Report

Protecting your property rights in new communications - signals, programs and technology

A Summary of the proceedings of the seminar held on 22 September 1993 sponsored by Communications & Media Law Association, Media & Communications Committee, Law Council of Australia, LAWASIA. Prepared by Elizabeth Collins, Allen Allen & Hemsley.

This workshop examined a broad range of perspectives on the protection of property rights in new communications, particularly satellite and cable transmissions. The conclusion was unanimously reached that there are serious deficiencies in the current domestic and international framework, and that there is an urgent need for reform in order to afford at least adequate protection for the holders of property rights in new communications.

The urgent nature of reform

The boom in the communications industry means that a number of new technologies will become commonplace in the next few years. In particular, the advent of pay television in Australia has brought with it the possibility of a number of competing forms of technology. Although the *Broadcasting Services Act 1992* was enacted in the belief that pay TV delivered by satellite using digital compression technology would provide the most superior service from both a technical and a consumer-interest perspective, it is also expressed to be "technology - neutral".

The result of this is that there is likely to be a number of alternatives to the satellite delivered service, in the form of microwave ("MDS") transmission, cable and possibly an optical fibre network utilising telephone lines. There has also been a proliferation in the number of geostationary satellites in the Asia-Pacific region, most of which are capable of delivering communication services to parts of Australia.

It is in this context that the protection of property rights in new communications was examined. It was however stressed by several delegates that the problems affecting holders of property rights do not only apply to Pay TV. Libby Baulch of the Australian Copyright Council pointed out that similar problems with copyright legislation are being experience in relation to computer-based products and interactive services, and Janette Paramore stressed the importance of an overhaul of laws to take account of new technologies such as CD ROMs and multimedia products.

The conference was opened by the Chairman, the Hon. Mr Justice Sheppard. Eric Hitchen from FACTS gave an introduction to developing technology in the communications area and highlighted the growth in the number of geostationary satellites which were capable of delivering communications, especially in the Asia-Pacific region. These satellites are capable of delivering an increasing number of services and a number of the satellites have the potential to deliver communications to the main population belt of Australia. In addition, a number of satellites, including PanAm Sat's "PAS 2", are planned for launch in 1994 and beyond. These satellites may deliver services to Australia via an up-link from either Australia or other countries such as the United States.

With the launch of so many new satellites, an increasing issue for the international community is frequency interference. Satellites must be about 3 degrees apart or they interfere with the receiving or transmitting frequency of other satellites. The increasing demand for a geostationary orbital position, which are administered by the International Telecommunications Union, has led to situations such as Indonesia leasing Tonga's allocated ITU rights.

Hitchen also discussed new developments such as video compression, which allows for an increased number of programmes to be delivered on a frequency band by compressing the delivery signal, and high definition television (HDTV), which presents a superior picture for consumers but which would be extremely costly to covert to.

Deficiencies in the Copyright Act 1968

Charles Alexander of Minter Ellison Morris Fletcher and Jane Levine of Allen Allen & Hemsley discussed copyright issues arising out of four case studies. By way of example, the first case study dealt with the situation where a North Queensland tourist resort rebroadcast a television service to each guest room via cable. The television service was received fortuitously via access to an international satellite. The study assumed an agreement existed between the original service operator and an Australian company, assigning rights for commercial exploitation of the service exclusively to that Australian company.

The case studies concluded that there are a number of "gaps" in Copyright legislation. This was also the conclusion reached by Libby Baulch in her presentation. The key issues discussed are described.

- For the service to come within the meaning of "broadcast" as defined in the *Copyright Act 1968*, the service must be a broadcast to the public. The service will not be a broadcast "to the public" if for instance, it is a point-to-point service, or possibly if the signal is encoded. In the situation where a satellite broadcast is received by an earth station which then retransmits the programme via alternative technology such as MDS, arguably the satellite broadcast would not be "to the public" and therefore would not be protected under the *Copyright Act*.
  A service provider operating under a narrowcasting class licence, for instance, non-English language channels, may be found not to be broadcasting "to the public", in which case the broadcasts would not be protected. There are also problems if the transmission is not viewed as a whole, and section 22(6) suggests this may be the case, as an up-link to a satellite cannot be classified as "to the public".
- Section 91 of the Act provides that copyright subsists in a broadcast only if it is made from a place in Australia or the *Copyright (International Protection)* Regulations apply, namely, the broadcast is made from a country which is a party to the Rome Convention. In addition, copyright only subsists if the broadcast is made by an authorised person.

