The Challenge of Multimedia Reform the Copyright Act?

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In 1978, Nicholas Negroponte predicted that three fields - broadcasting and motion pictures, print and publishing and computers - would, by the year 2000, be integrated into a single communications industry. His vision - convergence - has arisen sooner than ever imagined.

Convergence - the merging of what were previously distinct modes of communication (such as broadcasting, telecommunications and radio communications) and the resulting convergence of previously distinct industries - is now upon us through recent advances in technology which enable the delivery of products and services to consumers in numerous and flexible ways. Convergence raises novel and complex regulatory issues, giving rise to exciting, often heated, legal, academic and political debate.

Multimedia is at the forefront of convergence. It is created using technology which enables its deliver to consumers in a wide variety of ways in contrast to other types of media. It is forming the basis of a new, independent industry which combines the computer and entertainment industries in an unprecedented way. Significant investment is being made in the industry by developers who foresee handsome returns from this new innovative product. It has also been identified as holding enormous economic and cultural potential for Australia. As a consequence, the Federal Government has devoted over $80 million to its development and it is the subject of specific initiatives by State governments, including Victoria.

Not surprisingly, multimedia is posing unique challenges to our current regulatory framework, and in particular, our existing copyright regime. Notwithstanding the current environment of excitement and anticipation, there is currently no adequate copyright protection available to multimedia products.

The purpose of this paper is twofold. Firstly, I would like to briefly outline the inadequacy of copyright protection currently available to multimedia products under the *Copyright Act*. I will then consider the manner in which we should respond to the challenges multimedia poses to the existing copyright regime.

Definition of Multimedia

At the outset, I should clarify what I mean by multimedia. The buzzword, multimedia, is used to describe new computer based products which incorporate two or more forms of media in an end presentation, with which a user may interact. Types of media incorporated may include text, sound (in the form of music and speech), still images, animation, and video. Multimedia products may be distributed over a variety of delivery platforms which may be loosely divided into those for individual private use (such as CD-ROM and video games cartridges) and those for wider public use (such as on-line systems). Products therefore include CD-ROM computer games, on-line shopping services and information kiosk displays.

Notwithstanding the diverse forms a multimedia product may take, each product exhibits the following three distinctive features which distinguish it from previous forms of media, such as film and computer programs:

- it is digitised (and thus is computer based);
- it has multiple inputs (and thus incorporates two or more forms of media in an end presentation); and
- it is interactive.

At its simplest level, a multimedia product therefore consists of digitised computer instructions and media elements combined in an interactive framework.

PROBLEMS OF COPYRIGHT PROTECTION

Subsistence of copyright in multimedia products

Under the current regime, each component of a multimedia product may be subject to separate copyright protection (for example, as a literary, musical or artistic work). Some components may also form part of a larger component of a product which is also subject to separate copyright protection. For example, a piece of music used in the background of a multimedia product may be protected as both a musical work and a sound recording. The fact that copyright may subsist in a broader layer of product does not detract from the independent existence of copyright in its parts.

However, multimedia is not the subject of separate copyright protection under the *Copyright Act*. Accordingly, if an owner of multimedia wishes to obtain clear legal rights in a product as an entirety, he or she must be able to characterise a product under an existing category of copyright protection.

In this regard, it may be possible to characterise a multimedia product as one of the following under the *Copyright Act 1968 (Cth)*:

- a computer program;

- a compilation;
- a cinematograph film; or
- a dramatic work.

However, it is unlikely that any one of these categories will apply universally, if at all, to multimedia products, due to the definition of those terms under the *Copyright Act* and the way they have been, or are likely to be interpreted.

Ownership of copyright

Even if copyright subsists in a multimedia product under one of these categories, the person responsible for the development of the product is unlikely to be the owner of the copyright in the product, unless the developer has obtained an assignment of all copyright in the underlying components of the product or the product is produced entirely by employees whose employment agreements do not negate the rights of the developer.

This is because, with the exception of film, the rules used to determine ownership of the above categories of copyright under the *Copyright Act* vest ownership in individual authors and which have not been designed for products, such as multimedia, which require large scale investment, and complex design, production and distribution processes involving a large team of people.

Exclusive rights

Furthermore, even if copyright subsists in a multimedia product as an entirety under one of the above categories and the developer of the product is the owner of that copyright, the exclusive rights provided to the owners of copyright under the *Copyright Act* would fall well short of affording multimedia owners with adequate protection against acts of copying and dissemination of concern.

