Online copyright enforcement impacts the Internet industry as a whole, including different types of rights holders, ISPs, other content providers, technology providers and users. All these parties should be engaged in the discussion, which in turn needs to be broadened to include how access to authorised digital content is being improved via distribution, monetisation and enforcement models that are better suited to emerging technologies and market expectations.

INNOVATION AND BALANCE

It is becoming increasingly difficult to remember that it was only in the 1990s that we began to harness the commercial potential of the Internet, and only 2002 when Web 2.0 became a reality. Online engagement is now pervasive and perhaps even ‘indispensable’ (Brown 2009).

Up until this point, society has generally understood the boundaries (both in scope and geography) of the law and of acceptable behaviour. However the Internet is challenging not only the norms of communication, but also of these safeguards. In addition, it is fuelling a proliferation of devices which allow for immediate, uncensored and global interaction in a context that doesn’t always identify the individual or their purpose. Anonymity can be absolute – the ultimate freedom to do and say anything, or at least to potentially get away with it.

Against this backdrop, established causes of action are struggling for application and intellectual property laws in particular appear to be out of step with a diffusion of new, and convergence of old, technologies. Regulatory and business models which have to date successfully controlled access to (and the price of) information and content, are now being openly questioned and challenged. As a result, ‘…the Internet – has been the place where intellectual property has been least respected’ (O’Reilly & Koman 2001, 6). Which is not to say that this disrespect should be ignored, but neither is it to say that practices and rules which were developed in an entirely different context and time should not be reviewed.

The Internet is a compelling and creative channel to market in which online scale, distribution and cost models do not necessarily translate from long established offline ones. However innovation should drive innovation, to stimulate positive collaborative outcomes for all participants. The challenge is to find a balance which respects the rights and wants of individuals, while sustaining and growing new technologies and rewarding commercial and creative endeavour.

2005 – DISCONNECTION

Since the 2005 amendments to the Copyright Act 1968 (Cth), there has been a consistent campaign by rights holders to compel Australian ISPs to apply sanctions against those of their customers alleged to be engaged in copyright infringement, most recently via peer-to-peer (P2P) file sharing protocols. The rights holders’ campaign seems, at least in part, to be based
on a misguided belief that ISPs (and not for example, Australian courts, or other legislatively appointed bodies) are the ‘gatekeepers’ or ‘police’ of the Internet and by extension of user activities and communications.

At the centre of the rights holders’ campaign has been a complex ‘three strikes’ or ‘graduated response’ scheme. Such a scheme essentially involves the sending of notices by a rights holder, via an Australian ISP, to the ISP’s customer, alleging that the customer is infringing copyright. The customer’s failure to stop the alleged conduct after three notices would result in the ISP suspending or disconnecting the customer from the Internet. There is no judicial or other independent oversight of the scheme.

Australian (and overseas) ISPs have strongly resisted the proposal, on the basis that it is not effective, enforceable or proportionate and it raises serious questions about fairness and equity. For example, the rights holders’ proposal has never specified:

- why the presumption of innocence and onus of proof should be reversed for online copyright infringement
- what happens to a terminated customer (eg, are they banned from the Internet for life, for a defined period, or can they simply churn to a new ISP)
- what happens when a terminated Internet account is being used by a group of people (eg, a school, small business or share-house)
- what happens when a terminated Internet account is part of a bundled service offering
- what is the customer’s right of reply and who would listen
- how is the scheme’s effectiveness to be measured
- what steps would be taken to review and modify the scheme in the future, particularly in the context of emerging technologies and other user practices.

Rights holders have never offered to indemnify ISPs in circumstances, for example, where a customer is disconnected in error, or where disconnection causes other harm. Funding for the scheme also remains unclear. Rights holders have not offered to reimburse ISPs for assisting them to enforce their rights, which is contrary to other instances when ISPs are required to work with third parties. Likely costs include:

- reviewing multiple notices against a specified criteria
- matching a customer to an IP Address, which may be static or dynamic
- sending multiple notices to customers and corresponding with rights holders
- establishing and maintaining a database and supporting processes, to ‘track’ correspondence and flag the number of notices
- disconnecting customers’ Internet accounts (and any subsequent reconnections)
- handling customer complaints, concerns and queries (including from any resulting churn)
- training front of house and call centre staff, as well as staff dedicated to implementing and managing the three strikes scheme.

Some Australian ISPs currently receive an enormous volume (hundreds, sometimes thousands) of emails from Australian and overseas third parties, alleging that their networks are being used to infringe copyright. In almost all instances the material resides on P2P networks, over which the ISP has no control. How would these volumes of emails translate into a three strikes notice and disconnection scheme?

