Downloading Music off the Internet:

Copyright and Privacy in Conflict?

MEGAN RICHARDSON*

Abstract

Since the development of cheap and simple tape recording technology in the seventies and eighties of the last century, copyright law has struggled to reach a balance between persons wishing to tape copyright material for their own personal use and owners of the copyright material who claim that this is breach of copyright. With the development of peer-to-peer copying on the internet, which allows for the downloading of perfect copies, the issue has become more urgent and more complex. The article follows developments in the battle by music companies in particular to prevent private copying of their copyright material from the internet and the threats to privacy which have resulted. Recently, the companies have targeted individuals who have been involved in frequent copying and sued them for breach of copyright with the aim of publicising the breach of copyright involved in such copying and to deter others. They have hoped that through successful court actions they may be able to convince the public that private copying off the internet is a serious breach of their rights. Two threats to privacy have resulted from the companies' actions. First, they have subpoenaed internet service providers to release information about customers who have used the internet to breach copyright. Secondly, they have sought to publicise cases against those whom they have sued as serious violators in order to shame them and to make the case against private copying. The article discusses the moral and legal arguments for and against these threats to privacy, concluding that compelling internet service providers to provide evidence about the activities of their customers does not infringe privacy rights to a disquieting extent but that using evidence gained by such methods to name and shame offenders may be a misuse of the discovery process.

---

* Associate Professor, Law Faculty, The University of Melbourne. I am grateful to David Lindsay, Kimberlee Weatherall, and two anonymous referees for the *Journal of Law and Information Science* for helpful comments on an earlier draft of this article. The article is current as at 5 November 2003. A postscript on subsequent events can be found at the end.

1. Introduction

As a university student 25 years ago I bought a record player along with a handful of records. I liked much the same music as my friends and from time to time we shared what we owned. We borrowed and lent records and we taped songs off them using our cassette recorders. We were not the only ones. Home recording was an international phenomenon in the 1970s and 80s, the perception of music by its audience changing dramatically after Philips launched the first cassette recorder at the 1963 Berlin Radio Show.[1] Music publishing could now be done domestically, privately, for personal enjoyment.[2] The privacy of our venues meant we did not have to justify our potentially copyright infringing conduct.[3] But if we had been required to do so, we might have pointed to the fact that the self-tailored compilations we provided for ourselves were not available on the market. Although record companies found commercial success with pre-taped cassettes in the 1980s they still failed to offer what we as consumers most desired: 'variety, quality, and constant novelty': products tailored to 'smaller and increasingly heterogeneous, niche markets'.[4] It was hard to see the harm to the blatantly wealthy music stars and the record companies that managed their interests. At most our friendly dealings in imperfect copies affected existing markets only in a minimal way, markets we anyway supported in the records and pre-taped cassettes we bought. We might have thought differently if we had observed the music industry crumbling. We were fans

1 James Paul, 'Last Night a Mix Tape Saved My Life' *The Guardian*, September 26 3003, at http://www.guardian.co.uk/arts/fridayreview/story/0,12102,1049363,00.html.

2 It could also be done for profit by small entrepreneurs eager to enter a market previously closed off to them by the sunk costs required to fund a traditional recording studio: see P Manuel, *Cassette Culture: Popular Music and Technology in North India* (U Chi Press, 1993) – noting the growth of commercial scale local music production in India. In addition, as Manuel notes, in India as elsewhere commercial scale music piracy flourished in the cassette age (notwithstanding attempts by record companies to prevent this, and some expansion of copyright law to target piracy specifically): ibid ch 4. Interestingly, even piracy may be justified according to Manuel - forcing record companies to drop monopoly prices and providing 'a more authentic reproduction of live performance aesthetics than do legitimate studio produced tapes': ibid p 60. However, that is not the purpose of this article which is concerned only with non-commercial copying.

3 As social norm theorist Richard McAdams points out, privacy provides a vehicle for individuals to avoid the pressure of public opinion that might otherwise signal or enforce social norms: 'The Origin, Development, and Regulation of Norms' (1997) 96 *Mich L Rev* 338 at 410.

4 M Leaffer, 'The New World of International Trademark Law' (1998) 2 *Marq Intell Prop. L Rev* 1 at 5.

after all – the interests of our 'idols' were our interests as well.[5] We could readily appreciate we would be losers from the failure of the industry and the music it supported. Our sources for music would be more limited and difficult to access, and more expensive (given the costs of production would not change).[6] Eventually, there might be no market worth having in recorded music. Without the structure for cooperation to occur, philosopher David Hume said in the 18th Century, 'the mutual commerce of good offices [is] in a manner lost among mankind, and every one reduced to his own skill and industry for his well-being and subsistence'.[7] But, fortunately for us, the music industry seemed undaunted by our limited essentially private activities.

