

**BALANCING THE ENTERTAINMENT AND
COMMUNICATIONS SECTORS IN DIGITAL
COMMUNICATIONS**

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INTRODUCTION

Advances in technology have seen massive digitisation of “content” - accessible by consumers increasingly on demand via faster, more efficient and sleeker services and devices. As a developed country with relatively poor speed of internet access, Australia has embarked on the building of an ambitious National Broadband Network to deliver 100 megabits per second of data to 90% of Australian homes¹. Meanwhile, Google could be on track to become the world’s largest ISP, as it rolls out a trial network in the USA at speeds of 1 gigabyte per second.² Devices are becoming more powerful, more feature rich and more affordable. In time, speed of access over the internet will cease to be a talking point for consumer applications, when there is more speed than is relevant. Internet access and even basic software applications (residing in the “cloud”) will be a utility like electricity³.

In this brave new world, what role will “content” play and will it too become a “human right” along with internet access? What will become of free to air, advertiser-funded TV in the face of IPTV, mobile TV and free content shared over BitTorrent and similar systems of the future? What will become of the traditional copyright owners, such as music and film production and distribution companies, as barriers to production and distribution fall and barriers between artists and audiences/fans disappear? How will the copyright owners “compete with free” whilst consumers enjoy their seamless “multi-screen” experience? What role will advertising play as behavioural targeting becomes more prevalent and sophisticated? Levels of unauthorised copying by consumers for domestic use on audio and video tapes have customarily been tolerated. However, the industries that have traditionally invested in, marketed and produced content are under threat, and have litigated to protect their rights and lobbied governments into passing laws to preserve their businesses.

The limitations of litigation and an absence of adequate industry agreement on how best to proceed will lead to our Government considering different models for regulation to address the issues. It is hoped that an examination of several international approaches to regulation can inform the debate in Australia in the wake of the iiNet case at first instance.

There are many issues other than unauthorised copying that will need to be resolved in order to navigate through the challenges posed by the internet. In this regard we are still immature in our responses to the challenges which will arise. Such challenges include questions of the extent of national sovereignty and jurisdiction in an internet that lacks precise borders, differing cultural norms and legal approaches to freedom of speech, privacy, sharing information with foreign governments, identity theft, and other areas. Even IPTV and the creation of digital content for the media will run up against differing national copyright laws, problems of rights clearance for different regions and devices, treatment of orphan works and differing national approaches to the regulation of converged media.

¹ Australian Government Department Broadband, Communications and the Digital Economy, http://www.dbcde.gov.au/broadband/national_broadband_network

² A.Moses, “Google could be your next ISP”, Sydney Morning Herald, 18 March 2010, <http://www.smh.com.au/technology/enterprise/google-could-be-your-next-isp-20100318-gqtr.html>

³ W.Redmond, “Kelly See Economy, Flexibility Driving Cloud Computing Adoption” 28 April 2009, <http://www.microsoft.com/presspass/features/2009/Apr09/04-28CloudComputingBenefits.msp>

The tension between the electronics and internet companies and the content or entertainment companies increases as the balance of commercial success shifts to the electronics and internet companies more than ever before. Entertainment companies strongly assert that the scale of infringements has never been greater whilst consumer advocates find answers in new business models and the adaptive powers of the entertainment industries. Debate exists as to the scale of the problem of economic harm caused by unauthorised file sharing with some studies questioning the problem altogether.

The core questions addressed in this paper are:

- What are the efforts to address the widespread copyright infringement by the entertainment industries in the Australian courts?
- What is the evidence of alternative commercial measures available to the entertainment industries to remain viable?
- Is regulatory reform warranted by evidence of harm, and to what extent can Australia be usefully informed by international attempts to regulate in relation to unauthorised file sharing?

BACKGROUND – A SUMMARY OF THE COMMERCIAL INTERESTS AT PLAY AND ADVANCES IN TECHNOLOGY

In the 1970s and 1980s, before the internet, this debate could be characterised as seeking to balance the competing objectives of the electronic equipment industries and the entertainment industries. Evidence of that debate and the competing interests at stake is the 1988 House of Lords case in which CBS Songs sued Amstrad Electronics. Amstrad had developed a twin tape player which copied tapes at double speed. It was said by CBS that the player would be used for making infringing copies of music and thus Amstrad would authorise infringements. The law reports record the interdependent and competing interests very well:

“The electronic equipment industry manufactures and sells sophisticated machines which enable individual members of the public to transmit, receive, record and reproduce sounds and signals in their own homes. The entertainment industry transmits and records entertainment on an enormous scale. Each industry is dependent on the other. Without the public demand for entertainment, the electronic equipment industry would not be able to sell its machines to the public. Without the facilities provided by the electronic equipment industry, the entertainment industry could not provide entertainment in the home, and could not, for example, maintain orchestras which fill the air with 20th century cacophony or make gratifying profit from a recording of a group without a voice singing a song without a tune. Although the two industries are interdependent and flourish to their mutual satisfaction, there is one area in which their interests conflict. It is in the interests of the electronic equipment industry to put on the market every facility which is likely to induce customers to purchase new machines made by the industry. It is in the interests of the customers to purchase new machines made by the industry. It is in the interests of the entertainment industry to maintain a monopoly in the reproduction of entertainment..... Hence arises the conflict between the

electronic equipment industry and the entertainment industry which has resulted in these present proceedings.”⁴

The House of Lords when called upon to resolve this question in *Amstrad* held that “authorisation” meant a grant or purported grant of the right to do the complained-of act. The court focused on Amstrad’s lack of control over customers’ uses of its recorders and the fact that the copying device in question had both infringing and non-infringing uses. Amstrad’s device and conduct did not “authorise” infringement. There has been litigation around the world which has tried to define the precise point at which a new device or program makes its creator responsible for the copyright infringement it facilitates. This debate is not new and in Australia uncertainty in where the line should be drawn continues.

Since 1988 this conflict has become ever more heated with the development and proliferation of the internet. In the May/June 2010 issue of Intellectual Asset Magazine the world’s fifty most valuable brands are analysed⁵. Fifteen of these brands are electronics/ computing/ telecommunications brands, with Google, Microsoft, Vodafone, IBM and HP in the top ten brands globally. None of these companies had businesses resembling their present businesses in the 1970s and in the case of Google, Vodafone and Microsoft they did not exist at all. This emphasises the value of adaptability called for by many from the entertainment industries. One media/content production company makes the top fifty: Walt Disney, which comes in at number twenty, one behind McDonalds. Within weeks of its launch of the iPad, Apple took the place of Microsoft as the second largest company in the USA behind Exxon.⁶ Arguably the technology companies are having unprecedented success in part facilitated by the content industries. The question is whether the balance of interests presently seen is destructive of the content industries?

“The IFPI, the trade association for the worldwide recording industry, reports that global sales of recorded music fell 3% in 2005, 5% in 2006, 8% in 2007 and 8.3% in 2008. The IFPI trumpets rising online sales of digital recordings through iTunes and similar services, but acknowledges that they are dwarfed by the volume of unauthorised peer-to-peer exchanges and are swamped by the diminution of sales of recordings in traditional formats. Not surprisingly, the collapse of the traditional business model is hurting both musicians and intermediaries.

The newspaper industry is in even worse shape. In the United States, the rate at which newspaper circulation is declining recently increased from roughly 2% per year to roughly 5% per year. The revenues that papers earn from advertising have been falling even faster, as subscribers increasingly rely on free online sources for information about products and prices. To staunch the bleeding, almost all newspapers have been cutting staff and content. (The *Los Angeles Times*, for example, recently laid off 300 employees, including 70

⁴ *CBS Songs Ltd v Amstrad Consumer Electronics plc* (1988) 11 IPR 1 (HL).

