Kluwer Copyright Blog

The Extradition of Megaupload's People and International Obligations for Criminal Liability for Copyright Infringement

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In late 2020, the Supreme Court of New Zealand gave judgment on copyright aspects of the dispute on whether Kim Dotcom and other's involved in the Megagroup businesses should be extradited from New Zealand to the United States because of criminal copyright infringement. This episode, in a case which has involved multiple legal contests, was focused on whether the copyright causes of action could amount to criminal liability under section 131 of New Zealand's Copyright Act 1994. If any of the defendants are to be extradited to the United States, there must be "double-criminality", meaning the possibility of criminal offences in both jurisdictions (at [148]. Six out of the thirteen criminal charges were relevant to copyright and included infringement by "distributing a copyright work being prepared for commercial distribution on a computer network", "infringement by electronic means" and "aiding and abetting criminal copyright infringement" (at [230]).

This was the first time that the criminal provisions in New Zealand's Copyright Act

1994 were tested in such detail before New Zealand's highest court. The conclusions on the interpretation of the copyright provisions are final; however, for extradition to take place, other matters must also be dealt with. The Court's findings that the activities of Kim Dotcom and his associates could be criminal therefore pave the way for extradition.

There has not yet been a full trial on the copyright merits of the case because this is predominantly an extradition case, so that if the extradition goes ahead the full trial will take place in the United States under US law. The findings of the NZ Supreme Court about copyright are, therefore, not simply a matter of what law is applicable on the facts, but address copyright policy more broadly.

New Zealand's Copyright Act is based on the United Kingdom's copyright statute, with some important differences, including the absence of a specific criminalisation of the communication right. The Supreme Court did not attach any importance to that difference, as it interpreted the criminal provisions of the NZ Act as technologically neutral (at [309]-[310]). Many of the issues in the case turned on whether words in section 131 of the statute which have a pre-digital world flavour, including "object" and "possession", apply to digital files of the online world. The overall conclusion of the Court was that the acts at issue concerned "digital files" and were caught by the criminal provisions as they involved "an object that is, and that the person knows is, an infringing copy of a copyright work". The Court interpreted the Copyright Act in a way that reflected Parliament's intention that the Act be interpreted as technology neutral. Interestingly, the decision also comes part way through a copyright law reform process, which is likely to include many changes aimed at reflecting the nature of digital copyright issues. That reform process has been delayed for other reasons.

The judgment raises issues about international obligations for countries to provide criminal remedies and deterrents, and how these matters play out under domestic laws, which differ around the globe. Of particular note is the Court's discussion of the international framework, including its interpretation of the TRIPS Agreement and the WIPO Copyright Treaty (WCT). The judgment reveals a concern that New Zealand meet its obligation to provide remedies for "willful copyright infringement", stating that "it is inconceivable that it would be intended to put New Zealand in breach of its obligations under the TRIPS Agreement" (at [313]).

The Supreme Court's conclusion that New Zealand would be in violation of TRIPS was not necessary. It was a step too far, not only because that Court does not have jurisdiction to find such a violation – that belongs to the World Trade Organization (WTO) – but also because the Court may have been wrong. Put differently, adhering to the domestic law principle that legislation should be interpreted in accordance with international obligations is important (that was the Court's primary goal), but to do so does not require finding a violation of the TRIPS Agreement.

The relevant TRIPS obligation is a minimum standard and is thin on detail. Article 61 of TRIPS says, "Members shall provide for criminal procedures and penalties to be applied at least in cases of … copyright piracy on a commercial scale." WTO members have flexibility in how they implement this, which was underscored in the WTO dispute settlement process when the United States challenged China's approaches to

criminal enforcement. Many subsequent trade agreement negotiations, whether completed or not, including the Anti-Counterfeiting Trade Agreement (ACTA) (which never came into effect) and the Trans-Pacific Partnership Agreement (TTP) – replaced by the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) after the United States withdrew from the TPP – have attempted to both curtail this flexibility and to add other obligations. These trade agreements have also aimed to clarify that criminal enforcement applies to all copyright exclusive rights under the law of the relevant country, suggesting that this clarification is needed.

The alleged criminal activities of the Megagroup, broadly, are based on making or dealing with "infringing copies" that are "digital files" (at [288] and [294]-[296]). The Court did not consider that the interpretation of what amounted to a digital file was affected by the introduction of NZ's WCT compliant communication right (at [302]). There is some discussion in the judgment about the differences between communication and distribution and the "umbrella solution" of the WCT. However, the Court concluded that the WCT does not affect the TRIPS obligation to provide criminal penalties (at [312]). The Court's approach to treaty interpretation is an unfortunate simplification of an overlapping treaty problem.

