

PROTECTING THE MESSENGER: CARRIAGE SERVICE PROVIDERS' LIABILITY FOR THIRD PARTY COPYRIGHT INFRINGEMENT

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As required by the 2004 Australia United States Free Trade Agreement, Australia has made a range of changes to the Copyright Act 1968 (Cth) and applicable regulations, paralleling provisions in the Digital Millennium Copyright Act (US). This article considers judicial interpretation of authorisation of copyright infringement as it applies in the online environment and assesses the potential impact on privacy and due process of the creation of legislative 'safe harbours' limiting the liability of carriage service providers for third party copyright infringement.

I INTRODUCTION

Copyright formally protects creators' economic and moral rights, giving effective monopolies as reward for creativity and innovation. However, such monopolies must be balanced with the public's right to access and their effect on competition and free functioning of markets.

Protection of creative endeavours dates back to the 1883 Paris Convention concerning industrial property and the 1886 Berne Convention protecting literary and artistic works. Australia is signatory to a number of treaties administered by the World Intellectual Property Organisation, with applicable provisions incorporated into the *Copyright Act 1968 (Cth)*¹. Copyright protects original tangible expressions of ideas, information or facts (Part III 'works' or Part IV 'subject matter other than works'). Owners have exclusive use of a bundle of economic and moral rights for defined periods of time², and the option to assign economic rights.

The Internet provides a new medium for dissemination of creative works to the widest audience possible. It has however also made it easier to infringe copyright³. Carriage service providers⁴ form the backbone of the Internet and

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¹ Hereafter referred to as the Copyright Act.

² Time limits for economic rights e.g.: life + 70 years for works etc; no time limits for moral rights.

³ A non-owner or one without the owner's permission engaging in acts associated with copyright infringes that copyright.

are, according to Fitzgerald and Fitzgerald, ‘crucial nodes of power...uniquely placed in the decentralised interactive networks...to influence conduct and enforce cultural norms and laws’⁵. CSPs are also simply easier to find than individual infringing users and invariably have deeper pockets. As such, they have become the target for both litigation and legislative protection concerning copyright infringement.

II CARRIAGE SERVICE PROVIDER LIABILITY FOR COPYRIGHT INFRINGEMENT

S22(6) of the *Copyright Act 1968* (Cth) states ‘a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication’. If CSPs initiate content held to be infringing, they would be directly liable⁶.

CSPs however are usually not content providers. Rather, they provide the infrastructure (networks/servers) over which such content travels. The question is then whether CSPs should be liable for copyright infringement when the content in question is initiated by third parties? Heeding the sentiments of Sophocles⁷ to ‘not shoot the messenger’, if CSPs function only as messengers – mere transmitters – the answer is no. However if CSPs authorise the message, the answer is likely yes.

The following explores CSP liability only in situations where primary infringement by a third party can be established.

A Authorisation

S13(2) of the *Copyright Act* provides copyright owners with the exclusive right to authorise another to exercise any of their exclusive rights. S36(1) and s101(1) provide that doing or authorising the doing of any act comprised in copyright by a person not the copyright owner and without their licence amounts to an infringement. At common law, a person who sanctions, approves or countenances an act is taken to have authorised the act⁸. For example, in *University of New South Wales v Moorhouse* (1975) 133 CLR 1, provision of facilities (photocopiers) was judged as authorisation. S39A of the *Copyright Act* now exempts educational institutions provided prescribed notices are posted and facilities in question have been broadened to ‘machine (including a computer)’.

⁴ Also referred to as CSPs. Note definition also includes Internet Service Providers, also referred to as ISPs.

⁵ Fitzgerald, A. & Fitzgerald, B. (2005) *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and E Commerce*, Lexis Nexus.

⁶ See *Telstra Corp Ltd v APRA* (1997) 191 CLR 140 for an example of direct infringement.

⁷ Expression ‘Don’t shoot the messenger’ credited to Sophocles, Greek tragedian, approximately 450BC; <<http://www.phrases.org.uk>> 6 May 2006.

⁸ See, for example, *University of New South Wales v Moorhouse* (1975) 133 CLR 1; *Australasian Performing Right Assn Ltd v Jain* (1990) 26 FCR 53; *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 34 IPR 53.

s36(1A) and 101(1A)⁹ of the *Copyright Act*, inserted via the *Copyright Amendment (Digital Agenda) Act 2000* (Cth)¹⁰, provide three inclusive factors to be used in determining authorisation: s36(1A)(a) power to prevent the doing of the act; s36(1A)(b) nature of relationship between person and person doing the act; and s36(1A)(c) whether reasonable steps were taken to prevent or avoid the doing of the act, including compliance with relevant industry codes¹¹.

