

**Responsibility of ISPs for Illegal Content**

In the Draft Code of Practice and at law, there is no protection for service providers who host sites containing illegal material. "Illegal Content" is defined in the Code as "content, the mere possession of which is illegal under an applicable State, Territory or Commonwealth Law". However, if the service provider has taken reasonable steps to ensure illegal content is not transmitted by them, including if it becomes aware such material is available through them and they take steps to remove it, the service provider will not be liable.

Although the definition of "illegal content" does not cover misleading information, there is a separate principle governing conduct of all Code Subscribers stating that they

will not inaccurately represent the benefits of their product or service, or engage in misleading or deceptive conduct within the meaning of the Trade Practices Act.

**CONCLUSION**

I noted at the start of this paper that many of the legal issues associated with advertising and marketing via the Internet are essentially the same as promotions that use other forms of media such as television, magazines and newspapers.

However, the characteristics of the Internet give rise to a number of novel concerns, and should particularly focus the attention of corporate counsel on the need for employee training and a continuous legal quality assurance programme. These programs need to be appropriately

tailored to your corporation's activities and procedures. Their design and implementation does not require close familiarity with the underlying technologies, but should take account of issues associated with electronic commerce. The task is not huge, but relatively few corporations to date have given the task a high priority. No doubt electronic communications policies will suddenly become attractive once Internet-based litigation achieves a higher public profile in Australia, just as Year 2000 compliance strategies and programmes have suddenly come under corporate and public scrutiny.

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## The Liability of Internet Service Providers for Copyright Infringement in relation to Music Transmitted through their Networks

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**I Music and the Internet**

**A Introduction**

This article discusses the potential liability of Internet Service Providers ('ISPs') for breach of copyright, in music passing through their networks. It begins by describing the availability of music on the Internet and how music is transmitted on-line, the participants involved in such on-line transmission (with particular emphasis on the role of ISPs and the level of control they have over their subscribers' actions) and the subsistence of copyright in music.

The potential liability of ISPs for direct infringement of copyright in music, by exercising the copyright owner's exclusive rights of reproduction, performance, broadcast and diffusion rights, is

considered in light of the recent cases involving allegations by the Australasian Performing Rights Association ('APRA') of copyright infringement by Telstra<sup>1</sup> and OzEmail.<sup>2</sup> It is concluded that ISPs may be directly liable for the infringement of copyright in music transmitted through their networks.

This article then discusses the potential liability of ISPs for indirect infringement of copyright in music on the Internet pursuant to the law of authorisation and concludes that, in most instances due to ISPs' lack of control over their subscribers' actions, they would not be liable for authorising their subscribers' breaches of copyright.

Finally, this article looks at policy issues, international copyright developments and reform of

copyright in the new communications environment. It is concluded that the *Copyright Act 1968* (Cth) (the 'Act') should be amended to reflect developments in communications, that ISPs should not be directly liable for copyright infringements where they are merely acting as a conduit for the transmission of music and other material on the Internet and that the law of authorisation provides an appropriate and flexible measure of liability for ISPs for their contribution to copyright infringements in material passing through their networks.

**B Music On-line**

The Internet is a worldwide 'giant network which interconnects innumerable smaller groups of linked computer networks'<sup>3</sup>, that is a

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'network of networks'<sup>4</sup>. Various materials are assessable over the Internet, including text, pictures, films and music. This article focuses on the dissemination of music over the Internet.

The Internet has been described as 'a library without walls'<sup>5</sup> and in the context of music may be likened to a music store without cash registers. It has been noted that the Internet has bred an entitlement philosophy in users:

*The prevailing dogma is that anything available over the Internet — text, graphics, music, software, etc — is free, or at least should be. This attitude, combined with the relative ease with which music can be made available on the Internet, means that in cyberspace, copyrighted music is readily available, usually for free and without authorisation.<sup>6</sup>*

The digitisation of music and the growth of the Internet have enabled music to be easily and widely marketed and disseminated. The dissemination of digital music over the Internet has caused concern for the owners of copyright in music as such dissemination is difficult to monitor. Musicians fear loss of royalties and view digital dissemination as potentially stripping the market value from their music.

Music, in a variety of forms, may be listened to or downloaded from a variety of sources on the Internet. For example, Atlantic Records premieres new tracks on its web site,<sup>7</sup> Cdnw provides an on-line jukebox,<sup>8</sup> InTouch has a digitised music archive,<sup>9</sup> 2SM provides online radio services and MCA Records post footage from music concerts.<sup>10</sup> In addition, there are web sites dedicated to specific artists such as Madonna<sup>11</sup>, David Bowie<sup>12</sup> and Meatloaf.<sup>13</sup>

An analysis of copyright infringement in the context of the Internet necessitates an understanding of how material is transmitted over the Internet and the participants involved in such a transmission.

