---

123 Molly van Houweling, 'Fair Use and the Ecstasy of Influence', *Authors Alliance*, 23 February 2015, http://www.authorsalliance.org/2015/02/23/fair-use-and-the-ecstasy-of-influence-2/

124 Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It*, New York: Twelve, 2011.

125 Ibid.

greater contributions of 'Dark Money'.[126] Professor Zephyr Teachout has highlighted such problems in the political and judicial process in her book, *Corruption in America*.[127] There has been concern in that United States that copyright owners have been trying to curtail the sweeping defence of fair use in the debates over the reform of copyright law.[128] The language of 'fair use creep' has been deployed by copyright owners.

In *Moral Panics and The Copyright Wars*, William Patry said that 'the current piracy campaign is intended to create a negative association with all acts not authorized by copyright owners, including uses that are clearly fair use and therefore, lawful, such as non-commercial copying for personal use.'[129] He emphasized how copyright owners sought to confine and limit the scope of copyright exceptions. In his book, *How to Fix Copyright*, William Patry again highlighted the moral panic over fair use promoted by the copyright industries.[130] He said that 'the rhetorical device of turning fair use into a moral panic is made by those who oppose adapting copyright to the digital era.'[131] Patry commented: 'Fair use thus serves as a classic moral panic: an effort by vested interests to preserve the status quo through creating a

---

126 *Citizens United* v. *Federal Election Commission* (2010) http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/

127 Zephyr Teachout, *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United*, Cambridge (MA): Harvard University Press, 2014.

128 Parker Higgins, '"Fair Use Creep,' and Other Copyright Bogeymen, Appear in Congress', Electronic Frontier Foundation, 25 July 2013, https://www.eff.org/deeplinks/2013/07/fair-use-creep-and-other-copyright-bogeymen-appear-congress

129 William Patry, *Moral Panics and The Copyright Wars*, Oxford: Oxford University Press, 2009.

130 William Patry, *How to Fix Copyright*, Oxford: Oxford University Press, 2012.

131 Ibid.

false enemy whom, we are told, must be vanquished for the alleged good of society as a whole.'[132]

Legacy copyright industries have sought to frustrate, delay, and block the introduction of broad copyright exceptions – such as the defence of fair use – overseas. In this context, Australia is an illustrative case study. Over a number of decades, there have been a number of policy inquiries, which have recommended the adoption of a defence of fair use under Australian copyright law. Yet, copyright owners have engaged in a concerted effort to block the adoption of such recommendations at a political level. There has been a campaign to kill and murder fair use before it has a chance to develop in Australia.

In 2014, the Australian Law Reform Commission announced the publication of its report on *Copyright and the Digital Economy*.[133] The centrepiece of the report was the proposal for the introduction of an open-ended defence of fair use for Australia. The Commission stressed:

> Fair use also facilitates the public interest in accessing material, encouraging new productive uses, and stimulating competition and innovation. Fair use can be applied to a greater range of new technologies and uses than Australia's existing exceptions. A technology-neutral open standard such as fair use has the agility to respond to future and unanticipated technologies and business and consumer practices. With fair use, businesses and consumers will develop an understanding of what sort of uses are fair and therefore permissible, and will not need to wait for the legislature to determine the appropriate scope of copyright exceptions.[134]

---

132 Ibid.

133 The Australian Law Reform Commission, *Copyright and The Digital Economy*, Sydney: the Australian Law Reform Commission, IP 42, DP 79, ALRC Report 122, 2014, http://www.alrc.gov.au/inquiries/copyright-and-digital-economy

134 Ibid.

The report emphasized that a defence of fair use would be particularly useful to address emerging trends in the digital economy – such as 3D printing, additive manufacturing, Big Data, cloud computing, and the Internet of Things (IOT). Professor Jill McKeough – who was in charge of the inquiry – has highlighted the importance of access to content under copyright law.

