

Submission to the Australian Government's Online Copyright Infringement Discussion Paper, 05 September 2014

Our organisations represent users and creators of copyright works. Creative Commons is an international non-profit organisation that provides free licences and tools that copyright owners can use to allow others to share, reuse and remix their material, legally. Creative Commons Australia is the affiliate that supports Creative Commons in Australia.¹ The Organization for Transformative Works is a nonprofit organisation run by and for fans to provide access to and preserve the history of fanworks and fan cultures.

Our submission focuses on the adverse effects that the Government's proposals are likely to have on the legitimate use of copyright works. Copyright exists to support the production of new expression. Because new expression always builds on existing culture, any extension of copyright protection necessarily also increases the costs of creative expression. As a threshold matter, we do not believe that these further increases to the force of copyright law are justified. In recent years, the balance at the heart of copyright law has tipped too far in the direction of established producers and distributors, and now imposes unnecessary costs on ordinary creators. The available evidence does not support a further increase in the penalties and enforcement mechanisms available under copyright law.²

The Australian Government's proposal poses significant risks to creativity, free expression, and the flow of information, knowledge, and culture. In practical terms, ISPs and other online intermediaries are not in a good position to monitor and enforce copyright infringement. Copyright law is complex, and many of the decisions intermediaries are being asked to make require difficult evaluations of fact and law. In particular, private intermediaries should not be tasked with identifying whether a given use is validly licensed or legitimately used under one of the limitations to copyright, including fair dealing.

Private graduated response schemes rely on notices from copyright owners alleging that an intermediary's user has infringed their rights. International and domestic experience has shown that allegations are often made in error or deliberately designed to suppress legitimate criticism or competition. Intermediaries are poorly positioned to investigate the veracity of these allegations, particularly given the complexity of copyright law. The effect of a graduated response scheme that requires intermediaries to issue warnings and potentially impose

¹ Note that the views expressed here are those of the Australian affiliate, and are not endorsed by Creative Commons Corporation in the US.

² See Ruth Towse, 'What We Know, What We Don't Know and What Policy-Makers Would like Us to Know about the Economics of Copyright' (2011) 8 *Review of Economic Research on Copyright Issues* 101; Christian Handke, 'Economic Effects of Copyright: The Empirical Evidence So Far' (2011) <http://www4.nationalacademies.org/xpedio/groups/pgasite/documents/webpage/pga_063399.pdf>.

sanctions based on these notices is likely to chill freedom of expression, suppress socially valuable speech, limit the flow of information and culture, and reduce competition.

Given the risks of graduated response schemes, and the lack of evidence about their necessity or efficacy, we recommend that the Australian Government should not introduce any changes to authorisation liability. Before any additional obligations are imposed on intermediaries, a thorough cost / benefit analysis should be carried out.³ This has not yet been done.

We strongly recommend that if any scheme is introduced to respond to allegations of copyright infringement, it should be judicial in nature. Any legitimate system of regulating speech must be proportionate and contain strong protections for due process. In a copyright context, the task evaluating complex questions of fact and law can only be legitimately done through a judicial process.

We also recommend that if a graduated response scheme is introduced, it is created as a separate regulatory regime. The proposed changes to authorisation liability create too much uncertainty and risk for intermediaries. This is likely to significantly inhibit investment in the development and provision of new technologies of creation and distribution that individuals rely on to communicate effectively.

Allegations of infringement are frequently incorrect or misused

Data collected from the operation of Notice and Takedown procedures under the US DMCA shows it has been frequently used for the purposes of silencing critical speech or limiting competition.⁴ A single provider, WordPress, identified numerous examples of improper takedowns that interfered both with legitimate criticism and legitimate rightsholders, including the following:

³ See Department of Communications, 'Regulating harms in the Australian communications sector' (May 2014) http://www.communications.gov.au/_data/assets/pdf_file/0008/231884/Dept-policy-background-paper_2_May-14.pdf; Department of the Prime Minister and Cabinet, 'The Australian Government Guide to Regulation' (March 2014) http://cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf; Productivity Commission, 'Regulator Audit Framework' (March 2014) http://www.pc.gov.au/_data/assets/pdf_file/0005/134780/regulator-audit-framework.pdf.

