The digital deadlock:
How clearance and copyright issues are keeping Australian content offline

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A white paper commissioned by Screenrights and the AFTRS Centre for Screen Business to consider the problems faced by screen content producers in getting to grips with the digital world as a place to distribute product, generate audience and find new revenue sources.

Note: The views expressed in this paper are the author's and do not necessarily reflect those of Screenrights or AFTRS.
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1. New screen technologies: possibilities and constraints

The 20th century has demonstrated humankind’s infatuation with screen culture, from the transnational appeal of cinema (the first screen) to the rapid uptake of television in living rooms all over the world (the second screen). With the rise of computers (the third screen) and handheld and mobile devices (the fourth screen), our fascination with audiovisual storytelling has not diminished; indeed, it has both broadened and intensified. We love images (especially when they move), we love stories, and we love bringing them together in rich immersive experiences. Whereas once it was only in specially designed locations that we gathered to watch films, now we can take our moving images with us. We can watch and enjoy them on our own time, in whatever place we choose. We have, effectively, freed up the content from the constraints of place – we have empowered it to be everywhere we want it to be.

For producers and creative practitioners, these new screens allow the creation of new forms of content, including games, websites, mobile and interactive stories. They also provide an ideal space for the repurposing of ‘heritage’ media - content originally aimed at the first two screens, film and television. Through online and mobile channels, this heritage content can find a new lease of life as it is discovered by new audiences who need not be sitting in the same dark theatre, but can instead be dispersed across the globe.

Yet the exciting possibilities promised by the third and fourth screens are not fully available to producers or their audiences. Just as each generation must come to grips with the new world made possible by new technology, so too must the laws that control this changing environment grapple with new concepts of creation and copying, new constructs of original and copy, and new concerns over sharing and piracy. What I will argue in this paper is that our ways of thinking about copyright have failed to keep pace with this new digital landscape, and that they are a hindrance rather than a help, not only to producers and the creative industries but more importantly to consumers (and, by extension, to the public good).

In essence, the task of clearing rights is so onerous and so expensive that it acts as a heavy deterrent to producers. Most people involved in screen
content are in the business because they love it, but they still need to be able to see a return on their investment. While it might seem that digitising our content for posterity is costless, simple and straightforward, it really is none of those things. Many screen content producers, production houses and broadcasters admit that they have old film footage that is being left to deteriorate. When asked why they don’t make it available in a digital format, they all give the same response: the issues involved in clearing the rights are so problematic that the investment of time and money is simply not worthwhile. The excitement surrounding the recent re-release of the classic Australian film *Wake in Fright* (Ted Kotcheff, 1971) shows just how much interest there can be in this sort of material. This relatively recent and well documented movie nonetheless required staggering amounts of time and effort (in this case provided pro bono) in order to gain the rights required. For older, less well documented films, often containing content that requires additional clearances, the cost and effort all too often proves too much.

One producer recently decided to seek the digital rights to an iconic Australian TV series. As the rights for digital had not been sought at the time, the company was well aware that payment would need to be made – either in the form of a ‘buy out’ of rights, or by arranging a royalty percentage to go to the rights holders (cast and crew). After two years of negotiation, the producer’s initial offer was finally accepted by the union, but only as a *standalone agreement that could not be referenced in other cases*. The case was so bruising that the company will not attempt this clearance for any other content in its back catalogue, and it’s unwilling to be named for fear of reprisals. The losers? Not just the producers, but also the actors and rights holders (who would have benefitted from the additional income), not to mention the generations of Australians who are denied the chance to encounter this material in an accessible form.

**Could it be different?**

What would it take to change this situation? The first step involves a leap of imagination. We need to do a better job of grasping the possibilities offered by new technologies – to take a big-picture view, thinking of how everyone could benefit across the board if the repurposing of content were made easier. Lying around the corner are not only threats but also opportunities.

