



Article for Institute of Criminology

Internet Crime: Copyright Infringement

Ian McDonald,¹ Australian Copyright Council, March 1998

Abstract

In this paper, I want firstly to explore some fairly basic criminological issues thrown up by the physical and virtual character of the Internet:

- how is “crime” defined?
- what are the historical, geographical and social dimensions of the Net which affect any definition of crime?
- to what extent should copyright infringement be an offence?
- how do the offence provisions in the Australian Copyright Act relate to infringement of copyright on the Internet? and
- who are the infringers, and which of these are criminals?

Defining crime

“Crime” is whatever offends against the State.

Statutes and the law reports determine criminality. Those statutes and law reports are expected to reflect values resting in the hearts of the legislature and judiciary. We also expect the legislature and the judiciary to define what is criminal by reference to the views and the best interests of the community.

But we are all aware that the word “crime” has other, more general meanings. At one end of the spectrum, there is the very general use of the word in colloquial speech: it’s a crime to be inside at a conference on such a lovely day as this; it’s criminal to see all that milk go to waste; and so on. Further along the spectrum, “crime” is not what is on paper, but what attracts community opprobrium – the frowns of society. In this part of the spectrum, concepts of criminality are fluid, sometimes serious enough to form a legal norm, at other times not – laws and the enforcement of laws in this zone are, at best, haphazard. In this part of the spectrum, not everything which falls under the Crimes Act or the ægis of criminal law is regarded by sections of the community as “criminal”. For example, crossing against a “Don’t Walk” sign and speeding are offences under relevant Motor Traffic

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Acts; drug use contravenes various State and Federal laws. Legislation and law reports regard these as “crimes”. Significant sections of the community do not.

Similarly, old ladies don’t generally think twice about taking a cutting from a plant growing over a fence (arguably, theft);² and kids don’t think twice about propping themselves up against parked cars (trespass).

Everyday, people carry around a relativity between what is worth worrying about, and what is not. Similarly, insofar as copyright is concerned, the State accepts some relativity as to what it will *criminalise* and what it will not; what it will *prosecute* and what it will not.³

Insofar as copyright is concerned, I can illustrate this by reference to a poster produced some years back by the National Book Council. The picture has a silhouette of a distressed woman, whose handbag has just been ripped from her, with the slogan:⁴

PHOTOCOPYING IS STEALING!!

In strict legal terms, this is only correct if the copy is made for certain commercial purposes, such as sale or hire. While copyright is defined in the Copyright Act as personal property,⁵ photocopying copyright material for your own use does not give rise to criminal liability. Rather, the use of the word “stealing” in the slogan captures the attitude of authors, playwrights and publishers towards photocopying; at the same time, the slogan tries to reinforce that attitude among the wider community.

It is a commonplace of criminology that there are disjunctions between formal, or legal, concepts of criminality and attitudes in different parts of society, and community attitudes are a matter which assumes some importance when talking about crime and the Internet insofar as copyright is concerned.

Historical and geographical dimensions

Similarly, it is a commonplace that there are disjunctions between concepts of crime and concepts of intellectual property rights over time and from place to place.

² I cannot vouch for the application of this generalisation in the Northern Territory since the enactment of its draconian property laws.

³ In this regard, police harassment of Indigenous people or of young people through the use of sections of the criminal law merely demonstrates institutional bias which replays such relativities.

⁴ The poster was reproduced several times within the first edition of *The Playwright’s Handbook*, edited by Therèse Radic for the Australian Writers’ Guild. After the slogan quoted, the poster goes on to make the point:

So is performing a play
without the permission
of the owner of the copyright.

This type of use of copyright material *is* subject to criminal sanctions under section 132(5) of the Act. However, it is arguable that, insofar as the performance without permission is concerned, the producer would be the person committing the offence, not the actors.

⁵ Copyright Act 1968 (Cth) section 196(1)

For example, it was not a crime in sixteenth or seventeenth century England to perform other people's plays or print engravings of artworks; until the second half of the nineteenth century, it was not a crime to print and distribute works of foreign authors, however unfair that might have seemed.

Similar examples abound in relation to the types of uses which fall within the scope of copyright – the original right to make copies has expanded to include rights of public performance, rights of broadcasting, rights of cable diffusion and so on.

