Clamour against copyright changes grows

By Sam Varghese
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OzEmail has joined the ranks of those calling for the Federal Government to rethink copyright
Mary-Jane Salier, OzEmail's general counsel, said the latest changes had come to the notice of ISPs and the industry body, the Internet Industry Association, only recently.

"What it boils down to is that ISPs could be exposed and liable to claims for damages if they fail to immediately close down sites that may contain material that infringes copyright," Ms Salier said.

ISPs like OzEmail could face legal challenges from copyright owners and from organisations operating the sites.

"OzEmail, just as the vast majority of other established ISPs, has an enforceable Acceptable Use Policy that states clearly that subscribers may not 'violate copyright or other intellectual property rights'," she said.

"In most cases, the Australian ISP industry has maintained a strong policy of supporting the copyright and other intellectual property rights of companies and individuals."

Ms Salier said there was every likelihood that ISPs would "be quite literally forced" into shutting down websites before they could validate copyright infringement claims.

"This can have disastrous effects on many businesses that rely on the internet as a fundamental component of their operations," she said.

Investigating copyright claims would mean increased legal resources, resulting in additional costs in an industry which had very slim margins.

"One protracted civil case could ruin many smaller ISPs," Ms Salier said. "Ultimately, the internet user will be paying for the increased legal costs through higher internet access charges. This is not a good result for the Australian consumer".
Ms Salier said, in her view, potential issues with item 11 and 13 of the Copyright Legislation Amendment Bill 2004 were:

- It is unclear when web material is likely to be infringing. For example, is material the subject of a court case 'likely to be infringing'? If so, an ISP would be required to disable access to websites merely on an allegation that the website may contain infringing material.
- The new provisions create a 'pick and choose' scenario for copyright owners. A copyright owner could choose whether to issue a formal notice in accordance with the new FTA regulations, or it could choose to merely put an ISP on notice that material is 'likely to be infringing'.
- The provisions appear to open ISPs up to the very situation the Government was trying to avoid - the use of automatic web-generated notices in Australia.
- The FTA requires a process to allow users to object to their material being taken down, or access to their website being disabled. The new provisions do not contain this important consumer protection.
- The FTA notice and take down scheme contains important protection for ISPs - if an ISP acts on a notice from the copyright owner to remove material from the internet, it is protected from damages claims from the person who put that material on the internet.
- The new provisions require ISPs to act even on suspicion of an infringement - without any protection if the claim turns out to be wrong.
- There is also a strong possibility that the new provisions could be abused. As an ISP would have to act on every claim of infringement (not just a claim from the copyright owner), the provisions could be used:
  - by a competitor, to try and remove information about products from a company's website
  - to stifle free speech - by an organisation who may not wish certain views to be expressed over the internet

She also provided the following comparisons:

**Comparisons between FTA, US copyright law and copyright amendments**

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<th>Australian Copyright Law</th>
<th>Aust-US FTA</th>
<th>US Copyright law (DMCA)</th>
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The carriage service provider must act expeditiously to remove or disable access to copyright material residing on its system or network if the carriage services provider:

- becomes aware that the material is infringing; or
b. becomes aware of the facts and circumstances that make it apparent that the material is likely to be infringing. These provisions have no 'notice' arrangements as required by the FTA.

The safe harbours are conditional on "service provider expeditiously removing or disabling access to the material residing on its system or network on obtaining actual knowledge of the infringement or becoming aware of the facts and circumstances from which the infringement was apparent such as through effective notifications of claimed infringement in accordance with - each part shall establish appropriate procedures for effective notifications of claimed infringement, and effective counter-notices by those that whose material is the subject of a notice for removal or disabling access..." (something cannot be an 'actual' infringement until it has been found by a court to be infringing)

To be able to avail itself of the US safe harbours, a service provider must not have actual knowledge of the infringement, not be aware of facts and circumstances from which infringing activity is apparent, or upon gaining such knowledge or awareness, responds expeditiously to take the material down or block access to it. (something cannot be an 'actual' infringement until it has been found by a court to be infringing)

**US FTA 'safe harbours' (US Free Trade Agreement Implementation Act 2004)**

**Copyright amendments**

The safe harbours provide a balance of rights:

- effective formal notice by copyright owners
- take down process
- counter-notice by internet users that are subject to the claimed infringement
- CSP immunities from damages claims by copyright owners and users for following the process.

These arrangements are very similar to US 'safe harbours'.

- No balance of rights - balance shifted to copyright owner
- No effective formal notice - CSP only has to "become aware of the facts and circumstances that material is likely to be infringing."
• No counter notice for users to defend their rights to use the material

• No immunities for CSPs - CSPs liable to copyright owners if they do not take material down, and liable to users if they do.

• Creates two alternative schemes for copyright owner to follow – one with penalties and formal requirements, one without

• Claim regarding actual or likely infringement can originate from a third party (ie, not the rights holder).

"Once the US FTA is in place, CSPs are expecting to be flooded with claims of breach of copyright. They do not receive these claims at the moment, because Australian law is not fully tested," she said.