Music transmitted over the Internet will initially be stored or uploaded onto a content provider's computer. Then it will travel over the Internet via telecommunications infrastructure provided by a network infrastructure provider and may be accessed and downloaded or listened to by a user. In its travels it will pass through an ISP (whose role in the transmission of material on the Internet is described in more detail below). Each participant in the on-line transmission of music is potentially liable for breach of copyright in such music, however, this article limits its consideration to the potential liability of ISPs in such a transmission.

The transmission of data, including music, over the Internet may occur by a variety of means, such as via telephone wire, cable, satellite or microwaves.

For music to be disseminated over the Internet it must be first converted from analog to digital form. Analog record and tapes represent the vibrations of sound waves produced by the musical instrument or voice.<sup>14</sup> The music is then converted into digital form (that is electronically expressed binary language using the digits 0 and 1), stored on a computer disc file and uploaded onto the Internet. Alternatively, music may be generated digitally by connecting electronic musical instruments and synthesisers to personal computers. The standard system for doing this is the Musical Instrument Digital Interface (known as 'MIDI') which defines codes for musical attributes, such as a note's pitch, length and volume.<sup>15</sup> Such music is then reconverted back to a form of expression audible to the human ear when downloaded or listened to. Advanced sound systems use digital signal processing ('chips') to improve the analog-to-digital-to-analog conversion procedure, with the resulting sound equivalent to that produced by audio CDs and amplifiers.<sup>16</sup> The dissemination of digital music over the Internet enables high-quality reproductions to be made of music by anyone having

access to the Internet.

Software such as Realaudio or Shockwave enables users to browse, select and listen to music in real time and also enables content providers to broadcast music live without time delays, in contrast to the previous time-consuming methods of downloading. Such software, with its improving sound quality, is anticipated to contribute to an increased demand for music on-line and to create 'an explosion of realtime music and live concerts on the Net'.<sup>17</sup>

When analysing the possible consequences of breaches of copyright in music disseminated over the Internet, it must be recognised that music is often legitimately transmitted and accessed on-line without infringing copyright, such as when music is uploaded onto the Internet by the copyright owner (which constitutes the granting of an implied licence to use such music) or by licence of the copyright owner, when the term of copyright protection for the particular music has expired or when a defence to infringement applies in relation to a specific use of the music.

An example of the legitimate use of the Internet for disseminating music is the operations of Global Music Outlet. This United States marketing company distributes music on-line with the licence of the copyright owners resulting in artists, publishers and record companies receiving a higher proportion of the sales revenue than from traditional music distribution channels.<sup>18</sup>

It has been acknowledged that the marketing and dissemination of music over the Internet has the potential to provide benefits to the music industry:

Developments in technology have facilitated the recording, distribution and reproduction of performances. These changes have undoubtedly brought large social and economic benefits, making cultural products more widely available and creating whole new industries. The quality, ease and availability of modern

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recording, transmission and copying technology have increased the value of a performance through creating new avenues for exploitation.<sup>19</sup>

## C Copyright in Music

Pursuant to the Act, copyright subsists in both 'works', such as musical, literary, artistic and dramatic works, and 'subject matter other than works', such as sound recordings, cinematograph films, broadcasts and published editions.<sup>20</sup>

Music consists of various components; the lyrics, which are protected as a literary work, the music which is protected as a musical work, the sheet music which is protected as a published edition and the sound recording which is protected as such. In this article, references to 'music', unless specified otherwise or the context otherwise requires, are generic references to the musical and lyrical components.

Copyright encompasses a 'bundle of rights' and includes, in relation to music the rights to reproduce the work, perform the work in public, broadcast the work and to cause the work to be transmitted to subscribers to a diffusion service.<sup>21</sup> In this article, these rights are referred to as the 'reproduction right', 'performance right', 'broadcast right' and 'diffusion right' respectively.

Copyright in sound recordings includes a broadcast right (in relation to which a statutory licence is granted upon the payment of royalties)<sup>22</sup>, a reproduction right<sup>23</sup> and a right to cause the sound recording to be heard in public.<sup>24</sup> Copyright owners of sound recordings do not have the right to transmit such sound recordings to subscribers to a diffusion service.