The 2005 copyright amendments were based on the pre-P2P US Digital Millennium Copyright Act 1998 and followed directly from the Australia-US Free Trade Agreement. They introduced a take down scheme, under which rights holders can send ISPs prescribed notices alleging that an ISP’s customer is dealing with copyright infringing material, on a website controlled by the ISP. Upon receipt of a notice, the ISP must take the identified website down and notify its customer. If the ISP receives a prescribed counter-notice from its
customer, it must notify the rights holder. The rights holder then has 10 days to initiate Federal Court proceedings for copyright infringement, failing which the ISP must restore the suspended website. Key features of the scheme include:

- the ISP’s technical ability to take down the specific content or website/s of concern; and
- a requirement that the rights holder must apply to an Australian court for resolution of a contested infringement allegation, within a specified time frame.

The 2005 take-down scheme has rarely if ever been used. Whether as a direct result of the legislative amendments, or for other reasons, there has subsequently been an increase in infringing activities via P2P protocols, such as BitTorrent. ISPs have no control over user content in a P2P context – in particular, they can’t take down specific content or websites. As users download files directly from other users’ computers and shared materials are stored on the users’ computers, not the ISP’s network, the ISP’s only involvement is to connect the user to the Internet.

If ISPs start disconnecting or suspending their customers from the Internet at the request of rights holders, will online copyright infringement stop, or will these actions simply encourage new behaviours via alternative technologies such as encryption, HTML illegal streaming or ‘one-click’ downloading, or cyberlockers? In ‘an arms race between encrypted, anonymised services and industry detection techniques’ (Karaganis 2011, 31) what will be the next, and the next, regulatory and enforcement measures that rights holders campaign for?

RESPONSIBILITIES & CONSEQUENCES

The benefits of intellectual property protection for an economy, and for its scientific and artistic growth and wealth, are not in question. However intellectual property, and copyright in particular, is a conditional statutory monopoly and the condition is balance. Inventors and artists are rewarded for a limited period, provided that they share their ideas in order to stimulate new ones.

The IP ecosystem also doesn’t operate in a vacuum. It is subject to a wide range of laws and practices including competition, privacy, free speech, indigenous rights, trade relations and health. Enforcement of intellectual property (including trade marks, patents, designs and copyright) is subject to legal and equitable checks and balances.

ISPs do not condone copyright infringement. In fact many of them have extensive intellectual property portfolios and are both licensors and licensees of digital content. While addressing online copyright infringement is important (particularly in the context of commercial scale infringement) the relevant questions are: how should it be addressed and by whom? More specifically, is a complex (and costly) three strikes scheme – or a six strikes scheme as was recently announced in the US (MPAA Press Release 2011) – administered via a commercial intermediary and including Internet termination without court oversight, the right (and only) way to go?

The Internet has the potential to facilitate range of illegal and dangerous behaviours such as child pornography, incitement to commit violence, hate speech, fraud, identity theft, hacking, phishing and defamation. All of these activities are subject to Australian law and independent adjudication. Natural justice is afforded to those alleged to have breached the law and sanctions are applied by the courts (or other legislatively appointed independent body) not by those alleged to have been wronged. Why should copyright enforcement be any different? There is no similar three strikes scheme for dealing with any other type of Internet content.

iiNET CASES

The premise for three strikes, (or graduated response), or is an argument that ISPs are authorising copyright infringement by their customers. The film and television industry’s decision to test Australian law on this point (in the Roadshow No. 2 and Roadshow No. 3
cases) is well documented and we are currently waiting for the next round as the parties head to the High Court in late 2011.

The Full Federal Court’s conclusion that another ISP in different factual circumstances may be found to have authorised is not new. E-Talk was clearly found to have authorised copyright infringement on the facts of the Cooper case. However, defining the relevant factual circumstances remains the key difficulty, one which the Full Court in Roadshow No.3 struggled to answer, although Emmett J attempted to provide some guidance when he suggested that the starting points are:

• ‘unequivocal and cogent’ evidence of primary infringement;
• reimbursement of iiNet’s reasonable costs; and
• an undertaking to indemnify iiNet in respect of liability reasonably incurred as a result of iiNet acting on the rights holders’ notices.

However there is no certainty that a judge hearing another online authorisation case involving an ISP will follow Emmett J’s reasoning, or won’t add additional matters. Even Jagot J, who was clearly less sympathetic to iiNet’s predicament, doesn’t shed any light on the factual circumstances question.

And what of Cowdroy J’s innovative approach to authorisation in Roadshow No.2? While it has largely been ignored, his Honour’s focus on the technology that provided the means to allow copyright infringement has parallels with the Federal Court’s consideration of E-Talk’s conduct in Cooper, and would seem a more logical starting point to address the misappropriation of intellectual property rights.

