

## **COPYRIGHT, CRIME AND COMPUTERS: NEW LEGISLATIVE FRAMEWORKS FOR INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT**

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**Abstract:** *This paper considers intellectual property rights (IPR) enforcement from the perspective of criminal law, and in particular, drawing on recent Australian legislative reforms concerning copyright, cybercrime, covert investigations, mutual assistance and extradition, prosecution and sentencing options, as well as proceeds of crime recovery. The complex interaction of these laws suggests that the field of IPR enforcement offers numerous investigative, prosecutorial and judicial options beyond those traditionally associated with copyright infringement. Cases discussed include several prosecutions of file-sharing website operators, and the extradition from Australia of a suspect in an international online piracy group prosecution led by the United States Department of Justice.*

### **1. Introduction**

Intellectual property (IPR) enforcement has been transformed in the past ten to fifteen years by a combination of technological, societal and legal developments. Most significantly, the introduction and widespread adoption of the Internet as a basis for communication and dissemination of information, entertainment and products has resulted in a global community of file-sharers, including those who deliberately or recklessly trade in material that infringes copyright or other forms of IPR. This activity has been facilitated by a number of online file-sharing services and websites, some of which have featured prominently in civil and criminal litigation in a range of countries, for example, in litigation involving Napster, Grokster, Kazaa, Bit-torrent and The Pirate Bay. While most individual file-sharers do not consciously engage in acts of piracy or counterfeiting, their aggregate activity and effect on music, film and games software markets across the world can represent significant losses, which can result in civil and criminal liability with significant damages being awarded or penalties imposed (AIC 2008; Andrés 2006; Dejean 2009; Siwek 2007; Zentner 2006).

Over time, legal liability has been extended through a combination of legislative reforms and judicial interpretation, beyond the pool of direct sharers of infringing content to those groups and businesses that provide Internet-related services. In some cases, such as where clearly illegal conspiracies to make illicit gains from piracy or counterfeiting are involved, the imposition of criminal or civil liability is doubtless warranted. However, some enforcement actions leading to massive monetary penalties being awarded against individual file-sharers, or the deployment of criminal justice mechanisms such as search and seizure, arrest and prosecution and even extradition have attracted widespread concern and criticism (Barker 2004; Manjoo 2001; Richardson 2002; Weinstein and Wild 2008). Intermediaries such as Internet Content Host (ICHs) and Internet Service Providers (ISPs) have also found themselves potentially liable for failure to police and prevent online infringements by their customers, with some countries legislatively imposing restrictive 'take-down notice' and 'three strikes' regimes aimed at curbing online IPR violations (Lambrick 2009; Wan 2010; Urbas and Fouracre 2010).

The recent history of IPR enforcement has thus been marked by an increasingly complex array of technical and legal interactions, with resulting uncertainty about the ways in which copyright and trade mark law can and should interact with telecommunications law and regulation, criminal law and procedure, including recently enacted computer offences. The following analysis explores this evolving landscape by working through legislation and case examples in Australia, though it should be observed that the copyright, computer crime and criminal procedural laws under consideration are framed by international agreements and harmonisation processes, and therefore the analysis should be of relevance to those working in other jurisdictions. Indeed, as will emerge, much recent IPR enforcement activity has necessarily taken on a multinational aspect in response to the global trend in online piracy and counterfeiting activity. This is particularly evident in the emergence of a landmark extradition case involving an Australian member of an international online piracy group, who ultimately was required to face justice in the United States legal system.

## **2. Terminological Background**

International agreements, and to a varying extent domestic legislation, provide the technical vocabulary for any discussion of IPR enforcement. Footnote 14 to Article 51 of the World Trade Organisation's *Trade-Related Aspects of Intellectual Property Rights (TRIPs)* agreement provides (WTO 2010):

- (a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- (b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

By extension, the production, distribution, sale and other dealings in pirated or counterfeit goods are widely referred to, respectively, as 'piracy' and 'counterfeiting' (see also the European Directive on Enforcement of Intellectual Property Rights 2004). The TRIPs provisions detail enforcement measures that member states must adopt by way of civil and administrative procedures and remedies, border controls, and criminal procedures and penalties applied to counterfeiting and piracy. Note that the categories are not mutually exclusive, as a pirated article may also be counterfeit in the sense of being deceptively labelled and packaged. Accordingly, the production, importation, distribution and sale of pirated copies of copyright material may also involve breaches of trademark or other intellectual property rights, commercial dealing and import-export laws, and consumer protection regulations (Urbas 2000a).

Domestic intellectual property legislation does not necessarily use the TRIPs terminology. In Australia, for example, although the terms 'piracy' and 'pirated' appeared in an early versions of the Copyright Act, more recent formulations refer to 'infringement' and 'infringing works' (Kelcey 1995: 232; Smith 1997; Urbas 2000a and 2000b). Nonetheless, the 'piracy' terminology is well-established in the copyright world, particularly in academic discussions (Hughes 2005; Hinduja 2006; Kreie and Cronan 2002), among industry groups representing copyright owners such as the Business Software Alliance (BSA 2009), Recording Industry Association of America (RIIA 2010) and Music Industry Piracy Investigations (MIPI 2010), and also some file-sharing sites such as 'Pirates With Attitude' based in the United States or 'The Pirate Bay' operating in Sweden (Andersson 2009; Goldman 2004; Lewen 2008; Urbas and Fouracre 2010).