If carriage service providers make available the infrastructure for transmitting infringing material, are they to be taken to have authorised its transmission and, as such, be liable for copyright infringement? Consistent with Article 8 of the *WIPO Copyright Treaty*, s39B and 112E were added to the *Copyright Act* via the *Digital Agenda Act*. These sections, which specifically mention CSPs, provide persons providing facilities for facilitating or making communications are not taken to have authorised infringement merely because alleged infringers used their facilities. These sections however do not absolve CSPs from all charges of authorisation.

While American copyright legislation does not address 'authorisation' of infringement as contained in Australian legislation, cases decided in the United States illustrate how what constitutes 'provision of facilities' has changed with technological developments. They also serve to illustrate how companies may be held liable for third party infringements. In *Religious Technology Centre v Netcom On-Line Communication Services* (1995) 33 IPR 132 (US Dist Ct, Northern District of California), an American bulletin board service provider was found liable for contributory infringement for the actions of an individual posting infringing tracts from Scientology publications. In *A & M Records Inc v Napster, Inc* 239 F 3d 1004 (9th Cir 2001), the United States Court of Appeal for the Ninth Circuit found Napster guilty of contributory and vicarious liability for providing software that allowed users to copy MP3 music files held by other users¹². Napster's centralised cataloguing system was critical in determining that they went beyond mere provision of facilities. In *Metro-Goldwyn-Mayer Studios Inc v Grokster* (2005) 64 IPR 645, the United States Supreme Court found Grokster liable for the infringing activity of users of its decentralised peer-to-peer software¹³. The Court held that Grokster by clear expression or other affirmative steps had fostered and promoted infringement.

In *Universal Music Australia Pty Ltd v Cooper* (2005) 65 IPR 409, an Australian website proprietor was held liable for authorising infringement by providing links to music files on other websites. Tamberlin J found at 84 that 'The website is clearly designed to, and does, facilitate and enable this infringing downloading' and that Cooper 'knowingly permitted or approved the

⁹ s101(1A) provisions mirror s36(1A) provisions

¹⁰ Hereafter referred to as the Digital Agenda Act.

¹¹ The operative word is 'relevant' and assumes that such industry codes would require avoidance of activities that might amount to authorisation.

¹² Called Peer-to-Peer or P2P.

¹³ A super nodal configuration rather than Napster-style central registry.

use of his website in this manner and designed and organised it to achieve this result', exhibiting the necessary power to prevent required in s101(1A)(a) of the *Copyright Act*. A disclaimer concerning downloading MP3 files without permission was taken to have little effect and did not constitute 'reasonable steps' for infringement prevention under s101(1A)(c)¹⁴. Cooper's involvement was judged more than mere provision of facilities, thus not attracting s112E¹⁵ protection. The Internet Service Provider used by the website, its principal and an employee were also liable for authorising infringement. Tamberlin J held that the ISP had the power to prevent the doing of the infringing act as per s101(1A)(a)¹⁶ and took no steps to either take down the website or prevent further infringement when put on notice, as required under s101(1A)(c)¹⁷.

In *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, parties were found to have authorised infringement through decentralised peer-to-peer networks. Sharman and associated respondents were found to have the degree of control necessary to prevent infringement consistent with s101(1A)¹⁸. Wilcox J concluded that parties knew KaZaA P2P software was used to share copyright files, had not implemented technical measures such as keyword filtering, and exhorted users to 'Join the Revolution', increasing file-sharing and Sharman's profits. His Honour dismissed as ineffective website warnings against sharing copyright files. As in the *Cooper*¹⁹ decision, Sharman's involvement was judged beyond the bounds of s112E²⁰ protection. Wilcox J found the *Grokster*²¹ decision of little assistance as American law does not contain the concept of 'authorisation' of copyright infringement as considered in Australian law, relying instead on doctrines of contributory and vicarious liability.