Think of the early days of broadcast radio, which started life in the 1920s as a live medium. When music appeared on air, it was generally performed live in
the studio or via ‘live outside broadcasting’. Yet soon enough the stations discovered the benefit of recorded music. Not surprisingly, the recording industry was up in arms – attempting to sue radio stations for breaching their copyright, and complaining that if consumers could listen to songs broadcast for nothing, they would not need to buy recorded albums.¹

Meanwhile, the American Society of Composers, Authors and Publishers (ASCAP) demonstrated the pitfalls of an overly aggressive stance on copyright. ASCAP had been formed in 1914 to protect the copyrighted compositions of its members (including Irving Berlin, Jerome Kern and John Philip Souza). By the 1930s, ASCAP was becoming more vigorous in exploiting its monopoly on music licensing, increasing their licensing fees by more than 400 percent between 1931 and 1939. In response, the radio industry created its own licensing body, Broadcast Music Incorporated (BMI). When ASCAP refused to lower its prices, radio stations simply played BMI-licensed music. Within 10 months, ASCAP had come back to the negotiating table.

Over time, the recording industry’s ‘anti-airplay’ stance became subject to even stronger challenges. First of all, US court rulings in the early 1940s determined that the ‘first sale’ doctrine meant that once a radio station had bought a record, it had the right to play it over the air. Secondly, in 1942 the record industry witnessed the emergence of Capitol Records. Capitol recognised the promotional benefit of radio play and actively exploited this, encouraging radio stations to play its records, to great commercial benefit.² Capitol thrived not by fighting against the rise of radio but by actively embracing the free-to-air format and understanding the possibilities it offered.

The debates about home video in the 1970s and 1980s provide another precedent. Most famously, MCA Universal took Sony to court, based upon the claim that Sony’s new Betamax video cassette recorder would encourage people to copy programs illegally. The legal battle lasted a full eight years and went all the way to the US Supreme Court before being settled in Sony’s favour in 1984. Notably, while some studio executives declared that releasing their movies and TV shows on videotape would be ‘financial suicide’, others were taking a longer-term view. In particular, Steven J. Ross, the head of Warner Communications, embraced home video and cable TV at an early stage, sensing that the horizontal integration of cinema, home video and
merchandising would provide lucrative ‘synergies’ for his company.\(^3\) The next two decades would prove him right, in spectacular fashion.

Both of these examples illustrate the importance of vision and adaptability when considering the ever-changing relationships between old and new media. Business models that seem natural in retrospect (radio airplay as a driver of record sales, and home video as a lucrative post-theatrical release window) were not in fact pre-ordained. They had to be imagined, devised and advocated.

Today we face a similar set of problems, oriented around the question of balance: how can we provide an incentive for producers and creators to provide new content while allowing the public optimal access to this content? This is not a new idea. In fact, the question of balance has underpinned the very idea of copyright since its inception. What I will argue here is that these two sets of interests need not be in conflict. When the balance is fair, all parties stand to profit. In fact, easing copyright restrictions will benefit both the creators of content (who will be able to exploit fully their intellectual property) and consumers (who will be able to access content that would be otherwise unavailable via legal means).

On a broad level, then, we need to understand:

- The extent to which the public will benefit from enhanced access to content
- The costs involved in making content available under the current copyright regime
- The legal barriers that are preventing optimal availability of content
- The ways in which creators can continue to be recognised as rights holders even as access to their works is improved
- The ways in which consumers can be encouraged to pay fair value for access to content
- The enhanced opportunities for screen content producers that will be possible if we embrace systemic change.

In the following sections, I will go on to detail some specific problems regarding rights clearances, and outline some possible solutions. Some of these will be unappealing to various parties, for various reasons. However, in getting this conversation underway I believe it’s important to place as many options as possible on the table.
2. What are the barriers to repurposing content?

It is usually the case that rights agreements negotiated for heritage film and television content do not cover all of the uses possible in today’s digital environment. All too often, the attempt to repurpose such content leads to long and often unsuccessful negotiations to clear the rights. What we are witnessing is the result of an inefficient market, in which legislative inflexibility and lack of information work together to prevent parties from reaching mutually beneficial outcomes. The difficulties can be isolated into five distinct problem areas, relating to:

- Complexity of rights
- Clearance costs
- Uncooperative rights holders
- Orphan rights
- Lack of clarity around performance rights.

