2011 Student Prize

The Editors of the Computers and Law Journal are pleased to announce that the winner of the 2011 Student Prize is Sean Lau for the article "Time for a Conceptual Rethink: 'Parity' and Australia's Copyright Safe Harbour Provisions". Sean receives a prize of $1,000. We are pleased to publish the winning entry below.

Details regarding the 2012 Student Prize are published on page 5.

Time for a Conceptual Rethink

'Parity' and Australia's Copyright Safe Harbour Provisions

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Introduction

The so-called 'safe harbour' provisions of the *Copyright Act 1968* (Cth) are usually analysed in terms of whether they appropriately balance the protection of copyright owners with protecting copyright users as well as encouraging the continued innovation of internet technologies.[1] This balance is undoubtedly crucial. But to stop here would ignore what Bennett Moses calls the question of the 'parity' of online compared to offline regulation.[2] That is, through the safe harbour provisions, does Australian copyright law now treat online technologies differently compared to offline ones?

This article posits that the Australian safe harbour provisions lack online/offline parity. Previously, this point has only been stated infrequently,[3] and below I will point out how these prior articulations of my argument do not sufficiently rigorously distinguish between the *types* of parity that exist. Consequently, Part II outlines the safe harbour provisions' operation. Part III then examines what parity entails, and what it contributes to an analysis of the provisions.

Australia's Copyright Safe Harbour Provisions

Put most simply, the safe harbour provisions, contained in *Copyright Act 1968* (Cth) ss 116AA–116AJ, provide a defence against copyright related claims. They become relevant only for specific types of activities, such as providing services for transmitting copyright material,[4] or storing copyright material on a network upon a user's request.[5]

Only carriage service providers can use the provisions, that is, people who provide services for carrying communications using electromagnetic energy.[6] Given the activities currently caught by safe harbour provisions, the only carriage service providers who realistically might be protected by the provisions will be internet service providers ('ISPs'). At the time of writing, however, there is an ongoing review about whether the broader concept of 'service provider' should be used instead,[7] which would include other internet intermediaries like Facebook.

To avoid liability, the ISP must meet certain conditions.[8] Which conditions apply depends on which activity above is relevant. For example, when storing copyright material on a network, the ISP must expeditiously remove access to copyright material on that network upon becoming aware of an infringement, or of facts rendering an infringement likely.[9] Although Australian courts have not yet considered this condition, the equivalent US condition has received contentious litigation.[10]

However, a condition common to all categories of activities is that the ISP must implement a policy that terminates repeat infringers' accounts in appropriate circumstances.[11] This condition was considered by the Full Federal Court in *Roadshow Films Pty Ltd v iiNet Ltd*.[12] There, while splitting on the question of what it means to 'authorise' infringement,[13] all three judges agreed that iiNet had not satisfied this condition.[14] iiNet's so-called policy was to terminate accounts when there was a court order or finding made, or after an account holder admitted repeat infringements.[15] However, because this would leave many repeat infringers unaccounted for, termination was not in sufficiently 'appropriate circumstances' to satisfy the condition.[16]

Additionally, two judges clarified that to satisfy the condition, termination must be for repeat infringers' accounts even if the infringer is not the account holder,[17] for example if they use a family member's account. This construction was reached using the statute's ordinary meaning,[18] and because of the practical impossibility of determining which precise person used an account.[19] This will have some implications for my analysis of the safe harbour provisions' parity below.

Although at this article's time of writing, *iiNet* is on appeal to the High Court, only the authorisation issue, not the safe harbour issue, is being appealed.

Parity and the Safe Harbour Provisions

Having considered how the safe harbour provisions operate, I would now like to analyse these provisions under the conceptual rubric of 'parity'. What is parity? Put most simply, parity is the notion that 'what applies offline ought to apply online'.[20] This, however, is deceptively simple. First, the concept of parity should be understood as a subset of the broader idea of 'technology neutrality',[21] which states that regulation should equally treat different types of technology equally, and not preference any.

