COPYRIGHT: THE NEXT GENERATION

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TECHNOLOGY
COMMUNICATIONS
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TRADE PRACTICES

The Issue in Context

A brief overview of copyright law on authorization

The first copyright act, the Statute of Anne, was passed over three hundred years ago, in 1710.

Copyright law is regarded as an essential element in promoting investment of time, energy and capital in creative endeavours, in that it "creates incentives for people to invest their time, talent and other resources in creating new material – particularly cultural and educational material – which benefits society."[1]

Owners and licensees of copyright materials such as films, sound recordings, broadcasts and published editions have the exclusive right to reproduce such materials. In addition, there are rights relating to:

- showing films and playing recordings in public;
- transmitting films and sound recordings to the public using any form of technology (for example, via email, broadcasting, cable or the internet); and
- rebroadcasting television and sound broadcasts.

A person infringes copyright if he/she uses copyright works in one of the ways exclusively reserved for the copyright owner without permission.

The rise of the internet, and in particular peer-to-peer file sharing has had a significant impact on the incidence of copyright infringement, particularly in relation to works such as sound recordings and films.

[1] Australian Copyright Council, *An Introduction to Copyright in Australia* (March 2007) <http://designroyale.copyright.org.au/admin/cms-acc1/_images/1889836124c8dbfe7b2fba.pdf>.

The Recording Industry of America and the Phonographic Industry (UK) have bought infringement proceedings against individuals in the hope of deterring others. However, the judiciary has declared the process of suing individual users to be a "futile process".[2]

Importantly, in Australia, a person who authorizes the infringement of copyright is treated as if they themselves directly infringed copyright: *Roadshow v iiNet*.[3]

In Australia, apart from the recent *Roadshow* case, the music industry has on a number of occasions succeeded in establishing that an alleged infringer authorized the infringement in the relevant sense. So, for example:

- in *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd*,[4] the copyright owner succeeded against the persons and companies responsible for the peer-to-peer file sharing system known as Kazaa; and
- in *Universal Music Australia Pty Ltd v Cooper*,[5] again the copyright owner succeeded against the creator and host of a website containing links to infringing music files.

In summary, the cases to date have held that, in order to be held to have authorized copyright infringement, a person must:

(a) provide "the means of infringement"; or

(b) fail to take reasonable steps having regard to the factors set out in section 101(1A) of the *Copyright Act*; or

(c) "sanction, approve or countenance" the infringement.

The recent High Court decision in the *Roadshow* case affirms this approach and found that the current provisions on authorisation in the *Copyright Act* are not 'readily suited' to protecting copyright owners

[2] *Re: Aimster Copyright Litigation* (2003) 334 F 3d 643 (Posner J).
[3] *Roadshow Films Pty Ltd v iiNet Ltd (No 4)* (2010) 269 ALR 606
[4] *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd* (2005) 220 ALR 1.
[5] *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1.

from widespread infringement over the internet.[6] The majority (French CJ, Crennan and Kiefel JJ) and the separate opinion of Gummow and Hayne JJ ultimately found that iiNet had not authorised infringement of copyright by their customers over their network. The court also reaffirmed the decision of Justice Cowdrow at first instance that an ISP could not be liable for authorisation of copyright infringement by providing continued access to their customers, and in doing so overturned the Full Court of the Federal Courts finding that iiNet had provided the means of infringement, iiNet did possess relevant powers to prevent copyright infringement, and that there were reasonable steps available to them to prevent this infringement.[7]

The High Court was unanimous in their finding that the *Copyright Act's* provisions on authorisation could not be interpreted to cover iiNet's conduct in its 'indifference' to AFACT copyright infringement notices. In particular, both the majority and the separate judgment of Hayne and Gummow JJ found that iiNet (and by implication other ISPs) lacked the requisite power to prevent copyright infringements via BitTorrent services on their networks. iiNet had only a 'mere' contractual power to terminate customers internet connections, and had no technical ability to detect and prevent infringements occurring. Further, as there is no established industry protocol amongst ISPs that could successfully prevent iiNet customers whose services are cancelled from simply contracting with a new ISP and continuing their infringement over those services. The Court also found that it would be unreasonable for iiNet to act on the basis only on the evidence of AFACT infringement notices, as this could potentially expose them to action by customers for violation or improper termination of contract.[8]