With the benefit of hindsight our arguments for free music copying could be marshalled under copyright law's fair dealing exceptions to copyright infringement, drawing on exceptions in statutes dating back a century or more (and in judgments of courts a long time before).[8] As Wendy Gordon has observed of the US fair use exception, if there is an economic-utilitarian rationale for permitting free use of copyright material under fair use type exceptions, it lies with market failure.[9] And if there is a moral rationale that utilitarianism cannot account for, it lies in Locke's 'as much and as good' proviso, obliging those who claim a natural right in the fruits of labour to leave a commons for others to enjoy.[10] For a long time there was market failure in the music industry, Until recently, music was only available on the market in 'off the rack' forms, precompiled and pre-packaged. Little effort was made to facilitate home copying for private use as a market commodity, even when the cassette recorders that made it possible became

---

5 '[T]he boots *are* better in his eyes, worn by his idol': Burchett J in *Hogan v Pacific Dunlop Ltd* (1989) 14 IPR 398 at 430.

6 Since information is non-rivalrous, efficiency suggests it should be used often (maximising returns to sunk investment costs): see J Ordover and W Baumol 'Antitrust Policy and High-Technology Industries' (1988) 4 *Ox Rev Econ Pol* 13, 14.

7 D Hume, *Treatise on Human Nature* (1739-40), 1888 ed, pp 519-20.

8 Defences of fair dealing for private study and criticism or review were first introduced in s 2 of the *Copyright Act 1911* (UK) (with parallel provisions in other British Commonwealth statutes: for instance s 2 *Copyright Act 1911* (Cth)). In the US the more broadly framed (without reference to particular purposes) fair use defence was not given statutory form until 1976. However Anglo-American courts recognised fair dealing/use exceptions to copyright infringement from the 18th Century: see W Patry, *The Fair Use Privilege in Copyright Law* (Bureau of National Affairs, Washington DC, 1985) ch 2.

9 See W Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the *Betamax* Case and its Predecessors' (1982) 82 *Col L Rev* 1600.

10 See W Gordon, 'On Owning Information: Intellectual Property and the Restitutionary Impulse' (1992) 78 *Va L Rev* 149.

publicly available. Under pressure from record companies, the Australian blank tape levy was introduced. But this assumed copying of copyright material rather than using price discrimination to permit it at an extra cost as and when desired.[11] The law that supported it was eventually labelled a tax and held unconstitutional as outside the rather restrictive terms of the Commonwealth's taxing powers.[12] No other solution was offered by record companies (or legislators): home copying was *prima facie* infringement even if done merely for time shifting or space shifting purposes. It was around this time that US courts fashioned, under the aegis of fair use, a private use space-shifting exception to copyright infringement in the home videotaping *Betamax case*,[13] an exception equally applicable to home (audio) taping. Anglo-Australian courts took a narrower view of their more narrowly framed fair dealing exceptions.[14] Instead they opted for a restricted scope for secondary liability for copyright infringement (requiring a level of knowledge of and control over infringements for

11 Price discrimination allows for high value and low value users to pay according to the value of their use, but depends on the ability to prevent high value uses by those who buy at the lower price (for instance contractual proscriptions supported by contract law): see *Pro CD Inc v Zeidenberg* 86 F 3d 1447 (1996), Easterbrook J at 1449-50. Although economists typically regard price discrimination as a mechanism for extracting the full perceived value of a use from each user (ie those who will pay more pay more), it need not be taken to this extreme – and there may be good reasons for not doing so (ie 'high value' use ideally entails extra benefits not simply extra pleasure or ability to pay): see below n 23.

12 *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 25 IPR 1 holding the relevant provisions of the *Copyright Amendment Act 1989* (Cth) unconstitutional, being a tax that failed to comply with s 55 of the Australian Constitution in dealing with matters other than the imposition of taxation. For details of the blank tape 'royalty' (really levy) scheme, see J McKeough and A Stewart, *Intellectual Property in Australia*, (2nd ed, Butterworths, 1997) p 158. Contrast the US and Europe where royalty schemes were successfully established: J Ginsburg, 'Copyright and Control over New Technologies of Dissemination' (2001) 101 *Col L Rev* 1613 at 1628 especially and A Evans, 'Private Copying in the EU: The Technological Protection and the "Three-Step Test"' (2003) 21 *Cop Rep* 36 at 42-3 especially.

13 *Sony Corp v Universal City Studios Inc* 464 US 417 (1984) (manufacturers and retailers of mass market video recorders held not contributory copyright infringers since substantial use of recorders was for 'fair' private time-shifting purposes to which copyright owners would not reasonably object). See further Ginsburg above n 12.

14 Although it would have required an extended treatment of the research or study or criticism or review purposes of the fair dealing exceptions in the British Commonwealth Acts, something courts did not appear to favour at the time: see generally A Liberman, 'The Betamax Case and Copyright Law: An Australian Perspective' (1981) 9 *Aust Bus L Rev* 42. Certainly a literal treatment of both exceptions in the Australian *Copyright Act 1968* (Cth) can be found in the press clipping case *De Garis v Neville Jeffess Pidler Pty Ltd* (1990) 18 IPR 292, concluding such purposes were not satisfied by the provision of (commercial) press clipping services to clients.

this to be established) when those who provided the home taping technology were sued.[15]

The question is whether music copying should be treated differently in an age where technological advancement allows unlimited perfect copying and dissemination of music and monitoring of unauthorised activities to an extent never conceived of before: in the age of the internet? One might think so.