Wilcox J acknowledged the innovative nature of the technology and its potential for wider non-infringing uses²², allowing for continued use of the KaZaA system with technical anti-infringement modifications such as keyword filtering. At 116 Wilcox J commented on the need for modification to protect copyright interest but 'without unnecessarily intruding on others' freedom of speech and communication'. In *Universal Music Australia Pty Ltd v Sharman Networks Ltd* BC200601468²³, it was held that Sharman could be held in contempt for continuing to supply an unmodified version of the KaZaA file-sharing system.

¹⁴ *Copyright Act 1968* (Cth)

¹⁵ *Copyright Act 1968* (Cth)

¹⁶ *Copyright Act 1968* (Cth)

¹⁷ *Copyright Act 1968* (Cth)

¹⁸ *Copyright Act 1968* (Cth)

¹⁹ *Universal Music Australia Pty Ltd v Cooper* (2005) 65 IPR 409

²⁰ *Copyright Act 1968* (Cth)

²¹ *Metro-Goldwyn-Mayer Studios Inc v Grokster* (2005) 64 IPR 645

²² In *Sony Corp of America v Universal City Studios* 464 US 417 (1984) it was held that technologies capable of substantial non-infringing uses should not be made illegal just because they could also be used for infringement.

²³ Unreported, Branson, Lindgren and Finkelstein JJ, 23 March 2006.

In *Warner Music Australia Pty Ltd v Swiftel Communications Pty Ltd* (2005)²⁴, action was taken against an ISP for authorising infringement by hosting servers and a website using BitTorrent applications linking infringers to music recordings. Swiftel had not replied to requests to take down infringing sites. The case was settled out of court with Swiftel agreeing to implement new processes for dealing with infringement notices.

In these cases, providers were judged to be active participants, not 'messengers'. The Australian cases in particular suggest a narrow interpretation of 'provision of facilities' for s39B or 112E²⁵ protection, the ineffectiveness of standard web notices and disclaimers²⁶, and the significance of provider knowledge and action/inaction relative to takedown. It would appear that if CSPs have power to take steps to prevent infringement and are aware of possible occurrence, then they must take reasonable steps to prevent such infringement.

III STATUTORY LIMITATIONS ON CARRIAGE SERVICE PROVIDER LIABILITY

The Australia United States Free Trade Agreement (AUSFTA) signed in 2004 required harmonisation of designated laws. In terms of Intellectual Property, Australia agreed to introduce 'safe harbour' provisions for CSPs closely paralleling those in the *Digital Millennium Copyright Act* (US)²⁷. When 'safe harbour' conditions are met, CSP liability for third party infringement is limited.

The *US Free Trade Agreement Implementation Act 2004* (Cth) inserted Division 2AA of Part V limiting CSP liability²⁸ into the *Copyright Act*, effective January 2005. Part 3A containing specific procedures and template forms, was inserted into *Copyright Regulations 1969* (Cth)²⁹ via *Copyright Amendment Regulations 2004* (No 1).

The purpose of Division 2AA, as detailed in s116AA³⁰, is to limit remedies available against CSPs for copyright infringement. The operative word is 'limit', not totally exempt. To qualify for limitations, individuals or corporations must fall within the definition of a CSP, primary infringement in relation to one of four designated activities must be established³¹ and CSPs must have satisfied specified conditions. CSPs which fail to comply with specific conditions do not automatically become liable for infringement but rather lose entitlement to statutory limitations on remedies.

²⁴ Settled out of court: application for joinder [2005] FCS 1127.

²⁵ *Copyright Act 1968* (Cth)

²⁶ *Universal Music Australia Pty Ltd v Cooper* (2005) 65 IPR 409; AIPC 92-116; [2005] FCS 972 and *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1; 65 IPR 289.

²⁷ In particular section 512.

²⁸ As per s10(1) *Copyright Act 1968* (Cth), carriage service provider has the same meaning as in s87 *Telecommunications Act 1997* (Cth).

²⁹ Hereafter referred to as the Copyright Regulations.

³⁰ *Copyright Act 1968* (Cth)

³¹ To be established by the copyright owner.

A Activities

Division 2AA of the *Copyright Act* establishes four categories of activities³² where statutory limitations apply and conditions that must be satisfied under each category to obtain 'safe harbour' protection. CSPs engaged in more than one activity must ensure compliance with specific conditions and be aware of specific liability limitations for each category.

- Category A (s116AC - conduit): activities where CSPs transmit, route or provide connections or conduct required transient storage.
- Category B (s116AD - caching): activities where CSPs cache³³ copyright material through automatic processes with no manual selection.
- Category C (s116AE - storing): activities where copyright material is stored on CSP network at user direction.
- Category D (s116AF - directing): activities where users are directed to copyright material through information location tools (e.g. hyperlinks) or technology.