The Act provides for limited performers' rights, that is the right to control unauthorised recording and transmission of performers' live performances and unauthorised uses of such recordings.<sup>25</sup>

APRA<sup>26</sup> is an association of composers, authors and publishers of music which protects and administers

the copyright in almost all music (and associated lyrics) performed in Australia in respect of the rights of public performance, broadcast and transmission to subscribers to a diffusion service. APRA also administers the reproduction right, by arrangement with the Australasian Mechanical Copyright Owners Society ('AMCOS').<sup>27</sup>

APRA runs a voluntary licence scheme, which is practically no different to a statutory licence<sup>28</sup>, and distributes a percentage of such receipts to its members in the form of royalties. APRA has reciprocal agreements with collecting societies world-wide and represents the performing rights of practically all Australian and foreign composers.<sup>29</sup> A blanket licence from APRA, therefore, would clear ISPs in relation to nearly all music world-wide transmitted through their networks.<sup>30</sup>

## D The Role of Internet Service Providers

ISPs, such as OzEmail (whose operations are discussed in more detail below), Telstra's Big Pond and Access One, act as a conduit between the Internet and its users. ISP's subscribers link to the ISP by means of a telecommunication network and the ISP then connects to the backbone of the Internet. The role of ISPs in the transmission of music and other material on the Internet is described below:

*An ISP's primary function is to transfer material from the Internet to its customers. This material consists of emails sent to the ISP's customers, messages posted to newsgroups and viewed by the ISP's customers, computer files stored on FTP<sup>31</sup> sites and downloaded 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).<sup>32</sup>*

An ISP may transmit music to its subscribers in different ways. It may directly transmit music as a content provider, for example by uploading music onto its own web site or it may act merely as a conduit enabling its subscribers to access music made available by others on the Internet. ISP's are clearly liable for any breach of copyright in the first situation and their potentially liability for breaches of copyright occurring in the second situation is discussed in detail below.

## E ISP's control over on-line transmissions of music

The question of the level of control ISPs have over their subscribers' use of the Internet inevitably permeates an analysis of ISP liability for such use. Whether ISPs possess the means of controlling the passing of music through their networks will influence any policy consideration in respect of their direct copyright liability and the presence or absence of such control determines whether or not ISPs are indirectly liable for their subscribers copyright infringements by application of the law of authorisation.

OzEmail, in response to an action against it for infringement of copyright in music transmitted through its network (discussed below), states that it is neither possible nor permissible for it to know what conduct any of its subscribers are engaging in at any point of time and whether any such conduct is such as to cause OzEmail to infringe any copyright of APRA.<sup>33</sup> Similarly, in *Telstra v APRA* (also discussed below), Telstra argued that it did not initiate or control the content of its communications and that the legislature did not intend to impose strict liability for copyright infringement upon telecommunications carriers (or ISP's) for copyright infringement.

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It appears that ISPs do not have the power to prevent their subscribers from the uploading or downloading of music onto their networks.<sup>34</sup>

ISPs do not have the power to interrupt the transmissions of their subscribers as they are legally prohibited to do so pursuant to legislation prohibiting the interception of communications passing over telecommunications systems.<sup>35</sup> One commentator concludes as follows:

*If internet service providers intercept their users' transactions to review and monitor, they would be in breach of s7(1) of the Telecommunications (Interception) Act 1979 (Cth). Therefore, Internet service providers do not have the legal power to intercept transactions to review and monitor. Without this legal power, Internet service providers are not in a position to distinguish between legitimate uses and infringing uses. More importantly, without this legal power, they do not have power or control over how their users use their systems.<sup>36</sup>*

The above commentator's analysis, however, appears to only focus on whether ISPs may be liable for authorising their subscribers infringement where the primary infringement involves the downloading of copyright material from the Internet or the uploading of material in 'real-time'. She does not discuss the situation where an ISP hosts a web site and the subscriber uploads infringing material onto it, with such material remaining on the web site for a period of time. Such a scenario illustrates that in some situations ISPs may have the legal ability to monitor users' on-line actions without breaching the relevant legislation prohibiting telecommunications interception.

It is argued by some commentators that ISPs do have control over the use of their networks. Such an argument is as follows:

*As gatekeepers...ISPs are uniquely well-positioned to stop the loss of*

*intellectual property rights on the Internet. Indeed, many ISPs are already promulgating and enforcing rules of usage by their customers and have suspended accounts in thousands of instances where abusive use has occurred. They have the ability, of course, to dictate the online environment in which their customers are operating through the use of written control policies and guidelines. Furthermore, they can utilise and implement technology, including software, that is capable of automatically screening material on the network.<sup>37</sup>*

Overall, it appears that it is currently technically impossible and commercially infeasible for ISPs to prevent copyright infringement by their subscribers. Even if ISPs could monitor their subscribers' actions, it would be difficult for them to identify infringing material.

## **II Direct Infringement**

### **A Telstra v APRA**

Any discussion of the liability of ISPs for breaches of copyright in music transmitted over their networks involves an application of the High Court's reasoning in *Telstra v APRA*.<sup>38</sup>

This case involved consideration of the liability of Telstra, the owner of a telecommunications network in Australia, for its provision of music to telephone users who are placed on hold.

