

Licensing Issues for Converging Technologies

Michael Perkins looks at a lexicon and suggests a system for indexing of works.

At the outset please let us recognise that "convergence" is used in this paper in the sense recognised by the Copyright Convergence Group - i.e. as the deconstruction of boundaries between industries and (by implication) between commercial sectors.

When one considers the book (or print media), film and music industries, the licencing practice in each sector has evolved into distinct and not necessarily reconcilable approaches in dealing with authors rights. While each media sector was bound to be relatively isolated from each other by virtue of the characteristics of their delivery media and associated target markets, the emergence of digital delivery media and interactive multimedia has forced these sectors to recognise that no one has the definitive answer in dealing with authors rights, and along with copyright itself, the paradigms for describing and licencing copyright works for digital media publication need to be revisited afresh.

The speed with which these differences impact commerce is being slowed somewhat by the current practice of bringing to market titles which are in the most part reprographic usages of existing or newly created copyright works. This has led to a false sense of security that the existing licencing regimes will be sufficient to serve the interactive multimedia industry. As one starts to see the impact of digital processing on copyright works, it is becoming clear that this sense of security is already being challenged as the processing of a work creates a new digital work in which it is impossible to reconcile objectively the precise differences between two works.

a new set of semantics

So if the objective is the creation of a new overarching paradigm to manage the licencing of works in digital media form, let us also start this journey with a new set of semantics to describe that which we are

trying to control. Some examples follow.

"A *multimedia computer system*" is one that is capable of the input or output of more than one medium.

"*Encoding*" means a convention used to represent information. It may exist in conjunction with or in layers associated with other encodings. One or more encodings may be used as a base for another medium of expression. Each medium may in turn be combined with other encodings and the complete work may comprise one or more delivery technologies. Consider the implications of a CD-ROM based work which, transparently to a user, is interoperable with network information sources and in concert with the network information source, provides the user with a unified presentation of information such that the user is unable to discern what information is sourced locally and what information is collected from the network. What is the extent of the work, when it is an integral part of a "system"? At what point does a "system" become a virtual machine and that machine become patentable?

"*Medium*" means medium of expression.

"*Single - Media*" means any one medium other than multimedia and which, amongst other things, shall include: cinematographic film, print media works, photographs where they exist independently of expression in another medium, sound recordings and videotape recordings.

"*Multimedia*" means a medium which through a process of authorship using authoring tools, incorporates and / or encodes two (2) or more other single media with a single communication delivery technology.

"*Communication Delivery Technology*" means the science, means or process of conveying information by electronic or mechanical means.

"*Digital Communication Delivery Technology*" means the science, means or process of conveying information by electronic systems using digital format storage - eg. CD-ROM, CD-I, Interactive TV, HDTV.

"*Digital Multimedia*" means a medium

which through a process of authorship using software and other authoring tools, incorporates and / or encodes two (2) or more other single media with a single digital communication delivery technology.

A "*multimedia work*" is a work consisting of text, visual images (which may be still and moving) and sound (including music, ordinary speech and dramatic performance) stored in digital form and may include software to search, retrieve and manipulate such content."

Once you start considering the above definitions of encoding and digital multimedia, it becomes clear that a multimedia work is most closely akin to a compilation or anthology. As a work it is a combination of original creative effort as well as the product of the effort of others. The difficulty is in discerning and controlling the dividing lines between the various contributions to a work, especially in the face of digital processing of copyright works held in digital form.

proposed framework

In my view, in the face of these realisations, it becomes clear that a robust system for the indexing of not only digital media works, but of all components within their structure, is required in order to manage the creation of the work, let alone its licencing. Once identification of components and authors becomes recordable in a robust central administrative core, the management of downstream licencing becomes relatively easy in that:

- the existence, instance and scope of the work becomes subject to objective description and hence authority to use can be based confidently on this description;
- this descriptive structure can be easily extended to contain the licence percentages in which the revenue stream from the work is to be shared by the contributing licensors. This applies to media irrespective of its source;
- this structure can be integrated with

EFTPOS and electronic banking services to streamline the split of royalties, with payments coming from publishers or directly from on line usage licencing.

Happily, Copyright Agency Limited, the Australian Society of Authors and the National Library have all recently taken initiatives which when considered together sees the foundation of the real world infrastructure to support such a comprehensive vision of "delivery media independent" licencing. What must be now dealt with is a multiplicity of vested interests, legal uncertainties in the overall semantics of copyright and the inexorable move of our communications infrastructure to broadband network services.

some problems

The purpose of this paper is to highlight key foundation issues in licencing for digital media. Some problems which arise which require further examination are:

- to foster the development of robust semantics for describing the scope of permitted use of a work. This must be

carefully considered when controlling moral rights exhaustion in digital media content creation;

- to consider the feasibility of the Government setting up a form of Statutory "Errors and Omissions" insurance for works of imperfect parentage which nonetheless satisfy a test of due diligence for rights holder location. This is further developed in the paper co-authored with Pacific Advanced Media Studio entitled "Streamlining Content and Copyright";
- to consider the institution of formal "Chain of Title" protocols to ensure that commercial value is given to the works of strongest provenance;
- the emergence of the proposition that copyright is evolving into an authors equitable right to remuneration. Should this proposition be advanced to more substantial endorsement?
- how do principles of consensus and contractual certainty operate to defeat existing "all rights" assignment clauses in existing publishing contracts. Can existing copyright assignees truly say in the context of the present law on unconscionability and fair trading, that they automatically have a right which

was never in the reasonable contemplation of the parties at the time the contract was formed?

- how do common law tests of "reasonable foreseeability" sit with the emerging reality of technology convergence when applied to existing publishing contracts?

not the final word

The final word in this debate is nowhere near being said. I trust this brief outline elicits some further advancement of the debate on the best approaches to solve the practical reality of dealing with these issues. The faster lawyers can foster the emergence of best practice in this area, the stronger the contracts they draw will be and the better they will serve the interests of their clients.

I would encourage all lawyers interested in this paper to contribute to the discussions on Multimedia and Digital media publishing, currently being moderated on First Class Law, the communications hub being established for the legal profession by the Law Foundation of NSW.

Michael Perkins, Hooton & Perkins, Solicitors

COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA) ESSAY PRIZE

The Communications and Media Law Association is holding an essay competition in 1995.

The purpose of the competition is -

- to encourage high quality work in undergraduate communications and media law courses, and
- to improve links between those studying and practising in the area.

The prize will be given for -

- a previously unpublished essay which is the original work of the author
- completed by a student enrolled in an undergraduate or postgraduate course, possibly as part of that course
- on a subject relating to communications or media law
- of 1000-3000 words.

A prize of \$1000 and a one year membership of CAMLA will be awarded to the winner. The winning essay will be published in the Communications Law Bulletin.

The winning entry, to be selected by a panel of experienced communications and media law practitioners, is likely to demonstrate original research, analysis or ideas. The panel will not necessarily be seeking detailed works of scholarship.

The award will be made at the annual CAMLA Dinner or Christmas Function.

Please send three copies of each entry typed well-spaced on A4 paper. The name,

address and telephone/fax contacts for the author should be included on a separate, detachable sheet. The author's name should not appear on the pages of the essay.

Entries should be submitted to:

The Administrative Secretary
Communications and
Media Law Association
PO Box 545
GLEBE NSW 2037

by 30 September 1995