Second, there are different types of parity, which must be carefully delineated. For this, I adopt Bennett Moses' taxonomy, though it has parallels in the literature on technology neutrality.[22] *Parity of purpose* refers to when a law has a neutral objective, such as to protect children from harmful content rather than protecting children from harmful television shows.[23] *Parity of outcome of regulation* sometimes overlaps with this, occurring when a law's outcome is the same regardless of whether online or offline technology is used.[24] Finally, *parity of formulation* refers to when a law is drafted so as to not in its language discriminate against either online or offline technologies.[25] These types of parity can clash: a law adhering to parity of formulation in regulating online and offline technologies might disproportionately affect online ones, and so fail to achieve parity of outcome.

All this established, I will now evaluate the copyright safe harbour provisions in terms of whether they achieve online/offline parity. To do this conclusively, however, considering each type of parity is necessary for rigour and for clarity. Hence when Weatherall calls the provisions of the AUSFTA upon which the safe harbour provisions were based 'highly technology specific',[26] it is unclear, for example, whether she means technology specific regarding their purpose, or their formulation.

Therefore turning to the types of parity, first, the provisions lack *parity of purpose*: the Senate Select Committee has explained the FTA safe harbour articles in terms of the balance mentioned above between 'assist[ing] copyright owners to enforce their copyright' and 'introducing appropriate safeguards for users and ISPs'.[27] Through this reference to ISPs, it thus appears that the safe harbour provisions were purposefully designed as specifically targeting internet technologies.

Additionally, the provisions prima facie lack *parity of formulation*: they protect from liability activities such acts as providing connections or storing on a network. These activities are quite obviously relevant only in an online context.

However, deciding whether there is *parity of outcome* is not so simple. Obviously, the safe harbour provisions provide a defence to copyright infringement only available in an online context, and this by itself might seem to offend parity of outcome. But we must also consider how difficult it is to establish copyright infringement in an online context *but for* the safe harbour provisions, compared to an offline context.

An analogy might assist. Arguably, defamation is easier to establish for defamatory content published online rather than offline, because of broadness of the element of 'publication'.[28] That is, defamation disproportionately targets internet technologies. Conceivably then, copyright infringement also disproportionately targets internet technologies compared to offline ones in terms of how easy it is to establish infringement. The safe harbour provisions might then merely rectify this disparity of outcome by equalising the effort must be taken to avoid liability for infringements in either context.

But does copyright infringement disproportionately target internet technologies? Since infringement can

occur through authorisation,[29] to answer this question we would have to determine how difficult it is to authorise infringement for online technologies, compared to offline ones. However, given the immense uncertainty about the authorisation issue at least until the High Court decides *iiNet*, it appears that this question is currently unresolvable.

Nevertheless, what I will now suggest is that because of the specific conditions that must be satisfied before someone can use the safe harbour provisions, then *regardless* of how the High Court resolves the authorisation point, the provisions will *always* lead to a lack of parity of outcome. Precisely, as discussed, all the safe harbour provisions require an ISP to implement a termination policy for repeat infringers. But such a policy has consequences far beyond simply making it easier for ISPs avoid liability. As Suzor and Fitzgerald observe, disconnection severely impacts those disconnected due to our 'modern information society',[30] because of the internet's indispensability for how we now access information and communicate with others.[31] Thus there is sometimes declared a 'right to internet access'.[32] The negative consequences of disconnection are amplified by how disconnection is of whole households,[33] and how, as *iiNet* makes clear, disconnection may be of accounts where the infringer was not even the account holder.

Put simply, it is possible that the safe harbour provisions create *some* parity of outcome, by making it equally easy to avoid infringement in an online compared to an offline context. But the provisions also create a *disparity* of outcome, by removing a vital part of people's lives for online infringement, whereas no parallel of this exists for offline infringement.

Conclusion

This article has sought to demonstrate the lack of parity inherent to Australia's copyright safe harbour provisions. Particularly, the provisions lack online/offline parity regardless of whether we mean parity of purpose, parity of formulation, or parity of outcome. I have not, however, made any argument about whether any such parity is desirable, and no obvious answer to that question presents itself.[34] Nevertheless, what this article should establish is that *if* parity is desirable, then the safe harbour provisions become deeply questionable.

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[1] See, eg, Peter Leonard, 'Safe Harbors in Choppy Waters – Building a Sensible Approach to Liability of Internet Intermediaries in Australia' (2011) 3 *Journal of International Media & Entertainment Law* 221, 235; Kimberlee Weatherall, 'Of Copyright Bureaucracies and Incoherence: Stepping Back from Australia's Recent Copyright Reforms' (2007) 31 *Melbourne University Law Review* 967, 973.

