



LUND UNIVERSITY

Parallel Norms: File-sharing and Contemporary Copyright Development in Australia

Larsson, Stefan; Wnukowska-Mtonga, Susan; Svensson, Måns; De Kaminski, Marcin

Published in:
Journal of World Intellectual Property

2014

[Link to publication](#)

Citation for published version (APA):

Larsson, S., Wnukowska-Mtonga, S., Svensson, M., & De Kaminski, M. (2014). Parallel Norms: File-sharing and Contemporary Copyright Development in Australia. *Journal of World Intellectual Property*, 17(1-2), 1-15. <http://onlinelibrary.wiley.com/doi/10.1002/jwip.12018/full>

Total number of authors:
4

General rights

Unless other specific re-use rights are stated the following general rights apply:
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Read more about Creative commons licenses: <https://creativecommons.org/licenses/>

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

Parallel Norms: File-Sharing and Contemporary Copyright Development in Australia

Stefan Larsson

Lund University Internet Institute

Susan Wnukowska-Mtonga

Australian National University, and Lund University Internet Institute

Måns Svensson

Lund University Internet Institute

Marcin de Kaminski

Lund University Internet Institute

This article studies contemporary Australian copyright and contrasts this to a large-scale online survey on file sharing in order to analyse the seemingly parallel and non-compliant legal and social norms that they represent. Furthermore, a selection of 3,575 Australian respondents to an online survey is compared to a near global group of over 96,000 respondents, allowing determining distinctive traits of the Australian respondents. For example, the latter use offline methods for sharing and receive rather than distribute content to a higher extent in comparison to the global group of respondents. Furthermore, Australian respondents also have slightly less predominance of male sharers.

Keywords parallel norms; copyright; file-sharing; Australia

Introduction

What type of a crime is online copyright infringement, often referred to as “online piracy?” How do we come to terms with it? Given its commonness, a multitude of studies released show how a majority of primarily the younger generation has file-shared copyright-protected files, or in general does not feel that there is something wrong with this (cf. Andersson Schwarz and Larsson, 2014; de Kaminski *et al.*, 2013; Feldman and Nadler, 2006; Gracz, 2013; Karaganis *et al.*, 2012; Larsson, 2013a; Poort and Leenheer, 2012; Svensson and Larsson, 2012). This particular behaviour, which may be at odds with a near globally homogenous regulation, is closely connected to digital development and takes part in a context with strong political and industrial influences. This makes it a challenging problem but also an interesting one, which, to compare it to Nelken’s account on white-collar crime, “appears to straddle the crucial boundary between criminal and non-criminal behaviour” (Nelken, 2012, p. 631). The dilemma that Nelken identifies is that many white-collar crimes are “merely technically criminal” and are not socially considered on par with ordinary crimes and therefore do not “satisfy the requirements of a sociological definition of crime” (2012, p. 632). In other words, how the particular crime of illegal file-sharing is regarded in general, is of great interest here. As discussed below, the social norm among important groups in society does not follow the legal norm. Perhaps, in the case of illegal file-sharing we need to call the concept of using the law to draw the line into question. Anyhow, the binary approach on criminal or non-criminal behaviour clearly needs to be problematized here. Yet again reminded by Nelken’s analysis of white-collar crime, it is possible that online piracy, like white-collar crime, “illustrates the possibility of divergence between legal, social, and political definitions of criminality—but in so doing it reminds us of the artificiality of all definitions of crime” (Nelken, 2012, p. 632).

So, while reminded of this “artificiality of all definitions of crime,” we turn to the explicit case of online-file sharing as a copyright infringing activity en masse. Peer-to-peer (P2P) file sharing “has gained notoriety for facilitating Internet piracy” internationally (Lambrick, 2009, p. 185). In a study on social norms relating to copyright, Svensson and Larsson (2012) conclude that “[t]he sharing of computer programs, movies and music via the internet marks an *all-time-high* in the persistent controversy between intellectual property owners and the users of different reproduction technologies” (2012, p. 1147; cf. Larsson, 2011). This indicates, much like the American legal scholar Lawrence Lessig argues (2008), that the issue is bigger and more structural than just relating to a few deviants and rather regards a generation of Internet “natives” (cf Palfrey and Gasser, 2008). The infrastructural account on the emergence and subsequent commonness of file-sharing is further emphasized by Andersson Schwarz (2013) when using Sweden as a strategic case study. Consequently, Lysonski and Durvasula (2008) point out that lawsuits seem neither to slow down the rate of unauthorised file sharing, nor solve the issue. Moreover, others have noticed that the use of tools that make file-sharers harder to trace in an online context are more common amongst high-frequency sharers (Larsson *et al.*, 2012b) and the overall use of such tools are increasing (Larsson *et al.*, 2012a), indicating that the enforcement of legislation is increasingly difficult.

File sharing technologies such as BitTorrent have had a profound affect on how individual’s perceive and abide by copyright laws in the digital landscape (Larsson, 2013a,b). This is particularly prominent in Australia, which has been reported in the media as having one of the highest rates of TV copyright infringements in the world (Taylor, 2012). According to 2011 data from the Music Industry Piracy Investigation, now known as Music Rights Australian, an estimated 2.8 million Australians are reported to download music illegally each year (Music Industry Piracy Investigation, 2011; Paterson, 2012). Furthermore, data from the Australian Federation Against Copyright Theft estimated some \$1.370 million in Gross Output lost across the entire Australian economy due to movie piracy in 2010 (Ipsos MediaCT, Oxford Economics, 2011, p. 3).

It is therefore important to empirically look at both the legal development as well as, for example, the file-sharing practices that exist parallel to legal development. This study will thus elaborate quite extensively on contemporary development and the status of copyright in Australia. Subsequently, this article will then elaborate on the reality of file-sharing by analysing a rich sample of respondents in a survey conducted by the Cyb norms research group in 2012 on this practice.