Telstra was engaged in the provision of 'music on hold' in three different situations; firstly, where a user made a telephone call to a Telstra service centre and heard music when placed on hold, secondly, where a user heard music on hold after calling various business and governmental organisations to which Telstra provided a transmission facility and thirdly, where a user made a telephone call to a subscriber of a 'music on hold' service of Telstra's and was diverted to a 'music on hold' facility situated at Telstra's nearest telephone exchange. The telephone calls were made by both conventional telephones and mobile telephones.

The High Court held that in each of the above situations in which Telstra participated in the provision of 'music on hold' it breached the broadcast right (in respect of mobile phone calls) and the diffusion right (in respect of conventional telephone calls).

Kirby J acknowledges that the High Court's conclusions in *Telstra v APRA* may have significant consequences for other information technologies and that ISPs may be liable for Internet users' downloading copyrightable works.<sup>39</sup>

I discuss below the potential direct liability of ISPs for a breach of each of the copyright owner's exclusive rights in music, namely the reproduction right, performance right, broadcast right and distribution right.

### **B Reproduction Right**

The reproduction right in relation to music is the exclusive right 'to reproduce the work in a material form'.<sup>40</sup> Material form includes any form, whether visible or not, of storage from which the music can be reproduced.<sup>41</sup> Digital communication involves the temporary storing or 'reproduction' of works on a computer's memory. In contrast, traditional analog communication involves generally only permanent reproductions, such as the recording of a musical work onto a record or audio tape.

As an ISP makes a temporary reproduction of music on its network in transmitting such music to its subscribers and also often 'caches'<sup>42</sup> frequently used data, including music, passing through its network, it may be liable for breach of the copyright owner's exclusive right to reproduce such music.

To hold ISPs liable for the temporary and incidental copying that necessarily occurs in the course of electronic transmissions of music will expand the copyright owner's rights unjustifiably and hinder the dissemination of music in the digital communications environment.

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It is appropriate that the proposal contained in the Copyright Reform and the Digital Agenda Discussion Paper<sup>43</sup> to exclude temporary and incidental reproductions made in the course of the technical process of electronic transmissions to the public from the scope of the reproduction right should be implemented.<sup>44</sup>

### **C Public Performance Right**

The Act provides that where sounds are emitted by any receiving apparatus to which they are conveyed by the transmission of electromagnetic signals, the operation of the transmitting apparatus is deemed not to constitute public performance<sup>45</sup>. Further, in so far as such emission of sounds constitutes a public performance, the performance is deemed to be effected by the operation of the receiving apparatus.

In a situation where music is transmitted over the Internet, the receiving apparatus would be the subscriber's personal computer and the transmitting apparatus would be the ISP's network. Thus the subscriber is deemed to be the person performing the work in public and an ISP would not be liable for infringing the exclusive right of the copyright owner to perform the music in public when transmitting music to its subscribers.

At first instance in *Telstra v APRA*, Gummow J held that Telstra's provision of 'music on hold' did not breach APRA's public performance right by application of the above analysis.<sup>46</sup> The contention that Telstra breached APRA's performance right by providing 'music on hold' was not pursued in the appeals.

### **D Broadcast Right**

As referred to above, music may be transmitted on the Internet through a variety of mediums. ISPs are potentially liable for breach of copyright in music transmitted over the Internet by virtue of the broadcast right when music is transmitted to its subscribers via microwave or satellite.

The broadcasting of music, for the purposes of the Act, means its

transmission 'by wireless telegraphy to the public'.<sup>47</sup> 'Wireless telegraphy' means 'the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy'.<sup>48</sup> The definition of broadcast covers over-the-air transmissions, such as satellite or microwaves, and does not include transmission by telephone wires or cables.

The definition of broadcast includes a requirement that it be 'to the public' for it to breach the broadcast right. In *Telstra v APRA*, Telstra submitted that the transmission of 'music on hold' to mobile phone holders was not 'to the public'. The High Court broadly interpreted these words and held that a communication to individual members of the public in a private or domestic setting can be a communication 'to the public'. The nature of the audience constituted by those who receive the music is important. Following the High Court's reasoning in this case, where music is transmitted in a commercial setting, such as the majority of transmissions over the Internet, the occasion is unlikely to be private or domestic and the subscriber of an ISP is more appropriately seen as a section of the public.

### **E Diffusion Right**

ISPs are potentially liable for breach of the diffusion right. The nature of the diffusion right under the Act is quite complex. The transmission of music to subscribers to a diffusion service means its transmission in the course of a service of distributing broadcast or other matter, whether provided by the person operating the service or by other persons, over wires, or over other paths provided by material substance, to the premises of subscribers to the service.<sup>49</sup> The person operating the service, that is the person who in the agreements with subscribers to the service, undertakes to provide them with the service, is deemed to be the person causing the music to be so transmitted.<sup>50</sup> ISPs have agreements with their subscribers to transmit material to them via the Internet, which material includes music.

