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We congratulate Katrina Cavanough as the winner of the 2012 Computers and Law Journal Student Prize for the best article in the field of computers and the law. Katrina article on copyright in the digital age is a condensed version of a legal research paper undertaken as part of her studies.

Katrina received Bachelor of Laws from the University of Melbourne in December 2012. She also has a degree in Arts (Media and Communications) and a Diploma of Modern Languages in French.

Copyright in the Digital Revolution

An Analysis of Graduated Response Statutory Schemes After the High Court iiNet Decision

By Katrina Cavanough

While the digital revolution has brought about remarkable technological, economic and social progress it has also given rise to unprecedented challenges for copyright law. The ever-evolving organism of the internet now provides countless ways to access and exchange copyrighted content. However in this environment a copyright regime that was created to meet the needs of authors of the 18th century is problematic, if not fundamentally flawed. To date, efforts to apply copyright in the digital domain have been largely futile and widespread infringement persists. The sense of urgency to adapt copyright to the 21st century is compounded by the rollout of the National Broadband Network and a belief that, with increased broadband speed, the "unimpeded piracy of music will grow."[1]

A watershed moment for copyright law in Australia occurred in April 2012 when in *Village Roadshow Pty Ltd v iiNet* (*the iiNet decision*) the High Court held that an ISP was not liable for 'authorising' copyright infringements by its subscribers, despite knowledge that infringements were occurring. *iiNet* had no technical power to prevent the infringements and it was not reasonable for the ISP to take action against individual infringers.[2] In their joint judgment, French CJ, Crennan and Keifel JJ acknowledged that the law they were bound to apply was "not readily suited" to enforcing the rights of online copyright owners.[3] The decision exposed copyright law as inadequate[4] and the High Court majority suggested that responses being developed in overseas jurisdictions might be the key to protecting copyright owners.[5] In the aftermath of the *iiNet* decision there were calls for legislative intervention to remedy the "widespread infringements occasioned by peer-to-peer file sharing"[6] gathered momentum.

The Australian Law Reform Commission is currently looking at aspects of the *Copyright Act 1968* to determine whether in today's "digital environment" there is an "appropriate balance between the rights of creators and the rights, interests and expectations of users."[7] Notably, however, the Commission's draft terms of reference do not refer to "unauthorised distribution of copyright materials using peer to peer networks."[8]

Some developments have occurred in this area overseas recently. Several countries have enacted statutory schemes which enlist ISP as a gatekeeper intermediary between customer and content. In France the '*Internet and Creation Law*'[9] established a system administered by a commission known as HADOPI.[10] The scheme requires copyright owners,[11] to establish a continuously updated list of films and songs to be monitored for illegal downloading through peer-to-peer networks. If owners discover illegal downloading they obtain the IP (internet protocol) address of the infringer from a private company, Trident Media Guard. The IP address is sent to HADOPI and passed on to the relevant ISP who links

the IP address to the subscriber. The ISP then emails a notification to the subscriber advising against illegal downloading. If a further infringement is discovered within six months, the ISP must send a second notification to the subscriber and if, within a year of the second notification, an infringement is discovered, HADOPI informs the subscriber that they may face criminal prosecution.[12] Depending on the nature of the subscriber's failure and the quantity and frequency of the downloading, HADOPI may refer the matter to the public prosecutor. If a prosecution proceeds, the subscriber is served with an "infraction de negligence" and a judge may impose a maximum 1500 euro fine and/or suspend Internet access for a maximum one month.[13] ISPs will be fined 5000 euro for failure to suspend the account within fifteen days of a judge's decision.

