COPYRIGHT AS (DECENTRED) REGULATION: DIGITAL PIRACY AS A CASE STUDY

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Copyright is a complicated area of law that impacts on the lives and practices of almost everyone in our society. The reach of the Copyright Act 1968 *(Cth) adds to the challenge of encouraging compliance with the law. This article suggests that recourse should be made to an area of legal analysis that has focused on issues of compliance and enforcement – regulatory theory. While much of the work in that area examines the actions of governments and government agencies, a recent idea – that of decentred regulation – accommodates the diverse subject-matters and range of potential users of copyrighted material that are at the heart of the regulatory challenge. The theory, therefore, has the potential for furthering the understanding of how copyright law impacts on those who are subject to it. The argument is that the better the understanding of how copyright operates as a form of regulation, the better the chance of compliance. To assist in the application of the theory, the norms associated with 'digital piracy' will be used as an example, chosen because the term has become one of the more widely articulated norms relating to copyright infringement (such as via the anti-piracy advertisements on DVDs) and because the behaviour it seeks to control evidences all the problems that attach to the regulation of copyright.*

I INTRODUCTION

Copyright law is complex and the enforcement of copyright is an ongoing issue for copyright owners and for government agencies.[1] The increasing access in the community to facilities for producing high quality digital copies of copyrighted material means that it may be time to adopt a fresh approach to this issue. The option explored in this article is the examination of an idea from a literature devoted to the analysis and enforcement of laws, regulations, and norms – the legal sub-discipline relating to regulatory theory.[2] That this option has not been explored to a great extent before is hardly surprising as many consider 'regulation' as being the province of governments and their use of 'command and control' mechanisms or alternative modes of regulation, such as co-regulatory

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1 For a recent review of enforcement issues in Australia see Australian Institute of Criminology, *Intellectual Property Crime and Enforcement in Australia* (2008).

2 An introduction to regulatory theory and reference to key texts in the area are provided in Part II below.

models involving industry organisations.[3] None of these understandings easily translates into the regulation of individuals with respect to their potential to infringe copyright.[4]

The key difficulty in seeing copyright as a form of regulation is the copyright regime itself. Copyright is an unusual area of law in that its statutory provisions cover a large range of subject matters (from literary works and performances through to broadcasts) and it appears to envisage a wide range of infringers (from a child downloading music to international cartels engaging in the large-scale copying of movies and music). The inclusion of criminal penalties enforceable by the Crown and civil penalties enforceable by copyright owners coupled with the absence of a central regulatory authority (such as workplace inspectors in the area of occupational health and safety) renders problematic the conceptualisation of copyright as a form of regulation.

One idea that has come out of the field of regulatory theory, however, offers some promise for understanding copyright from a regulatory perspective. The theory of decentred regulation allows for the regulators, the regulated, and those whose interests are protected by the regulation to be spread throughout the community and the world.[5] The theory also accommodates the fact that an individual may be a creator, user, and infringer of copyright material. Therefore, it has the potential for furthering the understanding of how copyright law impacts on those who are subject to it and may be helpful in attempts to better enforce the interests of copyright owners. In order to demonstrate this, recourse will be made to an example of 'digital piracy'. This example is useful as the term has become one of the more widely articulated norms relating to copyright infringement[6] and because the behaviour that the norms relating to digital piracy seek to control evidences all the problems that attach to the regulation of actors in the copyright sphere.

II REGULATORY THEORY AND DECENTRED REGULATION

It is useful to introduce key concepts about regulation generally.[7] A regulatory regime may be understood to comprise 'standard-setting, monitoring compliance with the standards and the enforcement of the standards'.[8] Regulation has been defined, broadly, as the 'intentional activity of attempting to control, order or

3 One commentator has suggested that copyright is entering a new phase as a 'regulatory regime': Peter Menell, 'Envisioning Copyright Law's Digital Future' (2002) 46 *New York Law School Law Review* 63, 194-7. Menell perceives that the regulation will fall under the control of 'regulatory bodies and administrative officials', that is, in the form of command-centred regulation: at 197.

4 A co-regulatory approach has been suggested by the UK Government: Department for Business Enterprise and Regulatory Reform, *Consultation on Legislative Options to Address Illicit Peer-to-Peer (P2P) File-sharing* (2008).

5 Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1.

6 A sample of the literature that has arisen around the term 'digital piracy' is discussed in Part IV below.

7 For an overview of the state of play of regulatory theory see Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (2007).

8 Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker et al (eds), *Regulating Law* (2004) 246.

influence the behaviour of others'.[9] Other examples of definitions of regulation include the 'promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules'[10] and that regulation 'takes in all the efforts of state agencies to steer the economy'.[11] The economic aspect is important to copyright (in its capacity as a tool of economic policy)[12] as 'regulation is a necessary condition for the functioning of the market, [it is] not only a compromise between economic imperatives and political and social values'.[13]

Many of the regulatory frameworks developed in the past have been aimed at firms or industry sectors with defined roles and responsibilities. That is, regulatory efforts have involved regulatory organisations active in the monitoring of compliance with standards set either by the state alone or in consultation with the targeted industry sector. One example is the WorkCover Authority that has regulatory responsibilities in the area of occupational health and safety.[14] Such a regulatory organisation is not active in the regulation of copyright.[15] Despite the lack of central institution, there are aspects of the copyright regime that render it amenable to analysis through the use of regulatory theory: the setting of standards; the enforcement of the standards (through civil and criminal penalties); and its role in regulating a key sector of the economy. There has been little attempt at using theories of regulation to provide an account of the enforcement (and lack of it) of copyright.[16] This article adopts the decentred regulation model proposed by Julia Black to remedy this situation to offer a different conceptualisation of the regulation of behaviour relating to copyright.

Black's understanding of regulation is broad and appears to cover all areas of formal law and adopts a perspective of regulation as being wider than government

9 Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (2004) 1 citing Julia Black.

10 Robert Baldwin, Colin Scott and Christopher Hood, 'Introduction' in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (1998) 3.

11 Ibid.

12 Copyright, as one of the major planks in the protection of intellectual property, is seen as important in encouraging creativity and innovation. 'More innovation', according to one commentator, 'should fuel GDP growth': Lauren Stiroh, 'Uncertainty in the Economics of Knowledge and Information' in Gregory Leonard and Lauren Stiroh (eds), *Economic Approaches to Intellectual Property: Policy, Litigation and Management* (2005) 3, 6.

13 David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 *Annals of the American Academy of Political and Social Science* 12, 19.

14 There is a WorkCover organisation in every Australian State; see, eg, WorkCover New South Wales (2009) <http://www.workcover.nsw.gov.au> at 23 October 2009; WorkSafe Victoria (2009) <http://www.workcover.vic.gov.au> at 23 October 2009.

15 Instead of there being a central regulatory body for the enforcement of copyright, industry bodies, such as the Recording Industry Association of America ('RIAA'), have been involved in prosecuting copyright infringement in the US. The RIAA is a trade group rather than a statutory authority. For a description of the RIAA and of the work it does, see RIAA, *Who We Are* (2009) RIAA <http://www.riaa.com/aboutus.php> at 23 October 2009.

16 A search of the ssrn.com database using the keywords 'regulatory theory' and 'copyright' produced no publications that adopted the perspective of a regulatory theorist to explore the enforcement of copyright.

regulation.[17] More specifically, a particular value of Black's notion of decentred regulation is the recognition that regulation does not always operate from the top down, or from key industry bodies across, but that regulation may be better understood as being much more widely spread through the community.[18] According to Black, there are five aspects of the 'decentred understanding' of regulation: 'complexity, fragmentation, interdependencies, ungovernability and the rejection of a clear distinction between public and private'.[19] The focus, then, is on the non-rigid relationships between the parties involved in the operation of the regulatory system. Decentred regulation, as such, may be evidenced by a 'greater reliance on markets and less faith in both judicial elaboration of private law and control mechanisms involving regulators … [that places] a new burden on the law of contracts'.[20] This, again, reflects a shift away from 'command and control' modes of governance and acknowledges the role that individual parties may have in the protection of their own interests. Black's theory of decentred regulation, therefore, is well-suited to assist in the understanding of the operation of copyright.

III COPYRIGHT AND THE FIVE ASPECTS OF DECENTRED REGULATION

This Part acknowledges the regulatory challenges offered by the copyright regime and considers them in terms of decentred regulation on the basis that this more nuanced understanding of regulation makes it readily applicable to the operation of copyright law.[21] As mentioned above, the copyright regime is unusual in that it is statute-based and aimed at almost all people and organisations. A preliminary examination of the *Copyright Act 1968* (Cth) ('*Copyright Act*') highlights the rights that attach to material deemed to be original, the manner in which those rights can be infringed and the exceptions to such infringement. It is tempting, therefore, to consider individuals subject to copyright law solely in terms of either creators of copyrightable material or copiers of such material. This suggests a strict dichotomy between the two – a potentially misleading division. The interests of those who

17 A perspective that is implicit in the name of her model, 'decentred regulation', and discussed in Part III below. Black's understanding fits with the criticisms of others. Haines, for example, argued that 'much regulatory theory has had a rather restricted focus' and has been limited to the analysis of the 'relations between individual regulators and organisations': Fiona Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (1997) 15.

18 Black, above n 5. Put another way, regulatory theory has, in the past, focused on decisions made by one party over actions of another – where the first party is not the locus of harm. In the copyright context, as will be seen below, in most cases the decision to seek sanction against another party for damaging conduct is made by the party who is suffering the harm.

19 Ibid 4.

20 Hugh Collins, 'Regulating Contract Law' in Christine Parker et al (eds), *Regulating Law* (2004) 13, 29. In the digital sphere, this is evident in the 'shrink-wrap' licences that come with software and the increasing use of contract law (instead of copyright law) in the open source movement.

21 Black's work, however, does not engage with intellectual property specifically and does not offer mechanisms for enhancing the effectiveness of regulation in areas such as copyright. Black's ideas have, though, been applied to one aspect of online behaviour: Dimity Kingsford Smith, 'Decentred Regulation in Online Investment' (2001) 19 *Company and Securities Law Journal* 532.

fall into either, or both, of these categories may be seen to change depending on whether they are creating, sponsoring or using copyrighted materials.

