

## THE GAME OF CLONES AND THE AUSTRALIA TAX: DIVERGENT VIEWS ABOUT COPYRIGHT BUSINESS MODELS AND THE WILLINGNESS OF AUSTRALIAN CONSUMERS TO INFRINGE

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### I INTRODUCTION

It is often said that Australia is a world leader in rates of copyright infringement for entertainment goods. In 2012, the hit television ('TV') show, *Game of Thrones*, was by some figures the most downloaded television show over BitTorrent, and estimates suggest that Australians accounted for a plurality of approximately 10 per cent of the 3–4 million downloads each week.<sup>1</sup> The season finale of 2013 was downloaded over a million times within 24 hours of its release, and again Australians were apparently the largest block of illicit downloaders over BitTorrent, despite our relatively small population.<sup>2</sup> This trend has led the former United States Ambassador to Australia to implore Australians to stop 'stealing' digital content,<sup>3</sup> and rightsholders to push for increasing sanctions on copyright infringers. The Australian Government is looking to respond by requiring Internet Service Providers ('ISPs') to issue warnings and potentially punish consumers who are alleged by industry groups to have

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1 Ernesto, 'Who's Pirating *Game of Thrones*, and Why?' on *TorrentFreak* (20 May 2012) <<http://torrentfreak.com/whos-pirating-game-of-thrones-and-why-120520/>>.

2 Ernesto, 'Games of Thrones Season Finale Sets New Piracy Record' on *TorrentFreak* (10 June 2013) <<http://torrentfreak.com/games-of-thrones-season-finale-sets-new-piracy-record-130610/>>.

3 Jeffrey Bleich, *Stopping the Game of Clones* (23 April 2013) Facebook <<https://facebook.com/notes/ambassador-bleich/stopping-the-game-of-clones/542850132425361>>.

infringed copyright.<sup>4</sup> This is the logical next step in deterring infringement, given that the operators of infringing networks (like The Pirate Bay, for example) are out of regulatory reach. This steady ratcheting up of the strength of copyright, however, comes at a significant cost to user privacy and autonomy,<sup>5</sup> and while the decentralisation of enforcement reduces costs, it also reduces the due process safeguards provided by the judicial process.<sup>6</sup>

This article presents qualitative evidence that substantiates a common intuition: one of the major reasons that Australians seek out illicit downloads of content like Game of Thrones in such numbers is that it is more difficult to access legitimately in Australia.<sup>7</sup> The geographically segmented way in which copyright is exploited at an international level has given rise to a ‘tyranny of digital distance’, where Australians have less access to copyright goods than consumers in other countries.<sup>8</sup> Compared to consumers in the United States (‘US’) and the European Union (‘EU’), Australians pay more for digital goods,<sup>9</sup> have less choice in distribution channels,<sup>10</sup> are exposed to substantial delays in access,<sup>11</sup> and are sometimes denied access completely.<sup>12</sup> In this article we focus our analysis on premium film and television offerings, like Game of Thrones, and through semi-structured interviews, explore how choices in distribution impact on the willingness of Australian consumers to seek out infringing copies of copyright material. Game of Thrones provides an excellent case study through which to frame this analysis: it is both one of the least legally accessible

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- 4 Attorney-General George Brandis, ‘A Practical Look at Copyright Reform Forum’ (Speech delivered at the Opening of the Australian Digital Alliance Fair Use for the Future, Canberra, 14 February 2014) <<http://www.attorneygeneral.gov.au/Speeches/Pages/2014/First%20Quarter%202014/14February2014-openingoftheAustralianDigitalAllianceForum.aspx>>; see also Lexi Metherell, ‘Attorney-General George Brandis Considers Copyright Law Changes to Target Internet Piracy’ on *ABC Online* (15 February 2014) <<http://www.abc.net.au/news/2014-02-14/george-brandis-federal-government-to-target-internet-piracy/5261404>>.
  - 5 See Julie E Cohen, ‘Pervasively Distributed Copyright Enforcement’ (2006) 95 *Georgetown Law Journal* 1, 39–41.
  - 6 See Nicolas Suzor and Brian Fitzgerald, ‘The Legitimacy of Graduated Response Schemes in Copyright Law’ (2011) 34 *University of New South Wales Law Journal* 1, 17.
  - 7 See Adam Turner, ‘Foxtel Game of Thrones Deal Blocks iTunes/Quickflix Fast-Tracking’ on *Hydrapinion* (19 April 2013) <<http://www.hydrapinion.com/index.php/play/2013/04/19/foxtel-game-of-thrones-deal>>; John Birmingham, ‘Goodbye, Foxtel – Your Game of Thrones Stand Makes it Hodor to Stay’, *The Sydney Morning Herald* (online), 4 February 2014 <<http://www.smh.com.au/comment/blogs/blunt-instrument/goodbye-foxtel--your-game-of-thrones-stand-makes-it-hodor-to-stay-20140203-31xgw.html>>.
  - 8 Tama Leaver, ‘Watching Battlestar Galactica in Australia and the Tyranny of Digital Distance’ (2008) 126 *Media International Australia, Incorporating Culture & Policy* 145, 153.
  - 9 House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *At What Cost? IT Pricing and the Australia Tax* (2013) 17–18 (‘*IT Pricing Inquiry*’).
  - 10 Angela Daly, ‘Aussies Are Still Paying over the Odds and It’s Time for ACCC Action’ on *The Conversation* (16 June 2014) <<https://theconversation.com/aussies-are-still-paying-over-the-odds-and-it-time-for-accs-action-27920>>.
  - 11 Jordi McKenzie and W D Walls, ‘File-sharing and Film Revenues: An Empirical Analysis’ (Working Paper, School of Economics, The University of Sydney, 24 July 2013) 12–13.
  - 12 Josh Taylor, ‘Netflix’s Australian Block Keeps Quickflix Going’ on *ZDNet* (1 March 2013) <<http://www.zdnet.com.au/netflixs-australian-block-keeps-quickflix-going-7000012006/>>.

television offerings and one of the most downloaded through file-sharing networks of recent times. Our analysis shows that at the same time as rightsholder groups, particularly in the film and television industries, are lobbying for stronger laws to counter illicit distribution,<sup>13</sup> the business practices of their member organisations are counterproductively increasing incentives for consumers to infringe.

The lack of accessibility and high prices of copyright goods in Australia leads to substantial economic waste. The unmet consumer demand means that Australian consumers are harmed by lower access to information and entertainment goods than consumers in other jurisdictions. The higher rates of infringement that fulfils some of this unmet demand increases enforcement costs for copyright owners and imposes burdens either on our judicial system or on private entities – like ISPs – who may be tasked with enforcing the rights of third parties. Most worryingly, the lack of convenient and cheap legitimate digital distribution channels risks undermining public support for copyright law. Our research shows that consumers blame rightsholders for failing to meet market demand, and this encourages a social norm that infringing copyright, while illegal, is not morally wrongful.

The implications are as simple as they are profound: Australia should not take steps to increase the strength of copyright law at this time, at least in relation to the film and television industries. The interests of the public and those of rightsholders align better when there is effective competition in distribution channels and consumers can legitimately get access to content. While foreign rightsholders are seeking enhanced protection for their interests, increasing enforcement is likely to increase their ability to engage in lucrative geographical price discrimination, particularly for premium content. This is only likely to increase the degree to which Australian consumers feel that their interests are not being met and, consequently, to further undermine the legitimacy of copyright law. If consumers are to respect copyright law, increasing sanctions for infringement without enhancing access and competition in legitimate distribution channels could be dangerously counterproductive.<sup>14</sup> We suggest that rightsholders' best strategy for addressing infringement in Australia at this time is to ensure that Australians can access copyright goods in a timely, affordable, convenient, and fair lawful manner.

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13 Josh Taylor, 'Film Lobby Emails Detail Persistence for Copyright Crackdown' on *ZDNet* (11 April 2014) <<http://www.zdnet.com/film-lobby-emails-detail-persistence-for-copyright-crackdown-7000028324/>>.

14 Nicolas Suzor, 'Free-riding, Cooperation, and "Peaceful Revolutions" in Copyright' (2014) 28 *Harvard Journal of Law & Technology* 137.

## II THE TYRANNY OF DIGITAL DISTANCE

Australia has long suffered from a ‘tyranny of distance’;<sup>15</sup> our remote location means that imported physical goods are necessarily more expensive and more difficult to access than in other countries. For physical copyright goods (books, music, films, recorded broadcasts, and computer software), parallel importation laws also increased prices for consumers.<sup>16</sup> These restrictions, designed to insulate local markets from competition from larger producers,<sup>17</sup> also had the effect of prohibiting arbitrage and allowing a regime of regional pricing<sup>18</sup> that allowed copyright owners to charge Australian consumers higher prices for copyright works.<sup>19</sup> Because we are a relatively wealthy nation, with a high minimum<sup>20</sup> and average<sup>21</sup> wage, the distributors who have been able to limit arbitrage have often been able to increase prices in Australia relative to other countries.<sup>22</sup>

It is commonly understood that removing restrictions on parallel importation increases national welfare by reducing the deadweight loss accruing from market segmentation and monopoly pricing, as well as transforming economic rents of foreign companies into domestic consumer surplus.<sup>23</sup> In its recent report recommending the repeal of parallel importation restrictions on books (the last remaining restrictions), the Productivity Commission summarised the effect of parallel importation restrictions as imposing ‘a private, implicit tax on Australian consumers which is used largely to subsidise foreign copyright holders.’<sup>24</sup>

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- 15 Geoffrey Blainey, *The Tyranny of Distance: How Distance Shaped Australia's History* (Sun Books, 1966); see also Ann Capling and Kim Richard Nossal, ‘Death of Distance or Tyranny of Distance? The Internet, Deterritorialization, and the Anti-Globalization Movement in Australia’ (2001) 14 *The Pacific Review* 443, 449.
- 16 Australian Competition and Consumer Commission, Submission No 260 to Productivity Commission, *Report on Copyright Restrictions on the Parallel Importation of Books*, January 2009, 6–7.
- 17 Mark J Davison, ‘Parallel Importing of Copyright Material in a Digital Age: Why It Should Be Lawful and Why It May Never Be’ (1997) 25 *Federal Law Review* 263, 270.
- 18 Theo Papadopoulos, ‘The Economic Case against Copyright Owner Control over Parallel Imports’ (2003) 6 *Journal of World Intellectual Property* 329, 353–4.
- 19 Historically, Australia’s remoteness necessarily meant that imported IP goods were more expensive here than elsewhere: see *IT Pricing Inquiry*, above n 9, 3 [1.14].
- 20 Australian Industry Group, Submission to the Fair Work Commission, *Annual Wage Review 2013–14*, 28 March 2014, 23; Damien Oliver and John Buchanan, ‘Australian Business Gets a Good Deal from the Minimum Wage’, *The Conversation* (11 June 2014) <<http://theconversation.com/australian-business-gets-a-good-deal-from-the-minimum-wage-27698>>.
- 21 Australian Industry Group, above n 20, 28–9.
- 22 Papadopoulos, ‘The Economic Case against Copyright Owner Control over Parallel Imports’, above n 18, 354. Fels and Walker note that ‘[d]ue to the import restrictions, publishers can set prices on the basis of what each market can bear rather than on the basis of the relative cost of supplying that market as would happen under competitive conditions’: Allan Fels and Jill Walker, ‘The Market for Books and the Importation Provisions of the Copyright Act 1968’ (1990) 17 *Melbourne University Law Review* 566, 572–3.
- 23 Theo Papadopoulos, ‘Copyright, Parallel Imports and National Welfare: The Australian Market for Sound Recordings’ (2000) 33 *Australian Economic Review* 337, 344.
- 24 Productivity Commission, *Restrictions on the Parallel Importation of Books* (2009) xx–xxi.

Despite this recommendation and consumer criticism,<sup>25</sup> the restrictions on importing books have largely survived, partly as a protectionist measure to safeguard local publishers,<sup>26</sup> who have expressed a fear that they will be unable to compete with larger international producers who bear reduced labour costs and benefit from larger economies of scale.<sup>27</sup> The parallel importation restrictions on music, ebooks, computer software and periodicals, however, have all been lifted.<sup>28</sup>

In the digital age, while the costs of delivering content to Australian consumers has fallen significantly, digital copyright goods remain substantially more expensive than in other countries.<sup>29</sup> There appears to be a keen awareness in Australian society that Australians are paying significantly more for access to digital goods that are delivered by the same servers over the same network infrastructure that delivers orders to consumers in other jurisdictions. Control over digital distribution channels enables foreign rightsholders to maximise their profits through regional pricing,<sup>30</sup> just as parallel importation laws did for physical goods.