In response, copyright owners waged a political lobbying campaign against the introduction of a defence of fair use in copyright law. Film and Television groups – including Roadshow – and Rupert Murdoch's News Limited railed against the introduction of a defence of fair use in Australia.[135] The copyright owners engage in 'swiftboating' and accuse of the defence of fair use of being alien and foreign, uncertain and indeterminate, expansive and avaricious. The copyright owners have wanted to kill the fair use proposal stone-dead. In the election year of 2013, Village Roadshow – the makers of the Lego Movie and Mad Max – made substantial contributions, both to the Liberal Party of Australia, and the Australian Labor Party.[136] The film company has pushed for greater rights and remedies for copyright owners; and limits upon the operation of copyright exceptions. The new Attorney-General George Brandis has long been a supporter of a copyright maximalist position. He worked closely with the copyright industry in considering the question of copyright law reform in

[135] Australian Screen Association et al., 'Australian Film/ TV Bodies ALRC Discussion Paper Submission', August 2013, http://www.alrc.gov.au/sites/default/files/subs/739._org_australian_film__tv_bodies.pdf and News Limited, 'Submission to ALRC Issues Paper: Copyright and the Digital Economy', 30 November 2012, http://www.alrc.gov.au/sites/default/files/subs/224._org_newslimited.pdf

[136] Denham Salder, 'A Movie Company Spent Big on Both Sides of Australian Politics', *Vice*, 4 February 2015, http://www.vice.com/en_au/read/a-movie-company-spent-big-on-both-sides-of-australian-politics

Australia. Freedom of information requests by Josh Taylor revealed that the Attorney-General George Brandis had consulted narrowly with copyright owners, such as Village Roadshow and Foxtel – but had snubbed consumer groups, internet service providers, and public interest groups.[137]

Sympathetic to the concerns of copyright owners, the Attorney-General George Brandis dismissed the introduction of a defence of fair use into Australia out of hand.[138] He suggested: 'These recommendations will no doubt be controversial and the Government will give them very careful consideration.'[139] Brandis was particularly concerned about enhancing the rights and remedies of copyright owners: 'We are particularly concerned to ensure that no prejudice is caused to the interests of rights holders and creators, whether the proposed fair use exception offers genuine advantages over the existing fair dealing provisions and that any changes maintain and, where possible, increase incentives to Australia's creative content producers.'[140] He maintained: 'Without strong, robust copyright laws, they are at risk of being cheated of the fair compensation for their creativity, which is their due.'[141] Brandis insisted: 'It is the Government's strong view that the fundamental principles of intellectual property law that protect the rights of content creators have not changed, merely because of the

---

137 Josh Taylor, 'Brandis Snubbed Consumer Groups, ISPs in Piracy Debate', *ZDNet*, 23 February 2015, http://www.zdnet.com/article/brandis-snubbed-consumer-groups-isps-in-piracy-debate/

138 Senator George Brandis, 'Statement to the Senate – Tabling of ALRC Report on Copyright and the Digital Economy', the Australian Law Reform Commission, 14 February 2014, http://www.attorneygeneral.gov.au/Speeches/Pages/2014/First%20Quarter%202014/13February2014-TablingofALRCReportonCopyrightandtheDigitalEconomy.aspx

139 Ibid.

140 Ibid.

141 Ibid.

emergence of new media and platforms.'[142] He observed: 'In this changing digital world, we must look for the opportunities, but in reviewing the intellectual property laws, the Government has no intention of lessening rights of content creators to protect and benefit from their intellectual property.'[143]

At estimates in December 2014, Senator Jacinta Collins of the Australian Labor Party questioned the Attorney-General about what, if any, progress had been made in respect of copyright law reform.[144] She asked: 'Can you advise us on what progress has occurred since February?'[145] Senator George Brandis responded:

> It is under consideration by government. The online piracy issue has been identified as a specific area of reform within the broader topic of overall reform of the Copyright Act, and the effort and public discussion in relation to copyright reform in the past year have been largely focused on that particular topic. Broader reform of the Copyright Act is a matter for the future.[146]

Senator Jacinta Collins pointed out that copyright enforcement was outside the terms of reference of the inquiry: 'That topic was not really covered by the Law Reform Commission report, was it?'[147] Senator Brandis refused to give an indication of the time frame for the main

---

142 Ibid.

143 Ibid.

144 Senator Jacinta Collins and Senator George Brandis, 'Estimates', Senate Legal and Constitutional Affairs Committee, Canberra: Australian Parliament, 11 December 2014, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fb618c869-ff52-46ed-9acb-973c99e289a9%2F0005%22

