

Online Piracy Threatens the Value of Sports Broadcasting Rights

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Introduction

Over the last few years, sports rights holders have realised that there is a new and very real threat to the value of their lucrative broadcasting rights: Online piracy. By this, it is meant the unlawful live streaming of sports events over the Internet. The music industry began to face up to the fundamental challenge posed by the online piracy phenomenon several years ago. The sports industry has only just started. The technology enabling online piracy and the practice of viewing illegal live streaming of sports content constitutes a threat not only to the value of new media rights but also to the value of live television, broadband streaming and mobile rights.

The proliferation of new broadcast technologies has enabled sports rights holders to generate substantial new revenue streams. However, while such technologies have been embraced in respect of their lucrative returns, if the sports industry is to reap the financial benefits, let alone protect the value of its traditional broadcast revenue streams, it must quickly learn the lessons of the music industry's fight against online illegal content distribution.

The technology explained

Peer-to-peer (P2P) file sharing programmes offer anyone with an Internet connection a potentially endless supply of sports and other media entertainment. P2P networking is an application that runs on a personal computer and shares files with other users across the Internet. P2P networks connect individual computers together, enabling them to share files instead of having to go through a central server. In a P2P network, a television signal can be re-transmitted using ordinary computers to stream the live feed. This TV signal is often taken live off television systems, commonly in Asia.

BitTorrent is a particular P2P online distribution technology that is now being widely used to facilitate the illegal dissemination of audio-visual sports and media content by spreading the bandwidth load across many computers. Files are shared amongst 'swarms' of users. When a user joins a swarm, they download fragments of the file from other users in the swarm and likewise make the downloaded fragments available for upload to others who have not yet received them. The swarm therefore maximises the bandwidth available to its members and the efficiency of file distribution increases as the number of users in the swarm grows.

The technology enables the live, illegal streaming of high bandwidth sports content to a large number of recipients. The implications for, and action that should be taken by, sports rights holders are discussed below. First, however, it is instructive to look at the experiences of the music industry as regards its fight against online piracy.

The music industry's battle against file sharing

The music industry's struggle with online illegal distribution of copyright material is well documented. Upon initially becoming aware of the problem, the industry's response was characterised by inactivity. It stood and stared aghast as pirates, many of whom were technology-wise kids, essentially stole digital copies of record companies' prized assets: their recordings. The industry finally realised that it had to respond, which it did, in both a positive and negative way.

The negative response

This involved formulating effective monitoring and policing strategies, backed up by legal remedies, to identify the perpetrators of such unlawful activity and take effective action against them. Such action took the form of high profile proceedings brought against various online illegal distribution providers. The 2002 success in the litigation brought against Napster's music file-sharing service was the start of the music industry's fight back. There followed two further very high profile cases which are seen by many as confirming the music industry's resolve to counter illegal practices.

i) Grokster

In *MGM v Grokster*¹, the US Supreme Court held that P2P software services may be liable for inducing copyright infringement. Unlike Napster, Grokster did not have a centralised server that indexed files and assisted in their transfer. Instead, the protagonists provided software that allowed users' computers to search other users' computers for files. Nonetheless the Court ruled that distributing software with 'the object of promoting its use to infringe copyright' through illegal file-transfers constituted an 'inducement' and accordingly the service was liable for contributory infringement.

Commentators have expressed concern over the practical effect of the ruling, in that it may simply be instructive to P2P networks as regards how to structure their operations in order to prevent legal redress against them. Furthermore, relocation outside of the US Courts' jurisdiction could mean that the decision in *Grokster* has little preventative effect. Nonetheless, the case proved that successful proceedings could be brought against file sharing services which compromise the value of a rights holder's portfolio.

ii) KaZaA

The respondents in the Australian KaZaA litigation² were found to have 'authorised' copyright infringement through the KaZaA file sharing system, notwithstanding the fact that the website contained a warning against the sharing of copyright files and an end user licence agreement

¹ *Metro-Goldwyn-Mayer Studios Inc. et al v Grokster Ltd et al*, US Supreme Court, 27 June 2005

² *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, 5 September 2005

pursuant to which users agreed not to infringe copyright. The failure of the respondents to implement technical measures to curtail the sharing of copyright files, and the subtle way in which the KaZaA website encouraged P2P file sharing and criticised record companies' opposition to the practice, was key to the decision.

The case is particularly relevant to the UK because of the similarities between section 101 of the Australian Copyright Act and section 16(2) of the UK Copyright, Designs and Patents Act 1988 (which states that copyright is infringed by a person who does a restricted act without the copyright owner's consent, or authorises another to do so). If a similar case arose in the UK, the key issues of control, authorisation and preventative steps taken could well be central to the proceedings.

The British Phonographic Industry (BPI) has also taken legal action against large numbers of internet music file-sharers, as has the International Federation for the Phonograph Industry (IFPI). A large number of cases have been brought in Japan, a jurisdiction which has been hit particularly hard by the file-sharing phenomenon. The consistency of approach and lobbying of the music industry umbrella organisations has played an important role in shaping the music industry's response.