By way of example, if a multimedia product is considered to be a film, the owner would only have the right to prevent piracy and could not prevent recreation of the product by the creation of new images and sound. If a product is considered to be a computer program, reproduction of the "look and feel" of the product would arguably not constitute a reproduction of the computer program itself and thus would be beyond the control of the copyright owner. If a multimedia product is sent to consumers over narrowband or broadband networks without the permission of the owner of the product, the owner may be unable to prevent such dissemination if it is sent free of charge or is part of a two-way communication.

These gaps arise primarily because the rights provided to copyright owners under the *Copyright Act* are specifically suited to the forms of media contemplated under the *Copyright Act* when drafted prior to 1968, and to the means of copying and dissemination available at that time.

It follows that the existing copyright regime falls well short of providing clear and adequate copyright protection to multimedia developers seeking clear legal rights in their products.

Reliance upon underlying copyright

It may be suggested that a multimedia developer can rely upon the copyright subsisting in the underlying components of a product to obtain adequate copyright protection.

However, in order to obtain adequate protection in this manner, a developer would still need to obtain all necessary assignments to the copyright in the underlying components of a product, which may not be possible, or may involve costly and lengthy negotiations. Even if all assignments are in place, the ability of a multimedia developer to exploit and protect a product on this basis would have many of the shortfalls outlined above, due to the definition of the relevant exclusive rights under the Act. In addition, if copyright in the underlying components of the product is all that is available, multimedia developers would likely experience problems in organising finance and insurance for a multimedia project because the proposed product would not have a separate legal existence.

ACTION REQUIRED TO ADEQUATELY PROTECT MULTIMEDIA

The question now arises what action should be taken to address the current situation. In particular, do we endeavour to do something positive about the current copyright regime and introduce reforms to the *Copyright Act* which specifically address the current inadequacies with respect to multimedia, or do we adopt another approach, the most favoured of which is the use of contract and self-regulation.

Use of contract and self-regulation to protect multimedia

However, such an approach to regulation has significant deficiencies. In particular, it is unlikely that the use of contract and self regulation would be effective in countering the problems involved in relying upon copyright in the underlying components of a product. If such an approach were adopted, the need to amend the *Copyright Act* to take account of multimedia would be avoided.

However, such an approach to regulation has significant deficiencies. In particular, it is unlikely that the use of contract and self regulation would be effective in countering the problems involved in relying upon copyright in the underlying components of a product (which have already been outlined). This is partly because at present, there is no common practice in relation to the use of material in multimedia products and the relationship of the parties contributing of products. This is not surprising, given the infancy of the industry. However, in contrast to most other developing industries, professionals from previously distinct industries with vastly different approaches to rights management are involved in the

development of multimedia, with different, and often conflicting needs and wants. It is therefore highly unlikely that the industry will settle a standard approach to rights issues in the near future given the diverse interests represented in the industry. In the absence of a consistent industry approach, every multimedia product would necessarily be the subject of independent, costly and lengthy contractual negotiations and little certainty regarding the right of parties involved in producing multimedia would develop.

Even if a settled industry practice is established, the use of contract to control and protect multimedia products would not represent a viable option for many multimedia producers, given that many smaller developers produce products without financial backing and would not be in a position to bear the added legal costs associated with contractual negotiations and documentation. Furthermore, often it may not be possible for a developer to obtain title to materials used in a product, irrespective of the resources of the developer (for example, where popular pre-existing material, such as film footage is used but is rigidly licensed by the owner).

Reform of Copyright Act

Notwithstanding the numerous problems associated with relying upon contract and self-regulation as a means of adequately protecting multimedia products, it has also been suggested that our current copyright laws cannot adequately deal with technological advances, such as multimedia, given the pace of technological change. The Copyright Law Review Committee is currently considering this issue as part of its reference on the simplification of copyright law to accommodate multimedia products which should await any wider reform of copyright law which may result from the Committee's enquiries.

However, it is strongly arguable that copyright law is indeed *designed* to respond to technological advances such as multimedia. If one considers the history of copyright law, it may be observed that the challenge posed by multimedia is exactly the type of challenge copyright was created to respond to, and has responded to over the centuries. In this context, it is suggested that the basic concepts and framework of the *Copyright Act* are ideally suited to, and in fact emerged to deal with, new forms of media such as this. In this regard, it is worthwhile to briefly consider the evolution of copyright.