**Complexity of rights**

A common assumption made is that screen content, like books, has a single rights holder (the author) who needs to be negotiated with in order to clear rights. As screen content producers know, the reality is far more complex. There can be 20 or more rights holders in a screen content product and rarely are there less than six.

For producers, the sheer density of copyright entitlements can be overwhelming. Music, for example, can be subject to performance rights (for the musicians), publishing rights (for the composer) and synchronisation rights (covering the linking of the music with the visual elements). Additionally, music is treated differently if it is incidental or theme music. 4 Documentary filmmakers face another layer of complexity, as their productions often include footage from other broadcast events, all of it requiring separate clearances.

The complexity of rights means that even large organisations with large legal teams face a mammoth task in clearing content for online viewing. For example, the BBC recently completed a closed trial of online access to a selection of its extensive archives, but concluded that allowing access to the entire archive was untenable under Britain’s current copyright regime (which is very similar to Australia’s). Untangling all of the rights was simply too
intensive a task. Examples included cases where a single rights-holder refused permission even when all others had given consent.5

For most screen content producers and broadcasters, these factors make even exploring this area unattractive. As a result, much of our heritage of TV dramas, comedies and documentaries has been effectively locked away from the public. This is a significant national loss. The recent Cutler Report on Innovation identified the ABC’s free-to-air television content as a ‘public good’, which could be made freely available via digital distribution while incurring ‘negligible costs’. Yet this proclamation of digital distribution’s benefits fails to acknowledge fully the complex rights issues that stand in the way of such a desirable outcome.

There are many possible solutions to this deadlock. The most radical would be to enact retrospective legislation extending all negotiated rights for publicly broadcast screen content to include full digital use. This would need to include options to segment the content (as with DVD), or re-edit it slightly for other modes of consumption (as with in-flight video). Another solution would involve the establishment of a copyright registry. Under this proposal, while copyright might be granted automatically for a defined period of five or 10 years, registration would be required to extend this. A registry would allow producers to easily identify the rights holders for a particular piece of content and contact them to negotiate usage. If rights holders decided not to re-register their copyright interest after the designated period, the content would then fall into the public domain. The advantage of this system is its combination of transparency and accountability. Rights holders would be free to assert their ownership over their intellectual property, but would also take responsibility for doing so. Producers would be able to quickly and efficiently determine the rights underlying a project and ascertain the associated fees. Additionally, it is likely that many rights holders would choose to have their content enter the public domain in a clearly defined and easily implemented manner. This has the potential to dramatically increase the amount of content residing in the public domain.

There are well-established precedents for this approach. In Australia, a system of copyright registration was in place until 1968.6 In the United States, it was maintained until 1976. As Lawrence Lessig puts it:
This system of renewal was a crucial part of the American system of copyright. It assured that the maximum terms of copyright would be granted only for works where they were wanted. After the initial term of fourteen years, if it wasn’t worth it to an author to renew his copyright, then it wasn’t worth it to society to insist on the copyright, either. 7

Only a ‘small minority’ of authors, notes Lessig, took up the option of renewal. This might seem surprising, but as Lessig reminds us, ‘Most creative work has an actual commercial life of just a couple of years’. 8 The advantage of the registration system is therefore that the works remaining under protection tend to be those that have retained some commercial value.

Clearance costs
While the rights in heritage content are often covered by an award, there is no set scale for the cost of clearing rights for digital re-use. Often, these costs are completely out of balance with the scale and potential returns of the project in question. A popular Beatles song might have a value set in the millions, regardless of the cost of the content with which it is synchronised. But for archival material, it is not always feasible to re-record a soundtrack to remove a costly song, especially when the project’s ultimate returns are not known.

