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Swept Away in a Torrent of Litigation or Swimming Upstream Toward a Measured Approach: The Contradiction at the Heart of File Sharing Regulation

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1. Introduction

This paper is very much a work in progress as the story of Britain's legislative and judicial response to copyright breaches by individual file sharers is still unfolding. The areas we shall be considering are:

1. The factors which have given rise to the large amount of cases in the USA
2. Whether or not these factors are present in the UK scene
3. File sharing Technologies
4. The UK Legislation
5. Concluding observations and suggestions on file-sharing litigation

2. The US Scene

In September 2003 the Recording Industry Association of America (hereafter RIAA), filed 261 copyright infringement suits against individuals who used peer-to-peer file-sharing technology. These suits were based on the provisions of the Digital Millennium Copyright Act (hereafter DMCA), which not only outline the nature of copyright infringement in the United States but also grant copyright holders like RIAA the right to ask the courts to subpoena user information from Internet service providers. This act caused a number of complaints to be made primarily surrounding the legality of the subpoenas and some of the methods RIAA used to obtain personal information. However, there were also concerns raised about the apparent inaccuracy of the claims made in some of the suits. One case, for example, concerned a 66-year-old lady new to the world of computing whose system was not capable of running Kazaa the file-sharing tool in question. Yet RIAA claimed she had used Kazaa to download hundreds of hip hop music files, including the works of Snoop Dogg and Trick Daddy; to paraphrase one of the works of Snoop Dogg they were forced to drop this suit like it was hot. Finally, RIAA also seemed to be prepared to pursue cases where the infringement was relatively minor or indeed even concerned minors, for example an action taken against a 12-year-old school child and a grandfather who let his grandchildren use the Internet at his home when they visited. [1]

Despite the obvious flaws of these actions many users understandably agreed to settle out of court and RIAA claims that almost 850 other individuals have signed up to its “Clean Slate” amnesty programme (although this itself has been the subject of criticism). [2] Further legislation has been put in place and cases have been pursued more aggressively (as of March 2004 the total number of

cases had risen to 1,977). This scenario of increased control and litigation is obviously a stark warning to illegal file-sharers.

The key factors in the increase of this litigation (other than the obvious growth of the file sharing phenomenon) then seem to be industry willingness to pursue the actions, judicial willingness to grant subpoenas and exceedingly robust copyright legislation suited to the technological situation of its time.

3. Are these factors present in the UK?

The level of judicial willingness to grant subpoenas and the willingness of the British recording and film industries to pursue actions is exceedingly difficult to determine. Certainly, the media is full of stories on this topic and the industry does not seem reluctant to publicise their financial looses due to the file sharing phenomenon. [3] However, file-sharing has as yet not been the topic of a successful action against an individual non-commercial user. [4] (The single case so far taken was settled out of Court at the instigation of the BPI itself.) Given industry claims of loss however, and the judicial response to far it would be wise to proceed on the presumption that such cases will be taken in the future. The lack of cases thus far means that parameters of the Copyright Designs and Patents Act 1988 (hereafter the Copyright Act) as amended by the Copyright and Related Rights Regulations 2003 (hereafter the Regulations) remain untested. Thus we now need to consider if the UK legislation is sufficiently robust in light of the current technological file-sharing climate.

4. The Current Face of File Sharing Technology

File-sharing utilises a specialised form of the technology that underpins the entire function of the Internet. The Internet can be seen as an interlinked series of networks, which can communicate with each other via the use of shared operating conventions, or to put it another way, via a common communication language of the Internet called protocols. The protocols, which primarily govern the Internet, are commonly referred to as the TCP/IP protocols (Transmission Control Protocol/Internet Protocol). The FTP (File Transfer Protocol) that allows file sharing to take place is part of the TCP/IP family. Various specialist protocols also developed around individual file-sharing applications some of these are proprietary others are Open Source. However, distinctions have diminished as the trend in the sector has been for increased interoperability.

