

Copyright Crack Down – The Implications for Australian Internet Service Providers under a Free Trade Agreement between Australia and the United States

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The Australian government recently engaged in the first round of negotiations of a free trade agreement between Australia and the United States.¹ Should such an agreement be entered into, the harmonisation of US and Australian commerce legislation would be a likely consequence.² 'Harmonisation', in the words of John Richardson, means 'the US would like to influence our legislation in a way similar to theirs.'³ The *Copyright Act 1968* (Cth) is one such piece of legislation. In particular, US Trade Representative Robert Zoellick has raised the issue of internet service provider ('ISP') liability for on-line infringement of copyright.⁴ It will be seen below that under US copyright law, ISPs can only be sure of avoiding liability for on-line infringement if they contribute to the enforcement of copyright holders' rights in the on-line environment.

Although the Australian government has approached the Internet Industry Association (of Australia) for input,⁵ the Australian on-line industry is apprehensive about the proposals.⁶ There is a concern that political lobbying from the US entertainment industry, which has been said to be 'very aggressive'⁷ in its pursuit of American ISPs,⁸ is the driving force behind the push for change. This article examines the potential changes, their implications, and the merits of harmonisation with US copyright law in relation to ISP liability for on-line infringement of copyright.

1 ISP liability under Australian law: the present

The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) came into force in Australia in 2001. The amendments afforded blanket protection to ISPs against potential claims arising from authorisation of infringement of copyright; the authorisation being essentially inadvertent on the part of the ISP.⁹ Section 39B provides:

A person... who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work merely because another person uses the facilities... to do something the right to do which is included in the copyright.

2 ISP liability under US law: a possible future

If Australia were to harmonise its copyright law with US law in relation to ISP liability for infringement, what could we expect our copyright law to look like? Enacted in 1998, the *Digital Millennium Copyright Act* ('DMCA') amended US copyright law¹⁰ in very significant ways.¹¹ Indemnification of ISPs against liability for the copyright infringement of their users under the new section 512 was one key amendment. The DMCA provisions, however, are fundamentally different to Australian law because the indemnification of ISPs is only enjoyed subject to some important provisos.¹²

Section 512 is structured so that it first defines four heads of potential ISP liability for infringement of copyright. The section then sets out the conditions that ISPs must meet in order to take advantage of the indemnification 'safe harbour'. The four heads are:¹³

- transitory digital network communications (ie acting as a mere passive conduit);
- system caching (ie temporary storage of copies of recently accessed files);
- information residing on networks at direction of users (ie where users post information on ISP servers; for example, websites and email); and
- information location tools (ie linking and referring).

It is submitted that these four heads are all encompassed in the circumstances envisaged by sections 39B and 112E of the Australian legislation.

Of the conditions stipulated under section 512 in order for ISPs to be indemnified, some are specific to a particular head of liability, others are 'global' – ie they apply to more than one head of liability. There are two substantive conditions for ISPs to satisfy, both of which are global in their application. The first condition is the removal or disabling by an ISP of infringing material upon receipt of a notice of infringement issued by a copyright holder ('take-down notice'). The second is that ISPs must furnish copyright holders with information that identifies infringers when subpoenaed to do so by copyright holders. Thus, under section 512, an ISP is indemnified if its role in the conduct complained of

falls under one of the four heads of liability, and if it complies with the conditions applicable to that head of liability.

2.1 Take-down notices

The criteria of a valid take-down notice are found in section 512(c)(3)(A). Oddly, the criteria appear under the third head of liability (section 512(c)):

To be effective under this subsection, a notification of claimed infringement must be a written communication provided to ... [an ISP] that includes substantially the following:

- (a) A... signature of a person authorized to act on behalf of the [copyright] owner...
(b) Identification of the copyrighted work claimed to have been infringed...
(c) Information... sufficient to permit the service provider to locate the material.
(d) Information... sufficient to permit the service provider to contact the complaining party...
(e) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorised by the copyright owner... or the law.
(f) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorised to act on behalf of the [copyright] owner...