Digital piracy (a term with almost no legal effect) is a useful example for the drawing out of those aspects of copyright that render the decentred regulation model appropriate for this analysis because the behaviour that the term is intended to cover illustrates the key issues with respect to the enforcement of copyright.[22] That is, as the term 'digital piracy' covers a range of practices involving the copying of copyrighted material in a digital form, attempts to regulate behaviour in the area have to deal with the geographic spread of (ab)users of copyrighted material, the complexity of law (potentially in multiple jurisdictions) and the ease with which copyright can be infringed. That digital piracy is seen as a major threat to the profitability of copyright owners – particularly, of large firms involved in music and film production[23] – also means that there are obvious examples of efforts to regulate the behaviour of users of digital material. These efforts should be examined in terms of their effectiveness as norm-setting messages for the target audience.

A *Complexity*

In terms of its impact on copyright's regulatory effectiveness, the complexity of the regime is important from the perspective of those who are to be regulated. There is little doubt that copyright is complicated. This is, in part, because almost any individual may produce copyrightable material which may be in the form of a document, a sound recording, or a film.[24] The copyright protection offered to documents, recordings, and films is different because they fall into different categories in the *Copyright Act*. Further, the distinction between economic rights and moral rights is not self-evident – particularly as the categories of subject-matters, where moral rights may arise,[25] do not map directly to the dichotomy between 'works' and 'subject-matter other than works'.[26] Finally, there are provisions within the Act that deal with peripheral issues: Crown copyright;[27]

22 It has been noted that 'digital technology may expand the horizons of copyright piracy but it does not change its nature': Michael Meurer, 'Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works' (1997) 45 *Buffalo Law Review* 845, 853. Meurer points out that 'copyright holders have repeatedly preached the coming of the Apocalypse as new technologies for copying and distributing works became available', citing the reception of video cassettes, photocopiers and digital audio tapes by movie producers, academic publishers and the music industry respectively: ibid 846.

23 It has been suggested, for example, that 'US movie studios lose an estimated $6.1 billion annually in global wholesale revenue to piracy': Timothy Cho, 'Hollywood vs The People of the United States of America: Regulating High-definition Content and Associated Anti-piracy Copyright Concerns' (2007) 6 *John Marshall Review of Intellectual Property Law* 525, 525-6. Such estimates may be open to question as they can rely on potentially self-serving data from those who are claiming the loss; nonetheless, it is likely that copyright owners lose significant sales from the infringement of their copyrights.

24 Copyright may also subsist in dramatic, musical or artistic works as well as broadcasts (both television and sound) and published editions.

25 *Copyright Act 1968* (Cth) pt IX: 'Moral rights of performers and of authors of literary, dramatic, musical or artistic works and cinematograph films'.

26 *Copyright Act 1968* (Cth) pt IV.

27 *Copyright Act 1968* (Cth) pt VII div 1.

technological protection measures ('TPMs');[28] the limitation on remedies available against carriage service providers;[29] and the constitution of the Copyright Tribunal of Australia.[30] The inclusion of these matters makes sense to those who are familiar with the copyright regime. However, for the uninitiated, the inclusion of these provisions only complicates the understanding of copyright.

In sum, the complexity arises from the multiple forms of copyright available and the different limits that govern them. From the perspective of those who seek to understand the Act, it is unintuitive that copyright should be broken up into original literary, dramatic, musical and artistic works and 'subject-matter other than works'.[31] Difficulties are also posed by the sheer scale of the legislation as well as the range of categories of regulated matters contained within it. Researchers have shown that in 2005 there were 1597 subsections in the Act[32] and in 2006 the legislation contained 149 641 words and over 529 pages.[33] It is therefore not a simple Act – it may make sense to experts, but it would be a challenge for most creators and users of copyright material to fully understand the intricacies of the legislation.[34]

In addition, the legal technicalities of the Act's operation adversely impact on the engagement of a user of copyright material with the Act. These technicalities, for the purposes of this discussion, are the fundamental legal tests and the exceptions to infringement that exist in the law today.[35] The first technical test for someone who wishes to copy a work or a 'subject-matter other than a work' is whether the material is copyrighted.[36] In Australia, there is no need to register copyright and there is no need for copyrighted material to carry the copyright symbol ©. Instead, the person may have to assess, from first principles, whether the work could attract copyright. According to the Act, an 'original' work will attract

28 *Copyright Act 1968* (Cth) pt V div 2A.

29 *Copyright Act 1968* (Cth) pt V div 2AA.

30 *Copyright Act 1968* (Cth) pt VI div 2. The Tribunal may determine remuneration and royalty payable under the Act: ss 150, 152A. The Act sets out, inter alia, the requirements for the constitution of the Tribunal and the qualifications of the members of the Tribunal. The Tribunal, while important for the operation of the regime, is not central to the understanding of the manner in which copyright operates as a regulatory system and, therefore, will not be considered in detail in this article.

31 The latter category is contained in the *Copyright Act 1968* (Cth) pt IV which covers copyright in sound recordings; cinematograph films; television broadcasts and sound broadcasts; and published editions of works.

32 Emma Caine and Andrew Christie, 'A Quantitative Analysis of Australian Intellectual Property Law and Policy-making since Federation' (2005) 16 *Australian Intellectual Property Journal* 185, 192.

33 Emily Hudson, Andrew Kenyon and Andrew Christie, 'Modelling Copyright Exceptions: Law and Practice in Australian Cultural Institutions' in Fiona Macmillan (ed), *New Directions in Copyright Law, Volume 6* (2007) 244.

34 An alternative approach to understanding the complexity of copyright law is to adopt a postmodern perspective. For a discussion of copyright from a Foucaultian perspective, see Brad Sherman, 'Appropriating the Postmodern: Copyright and the Challenge of the New' (1995) 4 *Social and Legal Studies* 31; Chris Dent, 'Copyright, Governmentality and Problematisation: An Exploration' (2009) 18 *Griffith Law Review* 129.

35 'Technical', here, is meant to convey that the tests are not easily understood by those who are not trained in copyright law.

36 That is, as there can be no infringement of copyright if copyright does not subsist in the copied work, it is important to ascertain whether or not copyright does protect the copied work.

copyright if a number of conditions are met.[37] The Act, however, does not define what 'original' means.[38] The standard applied in this country to classify material as 'original' is relatively low;[39] however, a potential copier of material is not going to find this in the legislation – the obvious place for an interested party to look for guidance.[40]

The second test that demonstrates the complexity of copyright as a regulatory regime is that of infringement. Almost as many individuals may use copyrighted material as may create copyrightable material. Not all of those who use copyrighted material will infringe copyright in that material. The *Copyright Act* states that the copyright in a work is 'infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright'.[41] Acts that comprise copyright in a work[42] include the reproduction of the work in material form, the publication of the work, the performance of the work and the adaptation of the work.[43] Infringement, therefore, may come in the form of photocopying a poem, making two copies of a sound recording, or making thousands of unauthorised copies of movies for sale at markets. Further, not all instances of copying of copyrighted material will constitute infringement. The reproduction of copyrighted material is only an infringement if a 'substantial part' is copied.[44] A 'substantial part' will vary between categories of copyrightable material and,

37 See *Copyright Act 1968* (Cth) s 32. A similarly worded provision in the *Copyright Act 1911* (UK) c 46, s 1(1) has been interpreted judicially in *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 608-9 (Peterson J):

> The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought … The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.

38 The test of originality is problematic. As Mark Rose, quoting Northrop Frye, suggests: 'all literature is conventional, but in our day the conventionality of literature is "elaborately disguised by a law of copyright pretending that every work of art is an invention distinctive enough to be patented"': Mark Rose, *Authors and Owners: The Invention of Copyright* (1993) 2. Further, it is arguable that there is no such thing as absolute originality anymore, as the 'whole of human development is derivative': Hugh Laddie, 'Copyright: Over-strength, Over-regulated, Over-rated?' (1996) 18 *European Intellectual Property Review* 253, 259.

39 One of the key cases on originality is *Desktop Marketing Systems Pty Ltd v Telstra Co Ltd* (2002) 119 FCR 491. In this decision, the Court rejected the approach taken in the United States, notably in *Feist Publications Inc v Rural Telephone Service Company Inc*, 499 US 340 (1991). It is unclear what impact, if any, the recent High Court decision of *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14 (Unreported, French CJ, Gummow, Hayne, Heydon, Crennan and Kiefel JJ, 22 April 2009) will have on the assessment of originality in Australia.

40 Originality (or 'author-ity') may also be seen to function as a discursive sorting (or ordering) mechanism for the multiplicity of expressions created by people in a given discourse. See generally Michel Foucault, 'What Is an Author?' in Paul Rabinow (ed), *The Foucault Reader* (1991) 101; Rose, above n 38, 3.

41 *Copyright Act 1968* (Cth) s 36(1). This provision relates to works. The equivalent provision for 'subject-matters other than works' is s 101(1).

42 A 'work' includes 'a literary, dramatic, musical or artistic work': *Copyright Act 1968* (Cth) s 10.

43 *Copyright Act 1968* (Cth) s 31(1). For 'subject-matters other than works', acts that comprise copyright vary between subject matter: see, eg, s 86 (for cinematograph films) and s 87 (for television broadcasts).

44 *Copyright Act 1968* (Cth) s 14(1).

unsurprisingly for the legally trained, 'substantial part' is not defined in the Act.[45] A budding electronic musician, therefore, will have problems ascertaining what a 'substantial part' is of a track he or she wishes to sample.

