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Copyright Developments in the Online Space

INTRODUCTION

Eli Fisher, lawyer and co-editor of the Communications Law Bulletin, moderates a discussion between two of the most prominent voices in the Australian debate about copyright policy in the online space. **Laurie Patton** CEO of Internet Australia, and **Jonathan Carter** President of the Copyright Society of Australia and General Counsel of the Australian songwriters and music publishers' collective, APRA AMCOS.

They discuss recent developments in connection with site-blocking, extended safe harbour provisions, the development of an industry code governing how ISPs deal with copyright infringement, the *Dallas Buyers Club* litigation, the Productivity Commission's Draft Report and geo-blocking.

Copyright policy has taken on enormous importance in recent years. The ALRC conducted in 2012-14 the most comprehensive review of the *Copyright Act 1968* since it came into effect almost a half century ago, and there have been numerous other inquiries since, including the inquiries into IT pricing and online copyright infringement. The Productivity Commission's review of Australia's IP arrangements is ongoing, and the Government continues to consider implementing a Fair Use regime in Australia. And with innovation being promoted as the centrepiece of Australia's economy going forward, copyright continues to play a significant role in public policy and in commerce – particularly as content in Australia shifts to new digital platforms.

Some commentators have referred to debates on copyright policy between rights holders and consumers as "the copyright wars", and while discourse is somewhat polarised at times, it can only be valuable to consider reasonable arguments from both sides.

Laurie Patton is CEO of Internet Australia, the peak body representing Internet users and a chapter of the influential global Internet Society. An Internet evangelist, he believes in the need to build our economic and social future around a connected world where everyone has access to the Internet and has the skills required to use it. Laurie's career spans politics, journalism, senior management and non-executive directorships in media, IT and the events industry, much of which is detailed in his Wikipedia entry: http://bit.ly/1nk9eqU

Jonathan Carter is President of the Copyright Society of Australia and General Counsel of the Australian songwriters and music publishers' collective, APRA AMCOS. As a music lover, he believes that songs

CONTENTS

Editors
Victoria Wark &
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Imogen Yates

Printing & Distribution
BEE Printmail

play an integral role in shaping Australia's identity and culture. He is an advocate for an economic and social framework that support music creators and allow music to have value in the online marketplace. Jonathan's career has been dedicated to advancing the interests of music creators, firstly as a solicitor in private practice, then as a business affairs executive at major record labels, and now in his current role at APRA AMCOS.

The *Communications Law Bulletin* is grateful for their contributions.

If we want Australia's digital economy to continue to flourish, we need to ensure we have a regulatory framework which discourages free-riders and supports legitimate operators who can then compete on a fair playing field.

The Federal Government is focused on setting up the national economy so that it can thrive in the digital age. Where do you see copyright fitting into that, and what if anything needs to change so that the industries you each represent may take better advantage of what the future has in store for us?

JC: The Australian music industry is fully supportive of the Government's stated goal of creating a modern, dynamic, 21st century economy for Australia. As physical sales of music become obsolete, a strong and vibrant digital market is crucial to the sustainability of our industry. Innovation is obviously a buzzword right now and there is a lot of rhetoric in the media about how copyright hampers innovation. I genuinely don't see it that way. Innovation comes in lots of different shapes and sizes - the term should not be limited to notions of technical or scientific creativity. Cultural creativity (such as the art of song writing) is of course a form of innovation, and it is just as important to set a regulatory framework that encourages the creation of content as well as the creation of the technical means for distributing that content. Either way, copyright is a key framework by which that innovation (technical or cultural) is rewarded. In recent years the music industry has embraced innovation in the online market, and the music industry's contribution to the digital economy is significant – 62 percent of revenues from recorded music sales in 2015 were as a result of digital exploitation. If we want Australia's digital economy to continue to flourish, we need to ensure we have a regulatory framework which discourages free-riders and supports legitimate operators who can then compete on a fair playing field.

LP: Firstly, I think we need to differentiate between the music industry and film and television. I'm not sure that they are exactly the same in how they are being challenged by the advent of the Internet. Most of the more overt lobbying in recent times has come from the film and television industry and, I'd argue, for reasons of self-interest that are not advantageous to Australian producers much less consumers. That said, recent US reports are showing that live streaming of music (paid for) is now taking off big time. This means that the Internet will be a critical platform for delivering music rather than current physical forms like CDs (although I note an interesting revival in vinyl is also occurring!)