Section 512(f), entitled 'Misrepresentations', qualifies section 512(c)(3)(A):

Any person who knowingly materially misrepresents that material is infringing shall be liable for any damages... incurred by the alleged infringer, by any copyright

owner... [or] service provider, who is injured by such misrepresentation ...

It is apparent that the only substantive restrictions on the issuing of a take-down notice are good faith and civil damages for knowing and material misrepresentation. (The penalty of perjury only applies to the authorisation of the complaining party to act on behalf of the copyright owner.)... These restraints are hardly oppressive. 'Good faith' is inherently difficult to verify due to its subjective nature. Further, many cases of knowing misrepresentation may not even result in any quantifiable damage. For example, if a complaining party knowingly misrepresented copyright infringement against a private person downloading songs in the public domain without charge via peer-to-peer technology, and consequently the ISP disabled the facility, what damages could be claimed by the alleged infringer? Furthermore, successful damages claims rely on damaged parties having the will and resources to sue as plaintiffs to the action. In conclusion, the validity of a take-down notice at the time of issuing is determined by nothing more than its unverifiable compliance with broad restrictions, its form and its service.

The second, third and fourth heads of liability contain provisions similar to each other in relation to the obligations of an ISP when it receives a take-down notice, the condition of indemnification being that:

upon notification of claimed infringement... [the ISP] responds expeditiously to remove, or disable access to, the material that is claimed to be infringing...

It is pertinent that no provisions for take-down notices appear under the first head of liability: transitory digital network communications. This may have been intended to reflect the fact that when performing as a mere passive conduit, an ISP can exert no direct control over the content being conducted through its system. Nevertheless, it has recently been held that the absence of

take-down notice provisions under section 512(a) does not mean that take-down notices cannot be issued to ISPs acting as mere passive conduits. This position was based on the fact that control can be exerted over content in the form of termination of a subscriber's account per se. It is submitted that this form of control is indirect control, a factor relevant to the principles of authorisation of copyright infringement in Australia (at least). The Court's finding in Recording Industry Association of America v Verizon Internet Services ('Verizon') with regard to take-down notices under the first head of liability was crucially important to its interpretation of the operation of the second substantive condition: subpoenas to identify infringers.

Another important aspect of the take-down notice regime is that ISPs are obliged to comply 'expeditiously' when served. There are no provisions for appealing a take-down notice prior to compliance with it.

2.2 Subpoenas to identify infringers

Section 512(h) deals with subpoenas issued to ISPs by copyright holders in order to identify on-line infringers of copyright. It provides as follows:

- (a) Request. - A copyright owner... may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection.
(b) Contents of request. - The request may be made by filing with the clerk - a copy of a notification described in subsection (c)(3)(A)...
(c) Basis for granting subpoena. - If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form... the clerk shall expeditiously issue and sign the proposed subpoena...
(d) Actions of service provider receiving subpoena. - Upon

receipt of the issued subpoena... the service provider shall expeditiously disclose to the copyright owner... the information required by the subpoena...

As with take-down notices, there is no provision for the assessment of the merits of the subpoena. Indeed, this conclusion is axiomatic since the only substantive requirement of the subpoena is a valid take-down notice. Again, the obligation on an ISP to comply 'expeditiously' with the condition appears.

