
Domain Name Update

- ccTLD registries
- Commercial and business entities
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- ISPs and connectivity providers
- Non-commercial domain name holders
- Registrars
- Trademark, intellectual property, anti-counterfeiting

In Berlin, the Board failed to recognise a non-commercial Constituency because it resolved that the non-commercial domain name holder's submission for participation in the Constituency was inappropriate for recognition. According to ICANN, the non-commercial Constituency proposals were not mature enough to accept. Commentators have argued

that this sought of move rails against the spirit of the white paper which advocated a bottom up consensus and a firm commitment to 'initiate a balanced and transparent process'. The Board has recognised that non-commercial involvement should be involved as early as possible in the DNSO organisation process. At present, the other Constituency groups are debating parts of the WIPO plan. Although ICANN did not accept the WIPO plan, they have directed the DSNO to consider the following issues:

- Famous Trademarks
- New Top-Level Domains
- Dispute Settlement Mechanisms
- Best Practices

The ICANN Board has requested that by July 31 1999 the DNSOs submit recommendations concerning a uniform dispute resolution policy for

registrars in the .com, .net, and .org TLDs.

The deadline for a non-commercial Constituency consensus application is June 21, so that representatives of this Constituency can join the provisional DSNO Council. In my opinion, WIPO proposals will only work through mutual agreement between system operators and Internet users. Self-regulation essentially exists through the voluntary compliance with regulations that are developed by the community of interest. If concerns of bias towards big business are to be countered, involvement of non-commercial net users will be vital to the process of Internet regulation.

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Digital Killed the Recording Star?

Sean Simmons, Phillips Fox

This article examines whether two recent developments in digital technology signal an exciting new haven for music lovers, or threaten to unleash a wave of copyright home invasion which may swamp the careers of many musicians and the recording and publishing companies they rely on for survival. Whatever the outcome, the music industry's business model is being changed forever.

SIDE A: DUAL DECK CD RECORDERS

The Recordable/Rewritable Dual Deck Audio CD Player¹ made a low-key arrival into Australian hi-fi stores earlier this year. This is the technology that many music lovers have been waiting for since they heard their first CD back in 1982. CD burning (or

duplicating) is no longer the domain of computer buffs with access to slick office hardware. With the same ease of its twin tape-deck counterpart, consumers can now copy their favourite CDs at perfect digital sound quality in the comfort of their own lounge rooms for the cost of a \$3 blank CD.

CD burners have been around for some time in the computer world, principally to make copies of CD-ROMs and back-up copies of computer files. Burners also allow private users and organised music pirates to dub copies of audio CDs without ever having to visit a record store or invest in recording artists. Dual Deck CD recorders are a user-friendly, purpose-built packaging of this technology.

Burnin' and Lootin'

Burning copies of CDs without the copyright owner's authorisation violates copyright laws. Music copyright exists as a means to encourage and protect the economic interests of songwriters and performers and the publishing and recording companies who invest in their talents. The *Copyright Act 1968* (Cth) provides for distinct and separate copyright in original songs and sound recordings of those songs. By virtue of sections 31 and 84 of the Act, the copyright owners of original songs (musicians and publishers) and sound recordings (usually the record companies who finance the recordings)² have the exclusive right to reproduce the works in a material form, eg on a CD or other

audio format. These physical reproduction rights are known as "mechanical rights". Under section 36(1) of the Act, copyright is infringed by anyone who does any act comprised in the copyright without the permission of the copyright owner. Simply stated, every time a consumer burns a CD without authorisation they are committing an unlawful act of copyright piracy.

If Dual Deck CD recorders catch on in the marketplace (and the tantalizing cost savings to music fans suggests they will) this technology poses a greater scare to the Australian music industry than the relaxation of parallel importation laws³ which continues to generate considerable brouhaha in the business. That debate is about the price of CDs – this is about their very existence. The motto "if you wanna dance, you've gotta pay the band" which is axiomatic to the survival of the entertainment and arts industries is under serious challenge. Dual Deck CD recorders fly in the face of music copyright, the income streams that flow from it and, in part, the cultural richness of this country.