An ISP's participation in the provision of online music is likely to infringe the copyright owner's (which, in the context of music, is in effect APRA's) exclusive right to cause such music to be transmitted to subscribers to a diffusion service. It appears clear that music would be considered 'other matter', that the provision of Internet services via telephone wires or cable involves 'wire or other paths provided by a material substance', that ISPs are operating a diffusion service, that their customers using the Internet are subscribers to such service and that the ISPs cause music passing through them to be transmitted to their subscribers.

Data transmitted from its origin to an end user may occur by telephone wire, cable, microwave, satellite or a combination of these paths and the data may be divided into 'packets', each which travel autonomously via different facilities to their destination where they are reassembled into the original message.<sup>51</sup> It may be argued that microwave and satellite links are merely ancillary features to the operation of a diffusion service, because overwhelmingly the Internet works 'by transmission...over wires, or over other paths provided by a material substance, to the premise of subscribers to the service' in accordance with the definition of a diffusion service as discussed above. A broad interpretation of the provisions dealing with the diffusion right render it not necessary for a particular transmission, in order to come within the diffusion right, to be effected exclusively by wire or other material substance, but only that the transmission be effected 'in the course of a service of distributing ... matter... over wires...to the premises of subscribers to the service'.<sup>52</sup>

### **F Overview of ISP Liability**

The Act appears to impose direct and strict liability on ISPs in relation to their subscribers use of copyright material, including music, on the Internet. This is irrespective of their level of control or knowledge of any infringing use of such material.

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To avoid potential liability for the transmission of copyright music over the Internet, ISPs may obtain a licence from the owner of the copyright in the music. Unlike other copyright works, in the case of musical works such a task is relatively simple as licences may be obtained from APRA in relation to almost all musical works worldwide. APRA sought to grant licences to ISPs in relation to on-line use of musical works.<sup>53</sup> APRA was involved in negotiations with the Internet Industry Association of Australia<sup>54</sup> on behalf of ISPs whereby it requested a \$1 licence fee per subscriber. This fee was to be a temporary measure whilst negotiations were undertaken to determine a more accurate means of determining the appropriate royalty rate. APRA anticipated that it would cooperate with ISPs to sample web sites to determine the use of particular musical works on the Internet to ascertain appropriate remuneration rates.<sup>55</sup> Such negotiations over the payment of a licence fee have broken down, with ISPs claiming no liability in relation to the on-line transmission of music. Such breakdown in negotiations led to APRA issuing legal proceedings against OzEmail.

## G APRA v OzEmail

APRA, in issuing proceedings before the Federal Court<sup>56</sup> in reliance on the judgment in *Telstra v APRA*, contended that OzEmail had infringed copyright (in which it either owned the exclusive licensee or had the attorney of the owner of the copyright to bring proceedings in relation to) in various music and lyrics written by its members (or the members of affiliated societies overseas) by causing those works to be transmitted to subscribers to a diffusion service. APRA sought for OzEmail to be restrained from transmitting to any of its subscribers such music and lyrics, including the songs 'Don't Cry for me Argentina' and 'Telling Lies'.<sup>57</sup> Such music and lyrics were presumably the result of sample 'surfing' on the Internet.

OzEmail is Australia's largest ISP and is the owner and operator of a

computer network. OzEmail provides its subscribers with comprehensive Internet services, including facilitating the link between their personal computers and the Internet. As well as providing Internet access to its subscribers, OzEmail is a content provider. It provides services over its web site, such as 'Newswatch', 'Sportswatch', 'Stockwatch' and the 'Chaos Music Market'.<sup>58</sup>

OzEmail acknowledged its liability as a content provider<sup>59</sup> yet contended that it was not liable as a connectivity provider for the transmission of music over the Internet.

These legal proceedings have been discontinued and the matter settled.

## III Indirect Liability — Authorisation

### A The Law of Authorisation

Copyright includes the exclusive right to authorise any person to do any of the acts comprised in the copyright owners 'bundle of rights'.<sup>60</sup> It is an infringement of copyright to authorise, without a licence from the copyright owner, a person to do any of the copyright owners' exclusive rights.<sup>61</sup> 'Authorise' has been judicially interpreted to mean to 'sanction, approve and countenance'.<sup>62</sup>

The application of the law of authorisation may result in an ISP being indirectly liable in relation to the copyright infringement of its subscribers. An ISP's subscribers may infringe copyright in music by either accessing material provided on the Internet and downloading such material or by uploading music onto the Internet.