⁴ See, for example, Jennifer M. Urban & Laura Quilter, Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act, 22 *Santa Clara Computer & High Tech. L. J.* 621, 668–70, 678 (2006) (discussing noncopyright claims framed as copyright claims for purposes of benefiting from DMCA (Digital Millennium Copyright Act) takedown procedures); Letter from Sarah B. Deutsch, Vice President and Gen. Counsel for Verizon Commc'ns, Inc., to the U.S. Copyright Office 2 (Nov. 28, 2011), available at <http://www.copyright.gov/docs/onlinesp/comments/2011/initial/verizon.pdf> (noting DMCA notices sent on trademark grounds); https://www.cdt.org/files/pdfs/copyright_takedowns.pdf (a white paper by the Center for Democracy and Technology documents numerous examples from the 2008 US presidential campaign, which affected candidates from the left and right, and elsewhere).

- A reader who disagreed with a blog run by experienced science journalists tracking retracted scientific papers copied the blog posts, claimed them as his own by backdating his site, and issued takedown notices that led to the original, truthful content being disabled.
- A student journalist in the UK published a press statement voluntarily submitted to him, but the subject had second thoughts and submitted a takedown notice; the journalist did not have the resources or expertise to litigate and so the takedown succeeded.
- A medical transcription training service using forged customer testimonials on their website submitted a takedown for screenshots of the fake testimonials in a blog post exposing the scam.
- A physician demanded removal of newspaper excerpts posted to a blog critical of the physician, by submitting a DMCA notice in which he falsely claimed to be a representative of the newspaper.
- A model involved in a contract dispute with a photographer submitted a series of DMCA notices seeking removal of images of the model for which the photographer was the rights holder.
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- A frequent submitter of DMCA notices submitted a DMCA notice seeking removal of a screenshot of an online discussion criticizing him for submitting overreaching DMCA notices.⁵

Similarly, Google has identified numerous takedowns with the motivation of suppressing speech, “often repeatedly from the same vexatious submitters.”⁶ Recently, Spanish firm Ares Rights has been sending takedown notices to critics of the Argentinian and Ecuadorian governments.⁷ When the Electronic Frontier Foundation denounced this censorship, the EFF’s statement was covered in Ecuadorian publications such as PlanV,⁸ which subsequently received a copyright takedown notice from Ares Rights claiming trademark

⁵ Testimony of Paul Sieminski, General Counsel, Automattic Inc., before the House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, 13 March 2014,

<http://judiciary.house.gov/cache/files/b343eabe-0bf1-44e9-8c85-b3478892b8e1/031314-testimony---sieminski.pdf>.

⁶ Testimony of Katherine Oyama, Sr. Copyright Policy Counsel, Google Inc., before the House of Representatives Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, 13 March 2014,

<http://judiciary.house.gov/cache/files/be93d452-945a-4fff-83ec-b3f51de782b3/031314-testimony---oyama.pdf>.

⁷ Maira Sutton, State Censorship by Copyright? Spanish Firm Abuses DMCA to Silence Critics of Ecuador’s Government 15 May 2014 <https://www.eff.org/deeplinks/2014/05/state-censorship-copyright-spanish-firm-abuses-DMCA>.

⁸ Censura estatal a través de los copyrights 25 May 2014 <http://www.planv.com.ec/historias/politica/censura-estatal-traves-copyrights>.

rights in the use of the name Ares Rights.⁹ When a legal blogger reported the controversy, Ares Rights sent three more copyright notices to him.¹⁰ Such nonjudicial procedures are open to abuse, and they will be abused.