2. Does the Internet Change Things?

The improvements wrought by the internet, in facilitating cheap flexible copying, are only now beginning to be appreciated. Early on it was observed that the internet's prospect of a well functioning market built around cheap copying and flexible dissemination by music owners would raise the question whether free use should still be allowed.[16] Further, it seemed logical to suppose the internet would change the Lockean arguments for free copying as well: the operation of any 'as much and as good' proviso is less evident where what is reaped is exactly what another labours to produce and provide. Thus it might be presumed that the free use exceptions of copyright law's fair dealing/use doctrines would have less of a function in the digital age. Indeed, cheap, flexible, market based music downloading was promised by record companies in the *Napster* case three years ago.[17] For this reason among others, Napster's argument that the peer-to-peer music copying on the internet, facilitated by its software, was fair use was rejected by

15 See Liberman ibid and *A&M Records Inc v Audio Magnetics Inc* (UK) Ltd [1979] FSR 1; *CBS Songs v Amstrad* [1988] AC 103 - holding 'authorisation', for statutory purposes, and like common law torts required (actual or constructive) knowledge of and control over use of technology for infringing purposes. See also *ATMA v Commonwealth* above n 12, Mason CJ et al at 4-5 (sale of blank tape does not constitute authorisation of infringement). Nor does it appear the standard was altered by the insertion of a new definition of 'authorisation' in s 36(1A) of the *Copyright Act 1968*, by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

16 See generally D Lindsay, *The Future of the Fair Dealing Defence to Copyright Infringement*, Centre for Media, Communications and Information Technology Law, Research Paper No 12, 2000 and Ginsburg above n 12 and 13. But see M Lemley, 'The Economics of Improvement in Intellectual Property Law' (1997) 75 *Texas L Rev* 989 and L Pallas Loren, 'Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems' [1997] *J Int Prop L* 8 (questioning the assumption that transaction costs are relatively low in the digital environment). Even here it has been suggested that free use may not be the answer: compulsory licensing (including by courts limiting their awards to monetary remedies) could at least sometimes provide a better way of mediating interests: M Richardson, 'The Economics of Copyright and Fair Use in the Digital Environment' (2001) 19 *Cop Rep* 23.

17 *A&M Records v Napster Inc* 239 F.3d 1004 (9th Circuit, 2000).

the court.[18] But the promised reforms did not happen quickly – market alternatives for music downloading remained limited and expensive for some years to come. And prices remained high, with music continuing to be packaged in rigid off the rack format.[19] In the interval, providers of second-generation software that enabled peer-to-peer copying learnt from *Napster* that by removing themselves as intermediaries they could avoid the risk of infringement themselves.[20] As a result software facilitating free copying was still available to users of the internet, even after Napster was shut down. And the software was extensively used. Surveys reported in July 2003 that 30% of internet users felt entitled to download copyright protected music.[21] It seemed the market was still failing and not necessarily just because a new generation of music lovers failed to respect the policy reasons for music copyright protection.[22] Their reaction was consistent with what behavioural economists have now begun to discover – that, given the choice,

---

18 See ibid at 28-29, citing comments of Patel J at first instance (114 F Supp. 2d at 915) that 'record company plaintiffs have already expended considerable funds and effort to commence Internet sales and licensing for digital downloads'.

19 At $30-40 for a new release CD, Australian consumers consider music to be priced too high for everyday consumption, according to Charles Britton, policy officer for the Australian Consumers' Association: interview in K Needham and G Coslovich, 'Downloaded and Out' *The Age*, Sunday 13 September 2003.

20 See *MGM Studios Inc v Grokster Ltd* 259 F Supp 2d 1029 (2003) (defendants Grokster and StreamCast Network could not contributorily or vicariously infringe if they had no knowledge of or control over actual infringements) - the decision is currently under appeal. The Kazaa technology employed by Sharman Networks was not in issue in the case, and nor was its position resolved (ibid at 10). In January a California District Court ruled that Australian connected Sharman Networks, owner of Kazaa, could be sued in the US: *MGM Studios Inc v Grokster Ltd.* 243 F Supp 2d 1073 (2003).

21 Research for the Australian Recording Industry Association in July 2003 suggested Australian teenagers sourced one third of music illegally: see Quantum Economics, 'Understanding CD Burning and Internet File Sharing and its Impact on the Australian Music Industry' at http://www.aria.com.au/documents/AriaIllegalMusicResearchReport_Summary.pdf. In the US a PEW Internet Survey was told 29% downloaded music (although only 12% admitted also to sharing – out of the total 17% of respondents claiming to share music online); and 67% of those who downloaded said they did not care about whether music is copyright protected: M Madden and A Lenhart, 'Music Downloading, File-Sharing and Copyright' (Pew Internet Project Data Memo, July 2003) reported at www.pewinternet.org.