Purpose and Research Questions

The purpose of this article is to better understand digitally mediated copyright infringement in relation to the legal structures criminalizing this infringement. In doing so it focuses on the case of Australia. The study is twofold: on the one hand it consists of a legal investigation of trends in contemporary Australian copyright and on the other it provides a contrasting empirical survey of actual file-sharing behaviour in Australia. In order to be able to follow this purpose, we ask the following explicit questions:

1. In terms of demographics, who is the typical Australian file-sharer?
2. To what extent are Australian file-sharers on this account diverging from others?
3. What is the character of the Australian IP regulation in relation to international treaties and trade agreements, enforcement, the role of the Internet Service Providers (ISPs), and its contemporary development overall.

In May 2012 the Cyb norms research group conducted a survey on file sharing via collaboration with the infamous Pirate Bay (TPB). The survey was reached via a link from the main page of TPB, by clicking a remodelled TPB logo termed “The Research Bay” showing a magnifying glass over a pirate ship. Visitors who clicked on the altered logo were transferred to an online survey that was open for 72 hours.

The survey received over 96,000 respondents, of which 3,575 respondents answered that they are from Australia. This data forms the empirical basis for this study. This also allows Australian respondents to be compared to the global results.

Australian File-Sharing

Understanding the legal and political context goes some way to explaining the prominence of P2P file sharing in Australia. This is particularly due to the fact that the Copyright Act has not been used significantly against individual P2P file sharers, allowing the private use of infringing content to be regulated but largely unenforced. However, there are also other social considerations that form part of the rubric. Australia is notorious for its slow release of films, TV shows and music albums. For example the release of *The Great Gatsby* was released in the United States almost an entire month prior to being released in Australia, where the movie was actually filmed (Jericho, 2013). As a number of respondents to the survey outlined in this study, having access to content without waiting for the Australian release date is a reason that drives them to use P2P file sharing to illegally download movies. A survey conducted in 2012 by Swinburne University of Technology indicated that getting access to “hard to get content” (Ewing and Thomas, 2012, p. 33) was very important to a quarter of file sharing users surveyed when asked why they file-shared. This is significant and may reflect the need to pressure Australian networks in releasing international movies and TV shows into the Australian market sooner. An article by TorrentFreak that was widely publicized in a number of international news media articles (Ernesto, 2013) cited Australia as having the highest piracy rate of downloads of Season Three of *Game of Thrones*. While the popular TV show premiered in the United States on the 31st of March on HBO, fans of the show had to wait until the 1st of April for its release in Australia. While this date itself is not excessive, even a day delay appeared to provide opportunity and excuse for file-sharers to illegally download the series. Furthermore, as entertainment journalist Hardie (2013) recognises, the fact that the series is only available on Foxtel, a pay-TV network provides a catalyst for “prompting a wide, and voracious, audience desperate for the content to explore alternative options.”

Music Rights Australia estimates that in 2010 the number of Australian Internet users who admitted to downloading unauthorised content, including music via BitTorrent, at 27.8% (Music Rights Australia, 2013). However, according to the 2012 report conducted by the Swinburne University of Technology, file sharing services such as BitTorrent decreased in use in 2011 (Ewing and Thomas, 2012). The report suggests that perhaps this decrease can be attributed to “greater awareness of the illegality of some of this activity” (Ewing and Thomas, 2012, p. 32). Nevertheless, there may be alternate factors such as the use of streaming websites that do not require downloading, or perhaps the increase of legitimate sites. Spotify, an international sensation for legal music streaming, became available in Australia in 2012 and it will be interesting to find out how the use of illegal P2P file sharing is affected by this legitimate free service. While data seems to suggest that the underlying reason for illegal P2P file sharing, such as the use of BitTorrent, is because it is free (Ewing and Thomas, 2012, p. 33), the increase in free legal sites may significantly limit the number of individual’s currently engaged in copyright infringement through the use of P2P file sharing. Furthermore, with the anticipated reform to Australian Copyright law following the recommendations of the Australian Law Reform Commission, expected to be released late 2013, the social norms surrounding copyright law are also likely to change with people opting for legal sources over infringing ones.

Australian Copyright: Law and Enforcement

P2P file sharing as such is not directly prohibited under Australian copyright law or any other legislation. This is because P2P file sharing will not involve a copyright infringement where the owner of the

copyright material has provided consent to the material being shared. Australian copyright law does, however, prohibit certain actions of P2P file sharing. While P2P file-sharing systems such as Napster, Grokster and Australasian owned Kazaa were created to enable the downloading of copyright infringing content, the systems also provided the ability to share non-infringing content. Unlike these systems BitTorrent was created to “facilitate the legal sharing of live recordings of ‘Jambands’” (Paterson, 2012, p. 99) but has now become one of the major systems used for the transfer of copyright infringing material (Bright, 2011). It is the use of P2P file sharing to share or trade copyright works that are obtained without the consent of the author or without a license that give rise to an action for the infringement of copyright under the Copyright Act 1968 (Cth).

Under the Copyright Act 1968 (Cth) and in line with the Berne Convention, published musical works, sound recordings, cinematographic films and artistic works are all protected under copyright. It is the owner of a copyright work that has the exclusive right to reproduce the work and make the work public, something that unauthorised P2P file-sharing inherently undermines. This constitutes infringement under s 36 of the Act whereby “a person who, not being the owner of the copyright, and without the license of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.” The Act imposes strict liability, where the state of mind of an infringing party is only relevant in the assessment of damages but not relevant in establishing a breach of the copyright owner’s exclusive rights over works. While infringement of copyright is generally a civil action, depending on the scale, commercial value, or commercial profit of a P2P shared file, criminal penalties may be applied under the Act including imprisonment.

