This aspect of the proposed US regulations is opposed by the Coalition of Internet Webcasters (whose membership comprises AudioNet Inc, Real Networks Inc, and Terraflex Data Systems Inc). They argue that streaming and transmission that occurs in the course of performance of sound recordings should be exempt from liability under the mechanical right. Essentially the Coalition argues that any bill that will ultimately be submitted to Congress should represent the viewpoint of all relevant parties involved in the business of on-line music, whether they be music publishers, record companies, broadcasters or the consumer public in general. Although the Copyright Office's Notice invites such participation, the agreement between the NMPA and the RIAA that underpins the proposed rules was reached to the satisfaction of merely half the industry. It is arguable that, unless incidental copying in the transmission process becomes an exemption from copyright infringement, then electronic commerce involving the flow of copyright material on the Internet will be unduly restricted.

COPYRIGHT MANAGEMENT - IMRIMATUR

Collecting societies such as the APRA and AMCOS and their contemporaries around the world have a significant stake in the utilisation of copyrights in music on-line . What is clear, however, is that merely identifying rights usage is only the first step in securing revenues for a collecting society's members. The second step is to police and track the use of music on-line.

One of the most significant developments for this second step in the European Community is the introduction of the IMPRIMATUR programme. IMPRIMATUR is an acronym standing for Intellectual Multimedia Property Rights Model and Terminology for Universal Reference. The programme is funded by the European Union and its participants include telecom companies, library associations and music industry groups. Its purpose is to establish standard copyright management systems for a whole range of industries that use text, imaging or audio in an electronic format. The intended result is a commercial software prototype with internationally agreed standards which will enable Internet trade in intellectual property. The programme is an important part of the work of the Confédération Internationale des Sociétés de'Auteurs et Compositeurs and is being coordinated by the UK based Authors' Licensing and Collecting Society.

In the UK, the Mechanical Copyright Protection Society (MCPS) is currently testing a demonstrator model of the authorising system.[8] Under the model, copyright works indexed for licensing purposes on the MCPS database are uploaded on to the IMPRIMATUR server and given invisible watermarks. These watermarks tie the work to a system where its use can be regulated and audited[9].

Without adequate safeguards and initiatives such as IMPRIMATUR, copyright piracy is likely to continue to plague the music industry in cyberspace, as it does presently, costing 5% of the world's gross market share. Indeed the problem of piracy is further complicated in cyberspace by the cross jurisdictional nature of the medium. A pirate may locate in a jurisdiction where copyright protection laws are lax or may readily adopt a fleeting presence across a number of jurisdictions so as to avoid detection and prosecution.

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1 The commercial developments stated are current, to the best of the authors' knowledge, at the time of writing.

2 Unless otherwise specified the position is stated according to Commonwealth Law.

3 A significant exception is 'production music'. The Australasian Mechanical Copyright Owners Society (AMCOS) controls rights in the sound recording and musical work for such music.

4 As commercial applications of the web expand the public performance right in both the sound recording and musical work may be utilised by users who receive the services in premises such as gyms, clubs and cafes.

5 Excluding 'production music' the on-line rights for which are held by AMCOS

6 Telstra Corporation Limited -v- Australasian Performing Right Association Limited 38 IPR 294

7 The Federal Register Notice of Proposed Rule Making In Mechanical and Digital Phonorecord Delivery Date Adjustment Proceeding (62 Fed Reg 63506) lists proposals for the new regulation.

8 The author understands that there has been some consultation between MCPS and AMCOS/ APRA in relation to trails of the system.

9 For further details visit http:www.imprimatur.alcs.co.uk. For the purpose of the demonstrator model, MCPS has combined with Liquid Audio.

Football, Meatpies, Kangaroos and Holden Cars ....and Kiwifruit

Therese Catanzariti and Diane Hamilton review the release of draft Australian Content Standard for Commercial Free to Air Television.

Late on Friday evening 13 November 1998, the new draft Australian Content Standard slipped into the Australian Broadcasting Authority website **http://www.aba.gov.au/what/program/oz_review/**

The Australian Content Standard sets out, among other things, minimum levels of Australian programming which must be broadcast on commercial television, and what the Australian Broadcasting Authority, the ABA, considers to be an "Australian program" for inclusion in the quota. Australian Commercial television licensees must comply with the Standard. The object of the standard is to "promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control".

The prime catalyst for the review was the decision of the High Court in the Project Blue Sky case, which held that the Content Standard was inconsistent with Australia's obligations under the Australia/New Zealand Closer Economic Relations Trade Agreement because New Zealand programs did not count towards a commercial broadcaster's quota of "Australian programs". This was contrary to the Broadcasting Services Act 1992 which provides that the ABA must

determine a standard for Australian content and must perform its functions consistent with Australia's international obligations. In July 1998, the ABA issued a discussion paper. The ABA invited comments and consulted with the industry, both on the Project Blue Sky issue, and more generally on the operation of the Standard since it was introduced in 1995.

CONCERNS EXPRESSED IN SUBMISSIONS

The written submissions can be found on the ABA website. The submissions indicate that the main concern of many Australian film and television industry participants was not so much New Zealand programming, but programming from other countries.