Patricia Aufderheide and Peter Jaszi have outlined one example of the potential scale imbalance between clearance costs and production budgets:

The cost of rights can dramatically inflate a budget, as budding filmmaker Jonathan Caouette vividly demonstrated with the 2004 release of his home-made movie about his dysfunctional family, Tarnation. Although the film was largely made from images of his mother and grandparents, it interwove many references to popular culture. Thus, a film that the filmmaker estimated at a cost of $218 in hard cash ended up costing $400,000, using most of the eventual budget to clear rights. 9

Another recent example involves an American filmmaker who used music recorded in the 1920s for her film. She discovered that, for the publishing rights to the music, she would need to pay $500 per song per film festival and $15,000 - $26,000 per song for clearance for a DVD release. None of the record labels were willing to negotiate a royalty-based fee, and without
clearances, no distributor would release the film. An award-winning animation, the film cost less to make than the rights will cost to clear, meaning that it is currently denied any audience, any ability to make money and, importantly, any ability to raise the profile of the musical artist, which might in turn create revenue for the publishers of the music.10

Again, solutions to this problem are likely to be controversial. For example, one way of addressing the music issue would be to define two classes of music: excluded or ‘iconic’ tracks (which might be defined as, for example: songs which have sold more than 5 million copies) and non-excluded tracks. A fee scale could then be created for non-excluded tracks, set and administered by a collection body, which would also be responsible for payments to the rights holders. In any case, it must be acknowledged that the huge discrepancies between the ‘purchase value’ and the ‘use value’ of rights are impacting negatively upon individual producers as well as the industry at large. The problem here is not so much with the individual rights holders. Rather, it is to do with a system that allows the arbitrary determination of the value of content, without regard for the lost benefits for both producers and consumers. A two-tiered valuation model would remove some of this capriciousness.

**Orphan rights**

Orphan rights are rights that continue to hold legal force, despite the fact that the rights holder cannot be located. This is a common problem, as archival footage is not always well-documented and rights holders not always easy to track down.

The BBC addresses this problem by holding back a specified sum of money as an ‘await claim’ in the event that the rights holders in question are eventually located.11 However, no ‘warranty’ can be made that all rights have been cleared. It is therefore quite possible for a rights holder to appear, threatening legal action or demanding excessive payment. For many producers, this can be the final obstacle that derails their attempt to clear all rights in a project, while for distributors or broadcasters the lack of certainty surrounding the rights can be a major impediment to their commitment.

In addition to orphan rights, there may be cases where the rights are in dispute, possibly due to complications caused by the death or bankruptcy of a rights holder. While time should be given for a dispute to be resolved, public
interest should rule if the rights holder cannot be established. Here, possible solutions might include setting aside funds to cover future claims, or placing rights in the public domain after a reasonable period of time has elapsed. These solutions are less likely to appear punitive if they are associated with a clear centralized registration system, as I suggested earlier. Under this system, rights holders would need to re-assert their claim over the material (at, for example, five year intervals).

**Uncooperative rights holders**

Beyond the issues outlined above, producers may also encounter a more intractable problem: rights holders who simply don’t want to give up their rights. This may appear to be a simple matter. From one perspective, owners of copyright are perfectly justified in choosing to withhold their content from broader circulation. However, it is worth taking a more circumspect view when the rights of the individual intersect with, or come into conflict with, the greater public good.

Currently, in clearing the rights for archival content, the agreement of all rights holders is required. Effectively, this means that a single person who refuses to grant their rights results in a whole product not seeing the light of day. Rights can be refused on any grounds; a reason does not even need to be supplied. When it is, the most common claim is that the rights holder does not want work they did when younger and less skilled to be made available. This ‘reputation protection’ can effectively block the ability to provide the content digitally.

It is difficult to determine when the rights of an individual (or their heirs) should be allowed to trump the public good. One (admittedly radical) answer to this problem would be to require rights holders to produce justification for withholding their rights. At the very least, rights holders should be encouraged to take responsibility for asserting their rights in a given piece of content, for example via the central registry system proposed above.

**Lack of clarity around performance rights**

One of the main issues for producers and rights holders alike is the very nebulous nature of ‘digital’ content and products. The content itself may include video, sound recordings, text, still images, cartoons, digital avatars, virtual worlds and 3D projections on one or many screens simultaneously.
Any definition of digital content needs to take into account the fact that it might need to include the ability:

- to be consumed in a non-linear manner or at least, not in the order intended
- to be consumed over multiple devices (sometimes at the same time)
- to be stored for later consumption, even if available live at that time
- to be judged – ranked, rated, review and commented on
- to be shared by the consumer outside of the parameters of the content itself
- to be altered by the consumer

How should performance rights be treated in this context? One problem is that the existing guidelines and awards listed by cast and crew guilds are structured around heritage media concepts. There is some mention of ‘ancillary’ rights, but no real acknowledgement of the full gamut of digital and non-linear formats.