The High Court's decision confirms the position that authorisation does not occur simply if a customer uses a ISPs network to infringe copyright. In light of this decision ISP's can feel significantly more certain that infringement by customers on their networks will not expose them to claims for authorisation under the *Copyright Act*, as the court has recognised that they lack the requisite power to prevent copyright infringement.[9] As a matter of public policy, Gummow and Hayne JJ were careful to note that that it should be up to the Parliament to react to changes in technology that present new

[6] *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16, [79].
[7] See *Roadshow Films Pty Ltd V iiNet Ltd* (2011) 275 ALR 1.
[8] *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 [75].
[9] See ibid [79].

threats to copyright and that the courts should avoid radical interpretations of existing legislation to keep up with technological change.[10]

Notably, the music industry (in Australia and abroad) has not enjoyed very much success in recent times in this area; the safe harbour provisions in the *Copyright Act* are broad and the creators of peer-to-peer file sharing services have proved difficult to locate – as the search for the "Pirate Bay" demonstrates.[11]

In the United States, Viacom[12] sought $US1billion from YouTube for breaching safe harbour provisions by failing to remove infringing material. The case was dismissed at summary judgment: the District Court held that YouTube removed infringing material if it was informed of it and cancelled accounts of repeat offenders. This was enough to qualify for safe harbour protection under the US provisions. Further, the Court held that YouTube was under no obligation to search for infringing material.

Also, the Spanish Court has recently held that YouTube enjoys the protection of the safe harbour provisions in the European Union.

The problem

The Australian Government's National Broadband Network (the "**NBN**")[13] and Australia's growing digital economy pose significant challenges to our system of copyright law.

The NBN will create unimagined opportunities for the infringement of copyright. Emerging digital technology and increased broadband capacity mean that the marginal cost of reproducing and disseminating exact copies of protected digital works is rapidly moving towards zero. In the words of Andrew L Shapiro, "the Net…seems to be a gigantic copying machine".[14]

[10] Ibid [120].
[11] See for example 'European police in pirate raids,' *BBC News* (online), 9 September 2010 <http://www.bbc.co.uk/news/technology-11227813>.
[12] *Viacom International and Others Inc. v YouTube Inc and Others (*2010) WL 2532404 (S.D.N.Y.).
[13] It is assumed for the purposes of this paper that the NBN (or something much like it) will in fact proceed, although at the time of writing this is by no means certain.
[14] Andrew L Shapiro *The Control Revolution* (Public Affairs, New York, 1999), 79.

As the cost of reproduction moves towards zero, the cost of enforcement of copyright escalates. With sites such as YouTube boasting 24 hours of new video footage being uploaded every minute,[15] the problems with identifying and pursuing individual copyright infringements make the value of copyright seem hollow.

In its explanatory note to the *Copyright (Infringement File Sharing) Amendment Bill 2010*, the New Zealand Government states:

> "The cost of seeking an order and the cost of taking infringement proceedings in court is generally much higher than a possible award of damages for that particular infringement, acting as a barrier to the effective enforcement of copyright."[16]

Further:

> "While the damage sustained by a copyright owner from a single file sharing infringement is generally small, the prevalence of infringing file sharing in the current digital economy is having a negative cumulative effect".[17]

The Australian Federation Against Copyright Theft ("**AFACT**") estimates that internet piracy costs the local (Australian) economy approximately $92 million annually.

It now appears clear that our current system of copyright protection may well be inadequately equipped to tackle the issues arising in a digital environment. What is needed is a system of copyright protection which is flexible, dynamic and able to deal with the challenges wrought by changing technology.

Unique policy challenges

The internet is "arguably the greatest communication mechanism ever devised. But like all great innovations it threatens established business models, social practices, and, here the ability to control the flow and use of information. So it presents unique policy challenges to governments around the world".[18]

[15] See *Viacom International and Others Inc. v YouTube Inc and Others* (2010) WL 2532404 (S.D.N.Y.); more recently, YouTube has claimed that the figure is closer to 35 hours of new video footage being uploaded every minute.
[16] Explanatory Note, Copyright (Infringement File Sharing) Amendment Bill 2010 (NZ), 1.
[17] Explanatory Note, Copyright (Infringement File Sharing) Amendment Bill 2010 (NZ), 2.
[18] Internet Industry Association, 'Principles for a Digital Economy' (Manifesto, Industry Internet Association, 27 July 2010), 7.

