to the requesting carrier for the purposes of supplying point-to-point telecommunications services on such conditions as the requesting carrier and the carrier associate agree.

However, a carrier associate does not have to supply point-to-point telecommunications services if the service supplied by the carrier associate is used to supply a pay TV service and the requesting carrier requests the carrier associate to supply a telecommunications service that is to be used to supply a pay TV service. Once again, this exception only applies until 30 June 1997.

Further, a carrier associate does not have to supply a service if AUSTEL tells the carrier associate in writing that the supply is not technically feasible. However, if AUSTEL subsequently tells the carrier associate in writing that the connection is technically feasible the carrier associate must then supply the requested telecommunications services.

If a carrier associate supplies (or arranges to supply) a point-to-point telecommunications service and that service is subsequently used to supply a pay TV service without the written consent of the carrier associate, the carrier associate can, until 30 June 1997, cease to supply the service.

Interconnection to Network Facilities by a Carrier

Clause 5

If a carrier requests a carrier associate to interconnect the requesting carrier's network facilities to a network of the carrier associate for the purpose of the carrier associate supplying point-to-point telecommunications services, then the carrier associate must do so on such commercially negotiated terms and conditions as agreed between the carrier and the carrier associate.

However, if a carrier associate service supplied by the carrier associate is used to supply a pay TV service and the sole purpose of the request for interconnection is for the requesting carrier to supply a pay TV service then the carrier associate does not have to interconnect the requesting carrier.

Further, if AUSTEL tells a carrier associate in writing that the interconnection of the facility is not technically feasible then obviously the carrier associate does not have to interconnect the requesting carrier. However, if AUSTEL subsequently tells the carrier associate that interconnection is technically feasible then the carrier associate must arrange for interconnection.

Also, if after the carrier associate has allowed or arranged for interconnection of a requesting carrier's network facility, the facility is used to supply a pay TV service without the written consent of the carrier associate, then the carrier associate may disconnect or arrange to disconnect the facility. This provision will cease to have effect on 30 June 1997.

Consent Required to Supply a Pay TV Service

Clause 6

As a condition of the class licence, a carrier associate must not use another carrier associate's network to supply a pay TV service without the written consent of the other carrier associate.

Conclusion

The Explanatory Statement of the Direction states that the Direction may need to be revisited after the 1997 telecommunications policy review. Obviously, if changes are made to the *Telecommunications Act 1991* following the review, the Direction will need to be amended. The Explanatory Statement also foreshadows the Government's intention to review the exemption for pay TV services in the lead-up to 30 June 1997. If there is "appropriate competition in the delivery of pay TV services" the Government will allow the exemption to continue for a maximum period of 5 years, that is, until 30 June 1999. Determining what is "appropriate competition in the delivery of pay TV" is open to interpretation. No guidance is given as to the criteria by which the Minister will determine effective competition. In its current form, there is no certainty in the review process proposed for the Direction.

The Explanatory Statement also raises the issue of objectionable material being available on broadband networks. It states that the options for regulation of point-to-point services (such as self regulation, complaints procedures and the introduction of offence provisions) are being considered in relation to content regulation for more general point-to-point services, including broadband applications. These services are receiving attention in the implementation of the Government's national strategy for the adoption of new information and communication services.

The second article on the Direction will examine whether it meets its objective of promoting competition, diversity of content, technical innovation and new investment in broadband services delivered by means of cable.

Annabel Butler is a lawyer with Gilbert and Tobin.

Making International Multimedia Deals in The Interactive Age

Martin Cooper reports on the views presented to a conference on multimedia legal issues in Cannes, France in May 1995.

Between 21 and 22 May 1995 the International Bar Association and the International Chamber of Commerce conducted a conference dealing with legal issues relating to multimedia in the interactive age, in Cannes, France.

Some 120 delegates from all European countries and from the US, Australia, Israel and New Zealand joined to hear 24 speakers grapple with a number of issues relating to exploitation of this media.

The Chairman of the program, Dr Mathias Schwarz of Munich and the University of Leipzig raised a number of issues relating to the definition of multimedia. Is it a film for copyright purposes? Are 'on demand' services a transmission to the public? He also looked at questions of when a data base is protected under copyright and the EC Data Base Directive in relation to this.

He raised questions relating to cross border on demand services, questions such as droit morale and the function of collecting rights societies in dealing with the complexity of multimedia copyright issues.