In Australia, copyright protection has traditionally focused on economic rights, with the protection of moral rights only being introduced by the Copyright Amendment (Moral Rights) Act 2000. Amendments to the Copyright Act have been incremental following the Australia–United States Free Trade Agreement in 2004 and the Copyright Amendment Act 2006 (Cth). The amendments were meant to bring Australia in line with the system of copyright protection offered in the United States, modelling many provisions on the Digital Millennium Copyright Act 1998 (US). The Copyright Act now provides for the issue of takedown notices, with the requirement resting on copyright owners to monitor content. Effectively, under regulation 20U of the Copyright Regulations 1969 (Cth) ISP’s “must expeditiously remove, or disable access to, the reference to the copyright material specified in the notice and provided by the carriage service provider on its system or network.” The focus on protecting the economic rights of authors has led to a system which favours the interests of the copyright holder, providing few exceptions to the public under fair dealing provisions. The four long established exceptions are: advancing knowledge through research, commentary by way of criticism or review, reporting news and the administration of justice. In 2006 fair dealing for the purpose of parody or satire and time and format shifting were also included as exceptions.

Authorisation

The concept of “authorisation” was an early development in Australian copyright law. The authorisation provisions of Australia’s Copyright Act 1905 (Cth) in fact provided a template for the British Copyright Act of 1911, which was later adopted into the law of many British Colonies (Burrell and Weatherall, 2011). Therefore, the Australian legislature already had the framework in place when it gave into international lobbying by the copyright industries to put greater pressure on ISPs by making them liable for authorizing copyright infringement. This provided a way to ensure that ISPs worked with copyright owners in enforcing copyright law because it established that ISPs could be held legally responsible for acts of copyright infringement committed by their users (Burrell and Weatherall, 2011). It is perhaps this change in policy, from bringing an action against the individual user and instead bringing an action against the intermediary, that has contributed to the common use of illegal P2P file sharing. As Lambrick (2009,

p. 191) acknowledges, “[i]ntermediaries such as content hosts, ISPs and carriers are more financial and less elusive than pirates and end users.”

International Treaties and Trade-Agreements

While the Australian government has not taken a hard line on P2P file sharing, Australian policy towards copyright law has been influenced by developments in the international community and the international approach towards the protection of intellectual property in general. Australia is a signatory to the Berne Convention, the TRIPs Agreement, the WIPO Treaties, as well as a number of multilateral and bilateral treaties such as the Australia-US free trade agreement. As a result there has been criticism that the “Australian governments remain determinedly pragmatic in areas of music copyright, preferring to react (slowly) to legal stoushes rather than incorporate into a broader music or cultural policy” (Homan, 2011, p. 26). This criticism is reflective of much of the development of international copyright law, with the myriad of opportunities the Internet now provides for the transfer of music, film and other copyright protected works. It is thus not strictly fair to criticize the development of Australian copyright policy on this platform alone.

As mentioned, Australian copyright law was traditionally founded on the economic rights of the author, thus the development of policy in protecting the rights of the author have been centred on economic rights. The Copyright Amendment Act 2006 (Cth) determined a new copyright offence structure and imposed stricter measures to protect copyright. This was in response to the growing use of illegal downloading and the international increase in copyright infringement on a commercial scale. During the second reading of the Act in the Senate, Senator Lundy (2006, p. 102) noted that the new regime of strict liability fines for consumers who breach copyright “is unprecedented in the world and...represents a massive win for the large corporations that have been lobbying the Howard government to legislate to protect their interests.” Senator Lundy also criticised the then Howard led liberal government for not adopting a general fair use exception for private use under the Act, a criticism that was shared by other members of the Senate. With the Australian Bureau of Statistics National Accounts (DFAT, 2012) valuing intellectual property in Australia in 2010–11 at \$182.5 billion (AUD), it is unsurprising that the interests of the copyright owner have traditionally prevailed over that of the public in Australia.

The importance of trade in royalties for intellectual property for Australia in 2011 was estimated at \$1.1 billion (AUD) in exports and \$5.2 billion (AUD) in imports (DFAT, 2012). Hence, the importance of negotiating free trade agreements that reflect the significance of intellectual property. The Australian government signed onto the Anti-Counterfeiting Trade Agreement (ACTA) in October 2011. ACTA, described as the “strongest intellectual property enforcement agreement to date negotiated at the international level” (Bitton, 2012, p. 69) and not only a “country club agreement” but a “bad country club agreement” (Yu, 2012, pp. 7–8; cf Yu, 2011), would impose greater criminal penalties than currently exist for copyright infringement. Australia’s signature onto ACTA created public outcry and also some division in the Australian Parliament, with the Greens political party outright rejecting the agreement (Masnick, 2012). However, ratification of ACTA has come to a standstill, with the Australian Parliament’s Joint Standing Committee on Treaties (2012, p. 61) recommending that ACTA not be ratified until the government can provide an adequate evidentiary record that the agreement would be in Australia’s best interests.

The pressure from the public and the realization that the enforcement of copyright law in the digital context needs further reform has created a division in relation to the policy debate surrounding Australian copyright law. With the ratification of ACTA at a stalemate, Australia has also been participating in Trans-Pacific Partnership (TPP) negotiations, which also has provisions that would extend the term of copyright and provide stricter digital lock rules (Rimmer, 2012). On the other hand the Attorney-General’s

Department, the department in charge of dealing with copyright in Australia, during the same period asked the Australian Law Reform Commission to review copyright exceptions in the digital context.

Contemporary Revisions

Recognising that “Copyright law is an important part of Australia’s digital infrastructure and is relevant to commercial, creative and cultural policy” (Australian Law Reform Commission, 2012) the Attorney-General’s Department drafted Terms of Reference for the Law Reform Commission, which asked whether amendments could be made to the current law to provide greater availability of copyright material. The Commission has looked at whether there is a need to expand the exceptions for private use, and more importantly in relation to file sharing networks, exceptions for online use for social, private or domestic purposes. In June 2013 the Commission released its Discussion Paper, which presented a number of proposed reforms including repealing the “fair dealing” exceptions and replacing them with a new “fair use” exception (Australian Law Reform Commission, 2013). This would mean that when applied to domestic and private use there would need to be a consideration as to whether the use falls within the non-exhaustive list of fairness factors by examining: the purpose and character of the use; the nature of the copyright material used; the amount and substantiality of the part of the copyright material used, considered in relation to the whole of the copyright material; and the effect of the use upon the potential market (Australian Law Reform Commission, 2013, Proposal 4–3). While this might give a wider scope to exceptions under the Copyright Act, the Commission also made clear that unauthorised P2P file sharing of copyright material would not fall within the fair use exception (2013, p. 1849.63). These recommendations offer the public greater scope of access to Internet content, without fear of copyright infringement, but need to be carefully drafted by the legislature so as to ensure clarity in the laws application to enable the public to remain within the constraints of the law. The final report is now before the Attorney-General for consideration but whether amendments are made to the Copyright Act in light of the recommendations still remains uncertain.