As a former television producer I am fully supportive of copyright protections so long as they achieve the aims that Jonathan highlights. We also need to educate people about the purpose of copyright so that they understand the long-term downsides from copyright abuse. Unfortunately, largely at the behest of overseas (Hollywood) rights holders and their local representatives, our government seems determined to introduce regulations and processes that we know from international experience just don't work. A recent research report from Carnegie Mellon University found that a massive UK site-blocking exercise only saw a 22 percent reduction in unlawful downloading and a measly 10 percent increase in downloading from legitimate sites. Hardly a great outcome, especially given the costs involved for the ISPs required to implement the blocking (which will inevitably be passed on to consumers in increased Internet access fees).

Curiously, it has since emerged that Hollywood has provided Carnegie Mellon with millions of dollars to undertake their copyright research! Unfortunately, site-blocking does create a risk of damaging the efficient operations of the Internet. A while back, ASIC inadvertently put 250,000+ sites offline for several days in an effort to close down a few sites they alleged were committing consumer fraud. It is also worth noting that these "anti-piracy" moves are basically designed to assist overseas content producers, and not the local creative industry. For example, how many Australian feature films do you think are being downloaded via overseas "pirate" sites? Not many. It might be different for music as Jonathon suggests. If that's the case let's look for ways that help the Australian music industry as opposed to propping up the price-gouging activities of the overseas rights holders. Site-blocking is designed to help Hollywood, not Australian film and television producers.

JC: Laurie's correct that that music streaming sites are beginning to take off, not just in the US but also here in Australia. The Internet is already a critical platform for delivering music, but it's still early days for the subscription streaming services - by our calculations the number of Australian subscribers to legitimate music streaming sites will need to increase four-fold before the Australian music industry returns to the revenue levels it generated before unauthorised overseas websites decimated the recorded music market. However, I disagree with Laurie on his two other points.

First, I think legislative intervention does work, admittedly it's not a silver bullet but it's an important part of the overall framework for a legitimate market. The international data we've seen from the UK supports this proposition. There's the Carnegie Mellon study, which Laurie rightly points out was funded by rights holders. Of course, I'm sure tech companies would never fund academic studies to support their lobbying activities! But there's also a lot of music specific evidence we've

seen that supports our position, more on that later. Secondly, in the evidence that we've gathered for our upcoming "site-blocking" injunction, it's clear that there is plenty of Australian music available on unauthorised overseas websites – even a cursory search for your favourite Australian artist on any of those sites will confirm that point. In my view, any measure that disrupts access to "pirate" sites is intended for the benefit of local producers just as much as overseas ones.

The Government has been concerned about the effect of online piracy on the Australian marketplace for creative content. Do you share the Government's concerns? How are the industries you each represent involved in responding to the issue of online piracy?

LP: I'm just not sure that the Government has actually been all that concerned about the effects of unlawful downloading of content, so much as they have been subjected to a concerted lobbying campaign by a select group of high profile representatives of the overseas rights holders. Sadly, the claims from the rights holders that they are losing money through unlawful downloading of content have never been seriously questioned and they have provided no evidence of significant losses.

As I noted earlier, Australians have been 'price-gouged' on overseas content ever since the days of VCRs. Anyone who's been to the US in the last 20 years knows that DVDs are much cheaper there than here. And if you've been to the cinema in America you'll also know that we pay a good deal more than they do to go to the movies. Our Prime Minster, Mr Turnbull, back when he was Minister of Communications, summed up the situation pretty well when he stated that the best way to deal with unlawful downloading is for the rights holders to make their content more easily available and at reasonable prices. Internet Australia backs this viewpoint. In fact there is mounting evidence that unlawful downloading of video content is declining now that we have Netflix and the local streaming platforms, Presto and Stan, available. Internet Australia is concerned at the trend to blame the Internet and seek to solve the problem of unlawful downloading through methods that have the potential to damage the Internet and to see our Internet access fees rise to cover the costs of implementation.

