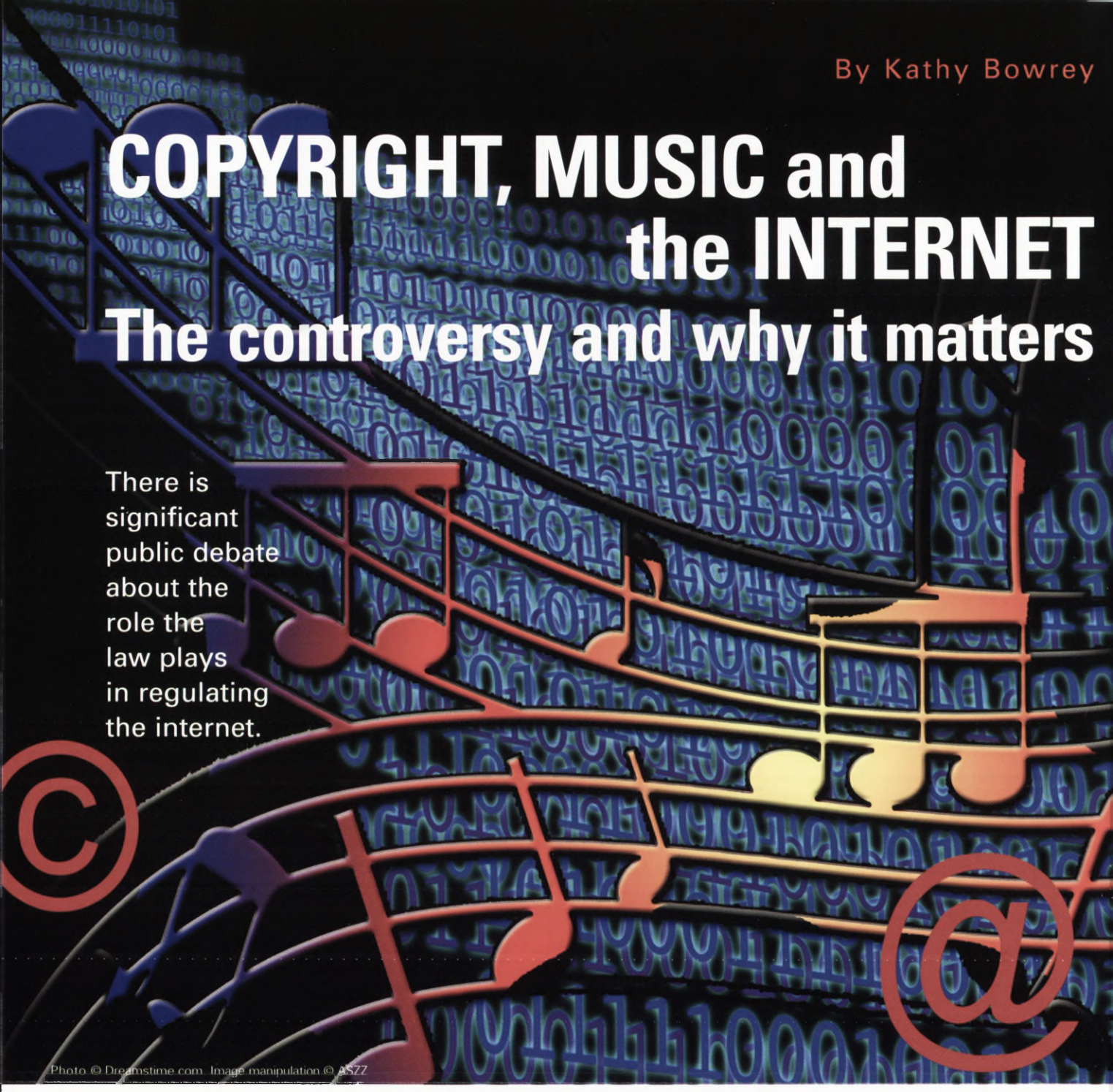
By Kathy Bowrey

COPYRIGHT, MUSIC and the INTERNET

The controversy and why it matters

There is significant public debate about the role the law plays in regulating the internet.