The leading case of authorisation is *University of New South Wales v Moorehouse* which involved the University being held liable for the infringement of copyright by students by the use of its library's photocopiers.<sup>63</sup> It was held in this case that:

*A person who has under his control the means by which an infringement... may be*

*committed...and who makes it available to other persons, knowing or having reason to suspect, that it is likely to be used for... an infringement and omits to take reasonable steps to limit its use to legitimate purposes, would authorise any infringement that resulted from its use.*<sup>64</sup>

### B Authorisation by ISPs

If an ISP has control over the transmission of material over its network and fails to take reasonable steps to limit such transmission to avoid breaches of copyright by its subscribers, it will be indirectly liable for such copyright breaches pursuant to the law of authorisation described above. Reasonable steps may include the posting of a copyright notice, monitoring subscribers activities and removing material or suspending a subscriber's account if made aware of infringing activity.

Whilst ISPs are providing access to the Internet, unlike the library's provision of the photocopier in *University of New South Wales v Moorehouse*, they do not provide the equipment that enables the copying (that is, the personal computer) and the actual infringements are not occurring on the premises of the ISP.

The ability of ISPs to control the transmission through their networks of material infringing copyright has been discussed in detail above. Such discussion indicated that ISPs do not have the requisite control to prevent their subscribers from infringing others copyright on the Internet. If an ISP can show that it took reasonable steps to avoid infringing acts by its subscribers, this is likely to negate liability for such infringement.<sup>65</sup>

Although Internet service providers, due to their lack of control over the passing of material through their networks, may not be held liable for authorising copyright infringements under the current Australian laws, it is unclear whether this means that they have no responsibilities. An analysis of the judgment in *University of New South Wales v Moorehouse* indicates ISPs must take reasonable steps to qualify the unlimited

invitation to users of their systems. That is, they would have to at least remind users of the existence of copyright laws. The more recent cases indicate, however, that there will be no authorisation of infringement where the requisite element of control is absent and it is therefore unclear whether ISPs would, in the absence of control over the material passing through their networks, have any duty to encourage compliance with copyright laws.<sup>66</sup>

It has been argued that the law of authorisation would, due to ISPs' lack of control of the activities of their subscribers, in the majority of instances absolve ISPs from liability for copyright infringement, and therefore it operates against the interest of copyright owners as it eliminates an avenue of possible redress in relation to infringement of their works over the Internet.<sup>67</sup>

Matters taken into account when determining what was reasonable include the manner and context in which the music was used, any practice in the industry in which the work is used that is relevant to the work or the use of the work and any difficulty or expense that would be incurred as a result of identifying the author.<sup>68</sup>

Therefore, ISPs are potentially liable for infringing moral rights subsisting in music by enabling such music to pass through their networks.

### IV Policy and Reform

#### A International Copyright Reform

Whilst Australia's domestic copyright law is the focus of this article, an analysis of desirable reform cannot be undertaken without reference to the international aspects of copyright law, particularly given the global nature of Internet communication.

There have been significant international developments in relation to copyright reform in the new communications environment. Two new treaties were drafted at a World Intellectual Property Organisation ('WIPO') Diplomatic

Conference<sup>69</sup>, namely the WIPO Copyright Treaty<sup>70</sup> and the WIPO Performances and Phonograms Treaty<sup>71</sup>. These treaties provide for greater protection for copyright material disseminated via the Internet. The first mentioned treaty deals with copyright in literary and artistic works and the second mentioned treaty deals with the rights of performers and producers of sound recordings.

The WIPO Copyright Treaty explicitly recognises the need to introduce new international rules to provide adequate solutions to the question raised by technological developments and the profound impact of the development and convergence of information and communication technologies on the creation and use of copyright works.<sup>72</sup>

#### B National Copyright Reform

The Australian Government is committed to updating the Act to ensure its appropriateness for the digital and on-line environment and to comply with international standards (such as those discussed above) and has acknowledged that the issues arising out of *APRA v Telstra* are the same issues addressed in the Copyright Reform and the Digital Agenda Discussion Paper<sup>73</sup>. This discussion paper proposes a legislative scheme for the reform of copyright law to respond to the challenges posed by new technologies and the on-line environment, including a transmission right and the right of making available to the public. The transmission right is technologically neutral in the sense that it is not tied to any form of technological transmission, and will encompass the broadcast right (which it will supplement) and the diffusion right (which it will replace).

The proposed transmission right would apply to transmissions to the public in the traditional non-interactive sense of broadcasting which involves the emitting of signals from a transmitter to a receiving device at a time chosen by the person

making the transmission.<sup>74</sup>

The proposed making available to the public right would be exercised when copyright material is made available to the public in such a way that it could be accessed at a time and a place chosen by users of the material.<sup>75</sup> This proposed right encompasses making material available over the Internet and is clearly exercised by the uploading of music onto a web site.

