

*commerce by means of the world wide web make any communications for commercial purposes that is available to the minor and that includes any material that is harmful to minors.*

It is a defence to a prosecution if the defendant:

*in good faith has restricted access by minors to material that is harmful to minors:*

*(a) by requiring the use of a credit card, debit account adult access code, or adult identification number*

*(b) by accepting a digital certificate that verifies age; or*

*(c) by any other reasonable measures that are feasible under available technology.*

The plaintiffs argue that age verification systems would turn away many potential visitors to their sites and significantly commercially damage them. The editor of an e-zine called *Salon* said:

Our site occasionally has columns containing sexual content. *Salon* would have to put up a gate saying you have to register. Our circulation would plummet overnight. Anytime you stop the normal impulse of a reader to click on your site, you lose traffic.

Judge Reed has stated that issues as to whether it would be economically realistic and technologically possible to verify the

identity information of visitors are still very real issues to be determined by law.

Proponents of the law suggest that it does no more than take what already exists under State law on-line. But the plaintiffs argue the law could end up applying local standards to web sites which are by their very nature global and thus applying the lower standard of a State law to a global jurisdiction is inappropriate.

The Act was signed into law despite advice from the Justice Department that provisions of the Act may constitute an unconstitutional restriction on free speech. It was reported<sup>2</sup> that President Clinton approved the COPA proposal because it was attached to critical spending legislation. This happened similarly with the CDA which was linked to assuring passage through Congress of the US Telecommunications Act of 1996. This has interesting parallels to the way that laws in Australia which seek to restrict access to 'adult' or offensive material are passed through Parliament. For example, an amendment to the *Broadcasting Services Act 1992* moved by Senator Harradine which restricts the broadcast of "R" rated material on subscription broadcast television until both houses of Parliament have approved it was accepted by Government in order to assure passage of legislation which fixed the debacle it had got itself into with the tender processes for Pay TV satellite licences A and B<sup>3</sup>.

Debate has raged about whether the recently released Starr report would have been covered by this law. Chris Barr, editor and chief of CNET said "it's a lot more targeted than the original CDA, but it would be problematic for companies like ours to find out the age of users before giving access to things like the Starr report". Government Attorney Karen Stewart argued that the Starr report would be out side of the scope of the statute because of its political nature. However the judge allowed the Starr report to be considered in the temporary restraining order proceedings on the basis that sites felt like they could face a prosecution for posting the report.

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## CONCLUSION

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This ongoing battle highlights the difficulty of the application of the criminal law in the content of the on-line medium and how little we still understand the implications of direct regulation in this area. It also highlights how easy it is for laws to have unintended consequences. The full hearing of the action challenging the COPA is due to be heard in December 1998.

*John Corker is General Counsel for the Australian Broadcasting Authority*

<sup>1</sup> Courtney Macvinta, CNET news.com, 'CDA II critics claim temporary victory', November 19, 1998.

<sup>2</sup> Courtney Macvinta, CNET news.com, 'Suit filed against CDA II', October 22, 1998.

<sup>3</sup> Senate Hansard: Thursday, 13 May 1993, p.531.

# Sound Unlimited: Music & Copyright in Cyberspace

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**Mark Bamford looks at how the music industry is moving its business on-line and the response of various copyright collection societies.**

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The music industry is taking its first tentative steps into cyberspace. At stake is a potentially lucrative method of exploiting music. However, significant difficulties need to be overcome, not the least of which is rights protection. This article reviews some developments in the music industry as it gears up for the move on-line.

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## THE MUSIC INDUSTRY GOES ON-LINE<sup>1</sup>

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Most major record companies and a host of independent labels have web sites. The

size and complexity varies. By way of example, the Epic Records Group regularly updates its artists' web sites and often incorporates electronic bulletin boards to obtain feedback from customers. George Michael's label, Aegean Records, places the Internet more centrally in its business strategy. Aegean recently jointed up with Sun Microsystems Intervid, Iterated Systems and Real Videos/Real Audio to launch a web channel which delivers real video, digital quality sound and content.

Perhaps the most common form of electronic commerce conducted on the Internet by music industry players to date is the mail order service. For the purpose of such a service the web site acts as a shop front enabling browsers to sample products (eg music from a CD) and then to order and pay for them by e-mail. The products are delivered to the customer by post.

The UK based Internet Music Shop provides a mail order service and makes monthly sales of around £25,000, growing at a rate of 25% per month.

Tower Records has plans to launch such a service in the UK following the success of its US retail stores. Tower Records will stock 350,000 different albums, videos and books which will be available to customers, in some cases at lower prices than found in retail outlets.

A few companies have gone a further step and provide music direct to the customer via the Internet. Central to this process is advanced information technology, and it is not surprising that the main proponents are US software developers.

