

CURRENT INTERNET ISSUES

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Part 1: OSPs, ideology and copyright

- An update on digital copyright law changes

Bleeding to death?

“The disincentive to invest in artists as a result of free-riding is a particular problem in the music, film and videogame industries because they are characterized by large investment costs and a relatively high risk of failure”

- Minister of Commerce (NZ), December 2009

Lies, damned lies and statistics

- 2008 in UK, 6.5 million users at some time downloaded illegally
- Game called 'Spore' released in UK recently, within 10 days half a million pirate downloads using P2P
- Shira Perlmutter of IFPI: 95% music downloads illegal
- But what is true extent of problem?

Selection of studies estimating the sales displacement effect

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

Source: Department for Business Innovation & Skills. Consultation on Legislation to address illicit peer-to-peer (P2P) file-sharing. 16th June 2009. p47.

But no doubt there is a problem

Estimates range from 0% to 20% total revenue for music and 2% to 9% for film/TV but its still unpleasant

- What to do?
- One approach is education and persuasion....

Motion Picture Association

- “YOU WOULDN’T STEAL A CAR
- YOU WOULDN’T STEAL A HANDBAG
- YOU WOULDN’T STEAL A TELEVISION
- YOU WOULDN’T STEAL A DVD
- DOWNLOADING PIRATED FILMS IS STEALING
- STEALING IS AGAINST THE LAW”

Sue the b_____s

- Users, but real enemy are indirect providers
- US employ 'vicarious', 'contributory' liability and 'inducing' infringement (eg Grokster)
- Commonwealth have joint tortfeasor and 'authorizing' (eg Ong v Lotus in Singapore; Sharman in Australia)

And amend legislation

- WIPO Copyright Treaties
- US DMCA
- Australian Copyright Amendment (Digital Agenda) Act
- EU Information Society and E-Commerce Directives etc..

But P2P operators

- Increasingly sophisticated
- Legislation generally one if not two steps behind

By the way, what is P2P?

- A form of file sharing on the Internet
- Files shared directly from digital device to digital device without need for intermediate server
- Various models, eg Kazaa and BitTorrent
- WinMX a common software used in Hong Kong
- No easy target because no storage

What the RHs want

- Get governments to legislate against OSPS
- Even consider criminalizing
- Make OSPs police officers

Common features

- OSPs to pass notices between RHs and AHs
- Often government sponsored negotiations of codes of practice
- Legislation packages provide 'safe harbours'
- Will deal either 'horizontally' with all OSP liability aspects or only with copyright implications

But..

- As noted, don't cover P2P infringement as no storage
- So notice and take-down ineffective
- Thus voluntary systems an option
- Incorporate notice and notice systems plus contractual measures for possible disconnection

USA – DMCA (current)

- Notice and takedown for ‘storage type’ OSPs
- Adopt/reasonably implement termination policy for repeat infringers
- OSPs get safe harbour
- But only tiny % users been cut-off, OSPs want court order
- As for almost all countries no statutory obligation on OSPs to deal with P2P types

Hard bits

- Differences appear once notice systems exhausted
- Who should deal with AHs?
- Should Internet be disconnected?
- How should costs be split between OSPs and RHs?
- Need judicial guidance?

Some countries have got tougher

- France: “Creation et Internet” graduated response (3 strikes and out)
- South Korea and Taiwan have similar provisions – though not as tough
- Most other countries still considering their position (UK, Japan..)
- What are we doing about it?

Lets pause here

As Miss Yvonne Choi (Commerce and Economic Development Permanent Secretary) said 17 November

“ We believe that the refined proposals have struck a reasonable balance among the interests of copyright owners, users and Online Service Providers (OSPs)”

However as Netanel said

- The balance is “precarious”
- “Digital technology threatens to upend copyright’s already uneasy accommodation of public access with private ownership”

Copyright law

- Yes, traditionally all about balancing rights
- Creators incentivized by monopoly in expression
- Users can access and take ideas
- Classic examples; Baker v Seldon, Cuisenaire v Reed

But even the judges are saying

“Eventually, copyright laws might well evolve to become completely unrecognisable. With a considered approach that eschews deference to copyright paradigms of the past, I am confident that a just and efficient outcome may be secured for future generations”

Andrew Ang J. 21/12/09 Singapore HC,
RecordTV v MediaCorpTV

Is Internet a gamebreaker?