File-sharing clients essentially transmit requests for data and responses to those requests. Like all Internet communication this is done by breaking the information into small amounts of data called “packets” labelled with a “header” which gives the computer the requisite information to reassemble the complete file once all the packets have been received. Traditionally, this was a direct process with each download coming from a specific source determined at the start of session (the source can be a fixed server (the client server model) or another user (the peer2peer model). Both of these have limitations however, the client server model is limited in the amount of users the server can deal with and the peer2peer model whilst it may allow download from multiple other users at once does not usually allow sharing of only partial files and it is difficult to organise the protocols efficiently. There is also the possibility of using other protocols like Usenet to share files though the duration of availability is often limited. Recent developments (namely the Bittorrent software and its clones) have circumvented these problems and are rapidly expanding the scale and scope of file-sharing. We shall deal with them in more detail later in this section.

The capacity for file-sharing has been a feature of computer networking from its inception. However, historically sharing on a large scale was curtailed by two factors. Firstly, it was limited by the comparatively narrow bandwidth, and meagre system resources enjoyed by home computers. This meant that file transfer was like filling a large bucket drop by drop whilst usually being able to do little else but wait while the process occurred. Improvements in hardware and Internet infrastructure as well as the increasingly competitive prices charged for these commodities effectively ended that

problem by bringing more powerful computers and faster Internet connections into the domestic sphere. The second problem was more complex, as it related to the protocols themselves and revolved around the fact that most Internet Service Providers do not permit home users to have fixed IP addresses but rather assign them dynamically upon connection to the Internet. Since the functioning of the TCP/IP protocol family relies on knowing the IP address of the computer they are attempting to connect with, this made the file transfer process exceptionally difficult and cumbersome. Certainly the procedure was not attractive to the casual user. To put it another way the assignment of dynamic IP addresses made using FTP a similar exercise to telephoning a friend to ask if you may borrow a book only to discover that their number changes every time you call and now you no longer know what it is.

The obvious answer is of course to use a directory and that is essentially what the earliest file-sharing client Napster used, a centrally stored directory of continually updated IP addresses. Every time a user logged on to the system their IP address was updated in the registry. Now instead of being limited to the relatively few holders of fixed IP addresses file-sharing was easily achieved between large numbers of home computers. To return to our telephone analogy we could now connect to an exchange which allowed us to speak to hundreds possibly even thousands of friends at once and find which of them has a copy of the book and are willing to give us a copy. You can then select the "friend" with the fastest connection to download the book from.

Napster of course soon ran into legal difficulties. [5] These are well documented and not pertinent to our discussion here since we are focusing on primary infringement by individual users rather than secondary infringement by the suppliers of technology that facilitates infringement. Suffice to say that Napster's legal problems arose because of the role it's centralised list and the vital role it played in facilitating file sharing, effectively it was held that Napster was so involved with the infringements of copyright being perpetrated by it's users that it also became an infringer. The victory over Napster was however in many sense a pyrrhic one users simply migrated to other clients, which no longer keep centralised lists but incorporate that function into end users' personal computers. Similarly, RIAA's recent litigations will undoubtedly be the catalyst for more programs that incorporate anonymity features.

The most successful of the new breed of file sharing applications is Bittorent. It works by allowing multiple connections (either peer2peer or client/server) they circumvent the old problems. They increase the number of sources by allowing sharing of partial files and solve the protocol difficulties via the use of trackers and metainfo files. The connectivity works as follows:

- The web site serves up static files as normal, but it also activates the BitTorrent helper application on the clients computer
- The tracker is receiving information from all downloaders and giving them random lists of peers. This is done over HTTP or HTTPS.

Downloader's software periodically checks in with the tracker to keep it informed of the download progress, and the tracker therefore ensures that users are uploading to and downloading from each other via direct connections in the most efficient way possible. These connections use the BitTorrent peer protocol, which operates over TCP.