The Internet Industry Association's ("**IIA**") "manifesto" states that the "processes for development of good policy for the digital economy and the internet should be similar to processes for development of good policy throughout the economy, namely they should engender:

- transparency and openness;
- proportionality and efficiency;
- recognition of global best practice;
- regulation only when necessary;
- empowerment of individual choice through education and tools;
- clarity and predictability, but with adaptability; and
- a reliance on valid and reliable evidence.

However, policies regulating the broadband internet must also: factor in the pace of change, seek conformity with international standards, manage change appropriately, aim to build trust and confidence – and above all recognise the unique attributes of the internet that may frustrate traditional regulatory responses".[19]

The Australian Commonwealth Government has announced its intention to ask the Australian Law Reform Commission ("**ALRC**") to examine whether copyright law should be amended to adapt to technological developments. The Commonwealth Attorney-General, Robert McClelland, stated in this regard, "it is my view that the area would benefit from the expertise of the ALRC. It is very complex; there are obviously competing interests between consumers and service providers and networks; and it is an area where there are legitimate views each way in respect of a whole range of issues. I think the best way to approach it is with genuine expert advice".[20]

<u>Orphan works (works where the copyright owner cannot be identified)</u>

[19] Internet Industry Association, 'Principles for a Digital Economy' (Manifesto, Industry Internet Association, 27 July 2010), 7.
[20] James Eyers, 'Copyright law to be reviewed', *Australian Financial Review* (Melbourne), 24 September 2010, 18.

The issue of orphan works appears to be looming as a significant by-product of the digital world.

The lack of an author is problematic, as only the copyright owner can authorize activities such as reproduction. A major concern in the UK is that a lot of orphan works are "cultural products" (photographs, drawings, *etc*.) which exist in a "black hole" because they cannot be used.

The UK proposed a solution to this problem, but it was controversial and was deleted from the *Digital Economy Bill 2010* (because the bill was passed during "wash-up" and there was no time to debate it). Under the proposed UK scheme, persons who wished to use an orphaned work could obtain a licence to do so (after demonstrating that they had undertaken a "reasonable search" for the copyright owner). The licence fee would then held in escrow in case the copyright owner were later identified.

The concern here for authors is that digital distribution and copying on the internet often results in orphan works. There are concerns that the proposed scheme would allow works to be used at a lesser price (or that the author may never receive the fee at all) and would lessen control over copyright works.

International Response – "Three Strikes" System

In recognition of the inability of traditional mechanisms of copyright enforcement to address peer-to-peer copyright infringement, several countries, including France, the UK and New Zealand have implemented (or have attempted to implement) a "three strikes", or graduated response, system. Essentially, the three strikes system shifts some of the onus of the enforcement of copyright onto internet service providers ("**ISPs**").

How does a three strikes system work?

The New Zealand model as an example[21]

Under this system, at the instigation of copyright owners, ISPs must issue infringement notices to alleged copyright infringers.

ISPS must then keep a log of any further evidence of infringement. The New Zealand Government says that it hopes that the issue of this first "detection" notice will be enough to deter the majority of infringers.

Upon receiving notification from an ISP that an account holder has received three notices, copyright owners may apply to the Copyright Tribunal for compensation of up to $NZ15,000 and/or make an application to a District Court requiring the ISP to suspend the account holder's internet access for up to six months.

Under the newly-inserted proposed section 122MA of the New Zealand Act, the onus of proof is effectively reversed, such that a copyright owner can simply issue an infringement notice alleging that someone has infringed their copyright and the Copyright Tribunal may accept that as the truth. This is the same kind of provision which was struck down as unconstitutional in France and, understandably, it has already created a lot of controversy.

A New Zealand Select Committee has completed its review of the Bill and has advised that suspension of internet accounts should only be available as a last resort.

New Zealand Labour ICT spokesperson Clare Curran has said that it was extremely important to have disconnection removed as a copyright remedy, saying it was "disproportionate", especially as internet access is effectively essential for businesses and families.[22]

ISPs must also retain information on the use of the internet by each account holder for 40 days, and must retain information about infringements for 12 months.

[21] *Copyright (Infringing File Sharing) Amendment Act 2011* (NZ).
[22] http://blog.labour.org.nz/index.php/2010/11/03/no-nzers-will-have-internet-access-terminated-in-copyright-bill/.

Under such schemes, "safe harbour" provisions will only protect ISPs from liability for file sharing infringements occurring over their networks if they comply with their obligations.