The International Federation of the Phonographic Industry (IFPI)⁴, the industry's co-ordination, lobbying and research arm estimates that globally one in three sound recordings is a pirated copy and that the unauthorised duplication of CDs has already reached 270 million units. The IFPI also estimates that music piracy is a US\$5.3 billion annual industry – a figure many times greater than the entire Australian music industry. The proliferation of pirated CDs in the Australian marketplace attracted considerable media attention on 19 May 1999 when, following months of surveillance activity by Music Industry Piracy Investigations (MIPI), the largest singular cache of counterfeit sound recordings ever to be seized in Australia was destroyed at the Ryde Waste Management Centre in Sydney.⁵ Until now, the pirate CD "market" has been dominated by illicit production lines in China, Taiwan, Macau and Bulgaria⁶. The introduction of Dual Deck CD

recorders could soon see the pirate market overtake the legitimate market altogether.

Fight Fire with Fire

The most direct (yet equally unlikely) response to this hi-fi technology would be for the Federal Parliament to show "zero tolerance" and prohibit its importation and sale in Australia. The analogy can be drawn to prohibiting radar detectors in cars. Arguably, the sole purpose of that technology is to facilitate the violation of traffic laws. The main attraction of Dual Deck CD recorders is that (wittingly or not) consumers can now go undetected in systematically infringing the *Copyright Act*. It should be pointed out that this technology may also be used legitimately by musicians to make direct digital live recordings from home studios and then to dub copies from the "master". This effectively enables garage bands to become their own do-it-yourself recording companies.

Under s.36(1) and s.101(1) of the *Copyright Act*, copyright will be infringed by anyone who authorises⁷ the doing in Australia of any of the copyright owner's exclusive rights without licence.⁸ In the late 1980's the question of authorisation liability of manufacturers of audio equipment with cassette dubbing facilities attracted the attention of the Courts. In *CBS Songs Ltd -v- Amstrad Consumer Electronics plc*,⁹ the multinational record company CBS sued a manufacturer of twin tape-deck stereos claiming that the manufacture and sale of this (now commonplace) home recording equipment was authorising blatant copyright infringements by consumers. The House of Lords rejected CBS' claim in finding that because the equipment could be put equally to legitimate and illegitimate uses, and that Amstrad had no control over the actual use of the equipment by consumers, Amstrad was not authorising the illegitimate activities of consumers.¹⁰

As discussed earlier, Dual Deck CD recorders can be put to both copyright-friendly and pirate purposes. Given the backdrop

provided by the *Amstrad* decision, manufacturers need not fear liability under existing copyright laws. Their immunity could be further assured by affixing warnings to the equipment and in sales brochures indicating that certain uses of the equipment may violate copyright laws - thereby demonstrating positive steps to discourage copyright infringements by consumers.¹¹ Hi-fi manufacturers and retailers are not left to attempt to duck responsibility for copyright infringements by offering the same argument which has been used recently by ISPs and telecommunications networks.¹² That is, they merely provide a mechanism and do not themselves breach any copyright. This simple logic has been likened by music lawyer Shane Simpson¹³ to the gun lobby argument that "it is people, not guns, that kill people".

The copyright collecting society responsible for collecting and distributing mechanical royalty income on behalf of publishers and their songwriters is AMCOS¹⁴ - the Australasian Mechanical Copyright Owners Society. AMCOS performs the same function for recording and synchronisation royalties as APRA¹⁵ does for public performance royalties. Under the *Copyright Act* each time a musical work is reduced to a material form, for example on a CD, the copyright owner's authorisation is required. That authorisation is obtained through an AMCOS licence for virtually all mechanical copying of songs in Australia or New Zealand. Dual Deck CD recorders threaten AMCOS' (and its members') financial viability. One would expect AMCOS and the Australian Record Industry Association (ARIA) would be leading a vanguard to combat this technology. However, to date, no official policy statements have been issued.