With the advent of personal computers and online file-sharing, other relevant terms enter the scene. The most important international agreement relating to computer misuse is the Council of Europe's Convention on Cybercrime, which was finalised in 2001 (COE 2010a; Smith, Grabosky and Urbas 2004) and came into force in 2004 with signatories including 42 European countries as well as Japan, Canada and South Africa, with the United States ratifying in 2006 (COE 2010b; Urbas 2005b). Australia has not signed the COE Convention but may do so in future – nonetheless its Cybercrime Act 2001 (Cth) is closely based on an early draft. Alongside provisions dealing with illegal access and interception, data and systems interference, misuse of devices, computer-related forgery and fraud, child pornography offences and associated procedural mechanisms and an optional protocol related to racist and xenophobic acts (COE 2010c; COE 2010d), the Convention on Cybercrime also deals with copyright and related rights. In particular, Article 4 obliges member States to 'adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright ... where such acts are committed wilfully, on a commercial scale and by means of a computer system' (COE 2010a).

Domestic computer crime legislation in most countries does not explicitly refer to 'cybercrime', though in Australia significant amendments to Commonwealth laws were introduced with the enactment of the Cybercrime Act 2001 (Cth), adding a range of unauthorised access, modification and impairment offences to the Criminal Code Act 1995 (Cth) (Smith, Grabosky and Urbas 2004; Smith and Urbas 2004). One of these offences, s477.1 (Unauthorised access, modification or impairment with intent to commit a serious offence) has potential application to copyright infringement as the latter has for some years carried a maximum penalty of five years' imprisonment, thus qualifying as a 'serious offence' for the purposes of the cybercrime provision. However, no prosecution along these lines has ever been commenced, presumably in part because most illegal file-sharing does not involve unauthorised access to computers or data, for example, by "hacking" into music files. However, as further discussed below, a new and broader offence, s474.14 (Using a telecommunications network with intention to commit a serious offence) could apply more easily to online copyright infringement as well as range of other serious crimes (Urbas 2005c; Urbas 2007b).

Finally, as regards terminology, a distinction is often drawn in copyright law between 'direct' or 'primary' liability for infringement, and 'indirect' or 'secondary' liability for authorisation, by third parties such as ICHs and ISPs, of infringing acts done by others. The concepts overlap to some extent with primary and secondary liability in criminal law, whereby not only those who directly commit crimes but also those who 'aid, abet, counsel or procure' or engage in incitement or conspiracy may become liable (Ginsburg and Ricketson 2006; Gething and Fitzgerald 2009; Urbas and Fouracre 2010).

### **3. Criminal Copyright Infringement**

The copyright law of most countries, including Australia, includes criminal penalties, as well as civil remedies for infringement. Criminal offences are particularly directed at larger-scale and organised infringement. There are also criminal penalties in Australia for trade mark infringement under Part 14 of the Trade Marks Act 1995 (Cth), but unlike many other countries, not for infringement of patents, designs and the other main forms of intellectual property (AIC 2008; McKeough et al. 2004; Davison et al. 2008; Urbas 2000a; Urbas 2005a and 2005b).

The main copyright offences are found in Part V Division 5 of the Copyright Act 1968 (Cth), as amended by the Copyright Amendment Act 2006 (Cth) replacing the central offence of copyright infringement with a set of discrete offences in Part V, including s132AD (Making infringing copy commercially), s132AE (Selling or hiring out infringing copy), s132AF (Offering infringing copy for sale or hire), s132AG (Exhibiting infringing copy in public commercially), s132AH (Importing infringing copy commercially), s132AI (Distributing infringing copy), s132AJ (Possessing infringing copy for commerce), s132AK (Aggravated offence--work etc. converted to digital form), s132AL (Making or possessing device for making infringing copy) and s132AM (Advertising supply of infringing copy). Other offences relating to public performances, circumvention of

access control technological protection measures, removal or altering of electronic rights management information, dealing in unauthorised decoders, and performers' rights are also contained in the legislation. Most of these offences carry maximum penalties up to five years' imprisonment and/or substantial fines for the indictable form of the offence, which require proof of intention, knowledge or recklessness for the main elements of offence; and two years' imprisonment and/or fines for the summary form of the offence, involving negligence. There is also, for many of the infringement offences, a 'strict liability' form with no required fault element, punishable by fine only. For strict liability offences, there is an infringement notice scheme under s133B and s248SA and Copyright Regulations 1969 (Cth) Part 6A (Luttrell 2008).

