



Closing the net on music piracy

Background

Music theft on the internet is huge (estimated to cost the industry billions of dollars each year). Such piracy drains profit to the extent that the very viability of the industry is under threat. If unchecked this economic cancer could spread to other industries.

Jason Beckett (Senior Manager, Computer Forensics) is interviewed about his recent involvement in an investigation that has led to the World's first criminal charges for music piracy. Jason's background is in High Tech crime with the NSW Police.

Q: What parties did you work with on this investigation?

Beckett: *We worked with investigators from the music industry, their lawyers and the Australian Federal Police. This partnership was a first in that the AFP were involved because we were pursuing criminal charges whereas – up until now only civil remedies have been sought. We were moving into new territory.*

Q: What were the challenging technical aspects of the investigation?

Beckett: *Well, from a technological point of view, the sheer volume of the data presented a huge challenge.*

Q: Roughly what volumes of data were involved?

Beckett: *Some of the websites we investigated had many hundreds of megabytes – sometimes gigabytes – of individual music files. If we were looking at CD size packs of information, there could be many thousands of CDs on some of these sites. Multiply that by the number of visitors to those sites and you can imagine the magnitude of the problem. Millions of CDs I guess.*

Q: So was it solely a matter of coping with that volume of data?

Beckett: *There were other important new issues to be addressed too. For example, data owned by private individuals limited our access as did the fact that Internet Service Providers often only retain a limited amount of usage information on individual users. That meant developing sound sampling strategies.*

And then we had to cope with the reality that the behaviour of suspects changes on a daily, if not hourly, basis. We had to develop downloading techniques to capture this 'data in motion' in a manner suitable for the Courts.

Q: There's a belief that most music piracy offenders are teenagers. Is this true?

Beckett: *A lot of them are teenagers, but the offender profile is becoming much broader than that. Increasingly, pirates are most likely to be in their 20s, 30s or 40s.*

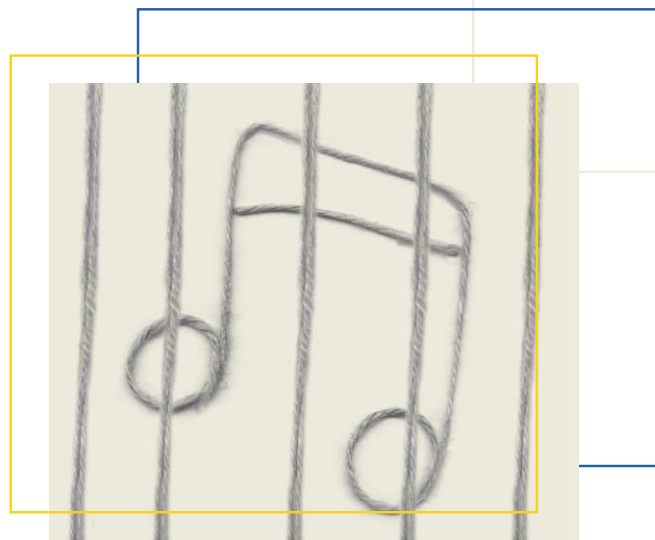
This points toward a growth of infringement that is increasing the stakes dramatically. It's a major concern. The practice is spreading throughout the population.

Q: What are some of the measures that the software and music industries are using to stop piracy?

Beckett: *There is a move to incorporate Digital Rights Management ('DRM') features into copyrighted material such as music or software. DRM is designed to stop CDs or software being copied, including for personal backup use.*

Also imminent now is a move by software manufacturers such as Microsoft to include DRM in their operating systems. This means that the purchaser of a downloaded song will only be able to play this on his own computer. DRM may also allow the operating system manufacturer to remotely administer your computer to check compliance with copyright agreements, a prospect which will no doubt cause concern amongst many potential infringers. That would definitely be a positive result.

For further information about how music piracy is being combated, Jason recommends you visit the International Federation of the Phonographic Industry website at <http://www.ifpi.org>



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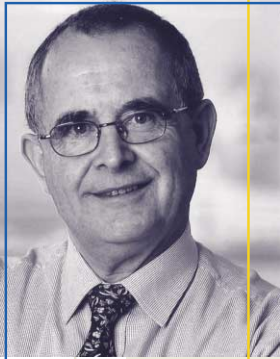
“Speed and success in forensic work are greatly enhanced if you know your market like you know the back of your hand. No two geographic jurisdictions are the same – local knowledge is the key.”

Executive Director Profile: John Lees, Hong Kong

Expert witness, investigating accountant and forensic specialist for corporate clients, the Financial Secretary of Hong Kong and The Department of Justice: 25 years of experience in forensic accounting, litigation support and corporate recovery – 15 years in Hong Kong.