The connection from the origin (the complete original file) to the server is uploading but not downloading at all, since it has the entire file and downloaders take the file from it and each other keeping network traffic to a minimum. The origin is necessary to get the entire file into the network but often for popular downloads the origin can be taken down after a brief while since several downloads may have completed and been left running indefinitely or there may be sufficient downloads that the sum of the parts may be available at certain points when no one then sharing actually possesses the whole. Metainfo file and tracker responses are both sent in a simple, efficient, and extensible format called bencoding. Bencoded messages are nested dictionaries and lists which can contain strings and integers. The metafiles contain key information required for the downloading process like the url of the tracker, the file name and a plan for assembling and disassembling the file.

The beauty of the process is that because the protocols are designed to maximise efficiency the packets need not all come from the one source (indeed multiple sources are preferred to increase the speed of the process) and will take the shortest route from the source to the end destination travelling on effectively random computers on the network in between. The only limitation recognised by the packet within the network are the resource constraints placed upon it by network traffic and file portion availability. The interesting thing about these large file-sharing networks is of course that more users creates more demand but also helps sustain that level of use by providing more data sources and conduits. This is very important as the increase in digital media, which has made file-sharing such an attractive prospect to many computer users in recent years has also increased the size of the files shared. File sharing using these formats have an important core feature which is taking random amounts of the data that forms a requested file from random computers which possess that file or parts of it and transmitting it via other computers on the network governed only by the imperative to find the quickest route in current network conditions. As we shall see this feature may have important legal implications

5. The UK Legislation

Due to the time constraints imposed by the conference format this discussion will be in an abbreviated form and will highlight only the key issues in relation to civil liability for file sharing. Readers familiar with the Copyright Act will be aware that some of these points also have implications for the criminal breach provisions contained therein. The Key questions raised by the new file sharing process are easily identified by considering the "rights" laid down in the legislative provisions. When we do so we immediately see that for non-commercial purposes the rights apply to the whole work or a substantial part thereof.

This issue is common to all the rights and is the main concern of this paper. In an action for primary infringement, the claimant must prove to the usual civil standard that:

- The defendant carried out one of the infringing activities we have discussed above;
- The defendant's work was *derived* from the copyrighted work; and
- The restricted act was carried out in relation to the *work* or a *substantial part* thereof

Though recently in cases of non-literal copying the meaning of derived has been exercising our highest court, we hall presume for the purposes of this article and indeed as a general observation on file-sharing that there will not be any difficulty in establishing the first two elements it is on the nature of substantial that there is room for argument. In determining whether an infringement has taken place in relation to the whole of a work or a substantial part thereof there are two questions, which must be answered:

- What is the work for the purposes of infringement?
- Has the defendant used the whole of the claimant's work or a substantial portion thereof?

The Work for the Purposes of Infringement

It is readily apparent that the parameters of the work are of vital importance when the question before the court is if the defendant has utilized a substantial part of the protected work. The question of how to determine the parameters of the original protected work was considered by Laddie LJ in *Hyperion v Warner Music* [6] a case concerning the sampling of an eight note musical sequence from a five minutes eighteen seconds long chant. The creators copyright holders of the chant (Hyperion) argued that not only was the whole chant a protected work but that the eight notes sampled constituted a copyright work in their own right. Judge Laddie did not accept that argument that it was legitimate "to arbitrarily cut out of a large work the portion which has allegedly been copied and to call that the copyrighted work". He was reluctant to accept that a copyright work could be divided into an infinite number of subdivisions, which also constituted copyright works stating

that "if the copyright owner is entitled to redefine his copyright work as to match the size of the alleged infringement, there would never be a requirement of substantiality". This is a vital observation for the purposes of multi-source file-sharing as it suggests that the very small file portions shared at any given time may not constitute an infringement. However, Laddie's judgement also asserts that parts of a larger copyright work could be considered a copyright work in and off itself if it had a discrete, natural or non-artificial shape. Other important considerations would include: the intention of the works creator, the level of interdependence or independence of the portions of work concerned, and the commercial form in which the work is published or made available (for example one instalment of a serialisation of a novel in a magazine might well be a protected work although it forms only a tiny portion of the whole). Laddie looked at this exact issue again in *Electronic Techniques (Anglia) Limited v Critchley* [7] in that case he dealt with the earlier case of *Cate v Devon and Exeter Constitutional Newspaper [8]* which was raised in argument by counsel. He comments that

