Between these extremes are names that contain ordinary English words which are in some way or other at least partly descriptive. Justice Hill considered that as one moved towards invented or 'fancy' names it became easier for a plaintiff to establish that the words used are distinctive of the plaintiff's business. Such a reputation would not likely exist at the purely descriptive end of the spectrum.

If the masthead is at the descriptive end of the continuum and where the defendant has not used a phrase exactly as that used by the plaintiff but something similar to it then a small difference may suffice to negative the likelihood of deception.

Nevertheless, all is not lost for publishers. The authorities also suggest that a court will incline in favour of finding that the defendant's use of a phrase, if sufficiently close to that of the plaintiff's, is an encroachment upon the rights of the plaintiff if the defendant has tried to take advantage of the plaintiff's reputation.

Passing off

The tort of passing off is committed by a person who, in the course of trade, makes a misrepresentation to consumers of goods or services supplied by him, which is calculated or likely to injure the business or goodwill of another and which causes actual damage to the business and goodwill of another or is likely to do so.

Proof of passing off involves a number of technical rules (including proving damage to the goodwill of the plaintiff). As these do not apply to actions brought under section 52, a section 52 action may be a procedurally more efficient means to protect the masthead from unauthorised use.

Conclusion

A publisher has a range of legal options open to it to protect a valuable masthead from appropriation by a competitor.

Copyright infringement proceedings will generally only be of limited application.

Registration of a masthead as a business name gives limited protection particularly while a trade mark application is pending. Trade mark registration is advisable if only because of the procedural advantages it confers in restraining infringement of a registered mark. There may be, however, particular difficulties in registering certain non-distinctive mastheads.

Proceedings under section 52 of the Trade Practices Act may well be the most effective means of preventing unauthorised use: however there will still be difficulties where a masthead is a descriptive word or words.

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ABT considers advertising content deregulation

Martin O'Shannessy examines the protectionist advertising regulations and considers prospects for deregulation

Government policy on industry protection is by now well instilled on the minds of industry and the public service.

Some aspects of industry protection that have remained in the backwaters until now fall under the control of the Australian Broadcasting Tribunal which administers the *Broadcasting Act*.

These include minimum Australian music requirements for radio, a quota system ensuring that eventually 60 per cent of television drama is of Australian origin or has major Australian participation and a restriction on the use of imported television advertisements which is currently under review.

One of the reasons that the ABT has maintained levels of protection in these industries has been its role of underpinning the Australian look and feel of television and radio. With this as a primary justification the ABT refers to protection for the Australian film production sector as a by-product of measures taken to ensure Australia's cultural identity. Notwithstanding it views, the ABT has agreed to review at least one area of industry protection.

Restrictions on the import of advertising material are currently under active review. Present television program standards (TPS 18,19 and 20) restrict the use of imported footage to 20 per cent of an individual commercial with limited exemptions for specific types of footage.

Safety net

The current inquiry is in its final stages following a decision by the Tribunal to consider a trial of deregulation. In deciding on this course the Tribunal has sought to apply the principal of a 'safety net' which would encourage freedom of business practices within well defined limits.

The purpose of the proposed trial is to determine the natural level of demand for imported footage in the economy. Once this level has been determined the appropriate place for the Tribunal to place the 'safety net' will be revealed.

The trial has been made possible by the agreement of the Federation of Australian Commercial Television Stations to monitor the amounts of material from Australia and overseas.

Should the Tribunal observe long term trends toward a radical shift of advertiser behaviour which are detrimental to the Australian look and feel of television, the Tribunal would step in and impose whatever controls it sees as appropriate. If, on the other hand, behaviour after the trial remains relatively constant, there would be no demonstrated need for active regulation.

A new approach

This decision by the Tribunal represents a significant move away from its previous protectionist stance. The approach adopted is also more in line with the recent decision on television drama which also bases its approach on looking at real impacts on the viewer.

The issue of what is to be counted as foreign in the trial is yet to be finally decided. However there is the real possibility that active regulation or rationing of imported footage will not be required if the trial shows acceptably low levels of demand for such footage.

On the horizon is the possibility that even less protectionist approaches will hold sway at the Tribunal.

Evidence of this comes in the form of Minister Beazley's announcement of 18 March 1991 of an inquiry into the possible benefits of lifting restrictions on co-production treaties for drama programs. Co-produced drama programs do not qualify as Australian under present drama rules despite the fact that they are made under official international co-production treaties.

While it is early days yet for this inquiry, the ability of the Tribunal to impose 'by-product' protection and Government's willingness to accept it seem likely to come under scrutiny.

The impacts of a new draft *Broadcasting Act* expected to appear in time for the Budget session of Parliament have yet to be considered in the equation. Media reports seem to indicate that Mr Beazley and his advisors see some of the present television standards as blatant protectionism. With this in mind the possibility of a whole new ball game should not be ruled out at this time.

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