⁵ Intellectual Property Asset Management Magazine, May/June 2010, Issue 41

⁶ R.Pegoraro, “Stock Market: Apple worth more than Microsoft”, Washington Post, 26 May 2010, http://voices.washingtonpost.com/fasterforward/2010/05/stock_market_apple_worth_more.html

from its newsroom.) For a growing number, however, even these measures have failed to stave off bankruptcy.”⁷

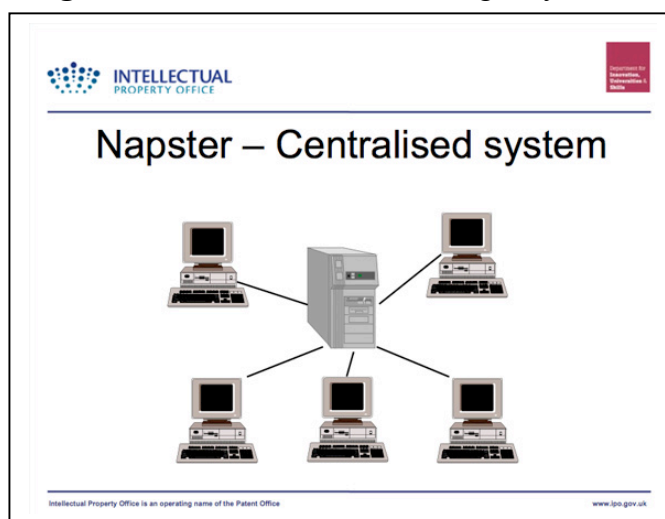
Without the content delivered over the internet, the demand for ever new and creative consumer devices, and more and better internet connections, would not flourish.

Taking music and orchestras into the home, moving from theatre to radio plays, from television and movies from the cinema to the home cinema, was all facilitated by advances in electronic equipment. This has driven upwards the revenue for content creators. In turn, demand for radios, television sets, record players, audio tape recorders, video tape recorders, iPods and iPads was driven by that entertainment content. The content and technology industries are interdependent and yet in conflict.

The digitisation of content rendered a copy the exact equivalent of the original digital work. This led first to copying of music with MP3 devices allowing people to carry hundreds or thousands of their favourite songs on new portable devices. File sharing (or sharing of these digitised songs) emerged into the mainstream in the late 1990s with companies like Napster distributing content, using central servers to control the process (see Diagram 1 below). The central servers and identifiable proprietors of the technology led to inevitable legal challenge. Music was widely copied first because file sizes were smaller and internet bandwidth more modest. During the last decade new technologies have emerged such as Gnutella and BitTorrent reliant on a more distributed or peer to peer model (see Diagram 2 below) in which no central server facilitates the sharing. This has made them a more difficult target for “authorisation” cases. At the same time better compression technology and improved internet bandwidth has meant that movies and television programs can be readily shared. These technologies can expand the markets for content, provided models for monetisation emerge.

It is difficult to predict future technologies but the certainty of change should inform both our courts in looking at the questions around “authorisation” of copyright infringement and our legislators in any regulation on file sharing.

Diagram 1⁸ Central file-server acting only as index “introducing” two users to each other:

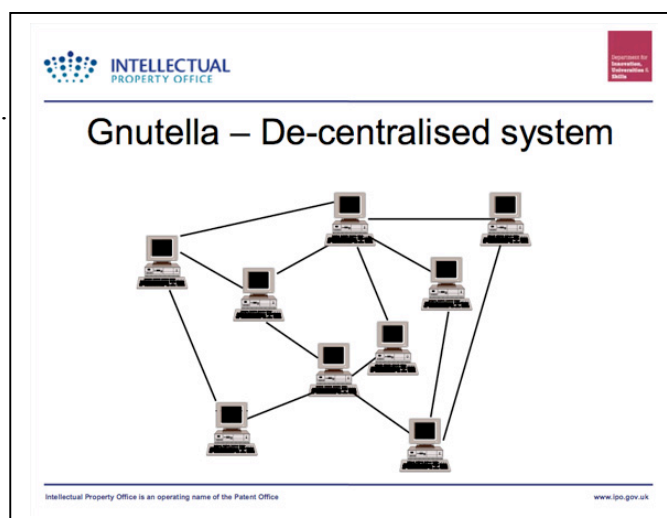


⁷ Professor William Fisher, “The Economist Debates, Copyright and Wrongs, This house believes that existing copyright laws do more harm than good”, 8 May 2009 <http://www.economist.com/debate/days/view/315>

⁸ <http://interactive.bis.gov.uk/digitalbritain/digital-economy-bill/>

Diagram 2 No central server. Each user (peer) will directly contact the other to source content:

III.



CONTENT INDUSTRIES GO TO THE LAWYERS: THE PROGRAMMERS RESPOND

Individual users of copyright works will clearly infringe the underlying copyright where they reproduce a copyright work without a licence. Contrast purchasing an authorised CD or DVD from a shop, with copying a friend's CD or DVD, or downloading a copy from a file sharing site on the internet. The end user's infringement is unlikely to be controversial. The question taxing copyright lawyers and courts in Australia and overseas is the extent to which intermediaries will be responsible for their role in facilitating such infringement. Take for example the makers of personal computers sold as "media centres", complete with software and hardware to copy, arrange and play the content; manufacturers of CD and DVD burners; MP3 players; blank disc makers; makers of personal video recorders (or "PVRs"); writers of software to "rip mix and burn" (words taken from an advertising campaign to support the iTunes launch in Australia in 2001 and 2002); internet service providers; and companies which write programs to facilitate widespread digital file sharing.

The murky history of determining "authorisation", under the *Australian Copyright Act* (1968) has created uncertainty as to the boundary between lawful and unlawful conduct in Australia. As Justice Cowdroy noted in his decision in the recent *iiNet* case:

"In the 1987 decision of *Hanimex*, Gummow J commented at 285 that '[t]he evolution of the meaning of "authorisation" in the 1911 Act and the 1968 Act has pursued perhaps an even more tortuous course than the doctrine of contributory infringement in the United States'. The Court concurs with such statement, and it has become even more apt in the years following that decision. Despite the legislature's attempt to simplify the relevant considerations pursuant to the *Copyright Amendment (Digital Agenda) Act* and s 101(1A), the law of authorisation has continued to grow more complicated and unwieldy, with a litany of competing and contrasting considerations, and with one statement of principle frequently matched with a contradictory one. The authority on authorisation has become a mire. There seems to be little

certainty other than the basic maxim that authorisation is a question of fact to be decided in the particular circumstances of each case”⁹

The Australian *Copyright Act 1968* provides (in sections 36 and 101) that: “*the copyright in a literary, dramatic, musical or artistic 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.*”¹⁰

It will be useful to examine the approach of Australian Courts to “authorisation” as the balance struck here between advancing technology and innovation on the one hand and preserving the status quo on the other is central to the question of the need for reform.

A. *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* (2005) 65 IPR 289 (KAZAA)

The Australian Federal Court decision of Wilcox J¹¹ found that Kazaa was notoriously encouraging infringement and any warnings on the kazaa.com website and in user agreements about copyright infringement were ineffective. Wilcox also found it relevant that Kazaa had available but failed to implement filtering technology.

The following statement from the Kazaa website influenced the court towards a finding of authorisation.

“THE KAZAA REVOLUTION

30 years of buying the music of [sic] they think you should listen to.

30 years of watching the movies they want you to see.

30 years of paying the prices they demand.

30 years of swallowing what they’re shovelling.

30 years of buying crap you don’t want.

30 years of being a sheep.

Over. With one a single click.

Peer 2 peer, we’re sharing files.

1 by 1, we’re changing the world.

Kazaa is the technology.

You are the warrior.

60 million strong. And rising.

Join the revolution KAZAA

Share the revolution”¹²

⁹ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 (4 February 2010) at [358]

¹⁰ (1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.”

¹¹ “Q&A Kazaa Settlement”, BBC News, 27 July 2006, <http://news.bbc.co.uk/2/hi/technology/5221014.stm>

¹² KAZAA paragraph 178

Wilcox J found:

“[e]specially to a young audience, the “Join the Revolution” website material would have conveyed the idea that it was “cool” to defy the record companies and their stuffy reliance on their copyrights’.”¹³

Kazaa was settled in July 2006¹⁴ when Sharman agreed to pay US\$115m in compensation for past infringements and convert to a legal business offering licensed music for downloading. By this stage technology had moved on and distributed P2P models like Gnutella (see Diagram 2 above) had changed the underlying technology used by consumers.

B. *Cooper v Universal Music Australia Pty Ltd* (2006) 156 FCR 380

Cooper’s website MP3s4free.net encouraged users to access and download MP3 music. “Comcen” the ISP also benefited from increased traffic as a result of a contract offering free hosting to Cooper. Cooper was found to be offering clear encouragement to users to download offending material. Comcen and Cooper were found to be authorising copyright infringement and both Comcen and Cooper were doing more than merely making the facilities available.

