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Commercial Viability Under the Microscope

An analysis of commercial viability by the Bureau of Transport and Communications Economics challenges its usefulness

The *Broadcasting Act* requires the Australian Broadcasting Tribunal (ABT) to have regard to the commercial viability of other services in the service area when considering the grant of a licence.

It is broadly accepted that commercial viability refers to the ability of a licensee to carry on a broadcasting business in compliance with the licensing requirements. Although linked to it, commercial viability is not the same as profitability. The licensing of a new service may significantly reduce the profitability of an existing service (indeed, generate losses in the short term) without necessarily destroying its ability to survive commercially in the long term.

Anti-competitive Policy

The justification for this anti-competitive policy has always involved the 'public trustee' position of broadcasters. Its proponents argue that the protection of a broadcaster's financial situation is a necessary condition for them to be able to comply with their public interest obligations. These obligations might include the provision of translators in marginally profitable rural areas or compliance with Australian content requirements. In the initial periods of commercial television and radio it probably contained some truth. Then broadcasters would have been reluctant to invest in the necessary capital equipment and, for example, provide relay stations in rural areas generating marginal advertising revenue if they faced a threat of potential, unencumbered new station entry.

However, as broadcast licence values increase to reflect the profit generated because of the absence of the threat of entry, but still accounting for the cost of complying with the "public interest" requirements, the argument loses force.

Public Interest

The "public interest" assessment of the impact of an additional licence in a given service area has legislative precedence over considerations of commercial viability. However, the 'public benefit' arising from the introduction of an additional station is not easy to identify. The actual outcome depends on the variance in taste of the audience in the coverage area. It may well be different between cities. For example, additional radio stations in an ethnically diverse market, such as Melbourne, may well result in niche formats which considerably increase listener satisfaction. In a more culturally homogeneous market, such as Hobart perhaps, such a benefit may not occur. The addition of a new station may result in an existing service switching programming from a magazine type format (catering for different groups of people at different times of the day) to a lowest common denominator format in direct competition with the new station.

Delay

The ABT or any appeal court would therefore have difficulty using the 'public interest' criteria to override the commercial viability criteria. In fact, planning decisions and the commercial viability criteria combined historically to preclude entry. More recently the major observable impact has been to delay the entry of new stations because the existing stations have engaged in litigation before the ABT and appeal courts, which have not found the concept easy to define (e.g. licensing of a new radio service for Gosford-Wyong in 1988). Given the administrative and delay costs associated with the consideration of commercial viability, the question arises: what public benefit has resulted from the application of the criterion? In the absence of the criterion, the entry of a new service in an area capable of supporting less than two adequate and comprehensive services would result in one of three possible outcomes:

- the new service fails to achieve viability; or
- the new service achieves viability but forces the existing service into insolvency; or
- both the existing and new service survive but each provides a less than adequate and comprehensive service.

In the first two of the possible outcomes, although only one service survives, the surviving service (in a contestable service area) is likely to be more efficient than a single service protected from entry competition. The mere possibility that a competitive new service could be established would put pressure on the existing licensee to provide the best possible service. The effect of the third possible outcome is not clear-cut. Whether the community would be better or worse off in such a case would depend on the values which the potential audience places on the availability of choice, or the perceived quality of the available services or on any loss of comprehensiveness in the existing service.

There have also been other criterion

Continued p2

which adversely affect the public interest.

The original reasoning behind the notion of protecting the commercial viability of incumbent broadcasters, and its subsequent inclusion in the *Broadcasting Act*, was that additional profits earned by stations, as a result of limited or no competition, would be used consequences of the commercial viability to fund publicly (but perhaps not commercially desirable) functions. This reasoning was probably valid for the initial licensees. However, as advertising revenue grew, few new stations were added, licence levies were not raised sufficiently and content regulations not made more onerous. Licence values grew considerably. Despite some recent, much publicised write-downs, the value of a licence remains a major (in some cases the dominant) portion of the total value of many broadcasters.

The new owners were thus faced with the servicing of a significantly higher level of investment and, consequently, a reduced capacity to fund increases in the public interest obligations of their licences. For example, the escalation of licence values represents an opportunity foregone to set "higher" program standards. Thus, higher Australian content requirements for television could have been introduced gradually, thereby increasing operational expenditure and reducing operational profits which, in turn, would have acted as a constraint on the escalation of licence values.

The only winners from such protection appear to be the original licence holders who are able to capture the scarcity value of these licences. The new owners of the licence, not being recipients of supernormal returns on their investment, would be in a weaker position to improve program quality, and consequently are likely vigorously to oppose increases in mandatory program obligations. Similarly they would be likely to oppose increases in licence levies.

