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INTERNET SERVICE PROVIDERS AND COPYRIGHT PROTECTION

The Intenet Service Providers (ISPs) and the copyrights protection on the web: where can this kind of responsibility be found? What have been the comparative jurisprudential and legislative developments? What does the FTA actually provide in this regard?

- Why are ISPs the subject of detailed provisions in the FTAs with the USA?
  - I can talk about the obligations in the Colombia-US FTA at the same time as the Australia-US FTA (AUSFTA) because about 95% of the text of each on ISP liability is identical to the other. (I have based my comparison on the 24 March 2006 draft of the Colombia-US FTA, which I note is subject to the legal scrub.)
  - 'Service provider' is defined in the FTAs as one or more of:
    - *A provider of transmission, routing or connections for digital on-line communications without modification of their content between or among points specified by the user of material of the user's choosing*; and
    - *A provider or operator of facilities for on-line services or network access*.
  - ISPs have been targeted by copyright owners seeking to combat infringement of their copyright works on the Internet, just as the bear picks the narrow point in the river to trap fish swimming upstream.
  - At first, ISPs might have argued that they were the online equivalent of the postal service, which is not saddled with liability for delivering infringing material put in the post. However, as competition resulted in ISPs providing more services to their subscribers, the comparison was less sustainable.
  - The FTAs provisions reflect the compromise hammered out between copyright owners and ISPs in the USA and incorporated in the US Digital Millennium Copyright Act (DMCA), which the USA regards as compliant with the FTAs obligations. The USTR refers to the provisions in the Colombia-USFTA as *reflecting the balance struck in the US Millennium Copyright Act* [sic] *between legitimate ISP activity and the infringement of copyrights*.

- Thus the FTAs provisions are about a **restriction** on the **remedies** that can be ordered **against ISPs** where they are held liable for copyright infringements by users of their systems. Through the conditions of eligibility of ISPs for those restrictions, the FTA provisions are also about **encouraging** them to help the copyright owners to deter such infringements.
  - Generally the FTAs mandate obligations to establish copyright protection, while permitting – but not mandating – exceptions to protection (this is also generally the case with multilateral copyright treaties).
  - In the case of ISPs and other service providers, the FTAs mandate **limitations on the remedies** available against them for copyright infringement in specified circumstances. However, the FTAs also require the contracting countries to provide ***legal incentives*** *for service providers* ***to cooperate*** *with copyright owners in* ***deterring the unauthorised storage and transmission*** *of copyrighted materials* (AUSFTA, art 17.11.29).

- Nature of the liability for the infringing actions of others
  - Copyright consists of a bundle of exclusive rights – each expressed as the exclusive right to authorise or prohibit a dealing or use of the copyright material. This is reflected in **Australian Copyright Act**.
  - Infringement of copyright under that Act consists of either
    - doing an act covered by an exclusive copyright right without the consent of the copyright owner, or
    - **authorising another** person to do such act – this latter form of infringement is known in Australia as 'authorisation' (in US law it is, I understand, called 'contributory' infringement). 'Authorise' has been interpreted as 'sanction, approve or countenance'.

- As part of a large package of amendments to the Act enacted in 2000 to implement obligations in the WCT and WPPT, some guidance was added on the factors relevant for a court in deciding what constitutes 'authorisation'. The court must take into account:

  a) The extent (if any) of the defendant's power to prevent the other person from doing the infringing act

  b) The nature of the relationship between the defendant and that other person

  c) Whether the defendant 'took any reasonable steps' to prevent the other person from doing the act, including whether the defendant complied with 'any relevant industry codes of practice'.