The problems associated with relying on universal membership and compliance with international instruments are discussed below; a noteworthy non-member of Rome is the United States, accordingly any broadcast coming from the US is not protected. Another relevant factor is that although section 22(6) operates to deem a broadcast made by a person from a satellite to have been made by the person at the time and from the place from which the material was transmitted from the earth to the satellite, it will not always apply and some ambiguity may arise as to who is the person "making" the broadcast.

- The various situations involving another jurisdiction also demonstrate that a number of other broadcasts will not be protected. If a broadcast is made from Australia but receivable overseas, it is probably not a protected broadcast as "public" is likely to mean the Australian public. There are also gaps where the transmission originates from the country that does not recognise Australian copyright law, or where it originates from a satellite itself, for instance, film or photographic material shot from the satellite and beamed back to earth.
- The potential ramifications of a transmission not being a "broadcast" may include the fact that, in the absence of a provision to the contrary, the broadcaster would probably not need the permission of the Australian copyright owners to make the broadcast.
- "Broadcast" is defined as to "transmit by wireless telegraphy to the public", which excludes cable transmissions. As discussed below, a cable transmission *may* be a "diffusion service", however the diffusion right is not a general cable transmission right.
  In order to obtain copyright protection of cable transmissions, there would first need to be a broadcast within the meaning of the Act, and then a cinematograph film made of that television broadcast. The distinction between protection of satellite and cable transmissions has been removed from other jurisdictions such as the United Kingdom, where the relevant Act provides for subsistence of copyright in the cable program similar to the copyright which subsists in a sound or television broadcast.
- If the satellite service is retransmitted via cable, section 199(4) may apply to authorise the transmission if it is "transmitted to subscribers to a diffusion service". If the retransmission is provided simultaneously and is by way of "broadcasting" it may be treated as a "secondary broadcast" under section 25(3) and no infringement will occur.
  However a question arises under this provision as to whether the "secondary broadcaster", having been deemed not to have used the record, is also deemed not to have used any underlying copyright works such as literary or music works. In addition, if a premises operator is held to be operating a "diffusion service", sections 199(4) and 26(3) may apply to effectively preclude the premises owner from being sued for infringement of the broadcast or underlying work.
- Live material broadcast via satellite may not be protected as there is no underlying work or film, and if a copy is made of live material it may not constitute a breach of copyright if the broadcast is not protected.
- An unauthorised decoder which obtains access to a pay television service without payment raises 2 issues.
  Firstly, the illegal decoder itself may be infringing copyright. If the consumer receives and views the transmission simultaneously, there is no breach of copyright in the broadcast assuming the reception is in a private home and is not then "rebroadcast" by the consumer. There may be an infringement of rights in underlying works, for instance script or film. If the consumer makes a copy of the broadcast, again assuming it is for private use, it is likely that copyright will not be infringed by virtue of the operation of section 111.
  Secondly, there is a question of whether the criminal law will provide recourse, through sanctions, in the situation where the service provider is deprived of revenue. The Crimes Act has not been amended at a State or Federal Level to take account of this situation, and it is unlikely that it would be covered by existing larceny or related offences. It is possible that Commonwealth legislation such as the *Telecommunications Act 1991*, the *Telecommunications Interception Act 1979* and sections of the Commonwealth *Crimes Act* relating to computers may provide a remedy by indirect means, however clearly a more desirable result would be an amendment criminalising dishonest reception, such as can be found in the *U.K. Copyright Designs and Patents Act 1988*.
- The concept of "ownership" of copyright in broadcasts, currently limited to the class of persons set out in section 91, needs revision. For instance, in the case of a broadcast from a satellite, questions as to ownership of copyright arise. There also may be a problem for persons operating under a class licence as section 91(b) refers to broadcasts made pursuant to a licence "granted" under the *Broadcasting Services Act 1992*.

