The hole in their bucket

Essays & Reportage

Julian Thomas and Ramon Lobato

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Media companies' campaign against internet piracy suffered a major setback last week when a federal court judgement let internet service providers off the hook for their customers' illegal downloads. But the copyright wars are more than just a matter for the courts, write Julian Thomas and Ramon Lobato

Pirated discs for sale in Sao Paulo. Rene de Paula

THE PERTH-BASED internet service provider iiNet, which won a remarkable victory against Hollywood in the federal court last week, used to advertise its various broadband plans on commercial radio. Their ads began, “The question is, how big is a Gig?” The answer: “A Gig is about 500 hi-res photos or about 300 songs or five episodes of the Golden Girls. At iiNet we explain this to you so you can choose a broadband plan that's right for you... it's not the size of the Gig, it's how you choose to use it.”

During the case, iiNet’s CEO Michael Malone was apologetic about the ad. Was the last sentence the key point – that subscribers control what they do online? Or was iiNet really saying to its customers, we can help you steal Golden Girls episodes, and any other movies or music you want, and we’ll let you know when you’ve reached your quota? Fortunately for Australian ISPs, Justice Cowdroy thought differently: the Golden Girls reference was not an incitement to piracy, but a joke about the improbability of anyone wanting to download the Golden Girls.

The iiNet case is interesting in many respects, and not only as an instance of pragmatic legal reasoning combined with an impressive grasp of contemporary viewing preferences. It shows how copyright law has become a treacherous battleground between the internet and entertainment industries, each armed with completely different conceptions of the internet. Where the screen industries see a crime scene, replete with the evidence of wanton theft and destruction, ISPs see a basic service industry connecting customers to vital information resources all over the world.

From the point of view of the movie industries, the ISPs were there at the scene of the crime, profited from it, and are complicit in it. Someone must be responsible for the losses of the industry, and the ISPs are a better target than the innumerable individuals who have actually done the downloading. From the point of view of the ISPs, movies, pirated and not, and the means to get hold of them, can indeed be found on the internet, along with virtually everything else. Adult users make decisions about what they do online and must be responsible for their actions.

In 2009, when this case was just beginning, Communications Minister Stephen Conroy made some surprising remarks at an industry conference to the effect that iiNet’s defence belonged in an episode of Yes Minister. Last week, in the light of what he called iiNet’s “decisive victory,” he expressed his regret that the parties had not been able to talk through their differences earlier, and suggested that a code of conduct for ISPs, agreed with the screen industries, would be the best solution. A settlement of that kind might still be reached. But the judge’s comments in this case underline the difficulties of this kind of approach: copyright infringement is not as simple a matter as the studios suggest, and policing it would be very difficult.

The studios made copyright the focus of this battle, and copyright may now make the battle unwinnable. How did it come to this? The answer lies in that particular Hollywood world view, and its roots in the history of the movie
business. Despite its love for the next big thing and the latest special effects, Hollywood is a slow-moving beast. In some senses it is still living in the 1930s, the golden age of classical Hollywood cinema. This was a time when the vertically integrated studios made their movies in-house, had long-term contracts with stars, and controlled the cinemas that screened their films. The public had no choice but to see what local cinemas screened, and cinemas had no choice but to screen what the studios supplied.

This all changed with the invention of television, which brought movies to millions of households for the first time, and then again in the late 1970s when home video appeared on the scene. The mass take-up of video was a major drama for studio executives, who were slow to recognise its potential value and feared that it would cannibalise their revenue from cinemas. The 1980s witnessed many public battles between Hollywood and VCR manufacturers and software producers, most notably in the Sony vs Betamax case, when the studios’ key lobbyist Jack Valenti famously pronounced that “The VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone.”

This hyperbole died down once the studios came around to the idea of video as an additional sales outlet which could be slotted into their existing distribution system. But even then the transition was not easy, and the studios detested the idea of losing control over their distribution pipelines.

The movie industry’s dealings with ISPs reflect this history, and their argument throughout the iiNet case is in line with their longstanding belief that watching a movie through channels outside their own distribution network is unlawful. Through careful and concerted lobbying, the copyright industries have created an environment in which only a limited range of listening and viewing options – such as paying to see a movie in a multiplex or watching advertiser-supported content on commercial TV – are legitimate. Circulating content outside this framework is “leakage” at best, or “theft” at worst.

This approach means that Hollywood always seems to be on the defensive. It is as though their entire business were a leaky bucket, and their task is to madly plug up the holes with whatever they can find to do the job – prosecuting individual pirates or ISPs, installing anti-copying software on DVDs, raiding street markets, lobbying for ever tougher legislation, and so on. In this way, they can present themselves as the underdogs in a battle to protect the livelihoods of the artists they represent.