‘With the evolution of digital communications, the means of reproducing and disseminating copyright works increasingly leave the control of copyright owners and commercial distribution intermediaries…we have new kinds of intermediaries, who do not themselves distribute copyrighted material, but give their customers the means to make works available to the public’(Ginsburg 2008, 2).

What should rights holders be doing in this context?

**WHAT IS AN ISP?**

Wikipedia defines an ISP in the following way - ‘An Internet service provider (ISP) is a company that provides access to the Internet’ (en.wikipedia.org/wiki/ISP, accessed on 24 July 2011). Should the additional words – ‘...who is also responsible for deciding whether its customers are behaving legally and if so, sanctions inappropriate behaviour at its discretion’ – be included in the definition?

An ISP connects a customer to infrastructure that has the potential to be used to access content from sources both legal and illegal. The ISP does not connect its customers with an intention or belief that they will engage in illegal activities. In fact via its contract, the ISP specifically requires its customers to comply with the law, including copyright. However, the ISP has no control over and does not (nor should it) monitor its customers’ behaviour. The decision to access illegal content, or engage in any other illegal online activity, is solely the customer’s.

Further, the question of whether or not a customer has in fact breached the law is not one an ISP can determine. It requires the oversight of a court, or other legislatively appointed body or instrument. The matters to be weighed, as in all civil disputes, are not without complexity and include:

• does the complainant have standing?
• has a breach of the law been established to the requisite standard of proof?
• does the alleged wrongdoer have a valid defence?
• are there any other circumstances that should be taken into account?
what damage has the complainant suffered?
what is an appropriate sanction/penalty to apply, in all the relevant circumstances?

While there is no question that an ISP must comply with an Australian court order (and its customer contract gives it the contractual ability to do so), ISPs are not qualified to adjudicate on the above matters. What other commercial entity is required to do so? It is the clear purpose of the Australian judicial system, or the legislature, to ensure that independent and equitable checks and balances are applied, in all the circumstances of an alleged wrongdoing.

ALTERNATIVES TO THREE STRIKES

The Copyright Act currently offers rights holders a range of remedies for infringement, including in appropriate circumstances, damages, account of profits, injunctions and court orders terminating an Internet account. The 2005 amendments also included a specific provision to deal with online infringement (following the Kazaa case) and criminal sanctions for commercial scale piracy.

In addition, Order 15A(3) of the Federal Court rules enables a rights holder to apply to the court (where there is a reasonable suspicion of infringement) for an order to identify an alleged infringer, so that formal infringement proceedings can be bought.

Rights holders have not availed themselves of any of these options in Australia. Their preference has been for a mechanism which avoids direct action against an infringer, in favour of indirect action via an intermediary, without independent oversight. While a desire to avoid potentially time consuming and costly court proceedings may be understandable, the Australian legal system does not condone vigilante action. Civil disputes are resolved by the courts, unless parliament directs otherwise.

There are a number of viable alternatives to three strikes, which would facilitate the rights holders’ ability to directly, quickly and more cheaply enforce their rights against alleged infringers, including:

- **Modified O15A type process** - An obvious difficulty faced by rights holders is their inability to identify an alleged infringer, other than by reference to an IP Address. If rights holders were able to quickly and easily identify an alleged infringer, they would then be able to correspond directly with that person and ultimately, if required, decide what action should be taken if the alleged infringer ignores the correspondence. While the current O15A(3) process enables rights holders to do this, an expedited and cheaper version (perhaps akin to a subpoena process) would clearly assist rights holders to enforce their private property rights. For example, a pre-agreed protocol could allow for an uncontested application, using an affidavit template and description of documents, with pre-agreed consent orders in accordance with Order 35 Rule 10 of the Federal Court Rules. An alternative (and cheaper) forum to the Federal Court (along the lines of the Federal Magistrates’ Court) could also be utilised.

- **Administrative process adjudicated by an authorised independent third party** – iiNet advocated such a model in its paper ‘Encouraging legitimate use of online content’ (iiNet 2011), published after the Full Federal Court’s decision in its litigation with AFACT. Essentially, an Independent Body (presumably duly authorised by legislation) would decide whether a rights holder has the requisite evidence of primary infringement to warrant a notice. If that is the case, the Independent Body would ask the relevant ISP to identify the alleged infringer from its IP Address. The Body would then correspond with the alleged infringer and would also allow for any appeal or cross-complaint. Based on the circumstances, the Independent Body would decide on and impose any sanction.

- **After three notices the rights holder applies to an appropriate court (or other legislatively appointed authority) for adjudication and resolution** – It is not clear why ISP determined sanctions, including termination, are the logical end point for any
online copyright enforcement scheme. An alternative, in line with the 2005 notice and take down process, would be for rights holders to ask a court (or similar body) for an appropriate remedy/sanction, if the requisite notice process is ignored by the alleged wrongdoer. An independent and qualified body would review the matter and make any directions.