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A glance at a daily newspaper carries familiar tales of leaks of information or images that embarrass governments, public officials and private citizens alike. We regularly see and hear rumours about email scams and hacking of accounts that erode our capacity to trust digital messages, at the very same time that our lives have become impossible without relying upon them.

Dramas unfold over off-the-cuff 'tweets' that are taken up for public discussion with the same earnestness (or derision) deserved by an expert commentator or perhaps a press release. There are growing fears of the loss of innocence and genuine affection when friendships are made and mediated via Facebook, and of computer addiction as the current generations of young folk disappear off, not to fight on distant shores, but to fight virtual battles in fantasy realms.

With each of these controversies there is a subtext that 'law' should be doing 'something' to intervene for the health and well-being of society. However, it is with disputes involving the music industry and distribution of music online where law has been most engaged in regulating the internet over the last 20 years.

Opinions abound on the politics, social costs and benefits of intellectual property rights in the internet age, and the wisdom (or otherwise) of recent case law or law reform. Views can be quite strongly held, but are not always based on sound legal foundations, nor an understanding of the complex social, economic and cultural contexts in which the

law operates. Quite distinct regulatory concerns have arisen in relation to copyright and digital music, and it is worth briefly recalling that history. It provides a basis for not only understanding the tensions in this one area, but introduces some of the more difficult technical, jurisprudential and political challenges that affect internet law more generally.

A LAWLESS CYBERSPACE?

Initially, in the 80s and early 90s, the courts and legislatures were uncertain of the role they had to play in regulating digital technologies. The primary concern was one of reach. These emerging technologies were to be used as everyday business, education and leisure tools. Could (and should) law control the development or conditions of access to innovations involving communications technologies? What justifies an intervention? Even when the technology was recognised as being potentially disruptive, the presumption was that law would always be playing a catch-up game, carping from the sidelines at technological changes that affect the status quo, but reserved and ineffectual in seeking to change our access to innovation.

The early discussions of cyberlaw in the 1980s enthusiastically celebrated the ingenuity and usefulness of the emerging, sophisticated network that enabled point-to-point communications across the nation and the globe. It is easy today to forget the exuberance with which the new capacity to communicate was greeted. Anything that could be converted into a digital format could be moved through the existing telecommunications system cheaply, so long as there were phonelines capable of carrying the data, and recipients had modems capable of receiving the data and hardware and software able to reconstruct it into desirable human-friendly formats. Data could travel anywhere over the network on demand. And it was instant. The provision of multiple transmission paths, nodes and hubs for data to travel across produced a highly robust, stable and efficient communications system.

The decentralised structure, borderless potential and the robustness of the engineering were the most celebrated features of the new cyber-space. For many users, cyberspace heralded an entirely new kind of personal liberty – a communicative freedom that empowered individuals, including even those with a relatively limited technical ability, to access an increasing range of 'information goods'.

Alongside this new freedom was a culture of generosity and openness, a celebration of breaking open new technical frontiers. Cyberculture challenged the idea that innovation required a hierarchical top-down management and oversight, significant investment and proprietary rights. However, this was not an anarchic, lawless domain. Soft law, in the form of engineering protocols and cyber-ethics developed at community level, provided a means of maintaining order and privileging some efforts over others.

The free software movement slowly developed into its various commercial and non-commercial strands. With a proliferation of communities and products of all sorts and for all tastes, serious differences of opinion about the future of the internet could be absorbed to some degree without disrupting its growth. However, companies that were established on proprietary rights models (copyright and patent) were deeply unsettled by all these interlopers disrupting their established research and development plans and tightly controlled commercial release of new innovation. At the same time, speculative investment in internet start-ups ballooned, further accelerating the commercial pressures on the established technologies companies, and increasingly encouraging large respectable corporations (or divisions therein) to embrace aspects of free culture. In the context of such rapid change, releasing services quickly to market and establishing a reputation for innovation and expertise quickly became more valuable in determining a corporation's sharemarket value than its tangible assets.