The Court’s Interpretation

As Urbas notes, “sentencing in Australian criminal copyright cases has historically been lenient compared to the maximum penalties available” under the Copyright Act (Urbas, 2012, p. 20). Unlike in the United States, where the Recording Industry Association of America sued over 20,000 individual users for unauthorised sharing of music files (Boag, 2004), the Australian court system has never been used for large-scale lawsuits against individual file sharers, even under civil sanctions. The court system has instead been used to concentrate on the creators of websites that potentially host infringing content. Only as recently as 2003 did an Australian court have its first occasion to determine a large-scale online piracy case in the unreported case of Tran, Ng and Le (unreported, NSW Local Court, Sydney, December 2003). Even in relation to the notorious copyright infringing P2P file sharing site Kazaa, the Australian Federal Court in the case of *Universal Music Australia Pty Ltd v. Sharman License Holdings Ltd* [2005] FCA 1242 opted for a balanced approach rather than an overzealous one in making a determination for breach of the Copyright Act, recognising the legitimate purposes of P2P file sharing. While the court ultimately found that the operators of Kazaa were liable for authorizing infringements by file sharers, in making the order Wilcox J stated, “I am anxious not to make an order which the respondents are not able to obey, except at the unacceptable cost of preventing the sharing even of files which do not infringe the applicants’ copyright” (at [520]).

The court system has also been used to test the obligation and liability of private ISPs in removing copyright content from websites they host. In *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972 the Federal Court upheld a decision finding the website operator of mp3s4free.net, Stephen Cooper and hosting ISP E-Talk, directly liable for copyright infringement. This was despite the fact that the site did not host any such material, but rather served as a conduit through which users could find downloadable

material for free. The court ruled that linking to such material was authorizing copyright infringement. Additionally, the ISP was liable for copyright infringement because it had failed to take down the site. While this decision seems to support placing an onerous obligation on ISPs to monitor the actions of third parties to enforce the economic rights of copyright holders, more recently it appears that the court has reverted to a balanced approach. This approach indicates that a less onerous obligation will be imposed on ISPs to monitor content and enforce the rights of copyright holders.

In April 2012, the Australian High Court seemed to provide a less stringent approach to copyright enforcement and the obligations on ISP's to remove copyright infringing content and their liability for authorizing copyright infringement. The decision in *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (iiNet case) was "the first case of its kind in the world to get to judgment" (Hutcheon, 2011, p. 422). The case was brought on appeal by the Australian Federation Against Copyright Theft (AFACT). AFACT represented no less than 34 Australian and US film and TV copyright holders who alleged that ISP iiNet had authorised copyright infringement by failing to terminate its contract with users who had used file sharing software to engage in illegal downloads. None of the appellants brought legal action against the individual's who had in fact engaged in the illegal download of movies and TV shows through the bit-torrent system. Instead AFACT issued iiNet with several notices indicating that these individual users were infringing copyright and a failure by iiNet to prevent these alleged infringements "may constitute authorisation of copyright infringement" (at [32]).

In finding that iiNet did not authorise copyright infringement by not terminating contracts with individual users, the court emphasised that iiNet

[O]nly in an attenuated sense had power to "control" the primary infringements utilising BitTorrent. 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 (at [146]).

This interpretation of the authorisation of copyright infringement has significant implications for individual BitTorrent and file sharing users, particularly if ISPs continue to have the role of enforcing copyright holder's rights by removing infringing content or an individual user's right to access such content. However, as Chief Justice French, Justice Crennan and Justice Kiefel identified in their joint judgment:

This final conclusion shows that the concept and the principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system. The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere, in constitutional settings different from our own, by specially targeted legislative schemes, some of which incorporate co-operative industry protocols, some of which require judicial involvement in the termination of internet accounts, and some of which provide for the sharing of enforcement costs between ISPs and copyright owners (at [79]).

This statement recognises that the current copyright system is not well suited to the plethora of P2P file sharing platforms that are arising in the digital context. The allusion to three-strikes laws, which require ISPs to terminate the accounts of repeated copyright infringers and which have been adopted in neighbouring New Zealand, is worrisome. However, the High Court also recognised alternative options in enforcing copyright in the P2P context, which coincide with the reform that the Australian government is currently considering. The outcome of the proposed reform will hopefully ensure a more cohesive and

clear copyright system that provides an adequate balance between the rights of the copyright holder, the ISP and the public, reducing the number of illegal P2P file sharing.

Methodology

The legal development and contemporary status of P2P file-sharing in Australia is important in providing the background of legal development and the context in which illegal file-sharing occurs. This concerns Australian legislation, international treaties as well as court interpretation and the legal doctrines emerging on such. On the other hand it is crucial to place these legal developments within an empirical framework to see the actual effect of the law on file-sharers. As mentioned, a large-scale online survey was conducted to study demographics, frequencies and opinions on file-sharing in such a way that Australian respondents could be compared to a near global selection of respondents. In May 2012 the Cyb norms research group conducted a survey on file sharing via collaboration with TPB. The survey was reached via a link from the main page of TPB, and visitors who clicked on the altered logo were transferred to an online survey that was open for 72 hours.