The full complement of exclusive rights and enforcement obligations are not found in a single treaty. The TRIPS Agreement does not include the communication right except in the limited forms of communication that are part of the Berne Convention, which is incorporated into TRIPS. The WCT does not have express criminal enforcement obligations, as the Supreme Court acknowledged (at [312]). The Supreme Court did not analyse whether the TRIPS obligation to have criminal remedies in cases of commercial piracy applies not only to the TRIPS rights, but also to those in the WCT. The Court assumed that the TRIPS obligation extends to the WCT. This appears to be because the Court accepted the US submission that to not interpret the criminal provisions as applying to "digital infringing copies… would put New Zealand in breach of its TRIPS obligations" (at [280]). It is easy to accept that is the case where the digital files violate a TRIPS right, but the path of treaty analysis is different for violating a right that is found and detailed outside of TRIPS, such as in the WCT. There is a strong argument that the TRIPS remedies' obligations do not extend to post-TRIPS treaty obligations precisely because they were not negotiated for and agreed to in TRIPS. This was not the argument that Kim Dotcom et al made – rather they tried to limit the interpretation of the NZ legislation on the basis that the WCT provided a cap on the application of criminal liability (at [274]-[279]). As a matter of treaty interpretation that argument is wrong, most obviously because, as stated by Article 1.1 of TRIPS, "more extensive protection" at national law is an option.

Many national laws will not make a distinction between the Berne and WCT rights – but importantly they could do so and still comply with international obligations, particularly the TRIPS Agreement. According to section 12 of the Copyright Act 1994, New Zealand's definition of infringing copies encompasses all modes of copyright infringement and the Megagroup defendants were unsuccessful in arguing that infringing digital files were not subject to criminal liability.

The approach of the Supreme Court, however, glosses over the problem of treaty dates and the fact that TRIPS precedes the WCT. The broadness of the TRIPS wording

may appear to capture any “copyright piracy on a commercial scale” no matter how it arises, but the recognised methods of treaty interpretation under the Vienna Convention would require consideration of context. An important aspect of that context is the obligations in the treaty at issue (i.e. the TRIPS obligations not the WCT). In addition to the WCT post-dating TRIPS, reading TRIPS as the Court did requires interpreting criminal liability with an unchecked dynamic approach.

However, the interpretation of TRIPS (and Berne in TRIPS) to include subsequent treaties is a debatable matter. It cannot be shown that the WCT binds all TRIPS members, as to do so wrongly suggests such members need not choose to sign up to the WCT, but are rather members by stealth. Some suggest that the WCT expands on Berne and then is somehow part of TRIPS via the incorporation of Berne in TRIPS. This is somewhat flawed, as the WCT is more than a clarification of Berne – rather, even though it is a Berne Protocol, it is a separate agreement. It is also debatable if TRIPS should be interpreted to include all WCT rights as a “subsequent agreement” or even “subsequent practice” under Article 31(2) of the Vienna Convention. Certainly, when it comes to TRIPS’ criminal enforcement provisions, the WCT cannot be interpreted that way, as it has no criminal enforcement obligations. If it is correct that TRIPS’ enforcement obligations cover the broad communication right (and others) then that would substantially lessen the need for the WCT right(s). And if the criminal remedies requirements under TRIPS scooped up all forms of evolving commercial piracy, no matter what substantive obligation was involved, then the need for subsequent trade negotiations of remedies would be curtailed. The negotiators of those agreements clearly think they need more than the existing treaties.

The WTO has considered the role of the WCT as an interpretive guide to the TRIPS obligations in its report on the dispute between the United States and China over the enforcement obligations. That seemed extraordinary because at that time the WCT was not in force. Even if a future panel did a similar thing (which arguably is not consistent with Vienna Convention rules of interpretation) there is a difference between using the WCT as an interpretive guide and drawing its provisions wholesale into the ambit of Article 61 of the TRIPS Agreement to create a new obligation. According to Article 3(2) of the WTO Dispute Settlement Understanding, the interpretation of the WTO agreements should not add to or diminish the rights. This may be an interpretative maze, but it is not one that should be glossed over by a domestic court, particularly in a way that was not necessary in order to reach the conclusion that the acts complained of were potentially criminal under the domestic law.

These are not points that the Supreme Court fully considered, but they would be relevant to proper treaty interpretation for the WTO to find a TRIPS violation. For the case at hand, the result could have been reached without a conclusion about treaty violation, as interpretation of the New Zealand statute to include digital files is TRIPS compatible. The key principle is consistency with obligations, such as TRIPS. New Zealand’s approach of including criminal liability for infringement on a commercial scale of all copyright rights stemming from Berne, TRIPS and the WCT is consistent with TRIPS. Differing approaches may also be consistent because that is the nature of a treaty of minimum standards that allows for different methods of implementation. Just as a consistent treaty interpretation process is vital in international disputes, it is

also important in cross-border disputes. This is not only because the same rules apply but because the outcomes inform each other. The New Zealand Supreme Court should have reached the same result without pronouncing an under-analysed conclusion about violation of the TRIPS Agreement. Courts around the world that make determinations about international treaty compliance are riddled with approaches to interpretation that do not comport well to the Vienna Convention's rules. This is not helpful for a coherent international system.

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