In 2010 the United Kingdom introduced the *Digital Economy Act*[14] and a *Draft Initial Obligations Code* to be implemented by *Ofcom*, the independent regulator and competition authority for the UK communications industries.[15] The Act and Code establish a three-stage process for responding to online copyright infringements. The first two stages are called the "initial obligations"[16] and the third stage contains "technical measures"[17] to be implemented by the Secretary of State when the "initial obligations" fail to achieve a significant reduction in copyright infringement. Under this scheme ISPs must maintain lists of copyright infringements occurring on subscribers' accounts to be forwarded to rights holders upon request. A rights holder may then compile a copyright infringement report if it appears that a subscriber or other person has infringed the owner's copyright by means of that internet connection.[18] Once an ISP receives a report they must send a first notification to the subscriber.[19] If another report is received within six months, a second notification will be sent.[20] If within twelve months of the first report, a third report is received, a third notification must be sent by registered delivery,[21] the subscriber placed on the copyright infringement list[22] and any further reports will trigger regular update notifications.[23] One of the more controversial aspects of the English scheme is that a subscriber, if they have not appealed the notification, may be placed on a copyright infringement list even though he or she has not personally committed an act of copyright infringement. Hence, like in France, there is heightened and arguably inequitable, level of responsibility placed on the subscriber of the internet connection under the English scheme.

The United States has developed a different approach to notification of online copyright infringement. Entitled the Copyright Alert System and formalized in a Memorandum of Understanding between major rights holder groups[24] and ISP associations, it establishes a process of sending up to six notices to subscribers when copyright holders notify ISPs that their copyright has been infringed. Notices "explain why the action is illegal and a violation of the ISP's policies and provide advice about how to avoid receiving further alerts as well as how to locate film, television and music content legally."[25] After the fifth notice the ISP may implement a "mitigation measure" which involves temporary reductions of internet speeds, redirection to a landing page until the subscriber contacts the ISP to discuss the matter or respond to educational information about copyright, or other measures that the ISP deems necessary to resolve the matter. The ISP may choose not to impose the mitigation measure at this stage but will be required to do so if a subsequent notice of copyright infringement is received relating to the same account. Review of the "mitigation measures" occurs through the American Arbitration Association.[26] This system is framed in terms of consumer protection with the emphasis on education and the empowerment of subscribers to protect themselves from "inadvertent or intentional online distribution of copyrighted content."[27] However the "mitigation measures" which impede the users internet connection are a rather considerable sanction.

New Zealand has adopted the most stringent statutory scheme to combat online copyright infringements. The *Copyright (Infringing File Sharing) Amendment Act* 2011, also known as the 'Skynet Law,'[28] enables rights owners to take enforcement action against subscribers who infringe copyright through file sharing.[29] At the instigation of rights owners, ISPs must issue a Detection Notice, followed by a Warning Notice and finally an Enforcement Notice, with at least three weeks between notices.[30] As in other jurisdictions, it is up to the ISP to link the IP address with their customer. In order to prevent an unmanageable flood of notices, the ISPs charge rights holders a fee of $25 per notice.[31] Rights holders may take a matter to the Copyright Tribunal of New Zealand on payment of an application fee of $200. The Tribunal will generally consider written submissions. Parties can request a hearing, but lawyers are not permitted. The Tribunal may impose a penalty of up to $15,000 to be paid to the rights owner. The law, in its original formulation, provided for suspension of internet connection for up to six months.[32] However, this provision is not yet in force and will only come into operation in the future if the Copyright Tribunal finds that the pecuniary penalty is ineffective. The proposed suspension of internet connection has prompted widespread criticism, particularly from internet rights groups on the grounds that today internet connection is an essential requirement in society today.[33]

At the time of writing, approximately 15 cases of illegal file sharing in New Zealand are pending[34] and the effectiveness of the schemes in France, the United Kingdom and the United States to reduce peer-to-peer file sharing and copyright infringement is not fully known.

In conclusion, in this area the benefits of curtailing copyright infringement must be weighed against potential ramifications for freedom of access to the internet. The importance of fostering "the unique and transformative nature of the Internet" cannot be underestimated.[35] It is unlikely that a significant and controversial legislative initiative will be passed in

Australia in the period leading up to an election but a graduated response system with an educative function as in the United States and proportionate sanctions could benefit all interested parties.[36] Whether graduated response systems are capable of striking the right balance between the competing interests at play in the online world is yet to be seen but should be watched closely in the coming years.[37]

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[1] *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377 at [16].