Empirical Findings

This section deals with the findings in the online survey conducted in May 2012. In this survey, 3,575 respondents answered that they were from Australia, which represents 3.7% of all the respondents in the global study where 96,659 respondents participated. Of the global group, a majority on 52.5% came from Europe, followed by 25% from North America. When it comes to gender distribution a very strong majority of 93.6% (89,931) were male and 6.4% (6,183) were female in the global group, of the 96,114 that answered this question. This overrepresentation of men is clear also amongst the Australian respondents but the female share is slightly higher at 9%. Furthermore, file sharers tend to be young. Globally, 57.4% of the respondents are younger than 25 and 5.9% are older than 45, see Table 1. The Australian respondents may be slightly younger with a larger group of those younger than 18 years old, compared to all respondents.

Media Types

A question of key interest regards what kind of media is shared when file-sharing. Music is—despite “free” legal streaming solutions such as Spotify—still one of the media types that are most shared (63.6% globally, 67.7% in Australia), movies (78.6% globally, 81.5% in Australia), TV shows (62.6% globally and 80.6% in Australia) and games/software (56.5% globally and 49.6% in Australia), see Table 6 below. The sharing of TV shows is interestingly more common in Australia than in the global group.

Alternative Techniques for Sharing Files

Despite copyright legislation and its enforcement, the format or specific method used for sharing files is of interest, and BitTorrent is of course not the only technique used for sharing files. For example, the use of so-called one click hosting sites where you can share a folder or upload files for others to download via a

Table 1: Respondents' Age in Australia vs. Globally

		–17	18–24	25–29	30–36	37–45	46–52	53–65	66	No response	Total respondents
Global	Nr	13,393	40,846	17,166	11,260	6,266	2,486	2,245	816	2,181	94,478
	%	14.2	43.2	18.2	11.9	6.6	2.6	2.4	0.9		
Australia	Nr	700	1,477	562	381	235	93	89	37	1	3,574
	%	19.6	41.3	15.7	10.7	6.6	2.6	2.5	1		

Table 2: Other File Sharing Techniques That Are Used (Besides TPB)

	Australia count	%	Global count	%
Other/Private BitTorrent Trackers	1,682	49.1	44,397	51.2
Other peer to peer networks	775	22.6	20,691	23.9
One click hosting sites (Dropbox, Rapidshare, Megafire, etc.)	1,491	43.5	41,751	48.2
FTP servers	401	11.7	13,101	15.1
Instant messaging (MSN, Skype; Gtalk, etc.)	718	20.9	21,319	24.6
E-mail	799	23.3	22,588	26.1
Offline file sharing (USB sticks, mobile phones, burned CDs/DVDs)	2,299	67.1	47,347	54.6
Other	347	10.1	10,823	12.5
None	442	12.9	11,114	12.8
No response	147		9,974	
Total	3,428		86,685	

specific link are used by almost half of the global respondents (48.2%) and 43.5% of the Australian respondents, see Table 2. Note that 54.6% in the global survey claim to use offline sharing, for example USB sticks, mobile phones, CDs, which is represented by the significantly higher share of 67.1% of the Australian respondents.

Upload Versus Download

BitTorrent technically means that while you download, you by default also share the same file (upload) with “the swarm” or network of nodes downloading the same file. That is, each downloader is also part in contributing to other downloaders with the parts so far downloaded, and the way this can work is due to that each and every file is divided into small pieces that are being copied and distributed continuously. This is a very commonly used protocol for distribution of large amounts of data, also used by legit services like Spotify (cf Andersson Schwarz, 2013; Larsson, 2013b). However, we study the intent of the sharing in this study, and it is clear that most file sharers mainly intend to download and not to share with the community. Globally, a majority of 65.3% never uploads any new material to the community, and only about 12% do so more than once a week. Of the Australian respondents, an even higher 72.4% never upload and only 8.9% upload more than once a week, see Table 3. The Australian respondents download slightly more than

Table 3: Upload Frequency of p2p File Sharing

Australia upload						
	Never	More than a month	More than once a week	Every or almost every day	No response	Total
Count	2,452	632	173	128	190	3,385
%	72.4	18.7	5.1	3.8		
Global upload						
	Never	More than once a month	More than once a week	Every or almost every day	No response	Total
Count	55,607	19,420	5,730	4,387	11,515	85,144
%	65.3	22.8	6.7	5.2		

Table 4: Download Frequency of p2p File Sharing

Australia, download						
	Never	More than once a month	More than once a week	Every or almost every day	No response	Total
Count	172	856	1,170	1,234	143	3,432
%	5.0	24.9	34.1	36.0		
Global, download						
	Never	More than once a month	More than once a week	Every or almost every day	No response	Total
Count	6,771	24,489	26,898	28,405	10,096	86,563
%	7.8	28.3	31.1	32.8		

in the global data; with 70.1% claiming to download more than once a week, as compared to the 63.9% in the global survey, see Table 4.

Anonymity and File Sharing

A way to measure an increased awareness of the need for protection against legal actions in the file sharing community is to ask about the use of anonymity services, such as encrypted ones. Of relevance is that the amount is not negligible; for example, approximately 16.4% of the global respondents use some variant of VPN or encrypted anonymity service in the global selection, and a slightly lower 13.3% of the Australian respondents do the same (see Table 5). Noteworthy, is that more than half of the respondents’ claim that they want to be more anonymous online, a figure that is even higher amongst the Australian respondents (see Table 5).