- When legislating to implement the AUSFTA obligations, Australia made **no** amendment to the scope of infringement by authorisation.
- At one end of the scale, ss 39B and 112E of the Act expressly negate liability by a communications facilities provider for authorisation of an infringement *merely because another person uses the facilities* for doing the infringement. At the other end of the scale, a defendant who knowingly requested or approved the doing of the infringing act without the copyright owner's consent would be liable for authorisation. In the Australian case of *Universal Music* v *Cooper* (2005), the operator of a website with links to other sites which offered unauthorised downloading of sound recordings was held to have sanctioned or approved, ie, authorised, the making available at the linked websites of unauthorised copies for downloads and the downloading by individuals from those sites. The court expressly rejected the defendant's claim to rely on s 112E.

- What the FTAs require with regard to ISPs and other service providers:

  - Damages or other monetary relief are not to be awarded against an ISP for the following acivities:

    A. transmitting or routing of material without changing it
    B. automatic caching
    C. user-directed storage of material on the ISP's system
    D. linking users to online sites by hyperlinks, &c—

    if the ISP **qualifies** as required below.

    In regard to ISPs **transmitting or routing** material (ie, **category A** above), what a court can do if the ISP is found liable for infringement is **further limited** to orders to terminate subscriber accounts or to take reasonable steps to block access to an on-line site. Court orders that can be made against ISPs held liable for infringement in relation to **caching, storage or linking** (ie, **categories B, C and D**) may extend, in addition, to orders to remove access to infringing material, and other necessary forms of relief for the plaintiff, provided that it is the least onerous form of relief for the ISP to comply with. These limitations on remedies against ISPs for authorising infringing acts (eg, unauthorised uploading and downloading of material through their systems) are known as the '**safe harbours**'.

  - To **qualify** for the safe harbours, the ISP must—
    - **not initiate** the **transmission** of the material (categories A-D)
    - **not select** the **material** or its **recipients** (categories A-D)
    - have a policy on **terminating the accounts** of '**repeat infringers**' (categories A-D)
    - permit the use of standard industry technical measures for protecting and identifying copyright material (categories A-D)
    - in relation to **caching** (ie, category B),

      - limit access to subscribers,

      - comply with 'generally accepted' industry standards regarding refreshing, &c of cached material, as required by the uploader of the material,

- not interfere with industry-standard use-monitoring by cached sites
- not modify the material in transmission to accessors, and
- expeditiously remove (access to) **cached** material on receipt of **notice** of claimed infringement, being material **removed** from or **made inaccessible** at the **original site**

- expeditiously remove (access to) material **residing on** the ISP's system on becoming aware, including through a **notice** (discussed below), of infringement or likely infringement (categories C and D)
- not receive financial benefit directly attributable to infringing activity which occurs through **storage or linking** by the ISP and over which the ISP can exercise control (categories C and D)—

but to qualify, ISPs are **not** to required to search or monitor their sites for infringing activity.

- The '**notice and take-down**' process (remembering that acting on notices is a condition for categories C and D ISPs) is to include provision for—
  - Giving of the notices of claimed infringement
  - ISPs to notify promptly those affected by its removal or blocking of access to material ('take-down' action) in response to a notice
  - counter-notices by those affected persons claiming the notice was mistaken, and for the ISP to restore material taken down unless the copyright owner who gave the original notice brings infringement proceedings within a reasonable time
  - 'monetary remedies' against a person (eg, a copyright owner) for knowingly providing wrong information on the basis of which an ISP removed or blocked access to, or restored, material and caused injury to someone (but the ISP is not to be liable for a take-down if it has complied with all procedural requirements in good faith)—

  and ISPs providing **storage or linking** (ie, categories C and D) have to publicly indicate how **take-down notices** may be given to them.

- Contracting countries to the FTAs have to provide for an 'administrative or judicial procedure' to enable a copyright owner who has given a take-down notice to 'obtain expeditiously from a service provider **information** in its possession **identifying the alleged infringer**'.

