Acts of futility (but what else)? The vexed question of the power of courts to shut down *offending* web sites

With news of international celebrities such as Paris Hilton, Keith Urban and the Brazilian model Daniela Cicarelli to name a few, seeking to have websites shut down by the courts; the vexed question of the power of Australian courts to shut down or in some way control offensive websites continues to play out. One judge has commented that such actions by Australian parties maybe seen as an "act of futility" given the cross-border nature of the world wide web ("WWW') that transcends national boundaries and legal jurisdictions. Apart from legislation which strives to deal with such areas as spam, copyright, trade marks and privacy – it appears that while judicial attempts to shut down offending web sites have had mixed results to date; in the absence of any other sufficient remedies the question may be asked: what else can be done?

Two recent international cases have highlighted the issues facing the law in overseas jurisdictions relation to the power of courts to shut down websites. The first case has involved a famous Brazilian model by the name of Daniela Cicarelli. On 17 September 2006 a video shot by paparazzo, Miguel Temprano, was broadcast on a television show called *Dolce Vita* featuring the famous model on a beach in Spain petting with her boyfriend, Renato Malzoni and later having sex with him in the water.

The following day an edited version of the paparazzi scenes from the show was uploaded as a video clip to YouTube but deleted that same day. Even after the deletion by YouTube the video was still available on various other internet sites and, despite best efforts by YouTube to withdraw the clip, it continued to appear under varying file names and links to video on other sites turning up all over the internet, including news groups and other computer peer networks.

On 27 September 2006 Malzoni and Cicarelli were granted an injunction by the Sao Paulo State Supreme Court against YouTube. Cicarelli sued again in December against YouTube with the consequence being that in early January 2007 the Supreme Court ordered that the site define a way to permanently block the video from being uploaded on its servers, to shut down their site until such a block could be realised, or to face an order imposed upon the Brazilian internet service providers to block access to YouTube. As a result, Brazil Telecom, Telephonica, and other ISPs implemented such a block with the result being that all YouTube ISPs were inaccessible in Brazil. A few days later the decision was reversed, following a major public outcry and backlash which included a retaliatory response whereby Brazilian YouTube users created a website to boycott Cicarelli and refused to support MTV and any advertised product unless she left the company.

This case from Brazil has highlighted a situation where a celebrity has arguably had her privacy invaded by the paparazzi and the resultant effect of having a video posted to YouTube and the viral marketing associated with such a posting. The irony of this situation was that the action taken by Cicarelli and her boyfriend in blocking YouTube may have really made no

difference and may have in fact resulted in more attention being generated in relation to the clip.

Despite the injunction and the later lifting of it, access to the original footage remains unabated; Google Video still readily permits this type of content and at the time of writing still carried both the Cicarelli footage and the controversial Saddam execution video. Regardless of the major video sites being forced to pull the clip, the injunction taken out by Cicarelli would not have prevented smaller video sites and thousands of independent blogs from posting it. It is becoming readily apparent as seen from the Cicarelli case that it is a highly difficult proposition in our modern digital age to suppress a video once it has appeared on-line via the internet.

Another case which has caught the international focus in respect of the general question of offending websites involves Paris Hilton. An unauthorised website called www.parisexposed.com has featured footage of the heiress' private life on full display. Following an application by Paris Hilton's lawyers the offending website was subject to a temporary injunction granted by a Federal Judge against the website peddling personal pictures, videos, diaries and other items that the heiress, Paris Hilton, once kept at a storage facility. Hilton has sued the website www.parisexposed.com accusing it of exploiting her private personal belongings for commercial gain and for breach of copyright. According to Hilton's lawyer, Mr Howard Weitzman, the Judge ordered the temporary shut down "because the site violated my client's right to privacy and was a copyright infringement".

Unlike the Cicarelli case, the action taken by Ms Hilton appears to be more concerned with the misappropriation of the heiress' publicity rights and privacy, which has a financial aspect given that visitors to the parisexposed site are required to pay an access fee.

Back here in Australia the question of Australian Courts shutting down websites has recently been considered in two leading cases. The first involved the *Australian Competition & Consumer Commission (ACCC) -v- Richard Chen* in the Federal Court in August 2003. In this case an application was made by the ACCC under the Trade Practices Act for a declaration and an injunction to restrain the Respondent's conduct in relation to a website entitled www.sydneyopera.org as well as two other offending websites, www.whitestar.com and www.worldsboxoffice.com.

According to the ACCC the Respondent had falsely represented that the offending sites were affiliated with the Sydney Opera House Trust and that the sale of tickets to events at the Opera House through the sites was approved or some way permitted by the Trust. The nature of this case highlighted some of the major problems and issues in relation to trying to stop offending websites, particularly when they are located off-shore. The ACCC, despite extensive investigations, never succeeding in actually serving the Respondent personally with any documents or, for that matter, ascertaining with any degree of confidence his whereabouts at any particular time.

In a Judgment handed down by Sackville J of the Federal Court there was a discussion in relation to how the internet operates. This discussion also included whether or not it would be futile on behalf of the Federal Court of Australia to grant a declaration and an injunction in relation to a site which was hosted in the United States and the identity of the individual who owned the site remained both a mystery and uncontactable.

The Judge even went so far to state that, by his own admission, an order prohibiting conduct in a foreign country could be seen as "an act of futility".

> "This might suggest that an order requiring or prohibiting conduct in a foreign country can be seen as an act of futility" (*ACCC v Chen* [2003] FCA 897 at 57)

While granting both the declaration and the injunction, the Judge admitted that while domestic Courts can, to a limited extent, adapt some of their procedures and remedies to meet the challenges posed by cross border transactions in the internet age, he indicated that "an effective response required international co-operation of a high order". Having granted the orders to the ACCC in relation to both the declaration and injunction, it is interesting to note that the website www.sydneyopera.org is still up and running.

A recent case involving the Australian Court in relation to offending websites involved the case of Universal Music against a number of Defendants, including one former policeman by the name of Steven Cooper, who ran a defunct MP3 site where he legally allowed to post links to mostly copyright MP3 files hosted on other servers. While Cooper did not appear to have posted any copyright music on his website, he did have links to enable people to download music from other sites which did infringe copyright. Upholding a single Judge's ruling from 2005, the Full Court of the Federal Court of Australia dismissed the appeal and held in favour of Universal Music Australia and the other major labels that brought the suit in 2004. The Court ruled that despite Cooper's argument that he had no power to prevent illegal copying because users could automatically add links to the site without his control, the Court found that Cooper's deliberate choice to set up the site in such a way that he could not restrict access to copyright files, when he could have designed it otherwise, renders him guilty of authorising copyright infringement.

This case was more a matter of dealing with copyright rather than the issue of shutting down an offensive website on the basis of the content *per se* but again shows the reach of the law in Australia and the recent activity by the music industry to ensure that these types of sites have been shut down.

At the time of writing notwithstanding the best efforts of the ACCC and the Federal Court of Australia, the website www.sydneyopera.org remains fully operational, the fate of Paris Hilton's unauthorised website remains to be determined and Ms Cicarelli's video continues to do the rounds of selected sites and chat rooms. While the Australian courts have clearly had a number of successes dealing with cases where there has been an infringement under related statutory areas such as copyright it remains to be seen how the courts and the legislature continue to meet the challenges of the 'offending' website -

particularly in light of the need for an international jurisdiction to effectively deal with implementing any sanctions handed down by the courts of a sovereign state.

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