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Peer-to-peer file-sharing

Jeremy Johnson, Wynn Williams, Christchurch

compares New Zealand and overseas approaches to copyright

The issues that confront governments dealing with peer-to-peer networks that infringe the rights of copyright holders highlight the challenges that modern technology poses to intellectual property law. There is a need to balance the interests of different interests while also upholding the international obligations that states have entered into. New Zealand has attempted to balance the interests involved by the Copyright (Infringing Filesharing) Amendment Act 2011, which introduces a graduated infringement system involving warnings of infringement to user, but which stops short of allowing the suspension of internet services.

Assessing whether this regime is the best one to confront the policy issues requires a better understanding of what the competing interests are. There are, broadly speaking, three ways in which the interests can be balanced. The first can be seen in the manner in which juries in the United States of America have approached the matter; primarily by levying significant (some would say excessive) statutory damages on those holding copyrighted works. It also involves attempting to enforce liability against ISPs to force them to take a pro-active approach to prevent infringement.

The second approach can be seen in the Netherlands, where the economic loss to right holders is dealt with by a levy on the sale of re-writeable CDs and DVDs. The third approach can be seen in the French HADOPI system, which places the emphasis on targeting subscribers through ISPs, although with protections for those subscribers. This also reflects the balanced approach taken in the E-Commerce Directive of the European Union (Directive 2000/31/EC).

These three approaches can then be contrasted with the approach that is taken in New Zealand, which adopts a somewhat softer line than the French HADOPI system (at this stage, at least). Ultimately, any policy response to copyright infringement needs to do four things. It needs to: protect the economic value inherent in copyrighted works; not expose infringers to disproportionate penalties; resolve disputes in the most efficient way; and maintain and balance other important rights (such as that to privacy). Taking those factors into account, it seems clear that the French regime, which involves the suspension of internet services, best fulfils all those objectives and should be introduced in New Zealand.

THE ISSUES

Peer-to-peer file-sharing enables the holder of computer media files (such as films, television shows, and recorded music) to make them available to others by way of the internet and other internet users to view, or listen to, the files from their own computers, with ease. Peer-to-peer networking threatens intellectual property rights; one analysis of the top 10,000 peer-to-peer swarms found that 99.24 per cent of the non-pornographic material traded was copyrighted.

This infringes a number of the exclusive rights granted to copyright holders, both in international law (such as art 14.1 of TRIPS which guarantees, for example, the right to make reproductions for producers of phonograms), and in domestic law (the acts often infringe a right of distribution given by domestic law). Although it is arguable whether it is socially accepted that peer-to-peer sharing is actually an infringement (the success of sites such as Pirate Bay, and of the Pirate Party in Sweden suggests as much), the legal consensus is that the acts in question do infringe copyright.

These issues are compounded by the ease and anonymity of the use of peer-to-peer networks. It is acknowledged by some that such primary infringement has a significant detrimental impact on the music, film and television industries, by reducing revenue which then reduces the incentive to performers, artists and producers to make the work (see Charleton J in the Irish High Court in *EMI Records v UPC Communications Ireland Ltd* (2010) IEHC 377). Of course, there are those that argue that such copying seeds creativity in users, contributing to cultural and economic development.

The next question is the best way to minimise the infringement of the intellectual property rights. Here there are also competing interests. Many jurisdictions acknowledge forms of secondary liability for infringement of copyright. For example, secondary liability in the United Kingdom arises when "copyright in a work is infringed by any person who, without the licence of the copyright owner, authorises another person to do any of the restricted acts" (s 16(2) of the Copyright, Patent and Design Act 1988). Is it better to use secondary liability and target those that may authorise the infringement by, for example, providing the access to the internet (the ISPs), or the file-sharing sites themselves? Or is it better to target the filer-sharers and users?