International protection of property rights

The international protection of rights in communications technologies was examined in a discussion on the current protection afforded by membership of international conventions, the limitation of this protection, and proposals for reform.

The *Berne Convention* adopts the principle of national treatment, so that an author of a work (protected by the Convention) will be given the same rights and protection in another country (of the Union) which that other country grants to its own nationals. Chris Creswell, of A-G's, argued that in some circumstances this may be an impediment to reform of Australian law, as the Parliament may be reluctant to confer privileges on foreign rights holders that are not enjoyed by Australian rights holders overseas.

Berne confers protection on "literary and artistic works" and grants the author of the work the exclusive right of authorising broadcasting communication of their work by means of wireless diffusion or re-broadcasting to the public. In addition, Article 14 protects a cinematographic work as an original work in its own right. The exclusive right can be reduced to a right to remuneration. The last time the Berne Convention was revised, however, was in 1967, and as such the Convention is to a large extent now out of date. Justice Sheppard suggested that Berne itself may need a major overhaul.

The *Rome Convention* provides that a wireless transmission not intended for or able to be received by the public is not a "broadcast" under Article 3(f). Rome gives the producer the right to remuneration for a broadcast of a sound recording, and the performer the same right for a broadcast of a recording of a performance provided, however, that the Convention member has not reserved the right not to apply Article 12. Article 13 grants to the broadcaster exclusive rights in respect of rebroadcasting, recording and duplication of unauthorised recordings, and a right to remuneration for paid public showings of TV receptions.

However, Chris Creswell noted that the United States has no plans to become a signatory to the Rome Convention, which

has prompted agitators within the Berne reform movement to push for an extension of Berne to cover matters dealt with under Rome.

The *Brussels Convention* attempted to address the problem of "spill-over", whereby a satellite transmission may be receivable not only in the country intended to receive the transmission, but also in neighbouring countries. Brussels requires signatory states to take "adequate measures" to prevent spillover and situations conducive to signal piracy. However it only applies to fixed satellite service transmissions, or "point to point", and does not apply to transmissions intended for reception by the general public or "point to multi point". The convention does not create rights in satellite signals, nor does it deal with rights of copyright owners of material carried in the transmission. It does not adopt a "national treatment" standard. In addition, no Asian countries have as yet become signatories. Therefore from an Australian perspective, protection afforded by this Convention is limited.

Proposed reforms at the international level

Chris Creswell outlined a number of proposed reforms to the Berne Convention, such as confirmation that Article 11 extends to satellite broadcasting and the abolition of the broadcasting licence in Article 11. In addition provisions relating to the enforcement of rights and ways of dealing with the circumventing of signal devices have been discussed. A Committee of Experts convened by WIPO to examine a possible protocol to Berne have also examined proposals that both performers and record producers have an exclusive right over "digital communication to the public". The Committee has yet to come up with a unified approach to reform.

Libby Baulch discussed proposals by WIPO to move away from a segmented approach and instead view the communication to the public as a whole as the "broadcast". However this proposal raises the question of determining which law should apply in a situation where the broadcast transcends national boundaries. The European Community have indicated that they may favour the application of the law of the country of emission, however WIPO has expressed concerns that owners of copyright may be inadequately protected if the country of emission has inferior rights to the country where the broadcast is normally received.

The GATT draft TRIPS text has the potential to sideline the specialist conventions, however it was noted that TRIPS excluded moral rights. Although it proposed a level of protection for performers similar to that required by Rome, the protection offered to broadcasters is not obligatory.

Alternatives to amending copyright legislation

Bill Childs, while agreeing that a piecemeal review of the *Copyright Act* would be inadequate, argued that the law to an extent is incapable of keeping up with technology. He cited the example of the definition of a "broadcasting service" in the BSA 1992, which excludes services available on demand on a point-to-point basis, including a dial-up program. The potential scope of this exclusion could place a large number of services outside the reach of the *BSA*, despite the fact that it professes to be technology neutral.