Blowin' In The Wind

The practical answers will likely be left to the recording and publishing companies themselves. They are the interest group with the most to lose. In the hands of politicians lobbied by omnipotent consumer groups, the

best outcome the music industry can expect might be something akin to the failed blank tape levy. Under that scheme, which was introduced as an amendment to the *Copyright Act* in 1989, a portion of the selling price of all blank audio tapes (typically purchased to infringe copyright), was to be returned by vendors to copyright owners (via their collecting society) to compensate them for loss of royalties due to home taping. In 1993 the blank tape manufacturers successfully challenged the constitutionality of the levy in the High Court¹⁶. The levy was repealed and has not re-surfaced. Conveniently, almost all of us have now forgotten that dubbing cassettes on our ghettoblasters remains illegal. It would be a disappointing outcome to again sacrifice the integrity of music copyright in the face of this new technology by introducing another anonymous tax that may or may not find its way back to the artists whose works are being exploited.

Digital encryption offers a more effective answer. Encryption technology allows digital information, such as the information stored on CDs, to be scrambled or encoded in a manner which would prevent after-market duplication. CDs in their present format contain no copyright security whatsoever. The major multinational recording and publishing companies are presently considering implementing a CD encryption standard for all new CDs. The race would then be on for pirates to attempt to crack the codes. At least then it would be the infringers and not the copyright owners playing catch-up. A downside is that encryption does not provide a solution for existing and already distributed back catalogues which provide essential cash flows to enable major record companies to justify investing in new talent. It is too late to encrypt the White Album that sits invitingly beside your friend's Dual Deck CD recorder.

For some, the preferred answer would be to revert to traditional non-copyable technology, ie vinyl. Vinyl releases already remain the preferred

medium for hip-hop and dance music genres, though they are expensive due to poor economies of scale. Going back to wax would be welcomed by those of us with unsung treasures left sitting in empty milk crates in the corner of our living rooms. It may also re-emphasise the aesthetic of the album as opposed to the disposable hit single which is too easily found amongst filler tracks by hitting the skip button on CD players.

No doubt this is just being nostalgic. Studio recordings are mastered digitally on Digital Audio Tape (DAT) and CDs are digital. Very little audio integrity is lost between the engineer's headphones and the lounge room listener. The internet is also digital and, with its ability to offer unlimited on-line catalogues to listeners, ultimately holds the answer (albeit amongst a mine-field of problems of its own). Smart manufacturers would be better served by installing modems into their CD players than recording decks if they want to survive in the final wash-up. Whether they prove to be only a short term curio or otherwise, Dual Deck CD recorders represent a significant step in the existing trend for pop music to go from discs to downloads.

SIDE B: MP3 AND BEYOND

Music fans worldwide have started unplugging their jukeboxes and are switching to MP3 files on the internet to tune into the latest hit songs. In techno-speak, MP3 (MPEG-2 Audio Layer 3) is a compressed data format which reduces the size of a music audio file from a 30 megabyte .WAV file to a 3 megabyte MP3 file. The name MP3 is derived from Moving Pictures Expert Group Level 3, an international group of audio experts formed to establish standard file formats for use on the Net.¹⁷ Because of their compressed format, MP3s enable enormous audio data files to be rapidly downloaded from the internet. MP3s play music at digital quality comparable to CDs and can even be channelled through conventional stereo systems.

MP3 files (songs and even entire albums) are available for free

download from a multitude of fan sites on the internet. All it takes is a Net search for "mp3 downloads" or just "mp3". No access codes, firewalls or secret keyways. Your search will arrive at a list of homepages where you can search for songs by artist or title or browse from a list of songs. You then just click on the song and download. Your kid brother can tell you more about all of this hi-fi sci-fi. Despite the presence of tens of thousands of legitimate songs on the Net, the best-known music is still pirated. The legitimate MP3 files are typically songs by "baby bands" signed on little-known record labels trying to tap into an audience they could not otherwise access through mainstream retail outlets and radio stations. Very few established artists share their sense of on-line philanthropy.