Analysis

From this brief analysis of the law and current policy debate surrounding Australian copyright law it seems that perhaps the current state of copyright law is not clear for the general public. While copyright infringement is heavily regulated with strict provisions against the infringement of copyright, it is not often enforced against individual P2P file sharers, which adds to the gap between what the law actually

Table 5: VPN as Means for Anonymity

		Yes, free	Yes, paid	No but I would like to be anonymous online	No, I don’t care about anonymity	I do not know	No response	Total
Australia	Count	299	142	2,070	528	292	244	3,331
	%	9.0	4.3	62.1	15.9	8.8		
Global	Count	9,271	4,420	45,479	15,306	8,772	13,411	83,248
	%	11.1	5.3	54.6	18.4	10.5		

Table 6: Media Type

	Australia count	%	Global count	%
Music	2,369	67.7	56,986	63.6
Movies	2,852	81.5	70,404	78.6
TV shows	2,820	80.6	56,058	62.6
Sports material	225	6.4	5,423	6.1
Games/software	1,735	49.6	50,607	56.5
E-books	910	26	27,090	30.2
Pornography	516	14.7	13,960	15.6
Other	319	9.1	12,410	13.9
No response	76		7,102	
Total	3,499		89,557	

states and what law is actually observed. With the decision of the High Court in the *iiNet* case, it seems that copyright owners cannot so heavily rely on ISPs to enforce their rights under copyright. More specifically in relation to P2P file sharing, the Australian High Court noted that the Copyright Act 1968 (Cth) is not well suited to deal with the “widespread infringements occasioned by peer-to-peer file sharing, as occurs with the BitTorrent system” (at [146]). This gap in the application of the law undoubtedly determines social norms of the younger generation who seem to more frequently engage in P2P file sharing, as measured in the Svensson and Larsson study, mentioned above (2012). Copyright reform is no doubt needed to better reflect the changes in technology; however, it is not just the law that is likely to shape social norms towards copyright in the future but also the changing structure of legal and free online services. Moreover, there may also need to be more discussion on social changes through new media structures. As the data suggest, sharing of TV shows is more pertinent in Australia than in the global group, see Table 6. This is consistent with the response of a number of respondents to the study that identified that waiting for release dates is a driving factor for engaging in illegal file sharing. This presents an opportunity for TV networks to engage in discussion on release dates and the availability of TV programs so as to prevent individuals from pursuing alternative and often illegal options to view the content they want.

Urbas claims that “most individual file-sharers do not consciously engage in acts of piracy or counterfeiting” (Urbas, 2012, p. 11). As indicated by the data, perceptions of “online piracy” as something related to “property theft”, that is, an act that is normatively wrongful, are likely to be weakly represented in Australia’s younger generation, with over 60% of respondents aged below 25 (cf. Andersson Schwarz and Larsson, 2014; Larsson, 2011, 2013a). This prompts the questions of the clarity of the law in relation to copyright infringing file-sharing networks and whether the law reflects the changing perception of society (Larsson, 2013a, 2014), in particular the younger generation. While the data gathered in the online survey suggests that only a small percentage of file-sharers use VPN or a similar service to remain anonymous online, 62.1% of those who completed the survey wish to do so. The extent to which online anonymity has become common becomes obvious from a google.au search, where the search terms “bit torrent” and “Australia” brings up on the first page a Gizmodo Australia article on “How to Protect you BitTorrent Privacy” (Wagner, 2012). As such the enforcement of digital copyright to avoid liability has fallen onto ISPs. As Lambrick (2009, p. 191) acknowledges, “[i]ntermediaries such as content hosts, ISPs and carriers are more financial and less elusive than pirates and end users.” However, this monitoring role is difficult when the data shows that 67.1% of Australian respondents surveyed claimed to use offline sharing. In this respect the enforcement of the Copyright Act becomes near impossible if the individual is not sharing copyright infringing material on a commercial scale.

Further, the issue of enforcement in a digital environment is of particular interest here. This is because enforcement in a digital environment provides the potential embedded in the technological setting for both governmentally enforced data retention and surveillance, which is counter-balanced by individually enforced anonymisation through encryption (cf. Larsson *et al.*, 2012a,b). In the midst of this, the role of the ISPs has become crucial. As Urbas argues, “[i]ntellectual property (IPR) enforcement has been transformed in the past 10–15 years by a combination of technological, societal and legal developments” (Urbas, 2012, p. 11). The enforcement of Australian digital copyright against illegal P2P file sharing and other forms of copyright infringement exemplifies this transformation. P2P file-sharing systems, such as BitTorrent, “provide efficient, decentralized mechanisms for end-users to distribute content, and which are difficult to police and control” (Lindsay, 2012, p. 51.2). Add the ability to hide an IP addresses through the use of a proxy or virtual private networks (VPN) and the task of policing or enforcing an action of copyright infringement against an individual becomes next to near impossible (cf. Larsson et al., 2012b; Larsson and Svensson, 2010).

Particularly three differences between the Australian respondents and the global group stand out. The first, however hard to speculate on why it is so, regards that even though the gender bias is strong even amongst the Australian respondents (9%) it is not as skewed as in the global group (6.4%). A second point of interest lies in the commonness of offline sharing, found particularly in the Australian group with more than three out of five (67.1%) using this particular method for sharing, see Table 2 above. Finally, the degree of downloading is higher amongst Australian respondents compared to the global group and the degree of uploading is lower, suggesting that the Australian file-sharers, to a higher extent than globally, are receivers and “consumers” more so than sharers and contributors to the file-sharing community, see Table 3.

Conclusion

Much evidence suggests that copyright in a digital society is suffering from a clear gap where parallel norms exist. On the one side, legal development has primarily focused on control over content and on the other side, a socio-technically dependent structure has allowed flows of media over digital networks. This particular study has elaborated upon Australian copyright development, which has its own disposition but to a large extent is interconnected on a global level, tied together by supra-national and multilateral agreements and treaties. This legal development is here compared and contrasted to a rather large online survey where about 3,500 Australian respondents were compared to a large set consisting of over 96,000 global respondents. On the one hand this displays the parallel practices of copyright protected content that seem so broadly accepted that any attempt to label it as “deviancy” does not sound reasonable. This particular behaviour, which may be at odds with a near globally homogenous regulation, is closely connected to digital development and takes part in a context with strong political and industrial influences. In some communities, particularly those with younger members, the online copyright infringement is likely perceived, in Nelken’s terminology, as “merely technically criminal” (Nelken, 2012, p. 631). File-sharing therefore, in a sense, can be said to “straddle the crucial boundary between criminal and non-criminal behaviour” (*ibid.*). When studying Australian file-sharing specifically, it is of interest that it has been reported in the media as having one of the highest rates of TV copyright infringements in the world (Taylor, 2012). The findings in the survey conducted in this study indicate that the Australian respondents to a higher extent use offline methods for sharing than in the global group of respondents. There is also a slightly less predominance of male sharers and seem to a higher extent receive, rather than distribute, content in relation to the global group of respondents. The results both suggest opportunities for example for TV networks that there are much to do with regards to earlier release dates, and at the same time that the policymaker needs to be more humble when it comes to

its possibilities of controlling the parallel, technology-driven social norms that has developed in the online context in this case.