Over the next few years, digital formats will continue to grow in popularity, and producers will increasingly begin to understand and exploit emerging business models for digital content. In order to be able to continue in their leading role, the Media, Entertainment and Arts Alliance (MEAA) and other organisations with a long history in heritage screen content will need to address the specific challenges of interactive and digital environments.

At present, MEAA has not articulated a clear stance regarding the appearance of its members in repurposed heritage content, in the ‘native’ digital space (which lacks clear release windows), or in multi-platform content, which combines both heritage and native digital screen content. ‘Case by case’ agreements are made with individual companies, but these do not set a transparent, open standard which can serve as a precedent for future deals.

Many screen content producers have also complained that the guilds and funding agencies often regard linear content and cross-platform extension content, created at the same time for the same project, as two different and separate products. This results in two agreements being required. It would seem fairer and more sensible, certainly in some cases, to negotiate a single agreement recognising that some performances would be heritage only and some digital only, with others spanning both traditional and digital media.
Importantly, the commercial models that apply to native digital content are completely different from those for traditional screen content, both in the funding of the content and the returns from distribution. In many cases, there is no initial funding for the digital content. Instead, money may be supplied through commercial arrangements (advertising or sponsorship) which then become part of the end product. Advertising and sponsorship revenue play a critical part in making digital content commercially viable, as do consumer subscriptions or upgrade payments. As the returns from digital content cannot be easily estimated, pre-payments for rights are difficult to determine. Percentage-based royalty payments, where performers are rewarded according to the success of the production, are therefore fairer and more realistic. This model could be applied to new digital and cross-platform projects, but also, retrospectively, to heritage projects that have been adapted to the digital space.
3. What is the best system for recognising and paying for rights?

Many in the industry fear that supplying content in a digital form will result in this content being pirated and the potential revenue being lost. Certainly, it appears that there is no effective manner of protecting content from being copied and shared across a peer-to-peer network if consumers are determined to do so.\textsuperscript{14} However, the level of concern is arguably greatest among the major studios. Many independent producers, by contrast, feel that restricting access to digital content merely serves to restrict the size of potential audiences. For these producers, the sharing of content can be one of the best forms of promotion. There are conflicting reports as to whether the sharing of content through peer-to-peer networks has a detrimental or positive effect on subsequent content consumption and revenue generation.\textsuperscript{15} Nonetheless, we should take seriously the increasing evidence that open access to content – much like radio airplay – can work to increase the profile of creative works.

Here, control is the central issue: who determines when, how and by whom content is accessed? The Internet has encouraged the assumption that content which is available to one should be available to all. Many who do illegally copy TV series say their motivation is the delay in the series being shown on television in Australia. Yet these rule-breakers often become the strongest promoters of a series to their peers, and often constitute a loyal TV audience as well.

Singer-songwriter Janis Ian is one content creator who has recognised the possibilities offered by the changed digital market. She argues that if the main record labels had provided the file-sharing website Napster with a licence agreement based on a rate of 5c per song, then the industry’s income would have increased by $500,000 \textit{per day}.\textsuperscript{16} Ian, whose fame was based principally on songs she recorded in the 1960s and 1970s, noted an increase in her own merchandise sales of over 300 percent \textit{after making free downloads of her music available online}. In this case, the clear promotional value of providing her music free online was reflected in greater tangible sales. This is not an uncommon result – for example, the rock band Nine Inch Nails has pursued the same approach with great success. Indeed, the band has commented publicly: ‘We believe BitTorrent is a revolutionary digital
distribution method, and we believe in finding ways to utilize new technologies instead of fighting them’. 17

These cases point to the fact that centralised control may not be the solution to the problem of piracy. Furthermore, as the example of Apple’s iTunes suggests, and research from Ipsos MORI and PricewaterhouseCoopers confirms, 18 people are willing to pay for content, provided that:

- the content is easy to access, download and use
- the content is charged at a reasonable price
- the content offered is reasonably comprehensive

What is clear is that the old model of copyright has failed to keep up with audience behaviour in the digital era. New models are needed. Here, I will detail three graduated options:

- Levy the medium, not the content (and create a collection society to administer and distribute the money)
- Encourage an industry-supported collection society (and retain the option of creating a statutory body if a voluntary collection society cannot be formed)
- Encourage industry to build and administer a peer-to-peer network for content sharing.

