

# Study on Telecommunications and Internet Access Sector

01 November 2016

I thank the Special Rapporteur for the opportunity to make submissions on this important topic. I would like to share references to my academic research that I hope may be useful in this report.

Nicolas Suzor <[n.suzor@qut.edu.au](mailto:n.suzor@qut.edu.au)> <http://nic.suzor.net>  
Associate Professor, QUT Law School: <http://staff.qut.edu.au/staff/suzor>  
ARC DECRA Fellow, Digital Constitutionalism: <http://digitalsocialcontract.net>  
Legal Lead, Creative Commons Australia: <http://creativecommons.org.au>  
Deputy Chair, Digital Rights Watch: <http://digitalrightswatch.org.au>  
Chief Investigator, QUT Digital Media Research Centre: <http://www.qut.edu.au/research/dmrc>

## The impact of private terms of service enforcement by platforms on freedom of expression

*Nicolas Suzor, 'Digital constitutionalism: Using the rule of law to evaluate the legitimacy of governance by platforms' (draft 2016), <https://osf.io/ymj3t/>*

Platforms govern users, and the way that platforms govern matters. In this draft paper, I propose that the legitimacy of governance of users by platforms should be evaluated against the values of the rule of law. In particular, I suggest that we should care deeply about the extent to which private governance is consensual; transparent; equally applied and relatively stable; fairly enforced; and respects substantive human rights. These are the core values of good governance, but are alien to the systems of contract law that currently underpin relationships between platforms and their users. Through an analysis of the contractual terms of service of 15 major social media platforms, I show how these values can be applied to evaluate governance, and how poorly platforms perform on these criteria.

The values of the rule of law provide a language to name and work through contested concerns about the relationship between platforms and their users. This is a necessary precondition to an increasingly urgent task. The law of contract does not address these governance concerns, and the concept of constitutional rights does not extend to governance by private actors. Finding a way to apply these values to articulate a set of desirable restraints on the exercise of power in the digital age is the key challenge and opportunity of the project of digital constitutionalism.

## Intermediary liability and freedom of expression in copyright law

*Suzor, Nicolas P., Choi, Rachel, & Pappalardo, Kylie M. (2016) Moments of flux in intermediary liability for copyright infringement. In Perry, Mark (Ed.) Intellectual Property Governance for the 21st Century: Global Evolution. Springer, pp. 129-149, available at <https://eprints.qut.edu.au/91196/>.*

In copyright law, we identify a worrying trend in Australia, as elsewhere, towards enforcement of copyright law in a way that does not provide strong safeguards for the legitimate constitutional due process interests of users. We provide an overview of recent developments on three key issues in Australia: industry agreement on 'graduated response' regimes, website blocking provisions, and preliminary discovery orders to reveal the identity of ISP subscribers. We argue that these shifts represent a greater sophistication in approaches to enrolling general purpose intermediaries in regulatory projects, and consider how these may negatively impact freedom of expression.

## **Mandatory data retention obligations**

*Nicolas Suzor, Kylie Pappalardo, Natalie McIntosh, 'The passage of Australia's data retention regime: national security, human rights, and media scrutiny' (forthcoming 2016) Internet Policy Review, <https://osf.io/6wxmw/>.*

In April 2015, the Australian Government passed the Telecommunications (Interception and Access) Amendment (Data Retention) Act, which imposes obligations on Internet Service Providers (ISPs) to collect metadata information about their users and store this metadata for a period of two years. This article reviews the operation of the Act and considers the extent to which it conflicts with the human right to privacy. We suggest that the broad scope of the data retention obligations and the lack of judicial safeguards to limit access to collected data presents a clear conflict with the requirements of international law.

From its conception through to its ongoing implementation, Australia's data retention scheme has been controversial. The Government has generally asserted that data retention is necessary to further Australia's national security interests and to assist law enforcement agencies with criminal investigations. In the face of criticism, however, Government officials have been notably unable to justify the scheme on these grounds, or to show that data retention is a proportionate response to national security and law enforcement concerns.

The passage of data retention in Australia is particularly notable for the significant confusion not only over what the scheme would achieve, but what it would actually do. The Data Retention Act does not clearly explain what constitutes "metadata" for the purposes of the Act, nor, famously, was the Attorney-General George Brandis able to define metadata when asked about it. This is part of a broader narrative of disagreement and confusion about what data is suitable for collection and how data collection can impact upon the privacy interests of Australian citizens.

We examine how public interest concerns were dealt with during the passage of the Act as reflected in Australian news media. While the Act was controversial and subject to substantial ongoing criticism, the Government ultimately did little to address the human rights concerns that had been raised. The Act was ultimately passed with bi-partisan support, despite severe deficiencies in the justifications, a lack of clarity in the operation of the scheme, and heated public opposition from a small but vocal group of advocates. We show how the complexity of the Act appeared to limit engaged critique in the mainstream media, and how escalating fears over domestic and international terrorist attacks were exploited to secure the Act's passage through federal Parliament.

## **Obligations to police non-consensual pornography in a legitimate and proportionate manner**

*Nicolas Suzor, Bryony Seignior, Jennifer Singleton, 'Non-consensual porn and the responsibilities of online intermediaries' (forthcoming 2016) Melbourne University Law Review, <https://osf.io/zx95e/>.*

This paper considers the legal options of victims of the non-consensual distribution of sexually explicit media - sometimes known as 'revenge porn'. Worryingly, proposals to address non-consensual pornography often seek to impose some obligation on private intermediaries to remove content without adequate judicial due process protections. We review developments in Australia to examine explicitly what role internet intermediaries should play in responding to abuse online. The challenge in developing effective policy is not only to provide a remedy against the primary wrongdoer, but to impose some obligations on the platforms that host or enable access to harmful material. This is a difficult and complex issue that requires careful proportionality balancing. We

provide a critique of the options that have been presented in order to identify how legitimate procedures may be developed.

## **The legitimacy of graduated response schemes in copyright law**

*Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34 UNSWLJ 1 <https://eprints.qut.edu.au/43926/>.*

In an attempt to curb online copyright infringement, copyright owners are increasingly seeking to enlist the assistance of Internet Service Providers ('ISPs') to enforce copyright and impose sanctions on their users.<sup>1</sup> Commonly termed 'graduated response' schemes, these measures generally require that the ISP take some action against users suspected of infringing copyright, ranging from issuing warnings, to collating allegations made against subscribers and reporting to copyright owners, to suspension and eventual termination of service. In this paper, we provide a detailed critique of the fundamental tensions between graduated response schemes and the rule of law. We argue that the weakening of judicial oversight poses significant problems for legitimacy and the fundamental rights of individuals to freedom of speech and access to information.