The Internet: copyright issues and some thoughts on protection

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Introduction

The Internet has created a huge range of information readily available to anyone with the right basic equipment - a PC, a modem and dial-in through a provider.

While there is no doubt that much material is placed on the Internet in full knowledge that it will be accessed and copied, it is inevitable that widespread unauthorised copying also exists and will increase.

One reason for likely abuse is the anonymous nature of the people using it. In 1994 a student at the Massachusetts Institute of Technology set up a computer bulletin board and encouraged his correspondents to upload copyrighted software that other users could download for free. The United States Government charged the student with criminal copyright infringement under the Federal wire fraud statute.[1] While the District Court noted the impropriety of the student's action it held that his conduct was not punishable under the wire fraud statute. While copyright law provided the full range of penalties for criminal infringement actions the court held that it did not cover the student's non-commercial activities.[2]

One only has to read the material produced by Internet anarchists in the United States to know that material placed on the Internet is very vulnerable to abuse from the perspective of copyright ownership.

Current Australian position

The theory underpinning copyright law is that there should be a balance between the exclusive rights of the author and the public benefit.

Under Australian copyright law the author of a literary, or other work is the owner of any copyright subsisting in it.[3] Much of the material available on the Internet is likely to be subject to copyright other than in situations where the person who placed the material on the Internet did so with no intention of retaining their exclusive rights.

The Copyright Act gives the copyright owner the exclusive right to do certain things in relation to the copyright subject matter and the exclusive right to authorise another person to do those acts. These exclusive rights in relation to a literary work (which includes computer programs) include the right to reproduce the work and to publish the work.

Section 29(1)(a) of the Copyright Act provides that a work is only published if reproductions of it have been supplied to the public by sale or otherwise. The High Court held in *Avel Pty Ltd v. Multicoin Amusements Pty Ltd*[4] that the words "to publish" mean to make public in the copyright territory, in other words the right of first publication. There is no reason therefore to preclude first publication of material on the Internet from the protection of the Copyright Act.

Another copyright is the right to reproduce the work or an adaptation of a work in a material form. It is this right which is breached most frequently in the decided cases with on-line copyright.

The term "material form" is defined[5] as including any visible or non-visible form of storage from which the work can be reproduced. The meaning of the definition was considered by Pincus J in *Roland Corp v Lorenzo*[6] when he was confronted with the copying of material contained in manuals which had first been stored on a floppy disk. Copying the printout was held to be a breach of copyright. The court held that copyright in the content of the disk included the right to reproduce the content of the disk in any form of storage in which the work could be reproduced.

The focus of the courts has not been on the form or embodiment of the reproduction but on its content. Brennan J in *Autodesk Inc v Dyason*[7] said: "The notion of reproduction still connotes a resemblance between the work in which the copyright subsists and the work which is copied from it. The material form to which the respective works are reduced need not be the same, but if the forms are so dissimilar as to deny resemblance between the works, one cannot be said to be a reproduction of the other.[8]

The Copyright Law Reform Committee in its Final Report on "Computer Software Protection"[9] has recommended clarification of the meaning of reproduction with reference to works stored electronically. The Committee has suggested that an amending definition be drafted which deems the mere act of converting or adapting a work from its hard copy readable form to an electronic form of storage, such as digital, which is machine readable and which, when printed out is unintelligible because it consists of machine-readable symbols, to be a reproduction of the work or an adaptation.[10]

The US experience is instructive on the different types of instances in which courts have held that copies have been made. These include:

- when a work is placed into a computer, whether on a disk, diskette, ROM, or other storage device or in RAM for more than a brief period;

- when a printed work is "scanned" into a digital file, a copy - the digital file itself - is made;
- when other works - including photographs, motion pictures, or sound recordings - are digitalised;
- whenever a digital file is "uploaded" from a user's computer to a bulletin board system (BBS) or other server;
- whenever a digitalised file is "downloaded" from a BBS or other server;
- when a file is transferred from one computer to another;
- when an end-user's computer is employed as a "dumb" terminal to access a file resident on another computer such as a BBS or Internet host.[11]

On the face of it then it is a breach of copyright to either publish on the Internet or reproduce from the Internet material which is the copyright material of another person.

Recent US decisions

Some recent US cases have added weight to the argument that copyright is enforceable in relation to material on the Internet. In *Playboy Enterprises Inc v Frena*[12] a BBS scanned photos from Playboy and posted the digitised photos on a BBS system. Playboy sued, claiming copyright infringement. The Court held that distribution of the digitised photos infringed Playboy's copyright.