This article examines the intersection of two increasingly prevalent themes surrounding access to copyright goods in Australia. On the one hand, there is a strong impression that copyright infringement is widespread and unsustainable, reinforced by the language of crisis used by industry lobbyists. On the other hand, Australian consumers are increasingly of the opinion that they are not being fairly treated by rightsholders. The disparity, colloquially known as the ‘Australia Tax’, became particularly apparent with the rise of the Australian dollar against the greenback over the last decade. The recent *IT Pricing Inquiry*, a high profile inquiry by the Australian House of Representatives Standing Committee on Infrastructure and Communications, both reflected this perception of unfairness and fuelled it by providing national media coverage to the practices of rightsholders in providing access to Australian markets.<sup>31</sup> Speaking generally, large foreign rightsholders and distributors were portrayed very poorly through the inquiry process – most notably, Apple, Microsoft, and Adobe were ultimately

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25 See, eg, Darren Osborne, ‘Book Business Is Its Own Worst Enemy’ on *ABC Online* (21 February 2011) <<http://www.abc.net.au/technology/articles/2011/02/21/3143909.htm>>.

26 Arlen Duke, ‘The Empire Will Strike Back: The Overlooked Dimension to the Parallel Import Debate’ (2014) 37 *Melbourne University Law Review* 585, 591; Lenore Taylor, ‘Labor Baulks at Book Reform’ *The Australian* (online), 12 November 2009 <<http://www.theaustralian.com.au/archive/politics/labor-baulks-at-book-reform/story-e6frgczf-1225796727872>>.

27 Australian Competition and Consumer Commission, above n 16, 5–6.

28 For sound recordings, see *Copyright Amendment Act (No 2) 1998* (Cth) as recommended in Prices Surveillance Authority, *Inquiry into the Prices of Sound Recordings* (1990) 152–3; for computer software and electronic versions of books, periodicals and sheet music, see *Copyright Amendment (Parallel Importation) Act 2003* (Cth), as recommended in Intellectual Property & Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement: Final Report* (IP Australia, 2000) 72–3.

29 *IT Pricing Inquiry*, above n 9, 18.

30 *Ibid* 91–2 [4.23]–[4.26].

31 *Ibid* 18.

compelled to give evidence after refusing to appear in public hearings.<sup>32</sup> When the inquiry was completed, the final report confirmed a commonly held belief: '[i]n many cases prices are significantly higher than what might be expected as a consequence of any costs arising from delivery in the Australian market.'<sup>33</sup>

This article explores the link between these two major themes. Our research examines the effect of the perceived failure of rightsholders and distributors to provide a fair deal for Australian consumers on the willingness of consumers to infringe. While a link between levels of access and infringement is often hypothesised and anecdotally discussed, this research provides a new qualitative exploration of how consumers justify copyright infringement and the substantial disconnect between rational, profit maximising market segmentation sanctioned by copyright law and the perceived fairness of those business practices.

### III METHODOLOGY

In order to provide a qualitative exploration of the willingness of Australian consumers to infringe copyright, Dootson conducted 29 face-to-face semi-structured<sup>34</sup> in-depth interviews.<sup>35</sup> The interviews were designed to provide insight into how consumers justified questionable and unacceptable consumption behaviours. The respondents were selected using purposive snowball sampling, where participants referred other potential participants to the researcher. This purposive non-probability sampling technique was used to ensure a broad range of views were collected in an efficient and cost-effective manner.<sup>36</sup> Respondents were then selected with respect to demographic criteria of age and gender, both of which have been found to influence perceptions of consumer behaviours.<sup>37</sup> The heterogeneity of the sample on these characteristics reflects differences in beliefs in the consumer marketplace. Only individuals living in Australia were allowed to participate, to ensure their views reflected the views found in an

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32 Spandas Lui, 'Apple, Microsoft, and Adobe Forced to Face IT Pricing Inquiry' on *ZDNet* (11 February 2013) <<http://www.zdnet.com/au/apple-microsoft-and-adobe-forced-to-face-it-pricing-inquiry-7000011103/>>.

33 *IT Pricing Inquiry*, above n 9, 3–4 [1.17].

34 Given the semi-structured nature of the interviews, all participants received the same questions from the interview guide, however, the probing and follow-up questions varied across respondents. A copy of the interview guide is available upon request.

35 The interviews lasted an average of 50 minutes and were audio recorded to enable transcription. An interview guide was used to provide structure, and follow-up and probing questions were asked to enable the researcher to expand upon the predefined questions. See Herbert J Rubin and Irene S Rubin, *Qualitative Interviewing: The Art of Hearing Data* (SAGE Publications, 2<sup>nd</sup> ed, 2005) 67.

36 William G Zikmund et al, *Marketing Research* (Cengage Learning, 2<sup>nd</sup> Asia Pacific ed, 2011).

37 See, eg, Randy L Genereux and Beverly A McLeod, 'Circumstances Surrounding Cheating: A Questionnaire Study of College Students' (1995) 36 *Research in Higher Education* 687; Joan M McMahon and Ronnie Cohen, 'Lost in Cyberspace: Ethical Decision Making in the Online Environment' (2009) 11 *Ethics and Information Technology* 1; George P Moschis and Gilbert A Churchill Jr, 'Consumer Socialization: A Theoretical and Empirical Analysis' (1978) 15 *Journal of Marketing Research* 599.

Australian marketplace. As this is not a representative sample, future research would benefit from quantitatively assessing the qualitative findings presented in this article using a probability sampling technique to enable generalisability of the results. As the purpose of the research was to explore general perceptions of deviant consumer behaviours, there was no need to restrict the sample to individuals who had experience performing the behaviours being examined.

Twenty nine Australian consumers were interviewed at which point theoretical saturation was reached, where no new information was presented.<sup>38</sup> Given the sensitive nature of the research topic, there was potential for social desirability bias, which was mitigated by guaranteeing informant anonymity and confidentiality.<sup>39</sup> While the method may be limited by its inability to generalise the findings beyond the sample, our intention here is not to provide quantitative measures of incidence or prevalence, but instead to gather deep, vivid, and nuanced information that is 'rich in thematic detail'.<sup>40</sup> A small sample is accordingly appropriate for this work.<sup>41</sup> Future research would benefit from conducting quantitative research to empirically examine the views of Australian consumers on willingness to infringe.

Table 1: Sample Characteristics

Age	Males	Females	Total
19-34	5	4	9
35-50	4	5	9
51-66	5	4	9
67+	1	1	2
	15	14	29

The interviews were designed to provide insight into how consumers justified questionable and unacceptable behaviours. The interviews included a card-sort activity, in which respondents were asked to sort a list of consumer behaviours into three pre-established categories: (1) acceptable behaviour, (2) questionable behaviour, and (3) unacceptable behaviour. Thirty consumer behaviours were chosen for the activity, two of which are relevant to this article: illegally

38 See Table 1 for sample characteristics. See also Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE Publications, 2<sup>nd</sup> ed, 1998); Steinar Kvale, *InterViews: An Introduction to Qualitative Research Interviewing* (SAGE Publications, 1996); Jane Ritchie, 'The Applications of Qualitative Methods to Social Research' in Jane Ritchie and Jane Lewis (eds), *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (SAGE Publications, 2003) 24.

39 Lloyd C Harris, 'Fraudulent Consumer Returns: Exploiting Retailers' Return Policies' (2010) 44 *European Journal of Marketing* 730. Social desirability bias occurs when the respondent feels either consciously or unconsciously compelled to answer in a socially desirable way, thereby distorting the data: see Zikmund et al, above n 36.

40 Rubin, above n 35, 129.

41 Ritchie, above n 38.

downloading TV shows from the internet for free, for personal consumption; and creating a fake US iTunes account to access and pay for content not available in Australia. The card sort was conducted at the beginning of the session to facilitate the interview questions. Following the card sort activity, respondents discussed how they defined each of the behaviour categories – acceptable, questionable, and unacceptable. Respondents were then asked their opinions of the consumer behaviours under examination. Using a third person technique, respondents were asked to create arguments to encourage and deter ‘Sam’ from engaging in these consumer behaviours. This third person technique allowed the respondent to transfer his or her own attitudes towards the third person to explain that person’s behaviour.<sup>42</sup> The data was analysed through thematic analysis, which involves ‘identifying, analysing and reporting patterns (themes) within data’.<sup>43</sup> The thematic analysis process involved coding, and re-coding data to identify overarching themes. Inductive and deductive coding techniques were used throughout the coding process to distinguish between existing ideas and new theoretical contributions.<sup>44</sup>

Below, we discuss the results of this study in relation to the reasons underpinning consumer willingness to (1) illegally download TV shows from the internet for free, for personal consumption; and (2) create a fake US iTunes account to access and pay for content not available in Australia. The themes identified in the data include: the lack of legal alternatives, caused by delays in availability and geographic segmentation; the acceptability of circumventing restrictions in order to pay for access; perceptions of fairness in meeting consumer demand; the lack of identifiable harm caused by infringement; and the ineffectiveness of legal and social norms in providing deterrence. In order to illustrate the theoretical and qualitative analysis in this article, we present some quotes from participants in context below. These quotes are designed to be illustrative of the themes we identified, but we make no claim about the generalisable nature of these perspectives among the Australian population. We have chosen to focus particularly on the business practices of the foreign (primarily US) film and television industries, and note that practices in digital music, software, games, books, and other markets are markedly different – and in some of these markets, Australian consumers are much better served. Broadening out the analysis to consider the generalisable nature of the results to other copyright industries would be interesting, but must be left for future research.

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42 Zikmund et al, above n 36.

43 Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77, 79.

44 Johnny Saldaña, *The Coding Manual for Qualitative Researchers* (SAGE Publications, 2009) 47–51.



#### IV INACCESSIBILITY OF CONTENT AND PERCEIVED LACK OF BEHAVIOURAL ALTERNATIVES

One of the strongest motivations for infringement is the lack of availability of digital content. In the Australian arm of the World Internet Project, Ewing and Thomas asked Australian internet users why they used file sharing services. Nearly two thirds of users surveyed rated ‘accessing hard to get content’ as playing an ‘important’ or ‘very important’ role in their decision to use file sharing services.<sup>45</sup> Our research provides qualitative support for this proposition and illustrates how many consumers justify circumventing access restrictions or illicitly downloading content as a legitimate response to the perceived failure of rightsholders to meet market demand.

Digital distribution systems in Australia have improved in recent years, but some content is still unavailable in this market. Australian consumers also complain about both the timeliness and convenience of Australian digital distribution channels. While Australians can access iTunes, for example, the range of television and film offerings is substantially smaller and more expensive than for US consumers.<sup>46</sup> Historically, television programs, films, and computer games have often been released several months later in Australia compared to other jurisdictions,<sup>47</sup> and Australians often have to wait for physical DVD or BluRay releases rather than being able to download films or television series.

Streaming services<sup>48</sup> for television and film content are a striking example of the disparity between levels of access in Australia and the US. Netflix, a provider of on demand media streaming in the US, offers access to over 100 000 titles and is widely considered the ‘crown jewel’ in the competitive market for streaming of content.<sup>49</sup> Netflix now accounts for up to a third of prime time downstream internet traffic,<sup>50</sup> demonstrating a level of access and market penetration that far outstrips what is (legitimately) available to consumers in Australia. Australia’s

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45 Accessing free content was the most highly nominated factor and was rated as ‘very important’ or ‘important’ by 78 per cent of respondents: Scott Ewing and Julian Thomas, ‘CCi Digital Futures 2012: The Internet in Australia’ (Report, ARC Centre of Excellence for Creative Industries and Innovation, 11 September 2012) 33.

46 See Clancy Yeates, ‘Why Australian Shoppers Pay More’, *The Sydney Morning Herald* (online), 13 July 2012 <<http://www.smh.com.au/business/why-australian-shoppers-pay-more-20120713-2208v.html>>; Annabel Hepworth, ‘We’re Paying 39pc More for Downloads’, *The Australian* (online), 12 June 2014 <<http://www.theaustralian.com.au/business/were-paying-39pc-more-for-downloads/story-e6fgr8zx-1226951246207#>>.

47 Leaver, above n 8, 151–2; Stefan Larsson et al, ‘Parallel Norms: File-Sharing and Contemporary Copyright Development in Australia’ (2014) 17 *Journal of World Intellectual Property* 1, 3.

48 Streaming services typically provide access to a broad range of content for a flat regular fee, but consumers must pay each month to maintain access, as opposed to one-off purchases on physical media or via digital downloads.

49 Jasmine Braxton, ‘Lost in Translation: The Obstacles of Streaming Digital Media and the Future of Transnational Licensing’ (2014) 36 *Hastings Communication and Entertainment Journal* 193, 202.