Importantly in interpreting these offences, the Criminal Code Act 1995 (Cth) applies to all offences under Commonwealth law, and supplies the meaning of key terms such as 'intent', 'recklessness' and 'negligence', and provides a number of general defences as well as provisions on accessory liability, inchoate offences and corporate criminal responsibility. A particular complexity arises because of the 'default' fault provisions of the Code, whereby a physical element of an offence (other than a strict or absolute liability offence) is interpreted to attract a fault element of intention if it is 'conduct', and recklessness if it is a 'circumstance' or a 'result' (Leader-Elliott 2002a and 2002b). Applying this to the copyright offences such as those in s132AD, it transpires that the indictable form of the offence has no explicit fault element for the physical elements of circumstance that the article being made for sale, hire or commercial advantage is (i) an infringing copy of a work or other subject-matter, and (ii) that copyright subsists in the work or subject-matter, and therefore recklessness applies by default; whereas for the summary form of the offence, negligence is explicitly stipulated to apply to these elements; and for the strict liability form, no fault element applies. This style of copyright law drafting poses dangers for intellectual property lawyers or others not familiar with the principles of Australian federal criminal law. Issues of jurisdiction and standard of proof for prosecution and defence are also dealt with by the Criminal Code Act 1995 (Cth), as well as the Evidence Act 1995 (Cth). Procedural issues and sentencing for offences under Commonwealth laws are governed by the Crimes Act 1914 (Cth). Although copyright and trademark offences are federal offences in Australia, criminal prosecutions are normally heard in the State and Territory courts, which may differ in some procedural rules. One interesting issue is the requirement of a jury in a contested trial, which is guaranteed for trial on indictment under s80 of the Commonwealth Constitution. Until the 2006 amendments to the Copyright Act 1968 (Cth), this guarantee did not apply to copyright offences even though they were punishable by up to five years' imprisonment, as these offences were dealt with summarily: see *Lai Ha v McCusker* [2000] FCA 1174 (3 August 2000); *Ly v Jenkins* [2001] FCA 1640 (26 November 2001). However, the indictable form of the offences outlined above now does attract the constitutional guarantee, so that a jury trial is required (which under s80 necessitates a unanimous verdict for conviction). Until very recently, the Federal Court of Australia had no capacity to conduct jury trials, but this has been addressed in 2009 legislation creating new cartel offences, and it is likely that the court's jurisdiction will be extended to include indictable copyright offences in future (Clarke 2005).

#### **4. Cybercrime Offenses**

As observed above, offences such as s474.14 of the *Criminal Code Act 1995* (Cth) may operate to apply to online copyright infringement. The physical elements of the offence are that a person connects equipment to a telecommunications network (such as the Internet) or uses equipment already so connected, and intends by this to commit or to facilitate the commission of, an offence (whether by that person or another person) which is a serious offence against Commonwealth, State, Territory or even foreign law. The default fault elements are intention with respect to the connection or use, and of course the explicit intention to commit or facilitate the further offence, but absolute liability is stated to apply to the circumstance that the further offence is a serious offence against State, Territory or foreign law. A 'serious offence' is defined to be one punishable by life imprisonment or a period of five years or more (which includes a number of indictable copyright offences), and the penalty for a breach of s474.14 is stipulated to be 'a penalty not exceeding the penalty applicable to the serious offence'.

Interestingly, presumably because this computer offence is already preparatory in nature, the legislation provides that it is not an offence to attempt to commit an offence against s474.14. However, a person may be found guilty under this provision even if committing the intended serious offence is impossible, for example, because there are robust technological protections in place which would prevent the offence from being carried through to completion. Thus, online copyright infringement, or commercial dealings in infringing material, may well constitute computer or telecommunications offences under the Criminal Code Act 1995 (Cth). To date, however, no prosecution using this characterisation appears to have been pursued, with prosecutors instead relying on the offences within the Copyright Act 1968 (Cth) themselves. This may be in part because it is possible for police to charge a person with attempt to commit a copyright offence in Australia, unlike in some other countries, obviating the need to rely on less familiar telecommunications offences. As discussed below, however, the option of dealing with online copyright offences as computer crimes under the Criminal Code Act 1995 (Cth) may well have some advantages for law enforcement in allowing the 'heavy machinery' of criminal procedural law to be invoked. Before turning to this topic, however, it is instructive to review some past Australian online piracy cases.

## **5. Australian Online Piracy Cases**

Both civil and criminal proceedings have been brought against a number of Australian defendants alleged to have committed online copyright offences. Significant cases include the following:

### *5.1 Tran, Ng & Le (unreported, NSW Local Court, Sydney, December 2003)*

This unreported case represents the first occasion on which Australian courts were required to deal directly with large-scale online piracy. The case is detailed as follows in the 2003-04 Annual Report of the Commonwealth Director of Public Prosecutions (CDPP 2004: 81-82):

This case related to the operation of a website called "MP3/WMA Land" which allowed members of the public to listen to, and download, unauthorized copies of music recordings and music video clips free of charge. The Website was linked to some mirror websites and provided access to a large number of CDs and individual songs. Some of the CDs were available through the website before they had been officially released in Australia. During the time it operated the Website received over seven million hits. Ng, Tran and Le were all university students. Ng established and maintained the Website, Tran later helped to maintain and update it. Le's role was to remix songs onto compilation CDs which were uploaded and posted on the Website.

