

Copyright infringement: What is your website linking to?

*Cooper v Universal Music Australia Pty Ltd*¹

Introduction

The recent Federal Court ruling in *Cooper v Universal Music Australia Pty Ltd* is important for anyone placing links to copyright protected material on websites and blogs, as well as for website owners and ISPs.

The Full Federal Court upheld an earlier decision that Stephen Cooper, the operator of mp3s4free.net, as well as the ISP that hosted the website, were guilty of copyright infringement because they provided a search engine through which a user could illegally download MP3 files. Although the website itself did not contain any music files, the Court held that the act of making links available can constitute *authorisation* infringement.

The law

The Copyright Act sets out two kinds of copyright infringements in relation to sound recordings:

- Direct infringement if a person who is not the owner of the copyright and without licence from the copyright owner *does* an act comprised in the copyright.
- Indirect infringement if the person *authorises* the doing of an act comprised in the copyright without license from the copyright owner.

In determining whether a person has authorised an infringing act, a court will consider:

- A person's power to prevent the copyright infringement.
- The existence of any relationship with the person carrying out the infringing act.
- Whether the person has taken any reasonable steps to prevent or avoid the infringing act.

However, a person doesn't authorise a copyright infringement just because someone else uses the facilities provided by that person to achieve the making of a copy. The court will look to other factors and the general behaviour of the alleged infringer in deciding whether authorisation infringement has occurred.

These principles from the Copyright Act were illustrated in *Cooper's* case.

Cooper v Universal Music Australia Pty Ltd

In *Cooper*, the website concerned provided internet users ready access to music files and numerous popular sound recordings via hyperlinks. Music files were not stored on the website, however, when an internet user clicked on a particular hyperlink on the website, the music file was transmitted directly to the user's computer from a remote server.

“ Even though the website itself did not contain any music files, the Court held that the act of making links available can constitute ... infringement. ”



¹ [2006] FCAFC 187.

In determining whether Mr Cooper indirectly infringed copyright by authorising the downloading of mp3s, the court examined the knowledge and degree of control possessed by him, and found the following as general principles:

- If someone does not have the knowledge or reason to suspect infringing acts, inactivity or indifference to prevent potential copyright infringements is insufficient to amount to authorisation. Such is the case even if that person has control over the content or the operation of the website.
- However, inactivity or indifference, coupled with other factors, such as knowledge or profiting from the infringing act may support an inference of authorisation. The court will focus on the behaviour of the alleged offender when making its determination.

The court also noted that Mr Cooper had the power to prevent the infringing acts as he was responsible for creating and maintaining the website. Most importantly, Mr Cooper had deliberately designed the website to facilitate the downloading of sound recordings in order to gain commercial advantage from advertising placed on the website.

Even though the website displayed disclaimers, the judges considered them 'merely cosmetic' and commented: "... those disclaimers misstated Australian copyright law in a material way; the inclusion of them on the website did not constitute a reasonable step to prevent or avoid the infringement of copyright."

Furthermore, the Federal Court found the website's ISP to have also authorised infringement. One of the judges commented that "rather than withdrawing hosting of Mr Cooper's website, or otherwise placing pressure on Mr Cooper to stop his website being used for the predominant purpose of copyright infringement, the ISP sought to achieve a commercial advantage from advertising on Mr Cooper's website."

As a result, the court deemed the conduct of Mr Cooper and the ISP to be more than the 'mere' provision of internet facilities and refused to grant them protection under the Copyright Act.

What are the lessons to be learnt?

Direct linking to sites that allow immediate downloading of copyright infringing material may make you liable for authorisation infringement. This is especially so if you are deriving a commercial advantage from the links. Disclaimers on websites need to clearly and accurately state the law. A 'cosmetic' presence is insufficient to defend liability. Further, ISPs that become aware of potential copyright infringing websites need to actively address the issue and ensure steps have been taken to rectify the problem. Turning a blind eye is not enough.

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