If the above recommendations are implemented, the issue will then be whether an ISP is exercising either of these two proposed rights. As an Internet user chooses when to access material on the Internet, such provision of material would not be an exercise of the transmission right, but may be an exercise of the right of making available. The ISP may also be exercising the right of reproduction.

The Discussion Paper on Performers' Intellectual Property Rights proposes an expansion of the present performers' (which term includes singers' and musicians') rights under the Act, based on proposals set out in the WIPO Performances and Phonograms Treaty.<sup>76</sup>

The Act has been drafted to reflect technical and operational distinctions of traditional broadcasting and telecommunication methods. The transmission of copyright material over the Internet was not known when the provisions of the Act detailing the exclusive rights of a copyright owner were drafted. As acknowledged by the Copyright Convergence Group<sup>77</sup>, the separation of what may be the same activities by an ISP into two separate categories of protection based on the means of delivery of music, that is by broadcast or transmission through a diffusion service, is inappropriate in the present communications environment.

The attempt to fit new technological situations into legislative provisions drafted for preexisting categories of communication creates anomalous results. The convergence of technologies, an aspect of which is the Internet, has blurred these traditional distinctions. The Act should be

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amended as indicated above to achieve technological neutrality.

## C Direct Liability of ISPs for Copyright Infringement

The legislature should specifically address the issue of ISP liability for copyright infringement occurring on their networks and should remove any direct liability of ISPs for breaches of copyright where such breach occurs due to the ISP's role in providing its subscribers with access to the Internet. The *APRA v Ozemail* case and the *Telstra v APRA* proceedings illustrate the necessity for reform to the Act. As Kirby J in the latter mentioned case noted:

*The importance of the competing policy considerations was recognised by the full court.<sup>78</sup> The law of copyright is concerned with balancing the public interest in economic and cultural development against the interests of individuals in securing a fair and equitable return for their intellectual efforts.<sup>79</sup> The potential liability of a telecommunication carrier for infringement of copyright, promoted through its network, is a matter of considerable public importance. The potential financial consequences of the decision in this case for telecommunications carriers (and therefore for the customers who may ultimately bear the costs of such potential liability) are considerable. The impact of a decision imposing liability on a telecommunications carrier may, in time, be heavier still, given the increasing integration of transmission technologies and the resulting technological blurring of the boundaries between the roles of carriers and content-providers.<sup>80</sup> Such considerations led Sheppard J to the conclusion that a legislative rather than a judicial response to the suggested injustice of denying copyright protection to the owner for the use of its work in a diffusion service was what was called for.<sup>81</sup> I agree that in this area, where the interests are large, and the rights are ultimately derived from the language of an international*

*treaty of national as well as global importance, judicial restraint is called for where an Act is obscure or arguably inapplicable.<sup>82</sup>*

The unfairness of such ISP liability is illustrated by the following:

*The apparent injustice is that the liability attaches not to the perpetrator of the copyright infringement but to morally innocent operator of the system who, in passing, is handy to sue....Holding service provider liable is particularly unfair because many of them have little control over the content and the flow of information through their network. Most importantly, service operators currently have no ability to prevent (and virtually no capacity to monitor) uploading of information onto their service, and they often have very little capacity to prevent downloading of data'.<sup>83</sup>*

The issue of the liability of ISPs for the transmission of copyright material over the Internet was considered by the WIPO Diplomatic Conference<sup>84</sup> in response to lobbying by telecommunications carriers and ISPs for explicit exemptions and copyright owners' opposition to any such exemptions.<sup>85</sup> An Agreed Statement was adopted by the Diplomatic Conference in relation to its proposed right of communication to the public in which it expressed the understanding that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the relevant treaty.<sup>86</sup>

The Discussion Paper on Copyright Reform and the Digital Agenda enumerates issues concerning the liability of ISPs, such as should ISPs be exempt from liability for the exercise of the proposed new transmission right and the right of making available, in particular in circumstances in which they provide notices to their subscribers about copyright and the nature of permitted use of copyright material and should the persons responsible for the content of the copyright material

transmitted or made available on-line be liable for the exercise of the proposed new rights.

No specific proposals are made in the above discussion paper in relation to the liability of ISPs, leaving such issues to be determined according to existing principles in the Act in relation to authorisation of copyright infringement. The discussion paper does state its intention to be that, to the extent that ISPs do not determine the content of material passing through them, they would not under the regime proposed themselves have transmitted material or made it available to the public and will only be liable if they have authorised the content provider to transmit the material or make it available on-line.<sup>87</sup> The applicability of the law of authorisation in relation to ISP liability is discussed below.