C. *Roadshow Films Pty Ltd v iiNet Limited (No.3)* [2010] FCA 24

The iiNet decision of February 2010 in Australia is now on appeal to the Full Federal Court. This case concerned an action by the entertainment industry (a collection of 34 motion picture copyright owners) against Australian ISP iiNet.

As an ISP iiNet provides internet access. It was placed on notice by AFACT (“Australian Federation Against Copyright Theft”) that its users were allegedly engaging in unlawful downloading of copyright content using BitTorrent technology.

The BitTorrent technology the subject of this case was true peer to peer distribution (see Diagram 2 above). There was no central server dealing with “clients” and as noted in the judgement this has created significant efficiencies in the distribution of content on the internet. A user would download small parts of a given movie from a large number of different computers all of which make available those parts. In this way a single computer is not engaged for a long period with uploading an entire movie.

The case was distinguished by Cowdrey J from *Kazaa* (above) as the Kazaa system had more centrally indexed features than BitTorrent. In the *Kazaa* case the provider of the means to infringement was sued and Kazaa intended and encouraged infringing conduct. In all of these ways this was distinguishable from iiNet’s conduct. The case was also distinguished from *Cooper* (considered above) as again Cooper intended and designed his website to be used for copyright infringement and his ISP “Comcen” provided free hosting in return for the commercial benefit of increased traffic.¹⁵

¹³ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 at [178] and [405].

¹⁴ “Q&A Kazaa Settlement”, BBC News, 27 July 2006, <http://news.bbc.co.uk/2/hi/technology/5221014.stm>

¹⁵ *Ibid* at paragraphs [360] to [365]

Justice Cowdroy analysed the *Moorhouse* Decision¹⁶, the leading Australian High Court authority on authorisation, and found those facts distinguishable as *Moorhouse* concerned a university making available *firstly* a photocopier and *secondly* a library full of copyright protected books.

In contrast, in *iiNet* Justice Cowdroy felt that provision of a “precondition” to infringement such as internet access or the provision of a computer did not mean that the *means* of infringement were provided.

“It is important to distinguish between the provision of a necessary precondition to infringements occurring, and the provision of the actual ‘means’ of infringement in the reasoning of Gibbs J in *Moorhouse*. As discussed earlier, a photocopier can be used to infringe copyright, but on the reasoning of Gibbs J and Jacobs J, the mere provision of a photocopier was not the ‘means’ of infringement in the abstract. Rather, it was only the ‘means’ of infringement in the particular context of the library, where it was surrounded by copyright works. Other preconditions existed, namely the supply of power and the physical premises in which the infringements occurred. The presence of each of these factors was a necessary precondition for the infringements to occur, but that does not inexorably lead to the conclusion that a person who individually provided each one of those preconditions could equally be found to have authorised the infringements.

In the present circumstances, it is obvious that the respondent’s provision of the internet was *a* necessary precondition for the infringements which occurred. However, that does not mean that the provision of the internet was *the* ‘means’ of infringement.”¹⁷

It was the use of the BitTorrent system that was the means by which copyright was infringed. Use of the internet alone could not lead to infringing conduct. *iiNet* had engaged in no relevant acts of authorisation. Justice Cowdroy remarked:

“Perhaps if the predominant use of the internet was to infringe copyright, its provision might constitute such an invitation. Perhaps if there was an additional relevant contextual factor, such as the existence of the library context in *Moorhouse*, an invitation to infringe could be implied. But in the circumstances of this case, the Court simply cannot find such implicit invitation to infringe.”¹⁸

The court considered the evidence of wide scale infringement and refused to identify high usage of data downloading with infringing conduct.¹⁹ The court was satisfied that *iiNet* users had engaged in primary infringement²⁰ but not that *iiNet* authorised these infringements. Rebecca Giblin wrote before the *iiNet* decision hypothetically assessing the potential of copyright holders pursuing BitTorrent on the basis that through its software it “authorised” infringements under Australian law. Giblin concluded that the case would have an uncertain

¹⁶ *Moorhouse & Angus and Robertson (Publishers) Pty Ltd v University of New South Wales* (1974) 3 ALR 1

¹⁷ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at paragraphs [400] and [401]

¹⁸ *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24 at paragraph [413]

¹⁹ *Ibid* at paragraphs [239] and [250]

²⁰ *Ibid* at paragraph [356]

outcome.²¹ It seems that Justice Cowdroy in the iiNet decision was not inclined to comment on the infringing or non-infringing nature of the BitTorrent system²² but nevertheless admonished the applicants for choosing the wrong respondent (the ISP) in the face of better respondents such as the downloaders and the “constituent parts of the BitTorrent system”.²³

The technology will always adapt around these “authorisation” decisions and legal risks. BitTorrent components are now available to the open source community. “Open Source” describes a system of licences which make source code for software available from multiple sources, with some contractual limitations but without charge. The typical vendor/customer role in the sale and distribution of software is absent in open source models with “vendors” charging only for modifications or support of the open source material. There would no longer be an effective target to sue if the objective was to stem the use of BitTorrent software to exchange files. Against this background, the ISPs, the consumers or the legislators are the only real places for the content industries to litigate, lobby and educate. The impossibility of catching BitTorrent technology now that it has entered the open source world was described well in an interview reported on Linux.com with an industry commentator:

“It's open source, so who do you go after?” asked Phil Albert, IP attorney and partner with the San Francisco law firm Townsend and Townsend. “You could go after its author and you could somehow force him to give up and say he'll never touch it -- so what? It's open source. Anybody can develop on it.”... Albert used the case of the original Napster as an example of how the open source nature of BitTorrent, created by Bram Cohen in 2001, bolsters its resistance to any legal strategy against it. With the old, centralized music swapping service, Napster represented a centralized server that facilitated the trading... After successful legal attacks against Napster, the decentralized models of Kazaa and Morpheus emerged and became popular -- remaining so to this day. Once the file trading moved to a decentralized form, the RIAA then pursued the companies behind the services, albeit unsuccessfully. Still, the RIAA at least had companies to target. With a widely used open source application such as BitTorrent, the focus of the court filing evaporates, according to Albert. “Now, you don't even have a company to go after,” he said.”²⁴

In the USA, pursuing different doctrines of “contributory infringement” the recording industry has had some success in pursuing Napster type models where a central server plays a role in facilitating access to unauthorised downloads.

²¹ Giblin (2009) 20 AIPJ 148 at page 170

²² Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24 at paragraph [406] “the Court does not wish to imply that the BitTorrent system is necessarily copyright infringing, nor that the BitTorrent system itself is illegal. Rather, that in the particular circumstances of these proceedings it is the ‘means’ of infringement, it having been deliberately used by persons to achieve this consequence. The Court expressly declines to find whether any constituent part of the BitTorrent system is the precise ‘means’ of infringement.”

²³ Ibid at paragraph [445]

²⁴ Legitimate use, open source, keep BitTorrent out of court March 08, 2005 Jay Lyman
<http://www.linux.com/archive/feed/43159?theme=print>

The music industry also adopted a strategy of pursuing individual infringers and there have been over 35,000 cases in the US since 2003.²⁵ These cases have generated significant negative media attention which have led to an end to this strategy.²⁶

The most prominent example of this negative attention was the case of Capitol Records v Thomas-Rasset in which a 32 year old, unemployed mother of 4 was found liable for infringement and ordered by a jury to pay damages of \$1.96 million for copying 24 songs before ultimately being reduced by a Judge to \$54,000 who commented that the damages were “monstrous and shocking”.²⁷

The position of pursuing individuals in the US would be difficult to deploy in Australia as there are no statutory damages in Australia leading to more complex questions of loss and damage.