For lawyers, the decentralised design features of the internet raised the question as to whether there was a practical capacity for hard law to regulate digital communications at all. The notion of borderless communications challenged the concept of sovereignty and jurisdiction. Of equal concern was the capacity of law and lawyers to understand the logic of the technologies and internet culture as established by technical elites.

Copyright law had been developed originally for print and, later, for mass media enterprises. This body of law was (and still is) structured with the idea of a world of hard copies, with highly produced commercial content as opposed to user-generated content, with tightly controlled >>

distribution channels for different kinds of products and with segmented geographic markets. Copyright was based on needing permissions and licences for a potentially limitless range of everyday activities.

At first, the copying of music was not a major concern because there was no efficient method of compressing digital sound and maintaining a level of sound quality. Methods of online distribution were limited. However, the broader threat posed by digital copying was well recognised by the media and entertainment industries from the start. A copy of a digital file was virtually indistinguishable from the original, able to be stored or multiplied without file degradation, and transferred to others on the network. By the mid-90s, one of the most promising and efficient methods for distribution of data online was peer-to-peer technology (P2P), which allowed for transfers of files outside of the http and ftp protocols. Before P2P, serving files from your PC required a permanent IP address, domain name, registration with DNS servers and properly configured webserver software on the PC. With P2P, computer storage, cycles and content was made available because the connected PC becomes a node that operates outside the DNS system, with significant autonomy from central servers and the ability to be accessed by other users. Individual PCs' processing power can be accessed by others, and the PC is available for others to access desired files, or merely fragments of files, as efficiency demands. Transfers are very difficult to track and, for the technologically savvy, transactions can be further anonymised making them extremely difficult to trace. For users, P2P reduced reliance on others for anticipating in advance demand for particular digital content, and it reduced the need for centralised storage facilities from which to send data in answer to requests.

Internet culture was an individualistic one – in that individuals were empowered to pursue their own interests online as they saw fit. However, cyberculture also had a social and political dimension reflecting its West Coast US roots, with connections to older political ideals about individual liberty, political accountability, and distrust of concentrations of power in government and global corporations. Technology was not just a tool for hedonism, but to be used to call society and powerful social actors to account.[1] It is upon this heritage that recent controversial sites like Wikileaks draw.

THE RISE OF COPYRIGHT MAXIMALISM

In the late 90s, media-owners and legislators worked hard to respond to the digital agenda. Multi-lateral and bi-lateral free-trade agreements were negotiated to strengthen rights holders, and the *Copyright Act* 1968 (Cth) was continually amended. The objective was to:

- technologically lock-down content to prevent digital copying, access and distribution;
- require a broader range of intermediaries, such as internet service-providers (ISPs), to take a more active role in policing users and help to enforce the private rights of owners;
- restrict the fair dealing rights of users to prevent free access to works in a digital context; and
- effect a 'cultural turn' to a permission-basis for online transactions.

The 'cultural turn' was based on an emphasis on private property rights, authorship and creativity. These became rhetorical constructs used to justify law reform. However, this rhetoric rang hollow for anyone well-schooled in copyright law.

Copyright law has always been based on a balance of owner and user rights. It is a statutory arrangement with owners' exclusive rights limited by a myriad of public purposes. Contrary to what has been suggested, copyright is not a natural private right of the creator. Further, law reform processes and corporate anti-piracy messages were closely linked to the preservation of multinational interests, in an industry that was infamous for hard deals struck with creative artists, some of which had led to artists' contracts being set aside as unconscionable contracts in the 80s and 90s.[2] Civil society groups were excluded from participation in policy debates at the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO).

This politics was much commented on in online communities and in academia, with serious commentators arguing that a small number of multinational media organisations, with privileged access to the corridors of power, were simply flexing their muscles on the international stage in order to shore up their existing global distribution systems and to disrupt and delay consumer access to the best new technologies.[3] This view was supported by the reality that there was little credible development of services for legitimate digital downloads by content-owners. Parodies of anti-piracy messages proliferated, and the hard ball strategy of the IP maximalists only further encouraged the view that piracy was cool and that copyright law, and law in general, had lost touch with contemporary society and the ordinary citizen.