"Even if that is so, the fact is that the Cate v Devon is representative of a strand of authority in which the behaviour of the defendant has been taken into account in determining whether the taking is substantial. Furthermore Mr Prescott argued that, in the circumstances of Cate v Devon, justice demanded that the court should find a way of granting relief to the plaintiff. Even if that is so, it may be that the solution is not for the court to change what amounts to a substantial part depending on whether it approves or disapproves of the defendant but to treat plaintiff's serial output as a single work which has been published in instalments. Furthermore it some cases the court may feel justified that the defendant's separate acts of copying should be viewed as a single act, spread over time, of copying. It may be that the time has come when a senior court should look more carefully at the principles underlying Cate v Devon."

A higher level court decision upon the matter would clarify this question as it stands the cases following *Electronic Techniques* have all been in the High Court and have focused on the point that certain elements may not be copyrighted but this does not effect the protection afforded to the whole. In relation to entrepreneurial works (films, sound recordings, broadcasts, or published editions) the protection is limited to the form in which the work is fixed. In defining the parameters of the work then we must consider how to distinguish the protected parts from the non-protected parts. This is achieved by:

Removing irrelevant elements from consideration. Only elements which are relevant to the type of work in question are protected. [9] In practice with the kinds of works usually shared this is not problematic but it can be so in relation to items which may attract more than one form pf protection for example functional works like circuit diagrams where it can be difficult to distinguish between the literary and artistic elements.

Only original elements of the work are protected thus commonplace motifs or ideas or elements of the work not related to its nature as a literary or artistic etc., work.

As with copyright generally ideas are not protected only the mode of expressions. This has recently been reaffirmed in the *Designers Guild v Williams* case. [10] Although we must approach this proposition with care because *Designers Guild* suggests that whilst in some cases protection will not arise because the idea has 'no connection with the literary, dramatic, musical or artistic nature of the work'. [11] In other instances the protection of ideas did not come about because they are not original, or so common place as not to form a substantial part of the work. [12] This is helpful because it elucidates the otherwise vague concept of what an idea is. The exclusion is in fact a fairly narrow one and as we shall see has great impact on the meaning of substantial.

In truth there is a lack of clear distinction between determining the parameters of the work and what constitutes a substantial part let us now move on to discuss what the courts have considered to be factors in determining the nature of substantial itself.

Taking the Whole or Substantial Part

Traditionally, multiple criteria have been used to determine whether or not any particular taking is the taking of a substantial part:

- The importance of the taken part to the claimants work
- Substantiality as a qualitative assessment
- Importance to Audience
- Importance of Ideas
- Capable of Attracting Copyright in and of Itself
- Repeated taking

As a result of the very tiny portions of entrepreneurial works we are discussing in relation to file sharing analysis in terms of qualitative and importance criterion seems in practice unviable since it would be impossible to determine which scenes, tracks etc., were being shared in any transmission. Even the size of the data packet would not necessarily indicate that qualitatively important elements of the work have been shared. Similarly, we could not know if the data shared would be capable of being copyrightable in and of itself since the exact data shared is unknowable. Thus, our main concern is the questions of audience and repeated taking.

In relation to repeated taking there are two potential scenarios. Firstly that of repeated taking of small amounts from one copyrighted work, and secondly, small systematic takings from multiple copyrighted works for example constantly copying the headline of a daily newspaper.

In the first scenario factors for consideration could include if the takings were put to the same purpose, and the time frame. It is reasonable that multiple takings from the same work may under limited circumstances accumulate to a single substantial taking. The courts may also recognise a doctrine of "systematic taking" amounting to a breach. This was recognised by the Court of Appeal in *Newspaper Licensing Agency v Marks & Spencers Plc*. [13] However, this matter was not discussed further when this case came before the House of Lords and the comments in the Court of Appeal were *obiter* since that case in fact involved repeated taking from different works. Thus, it remains unclear what exactly a "systematic" taking is.