There are also particular limits on the reproduction of copyrighted material that do not constitute infringement – the exceptions to copyright.[46] With respect to 'works', these exceptions include some copying for the purposes of: research or study;[47] criticism or review;[48] parody or satire;[49] and reporting news.[50] These exceptions permit the use of copyrighted material without such uses constituting infringement. The behavioural norms encouraged by the Act, then, are not simple prescriptions. It is not as straightforward as 'Thou Shalt Not Copy'.[51] Copies or partial copies may be made in certain circumstances.[52] Further, the exceptions listed above are not rigidly defined.[53] It can be seen, then, that the interpretation of the provision is not readily accessible to those who are not schooled in copyright law. The detailed requirements for the exceptions mean that it is unlikely that the average person who would like to be fully copyright compliant could be

45 There are references in the Act to what does not constitute infringement; for example, the multiple copying of no more than one percent of a literary or dramatic work by an educational institution where there are more than 200 pages in that work: *Copyright Act 1968* (Cth) s 135ZG. One example of what constitutes a 'reasonable portion' of a literary work is described as 10 percent of the number of pages in the edition reproduced for the purpose of research or study as it 'is taken to be a fair dealing ... for the purpose of research or study': *Copyright Act 1968* (Cth) s 40(5). The range and incomplete nature of these guides further clouds any understanding of what constitutes a 'substantial part' of a copyrighted work.

46 The exceptions to copyright infringement also vary between categories; and again, substantive limits to the exceptions are not included in the Act – save for the 'reasonable portion' limit for the copying of material for the purpose of research or study: *Copyright Act 1968* (Cth) s 40(5). This is understandable from a legal perspective because lack of specificity renders the task of potential copiers more difficult.

47 *Copyright Act 1968* (Cth) s 40.

48 *Copyright Act 1968* (Cth) s 41.

49 *Copyright Act 1968* (Cth) s 41A.

50 *Copyright Act 1968* (Cth) s 42. The exceptions for the copying of subject matters other than works include research or study: s 103C; criticism or review: s 103A; the reporting of news: s 103B; and the making of a copy of a sound recording for private and domestic use: s 109A.

51 Laddie does assert that one of the justifications for copyright is the Eighth Commandment, 'Thou Shalt Not Steal', however, he does not assert that the Commandment provides an appropriate scope for the monopoly protection: Laddie, above n 38.

52 Further, the *Copyright Act 1968* (Cth) does not apply to material of a certain age – copyright only subsists in material for a specific period of time; for example, for 70 years after the death of the author for literary works: *Copyright Act 1968* (Cth) s 33(2).

53 For example, the 'research or study' exception for 'subject-matters other than works' in s 103C(2) of the *Copyright Act 1968* (Cth) provides that:

> For the purposes of this Act, the matters to which regard shall be had in determining whether a dealing with an audio-visual item constitutes a fair dealing for the purpose of research or study include:
>
> (a) the purpose and character of the dealing;
> (b) the nature of the audio-visual item;
> (c) the possibility of obtaining the audio-visual item within a reasonable time at an ordinary commercial price;
> (d) the effect of the dealing upon the potential market for, or value of, the audio-visual item; and
> (e) in a case where part only of the audio-visual item is copied – the amount and substantiality of the part copied taken in relation to the whole item.

confident of being so, unless he or she did not copy any material that was subject to copyright. One response to this is that the complexity is good for the business of copyright lawyers.[54] An alternative response is that the current Act does not have a simplicity that encourages compliance – leading to a failure of regulation.

B *Fragmentation*

The copyright regime, particularly in the digital environment, may be understood as being fragmented in four ways: (1) the relationships between individuals and copyright; (2) the different motivations or purposes of those involved in copyright; (3) the multi-jurisdictional nature of copyright and its infringement; and (4) the diversity in approach to enforcement across those jurisdictions. These may be seen to relate to the fragmentation of knowledge.[55] More properly, they relate to the construction of the relationships of power between the respective actors[56] or, in the case of the relationship between individuals and copyright, to the construction of the 'self' and notions of originality.

In terms of the first aspect of fragmentation, almost anybody can create material that can attract copyright; almost everyone, who can create copyrightable material, can use copyrighted material (the capacity to copy is, after all, a fundamental part of human existence and training[57]); and, if a person can copy copyrighted material, then they can infringe the copyright in the material. Further, anyone at all can own copyright as someone else's copyright may be transferred to them[58] and, as such, owners do not have to be creators. As a result, different parties to the regime adopt different roles at different times in different categories of copyrightable material.[59] The regulation of copyright is, therefore, fragmented as

54 The carriage of *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 ('*Panel Case*') all the way to the High Court evidences the capacity of a dispute over copyright infringement to become expensive for copyright owners and for those who copy copyrighted material.

55 See Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a "Post-regulatory" World' (2001) 54 *Current Legal Problems* 103, 107.

56 See Black, 'Critical Reflections on Regulation', above n 5, 5-6.

57 It is arguable that the act of copying others is central to the operation of individuals as members of society. Recently, researchers have discovered a 'mirror neuron' in the brain that enables people (from infancy) to copy the behaviour of others: see generally Giacomo Rizzolatti and Corrado Sinigaglia, *Mirrors in the Brain: How Our Minds Share Actions, Emotions, and Experience* (Frances Anderson trans, 2008 ed) [trans of: *So Quel che Fai: Il Cervello che Agisce E I Neuroni Specchio*]. This may suggest that it is natural to copy the actions, and, therefore, works, of others. From this perspective, copyright may be seen to operate to regulate a behaviour that is central to our processes of learning.

58 As personal property, copyright may be assigned in the same manner as other types of property per *Copyright Act 1968* (Cth) s 196(1) and, therefore, in many cases, the owner of copyright will not be the creator of the material; though even after assignment, moral rights may be retained by the creator of the work: *Copyright Act 1968* (Cth) pt IX.

59 In certain circumstances, there may even be doubt as to the ownership of the copyright in a work at the time of its creation. Under the Act, an employer may own the copyright of a work if it is created by an employee in 'pursuance of the terms of his or her employment': *Copyright Act 1968* (Cth) s 35(6). In some instances, there may be doubt whether the work has been created in the course of employment or in the creator's private capacity. For a discussion of these issues in the context of patents, see *Victoria University of Technology v Wilson* (2004) 60 IPR 392 and *University of Western Australia v Gray (No 20)* [2008] FCA 498 (Unreported, French J, 17 April 2008).

a single person does not fulfil the same role in the copyright regime all the time.[60] This poses challenges for 'spreading the word' with respect to the regulation of copyright as the motivations that attach to each role may be different.

The fragmented motives of those involved are important as the purpose of copyright for the economy is different from both the purposes to which the system is put by (corporate) copyright owners and from the motives of the consumers of copied goods. For Black, regulation requires 'defined standards or purposes with the intention of producing a broadly identified outcome or outcomes'.[61] When it comes to areas of law such as copyright, however, it is arguable that the purposes are not obvious, because, in part, there are multiple, competing outcomes that are being sought. The standard justification for copyright is that it encourages innovation. For example, for Mark Nadel, a 'fundamental premise' of the regime is that 'granting the copyright holder a virtual monopoly by prohibiting the unauthorised copying and sales of copyrighted works is a necessary evil for attracting the financial investments needed to promote the creation and distribution of these creative works'.[62] Thus, the interests of society are furthered by giving certain members of the economy the capacity to control the dissemination of particular products.

The motivations of copyright owners, in particular of (non-creative) corporate owners, relate to the profits that can be gained from giving consumers access to the creativity of others. Financial rewards, then, are the outcomes sought by the owners. The consumers themselves have different motivations and characteristics. That is, there is no single group that may be characterised as consumers of copied goods, including those that do, and those that do not, infringe copyright.[63] Consumers include students, who have photocopied chapters of a single textbook, users of licensed and unlicensed software, and tourists, who buy cheap DVDs in overseas markets. Fragmentation is evident in these examples both in terms of the demographics of the consumers themselves[64] and in their reasons for either infringing copyright or choosing to pay the premium that often accompanies non-

60 This is different to the occupational health and safety area where a worker tends to be a worker and a firm tends to be a firm. The exception to this, of course, is the case of independent contractors. The challenge that independent contractors (because they are neither an employee nor necessarily an employer of others) present for the regulation of workplace safety has been acknowledged: see, eg, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making It Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, Report (2005) 54.

61 Black, 'Critical Reflections on Regulation', above n 5, 26. In a similar vein, the Organisation for Economic Cooperation and Development ('OECD') adopts the understanding that regulation 'establish[es] behavioural norms for a target group': OECD, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (2000) 10.

62 Mark Nadel, 'How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing' (2004) 19 *Berkeley Technology Law Journal* 785, 787. If the history of copyright is considered, however, it is arguable that there are two purposes interwoven through the system – the regulation of publishers (stemming from the patents over printing presses in the 16th and 17th centuries) and the regulation of the self-expression of modern subjects (arising from the *Copyright Act 1709*, 8 Anne, c 19 ('*Statute of Anne*')). See also Dent, above n 34.

63 This is the 'variety in controlees' discussed by Scott: Colin Scott, 'Regulation in the Age of Governance: The Rise of the Post-regulatory State' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 145, 165-6.

64 Including the range of cultural aspects of consumers: see, eg, Bryan Husted, 'The Impact of National Culture on Software Piracy' (2000) 26 *Journal of Business Ethics* 197.

infringing copies of copyright works (though all consumers may be understood to desire an outcome that maximises creativity in society).

Just as significantly, the fragmented nature of the regulation of the infringement of copyright in digital material arises from its cross-border nature and the different approaches to copyright enforcement undertaken in different countries.[65] A movie, for example, can be produced and released in one country, uploaded onto the internet in another, stored on a server in a third, downloaded in a fourth, and copied and mass-produced in a fifth country. This means that the laws of each jurisdiction may be relevant.[66] While there are substantial similarities between the copyright laws in different countries, in part as a result of the *Berne Convention for the Protection of Literary and Artistic Works 1886*[67] and the *Agreement on Trade-related Aspects of Intellectual Property Rights* ('*TRIPS Agreement*'),[68] there are also important differences. With respect to the exceptions to infringing behaviours, there are differences between the broad US exception of 'fair use'[69] and the particularised Australian exceptions of 'fair dealing'.[70] There are also differences with respect to the underlying tests that establish whether copyright subsists in a given piece of expression: while there is a minimum standard for a piece of expression to be copyrightable, the test in the US is higher than in Australia.[71] This means that the capacity for a copyright owner to successfully bring an action for infringement in response to the same alleged behaviour will vary between jurisdictions.[72]

65 This situation fits the characterisation of 'over- and under-lapping relationships … involving to a varying extent government departments, politicians, regulatory bodies, "target populations", firms, shareholders and the wider public': Martin Lodge, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (2004) 124, 125.