The Discussion Paper on Performers' Intellectual Property Rights notes that any limitation on the liability of ISPs resulting from the comments invited by the Discussion Paper on Copyright Reform and the Digital Agenda would apply equally to the proposed performers' rights of reproduction and making available to the public.<sup>88</sup>

## D Liability of ISPs for Authorisation of Copyright Infringement

I agree with the proposal contained in the Copyright Reform and the Digital Agenda Discussion Paper<sup>89</sup> that the present law of authorisation apply in relation to determining whether an ISP is liable for infringing the proposed rights of transmission and making available with the effect that an ISP that is aware of the likelihood of infringing acts occurring on its network who fails to take reasonable measures to avoid such infringement may be liable for authorising such infringement.<sup>90</sup>

I also agree with the position taken in the discussion paper referred to in the above paragraph that ISPs should not be expressly exempted from liability for authorisation of copyright infringement, for example upon the condition that they post a copyright

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## The Liability of Internet Service Providers for Copyright Infringement

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notice, as such exemption would be premature given the constant evolution of the communications environment.<sup>91</sup> Such an explicit legislative exemption will be effectively set in stone.

The applicability of the law of authorisation without a legislative exemption will enable the courts to determine the issues of whether an ISP has control over the transmission of material through its network and is taking all reasonable steps to prevent its subscribers from breaching copyright and to balance the competing interests of protecting copyright and enabling access to copyright material. It is imperative that the law allow flexibility in determining whether an ISP has the requisite element of control and is taking reasonable steps to be taken to prevent copyright infringements, due to the rapidly progressing nature of communications technology. What are reasonable steps in the present communications environment may not be considered reasonable steps when technology has advanced so as to give ISPs commercially viable means of monitoring their subscribers' Internet use.

The law of authorisation places a fair and reasonable burden on ISPs in relation to their service. It will obligate ISPs to monitor their subscribers' use of the Internet if technically and commercially feasible and to remove infringing material if notified of such material, but does not place them under strict liability. When applied to ISPs the law of authorisation will result in a regime that:

*Makes providers operate their service not only in a self-interested manner but also with a view to enforcing copyright law... that... creates legal disincentives for not being pro-active in system control and monitoring; does not impose liability when the provider exercised all reasonable control over its service and did not know or have reason to know of the infringing material or activity; and, promotes freedom of speech, privacy and access to information.<sup>92</sup>*

### E Conclusion

In the context of copyright in an online environment and from an economic perspective, the financial and administrative consequences of ISP liability for breaches of copyright in music passing through it are considerable. The costs imposed by such liability will be passed on to users of the Internet increasing the cost of access, restricting the amount and variety of on-line information and therefore decrease the availability and accessibility of legitimate, non-infringing material on the Internet.

It has been argued that ISPs should bear such costs:

*The on-line service providers provide subscribers with the capacity of uploading works because it attracts subscribers and increases usage.— for which they are paid. Service providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities... The risk of infringement liability is a legitimate cost of engaging in a business that causes harm to others.<sup>93</sup>*

There are practical problems associated with pursuing legal actions against the primary infringer, that is an individual Internet user or content provider. There may be innumerable copyright infringers and they may not have the resources to pay. In contrast, ISPs are easily identifiable and tend to have 'deep pockets'. Despite such issues, liability for copyright infringement should not be placed on ISPs merely to render them defacto collecting agencies, that is 'gatekeepers or toll booth for anyone who wants to find a convenient place to levy a charge'.<sup>94</sup>

Copyright has been described as the 'lifeblood of the arts'<sup>95</sup> and music should be encouraged and protected. However, liability of ISPs for the on-line dissemination of music where it is technically possible and commercially feasible for them to prevent or limit such infringement will unjustifiably stifle the growth and accessibility of the Internet.

Warnings have been given of the stifling nature of regulating the Internet, for example in a censorship context, and such concerns would apply equally to placing liabilities on ISPs for transmission of copyright material:

*The undoubted potential for significant additional wealth creation is in danger of being stillborn as established interests work feverishly to bring the new boy on the block back to the pack. Instead of the concentration of effort being on how to capitalise on the productive potential of the Internet, too much of the initial reaction has been on how to rein in its alleged and feared capacities to precipitate social, financial and commercial change.<sup>96</sup>*

The balance to be sought in any copyright regime is between the protection of the rights of copyright owners and the accessibility to copyright materials by users. The tension between these two competing interests is especially apparent in the context of the present communications environment.

The aim of copyright law should be to adequately protect the rights of copyright owners so that they receive reasonable remuneration from their creative endeavours and therefore to encourage such activities, without stifling information flow on the Internet. Such balance is achieved by holding ISPs liable for authorisation of copyright infringements by their subscribers where they have contributed to a copyright infringement over the Internet, but not for direct infringement where they are merely acting as a conduit to enable Internet users to transmit and access music on the Internet.

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