Who gets what from the new media

Martin Cooper foreshadows disputes in film and television rights agreements with the introduction of pay television

The isolated and politically homogeneous continent of Australia has been relatively immune from disputes between rights holders and distributors of film and television products, arising from new technology and new media. This is changing.

The recently decided *Peggy Lee* v *Disney* case (1990) in California which resulted in Lee being paid substantial royalties for the video of *The Lady and the Tramp* - a technology not known when the film was made - is typical of the problems arising from new technology interfacing with out of date rights agreements.

Being 'late into the market' for pay television should enable Australia to avoid some of the rights disputes now raging overseas. Australian and international distributors have been anticipating the new revenue source of pay TV in Australia for some years and more recent rights licence agreements clearly define the ownership or control of pay TV rights.

Deficiencies in current agreements

Typically Australian television distribution (as opposed to 'all rights') agreements utilise terminology such as 'broadcast', 'telecast' and 'transmit'. More recently, rights licensed have been limited by concepts such as 'free to air television' or worse still, 'non-pay services'.

The precise grant of rights intended by many of these contracts will be difficult to interpret if Australia gets satellite direct broadcast pay television services (DBS) delivered by AUSSAT, particularly if that service provides for pay per view services - an accounting mechanism by which subscribers are charged a particular fee for watching a particular program.

For example, the standard television program licence agreement of one Australian network says 'a licence to broadcast by television'. It says nothing about cable, satellite or pay rights but has an extensive provision reserving rights 'not specifically granted' to the rights owner.

Again, until recently a major Australian film distributor acquired rights from producers under a contract which simply said 'including cable and television and video cassette rights'. An annexure then defined 'television exhibition' as meaning 'television broadcasting as the term is understood in the Copyright Act, 1968'. The other terms were not defined.

Three issues are raised:

- Does the wording of the existing "television licence" include pay television, particularly by DBS?
- Who owns the DBS signal for privacy and copyright protection purposes?
- What obligations does the pay service have to confine its signal territorially?

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Deficiencies in legislation

The Broadcasting Act at section 4(1) offers some guidance on the first issue. It defines broadcast as the act of televising a 'transmission to the general public'. Does one cease to be a member of the general public by installing specialised reception equipment and paying a fee?

The Copyright Act at section 10 defines a broadcast in terms of wireless telegraphy and at section 26 refers to cable services as 'subscription to a diffusion service' by means of a material substance, such as cable but clearly not direct broadcast by satellite.

It appears that DBS is not a broadcast for the purposes of the Broadcasting Act, but is (at least the 'up-leg' to a satellite) for Copyright Act purposes. It may be a cable service under the Copyright Act if the signal is carried through a material substance for part of its journey.

In its report on Satellite Program Services in 1984, the Australian Broadcasting Tribunal advocated that point-to-point satellite transmissions should not be regarded as broadcasts except where that transmission is intended for direct reception by members of the public, in which case it should be regarded as a broadcast in which copyright subsists.

Ownership of a signal at the various stages of satellite transmission is equally unclear and confused. The Treaty of Rome and the 1974 International Convention on Distributing Program Carrying Signals Transmitted by Satellite touch on this issue and give protection to 'broadcasters' against re-broadcasting. But who is the broadcaster with DBS? In any event, Australia is not yet a signatory to the Treaty or Convention!

Transborder creep

As to transborder broadcasts, the law currently appears utterly inadequate to protect program owner's rights let alone to resolve parallel claims. Article 30 of the regulations of the International Telecommunications Union seeks to prevent signals being radiated over the other countries' territories but such regulations have proved ineffective in Europe and do not have force of law in Australia.

Ancillary to this issue is the inverse proposition: does the program owner have obligations to protect its licensees from transborder creep? Concern about this issue recently led Disney to withdraw from a proposed exclusive Disney Channel joint venture with what is now British Sky Broadcasting. Disney terrestrial television licensees took exception to the overpass of satellite fed signals through their exclusive territories and looked to Disney as the program owner to protect them, not to the broadcaster or originator of the signal.

This article seeks to do no more than to draw attention to the fertile ground for dispute which will exist if DBS is adopted to deliver pay TV in Australia. It is not suggested that the disputes cannot be avoided by proper drafting (except perhaps in the case of cross-border creep) but many film and television licence agreements have come from an era when such issues as those raised did not exist.

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