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Napster and Gnutella: Is distributed file-swapping software legal in Australia?

by William van Caenegem Associate Professor, Bond University

You may think that the Internet makes obtaining your favorite music cheap and easy, but have you ever considered whether downloading music files off the Web is legal. It may be that you are infringing the copyright of musicians and record labels. The Commonwealth Copyright Act 1968 grants musicians and producers exclusive legal right in musical works (scores), literary works (in this case, lyrics) and sound recordings (CD's, tapes etc.). They enjoy those rights whether the material is recorded in digital (eg as sound files) or traditional format. Recently the Commonwealth Parliament amended the Copyright Act to bring it up to speed with the digital age and exploitation of copyright works on the Internet: see the Copyright Amendment (Digital Agenda) Act 2000 (Cth). This amending Act will shortly come into force.

In the United States the big music labels have been trying to stop music lovers from downloading music files off the Internet without payment. They have brought legal action against a Web-based music file swapping service known as Napster. The first round in the court battle between Napster and the RIAA (Recording Industry Association of America, ie the industry association representing music companies

that own copyright) ended in a victory of sorts for the RIAA. RIAA won a court order temporarily shutting down the Napster.com music file-swapping servers, pending a trial of the issues. However, the 9th Circuit Court of Appeals granted Napster a stay on the injunction, and the Napster.com site is still in operation. Nonetheless, the decision of US District Court Judge Marilyn Hall Platel that the plaintiff, RIAA, established a strong likelihood of success at trial raises the question: what is the legal position in Australia?

Distributed file-swapping software.

Napster allows music lovers to access and retrieve music files from each other's computers by way of connecting central servers ('file sharing' or 'file swapping'). The existence of central servers and services, integral to Napster's operations, made it a sitting duck for RIAA legal action. But the newer generation of file swapping software, such as Gnutella, will deprive musical copyright owners of such easy targets. Gnutella does not rely on central servers and is not limited to *music* file-swapping. The software generates a list of web-addresses of individuals who make music files

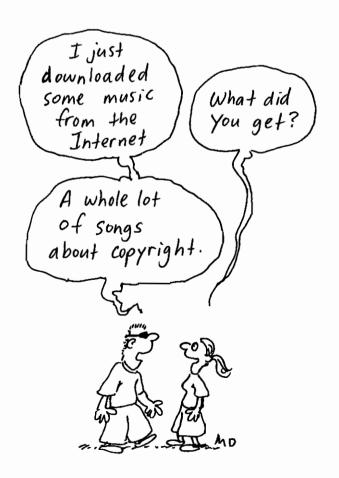
¹ Pyramid selling is a scheme where the promoter, at the top, sells the right to sell certain goods to a "participant", who in turn on-sells the right to sell the goods to another "participants", and so on, in a "pyramid" fashion. It is a gambling racket – you gamble that you will be able to on-sell the rights before the whole pyramid comes tumbling down. Those at the top of the pyramid and those "participants" who draw others into the scheme get their money, but only by selling positions in the pyramid to others. Eventually, the structure falls over, burning sometimes thousands of gullible participants at the bottom of the pyramid. Pyramid selling is prohibited by s 61 of the *Trade Practices Act 1974*.

available for swapping. Accessing another Gnutella user's hard drive via the internet then gives access to the addresses of other Gnutella users stored there and so on. There is no central server, only distributed software, bence the designation 'distributed file-swapping software'. Copyright owners have at least two possible targets in the absence of central services or servers:

a. individual 'home' users of the file-swapping software; and b. the makers and distributors of the software that enable the file-swapping to take place.

Downloading a music file

There is no 'home' or 'private use' exception for copying of 'sound recordings' in Australia. Taping music broadcast over the radio would amount to a breach of copyright. In the same way, unauthorised downloading of a music file amounts to an infringing reproduction of a sound recording (and possibly the incorporated musical and literary works), whether or not it is for purely private or domestic purposes. This is all the more so if the copyist in turn makes that file available for others to download from her computer. Furthermore, by virtue of the Copyright Amendment (Digital Agenda) Act 2000 (Cth), the copyright owner has the exclusive right to communicate a work or subject matter to the public. By virtue of s 10(1) of the Copyright Act, as amended, communicate means 'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter'. Thus a person who finds a music file on a remote computer and then downloads it to ber own, may be said to 'electronically transmit' the file. Using distributed software to find and download a copyrighted music file thus arguably infringes the 'reproduction' and the 'communication' rights of the copyright owner.



Uploading a music file

But would the making available of a music file for down-loading by use of swapping software by other web surfers also constitute an infringement of copyright? It may constitute infringement in two ways. First, it could amount to a breach of the 'communication to the public' right referred to in the previous paragraph. Secondly, it could amount to an authorisation of copyright infringement (see s 36 (1)). One aspect of the new communication right is the 'making available online' of a work or subject matter. Once the file-swapping software is installed, uploading music files so that they can readily be downloaded by other remote users must indeed constitute 'making available online'. If the files are subject to copyright and this is done without authority, it must amount to an infringement.

Liability of software developers and distributors?

So if both uploading music files for downloading by others by means of distributed file-swapping software, and using such software to download files amount to infringement of copyright, the copyright owner could take legal action against (potentially millions of) individual users. But that is not a practically feasible course of action. Could file-swapping software developers and distributors provide a better target?

But in any event, a Napster-type scenario doesn't provide the strongest arguments: Napster is more than a mere supplier of a tool, because regular contact with consumers persists after the software has been distributed. Napster provides an ongoing service, and thus the ratio of CBS Songs Ltd v Amstrad Consumer Electronics Plc (1988) 11 IPR 1 (the dual-tape recorder case) does not readily apply. In that case, the manufacturer of a dual tape deck was found not to authorise copyright infringement just because such a tape recorder could (and probably would) be used to make infringing copies of works or sound recording. The question is rather whether, in a distributed environment, the mere provision of file-swapping software (such as Gnutella), without any ongoing service component, could amount to authorisation of copyright infringement? This seems unlikely. In CBS (above) and in similar cases in Australia, ongoing control was the decisive factor. Once the distributed file-swapping software has been supplied, the supplier or developer has no further involvement with its use: where is the requisite level of control or 'power to prevent' the making of an infringing download?

Conclusion

Given that the copyright owners will be hard pressed to enforce their rights against large numbers of home infringers, two obvious options seem to arise to compensate them for loss of legitimate revenue. First, to resurrect the Blank Tape Royalty Scheme, which was a copyright levy on blank tapes in return for a home-copying exemption. This scheme was struck down by the High Court as being unconstitutional, and never reintroduced (see Australian Tape Manufacturers Association Ltd v The Commonwealth (1993) 176 CLR 480). In the current environment the levy should apply to all forms of digital storage space. The second option is to impose a form of royalty on the sale of file swapping software. Neither of these options is attractive, even apart from any constitutional difficulties that may arise.

In effect, they would amount to an unwarranted tax on cyberspace in favor of an established model of doing business and established market positions. Thus the only real solution for music companies is to embrace the potential of the Internet to the full, and to their ultimate advantage. This has been said many times before, but the key to generating revenue from copyright materials on the Internet is finding the technologies and ways of doing business that consumers will pay for.

Questions for Discussion

Lending a book to a friend to read, or swapping books amongst friends, does not amount to an infringement of copyright. Why should swapping music files on the Internet not be allowed?

If people are simply allowed to copy music files and swap and exchange the copies on the Internet without paying copyright owners anything. Who does this harm?