MP3 files can be created, played, downloaded and even burned onto CDs by using software called data rippers, encoders and plug-ins which are all available for free download on the internet. An MP3 player is included in Windows 98. To use an MP3 file, you do not need any hardware other than a sound card, speakers and your basic computer. To create MP3 files of your favourite CDs (and thus become an on-line pirate or "leecher"¹⁸ in the new jargon) all that is required is a CD-ROM drive and freely available software to encode the audio CD tracks to the MP3 format.

MP3 also offers a low-cost vehicle for willing musicians, publishers and record companies to distribute their music to on-line punters via the internet. The emerging US record company GoodNoise (<http://www.goodnoise.com>) operates exclusively in the MP3 format. The 'official' MP3 website (<http://www.mp3.com>) is a copyright-owners' approved site where all files have been cleared for on-line distribution by the musicians or other copyright holders. From this page you can download legal MP3 files and all the software you need to play and create them.

Go to Rio

For those who need to be wired for sound, portable MP3 players have now arrived as the ultimate entertainment accessory for Net-savvy music lovers. The market leader is Diamond Multimedia's "Rio" PMP300. It is about the size and weight of a deck of cards, contains no moving parts and holds up to an hour of CD-quality music in the MP3 format. The Rio includes an onboard encoder for converting CDs into MP3s and MP3 files can be loaded onto the player via a parallel port from the computer's CD-ROM or straight from the Net. Portable MP3 players are also now becoming standard in prestige European cars.¹⁹

The Recording Industry Association of America (RIAA)²⁰ – a body not known for being shy about protecting its rights – recently issued proceedings in the US against the manufacturers of the Rio, seeking an injunction to restrain its sale on the basis that the device indiscriminately plays and re-records both pirated and non-pirated music. The first rounds of the RIAA's lawsuit have been unsuccessful and Rio continues to sell like hotcakes.

Is it OK Computer?

The answer to the MP3 legality question is yes and no. There are many legal MP3 files which have received the copyright holders' permission for on-line distribution rights. MP3s that have not attained this permission are not legal. The youth culture (which is the music industry's critical demographic) is either blissfully unaware that what they are doing is illegal and consider the internet to be a copyright-free zone, or view existing copyright laws as inconvenient and outdated. The IFPI estimates that free downloading of recordings from the internet currently makes up .3% (and rising) of the global market. That figure in key music industry incubators like college campuses²¹ is far greater.

Uploading and downloading sound recordings via the internet amounts to reproduction – one of the exclusive

rights conferred upon copyright owners. These activities will infringe section 36(1) of the *Copyright Act* in circumstances where the copyright owner has not given permission. Anyone who authorises those activities may also be liable. A website or bulletin board operator may therefore be liable for any infringements that occur as a result of users of their sites uploading or downloading pirate material.²²

On 26 February 1999, the Federal Government released its draft *Copyright Amendment (Digital Agenda) Bill* 1999²³. The goals of the amendments are to clarify the scope of copyright in the on-line environment and to continue to provide an incentive for the creation of original works whilst allowing reasonable access to those works through the internet and new communications technology. The draft Bill also seeks to promote certainty for communications and information technology industries with respect to copyright, and to ensure that the technical processes which form the basis of the internet, such as caching and hyperlinking, are not jeopardised.

The central amendment in the draft Bill is the creation of a new right of "communication to the public". This right extends to electronically transmitting material, or making material available on-line. The drafting contains no reference to specific forms of technology in order to ensure that it will not become outmoded by future technological developments. The communication right will replace the existing right to broadcast and the right to transmit to subscribers via a diffusion service. The enactment of the proposed amendments will place it beyond doubt that downloading, emailing and hosting unauthorised MP3 files on the internet will infringe the rights of copyright owners in the same way as do burning physical copies and making unauthorised live performances. Whilst the legality of unauthorised distribution of copyright material on-line is not very controversial, enforcing these laws is,

and will continue to be, an extremely complicated task.

The draft *Copyright Amendment (Digital Agenda) Bill* 1999 also provides new enforcement measures including the imposition of criminal sanctions and the provision of expanded civil remedies. The amendments anticipate that devices may be developed, or already exist, which would be capable of circumventing technological measures (eg, encryption) designed to prevent unauthorised copying or communication of material. Under the proposed amendments the development and distribution of on-line circumvention devices will attract criminal sanctions. Curiously, actual use of circumvention devices will not be prohibited.