It is necessary to acknowledge the rights that need to be balanced. There are the clear economic rights and interests of the copyright holders (as well as the moral rights of the authors of the works). On the other hand, there is a need to avoid a disproportionate response when the economic harm, while real, is also, in relation to each individual infringement, comparatively limited (by way of example, a decision in Hamburg awarded damages of €15 per song for each title illegally shared by a 16 year old, as the damage was assessed on the basis of a reasonable licence fee to undertake the infringing activity). At the same time, the rights of file-sharers need to be acknowledged — including the right to privacy, and the right to access to justice, which can be imperilled in the response to peer-to-peer networks.

DIFFERING APPROACHES

In the United States, the defence of copyright has been primarily led by the Recording Industry of America Association (RIAA). The approach has been to bring cases against

people who have accessed peer-to-peer file sharing accounts. The basis of the actions, typically, is to allege that the existence of a "shared files folder" constitutes making a copyright work unlawfully "available for distribution".

In *Capitol Records v Thomas-Rasset* (USCA, 8th Circ, 11 September 2012) an action was brought against Ms Thomas-Rasset in relation to 24 songs that she had shared (she had physically destroyed her hard-drive before it could be examined which limited the evidence against her). The award initially made against her was $9,250 per song, or $222,000. At a re-trial (ordered on a technicality) the federal jury awarded an even greater amount of $80,000 per song, or $1,920,000. The damages could have ranged from $18,000 to $3,700,000. On appeal, the amount was reduced to $54,000 or $2,250 per song on the ground that the previous level was excessive and the need for deterrence did not justify such an award.

The exploitation of the statutory regime in the United States to deter individuals from file-sharing, as highlighted in the *Thomas* case, can also be seen in the approach taken towards file-sharing sites. According to the claimants in the litigation against the peer-to-peer site Limewire (*Arista Records v Lime Group* USDC, SDNY, 11 May 2010) the potential statutory damages ranged up to $75 trillion (although the Court said that the calculations were "absurd"). Regardless of the correctness of the calculations, the litigation was successful in getting the site to take active steps to prevent copyright infringement (in particular by shutting-down and re-launching in a different from).

Accordingly, the approach taken in the United States focuses on large potential damages to deter infringers. There have been attempts to use litigation to force ISPs to take action against infringers, or risk adverse awards, but they have not been successful as yet (for example, the litigation in New York between Viacom, and YouTube and Google — *Viacom v YouTube* (USDC, SDNY, June 2010)). Such an approach seeks to make the ISPs liable on a secondary basis, and force them to take pro-active steps to filter and prevent copyright breach by their subscribers, even where they have only a general knowledge of infringing behaviour.

The second approach is that currently taken in the Netherlands and other continental jurisdictions (although a reform proposal has been floated). Downloading from illegal sources for private use is permitted, although the economic losses to right-holders and authors are mitigated by way of a levy on rewriteable CDs or DVDs.

The third approach taken is that of the French. It effectively involves "three-strike" legislation (the system was actually amended after review by the Constitutional Court). Copyright-holders pass on to ISPs the details of subscribers allegedly infringing copyright. The ISPs then provide two warnings to the subscribers. After a third alleged breach of copyright the details are passed to public prosecutors for them to decide whether or not to instigate legal proceedings. Punishment includes a fine of €1,500 and the initial suspension of the individual's internet account for up to a month.

The approach taken by the French HADOPI system is consistent with the E-Commerce Directive of the European Union which deals with aspects of information society services, including electronic commerce and, most relevantly, the liability of internet service providers. The Directive sets out three "safe harbours" for ISPs; which are:

a) "Mere Conduit": the ISP is not liable for information transmitted, provided that the transmission does not originate with the ISP and it does not select the receiver of the transmission and does not select or modify the information contained in the transmission;
b) "Caching": the ISP is not liable for the "automatic, intermediate and temporary" storage of information provided that the purpose is to make the transmission of information to other recipients more efficient. There are additional conditions not relevant in the present context;
c) "Hosting": the ISP stores information provided by the recipient of ISP's service, provided that the ISP does not have actual knowledge of illegal activity or information and, in relation to claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent or, if it becomes aware of illegal activity or information, it removes or disables access to the information.

