have been talking about HDTV for decades - successive improvements in the black and white days were thought of as 'high definition' at the time. When the technologies that now bear the name 'HDTV' began to be developed, the goal was cinema quality pictures and CD-quality sound. The problem is, cinema-quality pictures have got better and better, and cinema sound is now capable of way more dramatic things than simple home CDs. Further, the cinema has reinvented itself as a social experience, totally differentiating itself from the experience of even high resolution audiovisual entertainment in the home. I simply don't believe a substantial share of consumers are going to think HDTV alone is worth many dollars to them.

Finally, the ABA report seems to have problems even on its own terms. It tries to treat the existing free-to-air stations equally, promising each a digital channel. Yet the reality is that this can only be achieved if there is shuffling around. I don't understand all the technical issues, but I'm troubled at the implications that Channel 10, the most vulnerable commercial broadcaster in a multi-channel environment, will need to shift frequencies - a fairly inequitable outcome, in a vision which is entirely based on equity for existing players.

ROLE OF NATIONAL BROADCASTERS

It's worth noting that in the UK, the BBC has been given the DTT multiplex with the best reach. One of the most important things that needs to happen with DTT in Australia is a restatement of the enduring significance of the national broadcasters, the ABC and the SBS, to our television culture. They need to be given a central place in any future television transmission system. The ABC, the SBS, the Ten Network - I'm not at all averse to the vulnerable getting a leg up. If the strong complain, we can always tell them to bugger off.

This is the full text of a speech given by Jock Given, Director, Communications Law Centre, UNSW at the IIC Conference in Sydney on 13 August 1997.

Telstra v APRA - Implications for the Internet

Simon Gilchrist examines recent High Court decision and the implications for Internet service providers in terms of their liability for infringement of copyright on-line

The recent High Court of Australia case on the liability of Telstra for the playing of music on hold (*Telstra Corporation Limited v Australasian Performing Right Association Limited (14 August 1997)*) has immediate implications for the development of the Internet industry in Australia.

At its broadest, the case imposes strict liability on Internet Service Providers (ISPs) for the transmission of copyright material to their customers - even material over which they have no control and no knowledge. This has exposed all Australian based ISPs to the very real risk of being at the receiving end of legal proceedings.

BACKGROUND TO THE CASE

The proceedings were brought by APRA (an Australian collecting society for musical works) against Telstra (one of the general telecommunications carriers) over the issue of who, if anyone, should be liable for the music transmitted over the general telecommunications network as "music on hold".

Telstra's involvement in the provision of music on hold occurs the following ways:

(a) an organisation plays music to its callers that it puts on hold. In this case Telstra's only involvement is the operation of the telecommunications system.

(b) Telstra plays music to callers to its service centres that it puts on hold.

(c) Telstra provides its CustomNet service to certain customers. The CustomNet service is a call managing system. As part of the service Telstra provides music on hold to callers to CustomNet customers that are put on hold.

In each of the above circumstances, music is played either via a CD or tape player or via a radio receiver.

THE CLAIM

APRA commenced proceedings in the Federal Court of Australia against Telstra arguing that the transmission of music in each of the above circumstances constituted an infringement of its diffusion right in the music and that Telstra was liable for that infringement. APRA is for all practical purposes the owner of the diffusion right in all musical works in which copyright subsists.

The High Court accepted APRA's arguments. (The trial judge found for Telstra (*(1993) 118 ALR 684; (1993) 27 IPR 357; (1993) 46 FCR 131*) but APRA successfully appealed to the Full Federal Court (*(1995) 131 ALR 141*) and the High Court rejected Telstra's appeal.)

The case focused on the meaning of the diffusion right, which is defined in section 26 of the Copyright Act - one of the less clear sections of the that Act. The owner of the diffusion right in a work has the exclusive right to object to the transmission of the work to subscribers to a diffusion service.

Section 26 provides that "the transmission of material to subscribers to a diffusion service" means the transmission by wire of the material in the course of a service of distribution of broadcast or other material (whether provided by the person operating the service or not) to the premises of subscribers to the service.

The person liable for the transmission of material to subscribers to a diffusion service is the person operating the service. That person is deemed to be the person who enters into agreements with subscribers and undertakes to provide them with the service (regardless of whether he or she is the person who transmits the broadcast or other material). Section 26(5) provides that where the diffusion service is incidental to or part of a service of "transmitting telegraphic or telephonic communications", a subscriber to the telegraphic or telephonic service is deemed to be a subscriber to the diffusion service.

Telstra argued that it did not have agreements with its customers to distribute music to them. It argued therefore that there was no transmission of music to subscribers to a diffusion service.

The High Court held that the diffusion service does not need to be for the transmission of the copyright material, but can be for the transmission of other material, in the course of which copyright material is transmitted. The High Court deemed Telstra to have agreements in place with each of its customers for the provision of a service - being music on hold. It did this by holding that music on hold was a service and deeming Telstra to have agreements with each of its subscribers to provide that service. It therefore found Telstra liable.