We now live at a point where copyright principles have settled into a body of opinion, certainly among judges and legislators, that if money is to be made from the products of intellectual endeavour, then it should generally be the originator of that product or their employer, and anyone acquiring rights through them, that should have the chance to benefit from its exploitation.⁶

There is a well-known comment by Peterson J: "what is worth copying is prima facie worth protecting",⁷ which to me is echoed in the three fundamental, perhaps, sacred, principles of copyright summarised by Mr Justice Laddie:

- matter created by the brain may be owned;
- those who create such matter should be rewarded; and
- "thou shalt not steal".⁸

These principles are seen in various international conventions. Article 27(2) of the Universal Declaration of Human Rights provides:

- (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In accordance with this fundamental right, Article 9(2) of the Berne Convention and Article 13 of the TRIPS agreement state that exceptions in relation to the reproduction right should "not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".⁹

⁶ In the context of civil action for infringement of copyright, an example of the way a right evolved is the development of the "public performance" right in music: see, for example, the movement between *Duck v Bates* [1884] 13 QBD 843 concerning a play performed in a hospital to the staff and their families and *Jennings v Stephens* (1936) Ch 469 where the performance was part of the activities of a private ladies club in a village, to the line of "factory cases" such as *Ernest Turner Electrical Instruments Ltd v Performing Rights Society* (1943) Ch 167, to the contemporary interpretation of the right in *Australasian Performing Rights Association v Commonwealth Bank of Australia* (1992) 25 IPR 157 and *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 38 IPR 294.

⁷ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 at 610, approved in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465 at 471 (per Lord Reid) and 481 (per Lord Pearce).

⁸ Mr Justice Laddie, "Copyright: Overstrength, Over-regulated, Over-rated?", (1996) 5 EIPR 253 at 253.

⁹ See also Article 13(1) of the Berne Convention, stating that reservations and conditions on the exclusive right granted to authors of musical works and accompanying words to record their work not to be "prejudicial to the rights of these authors to obtain equitable remuneration".

The history, community and geography of the Internet

So, let's look briefly at the history, community and geography of the Internet, and see how these affect the perception of what should be criminal when it comes to infringement of copyright in cyberspace.

geography

Geography first up.

There is a view amongst some Net heads that the Internet is a *terra nullius* – that it is a space akin to the high seas, outside the scope of territorial law generally, and copyright law in particular.

One of my favourite episodes of *The Goodies* is the episode in which the three decide to set up a pirate radio station off the coast of Britain. To escape liability, the three decide to tow Britain outside its own territorial limits. Some cybertizens seem to operate under similar logic. However, just as the tow rope used by the Goodies connected them firmly within jurisdiction, so the physical parts of the Net – its cabling and servers – ineluctably connect everyone on the Net to potential jurisdictions, as much as he or she might think they are pulling away from any such jurisdiction.

Activities and transactions on the Net are therefore liable to be governed by existing copyright regimes; the uploading, downloading and transmission of material on the Net correspond with uses already regulated by copyright: namely, reproduction, and cable diffusion. So, should the Internet be governed by the copyright laws of its geography? Or should different laws apply to Internet uses of copyright material?

history and community

Insofar as history and community are concerned, it is relevant to note that the Net developed principally as a means of, firstly, military and, secondly, academic communication. These communities have historically either ignored copyright issues or been able to rely upon special exceptions to the general need to obtain permission to deal with copyright material.¹⁰ More recently, the Internet has developed as a means of communication and commercial development among the general population and the business sector.

Insofar as copyright is concerned, the different communities on the Net may contribute to a debate on the extent to which “real” copyright law applies in cyberspace. They also inform issues such as the scope of exceptions to infringement of copyright: for example, in relation to the making of temporary copies in RAM; to practices such as caching; and in relation to “private” uses of copyright material which hitherto may have been incidental to commercial exploitation.

¹⁰ See for background information on the history of the Internet, see the following sites:

<http://www.w3.org/>
<http://www.w3.org/History/1989/proposal.html>
<http://www.w3.org/Proposal.htm>

So, which community's values is to be taken as the reference point when it comes to deciding how copyright applies on the Internet? Which community's standards will decide, firstly, what types of behaviour will infringe copyright, and, secondly, which infringements will be criminalised? Are the histories and communities of the Internet sufficient to allow the operation of different laws than geography would otherwise indicate?