As to the second scenario of repeated insubstantial takings from multiple sources Newspaper Licensing in the Court of Appeal makes it clear that this cannot amounted to an infringement as Peter Gibson LJ pithily put it:

"I do not understand how in logic what is an insubstantial part of a work can be aggregated to another insubstantial part of another work become a substantial part of the combined work." *[14]*

Since these matters have not been clarified by the House of Lords it may well be that file sharing particularly of portions of multiple works may not fall foul of the substantial test as traditionally laid down.

In *Designers Guild* however, Lord Bingham (and the other Lords agreed) stated that:

"The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labour creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown." *[15]*

This may of course have been a statement of principle rather than an articulation of a test particularly as he stressed that the other Lords could not agree on the exact nature of the test that he was briefly summarizing only his own reasoning.

"But since there are some differences of approach among my noble and learned friends most expert in this field I venture to summarise, very shortly and simply, my own reasons for reaching the conclusion I do." [16]

This would appear to set a very low threshold for substantial which equate insubstantial with *de minimus* however Lord Bingham expounded further on the matter by adding that:

"For, realistically recognising that no real injury is done to the copyright owner if no more than an insignificant part of the copyright work is copied, section 16(3) of the Copyright Act 1988 provides that, to infringe, an act must be done "in relation to the work as a whole or any substantial part of it." [17]

This test may be viewed as rendering the right holders right virtually impregnable. However, it might also open the path towards those accused of infringement raising evidence as to the likelihood of those they shared with actually purchasing the item since injury would surely only arise from loss of sales. (There is a clear difference here from pirated disks which might also have an element of passing off in their dissemination and thus cause damage to the right holders trading reputation). This may in fact lead to a recognition that file sharing causes much less loss to right holders than previously thought, should it become apparent that a file shared does not always equate with a sale lost. Once again House of Lords intervention and clarification is required.

Dealing With Infringing Copies

Finally in relation to the legislative provisions There is another general question of dealing with infringing copies under section 23 which provides that:

"The copyright in a work is infringed by a person who, without the licence of the copyright owner:

- Possesses in the course of a business,
- Sells or lets for hire, or offers or exposes for sale or hire,
- In the course of a business exhibits in public or distributes, or
- Distributes otherwise than in the course of a business to such an extent as to affect prejudicially the owner of the copyright, an article which is, and which he knows or has reason to believe is, an infringing copy of the work."

This infringement of course rests on the question of whether or not file sharing constitutes a business and if not if the sharing constitutes something that will affect prejudicially the owner of the copyright.

It has been claimed by commentators [18] that computer enthusiasts have already been held to have committed a criminal offence under s. 107 (1) where their acts of swapping computer games amounted to a restricted act of distribution in the case of *R v Lewis* [19] , and the Australian cases of *Irvine v Carson* [20] and *Irvine v Hannah-Rivero* [21] . This is in fact in need of clarification when it comes to its application to file sharing. Although only the sentencing element of *R v Lewis* is available to us the substantive trial having not been reported it is plain that Mr Lewis entered a plea of guilty to a plea under subsection (d) thus he conceded that his enterprise was a business without argument or exploration of the issue. This tells us nothing about prosecutions under subsection (e) and file-sharing or about whether or not file-sharing should properly be considered a business. Similarly, the Australian cases based on Section 132 of their Copyright Act 1966 that is virtually identical to our s.107concerned file-sharing arrangements which also included a service whereby the defendants sold the programs for $3 dollar fee. Once gain the defendants was convicted on their own pleas. Interestingly in *Irvine v Hannah* the court noted that they did not consider the activity to be in the course of a business but were more concerned with the scale of the activity which they held amounted to an extent which would prejudicially affect the copyright owner. It is also worth noting that these cases concern small closed networks and bulletin board schemes where the defendants supplied the whole of the shared resource directly upon request which we have noted is rarely if ever

the case with the file sharing technologies we are discussing.

Thus, it would seem that the whole question of liability may rest upon the notion of loss or prejudicial effect. The issues however, are still very much in the balance and in need of either legislative or high level judicial intervention because at the moment the UK legislation may not be an appropriate protection against file sharing. Let us consider briefly then the possible solutions to this legal uncertainty. There are essentially three approaches to determining these uncertainties all dependent upon a different view of the purpose of intellectual property.