145 Ibid.

146 Ibid.

147 Ibid.

areas of the Government response to the Australian Law Reform Commission report.[148] He said: 'The question of the fair use exemption is as, if you follow this area, you would know, one of the more vexed debates.'[149] Avoiding the question, the Attorney-General said: 'Whether we have a general fair use exemption or whether we have more particular categories of exemption, my views are as I expressed them to be.'[150]

Instead of fashioning a copyright defence of fair use, or even making reforms to current copyright exceptions, the Attorney-General George Brandis has pushed for the introduction of a new copyright code, governing intermediary liability in respect of Australian copyright law. A draft Copyright Notice scheme has been developed. There has been much disquiet about the operation of the new 'Three Strikes' copyright crackdown by commentators such as Adam Turner, Claire Reilly, David Swan, and Josh Taylor.[151] Jeremy Malcolm, an Australian policy analyst working with the Electronic Frontier Foundation, makes the point:

---

148 Ibid.

149 Ibid.

150 Ibid.

151 Adam Turner, 'ISPs to Dob in Movie Pirates Under Proposed Three-Strikes Rule', *The Sydney Morning Herald*, 21 February 2015, http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/isps-to-dob-in-movie-pirates-under-proposed-threestrikes-rule-20150220-13kc2c.html Claire Reilly, '"Censorship by Internet Filter": Industry Reacts to Proposed Piracy Laws', *CNet*, 10 December 2014, http://www.cnet.com/au/news/censorship-internet-filter-industry-reacts-to-proposed-piracy-laws/ David Swan, 'ISPs, Rights Holders Band Together to Block Piracy', *Technology Spectator*, 20 February 2015, http://www.businessspectator.com.au/news/2015/2/20/technology/isps-rights-holders-band-together-block-piracy and Josh Taylor, 'Three-Strike Piracy Code Draft Targets Residential Internet Users', *ZDNet*, 20 February 2015, http://www.zdnet.com/article/isps-and-rights-holders-release-draft-anti-piracy-code/

> Meanwhile, as Australia fusses around with policing copyright against Internet users in a likely vain attempt to curtail piracy, it is missing the opportunity to make a much longer-term investment in the country's technological future. Back when Australia's Attorney General first began talking about instituting a graduated response regime, he also passed up the chance to embrace the Australian Law Reform Commission's recommendation that fair use be added to copyright law. In Fair Use Week, it bears asking—is the adoption of a copycat graduated response scheme that has failed elsewhere in the world really going to do more for homegrown creativity and innovation than embracing fair use?[152]

In addition, the Attorney-General George Brandis and the Coalition Government have been supportive of the introduction of Data Retention regime. There has been concern that such data could also be deployed in copyright disputes – whether by copyright owners in civil disputes, or law enforcement agencies like the Police in criminal disputes.

Digital locks – known by the jargon 'technological protection measures' – also pose a significant threat to copyright exceptions, such as the defence of fair dealing, and the defence of fair use. Corynne McSherry of the Electronic Frontier Foundation observes: 'Fair use has been under assault for decades, thanks to laws like Section 1201 of the DMCA, which makes it illegal to bypass a technical protection measure under most circumstances even if your conduct is an otherwise lawful fair use.'[153] In his book, *Information Doesn't Want to Be Free: Laws for the Internet Age*, Cory Doctorow highlights the folly of digital locks, technological

---

[152] Jeremy Malcolm, 'Australia's Proposed Copyright Alert System Allows Rightsholders to Spy on Users', Electronic Frontier Foundation, 24 February 2015, https://www.eff.org/deeplinks/2015/02/australias-proposed-copyright-alert-system-allows-rightsholders-spy-users

[153] Corynne McSherry, 'Fair Use Is Not An Exception to Copyright, It's Essential to Copyright', Electronic Frontier Foundation, 21 January 2015, https://www.eff.org/deeplinks/2015/01/fair-use-not-exception-copyright-its-essential-copyright

protection measures, and copy protection.[154] He discusses the collateral impact of digital locks upon creativity, innovation, and freedom of speech. Doctorow has started Apollo 1201 with Electronic Frontier Foundation as a Moon-Shot project to rid the world of digital rights management.[155] He maintains: 'We all deserve a better future—one without DRM.'[156]