The critical step in the High Court's reasoning was that Telstra had agreements with each of its customers to provide (incidental to or as part of the service of transmitting telegraphic or telephonic communications) a service of distribution of broadcast or other matter to the premises of the customers.

There is no element of intent or knowledge in copyright infringement proceedings. If a person does an act comprised in the copyright in a work without the authority of the owner of copyright, he or she infringes copyright - regardless of whether he or she knew or ought reasonably to have known that their acts would constitute an infringement of copyright. An infringer's state of mind, however, is relevant when determining the monetary remedy that the infringer should pay. The basic rule is that an infringer must pay either damages or an account of profits. The owner of copyright is entitled to choose what method generates the highest dollar figure. If, however, an infringer can prove that he or she infringed copyright innocently (i.e. that he or she was not aware and had no reasonable grounds for suspecting that his or her acts would constitute an infringement of copyright), the owner of copyright is only entitled to an account of the infringer's profits. Damages are typically larger than an account of profits. In addition, it is usually difficult, time consuming and therefore expensive to quantify an account of profits.

The High Court did, however, accept Telstra's defence in relation to the transmission of music that originated from a radio broadcast. This is a technical defence which was primarily designed to allow cable operators to re-transmit free to air broadcasts.

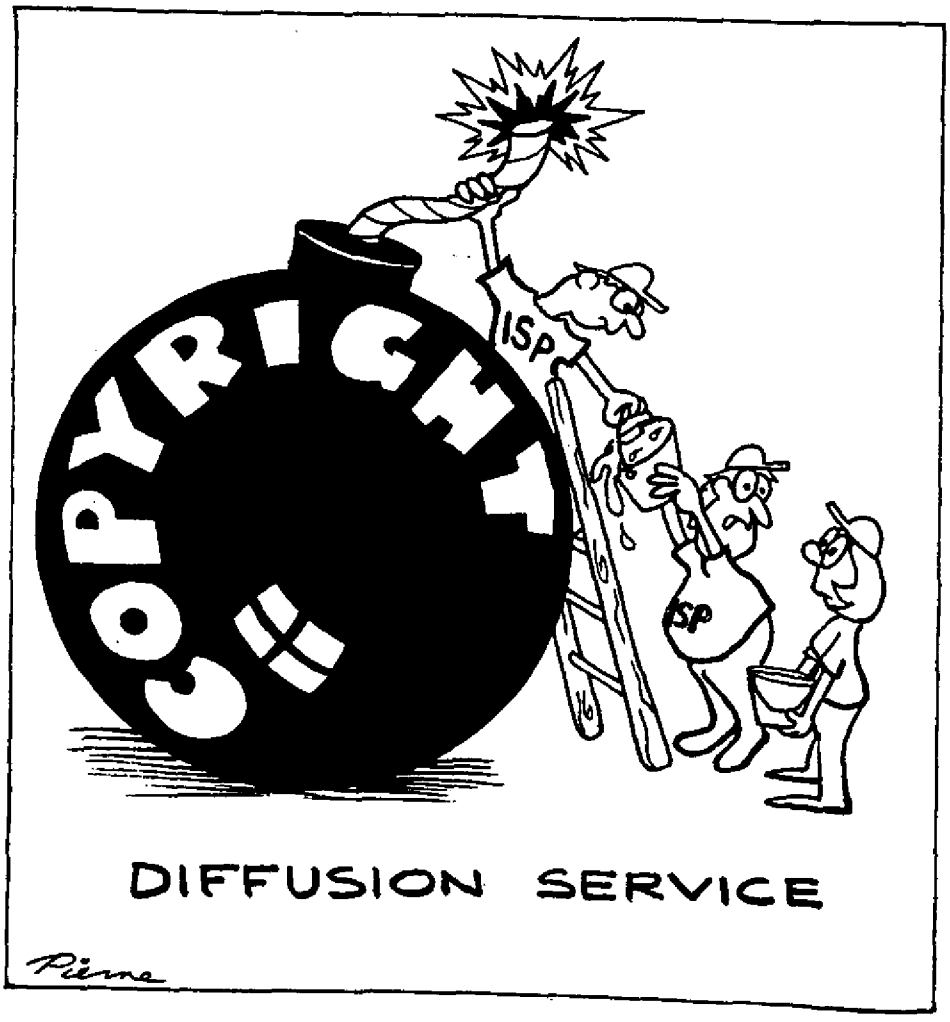
IMPLICATIONS FOR ISPs

This case has direct implications for ISPs. It would appear from the case that an ISP that unwittingly transmits unauthorised copyright material from the Internet to a customer's computer will be directly liable for the infringement of copyright caused by that transmission.

An ISP's primary function is to transfer material from the Internet to its customers. This material consists of e-mails sent to the ISP's customers, messages posted to news groups and viewed by the ISP's customers, computer files stored on FTP sites and down loaded by the ISP's customers, or web pages viewed by the ISP's customers. In short all of these activities involve the transmission of material from the Internet to the computers of the ISP's customers. Some of this material is either created by the ISP or is created by the ISP's customers and stored by the ISP on its servers (such as web sites that the ISP hosts). The majority of the material, however, is originated by third parties who have no connection with the ISP or its customers (other than being physically connected to the Internet).