Cerberus operates what is referred to as a 'digital juke box'. To operate the juke box a customer must acquire the appropriate software. The software allows the customer to download music onto the customer's computer hard-drive and then onto a mini-disc that can be used and re-used like an audio tape or floppy disc and played in any conventional mini-disc system.

The US based Internet music systems manufacturer, Liquid Audio, has formed a number of strategic alliances with other software companies for the purpose of developing systems to enhance on-line delivery of music. Liquid Audio has achieved CD quality sound on the low bandwidth of the Internet by developing new compression technology that has improved on Dolby digital compression.

An Internet user with a 'Liquid' music player can preview music titles with the player's streaming audio function. 'Streaming audio' currently works by apportioning a block of memory (a buffer in the random access memory of the users' computer) with two seconds of music so that it may begin playing that portion while it is downloading the next section of music to that same block. This means that the listener can hear the song in real time without having to wait for the whole song to download. If after previewing the music, an Internet user wishes to acquire it, the user can press a download button which will initiate a secure credit transaction and a one to two hour download of the title and its multimedia elements. When the music is downloaded to the user's CD-Rom drive, the quality of the resulting audio disc is virtually the same as a normal CD.

Another on-line juke box has been launched by a2b Music. AT&T, the US Telecom group behind the a2b Music software, claims it can reduce the download time for an average three minute song from twenty minutes to eight minutes and is currently negotiating with

record labels belonging to Polygram, TimeWarner and EMI to load up the jukebox with their artists' product. AT&T has already reached an agreement with Bertelsmann, the German media group, in connection with the Group's Arista and RCA labels.

### **COPYRIGHT CLEARANCE<sup>2</sup>**

What then are the copyright clearances required for such exploitation of music on-line?

An Australian on-line music distributor will need to clear copyright in the sound recording and the underlying music work of all songs exploited via its on-line service which are protected by copyright in this country.

In most cases a record company will control copyright in the sound recording by virtue of its recording agreement with the artist.<sup>3</sup> In some instances it may be necessary for the record company to revisit its agreement with an artist to ensure that it has obtained the necessary rights.

Where the on-line distributor does not hold the rights in the sound recording, a licence to copy the sound recording for the purposes of the service will be necessary.

The relevant rights in the underlying musical work (ie, the song and lyrics) which may be utilised in any particular instance of on-line distribution are the rights historically referred to in the industry as the 'mechanical right' (to make audio reproductions) and the 'synchronisation right' (to reproduce in audio visual adaptations such as videos). In addition, there is the so-called 'transmission right' which covers transmissions to subscribers of a cable or other wire-based service<sup>4</sup>. Such rights are likely to be administered, at least in part, by various collection societies.

Mechanical and synchronisation rights in musical works have historically been administered by the Australasian Mechanical Copyright Owners Society (AMCOS) on behalf of the copyright owners. However, at present such rights for music on-line have not been granted to AMCOS<sup>5</sup> and consequently it is likely that the relevant music publisher or artist controls such rights.

It seems that the transmission right will be utilised through on-line exploitation of music following the recent decision in *Telstra -v- APRA*<sup>6</sup>. Although the

subsequent court case between APRA and OzEmail, which may have put the matter beyond doubt, was settled before a decision was reached, APRA administers the transmission right on the basis that it is utilised. In administering the right, APRA has reached agreement with members of the Internet Association of Australia so that Internet services providers who are members contribute to a fund which essentially covers the right to transmit musical works on-line.

### **ON-LINE COPYRIGHT AND WEBCASTERS IN THE US**

In the US, the battle for on-line copyright royalties is hotting up in the context of 'webcasting' or on-line radio.

The US Copyright Office in Washington is considering implementing regulations that may have the effect of imposing a mechanical royalty for on-line radio<sup>7</sup>. Traditional forms of radio broadcast do not utilise the mechanical right and consequently broadcasters currently only pay performing right royalties.

Copyright in music in the US is in part regulated by the Digital Performance Rights and Sound Recordings Act 1995 which was introduced to maintain and affirm the mechanical rights of songwriters and music publishers in the face of technology which allows for digital delivery of recordings. The proposed regulations may affect this legislation so as to blur the distinction between mechanical rights and performing rights in relation to 'Digital Phonorecord Deliveries' or DPDs of music - a method of delivery for music on the Internet. This would mean the individuals accessing music for a single performance of the work may have to bear the cost of mechanical royalties.

The proposals result from a private agreement between the Recording Industry Association of America (RIAA) and National Music Publishers Association (NMPA) concerning the mechanical royalty paid to composers for the recording of performances of their music. The new regulations specifically address fees to be paid for electronic sale and distribution of recorded music under the 1995 Act. The regulations include two vague categories of 'incidental' and 'transient' DPDs. These could encompass temporary copies of parts of the recording that are made during transmission via the Internet and temporary copying in a computer's random access memory.