Contract law also poses a significant threat to copyright exceptions. In the Australian debate, film and Television groups – including Roadshow – have maintained that they should be able to contract out of copyright exceptions, as part of the operation of the marketplace.[157]

International treaties also pose a real and dangerous threat to copyright exceptions and access to knowledge. On the 12th February 2015, Senator Scott Ludlam of the Australian Greens expressed concerns in the Australian Parliament that Australia's copyright exceptions would be affected by the *Trans-Pacific Partnership*:

> We effectively imported some of the worst aspects of US IP law, without their protections. The US has fair-use clauses, which mean that you cannot be prosecuted under US intellectual property law for doing stuff that is quite clearly not impinging on profits—commercial-scale piracy and that kind of

---

154 Cory Doctorow, *Information Doesn't Want to Be Free: Laws for the Internet Age*, McSweeney's, 2014.

155 Electronic Frontier Foundation, 'Cory Doctorow Rejoins EFF to Eradicate DRM Everywhere: Longtime Digital Rights Champion to Liberate Users from Digital Locks that Restrict Our Tech', Press Release, 20 January 2015, https://www.eff.org/press/releases/cory-doctorow-rejoins-eff-eradicate-drm-everywhere

156 Ibid.

157 Australian Screen Association et al., 'Australian Film/ TV Bodies ALRC Discussion Paper Submission', August 2013, http://www.alrc.gov.au/sites/default/files/subs/739._org_australian_film__tv_bodies.pdf

> stuff. In Australia the situation is very much unclear, and it appears that the Trans-Pacific Partnership, from what we know of the IP chapters, will make that situation much worse.[158]

Ludlam is also concerned that copyright owners will deploy investor-state dispute settlement against the introduction of copyright reforms. He fears: 'If we sign up to the *Trans-Pacific Partnership*, which then embeds all kinds of property rights that did not exist before, for the rights holders—if this parliament then decided to do as the Australian Law Reform Commission recommended and institute a fair-use regime, that could be struck down by unelected trade bureaucrats in a tribunal, and the Australian government might choose to not even contest what would likely be a very expensive and extensive arbitral process.' [159] Ludlam expressed his concerns that the threat of investor actions could have a chilling effect upon progressive copyright reform in Australia.

Far from being a privilege only available in the United States and a few countries, fair use should become the norm and the standard in Australia, the Pacific Rim, and across the world. The integrity of fair use needs to be further protected from collateral attacks from political lobbyists; intermediary copyright law; technological protection measures; and contract law. Fair use needs to be able to flourish and grow, without political interference or legal sabotage.

---

158 Senator Scott Ludlam, 'Second Reading Speech on the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014', Canberra: Australian Senate, 12 February 2015, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2Fedffdf80-0ad5-47c0-9014-6e9c4b144774%2F0010%22

159 Ibid.

Recommendation 4

The Australian Parliament should implement the Australian Law Reform Commission's recommendations in respect of copyright exceptions.

5. The IT Pricing Inquiry and the Harper Competition Policy Review

Although the Coalition Government emphasized that timely access to affordable copyright content was key to addressing copyright infringement, the policy package provides no legislative or administrative proposals to address that issue. Turnbull sought to explain why the Coalition Government had not responded to the IT Pricing inquiry: 'The Inquiry raised significant public awareness of the issue of price disparity and brought to the attention of Australians a range of options and opportunities available to level the playing field.'[160] He noted: 'The Government agrees that Australian consumers should be empowered to seek out goods and services at the best available price, consistent with the measures being introduced for online copyright.'[161] Turnbull observed that 'there are also a number of other processes underway within Government including the Competition Policy Review (the Harper Review)[162] and the Government's consideration of its response to the Australian Law Reform Commission's report into Copyright in the Digital Economy.'[163] While the Coalition Government has deferred its response to the IT Pricing inquiry, it has rushed ahead with its proposals to enhance the rights and remedies of copyright owners.[164]

---

[160] Malcolm Turnbull, 'Online Copyright Infringement FAQs', 2014, http://www.malcolmturnbull.com.au/policy-faqs/online-copyright-infringement-faqs

[161] Ibid.