22 As argued, for instance, by Chicago School lawyer economist K Dam, 'Self Help in the Digital Jungle' (1999) 29 *J Leg Stud* 393 at 410 (copying norms need to be changed, and pro-owner copyright laws should be directed to that end).

many people would rather see fair practices in the market and in the absence of these may even bypass the market.[23]

Recent developments give more cause for optimism, however. As Jane Ginsburg predicted early on in the digital music wars, we should not underestimate the potential for music providers to enter the market and provide services to meet consumer demand; especially on the internet where cheap mass dissemination drops the cost of doing business.[24] Launched in April 2003, Apple iTunes provides commercial distribution of online songs, selling 10 million at (US) 99 cents each in the first four months of operation; and a recent development is expansion to cover Windows format.[25] If Apple's early success is an indication of things to come, consumer demand for cheap flexible music delivery at the touch of a button may eventually be satisfied through legitimate channels. Further, in the wake of Apple's success (and it must be admitted the success of the black market for downloaded music which still continues), at least one record company has adjusted its music cd price in an effort to maintain its traditional market in the face of increased competition.[26] While some observers still predict the downloading wars will lead to the end of the music industry as we know it, a more optimistic account is that a vibrant and diverse market, utilising the possibilities that the internet offers, is now finally beginning to emerge.

---

23 Experiments show over time that individuals often prefer cooperation to defection where mutual benefits can be obtained (even if defection gives more immediate payoffs), and will enforce this on each other where the opportunity arises: R Axelrod, *The Evolution of Cooperation* (Basic Books, 1984; Penguin, 1990) (iterated Prisoner's Dilemma game). Further they often would rather not share in spoils if they perceive unequal treatment; A Odlysko 'Privacy, Economics and Price Discrimination on the Internet', at http://www.dtc.umn.edu/~odlyzko/doc/privacy.economics.pdf. (Ultimatum game).

24 J Ginsburg, 'Copyright and Control over New Technologies of Dissemination' above n 12 at 1645-47 (beneficiaries of copyright control will be authors – and the public).

25 Under licence arrangements with recording companies including BMG, EMI, Sony Music Entertainment, Universal and Warner Bros as well as independent artists and record labels, Apple's iTunes Music Store was launched in April 2003. In the first four months of its life Apple 'sold' 10 million songs online at 99c/song. In its 'second generation' format iTunes is now available for Windows as well as Mac use: for details see http://www.apple.com.itunes/.

26 Universal has recently cut the average price of a cd in the US by one third (indicating there is some leverage in the level of profits it could sustain) – although without promising to do the same worldwide: see J Iverson, 'CD Price Drop' *Stereophile Magazine*, September 8 2003 http://www.stereophile.com/shownews.cgi?1730.

So too the internet's implications for individual privacy have only recently begun to emerge. Initially the focus of record companies' attention in copyright cases was the providers of peer-to-peer software. Having lost that battle for the meantime, record companies are now shifting their sights – aggressively launching infringement proceedings against ultimate users of peer-to-peer software for unauthorised copying purposes. Earlier this year, internet service providers were asked to give details of those using their networks to share and download music and some have been made to do so by courts, including in Australia.[27] Subsequently, hundreds of individuals – including students and children - have been 'outed' as persistent copyright infringers in high profile proceedings; and many have settled rather than fight claims for hundreds of thousands of dollars in damages for copyright infringements in court.[28] The increased monitoring and revelation of internet user activities required on the part of internet service providers (although a rearguard legal challenge by Verizon continues)[29] has led to questions about the previously assumed privacy of what goes on in the home. But there is another privacy

---

27 See *RIAA v Verizon Internet Services Inc* 240 F Supp 2d 24 (January 2003) (*Digital Millennium Copyright Act 1998* required Verizon to provide the Recording Industry Association of America with information about users who may have violated copyright. The decision is currently under appeal: see below n 28. See also *Sony Music Entertainment (Australia) Ltd v University of Tasmania* (2003) 57 IPR 77 (May 2003) (three Australian universities required to provide information about students using their networks for copyright infringement purposes under controlled conditions protecting confidentiality of extraneous information uncovered in the forensic process); Contrast *RIAA v MIT and Boston College* (August 2003) (defendants not required to provide RIAA with names of students that may have used their systems to download / distribute copyright protected music).

28 The RIAA proceeded against US students Jordan, Nievelt, Peng and Sherman in April 2003 claiming millions of dollars of damages for copyright infringement related to online sharing. In court approved settlements damages were reduced to between $12,000 and 17,500 (US) per defendant (who promised to refrain from further online distribution): see J Graham, 'Students Paying for Playing' *USA Today* May 4 2003 at http://www.usatoday.com/tech/news/2003-05-04-students_x.htm. In May 2003, criminal proceedings were launched against three Australian students who have since pleaded guilty to copyright violations. In September 2003 the RIAA served copyright lawsuits on 261 individuals identified as 'major offenders' in illegally distributing more than 1000 copyrighted music files. As at the end of September, 52 of these had settled (but more proceedings are anticipated): T Bridis, 'MP 3 Users Settle Case', *The Australian*, September 30, 2003.