Continued p4

GRANTLY BROWN

This issue marks the retirement of Grantly Brown as Editor of the Bulletin. Grantly has worked tirelessly on the Bulletin for some two years. We thank him for his important contribution to communications law by ensuring a Bulletin of a high standard. We wish him well in any new endeavours which might occupy his recently discovered leisure time.

CONTENTS

Public Domain Films

Kendall Odgers discusses the impact of international copyright laws on films in which the copyright is about to expire

The last few years have seen "public domain" video distributors in the US generate millions of dollars in earnings from film titles which, with the passing of time, have lost their copyright protection in the US. The US public domain distributors have already made their presence felt in Australia with the release of a large catalogue of 1930's titles. Companies seeking to distribute this material in Australia must however deal with a very complex legal question — is a film which is in the public domain in the US also in the public domain here?

This question is one of the most complex in copyright law, and, because of the relatively recent nature of the industry, is not one which courts in this country have had much opportunity to consider. It arises largely because the period of copyright protection of films in the US is different to that in Australia.

US v Australian Law

Take the example of *Gone with the Wind*, first released in 1939. Under US law, the film was entitled to an initial 28 year period of copyright protection and, providing it had been registered for copyright in that initial 28 year period, a further 28 years protection upon renewal in 1967. Assuming the registration requirements were complied with, *Gone with the Wind* will enter the public domain in the US in 1995.

Under Australian law, a film made in 1939 is not protected as a film, but as a series of photographs and as a dramatic work. The copyright in the photographs comprising *Gone with the Wind* would have lasted 50 years, and expired in 1989. The copyright in a film as a dramatic work expires 50 years after the end of the year in which the "author" of the film died.

One of the many uncertainties is the meaning of "author" in relation to a film. It is possible that the author of a film could be the script writer, or the director, or both. If the latter, copyright in *Gone with the Wind* as a dramatic work will not expire until 50 years has elapsed since the year in which the survivor of the script writer and the director died.

Assuming that 50 years has not passed since the death of the "author" *of Gone with the Wind*, the film will be protected by copyright in Australia (up until the end of the relevant year) — subject however to Australia's International Copyright Protection Regulations.

These regulations provide that a "published" film will not be protected by copyright in Australia if protection "in the nature of copyright" in the film has expired in the "country of origin". Accordingly, if *Gone with the Wind* has been "published" and the "country of origin" of the film (under the Regulations) is the US, the film will no longer be protected by copyright in Australia once copyright in the film in the US expires in 1995.

Defining Publication and Origin

The definition of "publication" used in the Regulations is not what might be expected — a film is "published" if copies of the film have been sold or hired to the public. Under this definition, merely exhibiting a film in a theatre will not of itself constitute "publication", because copies have not been sold or hired to the public. It is arguable that "publication" does occur according to this definition where copies of a film are hired to cinema operators for public exhibition in their cinemas — depending on whether cinema operators can be considered to be "the public". Certainly, release of a film on video will constitute "publication".

The definition of "country of origin" is also a problem area. The US will clearly be the "country of origin" of *Gone with the Wind* if first publication was in the US and the film was not published anywhere else within the next 14 days. On the other hand, if the film was first published in the US and then also published in the UK within 14 days, either country could be the "country of origin" for the purpose of the Regulations.

To summarise, if *Gone with the Wind* has been "published" and its "country of origin" is the US, the film will enter the public domain in Australia at the same time as the US, that is, no later than 1995. If, however, the film was simultaneously published in the US as a result of which the UK is the "country of origin", copyright protection in Australia for *Gone with the Wind* could subsist well beyond 1995 — because the films are protected by copyright in the UK in the same way as they are in Australia (that is, as a series of photographs and as a dramatic work).

Lessons for Distributors

The lessons for distributors of US public domain material looking to operate in Australia are clear. While many films will enter the public domain in Australia at the same time as they become public domain in the US, caution must be taken to determine the "country of origin" and whether the film has been "published". If a film is unpublished, or the country of origin is not the US, a "public domain" distributor may find that instead of successfully exploiting a new market for its products in Australia, it is faced with costly legal proceedings for copyright infringement which may result in loss of the products and damages payments to the owner of the copyright in the film.

Quite apart from any question of copyright protection, considerable care must also be taken to avoid any misleading suggestion on packaging or advertising that a film has been released in Australia by or with the approval of the former (or present) copyright owner.

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Continued from p2

In both cases, they would be able to point to their relatively weak financial positions. The Government and, more so, the community are the losers. The Government finds itself with a reduced capacity to capture an increased proportion of the scarcity value of licences. The community, however, not only forgoes the benefits of increased program choices which would have resulted from the entry of competing broadcasters, but also suffers from the reduced capacity of the existing broadcasters to increase their program quality.

This article is an edited version of an article published by the BTCE in its journal, "Indicators". Copies of the BTCE's Report, "Economic Aspects of Broadcasting Regulation", are available at Commonwealth Bookshops in all capital cities.