50 Todd Spangler, ‘Netflix Remains King of Bandwidth Usage, While YouTube Declines’ on *Variety* (14 May 2014) <<http://variety.com/2014/digital/news/netflix-youtube-bandwidth-usage-1201179643/>>. See also Steinar Ellingsen, ‘Seismic Shifts: Platforms, Content Creators and Spreadable Media’ (2014) 150 *Media International Australia, Incorporating Culture & Policy* 106, 107.

largest streaming service,<sup>51</sup> Quickflix, offers a comparatively small library of around 60 000 titles and, crucially, is missing many of the high demand blockbuster titles that attract consumers.<sup>52</sup> Part of the explanation is that copyrights have historically been fragmented along geographical lines, and foreign firms are not able to easily secure the rights to stream to Australian consumers.<sup>53</sup> Australian distributors, on the other hand, do not have the economies of scale that allow them to overcome the high transaction costs of licensing foreign content for digital distribution in Australia.<sup>54</sup>

Consumers in the US also benefit from significantly increased competition in digital distribution. Apart from Netflix, US consumers can access services such as Hulu (to stream television content); iTunes and Google Play (to rent or purchase television series and films); Amazon Prime (streaming and purchasing),<sup>55</sup> as well as offerings from individual television networks and production companies.<sup>56</sup> As a result, US consumers have much greater choice in the formats and price points at which they can access entertainment goods.

When rightsholders do not provide legitimate means of accessing content, we expect consumers to seek out alternate methods of obtaining access. Here we see an important disconnect between the business practices of copyright industries and the law. The legal proposition, of course, is that copyright is a property right, and the law generally<sup>57</sup> upholds the ability of rightsholders to make decisions about whether or not to sell access into any given market. Our research shows how consumers, however, may not accept this as a morally legitimate decision, regardless of its legality: 'I think it [illegal downloading] becomes acceptable if you can't get it anywhere. If there's no other option available to you then [sic]

51 Other services include film rental over iTunes and Bigpond Movies, as well as Foxtel's new streaming service, Presto: see Adam Turner, 'IPTV State of the Nation: Where does Foxtel's Presto Fit into the Big Picture?' on *Business Spectator* (25 March 2014) <<http://www.businessspectator.com.au/article/2014/3/25/technology/iptv-state-nation-where-does-foxtels-presto-fit-big-picture>>.

52 See, eg, Leigh Haugh, 'Netflix: New Viewing Options Available for Streaming in June 2014' on *Liberty Voice* (11 June 2014) <<http://guardianlv.com/2014/06/netflix-new-viewing-options-available-for-streaming-in-june-2014/>>.

53 'It is impossible to replicate the US Netflix offer here ... many of the content rights are not available due to exclusivity deals': Scott Lorson, CEO of FetchTV, quoted in Matthew Smith, 'Lagging Behind: Why Quickflix Isn't Doing a Netflix', *Business Review Weekly* (online), 1 August 2013 <[http://www.brw.com.au/p/business/lagging\\_behind\\_why\\_quickflix\\_isn\\_ikkcciSC0eltJ4NN01079O](http://www.brw.com.au/p/business/lagging_behind_why_quickflix_isn_ikkcciSC0eltJ4NN01079O)>. See also Leaver, above n 8.

54 Taylor, above n 12; *IT Pricing Inquiry*, above n 9, 54–6 [3.13]–[3.14], [3.20].

55 Christina Warren, '5 of the Best Streaming Media Services Compared' on *Mashable* (14 Feb 2011) <<http://mashable.com/2011/02/14/streaming-media-comparison/>>, cited in Dan Garon, 'Poison ivi: Compulsory Licensing and the Future of Internet Television' (2014) 39 *Journal of Corporation Law* 173, 193. See also Braxton, above n 49, 194–5, discussing the 'piecemeal' delivery of streaming services like Pandora, Spotify, Hulu, and Netflix.

56 Ryland Sherman and David Waterman, 'Technology and Competition in US Television: Online versus Offline' in Yu-li Liu and Robert G Picard (eds), *Policy and Marketing Strategies for Digital Media* (Taylor & Francis, 2014) 265, 268–70.

57 Subject to statutory licences for particular types of use and fair dealing and other limitations and exceptions.

illegally downloading it, why should you not be able to see the show because they haven't made it available?' (#4)

In part, this can likely be explained as a reaction to the widespread perception that copyright industries have not reacted quickly enough to meet demand for digital distribution.<sup>58</sup> Napster made consumers aware of the great potential of digital distribution for music – cheap (indeed, free), convenient access to an almost unlimited diversity of recorded music.<sup>59</sup> The music industry responded largely by trying to protect its physical distribution channels, engaging in a long series of litigation, education campaigns, and lobbying.<sup>60</sup> It wasn't until Apple, an external actor, entered and disrupted the market with iTunes that the music industry became serious about meeting consumer demand through legitimate channels.<sup>61</sup> The film industry, having had the opportunity to observe what was happening to music first, was even slower to respond. As Cunningham et al noted in 2010, the major corporations of Hollywood's film industry 'spent the best part of the last decade (a decade of experimentation and innovation) putting more energy into denial, threat and attempted litigation'.<sup>62</sup>

Change has been slower in Australia, primarily because our smaller market makes it comparatively more costly to develop infrastructure and overcome the high transaction costs of securing digital distribution rights. This inability to fulfil consumer demand in the Australian market may be a significant contributing factor in the willingness of Australians to infringe. The respondents in our research were aware that US consumers are able to enjoy a much greater degree of access, and they blamed the industry for failing to keep up: '[s]o I just think if they're not willing to keep up with the times, and they want to hold us to ransom, you know, then no, I don't feel any guilt [for illegally downloading].' (#12) By blaming the rightsholders and distributors in this way, consumers are able to deny their responsibility for any resulting infringement.<sup>63</sup> In the sections that follow, we explore how the marketing strategies of the film and television industries increase the

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58 Yu argues that 'enforcement problems will surface if the entertainment industry fails to meet consumer demand': Peter K Yu, 'Digital Copyright and Confuzzling Rhetoric' (2010) 13 *Vanderbilt Journal of Entertainment and Technology Law* 881, 935–7.

59 'Many consumers seem to expect access to digital copies of any individual portion of content they desire at any time. This digital buffet runs counter to the traditional business models of most content providers, which make money primarily by aggregating and distributing the creative output of others. This conflict provides fertile ground for infringement. Consumers who want access to disaggregated content may resort to self-help if the "legitimate" market fails to produce a solution': David W Opperbeck, 'Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation' (2005) 20 *Berkeley Technology Law Journal* 1685, 1730.

60 See Patrik Wikström, *The Music Industry: Music in the Cloud* (Polity, 2009) 152–6.

61 Wikström noted that while Apple launched the iTunes Music Store in 2003, it was only particularly challenged in 2007. By January 2008, music sales on iTunes still 'constituted more than 70 per cent of the global legal online music market': Wikström, above n 60, 101–3.

62 Stuart Cunningham, Jon Silver and John McDonnell, 'Rates of Change: Online Distribution as Disruptive Technology in the Film Industry' (2010) 136 *Media International Australia, Incorporating Culture & Policy* 119, 125.

63 The arguments for retaliating against consumption constraints can be explained by the neutralisation technique 'denial of responsibility': see Gresham M Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664, 667.

willingness of consumers to infringe and how consumers rank paying for access as morally preferable to infringing.

### A 'Cultural Buzz' and Consumer Demand

Game of Thrones provides an excellent case study through which to examine the conflict around distribution and copyright infringement. There has been a great deal of discussion around the apparent fact that Game of Thrones was the most downloaded television show on BitTorrent in 2012, and that Australians were the largest block of illegitimate downloaders.<sup>64</sup> Rhetorically, the image of Australians as unrepentant pirates has lent political weight to current proposals to develop new schemes to limit copyright infringement.<sup>65</sup> Importantly, however, Australian consumers face significant barriers in accessing Game of Thrones. HBO, the producer of Game of Thrones, restricts user access in Australia through an exclusive deal with Foxtel, a premium cable provider.<sup>66</sup> An Australian consumer who only wants to watch Game of Thrones (and not other bundled content) must pay \$74 per month, with a minimum subscription term of six months, to watch it on Foxtel cable television.<sup>67</sup> Alternatively, Foxtel offers a streaming service, Foxtel Play, for \$45 per month.<sup>68</sup> This is in stark contrast to other television shows, which are typically available not only through cable, but also for purchase as digital downloads for \$3–4 per episode (or \$29–39 per season) through Amazon, iTunes, and Google Play.<sup>69</sup> In 2014, viewers who either did not subscribe to Foxtel or preferred to purchase episodes that they could keep, rather than paying a regular subscription fee, had to wait until the series had finished in order to view it on Quickflix or Google Play,<sup>70</sup> or several months for the DVD or BluRay release date or through iTunes.<sup>71</sup>

64 Ernesto, 'Who's Pirating Game of Thrones, and Why?', above n 1; Lee Taylor, 'Australians Named Worst Game of Thrones Pirates', *News.com.au*, 21 May 2012 <<http://www.news.com.au/technology/australians-named-worst-offenders-for-illegally-download-game-of-thrones-e6frfo0-1226362158184>>.

65 See, eg, James Law, 'Online Copyright Infringement Forum: Can Anything Stop Our Nation of Pirates?', *News.com.au*, 10 September 2014, <<http://www.news.com.au/technology/online/online-copyright-infringement-forum-can-anything-stop-our-nation-of-pirates/story-fnjwneld-1227054171162>>; Attorney-General's Department and Department of Communications, 'Online Copyright Infringement' (Discussion Paper, July 2014).

66 Adam Harvey, 'Game of Thrones Piracy War: Choice Says Foxtel Has Itself to Blame for Illegal Downloading of Hit Show' on *ABC Online* (18 June 2014) <<http://www.abc.net.au/news/2014-06-17/choice-backs-australians-who-pirate-game-of-thrones/5530710>>.

67 Ernesto, 'Why People Pirate Game of Thrones, a Global Cost Breakdown' on *TorrentFreak* (13 April 2014) <<http://torrentfreak.com/why-people-pirate-game-of-thrones-a-global-cost-breakdown-140413/>>.

68 Foxtel, *Foxtel Play* (2014) <<https://www.foxtel.com.au/foxtelplay/home/default.htm>>.

69 Warren, above n 55.

70 Adam Turner, 'Are You Ready to Binge on Game of Thrones?' *The Sydney Morning Herald* (online), 16 June 2014 <<http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/are-you-ready-to-binge-on-game-of-thrones-20140616-zs8o1.html>>.

71 Adam Turner, 'Why Isn't Game of Thrones on Apple's iTunes?' *The Sydney Morning Herald* (online), 18 June 2014 <<http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/why-isnt-game-of-thrones-on-apples-itunes-20140618-zsd96.html>>.

HBO and Foxtel's distribution strategy focuses on lucrative premium subscriptions. Faced with the threat of increasing competition by Netflix and iTunes, HBO's strategy with its premium content like Game of Thrones has been to restrict access to drive up demand for its own channels.<sup>72</sup> Even in the US, the most recent episodes of Game of Thrones are only available online via the HBO GO streaming service<sup>73</sup> which also requires the subscriber to be paying for cable service.<sup>74</sup> The key difference is that in the US, a much larger proportion of consumers subscribe to cable television.<sup>75</sup> By choosing to focus on the premium end of the market, rightsholders often choose to exclude a large proportion of consumers.<sup>76</sup> Exclusive deals might encourage more people to subscribe to premium cable or streaming services, but they are also likely to encourage more people to infringe. This point reflects a fundamental disconnect between the way in which copyright industry executives talk about business model strategies and the attitudes of consumers. Foxtel executive Bruce Meagher has dismissed consumer concerns about fairness of the distribution method for Game of

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- 72 Todd Spangler, 'Why HBO Is Keeping "Game of Thrones", Other Shows Out of Amazon's Hands' on *Variety* (23 April 2014) <<http://variety.com/2014/digital/news/why-hbo-is-keeping-game-of-thrones-other-shows-out-of-amazons-hands-1201161978/>>; Paul Tassi, "'Game of Thrones" Sets Piracy World Record, but Does HBO Care?', on *Forbes* (15 April 2014) <<http://www.forbes.com/sites/insertcoin/2014/04/15/game-of-thrones-sets-piracy-world-record-but-does-hbo-care/>>. Liedtke states: 'No matter how much Netflix Inc is willing to pay for the rights, some online video remains off-limits. Major movie studios are refusing to license the rights to most of their latest movies at the same time they're released on DVDs. Premium cable channels such as HBO and Showtime also are withholding their most popular series, including "Game of Thrones" and "Dexter", because they are worried about losing subscribers if the content is available on Netflix's less expensive Internet service': Michael Liedtke, 'Gaps in Netflix's Online Library Likely to Persist' on *Yahoo Finance* (9 April 2012) <<http://finance.yahoo.com/news/gaps-netflixs-online-library-likely-200620240.html>>.
- 73 HBO GO continues to experience some technical difficulties that have angered consumers. Most prominently, the streaming service has crashed several times under peak demand when viewers tune in for premium releases: see Dorothy Pomerantz, 'Why It Matters That HBO Go Crashed Again During "Game of Thrones"' on *Forbes* (4 July 2014) <<http://www.forbes.com/sites/dorothy pomerantz/2014/04/07/why-it-matters-that-hbo-go-crashed-again-during-game-of-thrones/>>.
- 74 Edmund Lee, 'HBO's Amazon Deal Without "Thrones" Shows Cable Loyalty' on *Bloomberg* (24 April 2014) <<http://www.bloomberg.com/news/2014-04-23/hbo-s-amazon-deal-without-thrones-shows-cable-loyalty.html>>. Abbruzzese notes that '[f]or people who do not want to pay for cable but want access to the company's content, HBO Go became a flashpoint. Fans wanted to be able to pay for its digital offering, but HBO doesn't allow consumers to access its content without a cable subscription': Jason Abbruzzese, 'HBO Has Only Itself to Blame for Streaming Struggles' on *Mashable* (8 April 2014) <<http://mashable.com/2014/04/07/hbo-go-streaming-failure/>>.
- 75 The USA has four times as many cable television subscribers per capita: *Media > Cable TV Subscribers: Countries Compared* (2014) NationMaster <<http://www.nationmaster.com/country-info/stats/Media/Cable-TV-subscribers>>. See also Garon, above n 55, 174.
- 76 Boyle discusses 'an underlying problem' inherent in price discrimination, and quotes Dupuit who notes that '[w]hat the company is trying to do is prevent the passengers who can pay the second-class fare from traveling third class; it hits the poor, not because it wants to hurt them, but to frighten the rich': James Boyle, 'Cruel, Mean, Or Lavish – Economic Analysis, Price Discrimination and Digital Intellectual Property' (2000) 53 *Vanderbilt Law Review* 2007, 2024, quoting Jules Dupuit, 'On Tolls and Transport Charges' in Alan T Peacock (ed), *International Economic Papers No 11* (E Henderson trans, Macmillan, 1962) 7, 23.