Raging Against the Machine

The on-line playground presently being enjoyed by music pirates has attracted the attention of multinational and Australian recording companies. The RIAA, which represents the major US record labels, has attempted to shut down hundreds of websites containing pirate MP3 material by sending legal threats, "informative" letters to university administrators and, in some cases, filing lawsuits. This legal bluster has done little to stop the proliferation of the format. The anecdotal evidence is that pirate MP3 sites are an impossible moving target – as soon as one site closes, the same material pops up elsewhere at a new URL address. The distribution has been driven more underground, but it is still readily available. An on-line subculture has already emerged where music buffs and Netheads do battle to see who has the best collection of MP3s on their sites.

For a short time earlier this year, some good faith was being shown by all interest groups in relation to adopting low-level content regulation of the internet.²⁴ Senator Richard Alston, the Minister for Communications, Information Technology and the Arts issued a press release²⁵ on 19 March 1999 (largely in response to pornography dissemination) which foreshadows a regime to regulate the

carriage of content over the internet. The proposal is for the Australian Broadcasting Authority (ABA) to act as first point of contact for complaints about internet content. If the ABA considers the material "seriously dangerous", it will require the service provider to prevent publication of and access to the content. The Government has signalled its intention to establish this regime as soon as practicable.²⁶ The major ISPs, which are represented by the Internet Industry Association (IIA) have called for a rethink of many of the key details of the proposal fearing that the local internet industry will suffer from regulatory impediments to the efficient access to on-line material.

A similar role is already being carried out by record company staffers in monitoring the internet for unauthorised files containing copyright sound recordings. If unauthorised files are detected and the copyright owner notifies the hosting ISP, then that should be enough to ensure the site is taken down. An independent arbiter such as the ABA should not be necessary as direct copyright infringement does not involve controversial subjective considerations. First responsibility for on-line infringement should remain with the creator of the infringing material. However, once on notice, the ISP which hosts the site should share responsibility if it disregards notification and enables an infringing site to continue to be accessed on its network.

This position is consistent with the new Authorisation Liability²⁷ provisions contained in the draft *Copyright Amendment (Digital Agenda) Bill 1999*. Those amendments recognise that generally, ISPs have little control over material that travels through their networks but is hosted on other servers. Similarly, ISPs will not have any relationship with the persons who place that material on those servers. However, ISPs have greater control over the material that is placed on their own servers. Therefore, under the proposed amendments ISPs will need to take careful steps to avoid infringing

activity taking place on the websites they host.²⁸

The Bright Side of Life

Fans, writers and performers, and the entire music industry stand to benefit from a properly managed on-line music format. Fledgling recording artists could gain access to audiences that they could never dream of reaching through local radio and retail outlets. Independent and major record companies alike could explore the possibilities of 'e-tailing' music directly via the Net straight onto consumers' hard-drives or CD-ROMs. Purchasers could expand their music collections without subsidising pressing, distribution and retailing costs. These efficiencies also present greater bottom-line royalty potential for recording artists.

The multi-national record companies have already recognised the revenue potential of distributing music via the internet. For example, BMG and Universal have recently launched "getmusic"²⁹ an on-line alliance which sees the two record industry giants joining forces with a shared on-line distribution platform. At present, getmusic only offers on-line purchasing of physical recordings, but it is expected to extend to on-line audio files by the end of the year. This initiative is typical of the emerging strategic coalitions being forged between major entertainment and media industry players as they move towards a shared digital future.³⁰ It is also predicted that an increased emphasis on record label brand recognition will be critical to the major record companies' survival in the digital marketplace.³¹