About the Author

Stefan Larsson is head of Lund University Internet Institute (LUII), Sweden. He holds a PhD in Sociology of Law, a Master of Laws degree from Lund University, as well as a Licentiate of Technology from Blekinge Institute of Technology. Larsson is a sociolegal researcher who generally studies issues in the intersection of conceptual, legal and social change, particularly in relation to digitisation and the Internet; e-mail: Stefan.larsson@luiu.lu.se.

Susan Wnukowska-Mtonga, Australian National University graduate, Australian lawyer and researcher assistant, Lund University Internet Institute. Her research interests lie in the connection between Intellectual Property law and Human Rights law; e-mail: swnukowska_mtonga@yahoo.com.au.

Måns Svensson, Associate Professor in Sociology of Law at Lund University and Director of Research at Lund University Internet Institute. Svensson's scientific work generally deals with theory and method tied to the concept of norms and often in relation to the digital society.

Marcin de Kaminski is a sociologist and doctoral candidate at the Dep. of Sociology of Law at Lund University. He is also affiliated with the Cyb norms Research Group at Lund University Internet Institute, where he primarily is working with the educational program Social Innovation in a Digital Context. His research focuses on the normative gap, both social and legal, between the internet and the offline world with a special focus of internet communities and (sub)cultures.

Acknowledgments

This study is in part funded by Vetenskapsrådet (Dnr 2013-336).

References

- Australian Government Australian Law Reform Commission. (2012) Copyright and the Digital Economy (IP 42). Available at <www.alrc.gov.au/publications/copyright-ip42> [Accessed March 2013].
- Andersson Schwarz, J. (2013) *Online File Sharing. Innovations in Media Consumption*. Routledge, New York and London.
- Andersson Schwarz, J. and Larsson, S. (2014) 'On the Justifications of Piracy: Differences in Conceptualization and Argumentation Between Active Uploaders and Other File-Sharers', in J. Arvanitakis and M. Fredriksson (eds.), *Piracy: Leakages from Modernity*. Litwin Books, Los Angeles, CA.
- Australian Government Australian Law Reform Commission. (2013) Copyright and the Digital Economy Discussion Paper. Available at <<http://www.alrc.gov.au/publications/4-case-fair-use-australia/proposed-fair-use-exception>> [Accessed February 2014].
- Australia, Senate (2006) *Debates*, vol. S14, p. 102.
- Bitton, M. (2012) 'Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures', *The Journal of Criminal Law & Criminology*, 102(1), 67–118.
- Boag, J. (2004) 'The Battle of Piracy Versus Privacy: How the Recording Industry Association of America (RIAA) is Using the Digital Millennium Copyright Act as its Weapon Against Internet Users' Privacy Rights', *California Western Law Review*, 41, 241–76.

- Bright, S. (2011) 'The Current State of BitTorrent in International Law: Why Copyright Law is Ineffective and what needs to change', *New England Journal of International and Competition Law*, 17, 265–290.
- Burrell, R. and Weatherall, K. (2011) 'Before the High Court Providing Services to Copyright Infringers: Roadshow Films Pty Ltd v iiNet Ltd', *Sydney Law Review*, 33(80), 801–30.
- Department of Foreign Affairs and Trade (2012) Intellectual Property and International Trade. Available at <www.dfat.gov.au/ip/> [Accessed March 2013].
- de Kaminski, M., Svensson, M., Larsson, S., Alkan Olsson, J. and Rönkkö, K. (2013) 'Studying Norms and Social Change in Digital Age', in M. Baier (ed.), *Social and Legal Norms. Towards a Socio-legal Understanding of Normativity*, Ashgate Publishing, Farnham, Surrey.
- Ernesto. (2013) 'Game of Thrones Pirate Break BitTorrent Swarm Record', *Torrent Freak* [online], 1 April. Available at <<http://torrentfreak.com/game-of-thrones-pirates-break-bittorrent-swarm-record-130401/>> [Accessed April 2013].
- Ewing, S. and Thomas, J. (2012) CCI Digital Futures 2012 The Internet in Australia. Report for ARC Centre of Excellence for Creative Industries and Innovation Swinburne University of Technology, Australia.
- Feldman, Y. and Nadler, J. (2006) 'The Law and Norms of File Sharing', 43 San Diego L. Rev. 577.
- Gracz, K. (2013) 'Bridging the Gaps Between Social and Legal Norms Concerning Protection of Intellectual and Artistic Creations: On the Crisis of Copyright Law in the Digital Era', *The Journal of World Intellectual Property*, 16(1–2), 39–57. doi: 10.1111/j.1747-1796.2013.12005.x
- Hardie, G. (2013) 'Game of Thrones Final Sparks Viewer Frenzy'. *The Age*, [online], 11 June. Available at <<http://www.theage.com.au/entertainment/box-seat/game-of-thrones-finale-sparks-viewer-frenzy-20130611-2o1bw.html>> [Accessed June 2013].
- Homan, S. (2011) 'IASPM Music, Media and Copyright: Australian Contexts,' Paper presented at the Inholland University of Applied Sciences, Haarlem, 14–15 April 2011.
- Hutcheon, C. (2011) 'The Changing Face of the Internet: A Comment on Roadshow Films Pty Ltd v Iinet Ltd (No 30 (2010) 263 ALR 215', *International Trade Business Law Review*, 14, 422–32.
- Ipsos MediaCT, Oxford Economics (2011) Economic consequences of movie piracy Australia. Report on behalf of AFACT, UK, January.
- Jericho, G. (2013) 'The Great Gatsby: Why Has Australia Had to Wait so Long', *The Guardian* [online], 30 May. Available at <<http://www.guardian.co.uk/business/grogonomics/2013/may/30/great-gatsby-australia-tax-offset>> [Accessed May 2013].
- Joint Standing Committee on Treaties (2012) Review into Treaty tabled on 21 November 2011. Report no. 126, June. Commonwealth of Australia.
- Karaganis, J., Grassmuck, V. and Renkema, L. (2012) *Copy Culture in the US and Germany*. The American Assembly Columbia University, New York.
- Larsson, S. (2013a) 'Copy Me Happy: The Metaphoric Expansion of Copyright in a Digital Society', *International Journal for the Semiotics of Law*, 26(3), 615–34.
- Larsson, S. (2014) 'Karl Renner and (Intellectual) Property—How Cognitive Theory Can Enrich a Sociological Analysis of Contemporary Copyright,' *Law & Society Review*, 48, (1), 3–33.
- Larsson, S. (2013b) 'Metaphors, Law and Digital Phenomena: The Swedish Pirate Bay Court Case,' *International Journal of Law and Information Technology*, 21(4), 329–53.
- Larsson, S. (2011) *Metaphors and Norms. Understanding Copyright Law in a Digital Society*. PhD Thesis, Lund Studies in Sociology of Law, Lund University.
- Larsson, S. and Svensson, M. (2010) 'Compliance or Obscurity? Online Anonymity as a Consequence of Fighting Unauthorised File-sharing', *Policy and Internet*, 2(4), 77–105.
- Larsson, S., Svensson, M. and de Kaminski, M. (2012a) 'Online Piracy, Anonymity and Social Change—Deviance Through Innovation', *Convergence: The International Journal of Research into New Media Technologies*, 19(1), 95–114.