This aspect of the proposed US regulations is opposed by the Coalition of Internet Webcasters (whose membership comprises AudioNet Inc, Real Networks Inc, and Terraflex Data Systems Inc). They argue that streaming and transmission that occurs in the course of performance of sound recordings should be exempt from liability under the mechanical right. Essentially the Coalition argues that any bill that will ultimately be submitted to Congress should represent the viewpoint of all relevant parties involved in the business of on-line music, whether they be music publishers, record companies, broadcasters or the consumer public in general. Although the Copyright Office's Notice invites such participation, the agreement between the NMPA and the RIAA that underpins the proposed rules was reached to the satisfaction of merely half the industry. It is arguable that, unless incidental copying in the transmission process becomes an exemption from copyright infringement, then electronic commerce involving the flow of copyright material on the Internet will be unduly restricted.

#### **COPYRIGHT MANAGEMENT - IMPRIMATUR**

Collecting societies such as the APRA and AMCOS and their contemporaries around the world have a significant stake in the utilisation of copyrights in music on-line. What is clear, however, is that merely identifying rights usage is only the first step in securing revenues for a collecting society's members. The second

step is to police and track the use of music on-line.

One of the most significant developments for this second step in the European Community is the introduction of the IMPRIMATUR programme. IMPRIMATUR is an acronym standing for Intellectual Multimedia Property Rights Model and Terminology for Universal Reference. The programme is funded by the European Union and its participants include telecom companies, library associations and music industry groups. Its purpose is to establish standard copyright management systems for a whole range of industries that use text, imaging or audio in an electronic format. The intended result is a commercial software prototype with internationally agreed standards which will enable Internet trade in intellectual property. The programme is an important part of the work of the Confédération Internationale des Sociétés de Auteurs et Compositeurs and is being coordinated by the UK based Authors' Licensing and Collecting Society.

In the UK, the Mechanical Copyright Protection Society (MCPS) is currently testing a demonstrator model of the authorising system.<sup>8</sup> Under the model, copyright works indexed for licensing purposes on the MCPS database are uploaded on to the IMPRIMATUR server and given invisible watermarks. These watermarks tie the work to a system where its use can be regulated and audited<sup>9</sup>.

Without adequate safeguards and initiatives such as IMPRIMATUR, copyright piracy is likely to continue to plague the music industry in cyberspace, as it does presently, costing 5% of the world's gross market share. Indeed the problem of piracy is further complicated in cyberspace by the cross jurisdictional nature of the medium. A pirate may locate in a jurisdiction where copyright protection laws are lax or may readily adopt a fleeting presence across a number of jurisdictions so as to avoid detection and prosecution.

*Mark Bamford is a Senior Associate at Tress Cocks & Maddox in Sydney.*

1 The commercial developments stated are current, to the best of the authors' knowledge, at the time of writing.

2 Unless otherwise specified the position is stated according to Commonwealth Law.

3 A significant exception is 'production music'. The Australasian Mechanical Copyright Owners Society (AMCOS) controls rights in the sound recording and musical work for such music.

4 As commercial applications of the web expand the public performance right in both the sound recording and musical work may be utilised by users who receive the services in premises such as gyms, clubs and cafes.

5 Excluding 'production music' the on-line rights for which are held by AMCOS

6 Telstra Corporation Limited -v- Australasian Performing Right Association Limited 38 IPR 294

7 The Federal Register Notice of Proposed Rule Making In Mechanical and Digital Phonorecord Delivery Date Adjustment Proceeding (62 Fed Reg 63506) lists proposals for the new regulation.

8 The author understands that there has been some consultation between MCPS and AMCOS/APRA in relation to trials of the system.

9 For further details visit <http://www.imprimatur.alcs.co.uk>. For the purpose of the demonstrator model, MCPS has combined with Liquid Audio.

## **Football, Meatpies, Kangaroos and Holden Cars ...and Kiwifruit**

**Therese Catanzariti and Diane Hamilton review the release of draft Australian Content Standard for Commercial Free to Air Television.**

**L**ate on Friday evening 13 November 1998, the new draft Australian Content Standard slipped into the Australian Broadcasting Authority website [http://www.aba.gov.au/what/program/oz\\_review/](http://www.aba.gov.au/what/program/oz_review/)

The Australian Content Standard sets out, among other things, minimum levels of Australian programming which must be broadcast on commercial television, and what the Australian Broadcasting

Authority, the ABA, considers to be an "Australian program" for inclusion in the quota. Australian Commercial television licensees must comply with the Standard. The object of the standard is to "promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control".

The prime catalyst for the review was the decision of the High Court in the Project Blue Sky case, which held that the Content Standard was inconsistent with Australia's obligations under the Australia/New Zealand Closer Economic Relations Trade Agreement because New Zealand programs did not count towards a commercial broadcaster's quota of "Australian programs". This was contrary to the Broadcasting Services Act 1992 which provides that the ABA must