Thrones as ‘absurd’. Meagher argues that with the streaming service offered by Foxtel Play:

What we are left with is an argument at the margins about a few dollars. Yet some people still feel that they should be entitled to take this show for free without the consent of its creators rather than pay a reasonable price for an extraordinary product.<sup>77</sup>

Our research highlights the basic finding that many consumers may not view questions of distribution and pricing as ‘an argument at the margins about a few dollars’. Rather, restricted distribution models appear to be central to the willingness of consumers to seek out infringing copies. There is some concept of fairness that pervades consumer expectations, and this concept is reflected strongly in both the political discourse around issues like the *IT Pricing Inquiry* and copyright reform, and also in our data. It is not necessarily clear what ‘fairness’ means, but there is a strong disconnect between the way that industry representatives talk about fairness in terms of consumers refraining from stealing and the way that consumers talk about fairness in terms of rightsholders offering access on reasonable terms. Importantly, the experience of consumers is about much more than just price; while the price of access in Australia is significantly higher, other factors cannot easily be separated out. One of our respondents articulates how their concerns are about not just price, but also accessibility:

Well again, for me that’s, there’s a fairness thing there. I don’t understand why, um, content isn’t available in Australia from Apple and from that perspective I’m sort of thinking well hang on, why are we being treated unfairly by Apple. We should have access to that just like at the moment why are we paying exorbitant prices for goods when our dollar is better than the United States and it happens to be cheaper over there, like significantly cheaper. I don’t quite get that so it’s sort of pretty much in the same vein there. So I’m not 100 per cent comfortable accepting it [illegal downloading]. I’m not saying it’s totally unacceptable. For me it’s a questionable action. (#11)

A consistent frustration for consumers in Australia is that when media is available through legitimate channels, it is often delayed. For extremely popular media events, it is often suggested that a delay of even one or two days between the time a television show, book, or movie is available elsewhere and in Australia leads people to infringe.<sup>78</sup> For example, taking 168 movies from the top 100 films<sup>79</sup> of 2013 and 2014 that were available in the US, 107 were released later in

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77 Bruce Meagher, ‘Piracy: At Least the Lannisters Pay Their Debts’ on *mUmBRELLA* (10 April 2014) <<http://mumbrella.com.au/piracy-least-lannisters-pay-debts-219984>>.

78 ‘There are few shows that hold so much appeal to both a niche nerdom and a much broader audience – we’re talking brilliantly-written high fantasy here peppered with sex and violence – and these fans want to join in on the conversation as soon as it starts; with their friends, with other fans, on forums, in comment sections and on social media. A delay, even a 48-hour one, prevents Australians from doing that. And that’s a problem’: Lucy O’Brien, quoted in Claire Porter, ‘Games of Clones: The Battle to Thwart Thrones Pirates’ on *News.com.au* (2 April 2013) <<http://www.news.com.au/technology/biztech/games-of-clones-the-battle-to-thwart-thrones-pirates/story-fn5lic6c-1226610889872>>.

79 Measured by Australian Box Office takings.

Australia than the US, with an average delay of 20 days.<sup>80</sup> In 2012, *Game of Thrones* was available on iTunes and Foxtel at least a week after they aired in the US.<sup>81</sup> As noted above, while the most recent series was available almost immediately on Foxtel, it was not available for several months to non-subscribers. This delay in access can lead to a feeling that Australians are being unfairly left out in comparison with US and EU audiences, as articulated by a respondent:

I can understand why people actually do illegally download TV shows and movies and all that sort of stuff because you know, depending on the distribution they can not come out for weeks, sometimes months ... which is a very long time to wait, too much for our generation, sometimes even a year for some of the stuff to come out in Australia, which I think is really annoying. (#16)

Importantly, the link between engagement and willingness of consumers to infringe is not lost on some parts of the entertainment industries. Recently, for example, the Director of *Game of Thrones* dismissed concerns that Australians have high rates of infringement on the basis that these series depend on ‘cultural buzz’ – the discussion generated and fed by viewers, both legitimate and infringing, was ‘how they survive’.<sup>82</sup> The entertainment industries have become adept at encouraging this ‘cultural buzz’ in order to drive up demand for their premium offerings. Film and television has always been a social experience, but the new media environment allows producers to better exploit the connections between their viewers to increase audience loyalty.<sup>83</sup> The convergence of media enables producers to use multiple channels, including social media, to engage audiences in a much more sophisticated manner than was possible with broadcast media. Extensive marketing campaigns turn entertainment goods into media events, combining saturating coverage in mainstream media with carefully curated extra content (like ‘webisodes’) and interactive experiences such as direct engagement with production staff and actors through social media.<sup>84</sup> The cumulative effect of these strategies is often to enable audiences to feel much more closely connected to media experiences and franchises. Engaged audiences are more loyal, and therefore more profitable, but they are also a key vector for

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80 Nick Evershed, ‘Australian Film Industry Claims Delayed Release Is Rare but Data Shows Otherwise’, *The Guardian* (online), 30 June 2014 <<http://www.theguardian.com/news/datablog/2014/jun/30/australian-delayed-release-18-days>>.

81 Renai LeMay, ‘Australia Top Game of Thrones Pirating Nation’ on *Delimiter* (22 May 2012) <<http://delimiter.com.au/2012/05/22/australia-top-game-of-thrones-pirating-nation/>>.

82 ‘Downloads Don’t Matter: Game of Thrones Director Says “Cultural Buzz” More Important than Ratings for Survival’, *Sydney Morning Herald* (online), 26 February 2013 <<http://www.smh.com.au/entertainment/tv-and-radio/downloads-dont-matter-20130226-2f36r.html#ixzz2LyuE7AZ2>>.

83 Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York University Press, 2008) (discussing American Idol).

84 Leaver discusses the buzz created around the Doctor Who and Battlestar Galactica television series: Leaver, above n 8, 148–50. Glater quotes Craig Engler, general manager of SciFi.com, who says that ‘[t]his is a way to get people talking about the show a month before it airs’: Craig Engler, quoted in Jonathan Glater, ‘Sci Fi Creates “Webisodes” to Lure Viewers to TV’, *New York Times* (online), 5 September 2006 <[http://www.nytimes.com/2006/09/05/arts/television/05gala.html?\\_r=0](http://www.nytimes.com/2006/09/05/arts/television/05gala.html?_r=0)>.

building new audiences<sup>85</sup> and converting even more casual viewers into loyal fans.<sup>86</sup>

The effect of social conversations around media events in driving up demand should not be underestimated. Australians may regularly form the largest block of downloaders of *Game of Thrones*, but this must be seen in the context of the massive hype around the series. Given the pervasive discussion that saturates social media after every episode, any loyal viewer of the series who wants to either participate or avoid spoilers is left with little choice but to pay for premium cable offerings or download the show.<sup>87</sup> Those who do not are left out of the global discussion – for the most massive events or for releases with a particularly loyal cult following, even a matter of hours can be too late to join the live discussion or avoid spoilers. Because these conversations are not constrained by regional borders, global marketing campaigns often have the effect of driving up demand for Australian consumers long before the material is legitimately available. In these circumstances, consumers could feel justified in obtaining the content through illicit channels. This ‘cultural buzz’ feeds directly into the acceptability of using illicit means to access content, creating a self-reinforcing norm as peers are strongly motivated to participate in the conversations around them: ‘[d]ownload TV shows from the internet and then ... you talk to your friends about the latest shows you should get, you know, and if you’re all talking about it then you’re all doing it then clearly it’s acceptable.’ (#8)

Viewed as a marketing strategy, encouraging social buzz, even if it increases infringement, can be highly beneficial. Producers are increasingly dependent upon a loyal audience, and a sophisticated campaign of engagement is able to turn ‘casuals’ into much higher value ‘loyals’.<sup>88</sup> The infringement that accompanies cultural buzz and unmet consumer demand may not always harm sales of content when it is actually made available. Some content producers explicitly acknowledge the role that infringement has in growing audiences, building loyalty and increasing paid subscriptions. For example, when asked about users sharing passwords to access the HBO GO streaming service, the CEO of HBO Richard Plepler said that it had ‘no impact on the business’, explaining that HBO was ‘in the business of creating addicts’.<sup>89</sup> Similarly, the CEO of Time Warner (which owns HBO), also dismissed the impact of audiences illegally downloading *Game of Thrones*:

We’ve been dealing with this for 20, 30 years – people sharing subs, running wires

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85 See Henry Jenkins, Sam Ford and Joshua Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture* (New York University Press, 2013), 194–5.

86 Leaver, above n 8, 146; Jenkins, above n 83, 76.

87 ‘With many shared moments of fandom occurring via social media sites such as Twitter, Tumblr, and Facebook, the viewer runs the risk of being spoiled if they are even hours late in engaging’: Mark Stewart, ‘This Content Is Currently Unavailable: The Tyranny of Digital Distance, Updated’ (2014) 20 *Flow* <<http://flowtv.org/2014/07/this-content-is-currently-unavailable/>>.

88 Jenkins, above n 83, 76.

89 Matthew Lynley, ‘HBO’s CEO Doesn’t Care That You Are Sharing Your HBO Go Password’ on *BuzzFeed* (7 January 2014) <<http://www.buzzfeed.com/mattlynley/hbos-ceo-doesnt-care-that-you-are-sharing-your-hbo-password>>.



down the backs of apartment buildings. Our experience is that it leads to more paying subs. I think you're right that Game of Thrones is the most pirated show in the world. ... That's better than an Emmy.<sup>90</sup>

Engaged fans often make up a significant proportion of downloaders and likely often have a positive effect. These fans are audiences that are not seeking to avoid paying, but rather seeking to change the conditions upon which they can access the content.<sup>91</sup> These are the fans that not only buy the DVD boxed sets and limited edition merchandise, they are also responsible for spreading awareness and building the audience for the franchise amongst their own social networks.<sup>92</sup>

By managing and designing for cultural buzz, the copyright industries have been able to deliberately drive up demand for their offerings. Increasingly, they appear to do this with the full knowledge that increasing demand without making material more accessible will also increase infringement. Despite massive numbers of infringing viewers, for example, Game of Thrones has been HBO's most profitable series in recent years. This has led HBO's programming manager, Michael Lombardo, to also dismiss concerns about rates of infringement:

I probably shouldn't be saying this, but it is a compliment of sorts. ... The demand is there. And it certainly didn't negatively impact the DVD sales. [Piracy is] something that comes along with having a wildly successful show on a subscription network.<sup>93</sup>

This reflects a deliberate and sophisticated strategy of engagement, and it is not even clear that reducing infringement, to the extent that doing so would also reduce the ability of fans to engage new audiences and new audiences to become fans, would increase the profitability of entertainment franchises.

## B Conflicting Messages

While some sectors of the entertainment industries embrace or at least tacitly accept infringement, this is not reflected in the rhetoric of lobbyists and the legal arms of entertainment conglomerates. Faced with complaints from consumers who feel unfairly treated, the response from rightsholders continues to revolve around the basic claim that consumers have no 'entitlement'<sup>94</sup> to 'steal'<sup>95</sup> content if they are not prepared to access it on the terms presented to them. In dismissing the justifications of Australians to obtain Game of Thrones through BitTorrent rather than subscribing to Foxtel, for example, Foxtel's Bruce Meagher argues

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90 Sam Thielman, 'Bewkes: Game of Thrones Piracy "Better Than an Emmy"' on *AdWeek* (7 August 2013) <<http://www.adweek.com/news/television/bewkes-game-thrones-piracy-better-emmy-151738>>.