Judicial recognition of a three strikes system in Australia?

Whilst the three strikes system is not specifically referenced in the Full Court of the Federal Court's decision in *Roadshow* the system proposed by Justice Emmett (see above) arguably draws heavily on similar principles, and indicates an increasing judicial sympathy for the principles on which the three strikes policy is based. In particular, the suggestion of a graduated response by ISPs towards repeat infringers bears the hallmarks of the three strike system.

Policy implications of a three strikes system

The three strikes system is highly controversial[23] and has consistently been opposed by interest groups such as the IIA and ISPs (such as TalkTalk, the second largest ISP in the UK).

Consider the experience of France in passing the HADOPI legislation. The bill was passed on 13 May 2009, contested on 17 May 2009 and struck down for being unconstitutional by the Constitutional Council of France on 10 June 2009.

The Council found that the HADOPI Act violated the 1789 *Declaration of the Rights of Man and of the Citizen*, as the presumption of innocence was violated (the Council held that judicial review would be required before internet access could be severed).

The Constitutional Council of France also raised human rights concerns which are yet to be fully explored. In this regard, a growing number of advocates and interested parties are querying whether the right to internet access is becoming a fundamental human right.

For instance, commentary surrounding the NBN has emphasized the fundamental importance of internet access. In light of this, the question arises as to whether severance of a person's internet

[23] See for example Charles Arthur, 'Digital economy bill rushed through wash-up in late night session', *The Guardian* (UK) 8 April 2010.

account is a proportionate response to copyright infringement. Note, for instance, the Australian Minister, Senator Conroy's frequent references to the internet as being as important as electricity.[24]

Certainly, it is strongly arguable that disabling internet access is not a *proportionate* response when one considers the impact that internet disconnection may have on:

- students (where many resources are online or where studying by correspondence);
- the elderly or disabled (who use the internet for services such as online grocery shopping and banking);
- medical assistance, which is touted as one of the key social benefits of the NBN;
- social services delivered over the internet; and
- basic communications services, including VoIP (where a household may no longer have a traditional fixed line service).

The issue is further complicated in cases of shared living or families where the entire household is disconnected, so it may not only be the person who commits the copyright infringement who is punished.

Tim Berners-Lee, professor at Massachusetts Institute of Technology, expresses the problem thus:

> "If a French family can be forcibly disconnected from the internet by law for a year because one of their children downloaded something that some company asserts that they should not have downloaded, without trial – I think that's a kind of inappropriate punishment."
>
> "I'd like to go on using the internet. If it gets cut off, or for some reason things go wrong, in some cases, for me, my social life would disintegrate, for other people it may be access to medical information."[25]

[24] Senator Stephen Conroy, 'Realising Our Broadband Future – Keynote', (Speech delivered at University of NSW, Sydney, 11 December 2009).
[25] 'Web founder warns of internet disconnect law "blight"', *The Age* (Melbourne), 29 September 2010.

Finally, the three strikes system does not sit comfortably with ISPs. The IIA (on behalf of its ISP constituents) opines:

> "As a matter of principle, an *intermediary* who is acting as a mere conduit (*i.e.* doing nothing more than providing the means of communication or a corporate network – or by extension a technology, search, publishing or sale platform such as an auction site, or educational institution), should not be liable for the acts of its users where those users abuse facilities to breach third party rights. This is particularly the case in a user generated content world."[26]

It should be noted that the IIA's adoption of this position is consistent with the approach taken by the High Court.

iiNet in its white paper 'Encouraging legitimate use of Online Content: An iiNet view' described the 'Hollywood solution' of content owners investigating and notifying ISPs of infringement and requiring action from those ISP's as 'unattractive and unsatisfactory' to ISPs, particularly as the approach does not allow for independent verification and assessment of claims of infringement.[27] iiNet further assert that the approach:

- generates cost but no benefit to ISPs
- doesn't match the real world
- pits ISPs against their customers
- potentially penalizes people who have done no wrong
- is easily bypassed
- provides no appeal process
- finds consumers guilty without cogent and unequivocal evidence;[28]

Fair use and fair dealing

Meanwhile, changing social norms, whilst perhaps resulting in a consumer expectation that material on the internet should in some sense be free, have also led to rise of user-generated content. This has led to pressure to change copyright laws to protect user-generated content. Here, the general idea is that

[26] Internet Industry Association, 'Principles for a Digital Economy' (Manifesto, Industry Internet Association, 27 July 2010), 36.
[27] 'Encouraging legitimate use of Online Content: An iiNet view', (15 March 2011) *iiNet,* <http://www.iinet.net.au/press/releases/201103-encouraging-legitimate.pdf>, 6
[28] Ibid

users should be allowed to use copyright works so long as this does not result in economic disadvantage for the copyright owner.