The operation of sites of this kind has a significant impact on the Australian music industry because artists and producers derive no income when their works are made available to the public free of charge. The matter first came to notice as a result of complaints made by an organisation known as Music Industry Piracy Investigations.

This was the first criminal prosecution in Australia for offences of this kind. Ng was charged with 22 offences against the *Copyright Act 1968*, Tran was charged with 17 offences, and Le was charged with 29 offences. All three were convicted. Ng was given a suspended sentence and ordered to perform 200 hours of community service. Tran was given a suspended sentence and fined. Le was ordered to perform 200 hours of community service.

Although the Copyright Act 1968 (Cth) and its predecessors over the last century have contained maximum penalties of five years' imprisonment, no such sentence – or indeed any custodial sentence – had until this time ever been imposed in New South Wales. On the few occasions in which a custodial sentence has been imposed for an Australian copyright offence, it has almost always been suspended in favour of a 'good behaviour' bond. In the MP3/WNA Land case, the outcomes were similarly lenient.

*5.2 Duarte (unreported, NSW Local Court, Sydney, 2007)*

In 2007, *The Simpsons Movie* was released worldwide and pirate copies quickly began to appear for download on the Internet. A suspect in Australia was arrested as the first individual discovered to be involved in uploading a handheld 'camcorder' version of the movie. The Commonwealth Director of Public Prosecutions reported the arrest as follows (CDPP 2008):

On the 26 July 2007, *The Simpson's Movie* [sic] was released in cinemas throughout Australia. On 27 July 2007, an unauthorised copy of the movie was uploaded onto the internet from Australia and distributed worldwide. In excess of 70,000 downloads were recorded over the following days.

On 16 August 2007, the AFP executed a warrant on the home of the person alleged to have uploaded the movie onto the internet. He was subsequently charged under the Copyright Act 1968. The accused pleaded guilty and received a \$1000 fine.

As reported in the media, the offender was a 23 year-old Sydney resident named Jose Duarte, and his and similar conduct resulted in the deployment by movie studio employees of 'night vision' cameras in order to detect covert filming in cinemas (Moses 2008). The investigation involved collaboration between the AFP and the Australian Federation Against Copyright Theft, the latter stating that the unauthorised recording of movie was deleted by the authorities from Duarte's webpage within two hours of it being uploaded (AFACT 2007).

*5.3 Griffiths v United States of America [2005] FCAFC 34 (10 March 2005)*

This case represents a very significant development in copyright enforcement, involving the extradition of an Australian suspect in an online piracy group named 'DrinkOrDie', to the United States to face criminal copyright and conspiracy charges. On 11 December 2001, law enforcement officials executed over 70 search warrants simultaneously in the United States, the United Kingdom, Australia, Norway, Sweden and Finland against suspected members of the group. The concerted enforcement action, led by the United States Customs Service together with the Computer Crimes and Intellectual Property Section (CCIPS) of the United States Department of Justice, was given the name 'Operation Buccaneer'.

A series of criminal prosecutions for copyright and other offences, mostly ending in conviction and substantial terms of imprisonment imposed on defendants after guilty pleas, followed. Most of these convictions occurred in the United States, but there were related prosecutions in the United Kingdom and other countries. Alleged ringleader of the group, Hew Raymond Griffiths, from Bateau Bay in New South Wales, Australia, was the only member to face extradition. Griffiths was indicted by United States authorities in March 2003, with the Justice Department alleging that (using the online codename 'Bandido') he oversaw the illegal operations of the group and admitted in a 1999 online news interview to running the group's day-to-day operations and controlling access to more than 20 warez sites worldwide. The extradition was resisted, and the ensuing legal proceedings in Australia reached the highest appellate levels. Unsurprisingly, the extradition request was seen as heavy-handed by some observers, and perhaps politically motivated. The United States Department of Justice expressed the view that the extradition would have a deterrent effect on other infringers outside the United States, stating (US DOJ 2004):

The decision to extradite Griffiths for his role in intellectual copyright piracy should send a strong signal around the world. For too long, people engaged in piracy have believed that if they were outside the borders of the United States, they could violate our intellectual property laws with impunity. They're wrong.



This indictment and the extradition sends a clear and unequivocal message to everybody involved in illegal piracy that, regardless of where you are, the Justice Department will find you, investigate you, arrest you, prosecute you, and incarcerate you.

Griffiths has instructed his solicitors that he would plead guilty to offences under our Copyright Act. He has probably already spent more time in prison than any person convicted of a copyright offence in Australia. After a series of raids by the US Customs Service, about 60 people were arrested in a variety of countries, including 45 in the US and eight in Britain. All the British were charged under British laws and the US did not push for extradition. Griffiths is the only person, and the only Australian, in the group that the US is pressing to extradite.