The relationship between take-down notices and subpoenas in section 512(h) means that because the availability of a take-down notice under the first head of liability – transitory digital network communications²³ – has been a matter of debate, so has it been with subpoenas. In *Verizon*, the plaintiff subpoenaed the defendant, an ISP, for information disclosing the identity of a user who downloaded more than 600 copyrighted songs in one day via peer-to-peer on-line technology called KaZaA. The defendant contended that it was not obliged to comply with the subpoena. To support its position, the defendant argued that peer-to-peer technology only utilises an ISP as a passive conduit, thus placing it under the first head of liability. The argument followed that because there was no provision under the first head of liability for a take-down notice to be issued, and because such a notice was a necessary element of a subpoena under section 512(h)(2)(A), the subpoena was therefore invalid.²⁴ But, as alluded to above, this argument was emphatically rejected by Bates J, who instead held that as there was no reason why a section 512(c)(3)(A) notice could not be issued under the first head of liability (section 512(a)), there was nothing to prevent the requirements of a subpoena being satisfied accordingly (section 512(h)(2)(A)).²⁵

The reasoning of the Court warrants analysis because, according to Manjoo, '[t]he stakes are enormous'.²⁶ Broadly, Bates J took a strongly substantive approach. Specifically, Verizon's submissions were rejected on the basis of the

language and structure of section 512, and on the basis of policy arguments. In both cases, Bates J drew upon counter-factual reasoning as a tool of analysis; eg what *could* Congress have done had it wished to exclude section 512(a) from being subject to the take-down notice and subpoena provisions?

It is submitted here that Congress could have drafted section 512 more clearly. If the take-down notice provisions had been assigned their own subsection, as were the subpoena provisions, then their global application would be more readily discerned now. Explicit instruction as to which subsections the notice and subpoena provisions apply – or at least do *not* apply – would also be of real assistance. Thus, the choice in *Verizon* was between three conclusions:

- that the drafting of section 512 was merely 'sloppy';
- that the drafting was so grossly incompetent as to leave 'a huge loophole in Congress's effort to prevent copyright infringement on the Internet';²⁷ or
- that Congress intended the DMCA to protect 'only a very limited portion of copyrighted material on the Internet'.²⁸

Although Bates J was persuasive in his reasoning in favour of accepting the first of these three alternatives, it has since been contended that the implications of his interpretation are 'terrifying' and 'much more unreasonable, and much scarier' than even *opponents* of the DMCA had previously thought.²⁹

3 Implications of harmonisation

One need only look to the US experience under the DMCA to gain some insight into the implications of harmonisation for Australia, should it eventuate. Essentially, there are two specific areas of concern under the DMCA. The first is the potential for copyright holders to abuse both content via take-down notices and subscriber privacy via identification subpoenas. Secondly, there is the relatively minor issue of onerous

obligations of compliance on ISPs receiving high volumes of take-down notices and infringer identification subpoenas.

3.1 Abuse by copyright holders

The take-down notice and infringer identification subpoena provisions are calibrated to effectuate the expeditious removal or disabling of infringing material, and/or identification of infringers.³⁰ It is submitted that such expediency is unattainable without relaxed or minimal procedures for review of claims represented in notices and subpoenas. It is unsurprising, therefore, that take-down notices stand on ground no firmer than a good faith claim by a copyright holder, who may have little understanding of the limits of their own rights. And once a notice has been obtained or issued, a subpoena is little more than a formality. There is no review of the merits of these claims when they are formulated – judicial or otherwise.³¹ Thereafter, the obligation to comply expeditiously removes the opportunity for the ISP served to assess a claim,³² even if it had the resources to do so.³³ It is with some justification that the regime has been characterised as 'delete first, ask questions later'.³⁴ Although there are penalty provisions, they only apply to *intentionally* vexatious or specious claims. This leaves substantial opportunity for speculative, negligent or perhaps reckless claims to be made without fear of penalty, even if they are later found to be groundless. In theory, therefore, there is considerable scope for abuse of take-down notices and subpoenas by copyright holders.