[2] See also *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] IEHC 377. The facts of this case were similar to those in the *iiNet* case. Charleton J concluded that relief against the ISP, UPC Communications, was merited on the facts. However, Irish copyright law did not make any "proper provision for the blocking, diverting or interrupting of internet communications intent on breaching copyright" and as a result the Court could not grant injunctive relief to the recording companies.

[3] *Village Roadshow v iiNet* [2012] HCA 16 at 79.

[4] *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 at [79] per French CJ, Crennan and Kiefel JJ.

[5] However, Gummow and Hayne JJ were of the view that this was not necessary.

[6] Neil Gane, AFACT managing director, 'High Court decision shows government needs to act to keep pace with online environment: *Roadshow & Ors v iiNet'* Media Release, 20 April 2012.

[7] Australia Law Reform Commission Draft Terms of Reference 'Copyright and the Digital Economy,' 30 March 2012. The Commission is due to hand down its findings by November 2013.

[8] The Commonwealth Attorney-General's Department is currently holding negotiations between peak players in the content and communications industries to develop a code of conduct to address the issue of unlawful peer-to-peer distribution.

[9] *Loi favorisant la diffusion et la protection de la création sur Internet* n° 2009-669 du 12 June 2009 (*Law promoting the distribution and protection of creative works on the Internet*)

[10] Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet. (*High Authority for the distribution of works and the protection of rights on the internet*) *Code de la propriété intellectuelle* L. 331-12 - L. 331-22.

[11] The authorised representatives of rights holders are la Sacem, la SCPP, la SDRM and la SPPF for musical works and l'Alpa for films.

[12] The *Commission de protection des droits de Hadopi* was established by decree of 23 December 2009, and consists of three magistrates (a member of the Conseil d'État, a member of the Cour de Cassation and a member of the Cour des comptes)

[13] *Code de la propriété intellectuelle* Article L. 335-7-1.

[14] *Digital Economy Act 2010* (UK) amended the *Communications Act 2003* (UK).

[15] http://stakeholders.ofcom.org.uk/consultations/copyright-infringement/.

[16] *Digital Economy Act 2010* (UK) s 124A-B.

[17] Ibid s 124G (3).

[18] Ibid s 124A-B; *Draft Code* para 3.1.

[19] *Draft Code* para 5.5.

[20] Ibid para 5.6.2.

[21] Ibid para 5.7.

[22] Ibid para 6.1.

[23] Ibid para 5.9.

[24] The recording Industry Association of America and the Motion Picture Association of America.

[25] http://www.copyrightinformation.org/alerts.

[26] Ibid.

[27] Ibid.

[28] A reference to the *Terminator* films in which a fictional "highly advanced artificial intelligence" system called Skynet sets out to exterminate humanity. (See http://terminator.wikia.com/wiki/Skynet)

[29] As outlined in the *Copyright (Infringing File Sharing) Amendment Act* 2011 s 122A to 122U.

[30] *Copyright (Infringing File Sharing) Amendment Act* 2011 s 122B (2) and (3).

[31] *Copyright (Infringing File Sharing) Regulations 2011*, regulation 7.

[32] Ibid s 122B(4)(a) and (b).

[33] Thomas Beagle, Tech Liberty Co-founder and spokesman, available at: http://techliberty.org.nz/internet-disconnection-is-not-an-option/.

[34] Tom Pullar-Strecker, 'Skynet Law: 15 downloaders on 'third strike.' www.stuff.co.nz http://www.stuff.co.nz/technology/digital-living/8060463/Skynet-Law-15-downloaders-on-third-strike

[35] *Australian Digital Alliance*, 'Post iiTrial; the ADA explores overseas responses to unauthorised file sharing, '24 April 2012.

[36] The comments of John Stanton, Chief Executive Officer of the Communications Alliance, amicus curiae in the High Court appeal of *Village Roadshow Pty Ltd v iiNet*, speaking at the *Intellectual Property Research Institute of Australia* Public Seminar, Thursday 31 May 2012.

[37] Frank La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' United Nations Human Rights Council, 16 May 2011.