29 The privacy issue was raised explicitly in *In Re Verizon Internet Services Inc* 27 F Supp 2d 244 (2003) (stay of subpoena ordered in February sought, pending Verizon's appeal to the Court of Appeals scheduled for September, but refused). Verizon's arguments that disclosure of the identities of its customers violated their anonymity in breach of the First Amendment's protection of private speech, was considered to have 'minimal' chances of success: ibid at 268.

question the recent proceedings raise: whether private personal information obtained for the purpose of specific legal proceedings should be able to be made the subject of a broader high profile publicity campaign against unauthorised music downloading.

The argument against monitoring is, in my view, the weaker one. Sir Edward Coke said in reporting *Semayne's* case the home is 'the Englishman's castle and fortress, as well for defence against injury and violence, as for his repose'.[30] But the assumed privacy of the home is difficult to sustain when the activity involves use of the internet, a 'superhighway' that reaches out to the world. Using the internet is more like calling out an open window, talking over a fence or making a telephone call on a line that can be listened into than reading a book in peace and solitude which is the epitome of the private life in the home.[31] A more sophisticated notion of privacy – lying with the metaphysical place occupied by the person and justified in terms of personal integrity (a Kantian rationale) or personal flourishing (a utilitarian rationale)[32] – may provide an argument for presuming activities on the internet to be private and confidential.[33] But in the same way as consent to entry

30 *Semayne's Case* (1603) 5 Co Rep 91; 77 ER 194 at 195.

31 According to Philippe Ariès the emergence of the modern idea of a 'private life' in England is associated with the rise of religion, a change in the role of the state, the spread of reading and writing (that went with the rise of printing), and the establishment of the private home and activities – such as reading books and keeping diaries – that went on there: see his Introduction to P Aries and G Duby (eds) *Histoire de la Vie Privé* (Seuil, 1985-87) Vol III ('Passions of the Renaissance').

32 For privacy as a personal right to be 'let alone' see S Warren and L Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193. For alternate Kantian and utilitarian (derived from John Stuart Mill's justification of individual freedom in utilitarian terms of personal flourishing) rationales for privacy considered, see generally M Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melb U L Rev* 381.

33 Query, for instance, whether, for the purposes of equitable breach of confidence (which protects the confidentiality of private information), physical locus is important. In *Malone v Metropolitan Police Commissioner* [1979] Ch 344 Megarry J was prepared to assume activities such as talking over a fence or on the telephone to be at such risk of being overhead that no equitable confidentiality obligation could be found if information was even surreptitiously overheard. Later courts, however, have been more circumspect, suggesting that (in the absence of consent) the question whether a confidentiality obligation arises depends on notice and reasonableness in the circumstances – bringing surreptitious obtaining directly within the purview of the equitable doctrine: see *Attorney-General v Guardian Newspapers Ltd* (No 2)[1990] 1 AC 109, Lord Goff at 281. For the US privacy 'intrusion' tort as closely linked to physical privacy: see A McLurg, 'Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places' (1995) *NCL L Rev* 989. But the separate tort of public disclosure of private facts may be treated differently: the US Supreme Court in *Bartnicki v Vopper* (2001) 532 US 514 accepting that protection of private speech, even in public places, may be permitted under the US First Amendment.

may override the privacy of the home, although only for purposes for which consent is given,[34] so the question is whether the voluntary character of activities on the internet entails consent to some monitoring and publication for the purposes of copyright enforcement. Moreover, the public interest in various guises has always been a basis for limits on legal protection of privacy, including the physical privacy of the home.[35]

Consent to publicity is clearest where it is made an express condition of participating. In refusing an application to stay a subpoena ordered against internet service provider Verizon to reveal the identities of those using its services to infringe music copyright,[36] Justice Bates in the US District Court for the District of Columbia pointed to the fact that Verizon alerted its subscribers at the outset that it would disclose individual customer information if served with valid legal process, concluding that in the circumstances 'Verizon's customers should have little expectation of privacy (or anonymity) in infringing copyright'.[37] It was suggested also that opening a computer to peer-to-peer copying entails consent to any publicity that might follow,[38] although some might question the breadth of any inferable consent there.[39] In Australia, in equivalent proceedings, the issue was resolved more simply by reference to the public interest in expeditiously dealing with the record companies' copyright infringement claims. Thus in *Sony Music v University of Tasmania*,[40] Tamberlin J held that any interests in privacy that internet users might have would be

34 See generally D Feldman, *The Law Relating to Search and Seizure* (Butterworths, 1986) ch 2.

35 Ibid p 15 ('[w]hether one can justify powers of entry, and the grounds on which it might be done, is often said to turn on the concept of a balance between the rights of individuals and the needs of society' – However, operationalising this in legal terms 'is not simple'). In the US the line is generally drawn narrowly, with constitutional support for the privacy of the home (and activities within it) found in the Fourth Amendment to the Constitution: see M Dickerson, 'Can the "Public Interest" Justify Non-Consensual Searches of Homes in Bankruptcy Cases? (2002) 11 Wm & *Mary Bill of Rts J* 267. But for the increasing role found for the First Amendment in protecting private speech see Bartnicki above n 33.