- What Australian Copyright Act and Regulations provide regarding ISP liability:
  - Where the FTAs call for compliance with a 'generally accepted' standard or protocol, the Australian Act requires compliance with an 'industry code' as defined—if there is one.
  - The Regulations prescribe notices to take down (reference to):
    - Material that has been found by a court to be infringing (categories C and D)
    - Material that has been removed, or to which access has been blocked, at the original site (see category B)
    - Material that is claimed by the copyright owner to be infringing (see categories C and D)
  - The Regulations prescribe the procedure to be followed after taking down material on receipt of a notice of claimed infringement—
    - The ISP is to notify as soon as practicable the person whose material was taken down ('user of the material')
    - if the user believes the claim of infringement is mistaken, she can serve a counter-notice on the ISP
    - on receiving the counter-notice the ISP is to notify the copyright owner as soon as practicable—subject to observing the Privacy Act if the user of the material is an individual
    - The ISP is to restore the material taken down if the copyright owner does not, within 10 days of being notified by the ISP, institute infringement action regarding the material.
  - The Regulations also provide a procedure for take-down and notification where the ISP **itself** becomes aware that the material is or may be infringing and for counter-notice by the user of the material.
  - The Act provides guidance on what is a 'financial benefit directly attributable to infringing activity'.
  - No new procedure was enacted to enable a copyright owner who has given notice of a claimed infringement to obtain from the ISP information on the alleged infringer. It was thought that the existing power of courts, on application by the owner, to order the ISP to disclose the information was sufficient.

- There have been a number of US cases interpreting and applying the DMCA, on which the FTAs are based. A recent one which also reviews previous decisions, is *Corbis Corp.* v *Amazon.com* (2004) in which the District Court for the Western District of Washington—
    - interpreted the requirement to adopt and reasonably implement a policy on repeat infringers,
    - noted the line of cases that requires a copyright owner to have properly notified the ISP of claimed infringement, or that the site in question was self-evidently dealing in infringement, to support claim that this should have been apparent to the ISP,
    - gave a specific interpretation to the 'right and ability [of an ISP] to control' infringing activity as part of a condition of qualifying for the safe harbour under category C or D.

- Conclusion

    - Faced with the massive amount of unauthorised dealings with their materials on the Internet, copyright owners have singled out ISPs for special treatment because they are an easier target than individual Internet users. However, as ISPs have argued, if they are unduly burdened with responsibility for those dealings, the development of the Internet will be strangled.
    - ISPs can directly infringe copyright, but I have focused on their responsibility for infringing activity undertaken on their systems by their subscribers. This third-party activity can in certain circumstances render ISPs liable for infringement by 'authorisation' or 'contributory infringement'.
    - The FTAs provisions under the heading 'Limitations on the liability for service providers' do **not** call for changes to the law of authorisation or contributory infringement. What they do require is the offer of an **inducement** to ISPs and other service providers to help deter infringement on their systems—by limiting the remedies that can be ordered against them where they **are** held to have authorized or contributed to infringements on their systems.
    - The FTAs mandate that contracting countries must make provision for these 'safe harbours' for ISPs, but do not require that ISPs conform to the qualifications for benefiting from the safe harbours. The safe harbours prevent qualifying ISPs from being ordered to pay damages for infringement or being subjected to other orders beyond those specified.
    - The ISP **activities** and **conditions** for qualifying for the safe harbours are very detailed and complex, reflecting the hard-fought compromise negotiated between copyright owners and ISPs in the US DMCA on which the FTAs are closely modelled.
    - The qualifying activities of ISPs include those allowing their subscribers to deal with copyright material—connecting, caching, storing and linking.
    - The qualifying conditions seek to limit eligibility for the safe harbours to circumstances in which the ISP would not have a hand in or knowledge of the infringing activity, and to oblige the ISP to act against infringement coming to its attention, including by a 'take-down' notice.
    - As well as the safe harbour, immunity from liability has to be given to ISPs for taking down material in response to a notice. The ISP's subscriber whose material was taken down based on a mistake in a notice is to have recourse against the person who knowingly made the mistake.