- Larsson, S., Svensson, M., de Kaminski, M., Rönkkö, K. and Alkan Olsson, J. (2012b) 'Law, Norms, Piracy and Online Anonymity—Practices of De-identification in the Global File Sharing Community', *Journal of Research in Interactive Marketing*, 6(4), 260–80.
- Lambrick, J. (2009) 'Piracy, File Sharing...and legal fig leaves', *Journal of International Commercial Law and Technology*, 4(3), 185–95.
- Lessig, L. (2008) *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. Bloomsbury Academic, London.
- Lindsay, D. (2012) 'The Legal Perils of Being an Internet Service Provider', *Telecommunications Journal of Australia*, 62(4), 51.1–51.5.
- Lysonski, S. and Durvasula, S. (2008) 'Digital Piracy of MP3s: Consumer and Ethical Predispositions', *Journal of Consumer Marketing*, 25(3), 167–78.
- Masnack, M. (2012) Another One Bites the Dust: Australian Parliament Committee Recommends Rejecting ACTA [online]. *Techdirt*. Available at <<https://www.techdirt.com/articles/20120628/01500619519/another-one-bites-dust-australian-parliament-committee-recommends-rejecting-acta.shtml>> [Accessed on 6 March 2014].
- Music Industry Piracy Investigation. (2011) About Piracy. Music Industry Piracy Investigations.
- Music Rights Australia. (2013) 'Setting the Record Straight', Available at <www.203.147.192.212/antipiracy/setting-the-record/> [Accessed March 2013].
- Nelken, D. (2012) 'White-collar and Corporate Crime', in M. Maguire, R. Morgan and R. Reiner (eds.), *The Oxford Handbook of Criminology*. Oxford University Press, Oxford.
- Palfrey, J. and Gasser, U. (2008) *Born Digital: Understanding the First Generation of Digital Natives*. Basic Books, New York, NY.
- Paterson, H. (2012) 'Stuck in the Middle: The Need to Refine Intermediary Liability for Copyright Infringement in the P2P File-Sharing World', *International Journal of Technology, Policy and Law*, 1(1), 92–115.
- Poort, J. and Leenheer, J. (2012) File sharing 2©12 Downloading from illegal sources in the Netherlands, Institute for Information Law, CentERdata.
- Rimmer, M. (2012) 'A Dangerous Investment: Australia, New Zealand and the Trans-Pacific Partnership', *The Conversation*, [online] 2 July. Available at <<http://theconversation.com/a-dangerous-investment-australia-new-zealand-and-the-trans-pacific-partnership-7440>> [Accessed March 2013].
- Svensson, M. and Larsson, S. (2012) 'Intellectual Property Law Compliance in Europe: Illegal File sharing and the Role of Social Norms', *New Media & Society*, 14(7), 1147–63.
- Taylor, L. (2012) 'Australians Named Worst Game of Thrones Pirates', *News.com.au*. Available at <www.news.com.au/technology/australians-named-worst-offenders-for-illegally-download-game-of-thrones/story-e6ffro0-1226362158184> [Accessed March 2013].
- Urbas, G. (2012) 'Copyright, Crime and Computers: New Legislative Framework for Intellectual Property Rights Enforcement', *Journal of International Commercial Law and Technology*, 7(1), 11–26.
- Wagner, K. (2012) 'How to Protect your BitTorrent Privacy', *Gizmodo Australia* [online], 24 May. Available at <<http://www.gizmodo.com.au/2012/05/how-to-pirate-software-without-getting-caught/>> [Accessed March 2013].
- Yu, P. (2012) 'Of ACTA/TPP and SOPA/PIPA', *Occasional Papers in Intellectual Property Law*, Intellectual Property Law Center, Drake University Law School, pp. 1–22.
- Yu, P. (2011) 'Six Secret (and Now Open) Fears of ACTA', *SMU Law Review*, 64(3), 975–1094.