Because the internet is a vital outlet for ordinary speakers who lack access to traditional publishing venues, these takedowns are generally directed at people without legal training or resources to defend themselves. Thus they are likely to go unchallenged, and the relevant speech permanently suppressed. The problem is especially acute for marginalized speakers, such as women and people of colour, who already face cultural pressures against speaking out and are less likely to contest takedown notices.

While we do not yet have comparable data for allegations of infringement in graduated response schemes, there is no reason to believe the accuracy of these notices is likely to be any better.¹¹ It is also important to recognize that, where the contemplated volume of notices is high, even a small percentage of problematic notices can translate into large absolute numbers and impacts on important political and cultural conversations.

Private intermediaries are poorly positioned to evaluate notices

In graduated response schemes, it is almost impossible to determine the veracity of allegations of infringement. Because these schemes deal with transitory communications, they necessarily refer to past events for which there is no independent evidentiary record. Even if intermediaries had the resources to investigate allegations (which they often do not), there is no capacity to do so. Intermediaries accordingly have little choice but to accept allegations of infringement on face value. It follows that if sanctions are imposed as a consequence of these allegations of infringement, they are unlikely to meet public standards of legitimacy.¹²

Even if it were technically possible to investigate allegations of infringement, intermediaries lack the legal skills and due process safeguards to come to defensible conclusions about

⁹ Adam Steinbaugh, Ares Rights Wants Ecuador Journalists To Stop Talking About Ares Rights' Censorious Abuse of Copyright 29 Aug. 2014 <http://adamsteinbaugh.com/2014/08/29/ares-rights-wants-ecuador-journalists-to-stop-talking-about-ares-rights-censorious-abuse-of-copyright/>

¹⁰ Adam Steinbaugh, Ares Rights Adopts Matroyshka Doll Approach To Censorious DMCA Takedown Notices 2 Sept. 2014 <http://adamsteinbaugh.com/2014/09/02/ares-rights-adopts-matroyshka-doll-approach-to-censorious-dmca-takedown-notices/>.

¹¹ See e.g., *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42, 71 [78] per French CJ, Crennan and Kiefel JJ ('The information contained in the AFACT notices, as and when they were served, did not provide iiNet with a reasonable basis for sending warning notices to individual customers containing threats to suspend or terminate those customers' accounts.');

see also 90 [146] per Gummow and Hayne JJ ('It was not unreasonable for iiNet to take the view that it need not act upon the incomplete allegations of primary infringements in the AFACT Notices without further investigation which it should not be required itself to undertake, at its peril of committing secondary infringement.').

¹² 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.

them. Copyright law is notoriously complex, and determining whether an infringement is actually made out involves difficult questions of fact and law. Even making out prima facie cases of infringement is not straightforward. In the *Viacom v YouTube* litigation, for example, Viacom mistakenly sent takedown notices to Google alleging infringement for content that it had itself uploaded to YouTube, deliberately disguised to look like amateur content.¹³ Intermediaries are not in a position to determine whether a licence has been granted for any alleged infringing act.

Where there has been prima facie infringement, coming to a conclusion about whether the use is privileged is extremely difficult. The limitations and exceptions to copyright can be difficult to apply in any given case. The fair dealing exceptions, for example, permit uses including parody and satire and for criticism and review. In the convoluted *Panel* litigation, it took four Federal Court judges to come to a conclusion about whether Network Ten's use of short video clips were fair dealings or not,¹⁴ and another four Federal Court judgments,¹⁵ one high court appeal,¹⁶ and one unsuccessful special leave application to come to a final conclusion on infringement.¹⁷ The problem is further compounded by different standards that apply in different jurisdictions. The Australian fair dealing limitation for 'parody and satire', for example, is substantially broader than the US fair use limitation.

This is not an easy area of law to apply. Often, the best evidence about these matters is within the knowledge of the claimant, and sometimes the user, but intermediaries lack the ability to discover relevant evidence and evaluate claims, especially in the short timeframes contemplated by notice regimes.