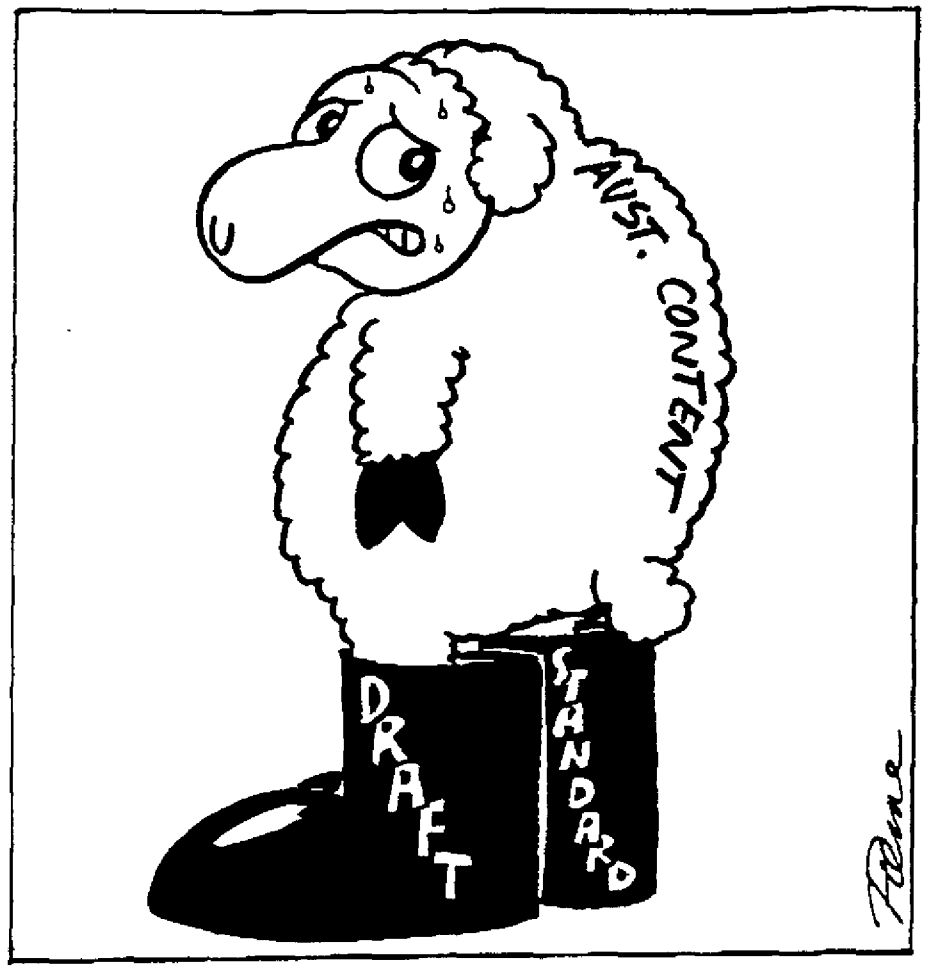
First, there was a concern that foreign producers would argue that their program was a New Zealand program, because there is no definition in New Zealand of what is a "New Zealand program". Many argued that programs such as "Xena The Warrior Princess" could be considered "New Zealand programs" and so count as Australian content because it is shot in New Zealand, even though United States producers had creative control. Second, there was a concern that foreign producers would rely on other treaties, such as the GATT and other World Trade Organisation treaties.

Some of the submissions called on the government to repeal the provision of the BSA which requires the ABA to comply with Australia's international obligations. It is no coincidence that many Australian film and television industry participants also lobbied Canberra against the OECD Multi-lateral Agreement on Investment.

THE DRAFT STANDARD

The main change in the Draft Standard has been to include New Zealand programming as counting towards Australian content. However, the Draft Standard now includes a threshold test of what the ABA considers to be a "New Zealand program". The test has the same creative elements as the Australian test.

In addition, the Draft Standard provides that the ABA has a discretion to disallow a program which meets the threshold test of being an "Australian program" (or a "New Zealand program") if there is a significant non-Australian (or non-New Zealand) content. The same sort of discretion appears in the test of what is "Australian drama" for the purposes of Australian subscription television. The discretion also appears in Division 10BA of the *Income Tax Assessment Act, 1936*. Division 10BA grants concessional treatment to investment in "qualifying Australian films". A "qualifying Australian film" must satisfy certain tests, and must also not have a significant non-Australian content.



The discretion introduces some uncertainty into the operation of the Standard. Division 10BA allows for the Department of Communications, the Information Economy and the Arts to issue a provisional certificate before a "qualifying Australian film" is completed. However, generally the ABA does not assess whether a program is an "Australian program" until after it has been broadcast. Broadcasters may be reluctant to commit to a program if there is some risk that it may not be an "Australian program". There is no provision in the *Broadcasting Services Act* which prevents the ABA giving producers and commercial broadcasters opinions on whether a program will satisfy the criteria for inclusion in the Australian content quota. If the discretion remains in the Standard, the ABA may come under pressure to give pre-broadcast opinions.

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