He also suggested that an alternative to struggling to keep the law abreast of new technology is to change the way rights holders trade their rights in the marketplace; if rights owners were to sell their rights ahead of process if may not be necessary to create new rights. Concerns were raised by Jock Given and Owen Trembath that upfront selling of rights will hurt the creator, and the contractual reality of artists selling to producers/distributors was that it did not take place on an equal footing.

Michael Gordon-Smith, of SPAA agreed with Bill Childs that there was a need for a major re-think on protection of property rights. He viewed the issue of copyright largely as an issue of control, over revenue and integrity, and noted that developments in areas such as the digitised image and satellite broadcasting threaten traditional areas of control.

Technological development has also lead to confusion about what rights are actually being traded. He emphasised that from an industry perspective the current copyright laws are too complex, increasing transaction costs for all parties and ultimately operating to constrain innovative use of material; if for instance, all the rights owners in old library footage cannot be identified, the risk of possible infringement may deter further use of the material. He also argued that the formulators of public policy should take into account the need to reduce costs and adapt laws to the commercial environment; he cited the restrictions imposed by the *Corporations Law* on profit-sharing arrangements between an author and a production company as an example of disharmony.

Justice Sheppard suggested that the view taken by the Workshop had been that "pirates" reception of broadcasts was unmeritorious, and that perhaps instead of calling for reform the originators of broadcasts should better protect their interests through contractual and encryption services. Dick Rowe highlighted the problem in Europe, where suppliers have denied program material to operators without a guarantee that the signal will only be receivable by the subscription base. The risk that this situation could repeat itself in Australia was a real one, although Bill Childs claimed this was a situation where the market was likely to adjust itself in response.

Likelihood and certainty

One feature of the Workshop was that discussion did not always recognise that, in reality, two broad problem areas were being addressed. First, there is the *likelihood* that existing copyright law will not adequately deal with the more complex relationships between intellectual rights holders and those seeking to exploit those rights commercially in the new communications environment. Second, there is the *certainty* that existing law (both copyright and other legislation) will not properly protect rights holders against the inevitable interest of unauthorised operators who will endeavour to pirate product for commercial gain.

This second consideration flows from the inherent difference between existing "free-to-air" broadcasting services and subscription services, and the fact that in relation to the latter there is a commercial value in the broadcast itself. The inevitable incidence of piracy of pay TV services will mean that the ambit of original negotiations between rights holders and broadcasters will not be an effective substitute for full protection under all relevant law, protection which does not currently exist.

Ross Kelso from Telecom outlined the pilot television service currently operating in Centennial Park and reiterated the call for urgent reform. In particular, he stressed the need to examine retransmission rights, creating equivalent rights for satellite and cable transmissions, effective ways of remunerating the rights owners and the creation of enforceable rights against "pirates" who obtain the benefits of programming without paying for it.

Mark Armstrong, of the Centre for Media & Telecommunications Law & Policy, argued that a radical re-think of the *Copyright Act* was not necessary; although clearly some amendments were necessary. He discussed the graduating levels of protection found in the *Broadcasting Services Act* and suggested that such a system may be appropriate for Copyright legislation. Professor Armstrong also stressed the importance of not tying any change to a particular technology, and

finally, the need to amend section 10 in order to remove the distinction between satellite and cable.

A number of delegates expressed alarm at the delay in reform and suggested that an absence of pressure on the Government to examine the issue since the ABT reports of 1982 and 1984 has contributed to the delay. Justice Sheppard commented that a likely result of calls for reform would be to focus attention on how change may affect consumers - particularly the cost of purchasing products under a new regime. Stephanie Faulkner of APRA commented that the recent Prices Surveillance Authority report has hurt the industry by leading to a downturn in investment.

Conclusions

The Workshop made a number of general conclusions, not the least of which was of the numerous deficiencies in the *Copyright Act* in relation to protecting satellite transmissions and the owners of underlying works.

The current situation, where cable transmissions are only protected if they come within the meaning of a "diffusion service", and the distinction drawn between broadcasting via satellite, and broadcasting via cable, is one that needs urgent review. Although cable was not common in 1968, it is increasingly utilised and the current situation is discriminatory. Suggested ways of reviewing this problem included the adoption of the Berne approach of an exclusive right to communicate to the public; the adoption of the UK approach of a more extensive right covering cable, based on communication to the public rather than "diffusion to subscribers"; or the creation of a broader right to communicate to the public that would encompass the right of public performances.

