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Anti-piracy – Can we stop the ‘Napsterisation’ of the film industry?

Music and film are inextricably linked: piracy in one has an adverse effect on the other. Both sectors are grappling with significant piracy issues. Everyone is downloading ‘Cinderella Man’ and the film has not even landed here yet. Technology is a double edged sword. While advances in technology have helped dissemination of works, it has also increased the possibilities of piracy and replication in the film and music industries.

Key message

The music industry has for years been routed by piracy, now with the expansion of broadband internet access around the world piracy is rising in the film industry.

What can be done to stop the ‘Napsterisation’ of the film industry?

Types of Piracy

In Australia the most common types of piracy include the following:

- » counterfeiting – this is unauthorised copying of the original recording. The buyers of unauthorised recordings are led to believe that they are purchasing a genuine product;
- » bootlegging – this affects the recording rights of performances by various artists. Very often the performance of the artists are recorded without the permission of the copyright holders and sold in the market; and
- » pirate recordings – often duplications are made from legitimate recordings and compiled together and distributed in the market for commercial gain, these are referred to as pirate recordings.

Anti-Piracy Measures – Copyright Act

The Copyright Act prescribes various remedies and penalties for infringing various forms of protection. These include:

- » civil remedies – that is the copyright owner is able to recover damages offered on account

of piracy. The copyright owner may also seek an injunction against the infringers, to prevent them from carrying on with piracy; and

- » penalties and punishments – the Copyright Act prescribes penalties and punishments not only for those who directly engage in piracy but those who aid and abet such activities. It also provides for imprisonment in certain circumstances.

Anti-piracy measures in relation to the music industry apply equally to the film industry.

How can piracy be combated?

Currently it seems that copyright enforcement at the Australian Federal Police level is inadequate. One measure Middletons recommends could be to implement special cells within the AFP to deal with serious copyright enforcement. The Australian Government could also provide direction on the issue by creating a form of Copyright Enforcement Agency.

In addition, television stations could promote fairness schemes where reward systems are provided for anonymous complaints reporting instances of piracy.

Further, an increase in 'self destruct' formats would enhance the fight against piracy. This would be similar to internet loaded software with limited shelf life.

We also suggest that better enforcement of intellectual property rights in the entertainment sector include the setting up of specialised courts manned by experts in the area, to deal with cases in relation to piracy. As it currently stands, litigation in the area is prohibitively expensive and delays are unwelcome.

Conclusion

Among the problems that rank in the music and film industries, piracy sits at the top. The sale of pirate products eats into the revenue of the industries thereby decreasing the quantum of taxes that is to be paid to the Government.

The misnomer is that piracy only affects the revenue of the producers and the large companies in the music and film industries. However since pirates escape the payment of taxes while enjoying high rates of return, the general public also stands to lose.

Stuart Gibson | Partner

Copyright in Films – The Directors' Cut

In recognition of the significant creative input directors have in the film making process, the Federal Government has moved to grant directors a share in the copyright of new films. The Copyright Amendment (Film Directors' Rights) Bill 2005 (the Bill) provides directors with a right to a share of royalties to be paid by subscription television broadcasters for retransmitting free-to-air broadcasts. This is a limited right to be recognised as a joint copyright owner only for the purposes of the retransmission statutory licence in Part VC of the Copyright Act 1968 (the Act) which was introduced in 2001.

Key message

The Australian Federal Government is making moves to grant copyright to movie directors as a reflection of their part in the creative process. What are the possible implications and how will directors be able to look after their rights?

According to the Act in its present form, all copyright in cinematograph films is held by the maker of the film (section 98(2)). The maker is defined in section 22(4)(b) of the Act as the 'person by whom the arrangements necessary for the making of the film were undertaken'. The Act adopts a 'capitalistic' approach and therefore ordinarily the 'maker' is the producer. As the copyright owner, the maker has all the key copyrights including the exclusive right to make a copy of the film, cause the film to be shown or heard in public and communicate the film to the public.

Internationally, there has been a division between the civil law and common law countries. Civil law countries (ie many European countries) have traditionally granted directors economic rights over films in recognition of their creative contributions. In contrast, common law countries (such as Australia) have traditionally emphasised the right of the

principal investor in a creative project to its commercial exploitation.

As part of a consultation process, directors have argued that as the key creative force in the film making process, they should be recognised as makers of, and owners in, films. This would place them in a similar position to other creative contributors such as composers and scriptwriters. Without such recognition, Australia risks losing its creative talent overseas.

In formulating a legislative response, the government aimed to address concerns of recognition as well as enabling directors to share in the new income stream while maintaining the current financial arrangements of the Australian film industry and avoiding any negative impact on consumers. Five options were considered with the preferred model being the remuneration of directors under the retransmission scheme only. This would require

only minimal amendments to the established copyright system.

