CABLE, CONVERGENCE AND MULTI-MEDIA: FURTHER CHALLENGES

Gina Cass-Gottlieb explores some challenges for copyright law

Technological developments herald the convergence of broadcasting, telecommunications networks and computer networks. These developments have placed significant strain upon the protection afforded by the *Copyright Act 1968* ("the Act"). The issue of eight cable pay TV licences by the Australian Broadcasting Authority under section 96 of the *Broadcasting Services Act* ("BSA") on 9 September 1993, the fact that cable delivered narrowcast services are already offered in limited areas pursuant to class licences and that hybrid delivery systems are likely to be utilised, make the question of the inadequacies of the *Copyright Act* treatment of program services transmitted by cable an urgent priority.

Lack of copyright protection

Those inadequacies include the lack of copyright in cable transmissions, the fact that the exclusive rights of a broadcaster are not infringed by an unauthorised cable transmission of the broadcast and that the holders of rights in underlying works comprised in the broadcast may not take action against subsequent cable transmission of the broadcast. The initial premises of the exclusion of cable retransmission from the exclusive rights of the underlying copyright holder were that diffusion services were used as a means of improving reception in areas where the original broadcast reception was poor. Accordingly, the rights holder, by authorising public broadcast, had effectively consented to all communication of the work to the public within the broadcast area. Those premises are now inconsistent with the introduction of pay cable and the anticipated introduction of pay MDS and satellite services. Under the current provisions of the Act a broadcast on a pay service delivered by MDS or satellite could be retransmitted on cable with or without charge, without the authorisation of the broadcaster or the underlying rights holders.

A central issue is the appropriate regulation to apply to cable retransmission of broadcasts and the underlying works comprised in the broadcasts. Debate has centred around the options of retaining the current exemption in favour of cable service providers from the exclusive rights of broadcasters and the underlying rights holders; the removal of that exemption leaving cable service providers to commercially secure consent and licences from the broadcasters and underlying rights holders; and compulsory statutory licences with the payment of negotiated royalties or as determined by the Copyright Tribunal.

US reforms

The history of US regulation, and particularly current reform proposals, are instructive in this debate. Under the *Copyright Revision Act* 1976, (Title 17 United States Code), there is a compulsory licence for secondary transmissions to the public by cable systems of primary transmissions by licensed broadcast stations. However, this compulsory licence only applies in limited circumstances including a

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requirement of authorisation by the Federal Communications Commission, accounting and reporting compliance by the cable system operator, and the requirement of simultaneous secondary transmission with the primary transmission. The royalty fees are paid to the Register of Copyrights and distributed among the copyright owners whose works were subject to secondary transmission by the cable system. Secondary transmissions to the public by cable systems which do not comply with the limited circumstances are actionable as copyright infringements. Of particular interest is the fact that an action lies if the content of the program or any advertisements or station announcements transmitted with the program and the primary transmission are wilfully altered by the cable system through changes, deletions or additions.

The reform proposals followed upon a Report of the Copyright Office *The cable and satellite carrier compulsory licences: An overview and analysis* of March 1992. The report recommended that the cable compulsory licence should eventually be phased out, which would mean that cable system operators would have to obtain licences from the broadcasters. The reform proposals also seek to amend the definition of cable system to include microwave or other technologies for the local distribution of secondary transmissions of broadcast programming. In the interim period before the termination of the compulsory licence system on 1 July, 1999, that system is to be replaced by a new compulsory licence for broadcast retransmission which is defined in a technologically neutral way.

Cable developments

The principal reasoning for the US reforms, apart from technological change, has been the large increase in the number of cable operators and in cable-originated programming. The likely predominance of cable originated programming in Australian pay cable services and the presence of DBS pay services, will distinguish the new Australian pay cable environment from the early American pay cable environment and will need to be taken into account in determining the applicability of particular stages of the US regulatory history to the current Australian situation.

Multimedia issues

A more complex question is raised by the convergence of multimedia computer applications combining full motion video and audio with television transmissions whether delivered by wireless means (UHF/VHF, MDS or satellite) or coaxial cable or optical fibre. The similarity between the utility of such services to end-users will be even greater with the advent of interactive television.

While under the current provisions of the Act a broadcaster has exclusive rights to make a cinematograph film of any of the visual images comprised in the broadcast, to copy such a film and to rebroadcast the broadcast, the protection of multimedia works consisting of visual images and audio generated by a multimedia "author" program on networked computer screens is in doubt. Such multimedia works would not appear to come within the protected subject matter "television broadcasts" because they are not "visual images broadcast by way of television". Further it does not appear that they qualify as cinematograph films because the visual images generated on the screen are not "embodied in an article or thing".

Report on computer software

The recent Copyright Law Review Committee *Draft Report on Computer Software Protection* expresses the Committee's doubt as to the protection of screen displays under the current provisions of the Act. The Committee invited submissions on the need for a form of protection for screen displays and also as to whether there are now new kinds of works not covered by the legislation. These questions are separate from the protection of the multimedia program or author program itself, which will be protected in common with other computer programs as a literary work under the Act.

The problems posed by attempting to apply the current concepts under the Act to recent developments are highlighted in the Committee's discussion of whether subscription databases should be treated as diffusion services. The Committee there considers whether the networking of databases to subscribers should be treated as a use of the copyright holder's exclusive right to diffuse the works comprised in the database. The Committee draws a line between the two on the basis that many databases will not fall within the definition of a diffusion service in that they will be limited to one entity and that the concept primarily contemplated the distribution of television and radio programs rather than other subject matter. With the pace of convergence of computer networks, multimedia works and interactive broadcasting, it will be increasingly difficult to draw such distinctions.

It must be recognised that the response of copyright law reform to technological progress has been by the addition of new categories of protected subject matter and the augmentation of the exclusive rights held by the makers of works rather than by variation to the existing framework of protection. International treaty obligations and the importance of maintaining a parity of protection with the protection offered by Australia's trading partners, constrain the ability to achieve a more streamlined, consistent, technologically neutral regime as was attempted for broadcasting in the BSA. However, within the existing framework by the means of varied definitions, addition of new subject matter and clarification of exclusive rights, the current deficiencies in protection must be addressed. A first step would be to follow the recommendations of the Australian Broadcasting Tribunal, in response to the 1980 direction from the Minister to inquire into matters relating to the introduction of cable and subscription television services, that a cable licensee should have similar rights in original cable transmissions as the rights held by a broadcaster in broadcasts.

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