The effect of the "safe harbours" is to exempt the ISP from liability for damages and criminal sanctions. In that sense it clearly precludes attempts, such as those by Viacom in the United States, to make ISPs liable on the basis of general knowledge (although such attempts have been unsuccessful in the United States to date). However, the ISPs may still be subject to injunctions, depending on whether such relief is allowed by national law (see, eg, *Twentieth Century Fox Ltd v Newsbin Ltd* [2011] EWHC 1981 (Ch)).

WHICH APPROACH?

In terms of the protection of economic interests, the three approaches outlined protect the economic interests of copyright holders to greater or lesser degrees. Although the United States system, which involves large awards of statutory damages, is arguably more protective in the sense that more compensation is available, practically that is not the case given that such large sums are irrecoverable. The Dutch approach, while dealing with economic loss across the industries affected carries the risk with it that it does not adequately deal with the losses that individuals (or individual industries) can face. Further, it is an approach that can be regarded as antiquated. A levy system worked better before digital music became so prevalent and listening to music increasingly occurred on digital only platforms. To that extent, therefore, the French approach is better at protecting against economic loss provided that it is practically effective.

On the issue of practical effect, although the approach of the United States involves deterrence through large awards, given the cost of litigation, and the significant number of internet users, its practical use is almost certainly limited, particularly when it comes to targeting individual subscribers. The effect of the closure of the Lime Wire site highlights how closing peer-to-peer sites can have considerable practical effect. There was a significant decrease in file-sharing; it was estimated that sixteen million peer-to-peer users downloaded music in the fourth quarter of 2010, down from twenty-eight million in the same period in 2007 (http://news.cent.com/8301-31001_3-20046136-261.html). The Dutch approach has no deterrent effect; it simply intends to reduce the economic loss. However given the risk that not all loss will be addressed, that approach should not be adopted.

The French approach, on the other hand, does arguably have greater effect, by threatening individual subscribers not

just with significant (but payable) fines, but also through the potential loss of internet access. The effectiveness of the system can be seen in the recorded response as at the end of 2011. There had been 800,000 subscribers given a first-warning, 68,000 a second warning; and 165 had their details handed over to public prosecutors. Those figures indicate the success of the individual warning system.

Of course, it has been argued that access to the internet is a "human right" (see, for example, *The Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Human Rights Council, May 2011). It is outside the scope of this article to enter into discussion about this particular issue, but, suffice to say, while there may be a legal argument for this position, it does seem odd to say that access to the internet is required for human dignity (assuming that you accept that human rights are about matters that are essential to being human). Further, such considerations do not appear to have prevented voluntary agreements between ISPs and media and music companies, whereby ISPs will enter into agreements with subscribers allowing the ISPs to disconnect subscribers in the event of infringing behaviour. The settlement of the litigation in Ireland between EMI, Sony, BMG, Universal Music and Warner, and Eircom is an example of this.

The French approach is also more practical than one that places an onus on the ISPs to take individual action, or actively to monitor and filter what their subscribers do. Firstly, there are limits to the technology that ISPs can be reasonably expected to deploy in terms of filtering before it interferes with their freedom to conduct business (as effectively acknowledged by the European Court of Justice in *Scarlet Extended SA v Société Belge des auteurs compositeurs et éditeurs* (C-70/10, 24 November 2011).

