as a major concern for both investors and creators.

In his presentation, Simon Olswang referred to some practical problems which have arisen with the restructuring of photographs. He referred to the recent case of the *Church of Scientology* v. *Ehrilich* in which the US First Circuit Court accepted the right of bulletin-board operators to be free of copyright sanctions. Olswang proposed an interesting new approach called an 'access right' regime which would be very similar to copyright but would abandon the distinction between areas such as distribution, broadcasting and cable rights. He argued that the access right would only work if it was global and would achieve a social goal of reinforcing the notion that the theft of copyright is repugnant.

In essence the access right would entitle authors to:

(a) Prevent access to their works - that is to pass the work down the 'pipeline' so that the end user would be liable for infringement; and

(b) Provide the lawful usage must be paid for, not by reference to what is reproduced, but by reference to the use which is made of the material.

Olswang saw no difficulty in running the system of an access right and copyright law in parallel.

The second day of the conference was preoccupied with issues of European competition rules which covered both cross-media mergers, strategic alliances and competition law delivered by Barry Brett, and cross-media mergers under EC competition law delivered by Gotz Drauz from Brussels.

Subsequently Lewis Horwitz, the well known Los Angeles-based film and multimedia financier dealt with some financing issues covering such matters as lending versus investing, collateral security – (distribution contracts, pre-sold rights, credit worthiness and notices of assignment and acknowledgement) and issues relating to completion bonds so far as an investor/lender is concerned.

In relation to new media he expressed the banker's concern that there is so little physical material in which to take security and the fact that the underlying security can be easily transported around the globe. There is no master sound recording or negative over which the lien can be taken nor any central distribution point to control.

The conference concluded with 3 excellent papers on Project Management by Gerald Bigle, a Paris based lawyer, Jean-Baptiste Touchard, a producer from Paris and Jonathan Wohl, another lawyer from Paris. Although substantially outside the scope of this paper, these interesting contributions emphasised that multimedia is not particularly different from other co-operative art forms in the complexities of rights clearances but that simply the problems are multiplied by the number of participants.

In summary, this was yet another conference in which many problems were raised and few answers were provided. Overwhelmingly the consensus appeared to be that conventional copyright law will have to solve the problems and that this will be largely done by means of collecting societies and encryption.

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More Multimedia Legal Issues: Rental and Public Lending Rights

An examination of the application and scope of lending and rental rights in multimedia.

Introduction

The last decade has seen a radical shift in the way in which we package and consume information. We are moving from books and journals, newspapers and film to computer programs, on-line access and multimedia products. Much has already been written on the uneasy relationship between new communications technologies and copyright law. The Federal Government has committed itself to wholesale review and reform of the *Copyright Act 1968* ('the Act') through the establishment and support of a number of groups including the Copyright Convergence Group (CCG), the Broadband Services Expert Group (BSEG) and the Copyright Law Review Committee (CLRC). These reform initiatives are essential in rebalancing the principles underlying copyright - the public interest in fair access and the interests of rightsholders in having a reasonable degree of control over the use of their works, including the right to receive remuneration for use.

Significantly less attention has been paid to other forms of exploitation (and revenue streams), such as rental and lending rights. Our methods of commercially exploiting communication technology are changing. So are our obligations as a member of the international communications community. It is now time to pay greater attention to rental and lending rights. I intend to look at lending and rental rights in Australia - what they cover, who they cover and whether they should be extended, particularly, whether they should be extended to cover new forms of communication, including multimedia.

Definitions

'Multimedia' is a term that has become worn by media use and drench advertising. It has different connotations to different people - and this reflects the breadth of its applications in today's society. I would like to use the term 'multimedia' generally to refer to digitised text, visual images (including moving images), sound (voice and music) and computer programs. The term is, in some ways, a misnomer. Multimedia combine media, formerly available in different forms, into one medium (digital signals). This combination then enables the user to access portions of material any number of times, to combine material into different combinations (including digital morphing), use hypertext links etc. They are, by nature, deconstructed and non-linear. It is unclear how the Act categorises multimedia works. Multimedia have elements that are similar to computer programs and to films, but also may include any amount of any other form of work or subject matter.