Each of these solutions would likely be subject to vigorous resistance from various stakeholders. But we have to be prepared to consider radical solutions to the digital deadlock. In doing so, we would be presenting consumers with a viable alternative to piracy (effectively decriminalising millions of Australians) while ensuring that authors and copyright holders receive a return for their work. The long-term cost of failing to resolve these issues is unknown but clearly substantial and rising daily.

**Option one: levy the medium, not the content**

This approach is perhaps the most radical of the three I am outlining: while being the most comprehensive in terms of returns to rights holders, it does depend on direct government intervention. Nonetheless, it is not without precedent. In 1998, Canada passed an amendment to its Copyright Act (Part VIII) which made a provision for the legal copying of music and sound recordings for private or personal purposes. To counterbalance this, blank media would attract a levy. At the time – a year before Napster first
highlighted the popularity of peer-to-peer sharing networks – this was not seen as a major issue. But subsequently, as sharing has become increasingly popular, the Canadian Recording Industry Association (CRIA) has been trying to overturn this legislation. In 2003, the right to copy and share music was further reinforced in a ruling that specifically stated that downloading songs from a peer-to-peer network was legal. The only solace that CRIA has been able to achieve is in having MP3 players added to the list of recordable mediums that attract a levy.19

While clearly the Canadian ‘levy at source’ is the most comprehensive attempt to address both sides of the copyright debate, Sweden is considering a levy at the Internet traffic level (with Internet Service Providers or ISPs).20 Either of these measures could be applied in Australia if there were enough will – with either a levy on recordable media and devices, or a levy at the Internet service provider point. In order to reflect actual levels of media downloading, this last option would require the ISP to determine the content of the data that is passing through the network (known as ‘packet sniffing’).

iiNet, one of the largest service providers in Australia, has recently been taken to court by seven major movies studios and one Australian television network on the basis that it allowed its customers to illegally download screen content. As iiNet is able to packet sniff, the movie studios argue that iiNet had a responsibility to disconnect customers identified as illegal downloaders.21 In a related case, Virgin Music intended to provide a broadband P2P sharing service and is estimated to have spent tens of millions of dollars negotiating this. Sadly, record label requirements (including not allowing users to upload or download music) seem to have ground this initiative to a halt.22

The British TV licence provides an analogy for this approach. Most people choose to pay the licence fee, as the cost of compliance is low and the fine is high. Accordingly, an ISP charging a low monthly content sharing levy might not sign up all of its customers, but in the face of high penalties for non-compliance, many would no doubt make the shift. This solution would also require some form of collection society to set the rates for content, collect the money (from ISPs and retailers of blank media), determine the allocation and distribute the money. Screenrights is an example of a collection society that performs these roles (see below).
Proposals:

- Bring in a levy on all recordable media or devices – to be paid into a fund to be distributed to right holders under a collection society arrangement.

- Bring in a levy at the ISP level based on packet sniffing the data. This levy would be charged by the ISP, and the money paid to an independent collection society for distribution to rights holders.

Option two: industry-supported collection society
The idea of an industry-based collection society offers a compromise option, bringing together perspectives from the public and the private sector. The entertainment industry has made small steps in this direction already. Warner Music, for example, has offered a blanket license scheme to universities which would allow peer-to-peer sharing and downloading for the payment of a small fee.23 The proposal includes the setting up of a collection society, called ‘The Choruss’, which would collect the funds and distribute them to the rights holders. If this scheme were implemented, students would pay a single fee included in their tuition fees and would be able to download content from any P2P site without fear of reprisals. The plan is supported by several other major labels, but there is dissent from some bodies, due in part to the license being compulsory and concerns that the scheme will not be transparent.24 However, Electronic Frontiers Foundation (EFF), a body seeking to remove barriers on the Internet, supports the proposed creation of Choruss (the plan is based on an EFF White Paper).25

There are good precedents for the collection society model, whether voluntary or statutory. The Australian statutory collection agency Screenrights, for example, collects a fee from schools and universities, allowing them to record and re-use broadcast screen content for educational purposes, and disburses payments to Australian rights holders. As a compulsory authority, Screenrights effectively manages rights and approvals for a wide selection of Australian content. It is unlikely that a voluntary collection society could have amassed such a comprehensive catalogue.