[162] Ian Harper, Peter Anderson, Sue McCluskey, and Michael O'Bryan, *Competition Policy Review*, Canberra: Treasury, 31 March 2015, http://competitionpolicyreview.gov.au/final-report/

[163] The Australian Law Reform Commission, *Copyright and The Digital Economy*, Sydney: the Australian Law Reform Commission, IP 42, DP 79, ALRC Report 122, 2014, http://www.alrc.gov.au/inquiries/copyright-and-digital-economy

[164] House Standing Committee on Infrastructure and Communications, *At what Cost? IT Pricing and the Australia Tax - Inquiry into IT Pricing*, Canberra: Australian Parliament, 29 July 2013, http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itprici

In his second reading speech, Turnbull highlighted the importance of access to affordable and timely content:

> In conclusion, in combating online copyright infringement the most powerful weapon that rights holders have is to provide access to their content in a timely and affordable way. The government accepts that this is an important element in any package of measures to address online copyright infringement. The government also welcomes recent action by rights holders and expects industry to continue to respond to this demand from consumers in the digital market. The bill complements these objectives by ensuring there is fair protection of the rights of content creators while balancing other competing interests in the online environment. [165]

Yet, the copyright bill does not absolutely nothing to achieving the objective of providing for access to affordable and timely content. As such, the bill utterly fails to provide for a 'balance' of competing interests in the online environment.

ACCAN is concerned about the lack of action in respect of providing affordable and timely access to copyright content. Teresa Corbin commented: 'Ultimately market solutions that provide affordable, available content to Australian consumers will have the biggest impact on piracy.' [166] She noted: 'CHOICE commissioned research has found that the top reasons

---

[165] The Hon. Malcolm Turnbull, 'Second Reading Speech on the *Copyright Amendment (Online Infringement) Bill* 2015 (Cth)', Hansard, the House of Representatives, the Australian Parliament, 26 March 2015, 28.

[166] ACCAN, 'Copyright Code will Streamline "Speculative Invoicing"', Press Release, 8 April 2015, http://www.accan.org.au/news-items/media-releases/1036-copyright-code-will-streamline-speculative-invoicing-accan

consumers download pirated content are all related to a lack of access to affordable content.'[167]

Notably, the Harper Review has called for scrutiny of the intellectual property regime in light of anti-competitive practices by intellectual property owners.[168] The Harper Review highlighted intellectual property as a priority for law reform.[169] The Harper Review commented:

> Disruptive technologies, especially digital technologies, are a pervasive force for change in the Australian economy. New technologies foster innovation, which in turn drives growth in living standards. Access to and creation of intellectual property (IP) will become increasingly important as Australia moves further into the digital age. Australians are enthusiastic adopters and adapters of new technology. We stand to benefit greatly by exploiting technology to its full extent in our business production processes and as end-consumers. Our IP policy settings should encourage this.[170]

The Harper Review warned: 'Excessive IP protection can not only discourage adoption of new technologies but also stifle innovation'.[171] Harper Review recommended: 'Given the

---

167 Ibid.

168 Ian Harper, Peter Anderson, Sue McCluskey, and Michael O'Bryan, *Competition Policy Review*, Canberra: Treasury, 31 March 2015, http://competitionpolicyreview.gov.au/final-report/ and Rohan Pearce, 'Harper Review Calls for Scrutiny of Intellectual Property Regime: Competition Policy Review Recommends Productivity Inquiry into IP', *Computer World*, 1 April 2015, http://www.computerworld.com.au/article/571739/harper-review-calls-scrutiny-intellectual-property-regime/

169 Ian Harper, Peter Anderson, Sue McCluskey, and Michael O'Bryan, *Competition Policy Review*, Canberra: Treasury, 31 March 2015, http://competitionpolicyreview.gov.au/final-report/

170 Ibid., 40.

171 Ibid., 40.

influence of Australia's IP rights on facilitating (or inhibiting) innovation, competition and trade, the Panel believes the IP system should be designed to operate in the best interests of Australians.'[172]