66 An example of the 'fragmentation of the exercise of power and control': Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a "Post-regulatory" World', above n 55, 108.

67 *Berne Convention for the Protection of Literary and Artistic Works 1886*, opened for signature 4 May 1886, ATS 1972 No 13 (entered into force 5 December 1887) ('*Berne Convention*').

68 *Agreement on Trade-related Aspects of Intellectual Property Rights* ('*TRIPS Agreement*'), opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995). This Agreement sets minimum standards for intellectual property protection in signatory countries. Other relevant international instruments include the *World Intellectual Property Organization ('WIPO') Copyright Treaty*, opened for signature 20 December 1996, 36 ILM 65 (entered into force 6 March 2002) and the *WIPO Performances and Phonograms Treaty*, opened for signature 20 December 1996, 36 ILM 76 (entered into force 20 May 2002).

69 17 USC § 107 (1976).

70 *Copyright Act 1968* (Cth) ss 40-42.

71 Though the 'thrust of the Supreme Court's ruling in *Feist* was not to erect a high barrier of originality requirement. It was rather to specify, rejecting the strain of lower court rulings that sought to base protection on the "sweat of the brow", that some originality is essential to protection of authorship': *CCC Information Services Inc v Maclean Hunter Market Reports Inc*, 44 F 3d 61, 66 (2nd Cir, 1994) citing *Feist Publications Inc v Rural Telephone Service Company Inc*, 499 US 340 (1991) ('*Feist*'). For a comparative discussion of the *Feist* decision see Daniel Gervais, '*Feist* Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law' (2002) 49 *Journal of the Copyright Society of the United States of America* 949.

72 This issue has already had an impact in other areas of law. For example, an Australian decision relating to defamation law, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, arose from an action brought by an Australian citizen against a US publication that was based in one US state and had its servers in another US state.

The multi-jurisdictional nature of copyright is also important as different agencies (both national and international) adopt different approaches to combat the problem.[73] One of the key aspects of regulation generally is the setting of standards. The regulation of the infringement of copyright in digital material is fragmented as there is no unified way in which copyright enforcement is tackled around the world. Some agencies adopt a collaborative approach with industry and governments, while other groups adopt a more punitive model. The US, for example, charges the Office of the United States Trade Representative to engage with the governments of countries that are seen as the source of pirated goods.[74] Industry groups also play an active role in the enforcement of copyright[75] and a number of agencies and organisations participate in raising awareness amongst government bodies.[76] Each of these approaches has its advantages and disadvantages. Taken together, the diversity of approaches creates a lack of consistency in enforcement and potentially a lack of clarity in the minds of users of copyrighted material,[77] and it increases the risk of misdirected and misunderstood regulatory messages. The four aspects of fragmentation mean that there are significant difficulties in disseminating educational messages about the problems of using infringing goods and, as a result, in regulating the behaviour of consumers of such goods.

C *Interdependencies*

There are a number of interdependencies evident in the regulation of the infringement of copyright in digital material. The most important interdependency is that between the creation and use of material that attracts copyright. The creation of material that is original enough to attract copyright does not occur in a vacuum to the extent that the re-use of past creations is an important aspect of the creative process. Not all re-use involves the infringement of copyright (as they say, there are only seven basic plots that support any story).[78] However, the re-use of a small part of a previously published work, or of the ideas expressed in it, is a

73 For Black, fragmentation means that 'no single actor has the knowledge required to solve complex, diverse and dynamic problems': Black, 'Critical Reflections on Regulation', above n 5, 5.

74 See, for example, Stephen Shiu, 'Motion Picture Piracy: Controlling the Seemingly Endless Supply of Counterfeit Optical Discs in Taiwan' (2006) 39 *Vanderbilt Journal of Transnational Law* 607.

75 Christopher Johnson and Daniel Walworth, 'Protecting US Intellectual Property Rights and the Challenges of Digital Piracy' (Working Paper No ID-05, US International Trade Commission, 2003). RIAA has been active in suing those who infringe copyright, with success in out-of-court settlements for amounts between US$2000 and US$5000: Jared Wade, 'The Music Industry's War on Piracy' (2004) 51 *Risk Management* 10, 13.

76 The United States Patent and Trademark Office ('USPTO') has established the Global Intellectual Property Academy that is aimed at training non-US officials: Jon Dudas, 'Message from the Under Secretary of Commerce for Intellectual Property and Director of USPTO' (2005) USPTO <http://www.uspto.gov/about/stratplan/ar/2005/02_message_director.jsp> at 12 October 2009. The Global Congress Combating Counterfeiting and Piracy ('Global Congress'), a joint initiative of the WIPO, Interpol and the World Customs Organization, has been established as an international forum for the development of strategies for reducing the incidence of, amongst other things, digital piracy: see generally Global Congress, *About the Global Congress* (2009) <http://www.ccapcongress.net/about.htm> at 24 October 2009.

77 For an overview of approaches in the US, see National Intellectual Property Law Enforcement Coordination Council, *Report to the President and Congress on Coordination of Intellectual Property Enforcement and Protection* (2008).

78 See, eg, Christopher Booker, *The Seven Basic Plots: Why We Tell Stories* (2004).

key part of the creative process.[79] In other words, the copying and re-use of (parts of) copyrighted work and the creation of copyrighted work are interdependent acts. This, in turn, impacts on regulatory strategies with respect to the copying of material. An over-successful call to restrict copying of material may lead to a reduction in the production of original works, with such a reduction being counter to the public good of greater knowledge.

Copyright generally also reflects interdependency in terms of the relationship between owners of copyright and consumers. The consumer of a product that infringes copyright – whether it is a movie or a piece of software – may also be a consumer of legitimate copies of copyrighted goods. A person who buys an infringing copy of a movie in an overseas market may also pay to see films at the cinema. And a person who has an unlicensed piece of software may also have paid for licensed software as part of a bundle that came with the computer. The consumption of pirated goods may encourage the consumer to purchase licensed products in the future. An over-enthusiastic punishment of consumers of pirated goods (such as those who download movies) may alienate them, which in turn may adversely impact on the revenue of publishers of copyright material.[80]

The interdependent nature of the infringement of copyright in digital material is also demonstrated by the regulation of technology and third parties. Computers and the internet are integral to the infringement of copyright in digitised material, as such infringement often requires the use of hardware to store and duplicate the copyrighted material.[81] The same hardware is also important for revenue-raising for copyright creators. One example of this interdependency is the servers operated by internet service providers ('ISPs').[82] The infringement of copyright

79 Academics, for example, are required to refer to past academic works in the production of any original publication.

80 This perceived risk of alienation was behind the initial reluctance of music publishers to pursue customers who shared music files: Charles Hill, 'Digital Piracy: Causes, Consequences, and Strategic Responses' (2007) 24 *Asia Pacific Journal of Management* 9, 22. This reluctance ended in 2003 when RIAA vigorously pursued those who shared music files: ibid. For a discussion of the impact of the RIAA's strategy, see Kristina Groennings, 'An Analysis of the Recording Industry's Litigation Strategy against Direct Infringers' (2005) 7 *Vanderbilt Journal of Entertainment Law and Practice* 389.

81 But see Isabella Alexander, 'Criminalising Copyright: A Story of Publishers, Pirates and Pieces of Eight' (2007) 66 *Cambridge Law Journal* 625, 656:

> Whilst it is certainly true that technology has been instrumental in shaping copyright law, it is not technology that is driving the law. Technology may reveal the problems, but the problems themselves remain constant. Taking a long view of music piracy reveals that neither commercial music piracy nor non-commercial private copying are 'new' challenges thrown up by new technology. Both have been around for a century, and longer.

Alexander's research highlights the 'tradition' of mass copying of sheet music in the late 19th century and the tactics employed by publishers to combat the practice.

82 Another example of the interplay between technology and copyright regulation is technological protection measures ('TPMs'). The advent of digital copying processes prompted copyright holders to introduce TPMs as a means of reducing the capacity of users to duplicate the protected copyrighted material. Those who wished to copy, without authorisation, material protected by TPMs have, in turn, produced technical means to circumvent the protections. A number of countries have provisions now that prohibit actions aimed at circumventing TPMs: see, eg, *Digital Millennium Copyright Act*, 17 USC § 1201 (1998) ('DMCA'); *Copyright Act 1968* (Cth) pt V div 2A; *Copyright, Designs and Patents Act 1988* (UK) s 296ZD. These provisions implement the protections required by the *WIPO Copyright Treaty*, opened for signature 20 December 1996, 36 ILM 65, art 11 (entered into force 6 March 2002); and the *WIPO Performances and Phonograms Treaty*, opened for signature 20 December 1996, 36 ILM 76, art 18 (entered into force 20 May 2002). For a detailed description and critique of the DMCA, see Glynn Lunney, 'The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act' (2001) 87 *Virginia Law Review* 813.

in digital material, in order to take place over the internet, requires ISPs and their hardware as a necessary part of the copying process. Their hardware is often the key to the transmission of pirated copies of digitised material; and, to a small extent, ISPs profit from that activity.[83] A number of countries have, therefore, introduced laws that go to the role of ISPs in copyright infringement.[84] The UK, for example, has a provision that allows injunctions against an ISP 'where that service provider has actual knowledge of another person using their service to infringe copyright'.[85] Providers, however, may also be key allies in the enforcement of copyright as their servers assist in the tracking of internet traffic.[86] The tension in the role of ISPs is evident in the so-called 'safe harbour' provisions in some legislative instruments that limit the capacity to sue the providers for copyright infringement.[87] Therefore, the infrastructure and function of ISPs are a focus of interdependencies between technology, copyright owners, users, infringers and their consumers.[88]

D *Ungovernability*

Black uses the term 'ungovernability' to describe the fourth aspect of decentred regulation. The five components of this aspect relate to the behaviour, attitudes, and autonomy of the regulated.[89] Taken together, the components do not suggest that those who copy copyrighted material and those who consume the material are ungovernable – merely that there are great challenges associated with getting them to accept, and respect, the norms of behaviour in this area. Key to this aspect is the capacity of actors in a system to regulate their own behaviour;[90] in particular, it relates to the attitudes of the regulated to their own self and to the focus of regulation, in this case, copyright. In terms of these attitudes, it is likely that many

83 Actions against third parties, such as ISPs, tend to be for secondary infringement. One category of third party that has been sued is the companies that own or control file-sharing programs. See, eg, Okechukwu Vincents, 'Secondary Liability for Copyright Infringement in the Bittorrent Platform: Placing the Blame Where It Belongs' (2008) 30 *European Intellectual Property Review* 4; Timothy Ryan, 'Infringement. com: *RIAA v Napster* and the War against Online Music Piracy' (2002) 44 *Arizona Law Review* 495; Paul Ganley, 'Surviving *Grokster*: Innovation and the Future of Peer-to-Peer' (2006) 28 *European Intellectual Property Review* 15.