B 'Safe harbour' Conditions

Subdivision D of the *Copyright Act* sets out the conditions that must be satisfied by CSPs to obtain 'safe harbour' protection. For all activity categories, CSPs must adopt and implement policies concerning termination of accounts of repeat offenders, designate and publicize contact details for a representative to receive notices³⁴, and comply with relevant industry code provisions concerning technical protection measures³⁵.

CSPs engaged in Category A activities (conduit) must not initiate transmission of the copyright material or make any substantive non-technical modifications³⁶.

CSPs caching (Category B) must only allow access only to users meeting conditions stipulated for access to original material³⁷ and comply with industry codes concerning updating or collecting user information³⁸. CSPs must remove material or disable access when notified of same on originating site³⁹ and not make substantive non-technical modifications⁴⁰.

³² Referred to in both the *Copyright Act 1968* (Cth) and *Copyright Regulations 1969* (Cth) as Category A, B, C or D.

³³ As defined in s116AB *Copyright Act 1968* (Cth)

³⁴ Regulation 20C *Copyright Regulations 1969* (Cth)

³⁵ Subdivision D s116AH(1) Item 1 *Copyright Act 1968* (Cth)

³⁶ Subdivision D s116AH(1) Item 2 *Copyright Act 1968* (Cth)

³⁷ Subdivision D s116AH(1) Item 3 condition 1 *Copyright Act 1968* (Cth)

³⁸ Subdivision D s116AH(1) Item 3 condition 2 *Copyright Act 1968* (Cth)

³⁹ Subdivision D s116AH(1) Item 3 condition 3 *Copyright Act 1968* (Cth)

⁴⁰ Subdivision D s116AH(1) Item 3 condition 4 *Copyright Act 1968* (Cth)

CSPs storing information at user direction (Category C) must not derive financial benefit⁴¹ from infringing activity (if have right/ability to control)⁴². Material judged infringing by a Court must be expeditiously removed⁴³. CSPs with actual or constructive⁴⁴ knowledge of infringement must remove material or disable access though bear no onus to prove infringement⁴⁵.

Category C providers must comply with removal or disabling procedures set out in *Copyright Regulations 1969* (Cth)⁴⁶. For example, under Division 3A.4, CSPs must remove material on receipt of owners' claims of infringement and notify alleged infringers of takedown and right to issue counter-notices. Alleged infringers have 3 months to issue counter-notices of good faith belief as to mistake in fact/law or identification. CSPs must then advise owners and restore material if Court action is not brought within 10 working days.

Category D providers who direct via location information tools must not receive financial benefit⁴⁷ (if right/ability to control)⁴⁸ and must expeditiously remove material on Court notice of infringement⁴⁹. Category D providers with actual or constructive knowledge of infringement must remove material or disable access, again bearing no onus of proving infringement⁵⁰. CSPs must comply with removal or disabling procedures in Division 3A.6 *Copyright Regulations*⁵¹.

These conditions are both extensive and prescriptive. As CSPs usually perform multiple activities, there is a need to continually monitor compliance in all activities to ensure 'safe harbour' protection.

C Limitations on Remedies

s116AG(1)⁵² requires that CSPs satisfy the conditions set out in Subdivision D⁵³ for each particular activity undertaken before limitations on remedies outlined in Subdivision C⁵⁴ for each particular activity will apply. S116AG(2)⁵⁵ provides general limitations applicable to all activities⁵⁶, precluding Courts

⁴¹ See s116AH(3) for issues a Court should regard when determining financial benefit.

⁴² Subdivision D s116AH(1) Item 4 condition 1 *Copyright Act 1968* (Cth)

⁴³ Subdivision D s116AH(1) Item 4 condition 2 *Copyright Act 1968* (Cth)

⁴⁴ See, for example, s116AH Item 4, condition 2A(b) *Copyright Act 1968* (Cth) - becomes aware of facts/circumstances that material is likely to be infringing.

⁴⁵ Subdivision D s116AH(1) Item 4 condition 2A *Copyright Act 1968* (Cth)

⁴⁶ For the purposes of Subdivision D s116AH(1) Item 4 condition 3 *Copyright Act 1968* (Cth), Division 3A.3 relative to court notices also applies.