Voluntary collective rights bodies are an effective way of balancing commercial and community needs. Under this model, the industry acts on behalf of its membership by taking a leading role in the structuring, regulation and management of rights bodies. For example, blanket licences
allow radio stations to broadcast music without needing to enter into individual agreements regarding each track. The Australian Performing Rights Association (APRA) and the Australian Mechanical Copyright Owners Society (AMCOS) are two bodies which negotiate blanket rights for certain uses of music on behalf of the industry. They collect money from those who use the content (play it on radio) and pay money back to the rights holders on a pro rata basis.

The Simpson Report, a review of Australian copyright collection societies, endorsed voluntary collection societies. They should be, it argues, ‘the preferred mid-way house between the exercise of individual exclusive rights and a compulsory licence where mass usage requires that the community be given access to the rights on reasonable terms’. The advantage of this system is therefore that it achieves a good balance between the interests of rights holders and the public at large.

Proposals:

- The Industry should voluntarily create a collection society (similar to, APRA and AMCOS) which would collect fees (from all collection means) and distribute the monies proportionally to rights holders.

- The music industry should be encouraged to enter into a collective scheme for the granting of rights.

- Where such a scheme is not voluntarily entered into, it should be legislated and a collection society similar to Screenrights created to manage collection and distribution.

**Option three: industry-supported peer-to-peer network**

Here, I suggest a related but distinct model, in which the system of payments and downloads is effectively and efficiently managed according to a decentralised, market-based logic. Here, the industry could act on its own behalf to ensure that content is made available with minimal restrictions but in a way that protects rights holders. This is a hybrid model involving the creation of a new organisation which would not act as a voluntary collection society, but would instead pool content and make it available to users on common terms.

Certainly, Warner’s ‘Choruss’ model, which would allow students to download P2P content for a flat ongoing fee, provides a promising example of
an industry-supported P2P network. I would suggest that this model could be extended beyond the education sector, and could apply to any kind of content. The main challenges presented by blanket license P2P downloads are: ensuring that people pay; and ensuring that the rights holder is remunerated at a level commensurate with the amount of content downloaded. The Choruss model proposes a set fee, with sampling to determine the distribution. Indeed, there are companies that provide this sampling service. BigChampagne - referred to as ‘the Nielsen of P2P’ - tracks P2P downloads and supplies these figures to, amongst others, the recording industry itself.27

A better model would involve the creation (voluntary or mandated) of an industry-supported peer-to-peer network, collecting a low subscription fee from consumers for access to the content. Consumers who had paid their ‘subscription’ would be allowed to download at will. Content providers (labels, broadcasters, agencies and so forth) would contribute to the content pool, and would share in the revenue collected, with this to be paid out by the collection society. This model may appear anti-competitive to some, but it supplies the best current solution for industry and consumers.28 While there may be those unwilling to pay for content under any circumstances, most people will choose to pay if the fee is reasonable and the process straightforward and easy.29 Even if only 10 percent of the consumer market participated, this would be more than double the current download market.

Proposal:

- Create an independently managed industry supported P2P network. This would include a low fee for subscribers to access all content, with the body also acting as collection society for rights holders.
Conclusion

For most screen content producers, the key issues remain: how to get an audience, how to get content into the hands of this audience, and how to make money doing this.

Where screen content producers have products they have rights to – either archive or unreleased – the barriers to getting this content online and thus available to a wider audience need to be lowered. As a nation, we run the risk of losing access to many of our screen stories and much of our history. Already, some broadcasters are destroying old tape copies of content that is costing money to store. This material is too costly to convert to a digital format for storage, particularly when the issues surrounding rights clearances mean that any investment made in extending the life of the content may turn out to have been wasted.