91 Jenkins, Ford and Green, above n 85, 113–14, citing Abigail De Kosnik, 'Piracy Is the Future of Television' (Research Paper, Convergence Culture Consortium, 17 March 2010).

92 Jenkins, Ford and Green, above n 85, 114–15.

93 Michael Lombardo, quoted in James Hibberd, 'HBO: "Game of Thrones" Piracy Is a Compliment' on *Entertainment Weekly* (31 March 2013) <<http://insidetv.ew.com/2013/03/31/hbo-thrones-piracy/>>.

94 '[S]ome people still feel that they should be entitled to take this show for free without the consent of its creators': Meagher, above n 77.

95 Bleich, above n 3.

that's like 'like justifying stealing a Ferrari on the basis that the waiting list is too long or the price is too high'.<sup>96</sup> This strong reliance on the rhetoric of property rights serves an important political purpose in establishing an ongoing crisis and justifying calls for harsher punishments and increased powers of enforcement for copyright.<sup>97</sup> But it also reflects a key divergence between the way in which representatives of the copyright industry portray the effects of infringement and the way in which consumers evaluate these effects. The industry's 'stealing' rhetoric has been effective to an extent – our data reflects the notion that consumers do internalise the wrongfulness of infringement – but it is simultaneously undermined by the perceived unfairness of restricted access and the false equivocation of every download with a lost sale.

It is likely that many consumers are aware that the intangible nature of digital downloads means that illicit copies do not always result in a direct cost to rightsholders (or their incentives to produce more content). Unlike stealing a Ferrari, failure to pay for digital content can more easily be dismissed as generally harmless or victimless.<sup>98</sup> Consumers clearly do not always internalise a categorical<sup>99</sup> requirement to always pay for digital content, although recent research shows that consumers do often pay for content even when they are not required to.<sup>100</sup> A large proportion of consumers appear to be highly attuned to fairness, and are often motivated to support the producers of creative content that they consume, particularly when they feel a strong connection to the artist or franchise.<sup>101</sup> As a result, consumers appear to have a much more nuanced view of the obligation to pay for access than they are typically credited with.<sup>102</sup> Our study demonstrates some of this nuance; respondents were clearly aware that copyright

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96 Meagher, above n 77.

97 Cohen, 'Pervasively Distributed Copyright Enforcement', above n 5.

98 This can be explained to a large extent by the cost structure of digital content distribution. Consumers generally assume that failing to pay for an information product, which typically has a low variable cost, high fixed cost structure, will inflict less harm than failing to pay for a conventional product, which typically has a high variable cost, low fixed cost structure: Joseph C Nunes, Christopher K Hsee and Elke U Weber, 'Why Are People So Prone to Steal Software? The Effect of Cost Structure on Consumer Purchase and Payment Intentions' (2004) 23 *Journal of Public Policy & Marketing* 43, 43. It is also easy for some consumers to consider their actions to cause no harm where the victim is 'unknown' or 'physically absent': see Gresham M Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1957) 22 *American Sociological Review* 664, 668; O Freestone and V-W Mitchell, 'Generation Y Attitudes towards E-Ethics and Internet-Related Misbehaviours' (2004) 54 *Journal of Business Ethics* 121, 126.

99 Immanuel Kant's categorical imperative requires people to '[a]ct only according to that maxim whereby you can, at the same time, will that it should become a universal law': Immanuel Kant, *Groundwork for the Metaphysics of Morals* (Allen W Wood trans, Yale University Press, 2002) [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)].

100 Belsky reports findings from studies of 'pay-what-you-want' schemes that show a surprisingly high level of contribution from consumers: Leah Belsky et al, 'Everything in Its Right Place: Social Cooperation and Artist Compensation' (2010) 17 *Michigan Telecommunications and Technology Law Review* 1, 63.

101 Suzor, above n 14, 153–6.

102 Garon argues that '[t]he perception that either file sharing of copyrighted material or plagiarism is treated differently than physical theft may be more imagined than real': Jon M Garon, 'Normative Copyright: A Conceptual Framework for Copyright Philosophy and Ethics' (2003) 88 *Cornell Law Review* 1278, 1292.

infringement is unlawful, but they sometimes equated this with ‘technical’, rather than ‘moral’ wrongfulness:

I’m trying to find out what happened off this particular TV show, what was the outcome, who won the whatever it was or something, right, so you can search on the internet, find somebody illegally has taped and posted that show, I’m not trying to make any profit out of it, I’m not trying to benefit in any way, apart from gaining the knowledge of [who won]. And so I guess, in my mind, I’m rationalising and saying even though to actually download this show is technically, according to our law, it’s illegal, I’m not directly harming anybody, my behaviour is not impacting on anybody else. So I guess in my mind I’m rationalising that and saying therefore, I think that that’s acceptable. (#7)

Some respondents appear to take the view that while creators generally deserve to get paid for their work, those creators who choose not to actually meet market demand lose some of that moral entitlement: ‘[w]e should be allowed to access it [content] anyhow, and if they’re not going to let us access it you’re going to go round and find another port of entry to get it.’ (#29) This sentiment shows a potentially substantial mismatch between consumers’ nuanced perceptions of fairness and the rhetoric of the copyright industry and of policy makers. Former United States Ambassador Jeffrey Bleich, for example, rejects any justification for copyright infringement:

I realize that fans of Game of Thrones who have used illegal file-sharing sites have reasons. They will say it was much easier to access through these sites, or that they got frustrated by the delay in the first season, or their parents wouldn’t pay for a subscription, or they will complain about some other issue with copyright laws. But none of those reasons is an excuse – stealing is stealing.<sup>103</sup>

This hardline approach simply does not reflect consumer experience and expectations of copyright. In our interviews, respondents were presented with hypothetical scenarios in which a third party said they were going to engage in infringing behaviour. In order to obtain greater insight into how consumers justified perceived questionable and unacceptable behaviours,<sup>104</sup> one of the authors asked respondents ‘what would you say to encourage someone to illegally download?’. While respondents differed substantially in their ability to justify the behaviour,<sup>105</sup> there was a clear sense that if rightsholders failed to

103 Bleich, above n 3.

104 Respondents were presented with hypothetical scenarios in which a person ‘Sam’ or ‘Alex’ said they were going to engage in a behaviour selected by the interviewer. Gender-neutral names were used to avoid any gender biases. The respondent needed to (1) encourage ‘Sam’ to engage in the behaviour and then (2) deter ‘Sam’ from engaging in it. Using a third person technique allowed the respondent to transfer his or her own attitudes towards the third person to explain that person’s behaviour: Zikmund et al, above n 36.

105 This variation in individuals’ abilities to justify deviant consumer behaviour reflects past research: see, eg, James R Detert, Linda Klebe Treviño and Vicki L Sweitzer, ‘Moral Disengagement in Ethical Decision Making: A Study of Antecedents and Outcomes’ (2008) 93 *Journal of Applied Psychology* 374; M K Duffy et al, ‘Moral Disengagement and Social Identification: When Does Being Similar Result in Harm Doing?’ (Paper presented at the Annual Meeting of the Academy of Management, Honolulu, August 2005); Brent McFerran, Karl Aquino and Michelle Duffy, ‘How Personality and Moral Identity Relate to Individuals’ Ethical Ideology’ (2010) 20 *Business Ethics Quarterly* 35.

make content available to satisfy consumer demand, they were in an important sense responsible for infringement: 'I'd tell them to do it because it's up to the company to make it available, if it's not available then you know you've got a right to download it, it's their problem.' (#1)

Ultimately, while some consumers do often accept the moral weight of copyright infringement and the 'stealing' language of the industry, they are often also able to balance that harm against their perceptions of the fairness of industry practices.<sup>106</sup> 'Fairness', as it is understood in consumer copyright markets, may be better thought of as a reciprocal relationship: it requires not just that consumers pay creators, but that creators provide legitimate means of access. This suggests that the key to ensuring that copyright business models are sustainable may lie in encouraging infringing audiences to become paying consumers, and not necessarily in decreasing infringement in itself. In the next section, we suggest that an important part of the solution requires providing consumers with the ability to pay for access, given that many frequently express a desire to do so.

### C Behavioural Alternatives: Consumers Prefer to Pay

One of the most interesting themes to emerge from our research is that faced with access barriers, consumers will often seek to circumvent those barriers in order to pay for access. When content is made available to consumers in other markets but not locally, it is possible for Australians to use technical tools like Virtual Private Networks or proxy servers to engage in their own domestic arbitrage.<sup>107</sup> The consumers we spoke to generally thought it was more morally acceptable to use these tools than to infringe and avoid paying. As these tools become easier to use, their reach begins to extend beyond the technically sophisticated into the mainstream. This expansion is facilitated by consumer advocates like CHOICE, who have released guides explaining how consumers can circumvent 'geoblocking' to access television shows, software, games, and physical products not available in Australia.<sup>108</sup> The *IT Pricing Inquiry* explicitly recommended that education campaigns be introduced to explain to consumers how they can circumvent geographical restrictions.<sup>109</sup> Many Australian consumers have apparently already taken this advice in order to bypass regional pricing or market segmentation. For example, despite the fact that Netflix does not currently officially operate in the Australian market, recent reports suggest

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106 'With regard to digital media, there is some evidence that pirates perceive the prices for digital goods to be high, and view this as inequitable, particularly given the economic success of some of the copyright holders. Pirates use this disparity to justify their illegal behaviour': Charles WL Hill, 'Digital Piracy: Causes, Consequences, and Strategic Responses' (2007) 24 *Asia Pacific Journal of Management* 9, 12.

107 *IT Pricing Inquiry*, above n 9, 102–3 [4.62]–[4.63].

108 Elise Dalley, *Navigating Online Geo-blocking* (5 March 2014) CHOICE Online <<http://www.choice.com.au/reviews-and-tests/computers-and-online/networking-and-internet/shopping-online/navigating-online-geoblocks/page.aspx>>.

109 *IT Pricing Inquiry*, above n 9, 108 (Recommendation 6).

that it may now have more than 50 000 Australian subscribers.<sup>110</sup> This has led to scathing criticism by Australian streaming firms, like Quickflix, that Netflix is able to sell streaming services into the Australian market without having to pay rightsholders for access.<sup>111</sup>

It is not clearly illegal for Australian consumers to circumvent these technical ‘geoblocks’ that are put in place to enforce geographic market segmentation.<sup>112</sup> The act of circumventing the geoblocks is unlikely to itself be prohibited by anti-circumvention legislation, although there is some uncertainty.<sup>113</sup> Since the foreign service provider may not have the rights to sell access to the Australian market, however, receiving those works might be an infringement of copyright.<sup>114</sup>

Our research focused on the circumvention of geoblocks in Apple’s iTunes store. By signing up for a US-based account, Australians can gain access to television shows, movies, and music that is either not available or more expensive in Australia as if they were in the US. Especially where circumventing geoblocks is relatively easy, consumers likely view it as more morally legitimate than downloading content through illicit channels. This seems to reflect a willingness on the part of Australian consumers to pay for content, if it is made available. Respondents expressed a strong perception that circumventing geoblocks when content was not accessible was not morally wrongful:

I know a lot of people who have done that [creating a fake US iTunes account] and I think that’s fine because even though you’re lying, you’re not stealing anything and it’s – you can’t actually buy it here. If you had the option to buy it here, even if it was a little more expensive, I would say that’s the right thing to do, but seeing as they haven’t made the option available I see that as acceptable. (#5)

The willingness of consumers to seek deviant alternatives to achieving their goals is well documented in criminological theory.<sup>115</sup> When an individual fails to

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110 Michael Bodey, ‘More Netflix Pirates on Board’, *The Australian* (online), 3 March 2014 <<http://www.theaustralian.com.au/media/broadcast/more-netflix-pirates-on-board/story-fna045gd-1226842998214#>>.

111 Paul Smith and Max Mason, ‘Quickflix Chief Hits out at Netflix’s Aussie Free Ride in TV Streaming Battle’, *Australian Financial Review* (online), 4 March 2014 <[http://www.afr.com/p/technology/quickflix\\_chief\\_hits\\_out\\_streaming\\_MPpkVja74SNNI3iM0SbcQM>](http://www.afr.com/p/technology/quickflix_chief_hits_out_streaming_MPpkVja74SNNI3iM0SbcQM>).

112 *IT Pricing Inquiry*, above n 9, 105–6 [4.71]–[4.76].

113 Either because a basic measure like an address check does not amount to an ‘access control technological protection measure’ because measures that control geographic market segmentation and restrict playback of legitimately acquired foreign content are excluded from the definition under s 10(1) of the *Copyright Act 1968* (Cth), or because the law is likely to be read down to not overly burden the ability of consumers to engage in arbitrage following the High Court’s decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193. See also *IT Pricing Inquiry*, above n 9, 105–6 [4.71]–[4.76].