36 *In Re Verizon Internet Services Inc* above n 29.

37 Ibid at 267.

38 Ibid, citing *United States v Kennedy* 81 F Supp 1013, 1110 (although the case concerned the rather more extreme situation of suspected pornography sharing).

39 Or even knowledge that activities may be invisibly monitored, as Laurence Lessig posits in 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harv L Rev* 501 at 505 (but the argument from lack of knowledge is more difficult to make now in 2003 than in 1999, given the great publicity given to the internet's architectural potential for monitoring).

40 *Sony Music v University of Tasmania* above n 27.

weighed against competing interests, including the 'public interest in having a full and proper disclosure by way of preliminary discovery in order to ensure that an informed decision can be made as to whether to commence proceedings and against whom they should be brought'.[41] The judge concluded that, in the circumstances, sufficient protection of privacy could be found in express confidentiality undertakings given by the applicants as a condition of granting the requested discovery as well as 'firmly established and enforced principles of discovery which prevent the misuse or abuse of information given on discovery and its use for purposes other than in the proceedings in which discovery was ordered'.[42]

3. Abuse of Rights as the Answer?

But has there been a 'misuse or abuse' by record companies of the private information granted for the purposes of copyright infringement proceedings? In the past the principles referred to by Tamberlin J have been primarily employed in cases where confidential documents obtained on discovery have been leaked to the news media;[43] but their potential operation is far broader. *Query*, for instance, whether record companies in launching copyright proceedings intended to pursue them to final resolution (given settlements have been actively promoted), or even to obtain meaningful damages in settlements (given average settlements made to date must hardly suffice to cover legal costs) or even to pursue all those in breach of the law (given the relatively small number of proceedings already launched). Query rather whether the overriding, or even sole, purpose of the proceedings is to publicly target the conduct of those labeled 'major offenders' in an effort to change social norms.[44] Employing copyright law

---

41 Ibid at 91.

42 Ibid, citing *Home Office v Harman* [1983] AC 280; *Esso Australia Resources Ltd v Plowman* [1995] 183 CLR 10 at 32 (per Mason CJ, stating that 'there is an implied undertaking, springing from the nature of discovery, by each party not to use any document disclosed for any purpose other than in relation to the litigation in which it is disclosed'). See also *Patrick v Capital Finance Ltd* (No 4) [2003] FCA 436, Tamberlin J at [15]-[18].

43 See *Home Office v Harman* above n 42 and further *The Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613. In both cases, contempt of court was found to prevent or remedy media publication of confidential information revealed in documents obtained on discovery.

44 Others have raised the same question, including most notably Lawrence Solum discussing 'Copynorms' on his Legal Theory Blog, at http://lsolum.blogspot.com/2003_08_01_lsolum_archive.html#105974929858142384. Concerns about the heavy handedness of the RIAA's lawsuits have led to two US Senate inquiry: see B Willis, 'RIAA Under Fire', *Stereophile Magazine* August 4 2003, at http://www.stereophile.com/shownews.cgi?1702 and R Mark,

expressively to change social norms may be considered efficient from an economic-utilitarian perspective (the enforcement burden is lower if standards of conduct promoted by the law are already widely accepted across the community).[45] But if public shaming rather than more anonymous methods of addressing violations is the technique employed, any benefits reaped come at a cost to the freedom and dignity of the person whose actions, among those of all others, are singled out for exposure.[46] At the extreme, the benefits of a shaming strategy may not be worth the costs.[47] John Stuart Mill, who in the 19th Century espoused the liberal-utilitarian principle that '[m]ankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest',[48] accepted that '[a]s much compression as is necessary' to prevent liberal agents from 'encroaching on the rights of others cannot be dispensed with'.[49] In Mill's terms *as much as is necessary* sets the limits of allowable interference under a liberal-utilitarian standard. If not copyright misuse (a US doctrine not yet known to Australian law)[50] or abuse of

---

'RIAA Settles 63 More Infringement Suits' September 29 2003 at http://dc.internet.com/news/print.php/3085051.

45 Social norm theorists have pointed to the norm signaling and norm reinforcing (and occasionally norm changing) effectiveness of legal rules: for instance, R Cooter, 'Expressive Law and Economics' (1998) 27 *J Leg Stud* 585; Lessig above n 39 (although more concerned with the independent operation of law and norms in regulating human behavior); McAdams above n 3. See also Dam above n 22 at 410.