In my view, we have seen what will probably be a fairly brief flowering of anarchy insofar as copyright on the Internet is concerned – what has been termed “a transitory and illusory” freedom.¹¹ Certainly those working in copyright would be familiar with the cry that “Information wants to be free”. Such cries carry a certain amount of credence, and even cachet, in certain circles.

Susan King, a sound artist or “cultural mechanic” of the Potential Fossil Assemblage, has even stated that “Copyright is a rather myopic, even juvenile idea”.¹² Another example is John Perry Barlow, the rock music-philosopher from *The Grateful Dead*, who has argued that copyright developed in a legal system based on ownership of physical property; rewarding people who convert ideas and information into a physical form is not relevant to “digitised property” which, on systems such as the Internet, may never be “fixed” in material form, and which is infinitely changeable and reproducible. He argues that intellectual property law is no longer appropriate, and recommends “a moratorium on litigation, legislation, and international treaties in this area until we [have] a clearer sense of the terms and conditions of enterprise in cyberspace”.¹³

Such antagonism towards the way copyright is developing is not limited to academics, artists, musicians and students – the traditionally revolutionary bourgeoisie. I will give you two examples of other, perhaps surprising, voices: Mr Justice Laddie, who I referred to earlier, and Sir Anthony Mason.

Sir Anthony gave the Inaugural Australian Library Week Oration in 1996.¹⁴ Referring particularly to the language of the Internet, Sir Anthony referred to the way:

¹¹ MJ Simpson, “Colonising Cyberspace: Life and law on the electronic frontier”, (1995) 11 *Commonwealth Judicial Review* 26, quoted by Russell Smith, “The ‘new age’ piracy: in search of better solutions”, (1997) 55 *Platypus Magazine* 28 at 29

¹² Susan M King, “Quiet Pillage: the case for free noise”, (1997) 2(4) *Artlines* 1 at 2.

¹³ John Perry Barlow, “Selling wine without bottles: The economy of mind on the Global Net”, (1994) 7 *IPLB Supplement*. (No speech or paper on the Internet is really complete without a reference to this article.) While the value of physical property is concerned with its scarcity, the value of digitised information is, Barlow argues, based on its contemporaneity. Barlow thus argues that people will pay for “real-time” information. Barlow also suggests that a system of patronage for artists and other creators will return, where people commission the creativity and expertise of others by direct interaction. In this Utopia, it will be relationships rather than ownership that will generate income. This interaction will be controlled by the technology itself, and Barlow sees no rôle for law in this system.

One of the flaws in his argument was neatly underlined by the death of one of the members of *The Grateful Dead*: copyright continues to give economic returns from beyond the grave; personal relationships do not (see, however, *Cummins v Bond* [1927] 1 Ch 167) and *Leah v Two Worlds Publishing Co Ltd* [1951] Ch 393).

¹⁴ Sir Anthony Mason, “Reading the future”, (1996) 9 *IPLB* 133; see also Sir Anthony Mason, “Developments in the Law of Copyright and Public Access to Information”, (1997) 11 *EIPR* 636.

fleeting and evanescent images conjured up by modern wordsmiths and fashion makers ... invariably obscure, if they do not entirely conceal, a deeper reality which belies the subliminal appeal of the superficial images.

It appears that, to Sir Anthony, that “deeper” (and, impliedly “uglier”) reality is copyright law reform, driven by large publishers and information providers – multinational conglomerates. To use a completely inappropriate mediæval image, Sir Anthony “takes up the cudgels” on behalf of users of copyright material.

In similar vein, Mr Justice Laddie entitled a recent speech “Copyright: Overstrength, Over-regulated, Over-rated?”.¹⁵ After canvassing the general principles upon which copyright rests, his Honour posed the question of whether these principles justify the current width of copyright legislation. In particular, His Honour commented adversely on a number of recent developments in relation to copyright, including the move to take private criminal actions for infringement.

To what extent should copyright infringement be an offence?