Leave the legislation as it is and interpret it generously to prevent the file sharing public from being stigmatized with the label of "pirates". Copyright is after all at least partially intended to secure goods for public use. This may well have negative financial implications for the media industries.

Re-legislate or interpret the current legislation in a way that views all unlicensed taking as substantial and prejudicial. (A zero tolerance policy.) This could lead to many home users being stigmatized with the "pirate" label for very minor infringements and may stifle innovation as creators might fear to build upon previous work in case it may be construed as a breach.
Focus on the notion of damage and loss and open up the case hearings to expert evidence on that question. This seems the most equitable and fair approach striking an appropriate balance between the right of the copyright holder, the public domain, and guaranteeing some freedom from prosecution for incidental or accidental copyright breaches.

6. Conclusions

By opening up the question of loss as a criterion in judging copyright breach the judiciary have made it possible to steer a middle path between zero tolerance and permissiveness if they choose to take command of the situation and map their own course. International agreements and the sheer litigation power of the industrial and user lobbies may not allow them to do this. However, it is my belief that this approach would be the effective, proportionate and dissuasive sanction envisaged in Article 8 of the Information Society Directive which our legislation is intended to enact.

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[1] A fuller account of the RIAA cases and the subsequent trend for suing the creators of file sharing utilities as secondary infringers can be found in Haubert, D., and Yavorsky, S., “Piracy: DMCA Wars” *Ent. L.R.* 2004, 15(3), 94-96
[2] Ibid.,
[3] See for example this survey of downloading related losses on the BPI website http://www.bpi.co.uk/news/stats/news_content_file_768.shtml
[4] The High Court did give a judgment in October of 2004 permitting the British Phonographic Industry to require ISPs to reveal which IP addresses belonged to which users, the actual proposed prosecutions ended in out of court settlements. See Hopkins, N., Fans to walk plank over pirating on the Internet, *The Times* 08 October 2004, http://www.comp-buyer.co.uk/buyer/news/hot-topics/64457 Hopkins, N., Piracy suits 'vindicated *The Times* 27 November 2004 which show the development of this case from BPI victory to settlement.
[5] See A&M Records Inc v Napster Inc, 114 F. Supp. 2d 896 (N.D. Cal. 2000) which was affirmed in part by A&M Records Inc v Napster Inc, 239 F. 3d 1004 (9th Cir. 2001)
[6] 19 May 1991 transcript available on LexisNexis
[7] 19 December 1996 Transcript available on LexisNexis
[8] [1889] L.R. 40 Ch. D 500
[9] See Cantor Fitzgerald International v Tradition (UK) [2000] *RPC* 95, 131
[10] Designers Guild v Williams [2001] E.C.D.R. 123
[11] See Lord Hoffmann at page 131
[12] See Lord Hoffmann at page 131 this is a well known proposition and can be seen in the case of Kenrick & Co v Lawrence & Co (1890) 25 QBD 99
[13] Newspaper Licensing Agency v Marks & Spencers Plc [2001] Ch. 257 at page 269
[14] Newspaper Licensing Agency v Marks & Spencers Plc [2001] Ch. 257 at paragraph 30
[15] See Lord Bingham in Designers Guild page 125
[16] See Lord Bingham in Designers Guild page 125

[17] See Lord Bingham in Designers Guild page 126
[18] See for example Shiell W.R., "Viral Copyright Infringement in the United States and the United Kingdom: The End of Music or Secondary Copyright Liability? Part 2" *Ent. L.R.* 2004, 15(4), p.108 and Laddie, H., Prescott, P., & Vitoria, M., *The Modern Law of Copyright and Designs* (3rd Edition) Volume 2, Butterworths, London, 2000, p.
[19] R v Lewis [1997] 1 Cr App Rep (S) 208
[20] Irvine v Carson (1991) 22 I.P.R. 107
[21] Irvine v Hannah-Rivero (1991) 23 I.P.R. 295