This matter was examined by the Commonwealth Government in the Attorney-General's Issue Paper (2005) *Fair use and other copyright exceptions: an examination of fair use, fair dealing and other exceptions in the Digital Age*.

Whilst this issue is beyond the scope of this paper (which is focussed on infringement of copyright materials which leads to direct economic disadvantage to the copyright owner), it is an important element in the overall debate about the boundaries of copyright protection in the digital age.

Recently, British Prime Minister David Cameron announced Britain's intellectual property laws are to be reviewed to "make them fit for the internet age".[29]

Mr Cameron said the law could be relaxed to allow greater use of copyright material without the owner's permission, a move which appears to be at odds with the UK's *Digital Economy Bill 2010* and is likely to pit internet freedom campaigners against the music and film industries.

This new direction by the British Government also appears to be motivated in part by a desire to recapture some of the enormous economic opportunities which come with attracting the business of digital giants such as Facebook and Google. In announcing this new direction, Mr Cameron said the founders of Google had told the government that they could not have started their company in Britain, saying:

> "The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States."
>
> Over there, they have what are called 'fair-use' provisions, which some people believe gives companies more breathing space to create new products and services.
>
> So I can announce today that we are reviewing our IP laws, to see if we can make them fit for the internet age. I want to encourage the sort of creative innovation that exists in America."

Anti-Counterfeiting Trade Agreement

[29] See http://www.bbc.co.uk/news/uk-politics-11695416?utm_source=twitterfeed&utm_medium=twitter, 4 November 2010.

Another element to the international debate is the multi-lateral Anti-Counterfeiting Trade Agreement ("*ACTA*"), signed (but not yet ratified) by Australia, United States, Australia, Canada, Japan, Morocco, New Zealand, Singapore, and South Korea and the European Union and 22 member states of the EU.

The early (leaked) *ACTA* draft(s) indicated that there was pressure to include provisions enabling copyright owner to apply for an injunction where "services are used by a third party to infringe an intellectual property right". This would have casts a broad net and would potentially have caught all kinds of intermediaries (including ISPs and universities).

The IIA chimed in, in opposition to such a move:

> "Most troubling of all, given the way trade agreements are struck, is the prospect of Australia singing on to a concluded ACTA text without the internet industry and the public having the benefit of scrutiny, discussion and debate of the agreement. Given the potentially far reaching ramifications for these stakeholders, a far more transparent and accountable process is both warranted and necessary."[30]

In the final text of *ACTA*, there is no mention of three strikes system (although, with the removal of the three strikes system, comes the removal of the safe harbour provisions for ISPs). However, the *ACTA* has attracted significant criticism for what some consider an 'overbroad' approach to preventing copyright infringement. In particular, art 27 of the agreement requires cooperation between ISPs and rights-holders in a way that may involve these actors exercising policing powers and imposing sanctions, without the involvement of public authorities.[31] Enforcement procedures are required to be extended to "means of widespread distribution for infringing purposes"[32] which has been stated to possibly justify "the implementation of provisions indirectly criminalizing blogging platforms, P2P networks, free software, and other technologies that contribute to dissemination of culture and knowledge on the Internet."[33] Provisions that may lead to restrictions imposed on internet

[30] Internet Industry Association, 'Principles for a Digital Economy' (Manifesto, Industry Internet Association, 27 July 2010), 38.
[31] *ACTA* Art 27(3).
[32] ACTA art 27.2.
[33] La Quadrature, 'ACTA: Updated Analysis of the Final Version' <http://www.laquadrature.net/en/acta-updated-analysis-of-the-final-version#footnote8_2yu96lg>

communications for the sake of preventing imminent copyright violations have also been singled out for criticism due to their potential to stifle freedom of communications.[34]

Is legal intervention the appropriate response? Changing business models

Commoditization

"Commoditization" of copyright works refers to a phenomenon whereby the industry's mode of competition moves away from innovation of the underlying product (the copyright work) and towards alternative methods of building value.