The necessary software technology to make this digital dreaming secure (and therefore economically sustainable) is arriving quickly. The shortcoming of MP3 is that it is an open format with no embedded encryption or copyright protection. Dozens of other software developers and coalitions are lining up in hope of becoming the new standard in the digital marketplace. Intertrust's DigiBox, AT&T's a2b format and Liquid Audio are each encrypted file

formats offering variations of persistent protection which would enable music publishers and recording companies to receive royalties for songs distributed on-line. A number of the emerging formats also include embedded watermarks which mean that even if a song file makes it into the unencrypted open, it will be possible to track the who, where and when. Some also have an in-built feature allowing artists to decide whether a song can be duplicated, how many times it can be played and whether it will expire after a certain amount of time. A body called the Secure Digital Music Initiative (SDMI)³² has also been established as a joint effort between recording industry and technology companies to develop a secure standard format by early next year as part of a proactive strategy to compete on-line with MP3s via a "legitimate" platform.

On balance, the benefits of using on-line technology for the preview and purchase of CD-quality music greatly outweigh the costs. It appears to be a safe projection that the internet will continue to be a popular way of distributing music. It makes little sense to preserve a status quo characterised by prohibitive manufacturing and retailing costs and perishable compact discs when a boundless array of CD-quality music is already available on-line. Mechanical royalties and retail record sales may soon become as commercially relevant as sheet music. The music business and its pirate nemesis will continue to cross swords in an on-line pay-per-play environment. The music buffs' paradigm will no longer be what CDs they "own" but what files they can afford to "access" on-line for a price. The PC will be the gramophone and even if you crave that old-school vinyl charm, there is already software on the internet that puts the crackle of vinyl back into the digital sound!

Believe in Rock 'n' Roll

The history of modern music is largely a history of technological advances. The music business has always

shown a robust ability to adapt and prosper. The gramophone did not kill off live performance and the tape recorder did not kill off the recording industry. As the new millennium dawns, more Australians are making their living from music than ever before. At the same time, the sale of recorded music and the dissemination of sound recordings via the internet represents one of the most radical changes in music consumption this century. Further revision of copyright laws³³, sophisticated enforcement strategies and clever technical solutions will each play a role in balancing the interests of consumers, artists and music companies, electronics manufacturers, internet industry participants, and others that have a stake in the digital delivery of music. The desired outcome is secure digital formats that enable consumers to easily access the music of their choice whilst respecting the economic rights of artists and those who invest in their work in the transaction.

A powerful factor to determine the impact of these digital technologies on the music industry will be consumer sovereignty. Music lovers should balance the tempting convenience and cost savings that these new technologies present with the home truth that there is something quite essential at stake here – the viability of being a musician and the excitement for listeners of having an ever-expanding musical spectrum to choose from. It is fair to say that if digital technology is allowed to strip away the economic incentives that are the central purpose of music copyright, then all of that will be jeopardised.

1 The Phillips Dual Deck Audio CD-Recorder CDR765 offers a high speed CD recording feature, records from all home stereo analogue and digital sources, plays all audio CDs and presently retails at around \$1,300.
2 See section 97 of the *Copyright Act 1968*.
3 The passing of the Copyright Amendment Bill (no.1) 1997 in June 1998 enables CDs made legitimately overseas under licence from the copyright owner to be imported and sold in Australia in competition with locally manufactured CDs. For a comprehensive discussion of the parallel imports debate and its relevance to the Australian music industry, see Irene Park "The Cacophony of Parallel Importation", Australian Intellectual Property