Secondly, it is difficult to assess the extent of knowledge that ISPs should be required to possess before they can be said to have engaged in secondary infringement (some form of liability would be required in order to force ISPs to take action). The issue has been highlighted by the litigation in the United States, including the *Viacom* case. It requires careful consideration of whether a generalised knowledge should, or should not, give rise to liability. Such a requirement would go against the general tenor of the law and also ignore the realities, in terms of the knowledge of office-holders and employees that face corporations of the size of successful ISPs. Finally, it also avoids having to stretch existing concepts in copyright law such as "authorisation" (see, for a discussion on the question in Australia, *Roadshow Films Pty Ltd v iiNet Ltd* [2011] FCAFC 23).

What about the other interests that are involved? Arguably the approach taken by France balances those. It protects the rights of the individual and minimises the risks of the "unconstitutionally disproportionate" awards that can be made against the individual subscriber in the United States. In terms of dis-incentivising infringing behaviour such awards may be necessary, rather than small fines which may be insufficient; the alternative of removing internet access can therefore be seen as preferable.

Further, by requiring ISPs to respond to breaches identified by right-holders, the broader social rights of subscribers are better protected. That is because the alternatives involve forcing ISPs to undertake intrusive monitoring or forcing them to hand over details of subscribers to copyright-holders for further action to be taken. Both involve interference with the rights of subscribers to privacy. In addition, forcing ISPs to act pro-actively to defend the rights of unassociated right-holders places an overly burdensome obligation on the ISPs when it should be up to the right-holders to defend their own economic interests. The advantage of the French approach is that it does so, but without the need for expensive and time-consuming litigation to be taken against numerous individuals.

THE NEW ZEALAND APPROACH

The current New Zealand approach was introduced by the 2011 Amendment Act; it introduces a graduated response which is similar to, but less rigorous than the French HADOPI regime. Like the French system, it places the onus on rights-holders to inform ISPs of suspected infringements; after three warnings the copyright owner may then take the case to the Copyright Tribunal which may then levy a fine of up to $15,000 on the alleged infringer. There is the option of introducing a penalty of up to six-month' suspension from internet access (on order of the District Court), but that will not occur until an Order-in-Council is issued. The government is expected to consider whether or not to issue an Order-in-Council in 2013.

The advantages of the New Zealand system are the same as for HADOPI. It is efficient as it places the onus on the right-holders rather than uninterested third parties to take steps to discover infringements. While it has a role for ISPs, the role is appropriately limited. Further, final decisions are made by an independent quasi-judicial tribunal, providing appropriate procedural (and substantive) protections to individuals.

The key question is whether or not the potential penalty of a fine of up to $15,000 will act as a sufficient deterrent. That is difficult to know (especially as, at the time of writing, the Tribunal has released no decision on file sharing infringement). On the one hand, if the fines routinely imposed are at the lower end of the spectrum, then there may be insufficient incentive to stop. On the other hand, levying a penalty of $15,000 for the download of one song may be too high a penalty to act as a realistic incentive, especially if the behaviour is allowed to continue notwithstanding insolvency. Further, given that a suspension order will be made by the District Court, it is clearly intended as a last resort against those for whom a fine is an insufficient deterrent.

On that basis, therefore, the approach taken by HADOPI is preferable. Suspension of access to the internet will almost certainly be a genuine non-financial incentive to stop the behaviour. The effectiveness of HADOPI has already been seen in the figures above. Further, if one acknowledges that the basis of intellectual property law is the protection of property, such a sanction does not seem too extreme a deterrent to unlawful interference with another's property. Accordingly the Executive Council should issue the Order-in-Council giving effect to the legislative provisions allowing for the penalty of suspension.

CONCLUSION

Although ISPs have an important role to play, because of their centrality to the access to the internet, making ISPs pro-active "gate-keepers" is ultimately impractical, endangers the rights of ISPs and individual subscribers, and places an unfair burden on ISPs to protect the rights of others. The French approach, which avoids those risks, as well as the risks associated with individual litigation against subscribers, is clearly the preferable approach to this complex social and economic issue; it is almost replicated in New Zealand, but not quite. The sooner the government allows for suspension of infringers' internet accounts, the better. ❐