114 Where Australians download copies of content without the authorisation of the copyright owner, they are likely to infringe on the right to make a copy or reproduce the copyright work under ss 31, 85 and 86 of the *Copyright Act 1968* (Cth). When streaming from a foreign provider, they are not likely to infringe the right of communication, which means ‘to make available online or electronically transmit’ under s 10(1), but they may be liable for the incidental copies that are made in temporary or permanent storage on their devices as a process of receiving the stream in accordance with s 43A.

115 See Robert Agnew, ‘Foundation for a General Strain Theory of Crime and Delinquency’ (1992) 30 *Criminology* 47.

access content via conventional means, they may perceive their main alternatives to be to either circumvent geographical restrictions and pay for content or to seek out the material from file-sharing networks. The fact that the first alternative mimics a normal business transaction leads consumers to perceive the behaviour to be more acceptable than illegal downloading content, as we see one respondent explain: 'I figured at the end of the day you're still paying for it. ... You are actually paying for the content so that's probably why I classified it [as] acceptable.' (#9)

In our study, respondents drew a moral distinction between paying and not paying for content:

I suppose it's [creating a fake U.S. iTunes account] generally not really piracy because you are still paying for the content anyway, if it was piracy like illegally downloading then it would definitely be unacceptable behaviour but ... you're still paying for it. ... I suppose in some way you might feel awkward about doing it, but not really, because you're still paying for it. (#16)

These sentiments suggest strongly that the historical geographic segmentation of copyright interests, designed to maximise global exploitation, no longer makes sense to consumers in a globalised economy. From the perspective of consumers, the geographical segmentation of rights appears to '[ignore] the possibilities afforded by networks and technologies in the twenty-first century'.<sup>116</sup> Even actors in *Game of Thrones* describe the industry's distribution models as 'archaic'.<sup>117</sup> Respondents seemed well aware that sellers of physical goods do not generally have the right to prevent arbitrage; in the shift to digital, the ability of copyright owners to control regional pricing seems to be an anomaly: '[i]f you just create one for the US account, then that's okay, 'cause you're just buying one from that site, it's like importing something from overseas.' (#10)

Ultimately, respondents express frustration and a sense that it is not legitimate for rightsholders to under serve the Australian market, particularly when they are willing to pay for access:

Why does it matter if I'm an Australian viewing it through a US account? At the end of the day I'm still the same person as a counterpart in America. It shouldn't matter based on stupid ideas by the companies when and how they should release their videos. They're providing a service or they're providing a product. I'm paying for it. Why is my Australian dollar any different from a US dollar? It's money that's what they want. Well if you're not going to provide service I'm going to go take a different route to get something I want. (#3)

One of the more surprising themes to emerge from this data is that consumers often want to be able to pay for access to content. This sentiment seems to be spreading amongst consumers in mainstream discourse. Discussion threads about

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116 Leaver, above n 8, 150.

117 See, eg, Meares, quoting Finn Jones, an actor in *Game Of Thrones*, talking while on tour in Australia, who says '[t]he way we distribute entertainment at the moment is quite archaic': Joel Meares, 'Game of Thrones Star Criticises "Archaic" Foxtel Distribution Deal', *The Sydney Morning Herald* (online), 6 April 2014 <<http://www.smh.com.au/entertainment/tv-and-radio/game-of-thrones-star-criticises-archaic-foxtel-distribution-deal-20140405-365pb.html>>.

regional pricing or geoblocking on forums, news articles, and blog posts are full of statements by consumers imploring rightsholders to ‘take my money’. In the US, an increasingly vocal group of consumers, known as ‘cordcutters’, are campaigning for networks to untie content from cable offerings and provide ‘legal, reasonably priced options’<sup>118</sup> for online distribution. A recent social media campaign, ‘Take My Money, HBO!’, saw over 163 000 people in 48 hours ask HBO to provide options to access *Game of Thrones* and similar shows without subscribing to a bundled cable service.<sup>119</sup> Some of our respondents explained that they wanted to pay for access but also wanted access immediately. When they were unable to circumvent restrictions and resort to illicit downloads, some respondents suggested a rectification process of downloading now and buying later in an attempt to mitigate any potential harm caused from infringement:

If you’re not going to be able to view it within the next couple of days in a platform that’s suitable to you, by all means just go download it and if you really like it, well, buy it on iTunes when it gets there so, you know, you’re not really depriving anyone there. It’s quick and easy to do within two or three clicks you’ve downloaded an entire TV show. (#3)

It has become more common to see claims that increasing consumer choice and competition in legitimate channels for access decreases infringement,<sup>120</sup> although solid empirical data on illicit downloading is still hard to collect. Steam, the online computer game distribution platform created by Valve, appears to have a marked effect on reducing infringement by enabling consumers to conveniently purchase games at reasonable prices.<sup>121</sup> The little evidence we do have suggests that both iTunes and Spotify<sup>122</sup> appear to have had similar effects in the music industry.<sup>123</sup> When Netflix took the unprecedented move to produce its own

118 See, eg, *Cordcutters Community* (2014) Reddit <<http://www.reddit.com/r/Cordcutters>>.

119 Jake Caputo, *It’s Happening* (2014) Take My Money, HBO! <<http://takemymoneyhbo.com/>>.

120 See, eg, Glyn Moody, ‘Two New Reports Confirm: Best Way to Reduce Piracy Dramatically Is to Offer Good Legal Alternatives’ on *TechDirt* (25 July 2013) <<https://www.techdirt.com/blog/innovation/articles/20130723/12235723906/two-new-reports-confirm-best-way-to-reduce-piracy-dramatically-is-to-offer-good-legal-alternatives.shtml>>.

121 Holm argues that ‘Steam’s success in attracting people away from piracy comes from multiple factors, but it seems likely that [its] low price, high convenience strategy plays a role’: see Peter Holm, ‘Piracy on the Simulated Seas: The Computer Games Industry’s Non-legal Approaches to Fighting Illegal Downloads of Games’ (2014) 23 *Information & Communications Technology Law* 61, 72.

122 Spotify, ‘Adventures in the Netherlands: New Spotify Study Sees Encouraging Downward Trend in Music Piracy in the Netherlands’ (Media Release, 17 July 2013) <<http://press.spotify.com/us/2013/07/17/adventures-in-netherlands/>>. See also David Von Wiegandt, ‘Spotify: Incentivizing Album Creation Through “The Facebook” of Music’ (2013) 2 *Berkeley Journal of Entertainment and Sports Law* 180, 190–2; Ernesto, ‘Music Piracy Continues to Decline Thanks to Spotify’ on *TorrentFreak* (28 September 2011) <<https://torrentfreak.com/music-piracy-continues-to-decline-thanks-to-spotify-110928/>>.

123 See Braxton, above n 49, 206–8; Joel Waldfoegel, ‘Music File Sharing and Sales Displacement in the iTunes Era’ (2010) 22 *Information Economics and Policy* 306; Joel Waldfoegel, ‘Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music Since Napster’ (Working Paper No 17503, The National Bureau of Economic Research, October 2011); Joel Waldfoegel, ‘Music Piracy and Its Effects on Demand, Supply, and Welfare’ in Josh Lerner and Scott Stern (eds) *Innovation Policy and the Economy* (University of Chicago Press, 2012) vol 12, 91.

television series and make them available for streaming immediately, for a flat monthly subscription fee, anecdotal evidence suggests that rates of infringement were far lower than those for conventional distribution models.<sup>124</sup> Some quantitative data from the US shows that iTunes also displaces illicit file-sharing for television content. When the NBC television network removed content from iTunes, the number of downloads of those shows via BitTorrent increased by 11.4 per cent (approximately 48 000 downloads a day).<sup>125</sup> This seems to support the hypothesis that consumers will choose to pay for digital downloads of copyright goods that are reasonably priced and convenient and that, as a result, it is possible to ‘compete with free’.<sup>126</sup> Our data provides a qualitative illustration of this effect, as legitimate channels become cheaper and more convenient to access:

If there’s a legal, a legal alternative that’s available, reasonably priced, then happy to do that. Um, movies is a classical example, um, for me personally, I guess, five years ago I can remember going to the video store, hiring DVDs or CD – [n]o, it would have been DVD movies, and burning copies of those DVD movies. I certainly haven’t bothered or haven’t tried to burn one for quite a long time now. It’s just not worth my time to be able to do it, movies are readily available online. We’ve got, um, you know, Big Pond movies, and also running with the subscription to Quick Flicks [sic], so that we can watch a whole lot of movies online at what I guess we’ve rationalised at a reasonable price, and the convenience factor and anything that goes with that and knowing that we’re doing it legally, has meant that we’ve stopped that what was once an illegal practice and still is an illegal practice. (#8)

Many rightsholders are moving to satisfy consumer demand for choice and reasonably priced, convenient, digital distribution channels. If it is accepted that many consumers seem to view paying for access as morally better than illicitly downloading, we expect that enhancing competition in copyright markets for digital distribution would be likely to have some effect on reducing rates of infringement. Quantifying this effect is likely to be difficult, since a consumer’s perception of fairness is likely to depend upon a large range of different factors and vary significantly between individuals. More research is likely required, but also more experimentation from rightsholders with new digital distribution models with different price points and feature sets.

Importantly, however, the interests of rightsholders are not always aligned with those of consumers. Even if satisfying consumer demand is likely to reduce infringement, it is not necessarily the profit maximising strategy. For premium

124 Alexis Kleinman, ‘Few People Are Pirating “Arrested Development” Because Netflix Is Affordable Enough Already’ on *Huffington Post* (29 May 2013) <[http://www.huffingtonpost.com/2013/05/29/pirating-arrested-development\\_n\\_3353465.html](http://www.huffingtonpost.com/2013/05/29/pirating-arrested-development_n_3353465.html)>.

125 Brett Danaher et al, ‘Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy’ (2010) 29 *Marketing Science* 1138, 1149.

126 See Mark A Lemley, ‘Is the Sky Falling on the Content Industries’ (2011) 9 *Journal of Telecommunications and High Technology Law* 125, 125. Lemley argues throughout his article that copyright industries have a long history of adapting to technological changes that have disrupted existing business models and made new ones possible.



offerings, rightsholders sometimes choose to maximise revenue through exclusive licensing of premium content, even if this leads to an increase in illicit infringement for the less wealthy or less engaged end of the audience. Time Warner and HBO's strategy with *Game of Thrones* provides an excellent example of a case in which rightsholders prefer to maintain exclusivity, despite high rates of infringement, in order to increase or maintain demand for bundled cable offerings.<sup>127</sup> This business decision leads back to the conflict at the core of copyright policy making: to what extent should the law support rightsholders decisions not to serve a market – and how can copyright effectively balance consumer welfare against the need to secure revenue streams for producers? In the next section, we examine two different responses to copyright infringement: increasing competition and making legitimate markets more accessible and increasing deterrence through enforcement and more punitive sanctions.

## V A LEGISLATIVE OR MARKET-BASED RESPONSE?

Australia's Attorney General, Senator George Brandis, has pledged to 'do something' about Australia's reputation as 'the worst offender anywhere in the world when it comes to piracy'.<sup>128</sup> In July 2014, the Attorney General's Department and the Department of Communications released a discussion paper that suggested sweeping changes to Australia's copyright laws to require intermediaries to do more to combat copyright infringement.<sup>129</sup> While what exactly this might entail is not yet clear, the current political debate revolves around 'graduated response schemes', which would require ISPs to take some action to forward on allegations of infringement and, potentially, impose a series of technical sanctions on users alleged to have infringed copyright on multiple occasions.<sup>130</sup> In this Part, we consider the interrelation between legal deterrence and social norms. While the lack of legal sanctions increases consumers' willingness to infringe, increasing legal sanctions without changing social norms is not likely to be very effective. Conversely, however, increasing legal sanctions without enhancing access to legitimate copyright markets is only likely to increase consumers' perceptions of the unfairness of copyright law and industry

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127 Unbundling HBO would '[make] no sense' until the relative size of cable subscribers to households with broadband but no cable increased significantly: The Economist, 'The Winning Streak', *The Economist* (online), 20 August 2011 <<http://www.economist.com/node/21526314>>.

HBO's President, Erik Kain, explains that HBO's cable affiliates bear most of its marketing and distribution costs and that losing exclusive deals with cable companies in favour of direct internet subscriptions 'would be a net loss. ... Our content [is] exclusive. It's the only place you can get it. And we believe there is value in exclusivity.' Erik Kain, quoted in Dustin Curtis, 'Why HBO's President Panned Internet Streaming', *Dustin Curtis* (10 May 2012) <<http://dcurt.is/hbo-forbes-journalism>>.

128 Josh Taylor, 'Australian Government Considers Graduated Response to Piracy' on *ZDNet* (28 May 2014) <<http://www.zdnet.com/au/australian-government-considers-graduated-response-to-piracy-7000029968/>>.