(a) Notices

The US experience shows that the abuse of the system by copyright holders may be more than a theoretical possibility. Dale Clapperton of EFA³⁵ asserts that '[i]n the four years since the DMCA became law in the United States, it has become a tool of censorship and harassment in the hands of big business.'³⁶ Clapperton also states that entire websites have been subject to 'frivolous, vexatious and specious

claims of copyright infringement'.³⁷ EFA has said that US chain stores, such as Wal-mart, Target and Kmart have used notices issued under section 512 to have mere merchandise pricing removed from a website carrying that information.³⁸ CNET News recently reported that a department of Penn State University was sent a take-down notice by RIAA on the basis of a file it discovered on the University's system using a file search program.³⁹ The file in question was called 'Usher.mp3'. RIAA thought that the file was an infringement of copyright in the work of Arista recording artist Usher. In fact, the file turned out to be a recording of a department song written by one Professor Peter Usher. While RIAA admitted to having issued 'conservatively tens of thousands of notices in the last five years', it asserted that the Penn State University notice is the 'first error that has been discovered'.⁴⁰ The couching of those words certainly leaves scope for many *undiscovered* errors. How many errors have not been discovered because an ISP issued with a notice has not challenged it? Like interlocutory proceedings, the interlocutory nature of take-down notices would mean that, in the vast majority of cases, compliance would be the final act. Cindy Cohn alleges that 'ISPs get thousands of these things, and they get a not insignificant percent that are not just wrong but are spectacularly wrong'.⁴¹

(b) Subscriber privacy

The *Verizon* decision illustrates the potential for abuse of subscriber privacy.⁴² Critics are now worried about the making of bogus copyright infringement claims with the intention of obtaining private information about the identity of people: 'there's a chance the system will become a target of people with something much more sinister than copyright enforcement in mind'.⁴³ Cohn asserts that '[t]his is a method by which an angry ex-husband can locate an ex-wife, or a process by which stalkers can locate people'.⁴⁴ What is most concerning is that in such instances it is easy to imagine that desperate people could inflict irreparable harm on others without

regard for the legal consequences under the DMCA, even if the consequences were to be intensified.

3.2 Onerous compliance obligations

With tens of thousands of notices being issued, the question of sheer burden of compliance arises. Further, a spokesman for the Penn State University department affected by RIAA's take-down notice asserted that the notice created the potential for the University's network to be disastrously shut down during a crucial final exam period, adding that bearing the risk of such consequences is 'not a price that society should have to pay'.⁴⁵ In the wake of *Verizon*, ISP's are concerned that they will now be inundated with subpoenas for subscriber identification.⁴⁶ 'The volume of these [subpoenas] would increase, and we'd find ourselves in the subpoena-compliance business, not the Internet business' states Les Seagraves from EarthLink.⁴⁷

4 Conclusions

Australia is presently negotiating a free trade agreement with the United States. The uncomfortable reality is that such an agreement could see Australian copyright law, in relation to ISP liability for on-line infringement of copyright, changed to reflect current American law on the subject.

The US position is really one of expediency and utility, rather than legal or moral principle. While the Australian position, it is submitted, codifies its common law position in relation to authorisation of copyright infringement, the American position reflects the practical reality that ISPs do possess considerably more power to prevent copyright infringement than copyright holders. It is for this reason that American ISPs have been conscripted into the war on piracy, and Australian ISPs may be forced to answer the same call to arms in the future.

Political powers will also be aware that on one side is the protection of moral and legal rights (privacy and freedom of expression), yet on the

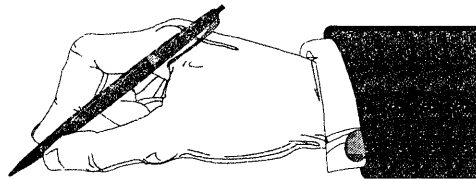
other is the protection of moral, legal and economic rights (copyright).⁴⁸ In this light, it is arguable that the US position in fact strikes a better balance than the Australian position because it does offer valuable protection to intellectual property on-line. However, the scope for abuse of the American system by copyright holders must be addressed before truly widespread support for the proposal could be anticipated.