A much more recent US initiative is that taken by the “U.S. Copyright Group” promising movie studios a new revenue stream.²⁸ The recent news report described the efforts of the “U.S. Copyright Group” as a “protection racket” as it plans to send automated threat letters to infringing downloaders of the movie “The Hurt Locker”. If users refuse to pay damages in the specified amount of US\$1,500 the group threatens to commence legal proceedings. According to the news report the group has now issued demand letters to the first 5,000 users. Apparently US ISP’s are cooperating freely with the group and handing over user information based on very little actual evidence. The owner of the Hurt Locker, Voltage Pictures announced on 12th May 2010 that it will attempt to sue “potentially 10s of thousands” of users who have downloaded pirated copies of the movie.²⁹

It seems that there is room for entrepreneurial lawyers to commence enforcement proceedings on a mass scale in relation to copyright infringements in the US. This is particularly the case because of the statutory damages regime. Whether the damages which may be awarded by an Australian court would justify the commencement of proceedings is less clear. On the basis of the *iiNet* decision, it would also seem that ISPs would be reluctant to voluntarily cooperate with a group such as the U.S. Copyright Group. Nonetheless, if similar action were to be contemplated in Australia such customer records could be obtained from the ISPs in pre-action discovery proceedings. The criticisms of this move by the owners of the Hurt Locker have been based around the bad experience of the music industry in its similar actions in the US which were widely seen as a public relations disaster perhaps even exacerbating future infringements.

²⁵ M.Harvey, “Single-mother digital pirate Jammie Thomas-Rasset must pay \$80,000 per song”, Times On Line, 19 June 2009

²⁶ M.Harvey, “Single-mother digital pirate Jammie Thomas-Rasset must pay \$80,000 per song”, Times On Line, 19 June 2009

²⁷ M.Harvey, “Single-mother digital pirate Jammie Thomas-Rasset must pay \$80,000 per song”, Times On Line, 19 June 2009

²⁸ K.Bode, “*The Hurt Locker Producers Sue 5,000 P2P Users, as US Copyright Group fires up copyright ‘protection racket’*” dated 1 June 2010

²⁹ Ibid

NEW DIRECTIONS IN COMMERCE; THE CONTENT INDUSTRIES AND THEIR STRUGGLES TO SURVIVE

“Creative industries are at a crucial moment of their evolution in the digital world. The music industry has embraced the new environment, yet still only a tiny fraction of its music is getting paid for. The film and TV industries are seeing the power of BitTorrent technology to make movies and TV programmes available to the world without payment or consent. Newspapers are seeing their readers desert them for free news online. And book publishers are warning about new popular websites like Scribd, where books can be downloaded for free, whatever the wishes of the author.”³⁰

We consider in the next section the mixed evidence of harm to the record and music industries. There are a plethora of new commercial models available on the internet which see content owners monetising their content. In broad terms, the strategies adopted to date have been litigation against intermediaries and individuals who infringe and to a large extent these measures have failed.

One technical model which has been adopted has been digital rights management (“DRM”) although this also is widely perceived to have failed. The reasons for failure of DRM include:

- (a) hacking which means that in a relatively small amount of time a non DRM version of any material will become available;
- (b) the inconvenience to consumers of a DRM limited form of media; and
- (c) lack of interoperability among devices.

For this reason it is apparent that DRM is not going to pose a long term solution for the content industries.³¹

“At this time, the lawsuit path and the DRM path both offer the entertainment industries in the West little hope of resurrecting traditional entertainment business models and revenues. In China, the notion that either of these strategies could help drive a turnaround in the difficult market for legitimate content is simply a non-starter.”³²

The broad emerging models for monetisation of content on the internet include a subscription model, an advertising supported model and a blanket licensing model by which users of the internet would pay a fee for that access to be used to incentivise content creators proportionately to use.

³⁰ John Kennedy, “The Economist Debates, Copyright and Wrongs, This house believes that existing copyright laws do more harm than good”, 6 May 2009 <http://www.economist.com/debate/days/view/315>

³¹ E.Priest, “*Why Emerging Business Models And Not Copyright Law Are The Key To Monetising Content Online*”, *Copyright Law, Digital Content And The Internet In The Asia-Pacific* at page 126

³² E.Priest, “*Why Emerging Business Models And Not Copyright Law Are The Key To Monetising Content Online*”, *Copyright Law, Digital Content And The Internet In The Asia-Pacific At Page 128*.

A. *Subscription*

The retail subscription model for providing access to content is one which is being trialled around the world. Facilitators like Noank (see their website www.noankmedia.com) involves copyright owners in uploading copies of their works onto Noank servers granting a licence for Noank to reproduce and distribute the materials. Noank allows its customers who will be aggregators of content to sub-licence content to their subscribers on payment of a monthly fee. Noank has software which detects what and how much of the content end users listen to and royalties are proportionately provided in accordance with the extent of listening. 85% of all fees are returned to the copyright owners with 15% kept to run Noank.

“Noank’s software essentially counts each and every play on a user’s system, identifying files through both hashing and audio fingerprinting. The client can not only count how often a file is played, but also for how long. Let’s say a user starts watching a video, but decides to skip forward through a dialogue. Noank’s software would know which parts he watched, right down to the minute level. These media usage details are collected on a user’s machine and then periodically uploaded to Noank’s servers — unless the user decides to opt out”.

Copley told me when I caught up with him after his keynote that the possibility to opt out is essential to Noank’s approach of data collection. “We had a fair amount of spirited internal debate about whether reporting ought to be voluntary,” he said. One of the main concerns was that voluntary reporting might lead to an undercount, particularly of long-tail content. But in the end, everyone agreed that the privacy of end users should come first. After all, a system like this one would really only work with users willing to participate.”³³

Retail subscription models will generally need value added services in addition to merely providing content and Noank encourages such services to its underlying content. There are a number of other examples of subscription based licence models for “all you can eat” content and they pose a viable model for the future.

B. *Advertising – A Panacea?*

“I’m getting to the point where I feel like every answer to every business development pitch is ‘We’re going to be advertiser supported,’” said Beth Comstock, president of Integrated Media at NBC Universal, which this year set up a fund to invest in media and digital companies. “It’s just not going to be possible,” she said at a recent advertising conference. “There are not going to be enough advertising dollars in the marketplace. No matter how clever we are, no matter what the format is.”³⁴

There have been numerous examples of successful internet companies that have received high valuations based on the number of members or the number of hits alone and examples of such companies include, YouTube, Facebook, Skype and other Web 2.0 businesses. Advertising spending is driving many of the new internet companies

³³ The New York Times May 9, 2009, Building The Tools To Legalize P2p Video-Sharing, By Janko Roettgers

³⁴ E.Priest, “*Why emerging business models and not copyright law are the key to monetising content online*”, *Copyright Law, digital content and the Internet in the Asia-Pacific* at page 135 .

and the global market for online spending is expected to increase from US\$36 billion in 2007 to US\$61 billion in 2010, overtaking global radio and magazine advertising spending during that period.³⁵ This online advertising revenue is not necessarily going to find its way in any significant fashion to the content industries. More than 70% of online advertising revenue goes to the top ten sites.³⁶ Inserting advertising in content such as movies and music is problematic with viewers or listeners able to fast forward over such content, depriving advertisers of a significant amount of value.

An interesting example of an online music site funded by advertising is the music streaming service Spotify. According to one report “*sell 1m records today and you’ll earn a half – sucked gobstopper covered in fluff*”³⁷. The British Academy of Songwriters, Composers and Authors has complained that Spotify’s payments to songwriters are tiny and that the way that they are calculated is not clear. Spotify users enjoyed one million plays of Lady Gaga’s song Poker Face which apparently earned the artist the sum of \$167. It is difficult to imagine the long term success of an entirely free download model.

A further interesting model is that used by Google with its ContentID system on YouTube.

C. *The Blanket Licensing Model*

It has been proposed by some commentators that an alternative compensation system may take the form of a blanket licensing regime that could be applied to all internet access accounts. The sums derived from the licence would then be distributed to the owners of copyright works. An alternative is for Governments to impose a tax on sales from other devices necessary to download and enjoy content. Some commentators such as Fisher³⁸ have gone into great detail to describe the development of new collection societies and new registration mechanisms to facilitate a either voluntary or a compulsory blanket licensing regime. It is unlikely that there would be global agreement on such a scheme and for this reason there would be leakage through jurisdictions in which the blanket licence was not utilised. It also remains to be seen whether such a model could in the long term generate enough revenue to provide incentives to create content.