⁴⁷ See s116AH(3) for issues a Court should regard when determining financial benefit.

⁴⁸ Subdivision D s116AH(1) Item 5 condition 1 *Copyright Act 1968* (Cth)

⁴⁹ Subdivision D s116AH(1) Item 5 condition 2 *Copyright Act 1968* (Cth)

⁵⁰ Subdivision D s116AH(1) Item 5 condition 2A *Copyright Act 1968* (Cth)

⁵¹ Subdivision D s116AH(1) Item 5 condition 3 *Copyright Act 1968* (Cth)

⁵² *Copyright Act 1968* (Cth)

⁵³ *Copyright Act 1968* (Cth)

⁵⁴ *Copyright Act 1968* (Cth)

⁵⁵ *Copyright Act 1968* (Cth)

⁵⁶ Category A, B, C or D

from ordering relief in the form of damages or account of profits, additional damages or other monetary relief.

Subdivision D also provides for category specific limitations. For Category A activities, under s116AG(3)⁵⁷, Courts can order disabling of online locations outside Australia or termination of specific accounts. For Category B, C or D activities (caching, storing, directing), s116AG(4)⁵⁸ allows for removal or disabling of access/reference to copyright material, termination of specific accounts or, under s116AG(4)(c)⁵⁹, a 'less burdensome but comparably effective non-monetary order'. s116AG(5)⁶⁰ provides guidance to the Courts as to matters to consider when making orders, including assessment of harm to copyright owner, burden of compliance on CSPs and technical feasibility of order.

CSPs under s116AH(2)⁶¹ are not required to monitor their services or seek facts beyond those required by standard technical measures in relevant industry codes. Under s116AI⁶², evidence provided by CSPs suggesting compliance is presumed, absent contrary evidence, to indicate compliance with a specific condition. Division 3A.7 of *Copyright Regulations* provides⁶³ CSPs are not liable for damages or other civil remedies for actions taken in good faith to comply with 'safe harbour' conditions⁶⁴.

CSPs who fail to restore content as required by Regulation 20M or 20R may be liable for damages or other civil remedies in actions by users or third parties but not by copyright owners. Regulation 20X allows civil actions against those who knowingly make material misrepresentations by not taking reasonable steps to ensure accuracy.

In *Universal Music Australia Pty Ltd v Cooper* (2005) 65 IPR 409, 'safe harbour' provisions were considered. While the provisions contained in Division 2AA have no retrospective application⁶⁵, Tamberlin J observed that the ISP would not have qualified in any event for 'safe harbour' protection. He noted its failure to adopt a policy for termination of the accounts of repeat offenders as required under s116AH(1) Item 1 condition 1⁶⁶, commenting at 432 that their admitted indifference to Cooper's use of their facilities and awareness of the likelihood of infringement fell short of the standard required. The ISP received financial benefit directly attributable to the infringing activity through free advertising provided on Cooper's website, contrary to s116AH(1) Item 4 Condition 1⁶⁷. Further His Honour noted that the ISP had not acted expeditiously to remove or disable in circumstances that amounted to

⁵⁷ *Copyright Act 1968* (Cth)

⁵⁸ *Copyright Act 1968* (Cth)

⁵⁹ *Copyright Act 1968* (Cth)

⁶⁰ *Copyright Act 1968* (Cth)

⁶¹ *Copyright Act 1968* (Cth)

⁶² *Copyright Act 1968* (Cth)

⁶³ Consistent with s116AJ *Copyright Act 1968* (Cth).

⁶⁴ Regulation 20V

⁶⁵ Tamberlin J at 411.

⁶⁶ *Copyright Act 1968* (Cth)

⁶⁷ *Copyright Act 1968* (Cth)

constructive knowledge, failing to comply with s116AH(1) Item 4 Conditions 2 and 2A⁶⁸.

Warner Music Australia Pty Ltd v Swiftel Communications Pty Ltd (2005) would have been the first to test 'safe harbour' provisions but was settled out of court. As such, these provisions have not, at the time of writing, been judicially considered and interpreted. The comments by Tamberlin J in *Universal Music Australia Pty Ltd v Cooper* (2005)⁶⁹ may however foreshadow strict compliance with all applicable statutory provisions will be needed before safe harbour provisions will be made available.