In my view, despite the reservations and rebellions I’ve just mentioned, the basic principles do apply in cyberspace, and will continue to apply in cyberspace. Barlow’s recommendation for “a moratorium” has been ignored. Indeed, in the very year he issued his plea, the World Intellectual Property Organisation (WIPO) concluded two new treaties which deal with copyright protection in an on-line world.¹⁶

The next question is whether that world should be policed by the State? Should infringements be criminal? If so, which infringements?

Generally, a critical mass of thought needs to develop before there is legislative change. Further, that critical mass needs to be positioned within critical points of the relevant power structures before certain types of conduct are not only stigmatised, but criminalised. Insofar as the Copyright Act is concerned, certain behaviour is already criminalised. There is no *tabula rasa* when it comes to law and the Internet; there is no need for a critical mass of thought to develop in order to apply copyright to the Net. Rather, what we are seeing, is a paradigm shift – from the Net being conceptualised as unfenced and unguarded frontier country dominated by squatter and bushranger values, to a realisation that the Net is already submitted to the laws of the places through which it passes; a recognition that the Net is an extension to urban, regulated, space. This is not to say that the way law applies to the Internet is adequate or appropriate, but rather merely to point out that the Internet as a physical space may be regulated in the same way as a physical highway, a physical shopping centre or a physical playground.

¹⁵ Laddie, *op. cit.*, at 258.

¹⁶ The treaties are the Copyright Treaty and the Performances and Phonograms Treaty, of 20 December 1996. The Australian government is still considering whether it will ratify and implement the treaties, and to this end has so far released two discussion papers through the Departments of the Attorney-General and of the Minister for Communications, the Information Economy and the Arts: *Copyright Reform and the Digital Agenda* (AGPS, Canberra, July 1997) and *Performers’ Intellectual Property Rights* (AGPS, Canberra, December 1997). At the time of writing, a third paper on general issues concerning Australia’s possible accession to the treaties was yet to be released.

Peter Drahos has commented that “one of the striking features of the evolution of intellectual property law is the increased involvement of the criminal law”:¹⁷

Under the evolving global regime, states are being drawn into the greater and greater use of criminal enforcement resources on behalf of intellectual property owners. The fact that US law enforcement agencies are choosing to make copyright infringement a priority is a matter for the United States. However, its criminal law enforcement priorities are not necessarily those of other countries. The danger under a globalised property regime is that [it] will become so. The fact that Australia is required to devote resources to criminalise and enforce intellectual property rights will no doubt please US copyright owners but one wonders whether Australian citizens would be equally pleased, if they knew.

Drahos notes that, in Australia, between 1992 and 1995, offences for copyright reported by the Australian Federal Police rose from 763 to 1,924.¹⁸ He also comments that “there has been no real serious discussion of why the state should mete out criminal penalties”.

So then, what we need is a rationale for criminalising certain cyberspace behaviour.

Historically, the offence provisions in the Copyright Act appear to result from a concern that some criminal provisions were necessary to take action if an infringer has no assets or is itinerant.¹⁹ The Spicer Committee, in its report on copyright to the Australian Federal Parliament in 1959, for example, stated as follows:²⁰

Some of us doubt the wisdom of inserting criminal provisions in a copyright Act. We realize, however, that they may be desirable in the case of an offender who is a man of little means.

The current Act, however, contains nothing which limits the application of the offence provisions to “men of little means”.

¹⁷ Peter Drahos, “States and Intellectual Property: the Past, the Present and the Future”, in *From Berne to Geneva: Recent Developments in International Copyright and Neighbouring Rights*, eds, David Saunders and Brad Sherman (Australian Key Centre for Cultural and Media Policy, Brisbane, 1997) 47 at 52. Presumably, Drahos is referring to Article 61 of TRIPS, which states in part that “Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale”.

¹⁸ In Drahos’ view, this rise has significant resource implications: see Drahos, *ibid.*, at 68. In the United States, since 1993 the FBI has more than tripled the number of agent hours spent on copyright infringement cases: “Bulletin Board Operator found guilty of infringement”, (1995) 50 *Copyright World* 12.