In the late 90s and into mid-2000s, the courts slowly found ways of commanding attention and making an impact on the digital economy. There was a cat and mouse game to litigation: P2P distribution tools like Napster were shut down as a result of court action;[4] but new services with different technical features were available. The successful, organised pursuit of the more popular P2P successors, like Grokster,[5] Kazaa,[6] LimeWire[7] and Pirate Bay,[8] across many jurisdictions, has simply encouraged the development and take-up of ever more complex and harder-to-monitor services. This now has implications for law enforcement agencies globally, as P2P distributes data of all sorts – legitimate software, a range of entertainment content and prohibited content alike.

Frustrated at the game play in constructing services to try and technically avoid copyright liability, in *Cooper*[9] and *Sharman*[10] the Australian courts moved to consider the contribution of the defendants to supporting a 'culture of piracy' as part of the context for a finding of authorisation of copyright infringement. In the 1970s, when tape-to-tape recorders first arrived on the scene, the US[11] and Australian

courts[12] had determined that the technology-provider had no extended obligation to protect the interests of copyright content-owners, if they were unable to control the use of the machines by infringers. In *Sharman*, Wilcox J suggested that the software-makers could filter content and make other technical changes, and in so doing suggested a kind of social obligation to modify technology to prevent users from accessing pirated content. However, content-filtering never eventuated and the parties reached a settlement.

Many commentators have subsequently linked the suggestion of a technical capacity and legal obligation on music download sites to filter MP3 files to the 2009 'child protection' initiative of the Labor federal government to mandate internet content-filtering by ISPs and the creation of 'blacklists' of sites thought to host prohibited content. The notion of 'censoring' access to the internet and blacklists has been criticised as an attack on freedom of speech and for giving comfort to authoritarian regimes that routinely censor citizens' communications and stifle legitimate political dissent.

However, for Australians this issue also directly reflects a growing concern over issues of 'trust' and the place for law in online worlds. The technical freedoms inherent in internet architecture empower law-abiding and criminal types alike. Not all content is material we would allow to circulate in an offline world. Who is responsible for maintaining community standards and values and protecting the vulnerable in the digital world? Who are the appropriate and relevant regulators or co-regulators of this digital space – the Australian Federal Police, the Australian Communications and Media Authority (ACMA), the telecommunications industry, individual ISPs, employers?

The P2P litigation was accompanied by a myriad of reforms to the *Copyright Act*. However, the volume of incremental amendments and entirely new provisions, (most particularly implementing the *Australia-US Free Trade Agreement* 2004), sat clumsily within the existing legislative framework. This has increased the legal complexity of an already poorly understood body of law. It has also done little to assist in clarifying principles of liability for copyright infringement for legitimate businesses, especially where a third party merely provides a technical means by which another infringes, but their technology also has legitimate uses within the internet economy. Why should a legitimate business encumber their activities, increase their running costs and conduct surveillance of their customers to serve the interest of one particular set of private business-owners?

A MORE BALANCED APPROACH?

There is a range of legitimate means of accessing digital music today and a large number of open-access copyright licences available that explicitly allow for content to be shared, subject to various conditions such as Creative Commons licences that allow for non-commercial use, or use only with attribution. This reality has further complicated earlier characterisations of the internet as lawless, and has helped to dilute the credibility of maximalist property rights rhetoric that presents the issue as a simple battle between owners and pirates, good and evil.

These developments have been matched recently by a shift in judicial reasoning, with a re-emphasis on the traditional balance in copyright:

> *'In assessing the centrality of an author and authorship to the overall scheme* of the Act, it is worth recollecting the longstanding theoretical underpinnings of copyright legislation. Copyright legislation strikes a balance of competing interests and competing policy considerations.'[13]

In a recent case concerning ISP responsibility, Cowdroy J noted that the defendant ISP, iiNet, had done no more than provide an internet service to customers and that the applicants had overstated the extent of piracy:

> 'The evidence establishes that copyright infringement of the applicants' films is occurring on a large scale, and I infer that such infringements are occurring worldwide. However, such fact does not necessitate or compel, and can never necessitate or compel, a finding of authorisation, merely because it is felt that "something must be done" to stop the infringements. An ISP such as iiNet provides a legitimate communication facility which is neither intended nor designed to infringe copyright.'[14]

An appeal was dismissed in February,[15] with the majority (Emmet and Nicholls JJ in separate judgments) maintaining that, in determining liability for authorising infringement, it was reasonable for copyright-owners first to provide the >>

ISP with sufficient detailed information about the alleged primary acts of infringement if they expected the ISP to suspend or terminate users' accounts. Emmet J went further and argued that it was reasonable to expect copyright-owners to undertake to reimburse the ISP for the reasonable cost of establishing and maintaining a regime to monitor the use of the iiNet service, as well as to indemnify the ISP for the consequence of its mistakenly suspending or terminating a service on the basis of allegations made by the copyright-owner.[16]

These recent judgments suggest the emergence of a more mature and measured legal approach toward internet culture. The courts appear more confident in letting the relevant industries battle it out in the marketplace, rather than beefing up interpretation of particular US-style provisions in order to impose heavy administrative and financial burdens and social obligations on those who merely provide the means by which we communicate. It is possible to appreciate the benefits and the problems for internet technologies without rushing in with a strong regulatory response in an attempt to shore up the legal relations designed for a different age.

LESSONS LEARNED

It is easy to agitate and create moral panics about new technologies that can be disruptive to the status quo and hard for the non-techie public (including some politicians and lawyers) to understand. A short history of copyright, music and the internet shows that internet law involves complex regulatory issues that often have technical, political, economic and cultural dimensions. A good legal response requires an awareness of the values that have supported the development and take-up of particular innovations, and attempts to reconcile these with more traditional legal principles. It is the ability of the law to adapt that is the key to good management of digital innovation.

This is also a lesson that politicians need to consider. As has been well reported recently, in its final days the Mubarak regime shut down internet access in Egypt, including disrupting mobile phone and landlines – presumably to make it more difficult to organise political rallies. Al Jazeera's broadcasting licence was also revoked. However, Al Jazeera's news service remained available online under a Creative Commons licence, opening up access to its coverage, including allowing commercial use by rival networks, so long as the original source is attributed. With electronic communications halted, banking and other business was also at a standstill, making Mubarak's political strategy unviable for any length of time and ultimately only increasing pressure for regime change. The genie has long been out of the bottle, and both law and politicians need to get used to it. ■

Notes: **1** This theme is explored in depth in Kathy Bowrey, *Law and Internet Cultures* (Cambridge University Press, 2005). **2** Some of the more famous plaintiffs were the Stone Roses, Holly Johnson (Frankie Goes to Hollywood), George Michael and Elton John. **3** Peter Drahos, *The Global Governance of Knowledge* (Cambridge University Press, 2010); Susan Sell, *Private Power, Public Law : the Globalisation of Intellectual Property Rights*, (Cambridge University Press, 2003); Michael Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Brookings Institute, 1998). **4** *A&M Records Inc v Napster Inc* 239 F.3d 1004 (9th Cir. 2001). **5** *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd* 545 US 913 (2005) **6** *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242. **7** *Arista Records LLC v Lime Group LLC*, No. 06 CV 5936, 2010 WL 2291485 (SDNY May 25, 2010). **8** Re Neij, [Stockholm District Court] 2009-04-17 Case No. B 13301- 06. **9** *Universal Music Australia Pty Ltd v Cooper* (2005) *150 FCR* 1. **10** Above note 6. **11** *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984). **12** *CBS Songs Ltd v Amstrad Consumer Electronics Plc* (1988) 1 IPC 1. **13** *IceTV Pty Limited v Nine Network Australia Pty Ltd* [2009] HCA 14 at [24]. See also *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984 at [9]. **14** *Roadshow Films Pty Ltd v iiNet Ltd* (No. 3) [2010] FCA 24 at [19]. **15** *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23. **16** *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 at [211]. The differences between the majority judgments and the dissenting opinion of Jager J may well provide ample ground for a High Court Appeal.

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