84 At present, there are no international agreements that specifically relate to the liability of ISPs for copyright infringement that results from the use of the servers of an ISP.

85 *Copyright, Designs and Patents Act 1988* (UK) s 97A.

86 There is little discussion in the academic literature of ISPs being encouraged to 'inform' on potentially infringing activities (there are, of course, significant privacy concerns to such activity); some commentators have, however, discussed the 'greater efficiency', in terms of law enforcement, of this approach and suggested that 'where private parties have information about violations, we should more vigorously reward the reporting of violations': Steven Shavell, 'The Optimal Structure of Law Enforcement' (1993) 36 *Journal of Law and Economics* 255, 286.

87 See, eg, 'safe harbour' provisions in the US legislation: 17 USC § 512 (1976).

88 For a discussion of a reform based on a technology-focused amendment of the *TRIPS Agreement*, above n 68, see Lance Clouse, 'Virtual Border Customs: Prevention of International Online Music Piracy within the Ever-evolving Technological Landscape' (2003) 38 *Valparaiso Law Review* 109.

89 Black, 'Critical Reflections on Regulation', above n 5, 6-7.

90 This aspect is therefore close to Foucaultian understandings of the manner in which the governed operate in today's society. See generally Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect – Studies in Governmentality* (1991). In the copyright sphere, see Dent, above n 34.

infringers of copyrighted material, and many consumers of infringing material, consider two key factors before they engage in practices of infringement. The first of these is the risk of getting caught. The second is their justifications for breaching copyright (or consuming infringing copies). Both go to the autonomy of the actor and the attitudes of the actor to compliance. These two factors, then, are the aspects of ungovernability to be considered with respect to the regulation of copyright.

In terms of the risk of the infringement being discovered, one of the bigger challenges to regulating behaviour in this area is the geographical, and/or jurisdictional, spread of those who publishers think should hear the message. As was suggested above, an act of infringement of copyright in digital material could take place across a number of countries.[91] This may reduce, from the perspective of the infringer, the risk of 'getting caught'.[92] It also renders more problematic the dispersion of the regulatory message – as all those who contribute to the copying (including those who do not consciously participate, such as ISPs) are potential recipients of the regulatory message and are spread around the globe. Further, many of those who duplicate copyrighted material may potentially be subject to litigation to enforce the copyright on a particular work. The owner of the copyright, therefore, may have to contemplate litigation in multiple jurisdictions in order to fully protect their rights. To do so would be very expensive. Those who commit large scale acts of cross-border copyright infringement probably know this and factor this into their risk assessment.[93]

Black's concept of ungovernability, specifically, goes to the attitudes that people have to copyright. It is unlikely that a person would grow to adulthood in a Western society without being aware of the existence of copyright and without at least some knowledge of its limits.[94] Not all would, however, value either the idea, or practice, of copyright, in part because not all would feel that it is a necessary aspect of

91 The diffusion of potential infringers throughout the world, and the reduced chance of being caught, has been enhanced through the development of peer-to-peer file sharing software. The generation of peer-to-peer networks after 'Napster', 'Grokster' and 'Kazaa' have created 'a "true" peer-to-peer environment ... [that] eschews a centralized server in favour of direct communications between all users on the system': Ryan, above n 83, 518.

92 The low chance of the infringement being discovered applies to the consumers of pirated goods too, increasing the demand for pirated goods.

93 Perceived risk has also been found to be a key determinant for the behaviour of consumers of pirated software: Alain d'Astous, François Colbert and Daniel Montpetit, 'Music Piracy on the Web – How Effective Are Anti-piracy Arguments? Evidence from the Theory of Planned Behaviour' (2005) 28 *Journal of Consumer Policy* 289, 292 citing Benjamin Tan, 'Understanding Consumer Ethical Decision Making with Respect to Purchase of Pirated Software' (2002) 19 *Journal of Consumer Marketing* 96.

94 The understanding of copyright, on the part of actors in the copyright system, may not be complete or accurate. Material from the US suggests that 'there is a significant separation between what people think the law is and what the law in fact is': Mark Lemley, 'Dealing with Overlapping Copyrights on the Internet' (1997) 22 *University of Dayton Law Review* 547, 577 citing Jessica Litman, 'Copyright Noncompliance' (1997) 29 *New York University Journal of International Law and Politics* 237. Australian researchers have, however, argued that 'awareness of copyright appears to have increased dramatically with digital technologies': Emily Hudson and Andrew Kenyon, 'Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions' (2007) 4 *SCRIPT-ed* 197, 204.

the creative process. As was emphasised above, almost anybody can create copyrightable material. Such individuals could create by themselves[95] or they may work within corporations, non-profit institutions and government, though in many cases the copyright will be owned by the organisation.[96] Individuals may create with no thought of copyright in mind; and, if that is the case, then it is arguable that the *Copyright Act* does not play a role in the creative process itself. In other words, not all creators are motivated by the incentive offered by copyright.[97] Some people create because they are paid a salary;[98] others create for the love of it: in economic terms, they are intrinsically motivated.[99] Some people do, however, create because they are motivated by potential future earnings (for example, through copyright royalties). In this sense, copyright regulates a number of creators in that the 'carrot' of protection is aimed at modifying the behaviour of individuals: the regime seeks to get them to create more by offering an incentive.[100]

That not all creators are tempted by the 'carrot' means there are different attitudes in the community about the value of copyright and the need for efforts to enforce it.[101] That is, there are likely to be divergent views about the value of

95 It has been suggested that the contemporary idea of creator, for the purposes of copyrightable material, is substantially linked with the modern era. This may be obvious, from a practical perspective, when it comes to those who create cinematograph films, sound recordings and computer programs. It has also been argued from a more theoretical perspective that the category of 'author' is also of relatively recent vintage. Woodmansee links the emergence of the '"author" in the modern sense [with] the emergence in the eighteenth century of writers who sought to earn their livelihood from the sale of their writings to the new and rapidly expanding reading public': Martha Woodmansee, *The Author, Art and the Market: Rereading the History of Aesthetics* (1994) 36.

96 *Copyright Act 1968* (Cth) s 35.

97 It also has been argued that copyright law is 'remarkably unaccommodating of the actual process of creating works of authorship': Jessica Litman, 'Copyright as Myth' (1991) 53 *University of Pittsburgh Law Review* 235, 236. Litman considers this insight and the application of the law against an understanding of the current theories of copyright and argues that the 'public's perception [is] that the copyright system is out of whack': at 248. This conclusion supports this article's consideration of the efficacy of attempts at the regulation of behaviour in the copyright system.

98 Academics, for example, are paid to create copyrightable works in the form of journal articles and books. Any royalties from copyright, in most cases, will be much smaller than the amount they receive as a salary.

99 For the economics of the effect of copyright and other incentives on creators see Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1 *Economica* 167; William Landes and Richard Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *Journal of Legal Studies* 325; Bruno Frey, 'State Support and Creativity in the Arts: Some New Considerations' (1999) 23 *Journal of Cultural Economics* 71; Steven Shavell and Tanguy Van Ypersele, 'Reward versus Intellectual Property Rights' (2001) 44 *Journal of Law and Economics* 525; Timothy King, 'Patronage and Market in the Creation of Opera before the Institution of Intellectual Property' (2001) 25 *Journal of Cultural Economics* 21.

100 The 'author as donkey' metaphor reflects a previous level of understanding of creators and copyright generally. Jaszi considered that there had been a failure on the part of legal scholars 'to theorize copyright' because of 'their tendency to mythologize "authorship", leading them to fail (or refuse) to recognize the foundational concept for what it is – a culturally, politically, economically, and socially constructed category rather than a real or natural one': Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of "Authorship"' [1991] *Duke Law Journal* 455, 459. Since Jaszi wrote this, there has been some work on this issue (a number of these pieces are referred to in this article: see, eg, Sherman, above n 34; Woodmansee, above n 95); his point is, however, still, to a large extent, valid.

101 A more complete consideration of the multiple practices that constitute individuals as discursive subjects in the copyright regime is provided in Dent, above n 34.

the regulation.[102] Differences in perspective may be reinforced, in terms of the apparent ungovernability, by the fact that those who infringe copyright do so for different reasons.[103] Motivations for copying movies or burning software, for example, may be diverse: some may do it for profit; others may copy a compact disc or a song to share with their friends.[104] Others, still, could circulate episodes of a foreign TV show out of spite because the local TV stations refuse or choose not to telecast the foreign show for commercial reasons.[105] These different motivations pose challenges to those who seek to regulate the behaviour. If regulation is about standard-setting and if there is, in the copyright arena, no strong connection between the standards desired by the copyright owners and the standards of behaviour of potential infringers (and these standards may not be limited to understandings of the morals of copyright), then there will be significant challenges to governing the behaviour of those potential infringers.[106]

E *No Clear Distinction between Public and Private*

There are two aspects of the infringement of copyright in digital material in particular that highlight the lack of a clear distinction between public and private: the inclusion of both civil remedies and criminal penalties in copyright legislation, and the role of industry groups and ISPs in regulation of copyrighted material. With respect to enforcement, copyright owners may bring an action in the courts for copyright infringement[107] and there is capacity for the state to prosecute copyright matters in cases where the infringement is sufficiently heinous.[108] As suggested above, there is no regulatory body that will enforce copyright on behalf of copyright owners.[109] The *Copyright Act* also provides for the remedies that attach to enforcement actions,[110] thereby offering inducements at least for the civil prosecution of copyright infringement. The expense of bringing legal

102 It has been suggested that some consumers perceive copyright infringement as a 'victimless' activity: UK Treasury, *Gowers Review of Intellectual Property*, Report (2006) 34. Others have argued that there is 'evidence of an absence of strong social norms against digital piracy': Hill, above n 80, 11 citing multiple studies.