[2] Lyria Bennett Moses, 'Creating Parallels in the Regulation of Content: Moving from Offline to Online' (2010) 33 *University of New South Wales Law Journal* 581.

[3] Kimberlee Weatherall, Submission No 294 to Senate Select Committee on the Free Trade Agreement between Australian and the United States of America, *Inquiry into the Free Trade Agreement between Australian and the United States of America*, 30 April 2004, 28–9; see also Leaellyn Rich, 'Limitation of Remedies Available against Carriage Service Providers under AUSFTA: More Trouble than It's Worth?' (2005) 59 *Computers & Law* 1.

[4] *Copyright Act 1968* (Cth) s 116AC.

[5] Ibid s 116AE.

[6] Ibid s 10; *Telecommunications Act 1997* (Cth) ss 7 (definition of 'carriage service'), 87.

[7] Attorney-General's Department (Cth), 'Revising the Scope of the Copyright "Safe Harbour Scheme"' (Consultation Paper, October 2011) 4–5.

[8] *Copyright Act 1968* (Cth) s 116AH.

[9] Ibid.

[10] See especially *Viacom International Inc v Youtube Inc*, 718 F Supp 2d 514 (SD NY, 2010); see generally Amir Hassanabidi, '*Viacom v. Youtube* – All Eyes Blind: The Limits of the *DMCA* in a Web 2.0 World' (2010) 26 *Berkeley Technology Law Journal* 405; Miquel Peguera, 'Secondary Liability for Copyright Infringement in the Web 2.0 Environment: Some Reflections on *Viacom v. Youtube*' (2011) 6 *Journal of International Commercial Law and Technology* 18; Daniel Seng, *Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries* (World Intellectual Property Organization, 2011) 55–8.

[11] *Copyright Act 1968* (Cth) s 116AH.

[12] [2011] FCAFC 23 (24 February 2011) ('*iiNet*').

[13] Majority: ibid [171]–[257] (Emmett J), [693]–[798] (Nicholas J). For Justice Jagot's dissent, see [389]–[477].

[14] Ibid [272] (Emmett J), [524] (Jagot J), [800] (Nicholas J).

[15] See ibid [259] (Emmett J).

[16] Ibid [264] (Emmett J), [520] (Jagot J), [805]–[806] (Nicholas J).

[17] Ibid [271] (Emmett J), [525]–[526] (Jagot J)

[18] Ibid [267] (Emmett J), [526] (Jagot J).

[19] Ibid [271] (Emmett J), [525] (Jagot J)

[20] Bennett Moses, above n 2, 582

[21] See, eg, Deborah Tussey, 'Technology Matters: The Courts, Media Neutrality, and New Technologies' (2005) 12 *Journal of Intellectual Property Law* 427, 434; Chris Reed, 'Taking Sides on Technology Neutrality' (2007) 4 *SCRIPT-ed* 263'; K G Donovan, 'Media Neutrality or Stakeholder Inequality? Why Emerging Technology Requires a Rethinking of the Stakeholder Balance in Copyright Law' (2010) 5 *Public Space: The Journal of Law and Social Justice* 1, 3.

[22] See, eg, Bert-Jaap Koops, 'Should ICT Regulation Be Technology-Neutral' in Bert-Jaap Koops et al (eds), *Starting Points for ICT Regulation, Deconstructing Prevalent Policy One-Liners* (TMC Asser Press, 2006) vol 9, 77.

[23] Bennett Moses, above n 2, 592.

[24] Ibid.

[25] Ibid 593.

[26] Weatherall, above n 4, 28.

[27] Senate Select Committee on the Free Trade Agreement between Australian and the United States of America, Parliament of Australia, *Final Report* (2004) 90 [3.177].

[28] See David Rolph, 'Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*' (2010) 33 *University of New South Wales Law Journal* 562, 580.

[29] *Copyright Act 1968* (Cth) s 101(1).

[30] Nicholas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34 *University of New South Wales Law Journal* 1, 7.

[31] Ibid 7–8.

[32] See especially Colin Crawford, 'Cyber-*place*: Defining a Right to Internet Access through Public Accommodation Law' (2003) 76 *Temple Law Review* 225.

[33] Suzor and Fitzgerald, above n 30, 10–11.

[34] See Bennett Moses, above n 2, 594–603.