IV THE PRICE OF PROTECTION

Recent changes to copyright legislation have strengthened the position of copyright owners. They have also afforded a measure of protection for providers who have minimal, if any, control over end users, providing a level of certainty which may encourage continued innovation. However, they have also imposed additional obligations and a cumbersome administrative scheme, with CSPs now functioning as de facto 'digital police'.

Copyright owners are not obliged by law to adopt self-protective measures or minimize their losses. It could be argued that the burden for enforcing copyright and protecting against copyright infringement has been shifted from the copyright owner to CSPs⁷⁰. Consider, for example, the *Sharman*⁷¹ decision where damages and 90% of costs were awarded as well as the need for expensive technical modifications if the file-sharing system was to continue operating. The entertainment industry has been at the forefront of litigation concerning third party copyright infringement, having both the required interest and financial resources. Michael Kerin, chief piracy investigator for the Music Industry Piracy Investigations unit, confirmed in 2005 that their focus would remain on ISPs and P2P networks – end users would not be targeted⁷². At least in that particular industry, the burden for protecting against copyright infringement will likely remain on the 'messenger'.

Actual compliance costs (e.g. notice and takedown procedures) and whether these are passed on to users by way of higher charges will ultimately depend on the number of copyright holders availing themselves of the system and the level of copyright infringement.

⁶⁸ Copyright Act 1968 (Cth)

⁶⁹ 65 IPR 409

⁷⁰ Rimmer, M. (2006) 'Robbery under arms: Copyright law and the Australia-United States Free Trade Agreement', first Monday Peer-Reviewed Journal on the Internet <http://www.firstmonday.org/issues/issue11_3/rimmer?index.html> 2 May 2006.

⁷¹ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1

⁷² Deare, S. (2005) 'New piracy boss talks tough on ISPs'

<<http://www.zdnet.com.au/news/communications/print.htm?TYPE=story&AT=139198607>> 30 June 2006.

To qualify for 'safe harbour' protection, organisations must fall within the technical and limited CSP definition contained in the *Telecommunications Act 1997 (Cth)*⁷³. The Australian definition with its focus on users is quite narrow, compared to the American definition with its focus on activity and type of service. As pointed out by the Australian Vice Chancellors Committee⁷⁴, major users and disseminators of copyright material such as education institutions, non-government organisations and indeed many government departments do not currently qualify as CSPs and are therefore not afforded 'safe harbour' protection, increasing their potential exposure. The rapidly changing online environment with the continuing emergence of new formats such as P2P suggests that a broader definition along the lines of the American definition may be more desirable, reducing the need for constant revision of this fundamental definition. This is one of the issues under review by the Copyright Law Branch, Department of the Attorney General.

A Privacy

To ensure copyright owners' rights are protected and enforcement action taken, disclosure of subscriber information may be required. Such disclosure can be court ordered. For example, in *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532, access to university records to identify alleged infringers was granted under Federal Court Rules, albeit with conditions imposed relative to confidentiality. In *Sharman*⁷⁵, Anton Piller orders were obtained for documents containing subscriber information.

In the United States, copyright owners have the right to subpoena infringer details⁷⁶ without judicial oversight. This right to subpoena was tested in *Recording Industry Association of America v Verizon* (2003) 351 F.3d 1229 (D.C.Cir., 2003). While the United States Court of Appeals for the District of Columbia ultimately quashed the issued subpoenas⁷⁷, concern still exists regarding potential invasions of privacy or use of private information for competitive or criminal purposes. In a speech delivered to the Internet Industry Association in 2004⁷⁸, the Minister of Communication, Information Technology and The Arts noted that the Australia United States Free Trade Agreement does not require Australia adopt the American subpoena system. Adopting such a procedure would, in any event, prove problematic in Australia as it effectively amounts to judicial powers being exercised administratively.

⁷³ Hereafter referred to as the *Telecommunications Act*.

⁷⁴ *Safe Harbour Regime Review of the scope of Part V Division 2AA of the Copyright Act 1968*, AVCC Submission to Attorney General's Department. October 2005
<<http://www.avcc.edu.au>> 28 April 2006.

⁷⁵ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1; 65 IPR 289

⁷⁶ s512(h) Online Copyright Infringement Liability Limitation Act, part of the *Digital Millennium Copyright Act 1998* - now part of Copyright Law in Title 17 of the United States Code.

⁷⁷ Verizon successfully argued that an ISP acting as a conduit for P2P activities did not fall within 512(h) *Digital Millennium Copyright Act 1998* (US).