¹⁹ See generally, Wayne Kelcey, “The Offence Provisions of the Copyright Act 1968 – Do they Protect or Punish?”, (1995) 6 *AIPJ* 229

²⁰ *Report of the Committee Appointed by the Attorney-General of the Commonwealth to consider what Alterations are Desirable in the Copyright Law of the Commonwealth*, (Government of the Commonwealth of Australia, Canberra, 1965) at 62. Similar comments were made by Senator Keating, in the second reading speech relating to the first Commonwealth Copyright legislation of 1905:

The united effect of [the offence provisions] is; many piracies take place on the part of persons against whom it is useless to proceed for damages or to take out an injunction because to put it in the vernacular, they are not worth powder and shot. Therefore, some summary remedies have to be provided to give authors protection against piracies.

(Quoted by Kelcey, *ibid.*, at 232.) Senator Keating also referred to the “drastic character” of the provisions.

In this regard, *Thames & Hudson Ltd v Design and Artists Copyright Society Ltd* is interesting.²¹ The case concerns the reproduction on a book jacket of a work by the painter Max Beckman (1884-1950). Proceedings were brought by the Design and Artists Copyright Society (DACS – the UK collecting society representing visual artists) against Thames & Hudson and its directors (most of whom were probably *not* “men of little means”). The defendants sought to have the criminal proceedings stayed while civil proceedings were being heard, arguing that it was an abuse of process to commence criminal proceedings in what was essentially a commercial dispute. One can feel the defendants, including an 87 year old widow, squirming at the indignity of having been brought before a criminal court. However, the publishers failed in their attempt to have the proceedings dismissed: Evans Lombe J stated that “no qualification appears in the statute limiting the types of offender capable of committing the offence to ‘pirates’”.

So, let’s look at the offence provisions within the current Australian Copyright Act insofar as they apply to the Internet.

How do the current offence provisions in the Australian Copyright Act relate to infringement of copyright on the Internet?

Insofar as infringing behaviour is concerned, the offences in the Australian Copyright Act are set out in section 132. The offences are not strict liability offences: each depends upon whether the defendant has relevant knowledge – whether they knew or ought reasonably to have known relevant matters. The provisions may be summarised as follows:

- under section 132(1), it may be an offence to make “an article” for sale or hire or to deal with an “article” in a number of specified, commercial ways.
- under section 132(2), it may be an offence to distribute “an article” that infringes copyright, if the distribution is for trade purposes, or for any other purpose that prejudicially affects the copyright owner.
- under section 132(2A) it may be an offence to possess articles which infringe copyright, if the possession is for specified commercial purposes or for any other purpose that prejudicially affects the copyright owner.
- under section 132(3), it may be an offence to have possession of a “plate” that is to be used to make infringing copies of works.
- under sections 132(5) and 132(5AA), it may be an offence to cause an infringing public performance of copyright material at “a place of public entertainment”.

In addition, under section 133A, it is an offence to advertise for the supply of infringing copies of computer programs.

There are two features of these provisions to which I would like to draw attention.

Firstly, with the exception of the offences dealing with possession of a “plate” and the public performance offences (sections 132(3), 132(5) and 132(5AA)), the offences relate to infringing behaviour which contains a commercial element.

²¹ The case is noted in [1994] 9 EIPR D-237, and reported at [1995] FSR 153.

The second point is that, insofar as distribution of articles are concerned, the current offence provisions generally require the distribution of “articles” – they are predicated on physical goods, and are not at all geared to infringing electronic distribution. The exception is in relation to computer programs – a transmission of a computer program which is then received and recorded so as to result in an infringing copy, is deemed to be distribution of that infringing copy.²²

So let’s look at what categories of people infringe copyright via the Net, and which of these should be dealt with under the statute as criminals. We can then see more clearly how well the current offence provisions apply to the Net.

Who are the infringers, and which of these are criminals?

Consider that there are between 60,000 and 100,000 bulletin board operators world wide;²³ add to that the number of Internet sites and home pages; consider also the ease of reproduction and transmission of material on the Internet, and the quality of reproductions once the material is digitised.

A copyright owner’s control over distribution and reproduction of their material is incredibly vulnerable to a number of types or categories of infringing activity:

- leakage of value through vast numbers of individuals infringing copyright, usually for “private” purposes, on an *ad hoc* basis; and
- old fashioned outright piracy and counterfeiting by dedicated individuals or groups, for commercial gain.

