

ARIA launches world first action against ISP

Natalie Ceola, Freehills

Natalie Ceola is a solicitor in the Employee Relations group in the Melbourne Office at Freehills. At the time of writing the article, Natalie was working in the Corporate IP-IT group, also in Freehills' Melbourne office.

Following an investigation into alleged music piracy relating to the website www.mp3s4free.net, the Australian Recording Industry Association (**ARIA**) has launched court proceedings against the registrant of the site (Stephen Cooper) and, in what is believed to be a world first, has named internet service provider (**ISP**), E-Talk Communications (trading as ComCen Internet Services), as the second respondent.

The investigation, conducted by Music Industry Piracy Investigations (**MIPI**), found the website to be one of the largest of its kind, providing free access to thousands of infringing files including new release music. It is estimated that 7 million people visited the website in the past year, resulting in over 100 million hits to the website.

ComCen appeared in the Federal Court before Justice Brian Tamberlin on 21 October charged with making money from providing copyright infringing materials. Up until now, ISPs have claimed that they have no liability in piracy cases on the basis that they are not responsible for and cannot control what their subscribers do, particularly given existing privacy laws.

MIPI claims that ComCen profited from allowing their network infrastructure to be used for trading copyright infringing digital music files. ISPs receive increased revenue from greater flow of traffic to the website and increased downloads. MIPI estimates that up to 20 per cent of ISPs' revenue comes from the illegal transfer of digital music files across the internet.

The website has since been removed and the parties will return to court next month, where debate is expected over whether links between sites alone is an infringement of copyright in situations where there are no actual music files on the servers.

ARIA had previously been involved in talks with the Internet Industry Association (IIA) with a view to developing a code of conduct for ISPs regarding take down notices for copyright infringing material. ARIA, however, withdrew from these negotiations stating that the take down notices would not be an effective way of preventing copyright.

This action follows escalating attempts by the music industry and MIPI to curb the increase in digital music piracy. A study commissioned by ARIA found that approximately 3.6 million Australians had illegally burnt a music CD in the 6 month period prior to the research study and approximately 3.4 million illegally downloaded music files through file sharing services. These significant levels of CD burning and internet file sharing were claimed to have a negative impact on the Australian sales of recorded music with Paul Robinson (chief operating officer of EMI Australia) estimating that CD piracy is costing the Australian music industry more than \$150 million in lost revenue to the artists, songwriters, music companies and retailers.

As a result, the music industry is taking a tough stance on digital copyright, extending their actions to individuals and universities. Recently, Sony Music Entertainment Australia, EMI and Universal Music Australia sued universities in Sydney, Melbourne and Tasmania, successfully gaining access to the universities' computer systems to investigate potential infringements. The Federal Police have also assisted, arresting three university students in April this year. The three men face up to five years in jail and \$60,000 in fines for distributing up to 60 million dollars of music from their music and video file swapping service on their website MPR WMA land. The trio have pleaded guilty to the charges and will be sentenced on 10 November.

ComCen's case runs parallel to the global trend of escalating action against piracy. According to Allen Dixon, general counsel at International Federation of the Phonographic Industry in the past year in Europe there has been significant action in Europe including demands against users in Denmark and Germany, raids in Italy and in Switzerland users have been criminally charged for uploading to Napster.

In the United States, the Recording Industry Association of America (**RIAA**) has also targeted universities, as well as services such as Napster, Grokster and Aimster. In their most controversial move, RIAA commenced action against 261 individuals in September. A second round of prosecutions of individuals is set to begin with RIAA having sent out advance notification to 204 additional individuals, warning them that RIAA is preparing lawsuits against them for copyright infringement.

In this climate of escalating tension regarding music piracy and distribution, the result of ARIA's case against ComCen could have consequences which ripple across the globe. If ARIA is successful, ISPs will be forced to take greater responsibility for what their subscribers do whilst online. This may increase costs of providing the service and also have privacy implications for those individuals being scrutinised whilst online.