⁷⁸ Minister's speech to Internet Industry Association Gala Dinner, February 2004
<http://www.darylwilliams.dcita.gov.au/Article/0,,07-2_4011-4_117825,00.html> 4 May 2006.

The *Copyright Act* is silent concerning the circumstances under which CSPs are required to provide subscriber details or the specific procedures to be used, leaving these key issues to existing procedures and judicial discretion. Whether existing procedures, such as the Federal Court Rules, will prove adequate remains to be seen.

Of further issue for CSPs in terms of notice/counternotice is whether disclosure through what is essentially an administrative rather than judicial process would amount to a breach of privacy under the *Privacy Act 1988* (Cth), breach of confidentiality under the *Telecommunications Act*, or contractual agreements with subscribers. These issues have not as yet been judicially determined, increasing uncertainty for CSPs.

B Due process

To qualify for 'safe harbour' protection, CSPs must 'expeditiously' remove or disable access to material once a claim of infringement is received or they have actual/constructive knowledge. Copyright owners advise that material is theirs and that there has been an infringement - they do not provide either evidence or a statement that such evidence exists and CSPs are not required to investigate the veracity of their claims. As such, the action of take-down occurs based on an allegation of infringement.

In *Rossi v Motion Picture Association of America* (2004) 391 F.3d 1000, the United States Court of Appeal for the Ninth Circuit held that subjective good faith belief of infringement was sufficient rather than an objective belief based on evidence and investigation. While this decision is not binding on Australian courts deciding similar cases, it does suggest a potentially low threshold for establishing claims of copyright infringement, lack of 'good faith' being inherently difficult to substantiate. The only constraint on takedown notices is civil damages for material misrepresentation.

CSPs are not required to monitor their services which may limit the incidence of actual knowledge. However with high profile cases and publicity about technology such as P2P, it will become increasingly difficult for CSPs to argue they have no constructive knowledge. There is no incentive for CSPs to resist claims or to not act, even if the action is based on mere suspicion; rather the incentive is to action them as quickly as possible - in essence 'act' then 'ask no questions'. Alleged infringers are not notified before takedown whether precipitated by notice or actual/constructive knowledge and their details may be provided prior to verification of offence or identity. As such, takedown occurs in the absence of evidence or judicial determination of infringement. Until a counter-notice is received from the alleged infringer, material remains off-line, effectively giving CSPs the right to grant a temporary injunction or restraining order. The Act is silent concerning CSP liability for material removed in error, with any recourse by the affected party left undefined.

Of particular concern is 20R of the *Copyright Regulations* referring to takedown other than notice by copyright owner (e.g. actual/constructive knowledge). This regulation allows a provider receiving a counter-notice to

restore material if it is 'satisfied that the copyright material is not, or is not likely to be, infringing'. This assumes a high level of knowledge concerning what constitutes copyright infringement and requires providers, who are not themselves experts in copyright law, to make what amount to judicial determinations, in the absence of detailed guidance or judicial interpretation.

As such, CSPs are in the potentially powerful position of being able to take down material (even if based only on suspicion), provide details as to identity prior to any infringement being established and then re-post material based on their own judgment as to its potential to infringe. Given the current 'safe harbour' provisions, they have been provided the necessary incentive for such actions.

One of the purposes of the *Copyright Amendment (Digital Agenda) Act 2000* (Cth) was to promote certainty for information technology and communications industries⁷⁹ to encourage continued investment and development in the online environment. Relative to the temporary copying of material required as part of technological processes such as transmission and caching as well as online browsing of copyright material, such certainty has been achieved. CSP liability for third party copyright infringement has been both clarified and limited.

However, while the amended *Copyright Act* outlines the basic 'rules of the game'⁸⁰, it does not provide the detailed provisions contained in the companion American legislation. While it can be argued that the Australian approach results in a less complex act which may be easier for the industry to comprehend, it leaves its implementation open to interpretation by the industry.

Judicial interpretation will likely be required on many Division 2AA provisions before providers can fully know the 'rules of the game'. For example, who constitutes a 'repeat infringer'⁸¹ - someone who is the subject of multiple notices or judicial determination? What are the 'appropriate circumstances'⁸² for termination? What would amount to 'substantive modifications'?⁸³ What constitute 'reasonable steps' to prevent infringement?⁸⁴ And when do these 'reasonable steps' amount to control over content, making the CSP potentially liable for direct infringement actions? Until judicial direction is given in these key areas, uncertainty as to what specifically CSPs should do to deal with or prevent copyright infringement and how specifically they should do it remains uncertain. Whether this uncertainty will lead to increased litigation and costs passed on to users remains to be seen. Rather than waiting for the litigation that will bring about the required judicial determinations, amendments to the legislation providing such clarification appear warranted.