The majority of this material is protected by copyright, this includes not just literary works but also images, music and video.

In many circumstances the owner of copyright has consented to the transmission of its material over the Internet - that is the purpose of the Internet. The act of placing copyright material on the Internet in all likelihood constitutes an implied licence to anyone to transmit, view and/or listen to the



material. A licence does not need any formalities, it can be implied.

In certain circumstances, however, the copyright owner will not have consented to the placement of its material on the Internet. From the reasoning in the Telstra v APRA case it appears that if an ISP transmits copyright material to its customers in the course of transmitting other Internet content, that transmission is a "transmission to subscribers to a diffusion service". In those circumstances, the unauthorised transmission of that material from the Internet to an Internet user's computer will constitute an infringement of the diffusion right in the material.

It also appears that an ISP would be directly liable for the infringement of copyright in the above circumstances. This is because it is the person who has agreements with its customers to transmit Internet material to them. Section 26(5) does not apply because the service of transmitting Internet material is not "only incidental to, or part of, a service of transmitting telegraphic or telephonic communications".

This is the case regardless of whether the ISP

(a) agreed to transmit the copyright material;

(b) originated any of the copyright material;

(c) had any knowledge of the existence of the copyright material; or

(d) had any way to prevent the transmission of the copyright material.

In other words the ISP faces strict liability.

The ISP is primarily liable for the infringement. The copyright owner is not required to take any action (or even identify) the person who place the copyright material on the Internet.

STEPS AN ISP CAN TAKE

The only way an ISP can totally avoid liability is to obtain licences from copyright owners. In the case of some classes of copyright material this is relatively straightforward (but not necessarily cheap). For example, APRA can grant licences in respect of virtually all musical works in the world. Most business that play or broadcast music have an APRA licence. But these types of blanket licences are not available for all classes of copyright material. For example, there is equivalent of APRA for photographs. In other cases only an incomplete licence is available. For example, the Copyright Agency Limited (CAL) may be able to grant on-line licences for some of the literary works controlled by it but not others. As a practical matter, therefore, an ISP can only obtain licences for certain types of copyright material. The Telstra v APRA case, however, together with the growth of the Internet may be the impetus for many owners of copyright to appoint collecting societies to collect royalties from ISPs and similar organisations on their behalf.

An ISP cannot "contract out" its obligations by stating in its agreements with its customers that it will not be liable for any infringement of copyright of which it is not aware. Its liability may only be waived by the owner of the infringed copyright material. An ISP can, however, attempt to shift its monetary exposure via contract. An ISP can seek to obtain indemnities from its customers in respect of any material that those customers post to the Internet, for example, material that a customer includes in a web site hosted by the ISP or material that a customer posts to a news group. As a matter of course an ISP should obtain indemnities from its customers for any liability that the ISP may incur as a result of material posted on the Internet by its customers, whether for infringement of copyright or other intellectual property rights or defamation or otherwise.

An ISP could also seek to obtain indemnities from the other ISPs that it connects to. An ISP's only connection to the Internet is via other ISPs - that is the nature of the Internet. Those ISPs are, however, unlikely to provide such indemnities. In certain limited circumstances an ISP may be able to commence proceedings against the person who placed the unauthorised material on the Internet or the ISP that originally hosted the material. But this would depend on the ISP being able to identify the person, being able to overcome any jurisdictional hurdles if the person is located outside Australia and being able to recover any judgment against the person.

At a practical and immediate level, however, this decision will encourage ISPs to take a totally "hands-off" approach to the material that they transmit. If an ISP can show that it did not monitor or control what it transmitted to customers, it may be able to succeed on an argument that it was an innocent infringer. This would limit a copyright owner's remedy to an account of profits. An individual copyright owner may think twice about commencing proceedings if all it stands to gain is an account of profits. A collecting society, however, would still stand to recover significant sums given the number of copyright owners it represents.

Of concern to the development of the Internet in Australia is the possibility that ISPs and similar businesses will engage in a form of risk arbitrage and avoid basing themselves in Australia. Even if this does not strictly speaking serve to shield offshore ISPs from liability, a local copyright owner may be less inclined to take action against them.

This case and the risk that it imposes on Telstra and ISPs is likely to be the impetus for the Federal Government to amend the Copyright Act to clarify whether and if so when carriers and ISPs should be liable for the unauthorised transmission of copyright material by them. This is particularly the case given the Government's desire to maximise the value of Telstra in the upcoming float. The Federal Government has released a discussion paper on the reform of the diffusion right "Copyright Reform and the Digital Agenda" (http://www.dca.gov.au/pubs/digital.html). It has proposed that ISP's only be liable for unauthorised transmissions that they "authorised". Whilst this is not an entirely satisfactory solution, it should assist most ISPs. Any reforms, however, are likely to take a significant amount of time before being agreed on and enacted.

In the meantime, unless they take appropriate steps, ISPs should expect to start receiving polite but firm letters of demand from copyright owners and their lawyers. OzEmail, one of Australia's largest ISPs, is already in court with APRA for alleged infringement of copyright in musical works.

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