Under this analysis, as the market matures and barriers to entry erode, competition intensifies and prices for the underlying product are pushed down. As a result, rights holders look for new ways of leveraging the value work itself to create new revenue streams.

The IIA stresses the need to ensure that policy does not damage Australia's capacity to innovate and compete in the global digital economy. It says, "to the extent that internet users, mainly the young, engage in infringing activities, we suggest the causes may be rooted in market failure more than they are in any regulatory shortfall."[35]

A recent report by the UK Intellectual Property Office found that, "digital technologies have altered the value chain. Authors can publish directly in the online world: commercial rights holders can sell product in new ways, and consumers have an enormous quantity of legitimate content at their fingertips, both free and paid for. For many creative businesses, the changing value chain is making the situation more complex as it is more difficult to realise economic benefits with digital technology, but there may be new opportunities to do so."[36]

TalkTalk (a UK ISP advocating against the measures in the *Digital Economy Bill 2010* (UK)) highlights "the notion that stealing copyright is socially acceptable, akin to breaking the speed limit by

[34] *ACTA* art 12(4); see Electronic Frontiers Foundation, '2011 in Review: Developments in ACTA', <https://www.eff.org/deeplinks/2011/12/2011-review-developments-acta>
[35] Internet Industry Association, 'Principles for a Digital Economy' (Manifesto, Industry Internet Association, 27 July 2010), 34.
[36] UK Intellectual Property Office, '© the way ahead: A Strategy for Copyright in the Digital Age' (Report, Department for Business Innovation and Skills, 2009), 13.

one or two miles per hour".[37] TalkTalk argues that most infringements occur because of user frustration with digital rights management (the IIA manifesto adds to this – suggesting that many infringements in Australia occur because we do not have ready access to legal content and many Australian websites/credit cards do not support micropayments (payment for 1 song).

According to TalkTalk, "Record labels and film studios need to find new ways of persuading people to pay for their content. Those that can't find new ways of making money in the digital age won't survive. They will be replaced by new ventures which see the online environment as an opportunity rather than a problem."[38]

And even the Australian High Court recognized in 2002 (albeit in a different context) that, "where the new problem is as novel, complex and global as that presented by the Internet…a greater sense of legal imagination may be required than is ordinarily called for" (*per* Kirby J in *Dow Jones v Gutnick* (2002) 210 CLR 575).

The IIA states that it, "supports the development of new models to facilitate maximum access to content and innovative content based services. Possible examples include; revenue sharing arrangements with ISPs, 'hyperdistribution' where, for example, advertising is embedded in the content, and arrangements like those between YouTube and Warner Music which now permit users (who now number in the tens of millions) to upload self created video content with commercial soundtracks, owned in this case by Warner, in return for a revenue share arrangement on advertising."[39]

Examples of commoditization of digital content

Not surprisingly, then, business models have emerged which allow the user to use a copyright work for free and rely on advertising, or generating a massive, loyal following (rather than the worth of the product itself), to create revenue.

[37] TalkTalk 'Digital Economy Bill cannot protect copyright' http://www.dontdisconnect.us/digital-economy-bill-cannot-protect-copyright
[38] TalkTalk 'Digital Economy Bill cannot protect copyright' http://www.dontdisconnect.us/digital-economy-bill-cannot-protect-copyright
[39] Internet Industry Association, 'Principles for a Digital Economy' (Manifesto, Industry Internet Association, 27 July 2010), 35.

These models may be contrasted with traditional revenue-generation models, such as buying a CD, or downloading songs from iTunes.

Google (including Gmail, YouTube, *etc*.) and Android phone technology

In a somewhat insightful article entitled, 'Google's Business Model: YOU are the product', Mark Elgin asks: "Why do they do it? Why does Google invest so heavily in great products, then just give them away? There's only one way to understand Google's business model , which is to understand that Google's services are not products. In fact, Google only has one product. And that product is you. Or, rather, us – all of us."[40]

According to Elgin, "Advertisers are Google's customer. What do they [Google] sell to advertisers? They sell you. Or, at least, they rent you out or provide access to you."

Essentially, under the Google model, advertisers pay to be the top hits ("sponsored links") in any combination of search words (this is done through auction every time a search is conducted) as well as paying for ads in side bars.

This has proved to be a highly effective model, to the point where an estimated 60% of internet users use Google. This has earned Google billions of dollars in annual revenue and being declared "an economy unto itself".