Turning to deal terms, he reiterated the fundamental axiom of multimedia which is 'acquire abroad and licence narrow!'. He looked at the question of allocation of royalties between the various copyright contributors to a multimedia product and questioned the basis upon which the rights might be divided. Should it be by bytes or duration or simply determined by free bargaining? Consider that 64,000 bytes per second is more than ample for high quality voice reproduction, 1.2 million bytes per second is more than sufficient for high fidelity music and 45 million bytes per second provides excellent rendering of videos. The differences are exponential and extraordinary.

Michel Bera, Corporate Vice President of Computer Policy at Matra Hachette, Paris, gave a technical demonstration of the Internet, the slowness and inefficiency of which demonstrated to 120 lawyers that the Internet has a long way to go before it will be an effective tool for the delivery of legal services or the interchange of legal ideas.

Jay Cooper, well known Los Angeles music lawyer, then spoke to the issue of licensing and cross licensing of characters, names and persons in the multimedia context and looked at issues of publicity, contract rights to personality, the scope of rights and clearances. Following through a typical multimedia contract Mr Cooper pointed out the types of issues that need to be considered when preparing a rights acquisition agreement and raised a number of negotiating concerns:

1. The publisher wants a broad grant of rights and there is a need for the owner to waive his/her or its rights of attribution, integrity, control and approvals if the system is to operate affectively. The most effective method of dealing with the overall problem may be for the licensee/multimedia producer to have a right of first refusal on any reserve rights.
2. One very contentious issue is the question of the right to future technology. The commonly expressed ' and by all means now known or yet to be devised' has taken on a whole new meaning in the last ten years and is no longer almost casually added at the end of rights assignments and licences. However, with the development of new platforms it becomes almost essential.
3. The right of content owners to exploit their own products in multimedia raises issues relating to rights clearances including the problems of extending old rights agreements to cover new media, the circumstances in which use may occur without licence (fair use, parody, comment, criticism), the rights of publicity established in various jurisdictions eg in the US, issues of defamation, the protection of deceased performers etc.

Jay Cooper also referred to the difficulties of identifying when copyright infringements have occurred with multimedia because of sampling and image manipulation and then looked to a number of issues relating to protecting the future. How does one draft an agreement today that will deal with rights to reproduce, distribute and exhibit in forms of media we cannot foresee? In this respect he referred to a number of recent US cases including:

(a) *Bartsch* v *MGM* (1968) where an assignment of motion picture rights in 1903 to a play was held to include the right to authorise broadcasting the film via television after analysing the following enabling provision: 'the right to project transmit etc the art of cinematography or any process analogous thereto'.

(b) *Lee* v *Disney* which involved a 1952 agreement which provided that Peggy Lee receive royalties in all 'records and transcriptions'. The court interpreted 'transcriptions' to include videos.

(c) *Platinum Co* v *Lucas Film* involving the film 'American Graffiti' where the words 'by any means or methods hereafter known' were held to include the right to distribute a video of the film which included a master sound recording.

(d) *Cohen* v *Paramount* concerning the film 'Medium Cool' where a licence confirming the right to exhibit a film by means of television was found not to include the right to distribute by video.

He then looked at a number of deal points that seem to be becoming normal in US multimedia deals. Fees seem to be settling at about 20% of net receipts with an exclusivity to multimedia and an advance to be negotiated. Currently the royalty on direct retail sales is commonly 50%. In relation to Internet agreements to exploit recordings the deal was seen to be 30% gross sale price paid by the purchaser plus shipping and handling. Finally it appears that the TV show format right royalty for CDI is settling at about 6% of wholesale (a half of this for foreign and a half again if bundled with other rights).

The next speaker was Sara John, Director of Legal Affairs of the British Phonographic Industry Limited (BPI) in London. BPI is a trade association representing the interests of British record companies with over 170 members who account for 90% of UK record sales.

This market is now about 180 million units per annum with average growth of about 16% per annum and CD sales constitute about 100 million units per annum. Retail sales are now reaching about £1.2 billion per annum.

The music industry currently regards Internet as a shop window as opposed to a shop but this will soon change. The discussion then progressed to how to establish a presence on the Internet and whether to do it yourself or hire an Internet server as an intermediary, in which case the issues to consider are specification, performance, ownership, portability and usage of the information.

The British record industry regards the use of the Internet as being fundamental to obtain the names and addresses of potential consumers. Because it is recognised that protecting materials on the Website is almost impossible, the principle is to only put up material you do not mind being copied. One issue that has to be determined yet is whether the PPL or the record company owns on-line rights to music.