⁷⁹ s3(b)

⁸⁰ cf *Broadcast Services Amendment (Online Services) Act 1999* (Cth) with its detailed procedures and penalties.

⁸¹ s116AH(1) Item 1, condition 1, *Copyright Act 1968* (Cth)

⁸² s116AH(1) Item 1, condition 1, *Copyright Act 1968* (Cth)

⁸³ s116AH(1) Item 3, condition 4, *Copyright Act 1968* (Cth)

⁸⁴ s36(1A)(c) and s101(1A)(c), *Copyright Act 1968* (Cth)

Abuses of the system have been noted in the United States with providers being bombarded with machine-generated claims, claims issued in error⁸⁵ or claims with apparent competitive intent. According to Urban and Quilter⁸⁶, 30% of notices reviewed contained obvious questions for judicial determination and over half of the notices sent to Google during their study period were from businesses targeting apparent competitors. Davis-Wilson⁸⁷ reviewing Google notices, noted that most target indexed user-created rather than Google created content. So why contact Google and not alleged offenders? Davis-Wilson suggests Google's accessibility and incentive to comply with 'safe harbour' provisions makes it an easier target. Interestingly, Davis-Wilson noted three main categories of notices: removal of 'cracks'⁸⁸, competitor sites and criticism. Reports such as this add fuel to American concern over breach of First Amendment⁸⁹ rights and foreshadow possible Australian experience⁹⁰.

V CONCLUSION

Under existing legislation, Australian CSPs would be directly liable for infringement if they determine communication content. Temporary reproduction or storing of copyright material contained in non-infringing communication does not infringe if required for technical reasons. CSPs are not taken to have authorised infringements merely by providing the facilities used to infringe. In other instances, whether CSPs authorised infringement would be determined by a number of factors listed in the legislation⁹¹ and interpreted by the Courts. Provided CSPs qualify for and fulfil conditions required, 'safe harbours' may be available to limit remedies available against CSPs for third party infringement.

Existing legislation however is based on current technology and current judicial and industry interpretations. As technology develops, will current 'safe harbours' provide sufficient protection? Consider, for example, YouTube, an American video sharing site which posts extensive terms and conditions

⁸⁵ See examples in Birchall, S. (2003) 'Copyright Crackdown - The Implications for Australian Internet Service Providers under a Free Trade Agreement between Australia and the United States', *New South Wales Society for Computers and the Law*, Issue 52 <http://www.nswscl.org.au/journal/52/Sydney_Birchall.html> 4 May 2006.

⁸⁶ Urban, J. & Quilter, L. (2005), 'Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act' <<http://www.mylaw.usc.edu/documents/512Rep>> 29 April 2006.

⁸⁷ Davis-Wilson, M. (2005), 'Google DMCA Takedowns: A three-month view' <<http://www.chillingeffects.org/weather.cgi?WeatherID=498>> 6 May 2006.

⁸⁸ Material copied wholesale.

⁸⁹ Right to free speech; discussed in *Online Policy Group et al v Diebold Inc* 337 F. Supp. 2d 1195 (2004) where blanket cease and desist orders were alleged to constrain free speech.

⁹⁰ 'IIA Warns Imminent Copyright Changes 'Dangerously Exceed' FTA Agreement', Internet Industry Association News Release, December 6, 2004. <<http://www.iaa.net.au>> 4 May 2006.

⁹¹ See, for example, s36(1A) *Copyright Act 1968* (Cth).

containing disclaimers, liability limitations and indemnities⁹², takes down on request, and blocks longer video⁹³. Would these actions be sufficient to satisfy Australia's 'safe harbour' conditions of undertaking 'reasonable steps'? If not and YouTube is required to take a more active role in monitoring their users' activities, will they still be the messenger or will they become part of the message?

⁹² It must be noted that these are only accessible by clicking the 'Terms of Use' link at the bottom of the home page. Video can be accessed without reading or agreeing to any Terms of Use.

⁹³ YouTube has determined that video over 10 minutes in length is generally under copyright and will not post it.