The Harper Review flagged concerns about the lack of proper guiding principles behind Australia's intellectual property regimes – both in terms of domestic policy-making and international negotiations: 'The Panel is concerned that Australia has no overarching IP policy framework or objectives guiding changes to IP protection or approaches to IP rights in the context of negotiations for international trade agreements.'[173] Recommendation 6 of the report called for an Intellectual Property Review:

> The Australian Government should task the Productivity Commission to undertake an overarching review of intellectual property. The Review should be a 12-month inquiry. The review should focus on: competition policy issues in intellectual property arising from new developments in technology and markets; and the principles underpinning the inclusion of intellectual property provisions in international trade agreements. A separate independent review should assess the Australian Government processes for establishing negotiating mandates to incorporate intellectual property provisions in international trade agreements. Trade negotiations should be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed intellectual property provisions. Such an analysis should be undertaken and published before negotiations are concluded.[174]

---

172 Ibid., 40.

173 Ibid., 40.

174 Ibid., 41.

Moreover, the Harper Panel argued that intellectual property needed greater oversight from competition regulators. Recommendation 7 called for an end to the intellectual property exception: 'Subsection 51(3) of the *Competition and Consumer Act* should be repealed.'[175]

Recommendation 13 called for a removal of restriction on Parallel Imports:

> Restrictions on parallel imports should be removed unless it can be shown that: the benefits of the restrictions to the community as a whole outweigh the costs; and the objectives of the restrictions can only be achieved by restricting competition. Consistent with the recommendations of recent Productivity Commission reviews, parallel import restrictions on books and second-hand cars should be removed, subject to transitional arrangements as recommended by the Productivity Commission. Remaining provisions of the *Copyright Act* 1968 that restrict parallel imports, and the parallel importation defence under the *Trade Marks Act* 1995, should be reviewed by an independent body, such as the Productivity Commission.[176]

It remains to be seen whether the Abbott Government will have the appetite to finish the reforms started by Richard Alston in respect of the removal of parallel importation restrictions.

Recommendation 31 of the Harper Review considered the issue of Price Discrimination:

> A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the Panel's recommended revisions to section 46 (see Recommendation 30)). Attempts to prohibit international price discrimination should not be

175 Ibid., 42.

176 Ibid., 48.

> introduced into the CCA on account of significant implementation and enforcement complexities and the risk of negative unintended consequences. Instead, the Panel supports moves to address international price discrimination through market solutions that empower consumers. These include removing restrictions on parallel imports (see Recommendation 13) and ensuring that consumers are able to take lawful steps to circumvent attempts to prevent their access to cheaper legitimate goods.[177]

The Panel supports 'moves to address international price discrimination through market solutions that empower consumers'.[178] The Panel called for 'removing restrictions on parallel imports and ensuring that consumers are able to take legal steps to circumvent attempts to block their access to cheaper legitimate goods.'[179]

It is concerning that the Coalition Government has rushed ahead with the copyright crackdown measures, while failing to address long outstanding concerns in respect of IT Pricing and Competition policy. The danger will be that the combination of the website-blocking power and the Copyright Code will further exacerbate problems in respect of intellectual property monopolies, consumer rights, and competition policy in Australia.

Recommendation 5

The Australian Parliament should implement the recommendations of the IT Pricing Inquiry and the Harper Competition Review in respect of intellectual property, consumer rights, and competition policy.

177 Ibid., 355.

178 Ibid., 354.

179 Ibid., 354.

Conclusion: The Future of the Internet

It will be interesting to see what the Australian Senate will make of the Coalition Government's proposals in respect of a copyright crackdown in 2015. Mark Gregory was worried about the larger policy dynamics of the copyright bill and the accompanying copyright code:

> The bill put forth by the government is a shallow attempt to prop up a failed business model that a foreign industry of dinosaurs clings to. It's an unprecedented attempt to support the US media industry over the rights and aspirations of Australian taxpayers. A far better solution would be for the government to invest in helping the local media industry move to a new business model that is more in tune with the modern digital economy. [180]

The Australian Senate has been compared to the Star Wars' Cantina — such is its diversity and variety. Much will depend upon cross-benchers like Nick Xenophon, the Palmer United Party, Family First, the Liberal Democratic Party, and various micro-parties and independents.