"Rental" is the temporary transfer of possession for profit or 'making available for use for a limited period of time and for direct or indirect economic or commercial advantage.'[1] It provides the user with a means of accessing works and the owner of the physical property with revenue. The rental of works in which copyright subsists has become a rapidly growing business. You only need think about the mushrooming of video and CD rental shops. At present in Australia, it is the owner of the physical property that benefits from the exploitation of the work. The owner of the intellectual property rarely receives any remuneration for the rental of their works. As rental increases as a means of accessing work, some rightsholders are finding that their sales are dropping. Early next year, the Act will be amended to implement 'rental rights' in accordance with Australia's international obligations. This will afford rightholders a means of control over certain uses of some copyright material, but the scope is unclear.

"Lending" is the transfer of possession of a copy of a work for a limited period of time for non-profit purposes. There is both private and public lending. The difference is that private lending is as between individuals, for instance, lending a book to a friend. Public lending is generally the lending of material from a public institution to members of the public, the most obvious example, being the lending of books from public libraries. Lending is, by its nature, a non-profit activity - neither the owner of the physical property nor the intellectual property receive any direct remuneration from the exploitation. This can be contrasted to rental for profit purposes. At present, Australia has limited lending right schemes.

A Threshold Issue

If we are to consider the application of lending and rental rights to multimedia works, there is an important threshold issue to overcome. That is, what kind of use is made of a multimedia work? Is it used in the sense that a book is read, or is it more than that? Could it be said that a person renting or borrowing a multimedia work, in using the work, actually copies the work in some way or perhaps even commands a performance or broadcast of that work? While these distinctions are relevant under our current legislation, it is likely that the definitions will be reviewed and redefined following consideration of the CCG and CLRC reports. I will therefore assume that a multimedia work can be 'used' without infringing one of the existing exclusive rights of copyright owners.

Australia's Commitment to Lending and Rental Rights

Australia has implemented lending and rental rights in copyright material to varying degrees. We have had a Public Lending Right (PLR) since 1975. We shall have an Educational Lending Right (ELR) in the near future. And we have an obligation to introduce a rental right under international agreements. The existing PLR scheme and the proposed ELR scheme apply to books and do not extend to multimedia products. The scope of application of rental rights is presently unclear but would not appear to extend to multimedia works.

First, I intend to look at the present state of lending and rental in Australia.

Public Lending Right (PLR)

PLR was established in 1975 to compensate Australian authors, illustrators and publishers for royalties lost in sales to the public owing to the use of their books in libraries. The scheme is contained in the *Public Lending Right Act 1985*, rather than the *Copyright Act 1968*. This reflects the fact that lending/rental and copyright are different forms of exploitations of the work - the work is lent/rented and not reproduced. Many would however, argue that, at least in the record, and less so in the film industries, lending and rental may facilitate unauthorised copying.

PLR is not a right to payment or to authorise lending. It is a means of recouping some remuneration in lieu of sales through library availability. In Australia, it has been recognised as an important means of supporting domestic writers and publishers, literary and commercial dominance of large publishers publishing in other English speaking nations. This can be contrasted with the Scandinavian approach where PLR is part of a long tradition of state support for literature and the arts and the scheme is based on cultural considerations rather than a policy to compensate authors and publishers represented in libraries.

In Australia, the PLR scheme is funded by the Federal Government and administered by the Department of the Arts. It is not funded in any way by public lending institutions. Therefore, it may be likened to a cultural levy, imposed on tax payers.

PLR - Eligibility Criteria

There are strict eligibility criteria for authors and publishers to benefit from PLR payments -

(i) the author must be an Australian citizen or resident. Publishers must regularly publish books in Australia. Unlike copyright legislation, principles of 'national treatment' do not apply, so overseas authors and publishers whose works are lent by Australian institutions are not eligible to receive payments under the scheme;

(ii) books must have an International Standard Book Number ('ISBN');

(iii) there must be no more than five creators in any one work;

(iv) there must be more than fifty copies of the publication held in public lending institutions in Australia; and

(v) creators must be entitled to royalties from the sale of the book, that is, creators in receipt of a one off fee are ineligible for PLR payments.

There are obvious limitations with this scheme. Not least, PLR applies only to books. A recent PLR brochure specifically states that 'non-book material including talking books, computer disks, compact discs, audio visual kits etc..' are ineligible. Yet, non-book material is becoming an increasingly popular service at libraries. The current criteria would exclude multimedia products on this, as well as several other counts -

- there may not be fifty copies of the work in libraries due to their expense and multi-user format.