And Google has taken the concept further with its Android technology, which is offered as "less than free" to phone companies. That is, Google actually pays phone manufacturers to use the Android operating system, because Google potentially makes money from every click on Google (as advertising is sold on every click).

Guvera – "paid for" (by advertisers) music downloads

Guvera is an Australian initiative (it is an unlisted Queensland-based public company).

Under the Guvera model, advertisers create channels for specified groups of consumers, and then pay for music on behalf of targeted consumers. The initiative is still in its infancy, but Guvera hopes that

[40] Elgin, M, 'Google's Business Model: YOU are the product', *Earthweb* 5 February 2009.

its website will be "a piracy killer", emphasizing that its Website was designed in recognition that a whole generation of internet users believes that downloaded music should be free.[41]

Radiohead – free music downloads

In 2007, British alternative rock band Radiohead offered the entire album *In Rainbows* through their website: fans were asked to **pay whatever amount they wanted** to digitally download it.

According to internet marketing blog DoshDosh, this "donation-style" system is significant because of Radiohead's reputation and the size of their fan base, which easily reaches into the millions globally.[42]

The band is able to offer their songs in a digital rights management-free mp3 format because they do not have a record label; hence they own complete distribution rights over their music. This essentially bucks the industry trend of reliance on record companies and marketing teams to produce, commercialize and promote music records.

Alongside the digital download of their album, Radiohead is also selling a £40 box-set which consists of the CD album, vinyl records, additional songs as well as artwork and lyrics. Whilst this "viral" marketing assault by Radiohead clearly resulted in massive foregone album sales revenue, it also reportedly resulted in enormous revenue in other areas, including a sell-out concert tour, as well as unquantifiable augmentation to their fan loyalty, reputation and brand awareness/strength.

Similarly, rock band The Smashing Pumpkins released their *Machina II* album for free on the internet by sending 25 physical copies of it to fans active in the online music community, with explicit instructions for re-distribution.

This approach has been successful for a number of (already highly popular) bands and contrasts with the approach taken by rock band Metallica, who sued Napster in 2000, thereby distancing them from fans and leading to a major public relations disaster for the band.

[41] Claes Loberg in Emma Connors, 'D-Day for music revolutionaries', *Australian Financial Review* (Melbourne), 5 October 2010, 34.
[42] See http://www.doshdosh.com/radiohead-anti-marketing-in-the-music-industry/.

The following table summarizes some of the models for commercialization of copyright material (music), both traditional and new. Of particular interest is the fact that not all successful (or potentially successful), non-traditional sales models involve copyright infringement:

Model / **Issue**	**Copyright held by…**	**Licence to use paid for by…**	**Copyright infringement?**	**Encourages artistic innovation?**	**Value lies in…**	**Issues?**
Traditional online sales model (*e.g.* Sony, iTunes)	Musician/ record label, *etc*.	Consumer	No	Yes	The song itself	Goes against developing social expectation that internet materials should (and can) be free
P2P file sharing	Musician/ record label, *etc*.	No-one (no licence to use)	Yes – by the person making the song available via P2P and by each person who downloads it	No	No value	Illegal; no reward for those who are creative
New Model (Radiohead)	Musician/ record label, *etc*.	Musician chooses to make music available for free but (in some cases) charges advertisers to place advertisements on the page where the song is available	No	Yes – if the song is a success then people will pay more to advertise (analogous to ad breaks in a successful TV show)	The sheer number of people downloading (advertising potential)	Arguably will only work for bands that are already successful
New Model (Guvera)	Musician/ record label, *etc*.	Advertisers on behalf of consumer	No	Yes – copyright owner still receives $$$	The sheer numbers of people downloading (advertising potential)	Untested as yet; needs industry support to succeed

Conclusion on protection of online copyright works

Policy in relation to the protection of online copyright works is currently in a state of flux. This is largely because the advent of broadband (and projects such as the NBN) is a game changing development and policy-makers are still in "catch-up" mode.

Legislatures and courts in Australia and abroad have so far taken a fairly traditional approach to dealing with the protection of online copyright works. Some novel measures (such as the "three strikes" approach) have been touted, although it is yet to be seen what impact such measures will have, and indeed what counter-measures might be adopted by ever-exuberant copyright users.

Ultimately, however, it is expected that creative creators will continue to think outside the square to develop new business models – and that this group will manage to stay "ahead of the curve" when it comes to generating value (and new revenue streams) from their creative efforts.

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