The Coalition Government's copyright proposals will further enhance the private power of copyright owners in respect of the governance of the Internet. Bernard Keane worries: 'We've thus arrived at the fully fledged war on the internet by this government that some of us have long been predicting, a war motivated by commercial interests and the never-satisfied greed of security agencies for more powers of surveillance and control, and a deep and abiding fear of what citizens will do with communications technology that is no longer

[180] Mark Gregory, 'Abbott's Copyright Kowtow A Step Backwards', *Technology Spectator*, 1 April 2015, http://www.businessspectator.com.au/article/2015/4/1/technology/abbotts-copyright-kowtow-step-backwards

controlled by governments.'[181] This is disturbing. The Internet will be increasingly subject to the rule of private sovereigns.

The Electronic Frontier Foundation has highlighted the adverse impact of content-blocking on the goal of an Open and Free Internet:

> Governments around the world block access to online content for a variety of reasons: to shield children from obscene content, to prevent access to copyright-infringing material or confusingly named domains, or to protect national security. From democratic nations such as India, Turkey, and South Korea to states with authoritarian regimes, governments are implementing extensive filtering regimes with varying degrees of transparency and consistency. There are various methods used to block content online. Government actors can block or tamper with domain names, filter and block specific keywords, block a particular IP address, or urge online content providers to remove content or search results.[182]

Jeremy Malcolm from the Electronic Frontier Foundation highlighted that censoring the web is not a solution for social problems.[183] He observed that 'it seems to be that it's politically better for governments to be seen as doing something to address such problems, no matter how token and ineffectual, than to do nothing—and website blocking is the easiest "something" they can do'.[184] Jeremy Malcolm warns: 'But not only is blocking not effective, it is actively harmful—both at its point of application due to the risk of over-blocking, but

---

[181] Bernard Keane, 'Government's Full-Blown War on the Internet is Here at Last', *Crikey News*, 11 December 2014, http://www.crikey.com.au/2014/12/11/governments-full-blown-war-on-the-internet-is-here-at-last/?wpmp_switcher=mobile&wpmp_tp=0

[182] Electronic Frontier Foundation, 'Content-Blocking', https://www.eff.org/issues/content-blocking

[183] Jeremy Malcolm, 'Censoring the Web Isn't the Solution to Terrorism or Counterfeiting – It's the Problem', Electronic Frontier Foundation, 25 November 2014, https://www.eff.org/deeplinks/2014/11/censoring-web-isnt-solution-terrorism-or-counterfeiting-its-problem

[184] Ibid.

also for the Internet as a whole, in the legitimization that it offers to repressive regimes to censor and control content online.'[185]

As Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet — rather than a copyright crackdown.[186]

[185] Ibid.

[186] Tim Berners-Lee, 'A Magna Carta for the Web', March 2014, http://www.ted.com/talks/tim_berners_lee_a_magna_carta_for_the_web?language=en

Biography

Dr Matthew Rimmer is taking up the position of Professor in Intellectual Property and Innovation Law at the Queensland University of Technology (QUT) in 2nd Semester, 2015.

Dr Matthew Rimmer is an Australian Research Council Future Fellow, working on Intellectual Property and Climate Change. He is an associate professor at the ANU College of Law, and an associate director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). He holds a BA (Hons) and a University Medal in literature, and a LLB (Hons) from the Australian National University. Rimmer received a PhD in law from the University of New South Wales for his dissertation on The Pirate Bazaar: The Social Life of Copyright Law. He is a member of the ANU Climate Change Institute. Rimmer has published widely on copyright law and information technology, patent law and biotechnology, access to medicines, clean technologies, plain packaging of tobacco products, and traditional knowledge. His work is archived at SSRN Abstracts and Bepress Selected Works.