TO LEGISLATE FOR CHANGE, STRIKING THE BALANCE THROUGH REGULATION

The Australian Government has been participating in international discussions directed at curbing piracy. Those discussions involve 27 countries negotiating the *Anti Counterfeiting Trade Agreement* or “ACTA”. The ACTA discussion have been criticised for their secrecy and by the EU for considering important IP issues outside the major international IP agreements such as TRIPS and WTO.

³⁵ E.Priest, page 134

³⁶ E.Priest, page 135

³⁷ S.Leith, Guardian UK, 18 April 2010

³⁸ W.Fisher, “Promises to Keep” Stanford, CA: Stanford Law and Politics, 2004, Chapter 6 + Appendix

The European Parliament in March 2010 voted in favour of the following statements:

“Expresses its concern over the lack of a transparent process in the conduct of the ACTA negotiations,..... is deeply concerned that no legal base was established before the start of the ACTA negotiations and that parliamentary approval for the negotiating mandate was not sought;”

“Deplores the calculated choice of the parties not to negotiate through well-established international bodies, such as WIPO and WTO, which have established frameworks for public information and consultation;”

“...the proposed agreement should not make it possible for any so-called “three-strikes” procedures to be imposed....any agreement must include the stipulation that the closing-off of an individual’s Internet access shall be subject to prior examination by a court;”³⁹

Communications Minister Conroy’s response to the first instance *iiNet* decision was to encourage the ISPs to engage with the content industries and forge their own solutions. Such solutions may take the form of a memorandum of understanding (“MOU”) and such an MOU was agreed in the UK in May 2008. A copy of this MOU forms Appendix 1 to this paper. That MOU was said to provide a course for industry agreement as an alternative to regulation. The UK Government was apparently not satisfied with progress and enacted the legislation discussed below. Australian participation in the ACTA negotiations, evidence of widespread infringement, evidence of harm to the entertainment industries and legislative responses in other jurisdictions such as the UK, New Zealand, US and EU, make a future legislative response to file sharing in Australia more likely in the absence of a constructive industry agreement.

A core question which will drive the introduction of any legislation in Australia is the extent of the harm being remedied. Thereafter important issues are:

- (a) the extent to which ISPs will bear the burden and costs of enforcement;
- (b) the sensitive issue of consumer access to internet services and circumstances in which that could be curtailed;
- (c) any provision for damages or compensation for the content industries; and
- (d) the mechanisms for oversight, appeal and transparency.

A. *WHAT IS THE EVIDENCE OF HARM*

Anecdotally the music industry has suffered significantly. Comments such as this are typical:

“The music companies that I represent in this debate are often seen as the canaries down the mineshaft, struggling to “monetise” a business in the digital era. Certainly we have suffered terrible losses from internet piracy, a market down from US\$40 billion in 1999 to US\$28 billion today. We have developed a range of new business models. And we have no doubt made some mistakes along the way. But the greatest lesson we have learned is simply that the most

³⁹ Anti-Counterfeiting Trade Agreement, European Parliament resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0057&format=XML&language=EN>

brilliant innovation in the world is incapable of succeeding in an environment of 95% unauthorised free music.”⁴⁰

A cabinet report prepared in New Zealand in late 2009 as a part of the introduction of legislation in that country contained a useful summary of surveys on the sales displacement effect of unauthorised file sharing. We set out that summary in full:

*Selection of Studies estimating the sales displacement effect*⁴¹

Studies	Sales displacement (% of tot revenue)	Industry	Country	Method
Oberholzer-Gee & Strumpf (2007) Journal of Political Economy	0%	Music	US	Actual downloads data
Blackburn (2004), mimeo	0%	Music	US	Actual downloads data
IPSOS (2007)	2%	Film & TV	UK	Survey data
Zenter (2006) Journal of Law and Economics	8%	Music	7 European countries	Survey data
Rob & Waldfogel (2006) Journal of Law and Economics	9%	Music	US	Survey data
Hennig-Thurau, Henning & Henrik Sattler (2007), Journal of Marketing	9%	Film	Germany	Downloads proxies data
Jupiter Research (2007)	17%	Music	UK	Survey data
Peitz and Waelbroeck (2004), mimeo	20%	Music	16 countries	Downloads proxies data

This table shows a scale of problem that is difficult to measure and may be somewhere in the range of 0% and 20% sales displacement due to file sharing for music, and between 2% and 9% of total revenue for film and television.

One 2004 study by Oberholzer and Strumph (earlier than the 2007 survey referenced in the table above) found:

“We find that file sharing has no statistically significant effect on purchases of the average album in our sample. Moreover, the estimates are of rather modest size when compared to the drastic reduction in sales in the music industry. At most, file sharing can explain a tiny fraction of this decline. These alternative factors include poor macroeconomic conditions, a reduction in the number of album releases, growing competition from other forms of entertainment such as video games and DVDs (video game graphics have improved and the price of

⁴⁰ John Kennedy, “The Economist Debates, Copyright and Wrongs, This house believes that existing copyright laws do more harm than good”, 6 May 2009 <http://www.economist.com/debate/days/view/315>

⁴¹ New Zealand Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing, 16 June 2009, p47

DVD players or movies have sharply fallen), a reduction in music variety stemming from the large consolidation in radio along with the rise of independent promoter fees to gain airplay, and possibly a consumer backlash against record industry tactics. It is also important to note that a similar drop in record sales occurred in the late 1970s and early 1980s, and that record sales in the 1990s may have been abnormally high as individuals replace older formats with CDs (Liebowitz, 2003).”⁴²

More recently in the Australian iiNet case AFACT witness Mr Gane gave evidence summarised as follows:

“Mr Gane testified that he was aware from his investigations and his own experience that the scale of copyright infringement of films and television programs taking place on the internet has increased substantially in recent years. He has attached two reports confirming this trend. The first is from a United Kingdom company, Envisional, and the second is from a German company, Ipoque. A report entitled ‘*Internet Study 2007*’ by Ipoque (made between August and September 2007) revealed that in Australia approximately 57% of internet traffic was P2P traffic and 73% of such traffic was associated with the BitTorrent protocol.”⁴³

Despite differences obtained through different studies the evidence is difficult to dismiss that there is negative impact on the music and film businesses caused by unauthorised file sharing. The extent of that harm seems very difficult to quantify. A March 2010 study in Europe entitled *Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries* published figures stating that 1.2 million jobs could be lost in the EU and up to €240 billion in retail income, by 2015 if measures to combat unauthorised file sharing were not introduced.⁴⁴

B. MODELS FOR A LEGISLATIVE RESPONSE

Australia will probably consider further legislation to combat file sharing. As demonstrated by the *iiNet* decision (discussed above) programmers and hardware manufacturers can always design around relevant legal tests of “authorisation” and the P2P technology of the BitTorrent system provides a good example of a situation in which the content or entertainment industries would be left with few alternatives other than unpopular logistically difficult actions against individual infringers. For the content industries to suggest that ISPs should devise their own schemes to monitor and deal with infringements seems unrealistic. Any failure, however, of the ISPs and the content industries to mutually agree an outcome will probably lead to legislation. As Justice Cowdroy noted in the *iiNet* decision:

“[t]he applicants argue that the respondent has the technical capability to suspend and terminate accounts. The Court accepts that this is the case. However, the technical feasibility of suspension and termination is not the only relevant consideration. ... [T]he applicants’ submissions suggesting that it would be a simple and reasonable

⁴² Department for Business Innovation & Skills. *The Effect of File Sharing on Record Sales An Empirical Analysis**. Felix Oberholzer, Harvard Business School foberholzer@hbs.edu, Koleman Strumpf, UNC Chapel Hill cigar@unc.edu March 2004, p24

⁴³ *Roadshow Films Pty Ltd v iiNet Limited (No. 3)* [2010] FCA 24 (4 February 2010) at paragraph [94].