- many multimedia works incorporate material from a wide variety of sources, often from overseas creators and more than five contributors. Would it be fair to exclude eligibility of Australian creators on the sole basis that the work of an overseas creator was included or on the basis that there were more than five contributors, even if they were all Australian residents or citizens?
- multimedia works do not have, or require ISBN numbers, although component parts may.
- creators that have received a one-off fee for contribution to a multimedia product would not be eligible for payment under the PLR scheme. Contributors to multimedia products may contribute for a one-off fee. It is difficult to price works used in multimedia products. A work may comprise only a small portion of a multimedia work. It is difficult to assess how important that portion is to the whole and to monitor access of that portion. And the nature of the industry involves uncertainty as to success of any given product.

PLR, in its present form, is clearly inapplicable to multimedia products. This may stifle creativity in multimedia, and certainly, does nothing to advance development, contrary to the Federal Government's public commitment to content creation and export of multimedia products.

Should the PLR scheme cover multimedia products

Multimedia products clearly do not fall within the existing scope of the PLR scheme. This begs the question - should they be included? Already, publishers are changing their distribution methods to supplement or replace print with multimedia. Multimedia products are durable and suited to intensive use, they offer interactive access and use and can be updated regularly. They are therefore well suited to business and educational use. This trend will, in time, be reflected in our libraries and other public lending institutions.

On the surface, there is no reason why PLR is restricted in its application to books. Multimedia producers may also suffer suppressed sales through the availability of public lending copies. In fact, due to the relative cost of single unit and the durability of multimedia products, there is an argument that multimedia producers are in a worse position than the owners of copyright in books. It is in the public's interest to ensure that these products are available to the public via lending and that the creators and investors are not starved out of existence through heavy unremunerated lending and lack of sales.

There has been limited consideration in Australia of the extension of lending rights to works other than books.

Lending rights and computer software protection

The CLRC in its Final Report on Computer Software Protection[2] considered the introduction of a right to control public lending of computer programs.[3] The Australian Vice Chancellor's Committee ('AVCC') submitted 'that university libraries, in particular, needed clear guidelines on the lending of computer programs to staff and students (including external students)'.[4] The CLRC stated that public lending was not addressed in any detail in the initial submissions received by them. Following release of the Draft Report, the CLRC received only five further submissions expressing opinions on public lending rights, none of which provided 'any substantial reasons for the views expressed'.[5] The CLRC concluded that 'the owner of copyright in a computer program should not have the exclusive right to authorise or prohibit the public lending of his or her computer program.[6] However, the Committee considers that this issue could be reviewed at a future date as part of the Committee's inquiry into simplification of the Act.'[7]

In making this recommendation, the CLRC noted that 'unlike rental, there is no obligation under TRIPS for a public lending right to be introduced and that internationally there is little support for such a right.'[8] They also referred to the 'public benefit in allowing lending by educational institutions and institutions assisting the handicapped, which it could be argued that outweighs the interests of copyright owners.' The Committee also 'acknowledges that the potential exists for copyright owners to suffer some detriment as the result of the public lending of computer programs ...'[9]

These recommendations and comments apply specifically to computer programs, not multimedia works, although many multimedia works have functional elements similar to those of computer programs. However, I would suggest that it is significant that there has been a recognition that public lending rights could conceivably be extended to apply to works other than books, considering the balance of owners' and users' interests, and that the step from computer programs to multimedia is one of small degree only.

Educational Lending Right (ELR)

Whereas PLR applies to the lending of books by public lending institutions, ELR will apply to the lending of books by educational institutions. The multiple use of books from libraries and text rooms in educational institutions can reduce royalties on sales to the public. The aim of ELR is to compensate Australian writers, illustrators and publishers for loss of these royalties and to thereby stimulate the production of books specifically for the educational market.

ELR was considered, but not introduced at the time that PLR was introduced, on the basis that it was 'too difficult' to survey bookstock in educational libraries, due to the variety of cataloguing systems. The educational institutions also had concerns regarding the funding and administration of an ELR scheme. There are, however, more Australian books held in educational libraries than in public libraries. It was anomalous that class sets of educational texts were not eligible for PLR whereas a single book in a public library was.

In the Cultural Policy Statement, *Creative Nation*, the Prime Minister[10] announced that "The Government will introduce an Educational Lending Right as part of an extension of the Public Lending Right Scheme". In the first year of the scheme (1996-7), approximately $1M will be paid by the Federal Government to authors and publishers whose books are lent in the text rooms and libraries of educational institutions. Payments are to be based on library holdings, not borrowings, and will rely on a survey of a representative sample of schools, rather than all schools, in order to reduce the administrative burden.