46 See McAdams ibid at 425-6 ('[e]conomic theorists are generally skeptical of privacy claims' and '[p]rivacy rights … may impede both discovery of the consensus and of its violation, seriously impeding norm formation and enforcement'.

47 Shaming may also be counterproductive: '[p]sychological studies show that feelings of shame may induce destructive behavior, whereas feelings of guilt - which are focused on a specific failure, rather than on the entire self - may encourage just the opposite', according to Herbert Morris: *On Guilt and Innocence: Essays in Legal Philosophy and Moral Psychology* (Cal U Press, 1976) 59 at 61-63. Negative reaction to shaming does seem to be a feature of the music downloading cases: see Graham above n 28 'Jordan, Nievelt and Peng insist they did nothing wrong'.

48 JS Mill, 'On Liberty' (1859) in M Warnock (ed), *John Stuart Mill: Utilitarianism, On Liberty and Essay on Bentham* (Collins, 1962) p 138.

49 Ibid.p 192.

50 In the *Napster* case copyright misuse was argued, alleging the RIAA was using copyright law for anticompetitive purposes (and although the argument was unsuccessful on the evidence it was not disputed that the doctrine might be invoked in cases where copyright claimants 'seek to control areas outside of their grant of monopoly'): see above n 17 at 1027. A declaratory judgment for copyright misuse, arguing a refusal to licence should preclude a subsequent infringement claim, was sought by Sharman Networks in a counterclaim to copyright infringement proceedings launched by MGM Studios and various recording companies (see *MGM Studios Inc v Grokster Ltd* 259 F Supp 2d 1029 (2003) above n 20). The application was dismissed, but only because the

rights (the broader civil law doctrine)[51] then 'misuse or abuse of information given on discovery' appears to offer the best hope for privacy protection for internet users who find their information publicly revealed for purposes going beyond simple copyright enforcement.

A pertinent case in this regard is *Peck v United Kingdom*,[52] recently decided by the European Court of Human Rights under Article 8 (the 'private life' article) of the European Convention of Human Rights. It concerned national broadcasting across the UK of closed circuit television pictures of the claimant Geoffrey Peck attempting to commit suicide by slitting his wrists on a local street in Brentwood. After rejecting the UK government's argument that Peck's interests would be adequately protected under the equitable doctrine of breach of confidence, the Court concluded there was a breach of Peck's privacy for which a remedy was required. The placing of CCTV cameras of which public notice was given was not problematic.[53] Nor was disclosure to the authorities called to save Peck's life. But the mass media publicity given to Peck's actions with the purpose of showing the cameras' effectiveness violated his right to a private life: being made without appropriate safeguards of his privacy, according to the Court: and '[a]s such, the [public] disclosure constituted a disproportionate and therefore unjustified interference with [Peck's] private life and a violation of Article 8 of the Convention'.[54] The UK's obligations under its *Human Rights Act* implementing the *European Human Rights Convention* including in it a right to private life meant a remedy had to be provided.[55] The extent of any obligation on the part of

court thought misuse was better dealt with as a defence to infringement than a separate counterclaim: see *MGM Studios Inc v Grokster Ltd* 269 F Supp 2d 1213 at 1225-7 (2003). As yet unexplored is the possibility for claiming copyright misuse on privacy grounds, but in principle there is no necessary reason to preclude this. For copyright misuse as an evolving doctrine in US courts, see B Frishman and D Moylan, 'The Evolving Common Law Doctrine of Copyright Misuse: A Unified Theory and Its Application to Software' (2000) *Tech LJ* 865.

51 The tort of abuse of rights which embodies the notion of unreasonable exercise of a right for a purpose other than that for which it is granted is of French origin (developed out of the general principles of Article 1382 of the Civil Code) and is 'widely accepted' in civil law countries: see J Perillo 'Abuse of Rights: A Pervasive Legal Concept' (1995) 27 *Pac LJ* 37. .

52 *Peck v United Kingdom* (2003) 36 EHRR 41 (at 719).

53 Ibid at 737 ('[t]he monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life').

54 Ibid at p 744.

55 Although, as Lord Hoffmann in the House of Lords rightly pointed out in *Wainwright v Home Office* [2003] 4 ALL ER 969, it would technically be sufficient for the UK government to enact specific

lawmakers outside Europe to ensure privacy is legally protected may be debated. Bills of Rights are not generally as clear about privacy as they are about free speech and Australia does not even have a Bill of Rights. However, Australia, like many other countries (including the US), is a party to the *International Covenant on Civil and Political Rights* which provides for a right of privacy as a matter of international law, reflecting to some extent international norms.[56] And historically policies about privacy have influenced the development of common law and equitable doctrines.[57] Reliance on abuse of rights type doctrines to safeguard the privacy of internet users who download and share copyright protected music is appropriately within the judicial function.