Law Journal, vol. 10, May 1999.
4 The IFPI's website which contains global music piracy statistics and strategies being adopted by the IFPI in response to the problem is at <http://www.ifpi.org>
5 In May 1999 a joint media release was issued by Senator Amanda Vanstone, Minister for Justice and Customs and the Australian Record Industry Association (ARIA) confirming the destruction of 250,000 pirate CDs with a street value of \$5 million and highlighting the need for industry and Government to work in co-operation for the protection of creators and consumers.
6 See Maryann Bird, "Flagging the Music Pirates", Time Magazine, 22 February 1999.
7 "Authorisation" has been interpreted by the High Court to occur when one person "sanctions", "approves" or "countenances" another's infringement of copyright. See *University of NSW -v- Moorhouse* (1975) 133 CLR 1; *WEA International Inc -v- Hanimex Corp Ltd* (1987) 10 IPR 349; *APRA Ltd -v- Jain* (1990) 18 IPR 663; *Nationwide News Pty Ltd -v- Copyright Agency Limited* (1996) 34 IPR 53.
8 Under s.13(2) of the Copyright Act, one of the copyright owner's exclusive rights is the ability to authorise others to perform any of the other exclusive rights embodied in the copyright.
9 (1988) 11 IPR 1
10 Similarly, in *A & M Records -v- Audio Magnetics Inc* [1979] FSR 1, a supplier of blank audio cassettes was held not to be authorising copyright infringement by consumers since the manufacturer lacked sufficient control over the use of its tapes.
11 In *The University of NSW -v- Moorhouse* (1975) 133 CLR 1, the High Court held that the university was liable for authorising copyright infringement by failing to take supervisory steps to safeguard copyright owner's rights in placing photocopying equipment next to book collections. The Court distinguished the case from the facts in *Amstrad* because the library had the ability to control students' activities within the premises. Following the High Court's decision, s.39A was inserted into the *Copyright Act* which protects libraries from authorisation liability if they place prominent notices near copying machines informing users of their rights and obligations under the *Copyright Act*.
12 The Australasian Performing Right Association Limited (APRA) has recently pursued separate Federal Court proceedings against both Telstra and OzEmail arguing that those network providers should pay a copyright fee for distribution of copyright material on their networks. Following the High Court's decision in APRA's favour (1997) 191 CLR 140, Telstra is now a fee-paying APRA licensee. APRA and OzEmail subsequently settled their dispute out of court and are working together towards agreeing to a suitable royalty regime for the ISP.
13 Shane Simpson, "Moving Towards Copyright Control on the Internet", Media and Arts Law Review, Vol.1 December 1996.
14 Information on AMCOS' functions and member services can be found on its website at <http://www.amcos.com.au>
15 APRA's website is at <http://www.apra.com.au>
16 The High Court in *Australian Tape Manufacturers Association & Ors -v- The Commonwealth of Australia* (1993) 176 CLR 480 held that the "royalty" levied on the vendors of blank tapes by s.135ZZP(1) was a tax and that, by reason of non-compliance with s.55 of

the Constitution, the levy was invalid. Blank tape levies presently exist in most European countries. In the US, the Audio Home Recording Act (passed in 1992) also provides for the payment of modest royalties to music creators and copyright owners by the distributors of digital recording equipment and exempts consumers from lawsuits for copyright violations when they record music for private, non-commercial use. The Act also mandates the inclusion of Serial Copying Management Systems in all consumer digital audio recorders to limit multi-generational audio copying (ie, making copies of copies).
17 Other standard file formats have also been devised for pictures/stills (JPEG) and video (MPEG).
18 A "leech site" is a website which encourages direct downloading of copyright protected material (eg, sound recordings and games software) without requiring anything in return.
19 The latest models can store the equivalent of 500 CDs of music.
20 Information about the RIAA's activities (including its fight against piracy and web licensing initiatives) can be found at <http://www.riaa.com>
21 For anecdotal insights, see Karl Greenfeld "You've Got Music!", Time Magazine, 22 February 1999.
22 See footnotes 24 and 25.
23 The reforms contained in the Bill are consistent with international standards reflected in the WIPO Copyright Treaty (1996) and the WIPO Performance and Phonograms Treaty (1996). These treaties (as well as measures to control computer piracy, encryption technology controls and limitations on internet service provider liability) are implemented in the US Digital Millennium Copyright Act which was passed in November 1998.
24 The March/April 1999 edition of "Internet World" summarised the initial dialogue between the Internet Industry Association (IIA) and the Minister for Communications, Information Technology and the Arts in relation to internet content regulation.
25 The full text of Senator Alston's press release can be found at <http://www.richardalston.dcita.gov.au>
26 The Government is presently trying to move the Broadcasting Services Amendment (Online Services) Bill through Parliament.
27 The Draft Bill proposes new sections 36(1A) and 101(1A) which provide:
"In determining whether or not a person has authorised any act comprised in 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 reasonable steps to prevent or avoid the doing of the act."
28 The range of issues relating to ISP liability for on-line music copyright infringement are explored by Karen Amos in her article "The Liability of Internet Service Providers for Copyright Infringement in relation to Music Transmitted Through Their Networks", Journal for the Australian and New Zealand Societies for Computers and the Law, August 1998.
29 <http://www.getmusic.com>