The successful legal action taken against first Grokster, then KaZaA and file-sharers across the world demonstrated that the litigation process, though slow and expensive, can be used to protect rights holders from online piracy, particularly against the major providers of software and network interoperability that facilitate rights infringement.

The positive response

In addition to cracking down on unlawful activities with the help of the Courts, rights owners realised the need to establish new business models that embrace and, indeed, exploit the various new online distribution techniques. Moreover, it is widely accepted that unless such sales methods are affordable and readily available, they will not constitute an attractive or viable alternative to illegal services. iTunes and (now) Napster are examples of companies that have adjusted their business models to provide customers with a realistic and appealing legal alternative to unauthorised file-sharing. Indeed, downloads of music now account for a very large proportion of the turnover of record companies.

The sports industry awakening

Businesses involved in the sports industry have now realised that similar problems to those faced by the music industry at the turn of the millennium are now posing a serious threat to the traditional sports broadcasting model. During the Saturday afternoon blackout period, when English Premier League matches are not permitted to be broadcast live in order to protect attendances at stadia, an estimated 50,000 people each week log on to websites streaming unauthorised coverage of games. Indeed, the FA Premier League announced recently that it was tracking a number of websites offering illegal streaming of live football and has succeeded in having a number of sites shut down.

It is not just football that is being affected. Live coverage of premium sports events around the world are now being watched free of charge on the Internet. Whilst the proliferation in the number of people watching pirate broadcasts has not yet reached a level which would have a materially detrimental effect on the value of official broadcast rights, the future worth of such rights is without doubt in jeopardy. Unless the industry reacts effectively to the rapid growth in the use of P2P file-

sharing in the viewing of live sports events (using BitTorrent and other software), rights holders could see themselves following in the footsteps of the record companies, losing huge sums of money.

A key difference between sport and music/film/television is that the real value is in the live broadcast of the sports event. If sports broadcasters cannot be guaranteed the right to broadcast an event live and exclusively, the value of broadcasting rights will fall. Alternatively, if there are considerable time zone differences, the value to a broadcaster of exclusive delayed broadcast rights could be compromised if the event is made available live (i.e. before the official broadcaster televises the event) through unauthorised streaming techniques.

Ultimately, this will have a negative impact on sport itself: If fewer funds are received by rights holders from the sale of the broadcasting rights, then (especially if the rights holders are governing bodies) fewer funds will be available to invest back into sport. It can be argued that the impact of this is potentially more damaging than the losses sustained by the record industry (where although artists undoubtedly lost royalties, it was the record companies' profits which were hit the hardest). More importantly however, whereas the record companies initial inactivity in the face of unprecedented technological development can be understood, or at least excused, the sports industry would have no such defence, having already been alerted to the danger by the music and film industries' experiences.

Looking forward

If the sports industry is going to avoid the losses in revenue sustained by the major players in the music industry, it needs to employ three strategies:

1. **The technology strategy:** The industry needs to employ first class monitoring of the media, policing of potentially infringing services and 'notice and takedown' procedures to remove infringing sites from ISPs;
2. **The legal strategy:** Sports rights holders should attempt to mirror the success of the music industry in the Courts, through the careful selection of high profile, targeted and appropriate litigation. For example, all users (who can be tracked down) in a BitTorrent swarm are potential targets for copyright infringement proceedings if content is being distributed within the swarm without the consent of the rights holder. Wide-spread and intelligent PR serves an important preventative role in the wake of successful litigation; and
3. **The commercial strategy:** Business models should be adapted to enable official content to be available for online dissemination at reasonable prices to create an attractive and viable alternative to pirate services. For example, the BBC recently trialled a new service which enables users to watch sports action through the legal use of P2P streaming technology. This will necessarily involve a 'windows' based approach to the structuring of media rights packages.

Conclusion

It is imperative that the sports industry provides a concerted, well-planned and industry-wide response to the problem of illegal streaming of live sports events. The music business, it could be argued, has started to get on top of the digital download problem and sport's major players must take a leaf out of their music counterparts' book.

However, it is questionable whether the relative success of the music industry would have been achieved without the significant lobbying and legal action brought by the industry's various umbrella organisations (notably the RIAA, BPI and IFPI). Umbrella organisations with equivalent mandates do not exist in the sports world and this is a potential problem. The establishment of an international organisation to support rights holders, which is charged with the task of protecting rights holders revenue streams against file-sharing piracy would, it is submitted, be welcome. Both lobbying and leadership are undoubtedly required. But such an umbrella organisation (if, indeed, it were viable) would take time to set-up and the threat posed by illegal online broadcasting is very real and imminent. High profile events such as the 2006 FIFA World Cup will undoubtedly be targeted by pirate services.

Unless immediate and concerted steps are taken by the sports industry, the value of sports broadcasting rights will be threatened in the face of substantial streaming of illegal content online. It is vital that the opportunities presented by the proliferation in new media technologies are not overshadowed by a failure of sports businesses to adapt to a new era in broadcasting and the associated problems it brings. The sports industry has the advantage of having witnessed the music industry's well-documented fight against illegal downloading. The response to this new threat to sports broadcasting rights must be swift, pragmatic and shrewd.

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