103 See, eg, Pola Gupta, Stephen Gould and Bharath Pola, '"To Pirate or Not to Pirate": A Comparative Study of the Ethical versus Other Influences on the Consumer's Software Acquisition-mode Decision' (2004) 55 *Journal of Business Ethics* 255.

104 An associated motivation relates to cost. Research has shown that a belief 'salient' to the practices of infringing copyright in the digital sphere is that 'digital media is overpriced': Sulaiman Al-Rafee and Timothy Cronan, 'Digital Piracy: Factors That Influence Attitude toward Behaviour' (2006) 63 *Journal of Business Ethics* 237, 247.

105 For a discussion of the interplay between an individual's emotional responses and regulation, see Bettina Lange, 'The Emotional Dimension in Legal Regulation' (2002) 29 *Journal of Law and Society* 197.

106 It has been argued on the basis of empirical research that 'anticopyright norms of present users of peer-to-peer technology cannot be unravelled through enforcement. In a regime of severe sanctions, users of file-sharing technology become more anticopyright': Ben Depoorter and Sven Vanneste, 'Norms and Enforcement: The Case against Copyright Litigation' (2005) 84 *Oregon Law Review* 1127, 1175.

107 *Copyright Act 1968* (Cth) s 115.

108 *Copyright Act 1968* (Cth) pt 5 div 4 provides for indictable and summary offences under the Act.

109 Such as the WorkCover Authority in the area of occupational health and safety.

110 Such as the award of damages under *Copyright Act 1968* (Cth) s 115(4) and destruction, or delivery up, of infringing copies under *Copyright Act 1968* (Cth) s 133.

action against another party, however, renders the enforcement of copyright by individual copyright owners problematic.[111]

Possibly as a result of the expense, in addition to individual firms enforcing copyright, there are industry bodies such as the Recording Industry Association of America ('RIAA')[112] and the Australian Federation Against Copyright Theft ('AFACT')[113] that are active in chasing after alleged infringers. The relevance of industry groups, such as RIAA and AFACT, to the resource issue in the enforcement of copyright, rests on their capacity to pool funds in order to pursue multiple alleged infringers.[114] They also have the capacity to set, and advertise, standards that accord with their rights and interests. The resources at the disposal of industry groups set them apart from smaller copyright owners who do not have the facility to institute infringement actions in their own country, let alone in another jurisdiction.[115] Industry groups, therefore, may be seen to have a greater (active) role in the enforcement of copyright than the state.[116]

The extension of liability in this area to ISPs suggests a regulatory role for the ISPs themselves that also blurs the public-private distinction. Specifically, the laws of some countries, such as the US, include 'safe harbour' provisions (highlighted above) that exempt ISPs from liability for copyright infringement as long as certain conditions are met. An ISP, for example, may avoid liability for hosting allegedly infringing material, so long as such material is removed after a request by the copyright owner.[117] It is not the ISP's role, in such a situation, to examine the validity of the claim of the copyright owner. However, the removal of allegedly infringing material from a server means that the ISP – an organisation, although private, that does not have its own copyright interests to protect – is integral to the regulation of copyright in digitised material.

The final blurring of the public-private distinction to be considered here relates to the potential regulatory impact of the 'incentivisation' role that public and private entities have with respect to innovation. In traditional areas of regulation, the state wants to encourage appropriate behaviour as a public good. For example,

111 There is a distinction between copyright creators and copyright owners (as a result of the transferability of copyright). In many cases, it will be a well-resourced publishing company that has the capacity to bring infringement actions against another party. An individual who owns the copyright in an unpublished novel, for example, may not be able to afford to sue another writer even where there is a strong case that infringement has occurred.

112 See RIAA, above n 15.

113 AFACT, *About AFACT* (2009) <http://www.afact.org.au/about.html> at 24 October 2009.

114 It has been reported that by June 2005 content industries had sued 11 700 users for copyright infringement: Rebecca Giblin-Chen, 'Rewinding Sony: An Inducement Theory of Secondary Liability' (2005) 27 *European Intellectual Property Review* 428, 429.

115 Individual multinational corporations, such as Sony, may also have the funds to pursue multiple enforcement actions. It may be in their interests, however, to spread the risks associated with litigation through cooperating in actions run by industry groups. Sony itself has been involved in a high profile case that went all the way to the High Court: *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193.

116 The state does have a significant role in the enforcement of copyright through its provision of the court system itself for the adjudication of disputes; this, however, may be seen as more passive than its role in prosecuting criminal actions in copyright.

117 17 USC § 512 (2008).

workplace health and safety is a public good, as the well-being of citizens is a prime goal of government, and the continued productivity of workers is important for the overall economy.[118] In the area of workplace safety, therefore, the state takes an active role in its regulation (through advertisements, the establishment of a regulatory institution, and through the prosecution of offences). In the area of copyright, incentives may come from the state, a private sector firm, or from the individual motivations of an author. Corporations may have the greatest incentive to encourage their workers to produce copyrightable material as the *Copyright Act* provides that a firm, in most circumstances, gains ownership of any copyright in original works created by a worker in the course of their employment.[119] This also means that firms have a greater interest in promoting the benefits of the copyright regime to the wider community, thus supplanting the state as the dominant source of messages aimed at supporting and enforcing copyright.

IV BETTER ENFORCEMENT OF COPYRIGHT: DIGITAL PIRACY AS REGULATORY NORM

Considered separately, each of the five aspects discussed above are obvious to a copyright lawyer. Taken together, they underpin the great difficulties that are faced when attempts are made to modify behaviour around the copying of copyrighted material. This acknowledgment facilitates a deeper understanding of the operation of copyright as a regulatory regime. This conception of copyright, in turn, may offer insights into the issues of compliance with, and enforcement of, the rules of copyright. The literature suggests that educational programs are more effective than deterrent mechanisms in achieving copyright compliance.[120] Therefore, the focus of this final Part of the article is on the norm-setting value of one of the more visible attempts at raising awareness of one aspect of copyright – the short advertisements included on DVDs that are aimed at reducing the incidence of unauthorised copying of movies. Anecdotally, these advertisements are perceived as an object of ridicule rather than taken seriously.[121] Their focus on digital *piracy* may contribute to how they are received by the target audience. The rhetorical flourishes in the advertisements and implicit in the term 'digital piracy' itself may count against it being seen as a clearly defined and effectively

118 Individual firms do have an interest in occupational health and safety; however, as insurance covers much of the cost of any harm suffered by a worker and as most workers are replaceable if they are permanently incapacitated, the greatest burden is potentially suffered by the wider economy (through insurance payouts) than by individual firms.

119 *Copyright Act 1968* (Cth) s 35(6).

120 See, eg, Ram Gopal and G Lawrence Sanders, 'Preventive and Deterrent Controls for Software Piracy' (1997) 13 *Journal of Management Information Systems* 29, 43-4. Deterrent controls for the purposes of that study included 'hardware- and software-based copy protection schemes': at 30.

121 See, eg, *MPAA's Anti Piracy Campaign 'Corrected'* (2006) YouTube <http://www.youtube.com/watch?v=oSQQ1NqOaA4&NR=1> at 7 September 2009; *Anti-piracy Parody Ad* (2007) YouTube <http://www.youtube.com/watch?v=AIZo4x_p4ug> at 7 September 2009; *Piracy Ad Parody* (2006) YouTube <http://www.youtube.com/watch?v=DcMNl-JBJ8U> at 7 September 2009.

promulgated norm. The non-specific nature of the norm may impact on the enforcement of copyright in the digital environment.

A *Establishment of the Norm of Digital Piracy*

An important aspect of a regulatory regime is the establishment of the norms of behaviour and the spread of those norms amongst the target groups. The norms of behaviour in the area of digital copyright are, to the extent they are legally enforceable, set out in the legislation. This educative aspect of regulation is particularly important here because of the disparate nature of the target groups (the users of copyrighted material) and because of the complex nature of copyright law. There are two aspects of the current laws important for the understanding of how norms relating to digital copyright could be (better) established.[122] First, there is no definition of digital piracy; that is, there is no form of infringement, or criminal offence, labelled 'digital piracy'. That the term is used, in part, for rhetorical effect means there are a number of definitions currently applied to it.[123] The definitions include[124] the copying or downloading of copyrighted digital files,[125] the sale of infringing copies of software at a discount price,[126] and a distinction between those who copy digital files for themselves and friends[127] and those who copy digital files for commercial profit. This presents significant problems for the clear communication of norms, supporting the regulation of digital piracy, to the target groups.

This is compounded by the sheer complexity of copyright law – the second important aspect of these laws. In terms of the regulation of the infringement of copyright in digital material across borders, there are differences in approach to the exceptions to infringement and different limits to what constitutes criminal

122 Norms may be seen as a fundamentally important part of the 'regulatory conversations' that take place in the processes of regulation: Julia Black, 'Regulatory Conversations' (2002) 29 *Journal of Law and Society* 163.

123 It is worth noting that the *Oxford English Dictionary* offers a definition of 'piracy' from the late 18th century: the 'unauthorised reproduction or use of something, as a book … or idea; especially when in contravention of patent or copyright'. Literary piracy has also been suggested to have a more specific definition in the 16th century England as the 'infringement of a copyright created by the government': Percy Simpson, 'Literary Piracy in the Elizabethan Age' (1947) 1 *Oxford Bibliographical Society Publications (New Series)* 1; though none of the quotes used by Simpson includes the terms 'piracy' or 'pirates'. See also Justin Hughes, 'Copyright and Incomplete Historiographies: Of Piracy, Propertization and Thomas Jefferson' (2006) 79 *Southern California Law Review* 993, 1009ff; and Peter Drahos, *Information Feudalism* (2002) ch 2.