4. Conclusion

Laurence Lessig famously observed that the unique architecture and social context of the internet demands a different legal approach.[58] The experience of music sharing and downloading shows that when copyright and privacy laws are extended to the internet environment they must adapt in the process in an effort to mediate the shifted boundaries of proprietary and privacy interests. On the other hand, adapting to meet new situations and circumstances is the heritage of the common law system.[59] The real question is whether the internet is truly revolutionary, calling for internet specific legal solutions (as Lessig among others has suggested). I suggest it is rather another step in a broader communications

---

legislation controlling the use of film from CCTV cameras to be enacted in response to *Peck* - the decision did not necessitate a 'high level' tort of privacy protection for the UK: ibid para 33. Even if that is concluded, however, it is clear post-Peck that wide ranging privacy protection is required under whatever statutory and common law (and equitable) doctrines are drawn on to carry out the UK's obligations under the Convention and under the *Human Rights Act 1998* (UK) which implements it.

56 *International Covenant on Civil and Political Rights* (UN, New York, 1966) Article 17. And see *Gutnick v Dow Jones & Co Inc* (2002) 210 CLR 575, Kirby J at 626.

57 See generally M Richardson, 'The Private Life After Douglas v Hello' [2003] *J Leg Stud* 1 (regarding the equitable breach of confidence doctrine in particular). The same may be said of the influences on statutory laws about privacy, although these appear to provide limited protection to internet users where statutory copyright interests are concerned: see G Greenleaf, 'IP, Phone Home: The Uneasy Relationship Between Copyright and Privacy Illustrated in the Laws of Hong Kong and Australia' (2002) 32 *Hong Kong LJ* 38.

58 Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' above n 39.

59 As Deane J pointed out in the Australian 'unfair competition' case *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 458.

revolution - beginning with the printing press in the 15th Century, and taking in the telegraph and telephone which spanned the world in the 19th Century, the rise of the mass media in the 20th Century,[60] and the simple personal cassette tape recorder in the 1970s and 80s – developments which have sometimes placed copyright and privacy on the same side but also sometimes found them at odds. If so, development of non-internet specific solutions to legal problems may generally be preferred. The internet with its massive ability to store and track personal data raises concerns about privacy, especially if information obtained for the purposes of launching copyright infringement proceedings can be freely exploited by copyright owners in a 'name and shame' publicity campaign. The suggestion of Tamberlin J in the case of *RIAA v University of Tasmania* that a solution to any privacy breaches would lie with established principles of 'abuse of misuse or abuse of information given on discovery' is therefore reassuring.

5. *Postscript*

Since this article was completed,[61] some new evidence has emerged as to the 'success' of the RIAA's strategy of publicly targeting individual music copyright infringers, with significantly fewer now admitting to downloading music.[62] Appearances are that the social norm about the appropriateness of downloading is changing. Apple iTunes also continues to do well in exploiting the market downloading copyright protected music for personal use;[63] and has spawned several competitors, including a re-launched legal version of Napster.[64] More copyright infringement suits have also been

60 As interestingly described by social historians Asa Briggs and Peter Burke in *A Social History of the Media: from Gutenberg to the Internet* (Polity Press, Cambridge, 2002). See also (arguing the internet has been overhyped – but that this has often been a feature of new technology, including the internet's forbear, the 19th Century telegraph): T Standage, *The Victorian Internet*, Weidenfeld & Nicholson, 1998).

61 November 5, 2003. This postscript is up to date as at 31 January 2004.

62 A Pew Industry survey on 'The Impact of Recording Industry Suits Against Music File Swappers' (L Raine and M Madden, January 2004), found downloading had, according to responses, dropped by half since the RIAA began filing suits and concluded '[t]he RIAA lawsuits against online music file sharers appears to have had a devastating impact on the number of those engaging in Internet peer-to-peer music sharing': see http://www.pewinternet.org. As others have noted, however, respondents may also be more wary about admitting to copyright infringements: see D McGuire, 'RIAA Sues Song-Swapping Suspects' Washington Post, 21 January 2004 at http://www.washingtonpost.com/wp-dyn/articles/A35281-2004Jan21.html.

63 See http://www.apple.com.itunes/ (recording *inter alia* over 2 million iPods sold as at January 2004).

64 See http://www.napster.com/ and, for its early success, http://www.comscore.com/press/release.asp?press=395.

launched by the RIAA,[65] although it suffered a setback when the US Court of Appeals (DC Circuit) on December 19 2003, on appeal from Judge Bates, held that Verizon could not be made to reveal the identities of subscribers under the terms of the *Digital Millennium Copyright Act 1998*.[66] The Court did not feel the need to conclude as to Verizon's alternative argument that revelation of identities would violate subscriber privacy. In Australia, to date, there has been no claim made regarding abuse or misuse of discovery in the aftermath of the *University of Tasmania* case.

65 McGuire above n 62 (noting launch of four new 'John Doe' lawsuits by RIAA targeting 532 people).

66 *RIAA v Verizon Internet Services Inc* 2003 US App LEXIS 25735 (2003), although not ruling out that a subpoena might be issued by the normal route of appearing before a judge (the DCMA merely shortcutting that process). The new lawsuits noted above n 65 follow that path.