JC: First, I'd like to clarify that it wasn't just "high profile representatives of overseas rights holders" that lobbied the Government to introduce (some reasonable and proportionate) measures to help tackle online piracy last year. APRA AMCOS was also there asking Government to make some changes and we represent over 86,000 local songwriters and music publishers from Australia and New Zealand. I can also recall seeing a number of highly paid lobbyists from the large ISPs and tech firms down in Canberra arguing against the Government's proposals, so it would be misleading to suggest that Government only consulted with rights holders on its proposed changes. If Laurie's after evidence of the impact of unlawful downloading of content on legitimate content sales, here's some: unauthorised download sites first became popular in Australia in around 2000. Since that time revenue from recorded music sales in Australia has halved. As for the price of DVDs in the US, well, debating comparative DVD pricing feels a bit last century to me. Suffice to say, the world's repertoire of music has been easily available at reasonable prices via over 20 legitimate online services in Australia for a number years now. And every month thousands of Australians still download music from illegal sites for free. Go figure.

LP: I was at the parliamentary inquiry when the local rights holders put their argument in favour of Internet site-blocking. At the time I never doubted their sincerity. I only questioned whether they had actually considered the fact that site-blocking doesn't work. I also wondered if they had differentiated between the unlawful downloading of overseas versus local content. By the way, there was nothing "reasonable or proportionate" in what the "high profile representatives of overseas rights holders" had to say – just blunt force trauma. I'm not saying that the Government only consulted the rights holders. It's just that they ignored everyone else's advice. The fact that people started unlawfully downloading and sales started to fall is not sufficient evidence. There's no direct causal relationship that can be proved. People were copying music on tape recorders when I was at school. Perhaps price has something to do with this? I'm pretty certain more people would go to the movies if the price was lowered and it didn't cost ten bucks for a bucket of popcorn!

In my view, any measure that disrupts access to "pirate" sites is intended for the benefit of local producers just as much as overseas ones.

That said, it's time in this conversation that I reminded everyone that I support copyright protection. I just don't believe that we should muck around with something as technically fragile as the Internet by introducing requirements that we know don't work. There are more than 400 ISPs in this country. It is ludicrous to think that we can stop unlawful downloading by taking a handful of them to court.

Finally, for now, the relative price of content delivered online is certainly relevant in that the Internet is essentially a free delivery mechanism so it costs no more to have someone download or stream content here or in LA. Again, I repeat it is about educating people as much as anything.

Let's explore the site-blocking development that you have both raised a little further, particularly given your respective roles. Laurie, with you representing Internet users in Australia, and Jonathan, with you being involved in one of the first applications, your thoughts on this could not be more timely. By way of background, last year, the *Copyright Act* was amended to include a section 115A. The purpose of this new provision was to give rights holders a new mechanism for protecting their interests. In particular, it would allow a rights holder to apply to the court seeking an order that ISPs block their customers' access to an "online

location" (such as a website) that is operated outside of Australia and which has the primary purpose of facilitating the infringement of copyright. What are your thoughts about this new right, and its prospects for reducing online infringement?

APRA AMCOS is very supportive of the new section 115A. By the time this article goes to print the music industry will have filed its first set of proceedings under the new provisions.

JC: APRA AMCOS is very supportive of the new section 115A. By the time this article goes to print the music industry will have filed its first set of proceedings under the new provisions. I really don't think s115A is a particularly controversial amendment to the Act. Trying to disrupt access to overseas websites which do nothing but exploit the creativity of others while giving nothing back to the people whose music they exploit on their sites, as they make millions of dollars from the advertising which appears on them, can hardly be equated with censorship or "breaking the internet". I'm confident that the various actions brought under the new s115A will be effective in reducing online infringements.

My understanding is that the injunctions sought so far in the UK (under very similar provisions) are having a positive impact on the legitimate online content market over there. In any event, the Australian Government has indicated it will undertake a review of the impact of the provisions after 18 months, although I worry that may be too soon to form a conclusive view. I think we need to be realistic about the amendment's potential impact. While it will certainly be of great assistance to the content industries, s115A is no panacea. Disrupting access to illegal sites is not enough in and of itself to stem the flow of unauthorised digital content into Australia. Disruption will need to be combined with improved consumer education, a reduction buying advertising on unauthorised sites, and easy access to content at reasonable prices, if we are to achieve lasting and significant change in the online content market.

LP: I can absolutely understand why APRA AMCOS would be keen to see something done to address this situation. It's their job to look after the interest of their members after all. I can only repeat that site-blocking doesn't work. The UK is in fact a good example of the problem we face in getting people to understand this fact. Yes, the UK legislation has seen countless sites blocked. On that basis you might think it was successful. However, what happens is the owners of the blocked "pirate" sites simply set up another one, and/or change the name. It is colloquially called "whack a mole".