124 A review of the literature also shows that many writers use the term 'digital piracy' without defining it. The articles that did not define the term tended to be generally legal academic articles which discussed 'digital piracy' contextually in relation to specific examples of 'digital piracy' such as the use of peer-to-peer programs regarding music piracy and associated US litigation. See, eg, Vincents, above n 83; Ganley, above n 83; d'Astous, Colbert and Montpetit, above n 93; Giblin-Chen, above n 114; Ryan, above n 83; and Raymond Ku, 'The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology' (2002) 69 *University of Chicago Law Review* 263.

125 Al-Rafee and Cronan, above n 104.

126 Hill, above n 80.

127 In other words, those who engage in 'softlifting' – the 'unauthorized copying of software for personal use': Husted, above n 64, 199.

infringement.[128] It is not going to be easy for someone using digitised copyright material in a given country to know whether the manner of use is within the accepted confines of the law of that country or of the country (or countries) in which the material was created, digitised, stored on a server, or downloaded. A user is not going to know what the limits of the legal exceptions to copyright infringement are in different countries.[129] This lack of clarity makes it difficult to establish, and encourage, particular norms of behaviour.

To establish an effective norm, it is useful to highlight two areas where engagement with pre-existing perceptions is important. The first area is where the infringement of copyright in digitised material is differentiated from other forms of counterfeiting and piracy on the basis of the 'economic drivers' that facilitate the behaviour. The economic drivers include: (1) a high level of profitability given the low unit costs; (2) the potentially large market for infringing goods; (3) no diminution of quality in the duplication process as exact copies are produced; (4) relatively low infrastructure costs; (5) infringing copies are distributed easily; and (6) relatively low risk of discovery for both infringers and users of infringing products.[130] Most of these drivers arise from the fact that:

> digital technology makes it possible to make an unlimited number of perfect copies of music, books, or videos in digital form, and through the Internet individuals may distribute those digital works around the world at the speed of light.[131]

The ease of its conduct, the quality of the copied product and the utility of the copied product to the end-user differentiates this form of unauthorised duplication from the counterfeiting of luxury goods and pharmaceutical products. For instance, there are substantial infrastructure costs associated with the production of counterfeit pharmaceuticals, and there may be significant differences to the end-user in their efficacy.[132] Further, while large-scale manufacturing of pirated movies does take place, the social copying of pharmaceutical products and designer luggage is less conceivable.

The second area of engagement is the relationship between infringement of copyright in digital material and current categories of copyright infringement. The definitions of digital piracy referred to above include the encompassing of all acts of copyright infringement in the digital environment; others limit the term to acts that are sufficiently serious to attract criminal penalties. With respect to the educative aspects of the norm in terms of the regulation of digital piracy, it

128 For example, the aggravated offence in Australia with respect to the digitisation of copyrighted material: *Copyright Act 1968* (Cth) s 132AK. There is no equivalent of this provision in the US, the UK or New Zealand.

129 Such lack of knowledge, coupled with draconian enforcement, could mean that creative people use no part of a published copyrighted work; this, in turn, could stifle creativity in the digital environment.

130 Adapted from OECD, *Economic Impact of Counterfeiting and Piracy: Executive Summary* (2007) 11.

131 Ku, above n 124, 264.

132 The expenses and difficulties associated with manufacturing counterfeit pharmaceuticals, spare parts for cars or aeroplanes means that the people attracted to counterfeiting such products would be different to those copying music files.

may be that digital piracy should be differentiated from other forms of copyright infringement. Otherwise, there is a risk that the recipients of the message see the label as an attempt to run a fear campaign based on the self-interest of large multinational companies (an example of the intersection of the multiple, fragmented motives evident in the copyright sphere). It would be possible to restrict digital piracy to those acts of infringement done on a commercial scale or, at least, for monetary gain – as this is one measure of the level of seriousness necessary for a criminal sanction. The *TRIPS Agreement* requires that there be, in the laws of the signatory countries, criminal remedies 'at least in cases of wilful … copyright piracy on a commercial scale'.[133] There is no binding requirement that all acts of copyright infringement be subject to criminal penalties and, arguably, there is an implication that there should be a distinction that currently exists between those acts that attract criminal penalties and those that attract civil remedies.[134]

The restriction of digital piracy to either criminal acts or acts done on a commercial scale would, necessarily, exclude those who simply make a copy of a song either for personal use or for a friend. It would allow the state, in the form of criminal prosecutions, to focus on the 'very despicable type of person' that makes copies for a profit.[135] On this point, any removal of social sharing of digitised material from the definition of digital piracy does not mean that such behaviour would be unregulated – it just means the regulatory processes would be different for the two sets of practices. Digital piracy would be a criminal offence, and criminal sanctions would be available, whereas other forms of infringement would remain a civil matter. Such a distinction would have benefits for the clarity of communication of the relevant standards of behaviour and the justifications for those standards.

There may also be a theoretical justification for the two distinct regulatory approaches. It is accepted that there are differences in the function and form of criminal and civil law. These differences, in part, rest on the relationship between the negative behaviour and the wider community.[136] A corollary to the assessment that the social copying of songs or movies is not in the same class of behaviour as the counterfeiting of aeroplane parts or pharmaceuticals is the acknowledgement that

133 *TRIPS Agreement*, above n 68. An example of the incorporation of this requirement into national laws is the *Copyright Act 1968* (Cth) s 132AC that also uses the reference to infringement 'on a commercial scale'. It may be noted that the *TRIPS Agreement* does include a definition of 'pirated copyright goods' in art 51, note 14: 'any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of copyright … under the law of the country of importation'. This provision applies to cross-border movements of infringing copies; therefore, it may be that the intention is that all infringing copies of copyrighted material are deemed to be 'pirated'; or, it may be that it is the movement of an infringing copy across a national border that renders it 'pirated'.

134 'Wilful' infringement has been considered to exclude 'acts done without knowing or having reasonable grounds to know that an infringement was taking place': Carlos Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (2007) 449.

135 Jurgen Proschinger, 'Piracy Is Good for You' (2003) 14 *Entertainment Law Review* 97, 99.

136 See, eg, Morgan and Yeung, above n 7, 204-5 citing John Coffee, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done about It' (1992) 101 *Yale Law Journal* 1878.

the social copying and counterfeiting pose two different levels of risk to society. It is important to separate out the interests of society as a whole and of individual copyright owners. With counterfeit pharmaceutical products, for example, there is a very real threat to human health and safety. The copying of digital goods, though economically damaging to individual copyright owners, does not pose a threat to health and safety.[137] It may, therefore, be more effective in the long term to view digital piracy as a distinct form of piracy that requires different strategies for the establishment, promulgation and enforcement of norms. In other words, it is likely to be counterproductive to the effective regulation of copyright to lump teenagers in with criminal syndicates as targets for the regulatory message – a conclusion that is reinforced by the interdependency between users of pirated products, legitimate purchasers and the copyright holders.

B *Promulgating and Enforcing the Norm of Digital Piracy in Theory*

The argument promoted in this article is that decentred regulation is well-suited to understanding the regulation of copyright from a theoretical perspective. It is a starting point for the setting of appropriate standards for the regulation of the use of digital material. The next stage in this discussion is the advertising, and enforcing, of the chosen standard of behaviour. The approach adopted here is, again, of benefit because the '"decentring" metaphor helps us to see more clearly the potential regulatory roles of state and non-state actors',[138] with the 'key dynamic' in the decentred understanding being 'not between regulator and regulated but between multiple actors within and between complex systems'.[139] Black takes this further:

> The decentring analysis emphasizes the de-apexing of the state: the move from a hierarchical relationship of state-society to a heterarchical one. That shift from hierarchies to heterarchies implies a different role for the state, one of mediator, facilitator, enabler, and for the skills of diplomats rather than bureaucrats.[140]

This perspective, therefore, acknowledges that the state is not necessarily the prime promoter and enforcer of the chosen standards.

Black's work, drawing on Foucaultian understandings,[141] accommodates the view that regulators in copyright, and regulators more generally, may be understood

137 Attempts have been made by industry groups, however, to link the copying of DVDs to 'pornography, possession of drugs and firearms, the exploitation of children, illegal immigration and, that most fearsome threat of all, terrorism': Alexander, above n 81, 648.

138 Ian Ramsay, 'Consumer Law, Regulatory Capitalism and the "New Learning" in Regulation' (2006) 28 *Sydney Law Review* 9, 32.

139 Ian Bartle and Peter Vaas, 'Self-regulation within the Regulatory State: Towards a New Regulatory Paradigm?' (2007) 85 *Public Administration* 885, 887.

140 Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a "Post-regulatory" World', above n 55, 145.

141 Black, 'Critical Reflections on Regulation', above n 5, 3.

to act 'through countless, often competing, local tactics of education, persuasion, inducement, management, incitement, motivation and encouragement'.[142] As copyright generally can be seen as an important site of convergence of law, economics and regulation, Foucault's work on governance is of particular value. For him, one aspect of modern governance is the constitution of all modern subjects as *homo œconomicus* – an 'entrepreneur … being for himself his own capital, being for himself his own producer, being for himself the source of his earnings'.[143] 'Economic Man', then, is constituted to be responsible for 'his' own financial well-being and endowed with the capacity to fulfil that responsibility; giving rise to the 'ungovernable' nature of copyright users – as copyright owners and users of copyrighted material each see themselves as being responsible for their own financial well-being. This individualism is, however, constituted as functioning within the broader practices of governance that include policy strategies and techniques of those in power.

It is this tension between self-responsibility and being governed that is at the heart of decentred regulation. This form of 'regulation seeks to harness individuals in civil society as part of the regulatory project'.[144] However, as the problematisation of the regulator-regulated dynamic is inherent in the decentred model, it also encourages the problematisation of the regulated actors. In other words, not only are the processes of regulation seen as complex, those who may or may not infringe copyright can also be seen as complex themselves. The problematisation of actors prompts a range of acknowledgements: in addition to the varying attitudes to the value of copyright among users of copyrighted material,[145] the attitudes of a given user will change over time. This may be the result of whether a person at a given time is a creator, user or owner of copyrighted material. It may also depend on the level of respect for copyright and other social norms evident among the user's peers.[146] As has been recognised by Black, the meaning of written norms is 'open to continual reinterpretation, depending on the actor's preoccupations and goals, the context of action, and who else is involved in the encounter'.[147] The potential for change to occur in the way that norms are received needs to be taken into account when setting, advertising and enforcing any norms.