The introduction of the scheme is an essential element in providing authors and publishers with an opportunity to spend more time on writing for use in education. Unlike European countries, Australian creators/investors do not have a different language to protect them against strong English speaking markets. ELR will go some way to encouraging the creation of Australian material for Australian students. However, the $1M allocated represents a quarter of the money allocated to the PLR scheme while there are possibly ten times the number of recipients.

Extension of ELR to multimedia

All of the comments in relation to the application of PLR to multimedia also apply to ELR. Hans Gulberg, in a Report to the ASA and ABPA, recognised that the scope of ELR may have to be reconsidered in light of library lending practices.[11]

> *... many countries include material other than books in the basis for calculating the lending right ... We have not gone into this but have generally assumed that the sort of material to be included be limited to books, largely as in existing Australian legislation. This seems to be a sensible approach to follow, as long as it is recognised that other stock, such as audio visual material, forms a growing proportion of the total amount of information available in schools as well as public libraries. (emphasis added)* [12]

I think it is most important that the extension of ELR to multimedia products be afforded serious consideration. Multimedia products are relatively expensive and are likely to be heavily utilised in schools, without the same degree of deterioration as books. Text book sets would be replaced every few years due to deterioration, thereby generating royalties for the creator. Multimedia is particularly durable and suited to heavy use, without requiring replacement. Consequently there are fewer copies sold. Multimedia tools can also be a particularly effective method of teaching and learning, due to their interactive nature. It is in the public interest that production should be encouraged and students have access to multimedia products.

Possible extension of lending rights to multimedia

A recent Public Lending Right booklet states that 'Consideration is being given to how the scheme can best address the increasing volume of non-book material, including audio tapes, compact discs and computer disks, that forecasters predict will replace books'.[14] Significantly, a recent ELR flyer states *"Initially,* ELR will only apply to books' (emphasis added). This suggests that the ELR scheme may encompass works other than books in the future. Perhaps we will see the PLR scheme encompass new communication products, including multimedia, as they become an increasingly large part of the market. However, it could also be argued that if the lending rights were extended now to include multimedia, multimedia may therefore become an increasingly large part of the market. Cause and effect.

I understand that the Public Lending Right Committee has already given some thought to the possible extension of PLR to works other than books, including multimedia products and recognises this as an issue warranting further and detailed consideration.[15] Representatives from the PLR Committee will attend the first "International Lending Rights Conference" in the United Kingdom in mid September this year. It is possible that the thorny subject of multimedia may be discussed in more depth at this Conference.

It is also possible that the introduction of rental rights may act as a catalyst for considering the extension of lending rights. Both lending and rental constitute exploitations of a work that may affect its distribution - there is no apparent reason why they should be treated in a different manner.

Obviously, if PLR and ELR were extended to include works other than books, including multimedia, substantial additional Federal funding would be required for rightsholders. Funding then is a political issue. Unlike statutory photocopying licence schemes, it is not the licensees and educational institutions that pay for use of an intellectual property right. It is the Federal Government, or rather, the taxpayer - you and me that pay for the PLR and ELR grants. One can argue for lending rights on the basis of the public benefit in public and educational access to multimedia works, but many taxpayers would claim that they should not pay on the basis that they do not derive a direct benefit from the use.

International consideration of Lending Rights

There has been some consideration of lending rights at an international level in a possible Protocol to the Berne Convention and European Community ('EC') Directives. Notably, lending rights have not been addressed in the General Agreement on Tariffs and Trade ('GATT').

The EC Directive on rental and lending rights and on certain rights relating to copyright provides that Member States shall afford authors a right to authorise or prohibit the lending of originals and copies of copyright works and other subject matter (Article 1). Article 2 concerns ownership of rental rights, including the fact that they can be assigned. Article 4 provides that each rightsholder must obtain equitable remuneration for rental or lending of their work. Article 5 (1) of the Directive allows Member States to 'derogate from the exclusive right ... provided that at least authors obtain remuneration for such lending'. The right to payment cannot be assigned but the right to administer can be. This provision is aimed at protecting rightsholders in weaker bargaining positions.

Member States are free to determine how material should be categorised for the purposes of applying exclusive lending rights, which lending rights should be replaced by a mere right to remuneration (cf. the right to authorise) and the criteria for distributing this remuneration. A Report on public lending in the EC is due prior to August 1997. It remains to be seen how multimedia products will be categorised and the scope to which lending rights apply.