As cited above, an academic report on the UK experience release recently clearly debunked the theory that site-blocking works. If "piracy" has been marginally reduced it is probably because of the publicity that site-blocking cases have had more so than the actual intervention. As Graham Burke of Village Roadshow told Fairfax media last year, "The high profile case helped educate people about the threat that piracy imposes on the creative industry to those who didn't realise or understand the implications." This perhaps belies what could be their ultimate motive for heading to the courts. That and the embarrassment presumably caused to the Government in the rights holders not rushing to use a law for which they lobbied with such gusto (they took more than six months to mount a case).

Others have reported that pressure was brought to bear by the Government to finally see some action. So in the end are we going to take such problematic action in the hope the publicity works to stop people? For those of us at Internet Australia that's a pretty blunt instrument. Better to have a constructive education campaign. We'd happily support one.

JC: Firstly, as I alluded to earlier, the evidence that I have seen coming out of the UK relating to unauthorised music services paints a very different picture to the one Laurie describes. Once a critical mass of illegal websites had been blocked, the UK music industry saw a decline in unauthorised music downloads and an increase in subscriptions to legitimate music services. If this change was in part because of the publicity that the site-blocking cases have had then that's fine by me! There are a number of academic studies out there which support this analysis. One study stated the following: "Website blocking has proved effective where applied. While blocking an individual site does not have a significant impact on overall traffic to unlicensed services, once a number of leading sites are blocked then there is a major impact. In the three years since The Pirate Bay and numerous other sites were blocked in the UK, there has been a 45% decline (from 20.4m in April 2012 to 11.2m in April 2014) in visitors from the UK to all BitTorrent sites, whether blocked by ISPs or not. In Italy, where courts have ordered the blocking of 24 BitTorrent sites, there has been a decline of 25.6% in the number of overall BitTorrent downloads in the country in the two years from January 2013." (IFPI Digital Music Report 2015).

As for the "whack a mole" issue, it's true that the unauthorised websites sometimes pop again under a different URL. But the court orders are formulated in such a way that these reincarnations are able to be quickly blocked without too much trouble. As for the time it has taken rights holders to bring proceedings under the new section 115A here in Australia, I can assure Laurie we haven't been sitting on our hands the last 6 months. We've been negotiating with ISPs about to what extent the applications can be brought cooperatively, gathering evidence, satisfying the notice requirements to the infringing sites, all of these things take time and given it's a brand new provision in the Act we want to get it right first time around.

Finally, I agree with Laurie that constructive education campaigns are important and it's great to hear his organisation would support one. As I keep saying, addressing the issue of online copyright infringement is not about choosing between "legislative intervention" or "education", they are just two of many factors which need to be implemented to disrupt the illegitimate services.

CONTINUED ON PAGE EIGHT >

CONTINUED FROM PAGE FOUR

The section 115A amendment allows rights holders to try to minimise copyright infringement by trying, at the ISP level, to block access to websites that infringe copyright. But what about pursuing individual infringers themselves? I'm interested to hear your thoughts about the recent case brought by the production company of *Dallas Buyers Club*. There, the production company, based in the USA, sought personal details of the Australian customers of various ISPs, so that it could then pursue infringement cases against them (or at least look to settle each matter upon payment of an amount of money). Is pursuing individual Internet account holders a viable option?

LP: First, it's worth noting that in the DBC case we are talking about less than 5000 alleged unlawful downloads. Thankfully, the court realised what was going on and set a bar so high that the rights holders eventually gave up and went away. On the available evidence it appears there was an attempt to introduce what's called "speculative invoicing", where rights holders send letters to alleged infringers threatening legal action unless they agree to pay large sums of money, often in the thousands of dollars. Hapless consumers knowing no better have been known to hand over money when they didn't actually need to. Or at least far more than any court would logically order them to pay.

JC: I think it's fair to say that APRA AMCOS would have approached this matter somewhat differently from the manner in which the producers of *Dallas Buyers Club* appear to have done. My personal view is that bringing legal proceedings against individual account holders is never going to be a viable option when it comes to discouraging online copyright infringement. What I will say is that Perram J's reasons for judgment in these proceedings are well worth a read, if only for his Honour's highly entertaining turn of phrase. It's good stuff!