This speaker's key concept was that there needs to be a world wide definition of 'digital diffusion'. To illustrate her point she referred to the Cerberus digital juke box which is a system for distributing music in digital formats. This system operates in 3 ways:-

1. Services have established a data base at which there are presently 2,500 compartments in each of which one song can be stored in digital format; by 1996 there will be 40,000 compartments.
2. For the first 2,500 compartments majors and independent labels pay £200 plus VAT per compartment per annum plus 12.5% plus VAT of the sum charged to the user for the down loading of each song; for unsigned artists the compartments

are free, but they pay service fees of 15p or 25% of the sum charged for down-loading each song, whichever is greater.

3. The cost to the user of down-loading a particular song depends upon the rate fixed by the record label or unsigned artists, probably around 50-70p per song; from this charge a proportion is accounted to the MCPS for the composers, lyric writers and music publishers; a proportion of the label or unsigned artists for the production/ performer's share and a proportion, calculated as explained in paragraph 2 above, goes to Cerberus.
4. The data base holds, at present, music, lyrics and text (for example, information about the artist) and the compartments are cross-referenced so that, for example, a user can ascertain what other songs by the same artist are held on the data base.
5. The data base is connected to the Internet through a World-Wide Web.
6. A prospective user of the digital juke box is supplied by Cerberus with the digital juke box player software free. The software contains details of the user's address and credit/debit card particulars.
7. In order to obtain music from the digital juke box a user must first make a payment - a minimum of £10.
8. Having made his/her payment the user sends a signal from his/her computer through the WWW to the juke box requesting the transmission of the specified song. The song is then automatically transmitted to it via WWW in digital format and in encrypted mode, using MPeg-II which provides a 1:15 down loading time.
9. The encryption code supplied to each user is unique to him or her; this means:
   (a) No one else may intercept the transmission of music from the juke box data base to the user;
   (b) The user may, if in possession of the appropriate equipment, record the music as transmitted; and
   (c) Users may place a recording as often as they please through the use of the player and the special software.

In these circumstances there are a number of copyright issues raised including that of 17(1) of the UK *Copyright Act,* which provides that a copy includes storing the work in any medium by electronic means but does not include sound recordings. Under UK law a transmission is protected. 3 recent cases were referred to: The *Thomas* case in which forum shopping resulted in California-sourced pornography being prosecuted in Tennessee; *Playboy* v *Freener* in which bulletin board down loading was found to be a breach of copyright and a further case dealing with wire-fraud.

The next speaker was Catherine Kerr Vignale, the Director of SESAM which brings together various collection agencies in France for various art forms. SESAM represents drama, SACEM represents music and there are four other representative agencies.

In France the typical experience is that a third of the budget of a multimedia production is spent on the creators. Of course the great problem is to identify the underlying works which is what SACEM and its related agencies help producers to do. A tariff list is currently being prepared, designed to reduce the amount of negotiation of each individual underlying right.

SACEM is undertaking a study of existing multimedia products to get 'a weighting of elements' in each product. This will be used to set up a typical regime and SACEM hopes to negotiate with representatives of producers to arrive at a paradigm which will suit most common circumstances. In France the STRM (the mechanical collection agency) has established a cheap and easy mechanism for enforcement of payment.

Madame Vignale also drew attention to SELL, which is an agency in France set up to represent computer game producers and some multimedia users. Interestingly SELL has complained to SACEM that it does not need a market to be established before it sets rates.

Judith Merians, Vice President of Business and Legal Affairs at Saban Entertainment in Los Angeles spoke about 'vactors', 'synthespians' and the right of publicity. She drew particular attention to the problems which arise when, by digital methods, the image of dead actors can be reproduced (as recent Coca Cola ads featuring Humphrey Bogart and James Cagney) or, in even more complicated instances, where the characteristics of several actors can be combined to produce a synogised result. The point made was that in many instances it will not be possible to even identify what are or who owns the parts that have gone in to making the compilation actor. As virtual reality becomes more important there appear to be 3 major areas of concern for practitioners who are buying and selling the services of performers:

(a) Technological capabilities for usage and exploitation of materials at any given point in time may not have been contemplated when materials were created, so clearing rights can be difficult or impossible (eg *Peggy Lee* v *Disney*).

(b) There are no standards to cover the new uses.

(c) Laws in different jurisdiction conflict and inhibit worldwide exploitation of digitally- created or technically-altered products. In Ms Merians' view, 'without serious changes in existing intellectual property law, we might be heading toward the digital market place where access to material, mixed with technical wizardry, equals ownership'.