- 30 For example, Sony has recently announced that it has accepted Microsoft's media player as its format of choice.
- 31 See Sahane Simpson, "Moving Towards Copyright Control on the Internet", *Media Arts Law Review*, Vol. 1, December 1996.
- 32 Additional Information about the SDMI can be found at <http://www.sdmi.org>.

- 33 For instance, The Copyright Law Review Committee (CLRC) Simplification Report recommends that no material form be required for copyright to subsist because of problems the concept is likely to pose with digitisation. A copy of that report is available on the Committee's website at <http://www.agps.gov.au/clrc>.

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An Essential Guide to Internet Censorship in Australia

Brendan Scott, Gilbert & Tobin

Brendan is Gilbert & Tobin's electronic business specialist. This paper is an update of an earlier paper "A Layman's Guide to Internet Censorship in Australia" and is current at 1 October 1999. The views expressed in this paper are not necessarily the views of Gilbert & Tobin.

INTRODUCTION

In 1998 the Federal Liberal Party won Government in Australia by a small majority. The two major policy platforms of its campaign were the introduction of a Goods and Services Tax (GST), and the further partial sale of the incumbent telecommunications carrier, Telstra. At the time Government did not control the Senate, but would be able to secure a majority with the assistance of Senator Brian Harradine. Senator Harradine, is an independent Senator who held the balance of power in the Australian Senate until 30 June 1999. Senator Harradine is known for taking a hard line stance against the availability of pornography.

As a result of the 1998 elections, on 1 July 1999 the balance of power in the Senate was to pass from Senator Harradine to the Australian Democrats. By early March 1999 it had become clear that Australian Democrats were opposed to the Government's two main policy platforms, at least in the forms

presented by the Government. By early March 1999 it was clear that if the Government wanted to make use of Senator Harradine's vote for the passage of the GST and Telstra Sale legislation it would have to do so by 30 June.

On 19 March 1999 the Government announced that it would introduce measures to "protect" Australian citizens against "illegal or offensive" material on the Internet. On 21 April 1999 the Government introduced a Bill (the *Broadcasting Services Amendment (Online Services) Bill 1999*) which makes content hosts and service providers liable for content they carry. The Bill was referred to a Senate Select Committee controlled by the Government. The committee reported back on 11 May 1999 (a little under 3 weeks later). In that short space of time, the committee received 104 submissions in relation to the Bill, a large number of them arguing that it had serious deficiencies. The committee's report endorsed the Bill, suggesting some minor amendments to it. One member of the committee (Senator Harradine) stated that the Bill did not go far enough.

On 26 May 1999 the Bill passed the Senate. By 25 June 1999, barely days before the balance of power in the Senate would pass to the Democrats for years, the Government's legislation on both the part sale of Telstra and on the GST passed the

Senate, and, coincidentally the Online Services Bill had also passed the House of Representatives. Shortly thereafter, the Bill received the Governor-General's assent and became law, although the Act limits itself to things occurring after 1 January 2000 (to give industry participants time to put compliance procedures in place).

The Act is very complex (it's 72 pages of text are not a pleasant read) and, while this paper presents a general overview of the operation of the Act, many of its complexities have been glossed over in order to cover its main themes. You should seek specific advice from your lawyer about how it applies to you and how your risks can be minimised.

WHAT IS THE ACT ABOUT?

The principle underlying the Act is that the holders and carriers of content should have more liability for content than the creators of that content. The Act establishes two approaches to content regulation. In both cases, the creator or owner of content is not subject to the effects of the legislation. The first approach of the Act deals with internet content hosts and internet content hosted within Australia. The second approach is for internet content hosted outside of Australia.