There is certainly some blurring between these two traditional types of infringement. As Dan Hunter of the University of Melbourne has commented:²⁴

Copyright relies on the notion that the only way to regulate unauthorised dissemination is to hold up a big stick and threaten people. In the golden age, this worked: you saw prosecutions against the commercial pirates, and a few others. But this is not going to work when everyone is a potential commercial pirate, since the infobahn and dissemination is virtually free.

The social relativities which might excuse “private” uses of copyright material make no sense in an on-line world. However, I think that there are two further categories of infringement which are peculiar to the Internet:

- a hybrid type of activity, where an initial person or group, by uploading copyright material onto the Net, or by providing a particular bulletin board service, makes vast scale *ad hoc* leakage possible; and
- accidental infringement where a person deals with copyright material in a way which is legal under the laws of the country where the material is uploaded, but which is infringing under the laws of another country.²⁵

²² Section 132(5A)

²³ Bruce A Lehman, Chair, *Intellectual Property and the National Information Infrastructure: the Report of the Working Group on Intellectual Property Rights Task Force*, (Washington, 1995) at 118, fn 378.

²⁴ Quoted in Ian Collie, “Copyright is dead ... or is it?”, (1995) 1 *Artlines* 10 at 10.

²⁵ Differences in the application of copyright laws between jurisdictions may include:

When it comes to the issue of which category or categories of infringement to make criminal, the issue is clouded by the fact that many of the infringers in the third category – those making material available for *ad hoc* copying are legally naive enthusiasts and fans – not the sort of criminal elements that no doubt other speakers in this conference will refer to or describe.²⁶

So, which of the above infringers should the State classify as thieves and crooks?

- the infringing individual;
- the out and out crook;
- the misguided enthusiast; and/or
- the accidental infringer, stumbling into another country's jurisdiction?

Why do I hesitate to say, all of them?

Category one: the infringing individual

I mentioned earlier that there are certain types of behaviour which don't arouse community concern.

Copyright rights fall into this area. Think, for example, of people who tape their CDs, in order to use the tape in the car (that is, rather than buy a commercially produced tape version); people who tape movies from TV to add to their libraries (rather than rent or purchase the video); people who photocopy newspaper items for friends, rather than obtain permission from the relevant copyright owner. Each of these activities rob the copyright owner of an opportunity to license and control that use, and are likely to have an impact on the value of the copyright and the return to copyright owners on their creative or financial investments. Albeit that the impact is small on a case by case basis, the cumulative effect of a series of small infringements can be huge.

If the question is adverted to at all, a person might excuse themselves by saying the act is unlikely to do harm; or rationalise their action in the same way as shop-lifting is rationalised by some ("it's only a small act against a big corporation"; "it's already been figured into the price you pay"; and so on). Perhaps one can be too careful in jealously guarding oneself against committing all or any infringements. Clearing rights is a nuisance, and may not be viable on a Saturday afternoon when you suddenly realise there is something on television that night that you'd like to tape to give to your friends. The same applies to the Internet; if you find a piece on the Net which you want to download and e-mail to a friend or colleague, how many will think twice, or refrain from acting?

Is this why we might feel it is difficult to criminalise *all* infringements? Is that why we squirm a bit at the thought of the defendants in the *Thames & Hudson* case?

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- the period of time for which the material is protected;
 - the scope of exceptions which are available ;
 - differences in who owns the material; and
 - differences as to who is liable for any infringements and offences.

²⁶ As noted above, the case of *Irvine v Hanna-Rivero* (1991) 23 IPR 295 involved a computer enthusiast.

In comparison with our general concepts of criminality, isn't this an odd reaction? My dim memories of criminal law don't dredge up any defences to burglary based on the fact that the property taken is only for personal use. I don't recall purse-snatching being OK if you only use the proceeds on yourself.

How seriously do we take the concept of copyright as private property?²⁷ Shouldn't taking it then generally be regarded as criminal, regardless of purpose?