⁴⁴ Tera Consultants: *Building a Digital Economy : The Importance of Saving Jobs in the EU's Creative Industries* March 2010 (<http://www.iccwbo.org>) at page 9.

step to implement a scheme for passing on warning notices has no merit..... The primary problem arises from ... the difficulty in imposing a notification *as well as* a disconnection regime. It is by no means clear how many infringements ought to lead to termination; whether a sufficient number can happen within one notification, or whether time should be given for behaviour to be rectified; whether termination should only occur in relation to infringements made on the basis of evidence generated by a DtecNet-style process or whether notices such as those sent by the US robot notices also ought to result in termination; and how to deal with subscribers disputing the accuracy of notifications of infringement. Indeed, the applicants also mention ‘suspension’ of accounts as an option, that is, a step short of termination. This would appear to be a suggestion that subscribers could be sanctioned by suspending internet access for a period. However, the duration required for any proposed suspension is unknown and it is unclear whether, for example, it ought apply only to iiNet users whose infringement were on a small scale. The respondent had no certainty, even if it took some steps, whether it might nevertheless be taken to have authorised infringement.”⁴⁵

A close study of the empirical data to show the harm caused by the file sharing in Australia should be a prerequisite for any such legislation. Assuming some harm, what form should that legislation take – an adventurous new taxation model or a carefully negotiated compromise position having regard to the interests of consumers, ISPs, technology providers and the content industries. It will be useful to examine the approach of other countries to this balancing of interests.

1. United Kingdom

The UK Government wished to secure the future of its content industries and was persuaded by the evidence available that further legislative measures were necessary. The debate around controversial measures such as restricting access to the internet was intense with protests being very much in the public eye. Internet service providers were also hostile towards the bill. A survey carried out by the BBC found that “87% of internet users felt internet access should be the *“fundamental right of all people”*”⁴⁶. This view is consistent with a November 2009 EU Directive⁴⁷

“[T]hat the Internet is essential for education and for the practical exercise of freedom of expression and access to information. Any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

The United Kingdom *Digital Economy Act* 2010 received Royal Assent on 9 April 2010. Select clauses of that Act have been reproduced as Appendix 2 to this paper.

Provision was made for two codes – one for the so called “initial obligations” (proof, standards of proof, procedures and notice requirements) and one for so called “technical

⁴⁵ Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24 at paragraph [434].

⁴⁶ “Internet Access is a Fundamental Human Right” BBC News 8th March 2010 (<http://news.bbc.co.uk/1/hi/8548190.stm>)

⁴⁷ DIRECTIVE 2009/140/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009

obligations” (restrictions of internet access). These codes will contain much of the controversial subject matter of the Act and it is yet to be made clear what form they will take. It was considered that codes could be refined and modified and provide a more flexible method for dealing with these issues as technology changes over time. (See Appendix 2 clause 124J of the Act for example).

It is now not clear how the system of “graduated response” will work as the codes have not been given definition by parliament. The Bill had provided for a graduated response such as slowing internet speeds then suspending access for repeat offenders. Details as to how this will now work is left for the codes.

2. Europe

The March 2010 study (see above 38) demonstrates a clear awareness in Europe of the seriousness of loss of revenue and other opportunities through ineffective copyright protection for digital content. Nonetheless in April 2008 the European Parliament voted against attempts to *criminalize* file sharing by individuals as well as the idea of cutting off internet access of offenders. In November 2009 the European Parliament passed the Telecoms Package which included the following:

“Any of these measures regarding end-users’ access to or use of services and applications through electronic communications networks liable to restrict those fundamental rights or freedoms may only be imposed if they are appropriate, proportionate and necessary within a democratic society, and their implementation shall be subject to adequate procedural safeguards in conformity with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with general principles of Community law, including effective judicial protection and due process. Accordingly, these measures may only be taken with due respect for the principle of presumption of innocence and the right to privacy. A prior fair and impartial procedure shall be guaranteed, including the right to be heard of the person or persons concerned”⁴⁸

3. France

In January 2010 after a lengthy battle in the French Parliament (and after earlier versions of its legislation were ruled unconstitutional) France’s “Creation and Internet” law was passed. The graduated response to peer to peer usage in that country consists of a warning letter (which allows the user an opportunity to modify its behaviour or check whether there is unauthorised use of their connection), then a second warning letter, whilst a third breach results in fines or in some cases the users’ internet connection being terminated. Termination of an internet connection requires judicial supervision. This judicial supervision of suspension accords with the approach now taken in New Zealand but differs from the approach set out under the UK legislation.

4. New Zealand

⁴⁸ DIRECTIVE 2009/140/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009

In New Zealand the scale of harm from unauthorised file sharing was assessed as low to moderate (see above note 43 and associated table). The size of the “screen” industries in NZ in 2008 was NZ\$2,743 million and film production was seen as an important industry for NZ generating NZ\$637 million.⁴⁹ It was seen as desirable to take advantage of the seeming consensus reached on a number of points in the proposed legislation and also desirable to facilitate good relations with trading partners whose copyright works would be afforded some protection through the measures contemplated.⁵⁰

In New Zealand the *Copyright (New Technologies) Amendment Act* (2008) contained the below section 92A. The controversy surrounding termination of access to the internet meant that this section was not brought into force. ISPs in particular felt that the burden of ensuring compliance with the *Copyright Act* should not fall so heavily upon them.⁵¹ The section has never come into force and it provides as follows:

- “(1) An Internet service provider must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the account with that Internet service provider of a repeat infringer.
- (2) In subsection (1), repeat infringer means a person who repeatedly infringes the copyright in a work by using 1 or more of the Internet services of the Internet service provider to do a restricted act without the consent of the copyright owner.”

The section is to be repealed by the *Copyright (Infringing File Sharing) Amendment Bill 119-1* (2010). The Bill’s objectives are to discourage file sharing that infringes copyright, educate the public about the problem, compensate copyright owners for damage sustained from copyright infringement by file sharing, provide sanctions, including termination of internet access for periods of up to 6 months for copyright infringers and also to limit ISP liability that may result from their customers' infringing file sharing.

The first issue in which a balance will be struck in the proposed NZ legislation is the provision providing safe harbour to ISPs. Provided the ISP complies with its obligations under the Act it would not be authorising the infringements of its users. In light of the intense pressure by the content industries on ISPs in Australia in the *iiNet* case there is some benefit in being outside of questions of “authorisation” of infringement. Section 92B(2A) provides:

“An Internet service provider does not infringe the copyright in the work, or authorise A's infringement of the copyright in the work, merely because the Internet service provider knows of the infringement ... provided that, in relation to the alleged infringement, the Internet service provider complies with all its obligations under those sections and under any regulations”

⁴⁹New Zealand Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing, 16 June 2009, page 22

⁵⁰ New Zealand Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing, 16 June 2009, page 24 and 25

⁵¹ New Zealand Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing, 16 June 2009, page 1

The proposed legislation has its own definition of an ISP written to exclude libraries, universities, hotels and businesses offering internet connections to employees. This is sensible having regard to the role played by ISPs under the legislation in accessing and storing account holder usage data. such data would not be held by this broader group of businesses.

The ISPs are by section 122Q required at their expense to collect and retain information about the use of the internet by their account holders⁵². A graduated series of notices will be sent to infringers. The three notices provided for in the Bill are:

“**detection notice** means a detection notice issued by an ISP to an account holder in respect of an alleged infringement against a copyright owner...

warning notice means a warning notice issued by an ISP to an account holder in respect of at least 2 alleged infringements against a copyright owner...

enforcement notice means an enforcement notice issued by an ISP to an account holder in respect of at least 3 alleged infringements against a copyright owner...”

Section 122C requires the ISP to send the notices:

- “(1) If a copyright owner provides an ISP with information that identifies an IP address at which an infringement of its copyright is alleged to have occurred as a result of file sharing, the ISP must:
- (a) match the IP address with the account holder to whom it related at the time of the infringement; and
 - (b) issue the appropriate infringement notice to the account holder within 1 week after receiving the information”

It is thought that a significant number of offenders will cease infringing activity after the first notice.⁵³ Of interest is that New Zealand with a population of some 4.4 million people is expected to see some 15,000 notices a month for the first few months and thereafter 1,000 a month as users are educated as to the enforcement regime.⁵⁴ The second and third notices (warning notices and enforcement notices) are to contain a list of alleged infringements for that account holder (since the detection notice) and a warning that the Copyright Tribunal (the “Tribunal”) may award compensation based on that list.