Under this model, the director would be deemed to be a maker of a film along with the 'maker'. The rights given to the director are however limited. A director is a joint owner of copyright in a film only for the purposes of retransmission under Part VC. This is the statutory licence payable by subscription television broadcasters for re-transmitting free-to-air broadcasts of their films. Provisions would also be included assigning the directors' rights to an employer where the director is working as an employee and no agreement to the contrary has been struck.

Currently, the Bill sits with the Senate which

has referred it to the Senate Legal and Constitutional Legislation Committee for inquiry. Submissions were called for by 3 June 2005. The Committee is due to report by 9 August 2005.

Even if passed in its present form, the Bill may not greatly impact the present copyright arrangements. If the arrangements for new films mirror past practices, the director will be an employee of the producer and therefore the new rights will rest with the employer. The Bill does however for the first time, reward the significant input that directors have in creating films with a piece of the copyright.

Stuart Gibson | Partner
Leigh Mollison | Articled Clerk

Radio Broadcasting Royalties – Are the Artists/Labels getting a fair deal?

There is a feud brewing between the copyright owners of sound recordings and commercial radio broadcasters over the amount of royalties that should be paid to them. The copyright owners think they deserve a bit more 'fat off the bone' than the commercial broadcasters are willing to cut them!

Key message

There is a feud brewing between the copyright owners of sound recordings and commercial radio broadcasters over royalties. The copyright owners think they deserve a bit more 'fat off the bone' than the commercial broadcasters are willing to cut them! What does the future hold?

Who Listens to the Radio?

Whenever music is played on the radio, broadcasters are required to pay royalties for exploiting the exclusive rights of copyright owners, being the communication right. This requires the payment of separate royalties for use of the sound recording and the underlying work, being the musical composition/lyric.

Unlike other royalties however, the royalty paid for broadcasting a sound recording is capped.

For the broadcast of a sound recording, broadcasters have the choice of either entering into voluntary licensing arrangements with copyright owners or simply complying with the statutory licence conditions. The statutory licence is established through sections 109 and

152 of the Copyright Act 1968 (Cth) (the Act). This allows a broadcaster to broadcast music without the copyright owners permission so long as they pay the amount determined by the Copyright Tribunal. Significantly, section 152(8) of the Act restricts the Tribunal from ordering a broadcaster to pay more than one percent of the broadcaster's gross annual income.

It is important to understand that this licence requirement only exists for sound recordings in which a broadcast right exists. However, such a right does not exist for sound recordings originating in countries where the local law does not recognise a broadcast right. Most notably, United States law does not protect a broadcasting right for sound recordings and therefore music originating from there can be broadcast without infringing copyright.

As would be expected, broadcasters want the cap retained whereas copyright owners want it removed. Copyright owners argue that the statutory cap on licence fees is anti-competitive and is causing significant economic loss and that they have indirectly and unfairly subsidised the FM radio industry. In contrast the broadcasters argue that the statutory cap balances the monopoly position of the collecting agency, that it creates a fall back position and is a trade-off for mandatory minimum Australian music content.

Somewhere, someone is raking in the dough. The entire radio industry generates in excess of \$800 million each year, yet reports indicate that the use of music costs them under \$3 million per year.

International Comparisons

Copyright owners say that other countries with licence requirements for broadcasting sound recordings have fees that range from 1.5 to 4 per cent of the broadcaster's gross annual income. Removing the cap, it is argued, would bring Australia in line with international practice.

The broadcasters, however, suggest that such comparisons are difficult because of the unique rules in the different countries. They also point to the United States as the biggest market, which has no licence requirement at all.

Economics

Through statutory protection, the copyright owners argue that the broadcasters are getting unwarranted and anti-competitive special protection.

No broadcaster would advocate that they do not benefit from broadcasting the sound recordings belonging to others. However they do argue that there is mutual benefit. It is claimed that record companies compete vigorously to get their songs played on air as it is the best way to promote the product. Airplay is seen as a form of free advertising.

Regulatory Role

The broadcasters see the statutory cap as a balance to the monopoly position held by the collecting agency. It performs a regulatory role similar to the price caps in other industries.

In contrast, the copyright owners point out that in theory, broadcasters can negotiate with individual owners however choose to negotiate with the industry collecting agency as a matter of convenience. They also point out that without the cap, the collecting agency does not possess an unfettered power. If negotiation does not lead to a mutually satisfactory fee, then it is for the Copyright Tribunal, as the independent arbitrator, to determine the rate.

Trade-Off

Pursued by the broadcasters is the argument that the one per cent cap is a trade-off for the mandatory minimum Australian program content. Such a quota limits the amount of free content that could be broadcast, providing guaranteed revenue for local artists. It is pointed out by the copyright owners that there is no evidence for such reasoning in the enacting legislation.

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