CPA Hong Kong & Australia; CA, NZ; Registered Liquidator, Aust; Member Academy of Experts; Association of Certified Fraud Examiners; Fellow, Hong Kong Society of Accountants; Chairman, HKSA Insolvency Practitioners Committee; Immediate Past President INSOL International.

PS: John will be giving a paper ‘Forensic Accounting: Challenges in Asia’ at the CPA Australia Regional Conference in Hong Kong in November 2003. If you’d like a copy mailed to you, please call Kym Kam on +(852) 2820 5612 or email kkam@fh.com.hk



There’s more to being an expert witness in court than simply being an expert

The Issue: The overriding duty of any expert witness is to the Court, not their client. An expert is not to be an advocate for any party to litigation. Lachlan Johns explains how the breach of this requirement can lead to big trouble.

The Cases: The expert investment banker in this case (*Commonwealth Development Bank of Australia Pty Ltd & Anor v Cassegrain [2002] NSWSC 980*) was unaware of the Expert Witness Code of Conduct applying to him under NSW Supreme Court Rules, during the preparation of his report and opinions. He had only been shown the code on the day he was to give evidence in Court. Despite the expert agreeing in Court to now abide by the code, it was sought that his report not be submitted into evidence.

In considering the submission, Einstein J contrasted this case with *Barak Pty Ltd v WTH Pty Ltd trading as Avis Australia [2002] NSWSC 649*, noting a key difference being

that in the Barak case the expert was aware of (and had read) the requirements of the Code at the time of preparing his report and opinions, but had failed to acknowledge so in his report.

Einstein J identified the considerable significance attaching to ‘enforcing strict compliance in the expert witness provisions now found in Part 36 Rule 13C’. In reference to the Commonwealth Development Bank case he went on to identify:

“the fact that the expert not having committed to the Code of Conduct at or as soon as practicable after his or her engagement in circumstances such as the present, will have committed to a particular form of opinion” and identified that in this instance the form (and content) of the expert’s report may have been quite different had he been aware of the requirements under the Code at the time of preparing his report.

The view is that the Court should ‘strain against’ allowing experts to adopt expert witness rules after the event in the interest of the proper administration of justice and in terms of fundamental fairness.

Accordingly, the application for an ‘otherwise order’ to allow the expert’s opinions into evidence was denied.

Implication: It pays to make sure any expert witness you engage fully appreciates – and follows – the principles set out in the Court Code of Conduct for expert witnesses... otherwise the best of cases can be severely prejudiced.

Lachlan Johns (Forensic Accounting Manager, Adelaide) has broad experience in the assessment of loss, financial investigations, valuations and fraud investigations. He is a member of the ICAA’s forensic accounting special interest group and lectured for the Securities Institute of Australia on the subject of applied valuation.

ASIC casts its insolvent trading net to catch all fish, not just the big ones **George Kompos* reports:**

The recent decision of Mandie J in *ASIC v Plymin, Elliot & Harrison [2003] VSC 123* involving the formerly listed Water Wheel Holdings Limited, sends a clear message to large company directors that ASIC is serious and successful in prosecuting directors for insolvent trading.

But our recent experience as an expert witness suggests directors of small private companies should also be aware that their actions are under scrutiny from the regulator.

A case in point is the matter of *The Queen v Peter Negoe* in which we tendered an expert witness statement on the issue of solvency. The matter proceeded as a criminal prosecution in the Victorian County Court, Negoe pleading guilty to 5 counts of allowing his company to trade whilst insolvent, incurring debts of \$480,000 which remained unpaid on the liquidation of the home building company which he operated.

In brief, the facts of the case were:

- Negoe was a builder by trade who had won many awards for building excellence
- He was reliant on his wife and her father to administer the business affairs of the company
- On the break-up of his marriage, Negoe was required to administer the business affairs of the company
- As the company’s financial performance deteriorated, an attempt was made to expand its sales, depleting the company’s working capital
- As the financial stress on the company increased, Negoe was not always honest in dealings with his trade creditors

Negoe received a suspended sentence of 2 years 9 months and was placed on a good behaviour bond for 3 years. Interestingly, he was remanded in custody for 2 weeks whilst the Court considered an appropriate sentence. Negoe was also prohibited from taking part in the management of companies for five years.

Directors should be aware that ASIC is currently running a pilot program targeting insolvent trading. Companies are identified from a range of sources including complaints received from the general public as well as other referrals internally at ASIC.

Alert! Don’t assume that ASIC only targets major corporations – it’s casting its net wide.

**George Kompos is a Senior Manger of the Forensic Accounting Practice in Melbourne. He has participated in many financial investigations for commercial and government clients including the preparation of expert witness statements. George has also provided valuable financial analysis to clients in many litigated matters, including some of the largest proceedings brought before the Supreme Court of Victoria (Pyramid Building Society Group).*

About forensics@ferriers...

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