Those who infringe three times may then be the subject of further enforcement action under section 122I (Enforcement action after issue of enforcement notice):

- “(1) A copyright owner may take enforcement action against an account holder who has been issued with an enforcement notice in respect of

⁵² *Copyright (Infringing File Sharing) Amendment Bill 119-1 (2010) S122Q (1) Every ISP must retain, for a minimum of 40 days, information on the use of the Internet by each account holder...*

⁵³ NZ Cabinet Report page 5

⁵⁴ NZ Cabinet Report page 6

infringements against the copyright owner by doing either or both of the following:

- (a) applying to the Tribunal for an order under section 122N against the account holder:
- (b) applying to a District Court for an order under section 122O against the account holder”

The compensation that the Tribunal may award is not to exceed NZD\$15,000 and is intended to be compensatory in nature and not a civil fine or penalty. Section 122N provides:

- “(1) The Tribunal must order an account holder to pay a copyright owner a sum if the Tribunal is satisfied that:
 - (a) each of the 3 alleged infringements that triggered the infringement notices issued to the account holder were infringements of the copyright owner's copyright that occurred at an IP address of the account holder; and
 - (b) the 3 notices were issued in accordance with this Act...
- (4) The total amount ordered by the Tribunal to be paid by the account holder must not exceed \$15,000.”

As an additional measure copyright owners may also seek to have an account holder's access to the internet suspended. This controversial step which dogged the introduction of earlier legislation is to be supervised by the District Court which is required to balance the interest of the internet user and the copyright owner. Section 122O provides:

- “(1) A District Court may, on application by a copyright owner, make an order requiring an ISP to suspend the account of an account holder for a period of up to 6 months
- ...- (3) When considering the circumstances, and determining the duration, of a proposed suspension, the matters that the court may consider include, but are not limited to:
 - (a) the degree of the account holder's reliance on access to the Internet; and
 - (b) the identity (if known) of the user who engaged in the infringements identified in the notices”

The ISP backlash against earlier legislation which was in their view unfairly burdening them with the demands of enforcement actions is somewhat balanced in this Bill by clause 122R.⁵⁵ These fees are not to extend to monitoring, capture and storage of data but will cover the preparation and sending of notices and reporting to copyright owners. The fees are also said to provide an adequate disincentive to copyright owners whom might require the sending of notices frivolously.

⁵⁵ Bill Supra n46 section 122R “An ISP may charge a copyright owner for performing the functions required of ISPs”

The New Zealand Bill has been quite controversial in that country. One local commentator observed:

“The proposals appear to have addressed most of the worst fears of the internet community (e.g. the risk of being disconnected). On the other hand, many rights holders may feel the original proposals have been so watered down that the notice system will be of little value.

This is the type of legislation nobody will be entirely happy with. Nevertheless, I believe the proposals fairly balance the interests of all of the main parties concerned.”⁵⁶

It is intended that the Copyright Tribunal be significantly expanded at the cost of the NZ Government to deal with the increased demands of this legislation and fees charged to users of the system will at best return 25% of these costs.⁵⁷ The people of New Zealand will thus fund this system to the benefit of rights holders – perhaps many of them overseas rights holders.

The model does seem to represent a good working compromise on many of the issues raised in Europe and the UK on similar models. It will be interesting to see its effect on consumer attitudes and behaviours. Will NZ truly be able to put the genie back in the bottle? The first suspension of access case will be much publicised and copyright owners would do well to make sure all in the community can well understand and agree with their request for suspension as this will be a divisive issue. The obvious difference with the UK approach is to be quite prescriptive as to the notice and suspension regime and to put it in the hands of a Court.

5. AUSTRALIA

As Cowdroy J noted in *iiNet* restriction of access to the internet will be a very significant policy question:

“The internet can be used to virtually any end. Mr Malone cited examples including communication, such as email, social networking websites and VOIP; online banking and retailing; and entertainment, such as through online media and games. The Court takes judicial notice of the fact that the internet is increasingly the means by which the news is disseminated and created.

While the Court expressly does not characterise access to the internet as akin to a ‘human right’ as the Constitutional Council of France has recently, one does not need to consider access to the internet to be a ‘human right’ to appreciate its central role in almost all aspects of modern life, (and, consequently, to

⁵⁶ Thursday, December 17, 2009, Imperator Fish, <http://www.imperatorfish.com/2009/12/section-92a-proposals-might-just-work.html>

⁵⁷ New Zealand Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing, 16 June 2009

appreciate that its mere provision could not possibly justify a finding that it was the ‘means’ of copyright infringement.)⁵⁸

Key questions identified above that should be considered to any legislative action include:

1. who bears the cost of the system;
2. what role will Government need to take and does existing infrastructure accommodate this;
3. what are the privacy implications of collecting and using internet usage data;
4. who will decide on, (often complex) infringement questions;
5. will a Court supervise any suspension function; and
6. how will this work with public access points.

CONCLUSIONS

In this paper we have examined some of the changes to the commercial and legal environments in which media and entertainment industries seek to monetise content. We have noted the tension between the interests of the content industries and the interests of the technology and electronic industries who significantly benefit from having high quality content available for their users in order to drive the take up and purchase of ever more powerful devices.

One area in which the tension between competing objectives of technology creators and content owners has been played out is the area of authorisation of copyright infringement. We have focused on recent Australian decisions involving internet based technologies in order to show the limitations of this remedy in the face of ever changing technology. The Australian federal court in the *iiNet* case has clearly taken a view that internet access is just one precondition to infringement and that there needs to be some strong encouragement to infringe (*Cooper* and *Kazaa*) or a provision of the actual means to infringe. The BitTorrent system has now been provided to the internet community in the form of open source software meaning that there is not even a central company to pursue in order to stop this highly efficient mechanism for sharing content in ways which infringe the rights of copyright owners. We looked at some of the history of suing individual infringers in the USA and noted the negative publicity received. Of interest is a renewed effort to pursue individual infringers being commenced in the movie sector with entrepreneurial lawyers leading the charge to recover lost royalties for the owners of the Oscar winning film “The Hurt Locker”.

In order to change the established patterns for downloading and infringing using file sharing networks some control will be necessary at the ISP level. ISPs know who their account holders are and who is using an IP address at a given moment of downloading. ISPs are in an ideal position to facilitate the provision of notices for copyright owners who feel their rights have been infringed. The big question is whether ISPs offer to take on any significant role in the process of notification of copyright infringement or indeed take any further steps in a graduated response to users who repeatedly infringe copyright. In the absence of industry co-operation legislation is more likely.

In New Zealand, the graduated response consists of three notices which can lead to a claim for damages and even, under supervision of a court, suspension or termination of a user’s internet access. In the United Kingdom the precise process for the graduated response is not

⁵⁸ Roadshow Films Pty Ltd v iiNet Limited (No. 3) [2010] FCA 24 at paragraphs [410] and [411].

yet apparent as it will be developed through various codes foreshadowed in the recent legislative response in that country.

If Australia is to adopt a legislative response to the question of peer to peer file sharing then that response should involve a court supervised process for any suspension or termination of internet access and it is on this point that the interests of consumers and content providers will conflict the most. The internet is an essential part of day to day life in the modern age.

The ISPs and the technology industry are strongly advocating that the music and movie industries should adopt new business models better adapted to work with current consumer attitudes to accessing content without charge. We have examined a number of promising models including a blanket licence or taxation scheme, subscription based services and advertiser funded models. It seems that these models will not provide a complete answer and will require some regulatory support if they are to thrive.

APPENDIX 1

Joint memorandum of understanding on an approach to reduce unlawful file-sharing. This voluntary MOU between key stakeholders from the ISP industry, the content industries, OFCOM and the Government lays the foundations for a self-regulatory regime to address the issue of unlawful P2P file-sharing.

OBJECTIVE

All parties agree that the objective of this MOU is to achieve within 2 to 3 years a significant reduction in the incidence of copyright infringement as a result of peer to peer file-sharing and a change in popular attitude towards infringement.

PRINCIPLES

This MOU establishes five principles under which action will be taken, and it is accepted that further work will be undertaken on individual issues:

Signatories believe that a joint industry solution to this problem represents the best way forward. This will enable progress to be made rapidly on an industry solution as back-up regulatory provisions are implemented and will ensure a light touch and flexible regime. Signatories agree to work together with each other and with Ofcom to agree codes of practice.

Signatories, led by the creative industries, will work together to ensure that consumers are educated to respect the value of the creative process, and the importance of supporting creators to invest time and resource in developing new work, and understand that unlicensed sharing of others' work is wrong.