In this regard, however, it is worth noting that our current copyright offence provisions don't generally go this far: generally a commercial purpose is needed before our little infringements step over into crime. In this regard, note that the general "commercial purposes" requirement does comply with Article 61 of TRIPS:

Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale.

It's a nice escape hatch for us: we can also step back from condemning ourselves and lining up for Pentridge as we leave the building.

Categories two and three: the out and out crook and the misguided enthusiast

I shall deal with both categories two and three together: the unscrupulous crook and the misguided enthusiast. While their motivation may differ, the end result is the same: big losses of potential licence fees to copyright owners. In this regard, I quote Justice von Doussa in *Irvine v Hanna-Rivero*:²⁸

The submission that the offence is trivial I reject. An offence may be trivial in its nature, for example a mere technical or casual breach of some minor law where there is no deliberate intention to commit a breach thereof. This is not such a case. A serious offence may also in its nature be rendered trivial by the circumstances under which it is committed. The present case involves a serious offence but there is nothing in the circumstances of its commission which, in my view, can be called in aid to justify treating the offence as trivial. Although the defendant's activity was more in the nature of a hobby than a commercial activity, the extent of his possession and use of infringing computer programs was anything but trivial.

Let's look at some facts and figures illustrating what unauthorised use by third parties costs copyright owners. Dr Russell Smith presented a paper to the Second National Outlook Symposium on Crime,²⁹ in which he gave some facts and figures. I won't go back over that territory in detail, instead, I'll pluck out some figures relating to infringements via the Net, to indicate why copyright owners are concerned about cyberspace.

²⁷ In this regard, see the comments of von Doussa J in *Irvine v Hanna-Rivero* (1991) 23 IPR 295 at 299. His Honour stated:

Copyright protection is a valuable asset to the authors of software programs. ... the cost in lost revenue to those legitimately entitled to receive it is very high. It cannot be over emphasised to those who are minded to engage in illegal copying of works protected by copyright, and trading infringing copies, that they will commit serious crimes.

(The case involved the copying of computer programs to be swapped with other computer enthusiasts.)

²⁸ (1992) 23 IPR 295 at 299

²⁹ The paper has been published: Smith, op. cit.

In one instance, a United States bulletin board operator, a Mr Richard Kenadek, charged subscribers \$US 99.00. Subscribers could then download as many as 200 commercial computer software programs without permission. Kenadek's revenue amounted to some \$US 40,000 – in other words, over 400 subscribers.³⁰ You can estimate the potential losses to the software owners.

In another United States case, a student operated a bulletin board, on which he encouraged users to upload software such as WordPerfect and Excel. These programs were then transferred to another Internet address from where they could be downloaded by users who had a special password.³¹ It is likely that this caused software owners and suppliers a loss of over \$US 1m.³² The student would no doubt disagree, but in my view it is unfortunate that the student escaped liability for his actions as the US legislation required him to be authorising the infringements for financial gain. The Australian legislation has been somewhat more robust, in that our legislation does not necessarily require commercial gain – all that is really needed under the relevant section 132 offences is commercial loss.

Insofar as copyright infringement actions based upon activities on the Net within Australia are concerned, I understand that there have been some civil cases brought by the Business Software Association of Australia against web site operators who have offered the latest versions of computer programs to subscribers, and one case where a person was downloading infringing software onto discs and selling the discs.³³

I have said that copyright does apply to transactions and actions on the Internet. This is not to say that there are not gaps, or that the provisions should not be reconsidered in the light of the types of infringing behaviours which are possible via the Internet. For example:

- the current offence in relation to making, dealing with or distributing infringing “articles” should be rethought to take into account the digital nature of material on the Internet;
(in this regard, section 132(5A) is relevant: the transmission of a computer program which is received and recorded so as to the result in the creation of an infringing copy is deemed to be “distribution”)
- any net advertisement for infringing goods should be subject to criminal sanction, in the same way as the current section 133A provides that publishing an ad for the supply of infringing computer software is an offence.

³⁰ “Bulletin Board Operator found guilty of infringement”, loc. cit.

³¹ *United States v LaMacchia* 871 FSupp 535, 33 USPQ2d 1978 (DC Mass 1994). I understand that the United States legislature has now closed this “loophole”: HR 2265 criminalizes a variety of wilful infringing acts without requiring proof of financial gain.