It seems the Australian Attorney-General, Philip Ruddock, and his department is only too eager to co-operate. The relevant minister under the Extradition Act, Chris Ellison, has the power to refuse the US request.

Griffiths' lawyers at the NSW Legal Aid Commission have written to Ellison asking him to exercise his power to do so. There was a delay of eight months last year while people in the Attorney-General's Department drafted a submission to the minister. The NSW Attorney-General, Bob Debus, wrote to Ruddock in June 2005 making the same argument, that extradition is inappropriate in this case. These pleas went nowhere and yet there is no explanation why this man cannot be charged in Australia and why of all those arrested, he is the only one the Americans want in captivity on their soil. All appeal avenues having been exhausted, Ellison has issued a warrant for Griffiths's extradition to the US and that is likely to happen at any time. It is a shocking case. The governmental cravenness is unwarranted. It means that if Griffiths is convicted in the US it is likely he will never be able to return to Australia, where he has lived all but seven years of his life. The Americans have provided him with a one-way travel document to the US. But that's the price of keeping in sweet with our great and powerful friend.

The responsible Minister signed a notice under the *Extradition Act 1988* (Cth), and a warrant was issued for Griffiths' arrest. The matter came before a New South Wales Magistrate on 25 March 2004, but the Magistrate ruled that the defendant was not eligible for surrender to the United States. The United States authorities were not satisfied with this decision, and sought a review in the Federal Court of Australia. On 7 July 2004, the Federal Court judge hearing the matter reversed the Magistrate's ruling and thus cleared the way for Griffiths' extradition: *United States of America v Griffiths* [2004] FCA 879 (7 July 2004), Jacobson J. Against this decision, Griffiths appealed to the Full Court of the Federal Court. On 10 March 2005, a bench of three judges unanimously dismissed the appeal on all grounds argued by the appellant: *Griffiths v United States of America* [2005] FCAFC 34 (10 March 2005), Whitlam, Finn and Conti JJ. Then in September of 2005, the High Court refused special leave to appeal: *Griffiths v United States of America & Anor* [2005] HCA Trans 666 (2 September 2005), clearing the way for Griffiths' extradition (Urbas 2007a). Griffiths was ultimately extradited in May of 2007 and pleaded guilty, and was sentenced to 51 months though time spent in custody awaiting extradition was taken into account, so he had effectively 15 months to serve. In February of 2008, he was taken from custody and returned to Australia under an agreement between the Australian and United States governments. He gave a televised interview on an Australian Broadcasting Corporation program shortly after his return, describing his prison experience (ABC 2008).

## **6. Criminal Investigation Issues**

A number of interesting criminal investigation issues arise in the context of online piracy, especially when considered as cybercrime rather than merely copyright offences. Of course, these issues need to be understood against a background of still developing forensic and evidentiary rules governing the collection of digital evidence (Broucek *et al.* 2005).

### *6.1 Covert and controlled operations*

Controlled operations were initially developed in order to infiltrate and prosecute drug importation and distribution networks. In *Ridgeway v The Queen* (1995) 184 CLR 19, the High Court quashed drug importation convictions that had been obtained through a joint AFP-Malaysian police operation including the 'controlled delivery' of heroin in breach of the *Customs Act 1901* (Cth). The problem confronting the prosecution was that the heroin found in the possession of the defendant had in fact been illegally brought into Australia by the police as part of the controlled delivery, but there was no legislative basis for this type of operation at the time, and so the evidence obtained as a consequence could be excluded as improperly or illegally obtained: see now s138 of the *Evidence Act 1995* (Cth).

Following this case, the Crimes Act 1914 (Cth) was amended to include a new Part 1AB giving a statutory basis to such controlled operations with a system of certificates ensuring their legality and consequent admissibility of evidence obtained. The constitutional validity of these provisions was upheld in *Nicholas v The Queen* (1998) 193 CLR 173. Since 2001, with the enactment of the Measures to Combat Serious and Organised

Crime Act 2001 (Cth), the scope of permissible controlled operations under Part 1AB has expanded from narcotics importation to any 'serious Commonwealth offence', defined as a Commonwealth offence:

- (a) that involves theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a State or an officer of a Territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organisation, financing or perpetration of sexual servitude or child sex tourism, dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports, or that involves matters of the same general nature as one or more of the foregoing or that is of any other prescribed kind; and
- (b) that is punishable on conviction by imprisonment for a period of 3 years or more.

It is noteworthy that the original Measures to Combat Serious and Organised Crime Bill defined 'controlled operation' so as to apply to all Commonwealth offences, as stated in the Explanatory Memorandum (Item 17 re clause 15H):

This proposed definition of controlled operation replaces the current definition so that a controlled operation may now be conducted during the investigation of all Commonwealth offences (rather than being limited to narcotic goods offences) and may involve persons other than law enforcement officers.