A graduated response is likely to chill legitimate uses of copyright works

Without proper judicial oversight, a graduated response system is likely to chill speech and limit the legitimate flow of knowledge and cultural goods. Intermediaries cannot easily evaluate allegations of infringement, and they are unable to safely rely on notices provided by rightsholders. If intermediaries are asked to enforce allegations of copyright infringement without a system to ensure that notices are not fraudulently or negligently incorrect, it is likely

¹³ Anna Katz, 'Copyright in Cyberspace: Why Owners Should Bear the Burden of Identifying Infringing Materials Under the Digital Millennium Copyright Act' (2012) 18 *Boston University Journal of Science and Technology* 343, 359-360 (Quoting Zahavah Levine, Viacom's chief counsel: 'Viacom was also using at least 18 marketing agencies to secretly upload its videos to YouTube. It even had the agencies "rough up" the clips before uploading, wrote Levine, so that they'd appear to be illegitimate, smuggled copies, imbued with forbidden sexiness. He claimed that in a moment of Pythonesque petard-hoisting, Viacom even sent copyright complaints to YouTube over some of these videos, which it subsequently followed up with sheepish retractions when it became clear that the infringer in question was another arm of Viacom.') (citations omitted).

¹⁴ *TCN Channel Nine Pty Limited v Network Ten Limited* [2001] FCA 108 (Conti J); *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146 (Sundberg, Finkelstein, & Hely JJ).

¹⁵ *TCN Channel Nine v Network* [2001] FCA 841 (Conti J); *TCN Channel Nine Pty Limited v Network Ten Pty Limited (No 2)* [2005] FCAFC 53 (Sundberg, Finkelstein, & Hely JJ).

¹⁶ *Network Ten Pty Ltd v TCN Channel Nine* [2004] HCA 14 (McHugh ACJ, Gummow, Kirby, Hayne, & Callinan JJ).

¹⁷ *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd & Ors* [2005] HCATrans 842 (7 October 2005) (Special leave refused, McHugh & Kirby JJ).

that a significant proportion of the time, they will get it wrong. When faced with the threat of liability for authorising copyright infringement, intermediaries are likely to err on the side of rightsholders.¹⁸

Users who receive notices of infringement are likely to modulate their behaviour. This is, after all, the goal of a graduated response scheme. There is a substantial risk that the scheme may be misused in order to silence critical speech and suppress competition. Small creators without access to legal advice are particularly vulnerable to silencing, even in the face of invalid legal claims. During the recent Australian Federal election campaign, for example, Juice Rap News were subject to a takedown request for a political parody video that was almost certainly fair dealing.¹⁹ It took the small comedy team over three months to have the video reinstated, by which time the election was long over. Even then, the video was only reinstated on the condition that all advertising revenue be given to the music publisher that made the allegation of infringement.²⁰ This is not an isolated phenomenon. In recent times, two Australian political advertisements were also subject to takedown notices,²¹ as was a satirical video produced by Greenpeace with an explicit political message.²²

Where a graduated response scheme includes notices that incorrectly allege infringement for legitimate expression, we also expect that ordinary creators and users of copyright expression will self-censor and avoid potentially problematic speech or legitimate uses of copyright works for socially beneficial purposes. Educational institutions in particular are likely to be extremely risk-averse, despite the importance of critical commentary and engagement with existing knowledge and cultural works to education.²³ Similarly, individual creators are likely to be highly vulnerable to increased risk and compliance costs. Professors Andrew

¹⁸ Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment' (2010) 24(1) *Harvard Journal of Law & Technology* 171, 177-178 (Explaining the risk for the safe harbor regime to impose high costs of censorship: 'The frequency of error and its bias against speech represents a structural problem with secondary liability and the DMCA: the DMCA makes it too easy for inappropriate claims of copyright to produce takedown of speech. It encourages service providers to take down speech on notice even if the notice is factually questionable or flawed.').

¹⁹ See Juice Rap News, 'Aussie Election: A Game of Polls - feat. Julian Assange [RAP NEWS 20 - Season 1 finale]' (25 August 2013) <https://www.youtube.com/watch?v=QWU6tVxzO1I>.