LP: Perram J certainly had some fun at the expense of the DBC mob. And good on him. I agree with Jonathan that singling out individual consumers is the wrong way to go. However, that's exactly what the rights holders convinced the Government we should do by proposing the "three strikes" warning notice system.

The Exposure Draft of the *Copyright Amendment (Disability Access and Other Measures) Bill 2016* was released earlier this year by Government. One of the most controversial items in the Exposure Draft of the Bill, and something that has been taken up in the Draft Report of the Productivity Commission, is the proposed extension of the Safe Harbour provisions. Currently an ISP would receive certain protections against an infringement action, provided it complies with the requirements of the scheme. The proposal is to extend those protections to a broader range of service providers. What are your thoughts?

JC: APRA AMCOS is strongly opposed to expanding the protections offered by the Australian Safe Harbour provisions to a broader range of online service providers. The intended beneficiaries of our Safe Harbour provisions were always persons who *provide facilities* for online services, not those who themselves provide online services. In our view there is a clear distinction between an entity that does no more than provide the facilities for a communication over the Internet and someone who is in the business of providing or aggregating content on a website. Entities such as cloud music services, social networking and video sharing sites exercise a different level of control over the material on their site or network and should not be protected by the Safe Harbour Scheme – they should obtain a licence from the relevant rights holders. It's worth noting that the Government's proposal to extend the Australian Safe Harbour scheme purports to mirror the relevant provisions of the United States' safe harbor scheme under their DMCA. But the United States' safe harbor scheme is at this very moment the subject of a formal review by the US Copyright Office as a result of claims it is 20 year old law that is no longer fit for purpose. So why on earth would we want to amend our Act now, to mirror the existing US provisions, and not wait to see the outcomes of that review first?

LP: I am still thinking through the implications of a "safe harbour" provision and other associated changes to the copyright law as they would affect the Internet. I'm nominally in favour of a provision that allows fair use and I have many well-versed colleagues who are strong proponents of safe harbours. On the other hand, I'm never in favour of slavishly following other jurisdictions, especially the US. We have a unique market structure and so we always need to tailor solutions to match our circumstances not copy others.

JC: I'll only add that there is some great material currently circulating in the US at the moment describing how their existing safe harbor scheme has been abused by content services in order to pay rights holders below market rates for the content that drives their advertising revenue. Do a search for the recent "Open Letter to YouTube" from the legendary artist manager Irving Azoff; it's a good read.

Connected to the Safe Harbour scheme is the idea of an industry code. Could you give a little background into that, and explain where industry is up to in the development of that Code?

LP: Representatives of the ISPs worked with a rights holder group on a code only to find the rights holders walk out on the process because they didn't want to pay for it. One has to wonder if they are facing real identifiable financial losses of any magnitude if they couldn't see the value in a system designed to stop people unlawfully downloading because it wasn't worth the cost to them! By the way, they have such a scheme in New Zealand and it is hardly ever used.

JC: I was closely involved in the negotiation of the code that was submitted to the ACMA for registration last year (it has not yet been registered). It was a great process to be involved with and we achieved a lot in five months of discussions. For APRA AMCOS, the code was not about "three strikes" leading to "potential legal action" as Laurie suggests. It was about asking ISPs to take reasonable steps to help rights holders notify and educate those consumers who were repeatedly downloading illegal content over the ISPs' networks. Rights holders were more than happy to pay for the majority of costs involved in implementing the code. But we felt strongly that if ISPs were genuine in their stated desire to help reduce online piracy and if compliance with the code meant ISPs were going to be protected from liability for copyright infringements on their networks, then they also needed to at least make a meaningful contribution towards the costs of the code. And that is where the negotiations stalled. It's true that Village Roadshow ultimately pulled out of the negotiations (without prior notice to the ISPs or its fellow rights holder negotiating partners!) and that was unfortunate. But the code has not been abandoned by rights holders and I hope not by the ISPs. Rather, ISPs and rights holders have agreed to put their negotiations over the code's costs on hold until such time as we have reviewed the impact of upcoming s115A actions. During that time, the ISPs may also have improved their automated notice sending capabilities, which may dramatically reduce the cost of the code for all involved.