The changes were at the behest of the then Opposition (Duncan Kerr MP, 2<sup>nd</sup> Reading debate, 20 Sept 2001) and explained as follows:

The opposition moved amendments in the Senate which would restrict the National Crime Authority to conducting controlled operations relating only to those offences which are set out in the National Crime Authority Act and which would restrict the Australian Federal Police to a similar set of offences, with the addition of a number of other serious offences. This is not a small list of matters. It canvasses the full range of serious crimes from which Australia is under threat by serious organised criminal activity. But we did not think it appropriate for these kinds of immunities in relation to law enforcement action to occur for what we might call trivial or minor offences. We think the legislation is the better for those changes.

The National Crime Authority (NCA) is now the Australian Crime Commission (ACC), and its mandate includes investigation of 'federally relevant criminal activity', a term that is essentially limited to 'serious



offence' defined as in the Measures to Combat Serious and Organised Crime Act 2001 (Cth), though with an updated reference to 'cybercrime' in place of 'misuse of a computer or electronic communications', in keeping with the enactment in 2001 of the Cybercrime Act 2001 (Cth).

Arguably, copyright infringement of a sufficiently organised and serious nature could fall within the relevant definitions, particularly if involving computer technology, or if prescribed for the purposes of the legislation, in which case such investigative techniques as controlled operations could be used. In practice, this might involve using assumed identities of traders or setting up 'honeypot' websites offering infringing product and investigating persons who made contact, much as currently occurs with online child pornography and child grooming offences in many jurisdictions around the world including Australia (Urbas 2007b; Urbas and Choo 2008). Such online offences are prescribed as potential 'serious and organised crime offences' under the Australian Crime Commission Regulations 2002 (Reg 3). In a recent Annual Report, the ACC foreshadowed the expansion of its financial crimes investigations into 'intellectual property crime and identity crime' (ACC 2007).

## *6.2 Mutual legal assistance and extradition*

Mutual legal assistance and extradition constitute indispensable tools for the investigation and prosecution of cross-border crimes. In Australia, law enforcement operations reaching outside national borders operate under legislation including the *Mutual Assistance in Criminal Matters Act 1987* (Cth) and the *Extradition Act 1988* (Cth). As noted above, the landmark case involving Australian resident Hew Raymond Griffiths ended in his extradition to the United States. The central legal point in these proceedings was the application of the 'double criminality' test in s19(2) of the *Extradition Act 1988* (Cth):

... the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if ... the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia ...

In finding that Griffiths was eligible for extradition, the Federal Court held, inter alia, that 'internet fraud, though relatively new, involves nothing more than an application of the legal principles applicable to communication by post and telegraph' and the fact that that Griffiths was not a fugitive from the United States was irrelevant. The court also observed that conspiracy to breach copyright was not an unusual kind of extradition offence, though few other cases of a similar nature appear to have occurred in Australia or elsewhere. Perhaps most challenging is the Federal Court's finding that it was wrong to say his acts were 'physically committed' in Australia and that, for the purposes of conspiracy, 'the conduct constituting the offence ... occurred in the United States and this includes Mr Griffiths' own conduct notwithstanding his actual physical presence in New South Wales' (Urbas 2007a). The case amply illustrates the powers that law enforcement can bring to bear in online copyright piracy cases involving cross-border offending.

## **7. Prosecution of Copyright Infringement**

Copyright and trademark prosecutions in Australia numbered in the few dozens per year during the 1990s and into the 2000s, until the significant legislative reforms of 2006 heralded a new copyright offence structure according to which indictable, summary and strict liability forms are distinguished. The result appears to be a markedly increased level of attention to copyright offending (Table 1).

Although it is still somewhat early to predict a stable trend, the emerging picture suggests that reported police and prosecutorial aversion to pursuing copyright offences, which can involve considerable cost and time commitments but have often resulted in low level fines even for seemingly serious offending, may have been overcome with recent legislative reforms. In the event that further reforms result in a more systematic treatment of such cases, for example within a Federal Court invested with expanded jurisdiction over both summary and indictable copyright offences, a greater judicial expertise in this area of law may follow.

**Table 1 – Copyright and Trade Mark Prosecutions by the Commonwealth Director of Public Prosecutions 1989-2010**

| Year    | Copyright |            | Trade Marks |            |
|---------|-----------|------------|-------------|------------|
|         | Summary   | Indictable | Summary     | Indictable |
| 1989-90 | 10        | 0          | N/A         | N/A        |
| 1990-91 | 11        | 0          | N/A         | N/A        |
| 1991-92 | 20        | 0          | N/A         | N/A        |
| 1992-93 | 14        | 0          | 22          | 0          |
| 1993-94 | 6         | 0          | 13          | 0          |
| 1994-95 | 11        | 0          | 20          | 0          |
| 1995-96 | 8         | 0          | 11          | 0          |
| 1996-97 | 3         | 0          | 11          | 0          |
| 1997-98 | 4         | 0          | 3           | 0          |
| 1998-99 | 12        | 0          | 12          | 0          |
| 1999-00 | 15        | 0          | 6           | 1          |
| 2000-01 | 8         | 0          | 15          | 0          |
| 2001-02 | 10        | 0          | 14          | 0          |
| 2002-03 | 11        | 0          | 10          | 0          |
| 2003-04 | 23        | 0          | 27          | 0          |
| 2004-05 | 37        | 0          | 14          | 2          |
| 2005-06 | 25        | 0          | 5           | 0          |
| 2006-07 | 35        | 3          | 25          | 0          |
| 2007-08 | N/A       | N/A        | N/A         | N/A        |
| 2008-09 | 504       | 40         | 56          | 6          |
| 2009-10 | 377       | 82         | 59          | 0          |