Of course, this is great PR for the studios, which are not known for their good corporate citizenship. Recent anti-piracy ad campaigns invite us to think about “what we’re really burning” and attempt to localise the issue by making a direct link between piracy and loss of jobs for Australian camera operators, scriptwriters and make-up artists. Personal appeals from figures such as Margaret Pomeranz and Joel Edgerton drive the point home: piracy is killing the Australian film industry.

This is powerful rhetoric, but it relies on a simplistic understanding of how media industries work and how media circulates. The leaky bucket scenario only makes sense if we keep our mindset locked into an old-Hollywood framework – a locked down model of distribution in which the only legitimate kind of consumption is licensed and paid for. The problem for the studios is that media has never circulated like this. The current era of strict copyright enforcement is a historical anomaly. Until relatively recently, what we now call piracy was the norm rather than the exception.

IF WE BEGIN our history of the film industry in 1900 rather than the 1930s, for example, then we get a very different image of how the film industry operates. Early Hollywood was a hotbed of copyright infringement. Piracy was so common that film companies would make sure their trademarks appeared in the background of key scenes so that their films could not be passed off as those of a rival producer. This scenario has come full-circle in the age of viral online video, when advertisers use product-placement in popular YouTube clips as a way to make money from unauthorised circulation, which they see as not only inevitable but desirable.

Increasingly complex intellectual property laws have done little to alter the fact that words, pictures and sound circulate in ways that exceed and frustrate regulation. In copyright law these are seen as infringements of the rights of content owners, but sometimes it may be more useful to recognise these as inevitable features of the media. Sharing a movie, like other informal forms of media circulation, may or may not be “piracy”, but that may not be the most important fact about it.
This conceptual short-circuit reflects the degree to which the copyright industries have set the terms of the piracy “debate”, which rarely strays far from an over-simplified understanding of how media industries work. The piracy discussion has been a series of moves and counter-moves around the same old leaky bucket argument, an argument defined by the copyright industries rather than by audiences. Moving away from the leakage scenario produces quite a different understanding of what media is, how it circulates, and how it should be regulated.

The fact is that paid consumption is only one part of a much larger media ecosystem. Take music, for example: we listen to it in shops, at restaurants, in workplaces; songs appear in TV shows, advertisements, jingles; people make mix-tapes and swap tracks with each other. Some of these activities generate revenues for copyright holders, others do not. But all are integral to our immersion in a musical culture, and they help us become lifelong music listeners and consumers.

Unfortunately, the debate about copyright tends not to acknowledge the importance of this informal consumption. Nor does big media, which is suspicious of any activity from which they do not directly benefit. Yet informal circulation, generally unlicensed and unmanaged, is one of the foundations of paid consumption. It is absolutely vital to the long-term sustainability of cultural industries.

This is why we now need to expand our view of what constitutes media business. A teenager who listens to illegally downloaded MP3s of her favourite band may also be a proudly paid-up member of their fan club, own several items of legally purchased merchandise, and be a paying regular at every gig. Yet the music industry’s refusal to acknowledge the role of informal circulation means that it can’t acknowledge these other potential sources of revenue. This studied ignorance does little to help record companies out of their current structural crisis.

The same is true of film. The Motion Picture Association of America, which represents the major studios, spends much of its time condemning the high rates of DVD piracy in the developing world. But many of these black economies for pirated Hollywood movies will one day ripen into legitimate markets. As the media critic Toby Miller argues, piracy breeds the “Hollywood habit”: it familiarises global audiences with American cinema and promotes a lifelong love of Hollywood products.

China is a good example here. Though it is the target of the MPAA’s most vociferous criticism, the People’s Republic is also an increasingly profitable market for the studios. Box office takings in China rose 44 per cent last year, on the back of a construction boom in multiplex cinemas. Hollywood will share in the benefits of that growing market, even though US films are still subject to an import quota. Yet none of this would have been possible were it not for a generation of Chinese consumers raised on pirate DVDs of Hollywood movies.

Mainstream media businesses benefit from informal media activity in other ways as well. Informal fan networks have long provided studios with valuable market intelligence and ideas for new products. More recently, the rise of social media and Web 2.0 has been driven by the perceived need to draw upon the creativity of amateurs to sustain and grow markets for commercial media products. While Hollywood sometimes paints broadband-enabled teenagers as the enemy, the same people are at the heart of its business strategy.

The formal and informal economies of media are overlapping and interdependent. The challenges for the media industries now are not problems of law or policy; they are to do with adjusting highly structured distribution systems and market strategies to the pace of technological change. Existing copyright protections already provide more than enough shelter for these businesses; it should be plain that the solutions will not be found in the courts. It is not that the industry must now admit the importance of informal circulation. But they would do well to accept its existence, and work with it.