Many legal online content services already exist as an alternative to unlawful copying and sharing but signatories agree on the importance of competing to make available to consumers commercially available and attractively packaged content in a wide range of user-friendly formats as an alternative to unlawful file-sharing, for example subscription, on demand, or sharing services.

Signatories will work together on a process whereby internet service customers are informed when their accounts are being used unlawfully to share copyright material and pointed towards legal alternatives. In the first instance ISP signatories will each put in place a 3 month trial to send notifications to 1000 subscribers per week identified to them by music rights holders, to agreed levels of evidence, as having been engaged in illicit uploading or downloading. Based on evidence from the trial, which will be analysed and assessed by all Signatories, Ofcom will agree with Signatories an escalation in numbers, widening of content coverage, and a process for agreeing a cap.

Signatories will be invited by Ofcom to a group to identify effective mechanisms to deal with repeat infringers. The group will report in 4 months and look at solutions including technical measures such as traffic management or filtering, and marking of content to facilitate its identification. In addition, rights holders will consider prosecuting particularly serious infringers in appropriate cases.

CODES OF PRACTICE

Signatories will draw up codes of practice to cover:

- standards of evidence;
- actions against alleged infringers;
- actions against repeat or criminal infringers;
- indemnity resulting from incorrect allegations of file sharing; and
- routes of appeal for consumers.

All codes would require the approval of Ofcom. The presumption would be that wherever possible the codes should encourage bilateral commercial arrangements between parties.

Engagement in this process would be open [to ISPs and rights holders], but would not be compulsory. The costs incurred in any action against alleged infringers would be shared between parties; the apportionment to be agreed. The intention would be that members would work together to produce standard processes designed to minimise costs whenever possible and appropriate.

COMPLIANCE WITH LEGAL REQUIREMENTS

For the avoidance of doubt this MOU does not affect any of the existing legal rights, remedies or protections of the Signatories, nor does it prevent the Signatories from entering into any agreement, outside the MOU, that they may wish to enter into. Implementation of the MOU will be in compliance with the provisions of the e-Commerce Directive as it affects ISPs and their liability, including mere conduit status, as well as the Copyright Design and Patents Act 1988 and competition legislation.⁵⁹

⁵⁹ “MOU between ISPs and rights holder”, BPI, 24 July 2008, <http://www.bpi.co.uk/our-work/protecting-uk-music/article/joint-memorandum-of-understanding-on-an-approach-to-reduce-unlawful-file-sharing.aspx>

APPENDIX 2

Extracted sections of the United Kingdom: *Digital Economy Act 2010*

“internet access service” means an electronic communications service that—

- (a) is provided to a subscriber;
- (b) consists entirely or mainly of the provision of access to the internet; and
- (c) includes the allocation of an IP address or IP addresses to the subscriber to enable that access;

“internet service provider” means a person who provides an internet access service;

124A Obligation to notify subscribers of copyright infringement reports

- (1) This section applies if it appears to a copyright owner that:
 - (a) a subscriber to an internet access service has infringed the owner’s copyright by means of the service; or
 - (b) a subscriber to an internet access service has allowed another person to use the service, and that other person has infringed the owner’s copyright by means of the service.
- (2) The owner may make a copyright infringement report to the internet service provider who provided the internet access service if a code in force under section 124C or 124D (an “initial obligations code”) allows the owner to do so.
- (3) A “copyright infringement report” is a report that—
 - (a) states that there appears to have been an infringement of the owner’s copyright;
 - (b) includes a description of the apparent infringement;
 - (c) includes evidence of the apparent infringement that shows the subscriber’s IP address and the time at which the evidence was gathered;
 - (d) is sent to the internet service provider within the period of 1 month beginning with the day on which the evidence was gathered; and
 - (e) complies with any other requirement of the initial obligations code.
- (4) An internet service provider who receives a copyright infringement report must notify the subscriber of the report if the initial obligations code requires the provider to do so.
- (5) A notification under subsection (4) must be sent to the subscriber within the period of 1 month beginning with the day on which the provider receives the report.
- (6) A notification under subsection (4) must include—
 - (a) a statement that the notification is sent under this section in response to a copyright infringement report;
 - (b) the name of the copyright owner who made the report;
 - (c) a description of the apparent infringement;
 - (d) evidence of the apparent infringement that shows the subscriber’s IP address and the time at which the evidence was gathered;

- (e) information about subscriber appeals and the grounds on which they may be made;
- (f) information about copyright and its purpose;
- (g) advice, or information enabling the subscriber to obtain advice, about how to obtain lawful access to copyright works;
- (h) advice, or information enabling the subscriber to obtain advice, about steps that a subscriber can take to protect an internet access service from unauthorised use; and
- (i) anything else that the initial obligations code requires the notification to include.

124H Obligations to limit internet access

- (1) The Secretary of State may by order impose a technical obligation on internet service providers if:
 - (a) OFCOM have assessed whether one or more technical obligations should be imposed on internet service providers; and
 - (b) taking into account that assessment, reports prepared by OFCOM under section 124F, and any other matter that appears to the Secretary of State to be relevant, the Secretary of State considers it appropriate to make the order.
- ...
- (3) An order under this section must specify the date from which the technical obligation is to have effect, or provide for it to be specified.
- (4) The order may also specify—
 - (a) the criteria for taking the technical measure concerned against a subscriber;
 - (b) the steps to be taken as part of the measure and when they are to be taken.
- (5) No order is to be made under this section unless—
 - (a) the Secretary of State has complied with subsections (6) to (10), and
 - (b) a draft of the order has been laid before Parliament and approved by a resolution of each House.

124J Contents of code about obligations to limit internet access

- (1) The criteria referred to in section 124I(4) are—
 - (a) that the requirements concerning enforcement and related matters are met in relation to the code (see subsections (2) and (3));
 - (b) that the requirements concerning subscriber appeals are met in relation to the code (see section 124K);
 - (c) that it makes any provision about contributions towards meeting costs that is required to be included by an order under section 124M;
 - (d) that it makes any other provision that the Secretary of State requires it to make;
 - (e) that the provisions of the code are objectively justifiable in relation to the matters to which it relates;
 - (f) that those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (g) that those provisions are proportionate to what they are intended to achieve; and

- (h) that, in relation to what those provisions are intended to achieve, they are transparent.

124M Sharing of costs

- (1) The Secretary of State may by order specify provision that must be included in an initial obligations code or a technical obligations code about payment of contributions towards costs incurred under the copyright infringement provisions.
- (2) Any provision specified under subsection (1) must relate to payment of contributions by one or more of the following only:
 - (a) copyright owners;
 - (b) internet service providers;
 - (c) in relation to a subscriber appeal or a further appeal by a subscriber to the First-tier Tribunal, the subscriber.

Power to make provision about injunctions preventing access to locations on the internet

- (1) The Secretary of State may by regulations make provision about the granting by a court of a blocking injunction in respect of a location on the internet which the court is satisfied has been, is being or is likely to be used for or in connection with an activity that infringes copyright.
- (2) “Blocking injunction” means an injunction that requires a service provider to prevent its service being used to gain access to the location.
- (3) The Secretary of State may not make regulations under this section unless satisfied that—
 - (a) the use of the internet for activities that infringe copyright is having a serious adverse effect on businesses or consumers,
 - (b) making the regulations is a proportionate way to address that effect, and
 - (c) making the regulations would not prejudice national security or the prevention or detection of crime.
- (4) The regulations must provide that a court may not grant an injunction unless satisfied that the location is:
 - (a) a location from which a substantial amount of material has been, is being or is likely to be obtained in infringement of copyright,
 - (b) a location at which a substantial amount of material has been, is being or is likely to be made available in infringement of copyright, or
 - (c) a location which has been, is being or is likely to be used to facilitate access to a location within paragraph (a) or (b).
- (5) The regulations must provide that, in determining whether to grant an injunction, the court must take account of—

- (a) any evidence presented of steps taken by the service provider, or by an operator of the location, to prevent infringement of copyright in the qualifying material,
- (b) any evidence presented of steps taken by the copyright owner, or by a licensee of copyright in the qualifying material, to facilitate lawful access to the qualifying material,
- (c) any representations made by a Minister of the Crown,
- (d) whether the injunction would be likely to have a disproportionate effect on any person's legitimate interests, and
- (e) the importance of freedom of expression.

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