129 Attorney-General's Department and Department of Communications, above n 65.

130 See Rebecca Giblin, 'Was the High Court in *iiNet* Right to Be Chary of a Common Law Graduated Response?' (2013) 18 *Media and Arts Law Review* 283.

practices. We argue that aligning social norms and copyright law likely requires meeting consumer demand for choice and competition in digital distribution models.

### A Increasing Legal Sanctions

Accessibility is not the only driver of infringement. Unsurprisingly, consumers often explain that copyright law provides little legal deterrent to restrain their behaviour. The music industry learned in the early 2000s that suing their fan base was a terrible public relations strategy,<sup>131</sup> and relatively few direct suits against consumers of mainstream media content have been filed worldwide since then. This lack of effective deterrence means that the perceived legal risk of infringement remains low among consumers, as one respondent points out: ‘[t]he chance of being caught I would think is quite small so the risk of detection would be small.’ (#14) Similar sentiments were common throughout the interview sample. Consumers can perceive some moral weight of copyright, but discount the threat of legal sanctions: ‘[e]ven though technically you are stealing it, well, breach of copyright, but chances of you getting caught are nil so to most people that’s probably why most people do it.’ (#23)

Graduated response schemes are the logical next step in increasing deterrence in copyright enforcement. Rightsholders are keen to avoid the high costs and bad publicity of legal enforcement by staying out of the judicial system and requiring private intermediaries to enforce their rights instead.<sup>132</sup> This leads to a severe threat for legitimacy and due process, particularly where ISPs are being asked to impose substantial penalties on consumers without judicial oversight.<sup>133</sup> This concern has forced rightsholders to step back from schemes that would require ISPs to disconnect users from the internet completely, following strong activism around the world and a successful and high profile challenge on constitutional grounds in France.<sup>134</sup> Current lobbying efforts for new enforcement measures generally focus on notice based regimes as a first step.<sup>135</sup> The schemes are

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131 Peter K Yu, ‘The Copyright Divide’ (2003) 25 *Cardozo Law Review* 331, 442–3; Peter K Yu, ‘P2P and the Future of Private Copying’ (2005) 76 *University of Colorado Law Review* 653, 660, 665; Kristina Groennings, ‘Costs and Benefits of the Recording Industry’s Litigation against Individuals’ (2005) 20 *Berkeley Technology Law Journal* 571, 589–91.

132 For a comprehensive overview of graduated response schemes around the world, see Rebecca Giblin, ‘Evaluating Graduated Response’ (2014) 37 *Columbia Journal of Law & the Arts* 147.

133 See Nicolas Suzor and Brian Fitzgerald, ‘The Legitimacy of Graduated Response Schemes in Copyright Law’ (2011) 34 *University of New South Wales Law Journal* 1.

134 Conseil constitutionnel [French Constitutional Court], decision n° 2009-580 DC, 10 June 2009 reported in JO, 13 June 2009.

135 The Government’s July 2014 proposal explicitly did not envisage requiring internet service providers to disconnect users who received multiple allegations of infringement, but any increased liability could force service providers to rely on the ‘Safe Harbours’ in s 116AH(1) of the *Copyright Act 1968* (Cth), which do include an obligation to terminate the accounts of ‘repeat infringers’. Even if a notice-based scheme were introduced, there is some likelihood that if sanctions are not imposed, subscribers who receive notices will quickly learn that no consequences usually follow. In this case, it seems highly likely that any drop in infringement due to ‘warning’ or ‘education’ notices would be temporary at best, and pressure on the Government and on private entities to introduce sanctions would be likely to follow.

framed as primarily educational, not punitive, and the imposition of ‘technical’ sanctions is generally left as an open possibility once the infrastructure is in place. Most recently, in the US, rightsholders and ISPs have established a private scheme that is designed primarily to ‘educate’ or ‘warn’ consumers, rather than require disconnection, although there is a vaguely worded requirement to impose a ‘mitigation measure’ on the fifth or sixth notice.<sup>136</sup>

Australian rightsholders are apparently not lobbying for a disconnection scheme, but are actively pushing for a scheme that would see ISPs warn users and then slow down their internet access.<sup>137</sup> The most recent push comes after the High Court in *Roadshow Films Pty Ltd v iiNet Ltd*<sup>138</sup> held that a general purpose ISP was not liable for the infringing actions of its users and was under no obligation to pass on allegations of infringement or enforce the rights of third parties. Before the *iiNet*, Australian ISPs seemed ready to back a notice based scheme that would allow rightsholders to discover the details of users who had received more than four ‘education’ and ‘warning’ notices.<sup>139</sup> Following *iiNet*, ISPs have less incentive to negotiate with rightsholders, but the possibility that a formal regulatory system may be introduced has led ISPs to note that they are willing to ‘re-engage in the debate’.<sup>140</sup> The Government’s proposal would essentially overturn *iiNet* in order to provide ISPs with an incentive to reach a negotiated agreement with rightsholders.<sup>141</sup> Two major points of disagreement remain: ISPs would prefer that rightsholders bear the costs of administering the scheme, and that any sanctions were only imposed through a valid judicial process.<sup>142</sup>

Whether additional enforcement mechanisms should be introduced remains an open question. While the lack of effective deterrence contributes to consumer

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136 ‘Mitigation measures’ might include a restriction in speed, mandatory education programs, suspension of service, or other measures at the ISP’s discretion: see Annemarie Bridy, ‘Graduated Response American Style: Six Strikes Measured against Five Norms’ (2012) 23 *Fordham Intellectual Property, Media & Entertainment Law Journal* 1, 32–3.

137 Mahesh Sharma and Ben Grubb, ‘World’s Worst Pirates and Their Parents Face Walking the Plank’, *The Sydney Morning Herald* (online), 13 June 2014 <<http://www.smh.com.au/digital-life/digital-life-news/worlds-worst-pirates-and-their-parents-face-walking-the-plank-20140613-zs5pb.html>>.

138 (2012) 248 CLR 42 (‘*iiNet*’).

139 Communications Alliance Ltd, ‘Australian Internet Service Provider (ISP) Proposal: A Scheme to Address Online Copyright Infringement’ (2011). See also Suzanne Tindal, ‘ISPs Propose Copyright-Notice Scheme’ on *ZDNet* (25 November 2011) <<http://www.zdnet.com/isps-propose-copyright-notice-scheme-1339326850/>>. *iiNet* later publicly withdrew support for the scheme: Renai LeMay, ‘*iiNet* Pulls out of Anti-Piracy Scheme’ on *Delimiter* (10 December 2012) <<http://delimiter.com.au/2012/12/10/iinet-pulls-out-of-anti-piracy-scheme/>>.

140 Josh Taylor, ‘Costs Must Be Fixed First in Piracy Solution: Comms Alliance’ on *ZDNet* (9 April 2014) <<http://www.zdnet.com/costs-must-be-fixed-first-in-piracy-solution-comms-alliance-7000028227/>>.

141 Importantly, the Government’s proposal would have provided rightsholders with a much stronger negotiating position than ISPs, and without intervention from strong representatives of consumers, there is little reason to think that any resulting agreement would represent a bargain that is in the public interest.

142 Josh Taylor, ‘Costs Must Be Fixed First in Piracy Solution’, above n 140; James Hutchinson, ‘ISPs Line up for Fresh Piracy Negotiations’, *Financial Review* (online), 7 April 2014 <[http://www.afr.com/technology/isps\\_line\\_up\\_for\\_fresh\\_piracy\\_negotiations\\_hfKEcCdCgswVVkATTmFxnK](http://www.afr.com/technology/isps_line_up_for_fresh_piracy_negotiations_hfKEcCdCgswVVkATTmFxnK)>.

motivations to infringe copyright, it is not clear that graduated response schemes are actually likely to reduce infringement. The evidence so far is inconclusive at best.<sup>143</sup> These schemes are only likely to be effective to the extent that they are able to substantially reduce the temporal distance between the time a consumer infringes copyright and the time the punishment is imposed.<sup>144</sup> Moreover, the probability of punishment, severity of punishment, and swiftness of punishment must all be high for the consumer to perceive infringement to be a high risk.<sup>145</sup> In short, changing consumer understandings of acceptable behaviour through deterrence is difficult, and likely requires a strongly punitive regime.

### **B The Social Legitimacy of Copyright Law: Changing Social Norms and Changing Business Models**

Infringing behaviour must always be understood in its social context. The effectiveness of copyright law depends not only (or perhaps not even primarily) on legal sanctions, but on how infringement is socially constructed and perceived.<sup>146</sup> Our research highlights a growing risk that copyright is losing its normative legitimacy. One of the authors asked the subjects: ‘if you heard of, or observed someone infringing, would you have a reaction?’. The response was a resounding ‘no’ from consumers interviewed. This supports the common intuition that there are few, if any, social sanctions against copyright infringement. The lack of either formal or informal sanctions suggests that infringing behaviour is normatively acceptable, as articulated by a respondent in our interviews: ‘[w]ell I think most people would class it as acceptable, even though it’s illegal ... I think it’s just become the norm. I think even across most generations people are downloading stuff off the net.’ (#23)

This demonstrated lack of acceptance of the legitimacy of copyright law should be extremely worrying. Without support from informal social norms,

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143 See Giblin, above n 132, 182–95. Giblin reviewed the empirical data developed so far and concluded that ‘the evidence that graduated response actually reduces infringement is extraordinarily thin’: at 195.

144 See Don A Moore and George Loewenstein, ‘Self-interest, Automaticity, and the Psychology of Conflict of Interest’ (2004) 17 *Social Justice Research* 189.

145 See Harold G Grasmick and Donald E Green, ‘Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior’ (1980) 71 *Journal of Criminal Law and Criminology* 325.

146 For example, Gunter found that ‘college students with peers engaging in piracy and parents supportive of piracy were more likely to engage in piracy themselves’: Whitney Gunter, ‘Piracy on the High Speeds: A Test of Social Learning Theory on Digital Piracy among College Students’ (2008) 3 *International Journal of Criminal Justice Sciences* 54, 65. Higgins, Fell and Wilson found that students who associate with peers who infringe copyright are more likely to infringe themselves: George E Higgins, Brian D Fell and Abby L Wilson, ‘Low Self-control and Social Learning in Understanding Students’ Intentions to Pirate Movies in the United States’ (2007) 25 *Social Science Computer Review* 339, 351.

copyright is unlikely to be respected or obeyed.<sup>147</sup> The inconsistencies in opinions on infringement suggest a lack of social consensus as to whether infringement is inherently wrongful. Consumers do at times internalise the idea that infringement is ‘stealing’, but at the same time, the norm against infringement is undermined by pervasive and normalised infringement and a feeling amongst Australian consumers that they are maltreated by copyright business models. When consumers are able to justify their actions by reference to the failure of distributors to provide legitimate access in cheap, convenient, and fair forms, they will be able to infringe and avoid experiencing any cognitive dissonance from their actions.<sup>148</sup> Consumers who continue to be excluded, either because their demand does not meet the threshold to subscribe to premium offerings, or because the material is not available in their region, will likely continue to have a strong motivation to infringe. For instance, one respondent noted that: ‘[b]uying a DVD as opposed to illegally downloading – it’s expensive and I have to wait for so long and I don’t really think that it’s kind of worth it to pay for that amount and wait for that long.’ (#24) This is a problem that extends beyond any private costs to rightsholders. Ultimately, the legitimacy of the copyright system is at stake – the real risk here is that copyright law has become ineffective at guiding behaviour.<sup>149</sup>

Introducing harsher sanctions might increase legal deterrence, but even with severe punishments, social norms may not shift if consumers continue to perceive the law or business models to be unfair. As long as access continues to be more limited and more expensive in Australia than in comparable countries, consumers are likely to continue to blame copyright industries for their infringement. This is not a new problem; when Napster was sued in 2000, there were already predictions that limiting distribution of content would not be a viable strategy: ‘[p]iracy is the tool that allows consumers to drive down prices ... they’re realising they have no power to punish companies for unfair pricing, price fixing [and] limited distribution for DVDs.’<sup>150</sup> This sentiment that business models need to evolve to meet consumer demand is reflected in our data:

The model for distribution is stuck in the last century, they haven’t really caught up with the internet yet ... so, that needs to be resolved, and because that sort of

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147 Cooter argues that law is most effective when it aligns with social norms: Robert D Cooter, ‘Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization’ (2000) 79 *Oregon Law Review* 1, 147. Hinduja found that perceptions of morally acceptable behaviour were linked to consumers’ willingness to infringe copyright in software: Sameer Hinduja, ‘Neutralization Theory and Online Software Piracy: An Empirical Analysis’ (2007) 9 *Ethics and Information Technology* 187, 197. Klosko discusses the importance of fairness in creating moral obligations for individuals to support the provision of public goods: George Klosko, ‘Presumptive Benefit, Fairness, and Political Obligation’ (1987) 16 *Philosophy & Public Affairs* 241, 247.