A number of delegates stressed that it is important to realise the *Copyright Act* also needs reform to take account of emerging technologies such a multimedia and interactive products, in addition to existing problems with the protection of computer-based products.

Concerns were expressed that sweeping reforms to the Copyright laws, requiring owner/creators to sell upfront additional rights, would operate to the detriment of those groups, who have traditionally only achieved a position of equal bargaining power with producer/suppliers through collective bargaining arrangements.

The advent of increasing numbers of new technologies poses a challenge for more than just copyright legislation; the Workshop examined the inability of the criminal law to prevent signal piracy, and submission were made that legal requirements were unduly complicated and out of touch with commercial reality.

The transnational potential of broadcasting makes the existence of satisfactory arrangements on an international level extremely important; the current situation is that reform to conventions is slow and consensus almost impossible to achieve, with the result that the current protection to holders of property right is at best sketchy. There are limitations on Australia's ability to increase protection at a domestic level and agitate for reform at an international level.

For a full text of conference proceedings, reference should be made to the tapes of proceedings. Copies of papers presented at the conference may be obtained through the Administrative Secretary, CAMLA.

Edmond In Wonderland

Georgina Waite reports on the recent defamation action brought by Vladas Meskenas against Edmond Capon

"Then you should say what you mean"
the March Hare went on.
"I do" Alice hastily replied - "
At least I mean what
I say - that's the same thing, you know."
"Not the same a bit" said the Hatter.
- Lewis Carroll

In a recent defamation case Edmond Capon, Director of the Art Gallery of New South Wales, was found to have defamed artist Vladas Meskenas in comments made by Capon about a portrait of Rene Rivkin which Meskenas had entered in the Archibald prize. The jury awarded Meskenas $100 for the damage to his reputation and the judge ordered Edmond Capon to pay the artist's legal costs. Edmond Capon has appealed against the costs order.

The action was based on comments by Capon, which appeared in the Sun-Herald reported as follows:

"It is simply a rotten picture. It's no good at all. I don't care what Rene thinks. I looked at the picture and thought "yuk!".... the hand's all wrong, so are the eyes. And look at the neck, it looks like it's been painted with chewing gum."

The plaintiff alleged that these words gave rise to imputations that the plaintiff was:

1. an inferior artist; and
2. so incompetent that he painted a second rate picture.

Judge Christie of the District Court ruled that Edmond Capon's comments were capable of conveying both these imputations, although the jury found only the first imputation to be conveyed to the ordinary, reasonable reader of the Sun-Herald.

The case had given rise to debate on two issues. First, does the art critic who attacks an artwork necessarily discredit the artist? Second, where a defence of comment is raised, should a defendant be required to prove that they honestly held the opinion represented by the comment itself, or the opinion inferred from the comment as identified in the imputations drafted by the plaintiff.

Say What You Mean

Identifying what a published comment means will always pose difficulties in the law of defamation. The defendant is accountable not only for the meanings he or she intends but also any secondary or inferred meanings which might be conveyed to the hypothetical "ordinary, reasonable reader". As with most of the law's hypothetical referees the ordinary, reasonable reader is of fair, average intelligence and not perverse, morbid or avid for scandal. Needless to say, such people disagree about what particular words or comments mean but the defendant must have them all in mind when expressing an opinion.

Capon's words fell to be measured by the ordinary, reasonable reader of the Sun-Herald's Tempo column and the jury found that such readers would understand Capon to be imputing that Meskenas was "an inferior artist". This is despite the fact Capon's words are clearly directed to the particular portrait of Rene Rivkin. As the defendant's Counsel pointed out, if a critic lambasts one of Picasso's works as "simply a rotten picture" about which the critic thought "Yuk!", would the critic have to qualify those remarks by saying "but I think his other works reflect his genius", lest he or she be taken to hold the opinion that Picasso was an inferior artist.

The point is that all artists do some work which is of poorer quality; no artist is uniformly excellent. A criticism of a work may mean no more than that the