**Source:** CDPP *Annual Reports*, 1989-90 to 2009-10.

**Notes:** *Annual Reports* to 1996-97 provide statistics for each State and Territory separately; from 1997-98 on prosecutions are classified only under the indictable/summary offence distinction. Offences under the *Copyright Act* and *Trade Marks Act* during this period were almost always dealt with summarily. No trade marks prosecutions are separately recorded for the years 1989-92. For 2007-08 offence statistics were not reported as the reporting system was under review.

## 8. Sentencing and Punishment Issues

As indicated above, sentencing in Australian criminal copyright cases has historically been lenient compared to the maximum penalties available, and certainly in comparison to sentences imposed in similar cases in other countries. In the majority of cases, infringers have been subject only to fines rather than custodial or other penalties. However, there are some recent indications that the picture may be changing.

### *8.1 Sentence options and impositions*

Sentencing options under the *Crimes Act 1914* (Cth), which applies to federal offences such as copyright infringement, include custodial sentences, fines, release on parole or licence, and a variety of community service or other orders. A number of recent Australian cases have involved the imposition of custodial and other sentences, as follows:

#### **Vu v New South Wales Police Service [2007] FCA 1508 (20 August 2007)**

In this case, a Magistrate of the NSW Local Court imposed a sentence of six months' periodic detention on an offender who pleaded guilty to 35 charges of selling or letting for hire infringing articles (DVDs). On appeal, Rares J of the Federal Court observed (at [33] – [34]):

The nature of the offence under s 132(2A)(a) is one of potentially considerable seriousness. One purpose of providing copyright protection to those who own or have the right to licence copyright material is to enable that person to exploit an exclusive legal right to earn a return from it. That right, among other things, enables authors or the creators of original works such as films or other entertainments to receive royalties. Copyright protects their intellectual property from being appropriated and sold by persons who have no legal right to use or to exploit. In particular the protection of the copyright owner's rights which the Act creates is intended to prevent strangers using the copyright material without providing any recognition or return to those who created it or did the work to produce it.

In a colloquial, but real, sense, to counterfeit, sell or hire DVDs is equivalent to stealing the author's, creator's or owner's work which is contained in the reproduction. Judges of this Court have expressed views concerning the degree of criminality involved in contraventions of s 132(2A)(a), although none has yet sentenced an offender to prison.

The appellant's argument that the sentencing Magistrate should have had regard to legislative changes made to the Copyright Act 1968 (Cth) in 2006 (which resulted in the gradation of indictable, summary and strict liability offences) was accepted in the Federal Court, and he was re-sentenced to a three year good behaviour bond with a self-surety in the sum of \$1,000 conditional on paying a penalty of \$5,000.

#### **Le v The Queen [2007] FCA 1463 (18 September 2007)**

In this case, the defendant was convicted of six copyright offences and five trademark offences and was sentenced by a Local Court Magistrate to 12 months' imprisonment, to be released after eight months on a recognizance release order upon entering into a bond to be of good behaviour for three years, with a self-surety of \$1,000. On appeal, Edmonds J in the Federal Court took into account various features of the offences, including their objective gravity:

The appellant traded in the pirated videos by renting them to the public for monetary gain. The presence of the television and extensive video equipment in her home and the large quantity of copyright-infringed video cassettes (over 35,000) demonstrates the high volume commercial extent of her criminality. The fact that the appellant has previously been convicted of similar offences also negates any suggestion that this was an isolated or "one-off" offence.

The Court is entitled to take into account the context and surrounding circumstances of the crime. Although 11 representative charges were ultimately prosecuted and the appellant pleaded guilty to these, this Court is not limited to only considering the facts arising from just these charges. While this Court cannot rely on the surrounding circumstances to aggravate penalty and increase the sentence, it is entitled to take these factors into account in reaching the conclusion that this was not an isolated incident so there is no warrant to extend leniency ...

As against this, the defence argued for leniency based on the subjective hardship that the defendant and her children would suffer from a custodial sentence. In the end, the 12-month sentence was upheld but the non-parole period was reduced to three months.