148 Lou Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press, 1962).

149 Tehranian argues that increasing enforcement of copyright law will ‘[force] us to address the uncomfortable and ultimately untenable’ disparity between law and social norms: John Tehranian, ‘Infringement Nation: Copyright Reform and the Law/Norm Gap’ (2007) (3) *Utah Law Review* 537, 549.

150 O Freestone and V-W Mitchell, above n 98, 126, quoting Marilyn Wheeler, ‘Inside the Online Movie Underground’ on *ZDNet* (15 May 2000) <<http://www.zdnet.com/inside-the-online-movie-underground-3002078963/>>, quoting Donald Moore.

business model hasn't caught up yet with where we're at, this is why people are doing this [illegal downloading]. But this just leads to all of this kerfuffle about copyright, and it just entrenches the positions of the big companies against piracy and that, so I think it detracts from the broader issue of moving towards a better model for everyone. (#27)

Ultimately, the pressure to increase deterrence in copyright intersects at some point with the need to increase access to information and entertainment goods. Both the Productivity Commission<sup>151</sup> and the Australian Parliament Standing Committee on Infrastructure and Communications<sup>152</sup> have recently recommended taking steps to increase competition and reduce geographic segmentation in copyright markets, on both efficiency and consumer welfare grounds. This is a direct conflict; enhancing enforcement, to the extent that it is effective, will enhance the ability of rightsholders to engage in price discrimination, including geographic market segmentation. In cases where the profit maximising strategies of copyright industries rely on price discrimination to encourage the most loyal audiences to pay for premium offerings, Australian consumers will likely continue to suffer from higher prices and less choice and competition in distribution channels. While the deadweight loss caused by unmet demand may be self-correcting to an extent, the damage to the public's faith in copyright is not.

This conflict, between enforcement and access, also plays out at the level of public policy development.<sup>153</sup> While the Attorney-General's Department appears keen to increase the strength of copyright, the Communications Minister, Malcolm Turnbull, has expressed strong support for the proposition that rightsholders should focus on making content available to consumers:

Basically you've got to recognise that the minute *Game of Thrones* or any other show is put to air, it will be available globally. ... So the owners of that copyright have got to be in a position where it can be released simultaneously theatrically, or in the case of something like that on Pay TV everywhere. But also, it should be for sale through the iTunes store or various other platforms at the same time. Because if it's not for sale –because what's happening is, *Game of Thrones*, episode three I think goes on air this week in Australia. I think it went to air a couple of weeks ago in the States. It's been tweeted and written up and Facebooked endlessly – and if they can download, they will. Now we're just kidding ourselves – all they are doing is throwing money away by not making it available instantly.<sup>154</sup>

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151 Productivity Commission, above n 24, discussing the market for books in Australia.

152 *IT Pricing Inquiry*, above n 9, discussing pricing for information goods including books, software, music, and film products.

153 Josh Taylor, 'Turnbull May Soften Brandis' Hard Line on Copyright Infringement' on *ZDNet* (6 June 2014) <<http://www.zdnet.com/turnbull-may-soften-brandis-hard-line-on-copyright-infringement-7000030281/>>.

154 Renai LeMay, 'Turnbull on iiTrial: We Need "Global Copyright"' on *Delimiter* (26 April 2012) <<http://delimiter.com.au/2012/04/26/turnbull-on-ii-trial-we-need-global-copyright/>>, quoting Malcolm Turnbull.

Certainly, copyright markets in Australia are getting better. Netflix is scheduled to launch in Australia in 2015,<sup>155</sup> although its available catalogue will likely be significantly smaller than in the US, at least initially.<sup>156</sup> Major television networks have increased the amount of content available on demand and reduced the delay in distribution that Australians face.<sup>157</sup> On demand streaming services have reduced their prices to be more competitive.<sup>158</sup> Television shows are increasingly broadcast in Australia within hours of the original broadcast,<sup>159</sup> and films and computer games now often receive near simultaneous release in Australia.<sup>160</sup> But this process is by no means complete; there is still a long way to go before Australian consumers experience parity of convenience and competition for distribution channels in the Australian market, and prices remain much higher in Australia.<sup>161</sup>

Until distribution models improve and consumers no longer feel maltreated, increasing the strength of copyright law risks alienating consumers even further. If consumers blame the industry for failing to provide access, increasing the severity of punishments without increasing access may lead to consumers to view industry practices as increasingly hypocritical. While increased deterrence might decrease acts of infringement, it will do so in a way that weakens the social norms that underpin copyright.<sup>162</sup> Maintaining high levels of legal deterrence will also likely require the continuation of an escalating arms race, as consumers seek out new methods of escaping detection for file-sharing.<sup>163</sup> The logical endgame in

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155 Claire Reilly, 'Netflix Confirms Australian Launch for March 2015' on *CNET* (19 November 2014) <<http://www.cnet.com/au/news/netflix-confirms-australian-launch-march-2015/>>.

156 Josh Taylor, 'Netflix Australia Will Not Be the Netflix You Are Looking for' on *ZDNet* (30 June 2014) <<http://www.zdnet.com/netflix-australia-will-not-be-the-netflix-you-are-looking-for-7000031046/>>.

157 Stewart, above n 87.

158 Adam Turner, 'Foxtel Slashes Presto Movies to \$9.99 p/m', *The Sydney Morning Herald* (online), 15 August 2014 <<http://www.smh.com.au/digital-life/computers/gadgets-on-the-go/foxtel-slashes-presto-movies-to-999-pm-20140814-104cli.html>>.

159 Michael Idato, 'Showing Now: Networks Fast-track Airing of Foreign TV Shows', *The Sydney Morning Herald* (online), 11 September 2012 <<http://www.smh.com.au/entertainment/tv-and-radio/showing-now-networks-fasttrack-airing-of-foreign-tv-shows-20120911-25pcx.html>>; Daniel Burt, 'On a Fast Track', *The Sydney Morning Herald* (online), 19 September 2012 <<http://www.smh.com.au/entertainment/tv-and-radio/on-a-fast-track-20120918-264h0.html>>.

160 Steven Duncombe, *Movies to Hit Home Sooner to Beat Pirates* (17 June 2014) CHOICE Online <<http://www.choice.com.au/media-and-news/consumer-news/news/movies-to-hit-home-sooner-to-beat-pirates-170614.aspx>>.

161 *IT Pricing Inquiry*, above n 9, 84 [3.122]–[3.124], 92 [4.26].

162 Drawing on Durkheim's theory of morality, Nycyk suggests that social norms around copying are unlikely to change through punishment alone – that reform requires 'autonomy', in the sense of 'the free adoption of social values', which in turn requires copyright industries to adopt and adapt new models of distribution: Michael Nycyk, 'We Still Need The Pirate Party and More: Changing Perspectives on the Morality of Music Sharing' [2013] *Platform: Journal of Media and Communication* <[http://journals.culture-communication.unimelb.edu.au/platform/essay\\_nycyk.html](http://journals.culture-communication.unimelb.edu.au/platform/essay_nycyk.html)>, citing Emile Durkheim, *Moral Education* (Everett K Wilson trans, The Free Press, 1961) [trans of *Education Morale* (first published 1961)].

163 Haber argues that graduated response schemes are likely to lead to further conflicts as technology continues to evolve in response: Eldar Haber, 'Copyrights in the Stream: The Battle on Webcasting' (2011) 28 *Santa Clara Computer & High Technology Law Journal* 769, 799–804.

this strategy is not attractive; it requires tight control over telecommunications networks,<sup>164</sup> with significant costs to privacy<sup>165</sup> and ‘generativity’,<sup>166</sup> as well as restricting the flow of information and cultural goods upon which our culture depends.<sup>167</sup>

## VI CONCLUSION

A serious disconnect has emerged between industry practices, copyright law, and consumer perceptions. Film and television producers have become adept at driving up demand by engaging audiences and nurturing the ‘cultural buzz’ that surrounds entertainment goods. At the same time, however, many players in the copyright industries are actually contributing to undermining copyright norms by failing to meet that demand. Our research provides qualitative evidence that shows how decisions not to provide access to Australian markets on the same terms as in other jurisdictions is seen by consumers to be unfair and increases their willingness to infringe copyright. We also show that consumers would often rather pay for access than infringe, as long as the material is available in a timely, reasonably priced, and convenient manner.

Particularly for premium offerings, the marketing campaigns of copyright industries reflect a much more sophisticated and nuanced understanding of copyright than is portrayed by their lobbying arms. The language of the lobbyists is one of crisis and ‘theft’, and there is increasing political pressure on the Australian government to increase the force of copyright law. These increases are likely to come at significant costs, both in increased enforcement costs and less measurable costs to due process and privacy. But the actions of the industry, occasionally explicitly acknowledged, reflect a markedly different view: infringement is not always harmful – it can just be a symptom of demand and popularity of a franchise, and it can sometimes actually be an important tool in increasing demand. The decision not to provide access to the Australian market is sometimes a relic of the historical way in which copyrights were segmented along regional lines; at other times, it is part of a deliberate strategy to maximise profits through exclusive licensing arrangements. Seen as a whole, the industry’s strategy appears to rely on increasing both infringement and the legal sanctions on infringement, in order to maximise both the number of people talking about

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164 Lessig discusses a hypothetical ‘push to complete the work of transforming the Net into a regulable space’: Lawrence Lessig, *Code: Version 2.0* (Basic Books, 2006) 76.

165 See Cohen, ‘Pervasively Distributed Copyright Enforcement’, above n 5, 39–41.

166 Zittrain introduces the concept of ‘generativity’ as a measure of ‘a system’s capacity to produce unanticipated change through unfiltered contributions from broad and varied audiences’: Jonathan Zittrain, *The Future of the Internet – And How to Stop It* (Yale University Press, 2008) 70.

167 Suzor discusses the limitations of an idealised ‘celestial jukebox’ in copyright markets: Nicolas Suzor, ‘Access, Progress, and Fairness: Rethinking Exclusivity in Copyright’ (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 297, 313–14. Cohen discusses the importance of the ‘play of culture’ in copyright systems: Julie E Cohen, ‘Creativity and Culture in Copyright Theory’ (2007) 40 *University of California, Davis Law Review* 1151, 1190–1.



and viewing film and television content and the number of people who choose to pay for lucrative premium offerings.

We think that increasing punishments at this time might actually be counterproductive. Increasing enforcement without better serving the Australian market is only likely to continue to undermine the moral legitimacy of copyright law.<sup>168</sup> Our research highlights the way that poor levels of access can lead consumers to blame rightsholders for failing to meet market demand, and this encourages a social norm that infringing copyright, while illegal, is not morally wrongful. Unless and until this norm changes, increased enforcement is unlikely to be very effective.

Assuming that increasing the deterrence available to rightsholders does reduce infringement, it might increase the proportion of users willing to pay for premium services. But without increasing access, it is also likely to increase deadweight loss – the welfare cost caused by unmet consumer demand. Because the incentives of rightsholders and consumers are not fully aligned, increasing the amount that rightsholders can charge for premium offerings might actually reduce the incentives to provide Australians with better legitimate channels to access creative cultural content. At least for premium content, rightsholders have so far chosen to maximise profits by focusing on the more lucrative end of the market – premium cable subscriptions, expensive digital rentals, and hardcopy distribution – at the expense of more affordable options. If enforcement levels are increased without measures to enhance competition in distribution channels, rational rightsholders will continue to have an incentive to limit access in order to push audiences towards more profitable premium services. The result is likely to be predictable: faced with an ongoing lack of choice in affordable digital distribution models, coupled with an increasingly punitive legal regime, Australian consumers will continue to lose respect for copyright law. This is an outcome that should be avoided, as it leads only to an ongoing, costly, and increasingly punitive enforcement arms race.

Copyright policy must strike a balance between providing private returns to rightsholders and promoting the dissemination of cultural goods. In Australia, there is a clear sentiment amongst consumers that this balance has not been met. Until distribution channels improve significantly to better meet consumer demand, the priority for copyright policy should be to seek to enhance access and competition in Australian media markets, rather than seeking to drive change through increased enforcement. Ultimately, consumers want access to content through legitimate channels in a way that is both convenient and reasonably

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168 We are not suggesting that legal enforcement has no role in helping to shift social norms, just that it is not likely to be effective at doing so as long as consumers still perceive that they are not being fairly treated. This point is reflected in policy development, according to emails obtained under freedom of information laws from the Department of Communications, which stress the need for '[f]acilitating access to legitimate sources of content' and '[f]air pricing ... [removing] the "Australians are getting done over factor"': Josh Taylor, 'Brandis and Turnbull Working on Joint Piracy Crackdown Policy' on *ZDNet* (5 June 2014) <<http://www.zdnet.com/au/brandis-and-turnbull-working-on-joint-piracy-crackdown-policy-7000030239/>>.

priced, and they do not want to feel exploited. As long as they are denied access on acceptable terms, consumers will seek out other ways to fulfil their demand. If rightsholders do choose to provide consumers with access on fair terms, it seems clear that many will prefer to pay rather than infringe.