Rimmer is the author of *Digital Copyright and the Consumer Revolution: Hands off my iPod* (Edward Elgar, 2007). With a focus on recent US copyright law, the book charts the consumer rebellion against the *Sonny Bono Copyright Term Extension Act* 1998 (US) and the *Digital Millennium Copyright Act* 1998 (US). Rimmer explores the significance of key judicial rulings and considers legal controversies over new technologies, such as the iPod, TiVo, Sony Playstation II, Google Book Search, and peer-to-peer networks. The book also highlights cultural developments, such as the emergence of digital sampling and mash-ups, the construction of the BBC Creative Archive, and the evolution of the Creative Commons.

Rimmer has also participated in a number of policy debates over Film Directors' copyright, the *Australia-United States Free Trade Agreement* 2004, the *Copyright Amendment Act* 2006 (Cth), the *Anti-Counterfeiting Trade Agreement* 2011, and the *Trans-Pacific Partnership*. He has been an advocate for Fair IT Pricing in Australia.

Rimmer is the author of *Intellectual Property and Biotechnology: Biological Inventions* (Edward Elgar, 2008). This book documents and evaluates the dramatic expansion of intellectual property law to accommodate various forms of biotechnology from micro-organisms, plants, and animals to human genes and stem cells. It makes a unique theoretical contribution to the controversial public debate over the commercialisation of biological inventions. Rimmer also edited the thematic issue of Law in Context, entitled *Patent Law and Biological Inventions* (Federation Press, 2006). Rimmer was also a chief investigator in an Australian Research Council Discovery Project, "Gene Patents In Australia: Options For Reform" (2003-2005), an Australian Research Council Linkage Grant, "The Protection of Botanical Inventions (2003), and an Australian Research Council Discovery Project, “Promoting Plant Innovation in Australia” (2009-2011). Rimmer has participated in inquiries into plant breeders' rights, gene patents, and access to genetic resources.

Rimmer is a co-editor of a collection on access to medicines entitled *Incentives for Global Public Health: Patent Law and Access to Essential Medicines* (Cambridge University Press, 2010) with Professor Kim Rubenstein and Professor Thomas Pogge. The work considers the intersection between international law, public law, and intellectual property law, and highlights a number of new policy alternatives – such as medical innovation prizes, the Health Impact Fund, patent pools, open source drug discovery, and the

philanthropic work of the (Red) Campaign, the Gates Foundation, and the Clinton Foundation. Rimmer is also a co-editor of *Intellectual Property and Emerging Technologies: The New Biology* (Edward Elgar, 2012).

Rimmer is a researcher and commentator on the topic of intellectual property, public health, and tobacco control. He has undertaken research on trade mark law and the plain packaging of tobacco products, and given evidence to an Australian parliamentary inquiry on the topic.

Rimmer is the author of a monograph, *Intellectual Property and Climate Change: Inventing Clean Technologies* (Edward Elgar, September 2011). This book charts the patent landscapes and legal conflicts emerging in a range of fields of innovation – including renewable forms of energy, such as solar power, wind power, and geothermal energy; as well as biofuels, green chemistry, green vehicles, energy efficiency, and smart grids. As well as reviewing key international treaties, this book provides a detailed analysis of current trends in patent policy and administration in key nation states, and offers clear recommendations for law reform. It considers such options as technology transfer, compulsory licensing, public sector licensing, and patent pools; and analyses the development of Climate Innovation Centres, the Eco-Patent Commons, and environmental prizes, such as the L-Prize, the H-Prize, and the X-Prizes. Rimmer is currently working on a manuscript, looking at green branding, trade mark law, and environmental activism.

Rimmer has also a research interest in intellectual property and traditional knowledge. He has written about the misappropriation of Indigenous art, the right of resale, Indigenous performers' rights, authenticity marks, biopiracy, and population genetics. Rimmer is the

editor of the collection, *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015, forthcoming).

Rimmer has supervised four students who have completed Higher Degree Research on the topics, ‘Secret Business and Business Secrets: The Hindmarsh Island Affair, Information Law, and the Public Sphere’ (2007); ‘Intellectual Property and Applied Philosophy’ (2010); 'The Pharmacy of the Developing World: Indian Patent Law and Access to Essential Medicines' (2012); and 'Marine Bioprospecting: International Law, Indonesia and Sustainable Development' (2014). He has also supervised sixty-seven Honours students, Summer Research Scholars, and Interns, and two graduate research unit Masters students.