We need also to find ways to encourage screen content producers to step willingly into native digital production by making it financially more attractive, as well as easier to navigate the minefield of rights – clearances, music rights and performer fees.

Finally, in the digital world – online, interactive, handheld or mobile – there is a single, easy equation: distribution + audience = commercial opportunities. We need to rethink how we supply content and collect money for this. The solutions may be small-scale ones, but it seems likely that a more drastic and wide-ranging approach will be needed in order to break the digital deadlock.

I believe that all of the solutions proposed here should be considered seriously. My preference would be for a voluntary collection society. The levying of a small subscription fee would reduce uncertainty in the current P2P market, making finding and sharing content easy (and legal) for consumers, and rewarding screen content producers in the process. Those who favour a less centralised approach may prefer an industry-driven P2P model. Whatever the case, it is clear that the current situation is working to the detriment of the production sector and the public at large. It will require imagination and foresight to find a way forward. The stakes are high, and the cost of inaction substantial. After all, the history of media tells us that change offers opportunities as well as threats, and that those who fail to embrace change are all too often left on the sidelines.
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Notes

1 For richer coverage of the issues here, see Lawrence Lessig’s Free Culture (London: Penguin Books, 2004) available for download and licensed under Creative Commons at: http://free-culture.org/get-it
7 Lessig, Free Culture, 133–34.
8 Ibid., 134.
http://blog.ninapaley.com/2008/08/26/music-industry-on-killing-spree/
11 See Haywood-Tapp, ‘Contributor Rights’.
12 Some excellent work has been done on orphan works. See Marybeth Peters, ‘The
http://www.copyright.gov/orphan/
13 Microsoft has created a touch-sensitive dual layer visual display table called ‘Second Light’.
An image appears on the lower screen (table) and this can be manipulated by touch. A
second layer held over the table reveals different information — so a map of the stars on the
lower level can have an image of the constellations projected onto the second layer, with the
lower layer remaining complexly touch navigable. For a review of this, see:
14 See Rosie Swash, ‘Online Piracy: 95% of Music Downloads are Illegal’, *The Guardian*, 17
January 2009*. This article notes that 40bn online music files were shared illegally in 2008,
compared with only 2.3bn legal downloads.
September 2003.
00e467debbe&ei=5007&partner=USERLAND. For a good summary of the issues see Canadian
Internet Policy and Public Interest Clinic, ‘File Sharing’, CIPPIC website, June 2, 2007:
http://www.mindjack.com/feature/piracy051305.html
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18 See Kevin Anderson, ‘Research: Pirates will buy if the price is right’ Paid Content (Media
Guardian) 3 July 2009. http://paidcontent.co.uk/article/419-research-pirates-will-buy-if-the-
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Publishing in the Digital Age’, a 2009 report by PricewaterhouseCoopers indicating that
consumers are ‘willing to pay’ for ‘high value content’ (4). http://www.wan-
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culture.org.au/index.php/Peer-to-Peer_-_Legal_Issues_(Canada)
http://www.thelocal.se/9925/20080208/
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22 Mark Jackson, ‘Virgin Media puts legal P2P sharing service on ice’ *ISPReview*, 24 January
2009. http://www.ispreview.co.uk/news/EkFkZ1vpxkxNYMGHm.html
23 Wired Blog has details of this as well as links to the slides and other sites: Eliot Van Buskirk,
http://blog.wired.com/business/2008/12/warner-music-gr.html#. See also: Mike Masnick,
‘Warner Music Pitches Music Tax To Universities: You Pay, We Stop Suing’ *Techdirt*, 12
includes a copy of Warners’ slide presentation to universities. The proposal is being
promoted by Jim Griffin who, in 2004, gave an interview to *The Register* about how P2P
sharing needs a blanket licence:
http://www.theregister.co.uk/2004/02/11/why_wireless_will_end_piracy/


28 This would be in direct competition to services such as iTunes and Napster.

29 Eliot Buskirk, ‘Music One Step Closer to Being an ISP Feature’, Wired.com, 28 March 2008. http://blog.wired.com/music/2008/03/music-gets-one.html This article includes a poll on whether people would pay $10 per month for unlimited access to music. The results show more than 70 percent of respondents would pay.