- Addressing protocols that allow for the dissemination of unauthorised content – If certain technologies are providing the means to access and disseminate unauthorised content, then as Cowdroy J suggested at first instance in Roadshow No.2, rights holders should be taking steps to bring those who facilitate access to, and who control the technologies to account.

Additional options may lie with the government, to consider extending the safe harbours to benefit all online providers; to revisit the exceptions to copyright infringement by way of a flexible fair use defence, or other specifically defined fair dealing exceptions; and to consider the relevance and application of authorisation in the context of technologies that were not in contemplation in 1968 (or even as recently as 2005).

WHAT DO USERS WANT?

While the obvious stakeholders – rights holders and intermediaries – have been forthright in advocating their positions, the Internet user has largely been unrepresented in the discussion about access to digital copyright. So what do users want?

- timely access to content – they don’t want to wait six months for their favourite TV series or movie, when they know that their overseas friends and family are watching them now
- ability to media shift on multiple platforms – they want to be able to move content around on the growing number of devices they are encouraged to purchase, so that they can access it when and where they want
- no double dipped royalties or rights slicing or splitting
- competitive access to legal content, at a cost that realistically takes into account the technologies involved in its production and distribution – they don’t want to pay $30 for a CD or DVD.

To date the rights holders have not directly linked the above to the online copyright enforcement discussion. If three strikes or another enforcement scheme were implemented, what will rights holders in turn do to improve the speed, price and accessibility of authorised content for Australians?

It has been argued that online copyright infringement is the result of a market failure, for example ‘a global pricing problem’ (Karaganis 2011, i). While this is not an excuse for infringement, these types of initiatives offer a positive opportunity for rights holders to better engage with users and to expand the online content market to the benefit of all.

A TIME TO REBOOT

The online copyright enforcement discussion has been (and continues to be) a difficult and overall negative one. Rights holders and ISPs are natural partners and online content users are clearly the beneficiaries of their collaboration.

ISPs do not approve, condone or authorise anyone engaging in copyright infringement (or in any other illegal online behaviour). They also believe that rights holders have primary responsibility for enforcing their rights, in a context where an independent and authorised body (and not a commercial enterprise) has oversight of the parties’ conduct and responsibility for imposing sanctions.

Stricter enforcement measures with increasing regulation, draconian sanctions and greater administrative and cost burdens are not a positive or sustainable solution. While ISPs may
have a role to assist rights holders (eg, by identifying an alleged infringer from an IP Address in appropriate circumstances) rights holders must take the lead.

Online copyright enforcement impacts the Internet industry as a whole including different types of rights holders, ISPs, other content providers, technology providers and users. All these parties should be engaged in the discussion, which in turn needs to be broadened to include how access to authorised digital content is being improved via distribution, monetisation and enforcement models that are better suited to emerging technologies and market expectations.

The impact of the Internet on access to information and content may not have been foreseen in the 1990s or in 2002 or even in 2005, but we now know (or think we know). It’s time to reboot and move forward.

REFERENCES

JOURNAL AND NEWS ARTICLES

Brown, Gordon. 2009. ‘The Internet is as vital as water and gas’ TimesOnline June 16, 2009, accessed on 24 July 2011. Available from: http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article6506136.ece


CASES AND LEGISLATION

Cooper v Universal Music Australia Pty Ltd [2006] FCAFC 187 (Cooper)

Copyright Act 1968 (Cth)

Copyright Regulations 1969 (Cth)

Order 15A(3) of the Federal Court rules

Roadshow Films Pty Ltd v iiNet Limited (includes summary) (No. 3) [2010] FCA 24 (4 February 2010) (Roadshow no.3)

Roadshow Films Pty Ltd v iiNet Ltd (No 2) [2011] FCAFC 82 (1 June 2011) (Roadshow no.2)

Telecommunications Act 1997 (Cth)

Universal Music Australia Pty Ltd v Sharman License Holdings Ltd FCA 1242 (5 September 2005) (Kazaa case)

PRESS RELEASES AND REPORTS

ENDNOTES

1. According to the Australian Bureau of Statistics at the end of December 2010, there were 10.4 million active Internet subscribers in Australia (excluding Internet connections through mobile devices). This represents an annual growth of 16.7% and an increase of 9.9% since the end of June 2010.

2. Division 2AA of Part V of the Copyright Act 1968 (Cth)

3. For example under Freedom of Information Act 1982, or where assistance is provided to law enforcement agencies under s314 of Part 14 of the Telecommunications Act 1997 (Cth)

4. An IP Address, or ‘Internet Protocol’ Address, is a series of numbers used to identify devices which connect to the internet. IP Addresses may be static or dynamic, which means that an IP Address may remain with the same user, or the same IP address may be allocated to different Internet users at different times.