²⁰ See Juice Rap News, Facebook post (19 December 2013) <<https://www.facebook.com/juicerapnews/posts/10152470911188452>>.

²¹ See Judith Ireland, 'Liberal complaints see Labor parody ad removed from YouTube', *Sydney Morning Herald*, 07 August 2013

<<http://www.smh.com.au/federal-politics/federal-election-2013/liberal-complaints-see-labor-parody-ad-removed-from-youtube-20130807-2rgih.html>>.

²² See Tim Cushing, 'Warner Brothers Pulls Plug On Viral Greenpeace Ad Utilizing 'The Lego Movie' Theme Song (And Legos)', *Techdirt*, 11 July 2014

<<https://www.techdirt.com/articles/20140711/05194727847/warner-brothers-pulls-plug-viral-greenpeace-ad-utilizing-lego-movie-theme-song-legos.shtml>>; Richard Willingham, 'Liberal ad pulled from YouTube over copyright breach', *The Age*, 06 February 2014

<<http://www.theage.com.au/victoria/liberal-ad-pulled-from-youtube-over-copyright-breach-20140206-324mm.html>>

²³ Comments of the Organization for Transformative Works to the NTIA/PTO, 30 (Nov. 17, 2013), <<http://transformativeworks.org/sites/default/files/Comments%20of%20OTW%20to%20PTO-NTIA.pdf>>, at 72-75.

Torrance and Eric von Hippel have identified “innovation wetlands”: largely noncommercial spaces in which individuals innovate that can easily be destroyed by laws aimed at large, commercial entities, unless those individuals are specifically considered in the process of legal reform. Given the small scale and limited resources of most individuals, “[a]nything that raises their innovation costs can therefore have a major deterrent effect.” As a result, “heedless government actions currently have significant impacts upon the fragile ‘innovation wetlands’ environment within which individual innovators operate.”²⁴

Finally, the current proposal would substantially increase legal risk for intermediaries and inhibit their ability to create and deliver services that promote innovation, creativity, and expression.²⁵ In addition to applying to Internet Service Providers, the broadening of authorisation liability is likely to catch many other technological innovators who help individuals to create and communicate. For example, the proposed test would make it much more risky for device manufacturers to create technologies like the VCR that have been used for decades to enable ‘vidders’ to create expressive remixes of audiovisual content.²⁶ The increased liability will make it riskier for providers of new tools for creating, hosting, and distributing expressive content, with a likely negative impact on innovation and investment. This is again likely to significantly curtail legitimate expression by ordinary creators who rely heavily on intermediaries to effectively communicate.

Overall, we are concerned that the proposed changes could have severe negative effects on the flow of knowledge and culture, legitimate and licensed sharing, and free expression. As drafted, the proposed changes likely introduce substantial uncertainty and risk. Any increase of risk will decrease the willingness of users to use legitimately licensed material, the incentives of creators to share their works, and depress investment in new digital businesses and platforms in Australia. This effect is likely to be particularly pronounced in its effects on some of the more socially valuable critical speech, the most marginalised and vulnerable users, and the most innovative actors of the digital economy.

²⁴ Andrew W. Torrance & Eric A. von Hippel, *Protecting the Right to Innovate: Our ‘Innovation Wetlands’* (Oct. 9, 2013), at 2, available at SSRN: <http://ssrn.com/abstract=2339132> or <http://dx.doi.org/10.2139/ssrn.2339132>.

²⁵ See Michael A. Carrier, ‘Copyright and Innovation: The Untold Story’ (2012) *Wisconsin Law Review* 891, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2099876 (reporting empirical research on investment in innovative services in the United States that clearly reveals an association between uncertain liability and innovation).

²⁶ See Francesca Coppa, ‘Women, Star Trek, and the early development of fannish vidding’ (2008) 1 *Transformative Works and Cultures* <<http://journal.transformativeworks.org/index.php/twc/article/view/44/64>>.