Service providers' perspective on post 1997

Christina Hardy - Corporate Counsel, AAP Telecommunications Pty Limited

This article briefly looks at the criteria against which service providers will assess the Exposure Draft Telecommunications Bill 1997 (Cth), which reflects the Federal Government's 99 Policy Principles ("Policy Principles") released in August 1995 and briefly compares the current regime with the regime for post 1997 as outlined in the Policy Principles. At the time of writing the Exposure Draft Bill itself has not yet been released.

It would have been difficult to predict what impact, if any, service providers would have had on the development of the telecommunications industry after their introduction into both the regulatory regime and marketplace in 1991. There is little doubt that they have contributed greatly to the increased competition so desired by the Federal Government when it announced its blueprint for telecommunications reform in the 1988 and 1990 Ministerial Statements.

Today there are over 150 service providers operating in Australia with a total estimated annual revenue exceeding $1 billion. Service offerings include voice, data and facsimile with a focus on the small-medium business market.

Over the past five years, the major areas of concern for service providers that have emerged include:

- cost-justified pricing for interconnection to general carrier networks with arbitration in the event of a dispute;
- interconnection to carrier networks using appropriate technical protocol;
- equal access with the general carriers to customer marketing and billing information; and
- preselection (that is, the programming into a general carrier's network of a customer's selection for a preferred long distance carrier).

It is with these issues in mind that service providers will be assessing the Exposure Draft Bill.

AUSTEL's final report on the service provider industry released in March 1995 identified inefficiencies in the emerging service provider sector which needed to be corrected to ensure competitive market conditions. AUSTEL divided the industry into two types of service providers - switchless service providers (who generally aggregate customer traffic to obtain a volume discount from a carrier) and switched service providers (who invest in infrastructure, operating their own switched network to achieve greater economies of scale in addition to using the carrier networks).

AUSTEL's final report recognised the significant effect carrier/service provider connection and network functionality had on the ability of switched service providers to compete with the carriers, particularly in the high end corporate market.

The regime proposed in the Policy Principles, particularly in the competition policy area, appears to address the concerns that AUSTEL raised.

Under the proposed regime, carriers will be required to give an access undertaking covering interconnection of service providers (Policy Principle 20). There is a further safety net where a particular service is not the subject of an access undertaking. In that case the general access regime in Part IIIA of the Trade Practices Act (Policy Principle 21) will apply.

Currently the price of service provider interconnection with Telstra is subject to ministerial notification and disallowance. Presumably access undertakings will provide increased transparency to the terms and conditions, including price, under which service providers will have access to carrier networks.

All carriers and service providers are to be fully subject to Part IV of the Trade Practices Act (Policy Principle 13). This compares with the Telecommunications Act 1991 (Cth) ('1991 Act") where certain carrier conduct is quarantined from scrutiny under Part IV of the Trade Practices Act, such as an act or omission that is necessary to comply with a registered carrier access agreement. The practical effect of this is that it is difficult for a service provider to argue misuse of market power when contesting carrier access terms and conditions.

A major source of frustration for service providers under the 1991 Act has been the lack of formal arbitration procedures for carrier/service provider access disputes (although it is noted that AUSTEL has participated in informal mediation procedures). However Policy Principle 15(d) gives rights to "service providers to interconnect with carriers' networks and to obtain arbitration on terms and conditions of access to services and facilities available under the access regime".

Prior to the introduction of the proposed 1997 regime, AUSTEL, in conjunction with the Australian Competition and Consumer Commission, is to conduct a review of all current and proposed carrier and service provider licence conditions (Policy Principle 98).

In addition, mirroring the self-regulatory model contained in the Broadcasting Act, carriers and service providers must develop a code of practice covering the release of public information on prices and other terms and conditions of service (Policy Principle 29). Currently service

providers are not required to tariff or make pricing information publicly available.

Further, service providers will be required to comply with a code of practice covering complaint handling and a redress scheme (in accordance with the Telecommunications Industry Ombudsman Scheme).

The increased statutory protection given to service providers (in the form of carrier access undertakings and arbitration procedures) should ensure that competition continues to develop in the service provider sector post 1997. At the same time service providers will need to develop internal compliance procedures and cooperate with carriers to develop industry codes of practice.

Protection for technical program protection mechanisms (hardware locks) under German law

Andreas Raubenheimer

Introduction

On 22 June 1995, in the most recent decision of a series of judgments of the Munich courts since 1993, the Munich Court of Appeals again prohibited the offering and distribution of a software program which circumvented a hardware lock. Furthermore it required the defendants who offered and distributed the circumvention program to pay damages and to list their customers and the profits made from distribution of the infringing program.

The plaintiff distributes a program equipped with a technical program protection device (also known as a hardware lock, dongle or key). This protection device ensures that simultaneous program use is possible only on the number of computers corresponding to the number of licensed programs, since the hardware lock has to be affixed to the parallel port of each computer. The program controls the hardware lock and immediately stops a further program run where the lock is found to be missing.[1]

Thus, in accordance with copyright law, a multiple parallel program use of one licensed program is excluded, whereas manufacture of unlimited numbers of copies is still technically possible. Therefore a licensee's rights under § 69d (2) UrhG (Copyright Act)[2] are not affected. That section allows the manufacture of one back-up copy for each licence to enable replacement of the original program if it is damaged or destroyed.[3] One should note that insofar as the number of copies used is neither covered by a licence nor a consent of the rightholder one can speak of illegal copies which infringe the exclusive copyright of the rightholder under § 69c No. 1 UrhG.[4] A multiple parallel program use (ie. a simultaneous use of program copies exceeding the number of licences for the program) is therefore also unauthorised (use of illegal copies) unless the rightholder gave his prior consent.

However, individuals and firms have developed ways to circumvent such program protection including by the use of a compatible hardware lock imitating the function of the original lock. Other methods are by use of a circumvention software program which deceives the original program by imitating the existence of a lock and by altering the programming of the original program responsible for the lock control. Usually these methods cost considerably less than the original program equipped with a hardware lock. Therefore the distribution of infringing programs equipped with means to circumvent the original program's protection seriously affects the business of the distributor of the original program who therefore seeks the relief of the courts to defend his rights.[5]

Technical program protections like hardware locks are protected under copyright law.[6] Their unauthorised circumvention or removal will therefore ground rightholder's claims under § 69f (2) UrhG[7] to surrender or destroy all circumvention programs or devices.[8] Furthermore those responsible for offering or distributing such programs or devices to third parties will be, under § 97 (1) UrhG, subject to the rightholder's claims to cease and desist, for damages and for information about these copyright infringements.[9]

The aforementioned claims can also be based on violation of the unfair competition rules laid down in § 1 UWG (Act Against Unfair Competition). The offering or distribution of a program or device circumventing the hardware lock of a original program is considered an illegal and unfair blocking of the market for the original program equipped with a lock.

History of the litigation

The abovementioned series of four judgments of the Munich courts deal with two different cases concerning respectively an old circumvention program distributed in 1987/1988 and