LP: I beg to differ with Jonathan. I was also involved in the formulation of the "three strikes" code. Perhaps APRA AMCOS was happy to pay, but in the end the agents of Hollywood walked away. Village Roadshow unilaterally pulled out of the negotiations via an announcement at a news conference. I can personally corroborate reports that ISP representatives only became aware of this from reading newspapers the next day. On the matter of ISPs paying for the notice scheme, I can't speak for the big telcos but I think that the majority of ISPs were always of the view that if the rights holders wanted a scheme like this they should pay for it. No ISP I've spoken to thinks that they should be responsible for what people download any more than tollway operators should be responsible for the driving habits of motorists. The notion that somehow 400+ ISPs are about to improve their automated notice sending capabilities so they can send out threatening letters to their customers on behalf of rights holders is somewhat fanciful in my opinion. *[Editors' note: after this piece had been completed, it was reported that the negotiation of the Code has been parked for a year by all stakeholders.]*

The Productivity Commission has just released its Draft Report in connection with its enquiry into Australia's IP arrangements. Broadly speaking, what have been the reactions of those in your professional circles, and what are your early thoughts?

JC: It won't come as any surprise to Laurie or your readers that rights holders were extremely disappointed by the Productivity Commission's recent draft report. Particularly frustrating was the Commission's characterisation of various rights holder submissions as "self-interested" while the submissions of large technology firms set to benefit from the proposed reforms were quoted and relied upon ad nauseam. Frankly, there are simply too many false assumptions and factual inaccuracies in the Commission's draft report to address in the space available here but please feel free to read APRA AMCOS' public submission in response to the draft report in early June where all of our arguments will be set out in full.

No ISP I've spoken to thinks that they should be responsible for what people download any more than tollway operators should be responsible for the driving habits of motorists.

LP: All I'd say at this point is that the Productivity Commission has acknowledged what everyone has known for years, which is that historically Australians have paid an excessive price for overseas originated video and content and that this is the result of geo-blocking. It is extraordinary when you think about it that we have spent decades refining our consumer laws and our international trade agreements and yet this outrageous price-gouging has been allowed to continue. Once again, I'd ask that we differentiate between moves that would assist the local industry as opposed to those that are simply designed to help large overseas content rights holders.

JC: I think the issues around geo-blocking are more complex than simply equating it to the price-gouging of Australians by overseas content owners. The reality is that funding for Australian content depends on geo-blocking at least to some extent – local producers need the ability to sell exclusive rights in their content to different distributors in different territories in order to recoup their investment. Lots of companies price their goods and services differently in different countries based on any number of variables - cost of

living, currency fluctuations, willingness to pay, competition in the local market, to name but a few. Plus, services are sometimes geo-blocked not just on pricing grounds but because the content or advertising is targeted to the local audience.

Finally, could you each provide some concluding remarks about moving forward – in particular, what are your concerns and hopes for copyright in a digital age?

LP: The protection of copyright is a fundamental element of our legal system and something that Internet Australia fully supports. We just do not believe that this justifies the imposition of costly processes that don't work, apart from perhaps having some PR value. We are also opposed to slavishly doing what overseas rights holders want us to do. The same rights holders that have used geo-blocking to price-gouge Australian content consumers for decades. I've met with APRA AMCOS previously and would welcome the opportunity to sit down with them and look at ways to deal with unlawful downloading that might actually work. One that would have the major benefit of looking after local rights holders. Thus far the schemes that have been proposed have been largely to the benefits of overseas interests. I spent six year as deputy-chair of the NSW Film and Television Office (now Screen NSW) and I am a former television producer. So I think my record of supporting the local content industry is such that I can argue against site-blocking without being seen to support so-called "pirates".

JC: Content is such an important part of Australians' digital experience and as more and more content is consumed online it is crucial from both an economic and cultural perspective that Australia gets its regulatory setting right in this area. Copyright is simply a framework by which creators (and those who invest in them) can be remunerated for their endeavours. I don't think it's such a bad thing for that framework to discourage consumers from using illegal services and encourage them to use legitimate ones instead. Laurie and I probably agree on that principle, where we diverge is over what are the most effective ways to achieve that end. I know Laurie's been in this game, having debates like this, a lot longer than I have so of course I'd be very happy to meet with him and learn about his ideas on alternative ways to address the issues that continue to undermine the Australian music industry, especially if they benefit Australian songwriters and music publishers. The coffee is on me Laurie!