Harper’s competition review is good news for Netflix consumers

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It’s been an interesting month in Australian copyright law.

A couple of weeks ago, Communications Minister Malcolm Turnbull announced that the government’s proposed reforms to strengthen copyright were dead on arrival.

Then, on Monday, the expert panel conducting the Competition Policy Review, led by Professor Ian Harper, released its draft report. The report recommends the Australian government investigate a range of ways to circumvent geoblocking – that is, overseas content companies using technology and copyright law to segment markets by country in order to extract the maximum value from each jurisdiction.

Harper’s report endorses ways to encourage consumers to bypass geoblocks — good news for the estimated 200,000 Australians who watch Netflix via a Virtual Private Network (VPN) or a US Domain Name System (DNS) server that makes their home computer look like it’s sitting in the US.

Netflix offers internet video-on-demand streaming for a monthly subscription fee. EPA/Britta Pedersen

Copyright v competition policy

The proposals in the report are part of a larger battle between copyright and competition policy that’s been raging for years, and which has seen the gradual erosion of laws that forbade the “parallel importation” of copyright works.

Until the 1980s the Copyright Act made it illegal to import genuine copies of copyright material without the permission of the Australian distributor. So, it was illegal to go to a country that had cheaper prices than Australia, buy up genuine-but-cheap books or movies or CDs, and ship them into Australia.

This principle is still part of copyright law, but over the last 30 years various competition policy enquiries have chipped away at the principle, and now it applies to a relatively small number of cases.

Content companies haven’t taken this lying down, and they’ve supplemented the law with numerous technologies that segment markets. That’s why DVDs of movies and videogames have regional coding and when you try to watch clips of The Daily Show or The Colbert Report you end up seeing a black screen and the notice:

This content is not available in your location.

Arrested Development (2003) MoviePosterDB

It’s also why, until recently, you could go months before you saw hit US television shows and movies: the studios windowed the content to extract the maximum value from each geographical region.

Consumers fought back – geographical segmentation tends to get people hot under the collar – and various technologies of various levels of legality have emerged over time. Region-free DVD players, VPNs, and even illegal streaming sites can be seen as consumer responses to geographical segmentation.

The content industries have viewed each of these responses with both suspicion, and sometimes litigation.
The right to bypass geoblocks

The proposals in the report by the Competition Policy Review are therefore extremely significant.

They are built around concerns that the law is used by copyright holders to price gouge Australian consumers as well as troubling evidence that Australian consumers lack choice in film and television, face delays in accessing content, and generally feel ripped off by distributors of international content.

Unlike the approach in Canada, where it seems the law will be changed to forbid copyright-based price discrimination, the Australian Competition Review’s preferred approach is to amend the Copyright Act to make clear that consumers have the right to bypass geoblocks, and also have the government allow and even educate consumers about how to bypass these geoblocks.

Dascha Polanco as Dayanara Diaz in Orange Is The New Black, another Netflix release. Foxtel

The report also endorsed the Australian Competition and Consumer Commission’s (ACCC) observation that the reality of consumers bypassing geoblocks has led to reduction in prices and to release of content at the same time as overseas markets.

The report also adopted much of the July 2013 report of the House of Representatives Standing Committee on Infrastructure and Communications into IT pricing in Australia, which recommended changes in the Copyright Act to improve competition.

Government contradictions

The Lego Movie poster (2014). MoviePosterDB

There are a number of weird ironies here. The most obvious is that three agencies of the Australian government – the ACCC, the Competition Policy Review Panel, and the House of Reps Committee on Infrastructure and Communications – are recommending the exact opposite of the sort of copyright reform the government rushed into headlong just a few months ago.

These groups argue for weaker, not stronger, copyright laws, in the interests of Australian consumers.

The more-subtle-but-more-important irony is that these government bodies are endorsing copyright infringement. They are careful not to say this directly, but nonetheless it’s true.

Bypassing geoblocks is probably a copyright infringement under the current law, and streaming content from a pirate site definitely is. But it’s these actions which have placed the pressure on content distributors and have made it hard for them to charge as much as they once did, and to continue delaying Australian releases.

Village Roadshow co-chairman Graham Burke noted that holding back the Australian showing of The Lego Movie (2014) was a disaster for them. “No more,” he told participants in a recent forum, promising to release on the same day and date as in the United States. Mr Burke was careful not to mention that this pressure came from illegal streaming of the movie.

Harper’s report casts a new light on how copyright costs Australian consumers. It is just the latest entry in a long list of attempts to reform a Copyright Act that no longer works for many Australians.

The government has said it will go back to the drawing board and work out a way to fix copyright, in a way that balances the interests of all stakeholders.

Good luck with that.