- There are the technical challenges
- Ease and speed of copying
- Access and copying blurred
- But it has also created a new frontier for idealogues
- Copy left v copy right, the language of a cultural war

Impact on 'ordinary' infringement

- Illustrated in recent Australian High Court decision of IceTV
- On-line TV scheduler took essential slivers of information from rights-holder
- Against considerable authority, not substantial

Practical and policy issues

- What is a work if first produced in digital form?
- If nature elusive how do you measure similarity?
- Who are the 'authors'?
- Digital compilations constantly evolving
- New ideas on freedom of expression influenced final decision

Ideological issues

- Adoption of rhetoric from both 'sides' ("DOWNLOADING PIRATED FILMS IS STEALING")
- Lessig in "Remix" says an entire generation will be criminalized if IP law left as it is
- And, by the way, is use of terminology making moral claim, legitimate?
- But the copy left are just getting into stride

Lessig

- Wider issue is call to diminish power of copyright
“...free resources have been crucial to innovation and creativity; that without them creativity is crippled. Thus, and especially in the digital age, the central question becomes not whether government or the market should control a resource, but whether a resource should be controlled at all” (The Future of Ideas).

- “Each day brings some new Internet horror story about the excesses of IP law”
- -- reviewer of Boyle’s “brilliant copyfighter’s latest book”
- Netanel – wants a new ‘democratic paradigm’ to ward off the ‘neo-classicist’ approach to copyright rights in the web environment
- But there is more, much more..

Pirate Party Declaration of Principles

- The view is: ideas, knowledge and information by nature non-exclusive
- Reduce commercial copyright – eg monopoly to create copies shrunk to 5 years and more freedom to create derivative works
- All non-commercial gathering, use, processing and distribution of culture expressly encouraged

'Copyfighters unite'!

- Appears to be widening crevasse between some users/academics and rights holders
- Internet largely responsible
- RHs winning the battles but will they win the war?
- Parallel issues in politics (censorship)
- Freedom of expression in fact of concern to Hong Kong Commerce and Industry Panel in OSP issue, to which we now turn.....

The local response



Hong Kong approach - history

- December 2006 consultation document released for public and stakeholder input.
- April 2008 Legislative Council issues preliminary proposal
- 17th November 2009 refined proposals announced
- Appears an amendment bill likely in latter half 2010

Summary of 'Digital' proposals (11/09)

- Communication right plus criminal sanctions especially for “streaming”
- Statutory limitation of liability for OSPs
- Exception for temporary, technical reproduction
- Additional damages to be refined
- New media shifting exception for sound recordings

Original OSP proposal

- Initial government response on OSPs threefold
 - - an exception for caching by OSPs
 - - a voluntary code of practice (CoP) which would be an adjunct to existing authorisation liability.
 - - 'Norwich Pharmacal' procedure would stay as the method by which information (name, HK identity card number and address) about OSP customers can be gained.

1. Caching exception to liability

- Common exception around the world.
- ISPs during their operation will temporarily store web content on their proxy servers so it can be quickly retrieved in future requests.
- But conditions – communication must be non-infringing; the content not modified; OSPs would comply with conditions of copyright owners.

2. Code of Practice (CoP)

- Voluntary CoP be drafted by users, owners and OSPs.
- CoP be adjunct to authorisation liability; if OSP followed CoP, a factor against them having authorised infringement.
- Authorisation restricted act - s 22(2) CO. At present OSP only liable for customer actions if authorises action or joint tortfeasor.
- System favoured by government because greater flexibility, less need to update legislation.

3. Norwich Pharmacal

- Under current HK law if copyright owner wants information about customer from OSP needs High Court discovery Order.
- The factors were summarised in First Instance decision , Cinepoly Records v Hong Kong Broadband Network Ltd [2006] HKCFI 84.

Norwich Pharmacal cont

- Serious tortious or wrongful activities, evidence must be cogent and compelling.
- Alleged wrongdoer is a person whom the applicant *bona fide* believes to be infringing his rights.
- Party against whom discovery sought has caught up or has become involved in such activities, thus facilitating perpetration or continuation.

Norwich Pharmacal cont

- Copyright owners say procedure slow and expensive..
- Government thought there was insufficient hardship on copyright owners to justify.
- Stance prompted by public concern over abuse of the system, concern over privacy, impeding dissemination of information and that additional costs for OSPs would stagnate Hong Kong's aspirations to be Internet hub.
- Privacy Commissioner for Personal Data made submissions against it

November 2009 Proposal

- Preliminary proposal confirmed except regards CoP.
- Voluntary CoP abandoned.
- Key reason - tripartite forum wanted certainty and greater incentives for OSP compliance.
- Wanted statutory limitation of liability regime for OSPs provided they complied with certain conditions.

2009 Proposal cont

- Proposal clear in rejecting “graduated response” until outcomes in eg France, South Korea and New Zealand.
- Main reason for ‘wait and see’ is civil rights implications of terminating internet connection.
- Government also emphatic on keeping “Norwich Pharmacal” or any system which ensured that identity disclosure was at the scrutiny of the Court.