³² For information on software infringement generally see the Business Software Association report, *Overview: Global Software Piracy Report: Facts and Figures, 1994-1996*, which is available online:

<http://www.bsa.org/piracy/96REPORT.HTM>

See also the judgement of von Doussa J, (1992) 23 IPR 295 at 299, for some 1991 figures concerning software piracy.

³³ None of these cases have been reported – they have either settled or are in train. None of these cases have involved criminal actions.

In addition, as Australia begins to discuss both whether it should accede to the two WIPO Treaties of 1996, and if so, how the obligations of the treaties should be implemented, the rôle of the criminal law needs to be considered in relation, for example, to tampering with Rights Management Information and Technological Measures.³⁴

The accidental foreign infringer

We typically think of copyright as a global form of protection, and certainly, copyright law is subject to a fair degree of uniformity between countries. This uniformity is the result of a long tradition of international agreements between countries – the principle agreements being the Berne Convention; the Universal Copyright Convention and, most recently, TRIPS. However, there are a number of differences in the way copyright law applies which may mean that it is not an offence to deal with material in certain ways on the Internet in one country, but that the same behaviour is a crime under the law of another country.

Effectively, it may be that the countries which have the highest levels of protection have the opportunity to dictate the standards which must apply in relation to online use of copyright material in every other country.

There are already a number of United States cases on “long arm” statutes, and what reach a court of one jurisdiction has in relation to activities on the Internet which initially occurred in another country.³⁵ The jurisprudence of how to deal with such cases is still evolving, and I merely raise the matter here as another example of the legal complexity which arises from the Net’s nature.³⁶

Obviously, further work is needed to address the issue of what to do with the ‘gaps’ in the laws of the countries where upload and download take place. While I have labelled this category the “accidental” infringer, I think we also realistically have to speculate that an “accidental” foreign infringer may not be accidental at all, but an off-shore pirate in a copyright safe-haven, which has no or minimal copyright laws.

Perhaps further work at the international level is necessary, to harmonise, for example, ownership provisions and the scope of exceptions insofar as the Internet is concerned. Alternatively, or additionally, international agreements about when “long arm” statutes apply need to be developed, together with standards as to when

³⁴ See Articles 11 and 12 of the WIPO Copyright Treaty, and Articles 18 and 19 of the WIPO Performances and Phonograms Treaty, all of which refer to Contracting Parties providing “adequate and effective legal remedies” against certain acts and persons. The government has so far released two discussion papers on the two Treaties: *Copyright Reform and the Digital Agenda*, and *Performers’ Intellectual Property Rights*. Both of these are available on-line at the Department of Communication and the Arts website, and the web site of the Federal Attorney-General’s Department. See paras 5.15 and 5.17 of *Copyright Reform and the Digital Agenda* for proposals to extend the criminal offences to the importation, distribution, and possession for commercial purposes of devices “designed to facilitate the unauthorised circumvention of computer program “locks”, and in relation to the intentional interference with digital Rights Management Information.

³⁵ See for example: *McDonough v Fallon McElligott Inc* 40 USPQ 2d 1826; *Playboy Enterprises Inc v Huckleberry Publishing Inc* (1996) 36 IPR 104.

³⁶ Paul Edward Geller’ essay, “Conflict of laws in cyberspace: international copyright”, (1997) XXXI *Copyright Bulletin* 3, represents a start in this direction.

potential defendants are taken to have submitted to jurisdiction through on-line presence and activities.

Conclusion

In conclusion then, despite some anti-copyright sentiment, it is fairly settled that copyright does apply in cyberspace.

Secondly, as copyright is personal property, the State not only has a rôle, but an obligation, to protect it by means of criminal law.

Thirdly, there are some difficulties with the application of our current offence provisions insofar as the Internet is concerned. While developments in jurisprudence and international protocols for dealing with the accidental foreign infringer will no doubt continue for some time, we need now to upgrade the offence provisions to catch the criminal infringements which occur on the Net, and thereby uphold the basic normative values noted by Mr Justice Laddie: ownership of products of the brain is valid; copyright is an important part of encouraging further creation; and dealing with copyright material without permission is indeed stealing.