Perceptions of the norm, on the part of the target of the regulations, are important. A computer user in Europe may not consider that her sharing of computer files

142 Peter Miller and Nikolas Rose, *Governing the Present* (2008) 55.

143 Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (Graham Burchell trans, 2008 ed) 226 [trans of: *Naissance de la Biopolitique*].

144 Ramsay, above n 138, 13-14.

145 Other factors, in addition to attitudes to piracy, that have been found to contribute to a person infringing copyright in digitised music include the perception of whether 'important others want him or her to do [it], and one's perceived capabilities to actually perform this behaviour': d'Astous, Colbert and Montpetit, above n 93, 307.

146 See, eg, Linda Trevino and Stuart Youngblood, 'Bad Apples in Bad Barrels: A Causal Analysis of Ethical Decision-making Behaviour' (1990) 75 *Journal of Applied Psychology* 378. More recent studies have shown that 'as a certain norm-violating behaviour becomes more common, it will negatively influence conformity to other norms and rules': Kees Keizer, Siegwart Lindenberg and Linda Steg, 'The Spreading of Disorder' (2008) 322 *Science* 1681, 1684.

147 Black, 'Regulatory Conversations', above n 122, 176.

is piracy, as piracy is strongly linked in the media with Asia.[148] A computer user in the US may not feel compelled to abide by the norm, as it is the RIAA who is pursuing file-sharers and not the government. This lack of clear distinction between public and private regulators (and the lack of a formal regulatory institution in copyright) may impact on the perception of the authority of the bodies promulgating the norm and, in turn, on the need to comply with that norm. This blurring of lines of authority renders the standard-setting process more difficult in two ways. First, the process will be more difficult in the event that the state and the private entities try to set different standards. Second, if the standards are only being set by private interests, there is a risk that those who are supposed to hear the message may not take it as seriously. A non-government message may have less impact either because it is perceived as being less important on the grounds that the government is not 'spreading the word' or it may be seen as private entities trying to selfishly protect their interests and therefore the standard does not have universal importance.[149] These challenges to the setting of standards, however, do not mean that the regulation of digital piracy should not be attempted.

C *Promulgating and Enforcing the Norm of Digital Piracy in Practice*

A decentred understanding of digital piracy and of those whose behaviour is sought to be regulated does not, in itself, solve the problem of digital piracy. The literature shows that strategies for limiting the damage that results from copying of digitised material have changed. As far back as 1996, advice to copyright holders (amongst others) aimed at limiting exposure to piracy contained multiple avenues:

> participating in the [International Anti-Counterfeiting Coalition]; pursuing litigation against pirates; lobbying for stronger domestic and international legislation; adding unique labels to the product for identification purposes; using financial incentives to reward … [the] rejecting [of] counterfeits; informing the public and the trade about the potential risks of counterfeiting; and monitoring and investigating channel[s] … used by counterfeiters.[150]

More recently, in 2007 another commentator suggested that there are seven 'strategic responses' that a copyright owner may pursue to counter the infringement of their copyright:

148 Hill, for example, argues, without providing evidence, that 'in some Asian nations ... enforcement of intellectual property rights has been weak': Hill, above n 80, 22.

149 Attitudes to the motives of firms protesting about piracy are further complicated by the perception that online diffusion, through the use of infringing copies of digitised material, has, in the past at least, been a marketing ploy of some firms: Gupta, Gould and Pola, above n 103, 269-70 citing Moshe Givon, Vijay Mahajan and Eitan Muller, 'Software Piracy: Estimation of Lost Sales and the Impact on Software Diffusion' (1995) 59 *Journal of Marketing* 29.

150 Peggy Chaudhury and Michael Walsh, 'An Assessment of the Impact of Counterfeiting in International Markets: The Piracy Paradox Persists' (1996) 31 *Columbia Journal of World Business* 34, 43.

> (1) adopt a permissive stance to piracy, (2) counter piracy by providing free samples, (3) lower the price of the legal good, (4) offer something extra to consumers who purchase the legal good, (5) switch to a business model that is less vulnerable to piracy, (6) embrace the technology used by pirates (such as peer-to-peer networks), and (7) increase the perceived moral intensity associated with the decision to participate in the market for pirated goods.[151]

This change is likely to reflect the greater availability of the infrastructure (computers, broadband) required to copy digitised material and the greater capacity of producers of copyrighted material to sell directly to consumers (for example, via online retailing such as iTunes). In other words, the shift in advice reflects those aspects of the infringement of copyright in digitised material that render the regulation of the activity more complex. Not all of Hill's strategies, however, will be available to all owners of copyright in digitisable material. Pursuing only one strategy may not be effective. The anti-piracy advertisements are, arguably, directed at increasing the 'moral intensity' associated with copying movies as they are based on the perception that to do so is to steal. Potentially denying to a copyright owner a (small) royalty payment from the sale of a DVD, however, does not have the same moral impact as denying someone access to a car, for example. The latter prevents the car owner from using his or her car, whereas the former does not restrict the copyright owner's access to the content of a DVD itself. This may explain, in part, the research that has shown that anti-piracy arguments have been ineffective in terms of producing 'significant changes in the behavioural dynamics underlying on-line music piracy'.[152]

There is no space in this article to be overly prescriptive about the practices which should be adopted to promulgate and to enforce most effectively the norm relating to the infringement of copyright in digitised material. Two key concerns around the advertising of the norm are the endemic nature of unauthorised copying of digital material and the potential impact of cultural differences on the reception of the message. To address the first concern:

> It is quite certain that the bulk of people who own a PC, and who know other computer users or enthusiasts are by standard definition 'pirates'. Almost everyone has at least one piece of media which is unregistered or which was copied by a friend.[153]

There would also be a substantial, and partially overlapping, group of people who share music and video files. This poses significant problems for targeting the regulatory message. Focus on one category of copyright (musical works, cinematograph films or software) or one section of the population that is spread throughout the community risks either diluting the message or overselling it.

151 Hill, above n 80, 20.

152 d'Astous, Colbert and Montpetit, above n 93, 307.

153 Proschinger, above n 135, 98.

This is particularly the case if different forms of behaviour are sought to be affected (a result of the 'fragmented' nature of copyright regulation). Some people infringe copyright for personal reasons, some people for social reasons and some for commercial profit. A standard that seeks to cover all these practices (for all categories of copyright) is less likely to be effective, since a person who infringes to provide a copy of a CD for a cash-poor musician friend is not going to identify with a moral message aimed at reducing instances of selfish or commercially motivated actions. This suggests a more targeted approach to advertising the desired standard of behaviour. This targeting could also take account of cultural differences. Brian Husted argues that in collectivist nations 'anti-piracy campaigns need to demonstrate that piracy is a shameful practice that brings a loss of face upon the family, school or business firm. A focus on the criminal nature of piracy would probably have less impact'.[154]

Finally, Braithwaite argues that '[p]unishment is not the most important lever of compliance in a responsive regulatory framework'.[155] This raises the issue of the vigour with which the enforcement of copyright is pursued. Copyright is akin to a personal property right; therefore, there should be no discouragement of individual copyright owners protecting their own interests. However, there may be advantages in separating out the pursuit of civil compensation of low level infringement and the enforcement of criminal sanctions against large scale acts of digital piracy. Under the decentred model the state is not the prime promoter or enforcer of copyright standards – this is, and should remain, the province of copyright owners. The state could, however, be the responsible body for prosecuting the most egregious examples of copyright infringement such as the large scale copying of movies for profit. In order to clarify the responsibilities of the parties involved, and to allow for more effective risk assessments on the part of those who are to be regulated, it is suggested that the use of the term 'digital piracy' should be limited to large scale (criminal) infringements of digitised copyrighted material. All other acts of infringement of digitised copyright material should simply be referred to as 'copyright infringement'. The 'selling' of the different standards of behaviour should, therefore, emphasise this distinction in order to target the appropriate norm at those sections of the population that need education about the relevant standard.

V CONCLUSION

The range of individuals and organisations which have a role in the enforcement of copyright and the maintenance of the copyright system may impact on the effectiveness of copyright law as a form of regulation. The complexity and

154 Husted, above n 64, 208. Others also support the role of culture in practices associated with the infringement of copyright in digital material: see, eg, Barry Shore et al, 'Softlifting and Piracy: Behaviour across Cultures' (2001) 23 *Technology in Society* 563; Kallol Bagchi, Peeter Kirs and Robert Cerveny, 'Global Software Piracy: Can Economic Factors Alone Explain the Trend?' (2006) 49 *Communications of the Association for Computing Machinery* 70.

155 John Braithwaite, 'Rewards and Regulation' (2002) 29 *Journal of Law and Society* 12, 25.

fragmented nature of copyright and the classes of people who are part of the copyright world means that the regulation of behaviour of users of copyright material is not straightforward. To be more effective, the regulation of copyright has to take account of the decentred nature of this area of law. In terms of the enforcement of copyright in the digital environment, the global nature of the Internet, and the infrastructure needed to support it, adds a further degree of complexity but raises the potential for a sharing of the regulatory load. These factors suggest that efforts to regulate the infringement of copyright in digital material will not be simple. Multiple tactics are likely to be more useful than a single educative or punitive approach.

One key tactic will be the promulgation and enforcement of a norm or norms founded upon an understanding of copyright that accounts for the complexity and fragmentation central to its regulation. The attempts by industry to seed the single norm of digital piracy that is intended to cover multiple forms of infringement may be counterproductive – a perception reinforced by the parody advertisements available online. From a regulatory perspective, the clearer the definition of the required standard (or standards, if civil infringement is separated from criminal digital piracy), the easier is the communication of those standards. The more effective the communication of the required norms, the higher is the level of compliance with the regulation concerned. In other words, the better the understanding of how copyright operates as a form of regulation, the better is the chance of greater compliance and effectiveness of enforcement of copyright. The range of parties involved in the regulation of digitised copyrighted content, however, renders unlikely such an internationally agreed regulatory process.