Copyright was created in Britain in the early 18th Century for the purpose of "encouraging learning" by balancing the competing interests of providing free access to, and use of ideas, with the interests of authors in ownership of their literary work. It was felt necessary to introduce such a right following the introduction and effects of the printing press which threatened the livelihood of authors.

Accordingly, in the first Copyright Act of 1709 (the Statute of Anne), authors were given the right to prevent others from copying their literary property. All material forms of literary expression were protected, but not the information or ideas expressed therein. Since 1709, copyright law has continually responded to technological developments in an effort to protect different forms of creative works. Britain enacted copyright legislation in respect of engravings in 1734, sculpture in 1814, dramatic works in 1833. Photographs, paintings and drawings were protected in 1862, and gramophone recordings, perforated pianola rolls and cinematograph films first came under British copyright protection in 1911.

After 1911, the extension of the *Copyright Act* to new forms of subject matter accelerated rapidly, mirroring the explosion of technology which occurred. The evolution of radio, television, the modern record industry, tape recorders, videotape, computers, new methods of printing, photocopying, satellite transmission of radio and television programs and electronic diffusion services each created a challenge regarding the applicability and scope of copyright protection. The existing *Copyright Act* did not enact fundamental changes to copyright law, but rather created or extended proprietary rights in sound recordings, cinematograph films, broadcasts and published editions of literary works - the products of technological innovation. As a consequence there are now two principal categories of subject matter under the *Copyright Act* - "works", being the traditional type of subject matter and "subject matter other than works", being the subject matter granted to new proprietary rights.

Notably, both the purpose of modern copyright law and the framework through which that purpose is expressed remain fundamentally the same today as they were nearly 300 years ago. Copyright continues to exist for the purpose of encouraging the exploitation of intellectual property by balancing the competing interests of ownership in, and access to such property.

The definition of "copyright" has simply been expanded to accommodate wide ranging developments in technology by encompassing:

- the expression of creative ideas in a wide variety of media, not just in literary forms; and
- exclusive rights to manufacturing, distribution and other forms of copying and dissemination not possible with the simple printing press.

Accordingly, the challenges posed by new technologies, such as multimedia, are analogous to the challenges posed by other technologies over the past three centuries. There would appear to be no reason in principle why this new form of expression - "multimedia" - and its new forms of exploitation cannot be included within the current framework of the *Copyright Act*.

This may involve the challenging task of redefining fundamental concepts used in the *Copyright Act* such as material form, reproduction and authorship, at least in relation to new forms of media. But just because the task would not be simple does not mean we should not tackle it. Arguably, we should be better equipped in this electronic age to cope with such legislative changes.

So where to from here? It is clear that real debate is required concerning the amendment of the *Copyright Act* to take account of multimedia, sooner, rather than later.

Options include extending an existing category of copyright to clearly encompass multimedia (for example, by extending the definition of computer program or film under the *Copyright Act*), by introducing a new category of "audiovisual works" to include film and multimedia works, or by introducing an entirely new category of copyright - "multimedia products" under the *Copyright Act*, in the same way that films were granted separate protection under the 1968 *Copyright Act*.

The latter approach would appear to be the most appealing. It would clearly have the following advantages:

- it would not involve stretching the definition of existing categories to include new technologies (the difficulties associated with the inclusion of computer programs within the definition of literary works is a case in point);
- it would recognise that multimedia is not simply a computer program, film or form of audio visual work, but is a new, distinctive and valuable product with unique characteristics (incorporating both computer program and audio visual elements), worthy of protection in its own right;
- it would allow the definition of rules concerning ownership and exclusive rights specifically suited to multimedia; and
- it would be consistent with the rationale and evolution of copyright law.

It will be interesting to see what steps, if any, are ultimately taken to address the situation, and how long we defer directly tackling the challenge multimedia poses.

Notably, the current debate concerning the appropriateness of copyright law is not particularly new, but indeed is reminiscent of debates which have been engaged in copyright law.

In the parliamentary debate preceding the introduction of the 1968 *Copyright Act* it was observed:

> *It is standard to say that we are undergoing a technological revolution. But I think it is also standard to regret that none of us is very well equipped to say how we are to handle these new techniques in a modern society.*

There would appear to be absolutely no reason why we as lawyers cannot be well equipped to handle new technologies as they emerge and to find a proper place for them under the *Copyright Act*. Multimedia provides us with the perfect opportunity to respond to technological advances in a timely and productive fashion. Let us now see if we can rise to that challenge.

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