- 1 17-21 March 2003.
- 2 Professor John Quiggan in ABC Television, 'Australia, US Bargaining Hard on Free Trade', *The 7:30 Report*, 21 May 2003 <<http://www.abc.net.au/7.30/content/2003/s860735.htm>>.
- 3 John Richardson, Director of Department of Foreign Affairs and Trade Regional and Free Trade Agreement Section, in Simon Hayes, 'US Tightens Net Copyright', *The Australian* (Sydney), 28 January 2003 <<http://australianit.news.com/articles/0,7204,5896759%5E15306%5E%5Enbv%5E,00.html>>.
- 4 In a letter to Congress prior to the commencement of negotiations: Hayes, *ibid*.
- 5 Hayes, *ibid*.
- 6 The organisation Electronic Frontiers Australia ('EFA') for example.
- 7 Peter Coroneos in Hayes, above n 3.
- 8 The position of AOL Time Warner is intriguing – it is at once the world's largest internet company and largest entertainment company See Farhad Manjoo, 'AOL's Jekyll and Hyde Act', *Salon.com*, 10 February 2003 <http://www.salon.com/tech/feature/2003/02/10/aol_file_sharing/>.
- 9 Sections 39B (works) and 112E (subject matter other than works).
- 10 17 USC (2002).
- 11 'The 1998 enactment of the [DMCA] represents the most comprehensive reform of United States copyright law in a generation.': *The Digital Millennium Copyright Act* Educause <<http://www.educause.edu/issues/dmca.html>> at 19 May 2003.
- 12 17 USC § 512 (2002).
- 13 17 USC § 512(a)-(d) (2002) respectively.
- 14 *Contra* Douglas Lichtman, University of Chicago Law School, who states: 'a sworn statement under penalty of perjury provides a strong protection' in Manjoo, above n 8.
- 15 Or a notice is received by its designated agent: section 512(c).
- 16 Section 512(c)(1)(C). Mirror provisions are found in sections 512(b)(2)(E) and (d)(3).
- 17 Section 512(a).
- 18 See Sarah Deutsch in Manjoo, above n 8.
- 19 *Recording Industry Association of America v Verizon Internet Services* (Unreported, District Court of District of Columbia, Judge Bates, 21 January 2003). The facts of the case are explained below
- 20 At 15, n 5 (Bates J).

Copyright Crack Down

- 21 See above n 19.
22 Sections 512(b)(2)(E), (c)(1)(C) and (d)(3).
23 Section 512(a).
24 At 12 (Bates J).
25 Ibid. 13-14.
26 Manjoo, above n 8.
27 At 18 (Bates J).
28 Ibid. 19.
29 Manjoo, above n 8.
30 *Verizon*. 16-17 (in relation to subpoenas).
31 Manjoo, above n 8; Peter Swire in Manjoo.
32 Electronic Frontiers Australia, 'EFA Outraged over Possible ISP Liability Changes' (Media Release, 30 January 2003)
<<http://www.efa.org.au/Publish/PR030130.html>>.
33 Manjoo, above n 8.
34 Dale Clapperton in EFA, above n 33; G Teran, *ISP Liability for Copyright Infringement* (1999)
<<http://cyber.law.harvard.edu/property99/liability/main.html>> at 16 May 2003.
35 See above n 32.
36 Ibid.
37 Ibid.
38 'EFA Outraged over Possible ISP Liability Changes', *The Age* (Melbourne), 30 January 2003
<<http://www.theage.com.au/articles/2003/01/30/1043804451214.html>>.
39 Declan McCullagh, 'RIAA Apologizes for Threatening Letter', *CNET News.com*, 12 May 2003 <http://news.com.com/2100-1025_3-1001095.html>.
40 Ibid.
41 Cindy Cohn in Manjoo, above n 8.
42 Ibid.
43 Manjoo, above n 8.
44 Cohn in *ibid*.
45 Peter Meszaros in McCullagh, above n 39.
46 Manjoo, above n 8.
47 In *ibid*.
48 'Calling it a free trade agreement is something of a misnomer. It's really an economic integration agreement.': Quiggan, above n 2.
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