Likely process in Hong Kong

- USA type take-down system for 'storage' OSPs
- For P2P , likely to be similar to UK? But no indication that 'technical' measures be included and exact procedure
- Must wait and see for final proposal

New Zealand: Background

- S 92A –ISP “must have policy for terminating accounts of repeat infringers”
- Select committee removed it
- However, s92A reinserted at last minute and passed April 2008
- Working group set up to create Code of Practice to govern s92A.

A short time later...



à Versailles à Versailles du 5. Octobre 1789.



Misapprehension & hysteria

Concerns:

privacy, remedy disproportionate, freedom of speech & dissemination of information, scope of the “ISP” definition (schools included?), due process, burden on ISPs, and more..

The new proposal

- Deals solely with P2P infringement (s92A)
- Split made as P2P infringement biggest problem so streamlined procedure
- As P2P is a network, notice and takedown pointless. Thus only services which store infringing info are subject to it.

ISP definition

- Thus, two ISP definitions proposed.
- P2P version to cover only those who can match dynamic IP addresses with account holders and store the information.
- Storage definition to cover many organisations eg business, govt, libraries etc.(ss 92B and C remain with safe harbours)

Safe Harbours

- P2P ISPs must abide by notice system. If act as conduit of notices and store information and comply with Court orders for suspension they will be immune to prosecution by RHs and AHs.
- Similarly if storage ISPs abide by the notice and takedown system they will be immune.

The P2P system

- A three notice procedure with rigid time frames.
- Reasonable evidence of infringement must be sent to ISP within 20 working days
- ISP matches IP address to AH and passes first notice on (education notice)
- A second notice (cease and desist) will be sent at least 10 working days after first, if infringement continues.
- A third notice (advisory) is sent at least 10 days after the second and only after the third infringement has occurred.

P2P system response

- A counter notice from AH can be sent at any stage to ISP or RH.
- RH may commence CT proceedings if 3 infringements occur from same AH, in the appropriate timeframes.
- Process must occur within 9 months, otherwise RH must start from first notice.
- Other option - court.

Copyright Tribunal role

- Copyright Tribunal to accommodate new claims.
- Maximum value of a claim \$NZ 15,000
- To protect identity only CT can demand identity of AH from ISP, but only for its process (RH must go to court to get identity of AH to sue).
- No representation by lawyers, decisions made on papers

Court

- New remedy – can suspend infringers' accounts up to 6 months.
- Thought appropriate as only court can adequately consider: BORA, multiple users, business effects and vulnerability etc.
- If RH went to court, HCR 8.25 can be used to get identity and proceed.

Key points

- NZ use 'graduated response' (3 steps)
- RHs expect to issue 15,000 notices to ISP in first few months
- New role for CT - quick fire remedies
- May 'hear' 1800 cases in first year
- Court can disconnect
- Law expected in July
- More efficient/effective?

So what now?

- Will this be finger in the dyke
- The web constantly re-inventing itself
- History of copyright – new technology begets new copy methods leads to new rights
- New techniques will arise plus the power of the (young) people
- So is Internet simply another frontier or a new paradigm?

Part Two: trade marks

Also threatened by Internet

- Copyright not only IPR facing new threats
- Search engines sell 'keywords' – user may generate an advertisement
- Is there an infringement or is this simply the same as the ... “Yellow Pages”

Cases

- Wilson v Yahoo! Ltd
- - but defendant did not use 'Mr Spicy' mark in sponsored link to Sainsbury
- L'Oreal v eBay (22 May, UK HC)
- - arguable that there was 'use' and was 'in relation to' but need ECJ to decide
- - nor was eBay a joint tortfeasor

Google France

- Sued by Louis Vuitton and two others
- Cour de cassation asked ECJ for help
- Advocate General delivered opinion on 22/9/09
- ECJ to give its decision shortly

Issues

- Whether G in selling a TM Adword infringes
- Whether G infringes when Adwords program generates the ad in response to user query
- Opinion - both use types do not infringe
- First type – no use in relation to goods/service covered by the registrations
- Second type – was use re goods/service but mere display of relevant site not “confusing”

In short A-G says

- Offer and acceptance of keywords not infringing
- TM owner can't prevent registration of keyword OR use to generate link
- Moreover argument that famous mark has special rights failed
- No 'contributory infringement'

The problem of “use”

- Google-type cases raise this thorny issue
- What is use?
- What is “in relation to goods or services”?
- What about ‘in a trade mark sense’?
- What if another function is affected?

Hong Kong s 18 TMO

- Questions the same in this jurisdiction
- Is there 'use'?
- 'Course of trade'?
- Use 'in relation to goods or services'?
- Likely confusion/impact on essential function(s)?
- Note, not concerned with use in an actual advertisement
- ECJ to have next say, will not be final word....