In *Sega Enterprises Inc v MAPHIA*[13] a system operator ran a BBS on which users up- and down-loaded copies of copyrighted video games. The system operator was found liable for copyright infringement and the BBS was shut down. The Court found that the bulletin board was used to "make and distribute" copies of copyrighted video games, and there was "unauthorised copying and distribution" of the games on the bulletin board. It was irrelevant that the system operator did himself not make copies.

Some commentators have questioned whether it might not be more appropriate to bring the action against the person who did the copying rather than against the operator of the service who merely provided the facility, without knowledge of the infringement.

The US Presidential Working Group on Intellectual Property Rights established in 1993 released its report in September last year entitled "Intellectual Property and the National Information Infrastructure" (the "White Paper"). The essence of the White Paper is that the growing computer communications system in the US will not flourish without safeguards against theft and copyright abuse.

Among its proposals the White Paper recommends amending existing provisions under copyright law to clarify that digital transmissions are distributions of copies to the public and to amend the definition of "transmit" to include transmissions of a reproduction.[14]

The White Paper also recommends prohibiting the distribution of devices and services aimed at circumventing technological protection for copyrighted works: decoders, password breakers, and optical character recognition (OCR) devices that can facilitate the unauthorised reproduction of copyrighted works.[15]

The White Paper also proposes reinforcing existing laws. The unauthorised browsing of a work in digital form would be considered an infringement of the owner's copyright. Strict liability for on-line service providers for copyright infringement by users would be imposed. Finally, the application of copyright's fair use doctrine in digital networked environments would be limited. This would curtail the powerful argument that a copyright was not infringed because the entire work was not appropriated, or the original market for the work was not affected.

Safeguarding material on the Internet

What are some approaches which might be taken to protect material loaded on the Internet?

Some on-line service providers are already following a path which limits the data uploaded and the subsequent distribution of copyrighted material. America On-Line (AOL) terms of service provide that anyone posting information in message board areas consents to the placement of that material in the public domain. The placement of copyrighted material in any public posting area without the consent of the copyright owner violates the terms of service.

Another possible method is to locate a Web-wrap agreement with material when it is loaded on the Internet. A Web-wrap agreement operates in much the same way as a shrink-wrap licence. A browse on the Internet reveals that such licences usually include copyright and trademark proprietary notices, limitations on warranties, licences for the display, personal use and limited copying of material and terms and conditions of access and use.

The critical legal question is whether such licences are effective. Has the user actively or passively consented to the terms of the agreement? The cases on shrink-wrap licences may assist to some extent although they generally do not offer a lot of support for the enforceability of the licence agreements.

The US Third Circuit court considered the enforceability of shrink-wrap licences in some detail in *Step-Saver Data Systems Inc. v Wyse Technology*[16]. The court generally applied the provisions of the UCC dealing with sale of goods. It held that the parties had agreed to a contract at the point at which the purchaser placed a telephone order and the product was shipped. Accordingly only those terms which the parties had agreed at that point became part of the contract. The shrink-wrap licence was ineffective to modify the contract terms unless the purchaser

specifically agreed to the modification.

Under the proposed UCC revisions dealing with software licences, Web-wraps (as on-line versions of standard form licence agreements) would be enforceable only if the user actively gives assent after having had an opportunity to review the licence terms.

An "opportunity to review" requires only that the licence be available before providing access to the works in such a way that the user is made aware of the terms of the licence in his or her normal first use of the works. There is no requirement that the user actually read the agreement.

Conclusion

What is clear is that current copyright law and copyright licensing falls somewhat short of the level of protection required in the age of digitised transmissions. The challenge for copyright lawyers will be to find a form of protection which balances the rights of the copyright owner with the principles of open access espoused by net-users.

1 18 USC 1343
2 United States v LaMacchia 871 F.Supp.535 (D.Mass.1994)
3 Section 35(2) Copyright Act 1968
4 (1990) 18 IPR 443
5 Section 10(1) Copyright Act 1968
6 (1991) 22 IPR 245
7 161 CLR 171
8 Ibid at page 207
9 Office of Legal Information and Publishing, Attorney-General's Department, Canberra 1995
10 Para 6.55
11 "Intellectual Property and the National Information Infrastructure", The Report of the Working Group on Intellectual Property Rights, September 1995 ("the White Paper") ate page 65
12 839 F.Supp.1552(M.D.Fla.1993)
13 857 F.Supp.679 (N.D.Cal.1994)
14 White Paper, supra at page 213
15 Ibid at page 230
16 939 F.2d 91 (3d Cir.1991)

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COMPUTER COPYRIGHT UPDATE — THE STATE OF PLAY IN PROTECTION OF SOFTWARE AND DATABASES

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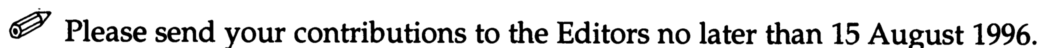

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