Mark Turner, partner of Denton Hall, London, talked about assembling the rights and issues of electronic piracy. He identified pirate activities as being home copying/interactivity, local operations, international operations and on-line thieves.

In his view, the correct approach to preventing piracy with multimedia is to rely upon technology, international co-ordination and co-operation and enforcement through both criminal investigation and private co-operation. He draw attention to institutions such as 'Netscape' which enforces copyright on the Internet, but emphasised the need for harmonisation of legal regimes and the standardisation of technical protections in order to ensure a uniform system of enforcement.

A panel discussion then ensured on the question of whether copyright is dead. In this debate Simon Olswang of Olswang Solicitors, London, Marjut Salokannel, of the Academy of Finland and Pierre Sirinelli, Professor of Law at the University of Paris - South, looked at issues of the application of the 'droit auteur' regime to computer software which was introduced in 1985 but was subsequently abandoned in 1992 by the introduction of a law which applied a new regime throughout copyright law. Neighbouring rights legislation is also seen

as a major concern for both investors and creators.

In his presentation, Simon Olswang referred to some practical problems which have arisen with the restructuring of photographs. He referred to the recent case of the *Church of Scientology* v. *Ehrilich* in which the US First Circuit Court accepted the right of bulletin-board operators to be free of copyright sanctions. Olswang proposed an interesting new approach called an 'access right' regime which would be very similar to copyright but would abandon the distinction between areas such as distribution, broadcasting and cable rights. He argued that the access right would only work if it was global and would achieve a social goal of reinforcing the notion that the theft of copyright is repugnant.

In essence the access right would entitle authors to:

(a) Prevent access to their works - that is to pass the work down the 'pipeline' so that the end user would be liable for infringement; and

(b) Provide the lawful usage must be paid for, not by reference to what is reproduced, but by reference to the use which is made of the material.

Olswang saw no difficulty in running the system of an access right and copyright law in parallel.

The second day of the conference was preoccupied with issues of European competition rules which covered both cross-media mergers, strategic alliances and competition law delivered by Barry Brett, and cross-media mergers under EC competition law delivered by Gotz Drauz from Brussels.

Subsequently Lewis Horwitz, the well known Los Angeles-based film and multimedia financier dealt with some financing issues covering such matters as lending versus investing, collateral security – (distribution contracts, pre-sold rights, credit worthiness and notices of assignment and acknowledgement) and issues relating to completion bonds so far as an investor/lender is concerned.

In relation to new media he expressed the banker's concern that there is so little physical material in which to take security and the fact that the underlying security can be easily transported around the globe. There is no master sound recording or negative over which the lien can be taken nor any central distribution point to control.

The conference concluded with 3 excellent papers on Project Management by Gerald Bigle, a Paris based lawyer, Jean-Baptiste Touchard, a producer from Paris and Jonathan Wohl, another lawyer from Paris. Although substantially outside the scope of this paper, these interesting contributions emphasised that multimedia is not particularly different from other co-operative art forms in the complexities of rights clearances but that simply the problems are multiplied by the number of participants.

In summary, this was yet another conference in which many problems were raised and few answers were provided. Overwhelmingly the consensus appeared to be that conventional copyright law will have to solve the problems and that this will be largely done by means of collecting societies and encryption.

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More Multimedia Legal Issues: Rental and Public Lending Rights

An examination of the application and scope of lending and rental rights in multimedia.

Introduction

The last decade has seen a radical shift in the way in which we package and consume information. We are moving from books and journals, newspapers and film to computer programs, on-line access and multimedia products. Much has already been written on the uneasy relationship between new communications technologies and copyright law. The Federal Government has committed itself to wholesale review and reform of the *Copyright Act 1968* ('the Act') through the establishment and support of a number of groups including the Copyright Convergence Group (CCG), the Broadband Services Expert Group (BSEG) and the Copyright Law Review Committee (CLRC). These reform initiatives are essential in rebalancing the principles underlying copyright - the public interest in fair access and the interests of rightsholders in having a reasonable degree of control over the use of their works, including the right to receive remuneration for use.

Significantly less attention has been paid to other forms of exploitation (and revenue streams), such as rental and lending rights. Our methods of commercially exploiting communication technology are changing. So are our obligations as a member of the international communications community. It is now time to pay greater attention to rental and lending rights. I intend to look at lending and rental rights in Australia - what they cover, who they cover and whether they should be extended, particularly, whether they should be extended to cover new forms of communication, including multimedia.