**Interville Technology Pty Ltd v Commonwealth Office of the Director of Public Prosecutions [2009] FCA 481 (8 May 2009)**

This case concerned a Sydney Internet café at which customers were able to download illegal copies of films and music that were stored on the operator's intranet facility. On being convicted of 20 copyright offences of possessing an infringing article with the intention of distributing it to obtain a commercial advantage contrary to section 132AJ of the *Copyright Act 1968* (Cth), total fines of \$80,000 were imposed on the defendant company. On appeal, this amount was reduced to \$30,000 with Jacobson J of the Federal Court citing and applying the principles set out in earlier cases such as *Vu v New South Wales Police Service* and *Le v The Queen*, discussed above. Interestingly, the Local Court Magistrate had in imposing the original sentence 'observed that these offences are becoming common in the film, television, and music industries, and call for heavy penalties to be imposed [and] that he was dealing with serious offences which call for heavy penalties to be imposed to "get the message out" that film and music piracy is not to be countenanced', but also the fact that Interville had pleaded guilty at the very first opportunity; that copyright piracy was not the main part of Interville's business, which was the operation of an Internet café, and that the copyright infringements were "a by-product" of the business [and] the fact that he was asked to make a forfeiture order in relation to certain hardware, which was said to have a replacement value of \$15,000 [as well as] the financial situation of the company which showed that it was a comparatively small business. Whether the Federal Court's variation of the fines preserved the initial 'message' identified by the Magistrate is open to debate.

## *8.2 Proceeds of crime recovery*

The *Proceeds of Crime Act 2002* (Cth) provides for a range of orders that can be sought by the Cth DPP in relation to indictable or serious offences, including restraining orders, forfeiture orders and pecuniary penalty orders. The definition of 'serious offence' for the purposes of the Act is technical but may encompass copyright infringement in some circumstances. It includes indictable offences punishable by imprisonment for three years or more, involving conduct that causes or is intended to cause a benefit to the value of at least \$10,000 for that person or another person, or a loss to the Commonwealth or another person of at least \$10,000, or an indictable offence specified in the regulations. Sufficiently large-scale infringement offences prosecuted on indictment would appear to qualify. Alternatively, copyright infringement may be specified under the *Proceeds of Crime Regulations* in future. This regime would complement forfeiture orders that may already be available under the *Copyright Act 1968* (Cth).

An example of proceeds of crime recovery in relation to online copyright offending is described in the 2008-09 Annual Report of the Commonwealth Director of Public Prosecutions (CDPP 2009):

In December 2008 the CDPP obtained a civil asset-directed restraining order over funds in excess of \$50,000 contained in an Australian bank account. It was alleged that the funds represented proceeds from the sale of memberships to a particular website allowing users to download movies. Neither the website nor its operators held copyright in relation to the movies being offered for download. In March 2009 the funds contained in the bank account were forfeited to the Commonwealth by consent.

The report does not disclose which legislation provided the basis for the forfeiture. Another way in which infringing goods may be effectively forfeited is under Division 7 of Part V of the *Copyright Act 1968* (Cth) and Part 13 of the *Trade Marks Act 1995* (Cth), which enable copyright and trade mark owners, respectively, to lodge notices of objection to the importation of any goods appearing to be copies, or bearing the marks, of their protected merchandise. The role of Australian Customs Service (ACS) is to hold the goods pending resolution

of the matter by the parties, but it can occur that shipments seized under these provisions are simply not claimed by an importer. However, unlike customs authorities in some other countries, the ACS has no *ex officio* powers of seizure of infringing copyright material, nor does it have jurisdiction with respect to the movement of electronic signals that may be used to transmit prohibited content across national borders (Urbas 2000a and 2000b; Ecob and Cootes 2003).

## **9. Future Developments**

The future of IPR enforcement is notoriously difficult to predict, not least because the landscape is frequently altered by innovations in technology, shifts in consumer attitudes, international legal and trade arrangements, and volatile economic considerations. Nonetheless, some developments can be identified. One of these is the renewed focus on multi-national agreements that, if not quite as international as the TRIPs agreement of 1994, nonetheless consolidate the internationalisation of enforcement efforts. Most recent of these is the *Anti-Counterfeiting Trade Agreement* (ACTA), with an official draft text released in April 2010 (Australian Government DFAT 2010), which seeks among other objectives to clarify the position of intermediaries such as ISPs.

Another development of interest is the reported relaxation of technological protections such as digital rights management (DRM) applied to online music products, in order to entice prospective purchasers of legal content away from infringing alternatives available on the Internet (Sinha *et al.* 2010). This approach suggests a more nuanced attitude on the part of copyright owners and their industry organisations, distinguishing between ‘hard core’ criminal infringers and general consumers whose online behaviour can be modified with suitable technological options and economic incentives.

It is unlikely, however, that the criminal enforcement provisions of Australian or other countries’ copyright laws are in danger of becoming redundant any time soon. Rather, the trend appears to be towards more punitive sentencing, increasing use of mutual assistance and extradition mechanisms, and (as suggested by this paper’s analysis) the emergence of an interesting intersection between copyright, criminal and cybercrime laws.

\* \* \* \* \*

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