An International Bureau of World Intellectual Property Organisation ('WIPO') memorandum dated 29 April 1994 discussed whether an exclusive right for authors to authorise public lending of work should be incorporated in the possible Protocol on the Berne Convention, on the basis that public lending conflicts with the normal exploitation of works. At the time, there was little support for this proposal and it has been dropped from the Berne Protocol agenda for the present

Rental Rights

Australia's need to implement a rental right has been considered in some depth at both domestic and international levels.

International Developments

Rental has become an important issue at international level and is included in the proposed European Communities Council Directive and the TRIPS (GATT) text and may be included in the proposed Protocol to the Berne Convention. This may be attributable to technology -traditionally, copyright law was concerned with the copying of works, but as methods of dissemination have diversified, copyright law has been extended to include new methods of dissemination. Due to the increased 'globalisation' and the resultant permeability of national borders, particularly by digital communications, international uniformity of legislation has become increasingly important.

As at mid 1992, at least 25 countries had some form of rental right, including France, Germany, Japan, Scandinavian countries, United States and United Kingdom. Some countries, including England, have 'first sale doctrine'. That is, once the work has been made public, the owner cannot control subsequent distribution, except in relation to rental of films, sound recordings and

computer programs (ie. rental is an exception to the doctrine). Others have 'open' copyright systems, where an owner's rights are sufficiently broadly defined to include rental. The right is often considered as a variant of the right of distribution that would include change of possession or ownership.[16]

European Community

The EC has issued several Directives on the harmonisation of copyright law in EC communities. A formal commission on rental and lending in the EC was adopted by the Council on 19 November 1992 and a national implementation deadline of 1 August 1994 was set. As noted above in relation to lending rights, the Directive confers three principal rights, namely exclusive rental and lending rights and an "unavailable right to equitable remuneration". The Directive encompasses a wider range of owners of the rights than previously existed. Matters of implementation are left to the discretion of individual Member States[17].

By way of example, rental rights in German copyright law[18] are regarded as being of particular importance to digital material. Due to the high quality of such materials, they are well suited to mass reproduction. In the recitals of the Ministerial draft for the bill for the incorporation of the Rental and Lending Directive, the interests of authors and rightsholders and their need to be safeguarded in view of the risks associated with new technical means, were expressly recognised[19].

The manner in which this Directive is implemented by Member States may affect the rights afforded to Australian rightsholders where their works are rented in EC countries[20]. The owners of copyright in multimedia works may be eligible to receive royalties, if the scope of the rental right implemented is sufficiently broad and effectively administered.

General Agreement on Tariffs and Trade (GATT)

Articles 11 and 14 of the text on intellectual property rights (TRIPS) in the GATT refer to rental rights[21]. Australia and other signatories which do not already have such a right will be required to introduce a rental right to give copyright control over computer programs and sound recordings. Rightsholders in signatory States have the right to authorise and prohibit commercial rental to the public of originals or copies, with exceptions applying to film and computer programs. The obligation does not extend to film, unless rental activity has led to widespread copying. Article 14 provides an exception to account for compulsory licensing in relation to rental of sound recordings. This provides for existing compulsory licensing schemes in Japan, where rightsholders are denied the right to authorise the rental of their work but are assured payment for use.

Proposed Protocol to the Berne Convention

The proposed Protocol to the Berne Convention may include a rental right which applies to audio-visual works, works whose performances are embodied in sound recordings, computer programs, databases and sheet music. It is likely to recognise that rental is part of the general distribution right and that maintenance after first sale is justified in relation to certain works.

Unlike the limited support for the introduction of a lending right, the WIPO Chairman said in summary of opinions that 'the majority can accept a broad rental right covering all categories of works.' The meeting expressed a preference for the introduction of a right to authorise, rather than a mere right to remuneration.

Why we need rental rights

Uncontrolled rental has the potential to damage industries that derive copyright protection. Even if rental doesn't damage sales, it is a commercial use that should be controlled by rightsholders. 'Free riders' should be discouraged from benefiting at the expense of a person more deserving of the benefit.

Rental activity is likely to increase in Australia. There is an increasing amount of material created that people do not want to buy due to its ephemeral nature (eg. pop CD's) or cannot afford to buy (eg. costly multimedia products). However, more homes are obtaining access to the necessary equipment to run these products. Rental is a viable means of distributing computer programmes and other digital material eg. databases. Whilst currently in its infancy, rental is likely to become a widespread means of exploitation.

Similarly in schools, multimedia products may be hired out (instead of loaned) in schools by teachers for class use or hire to students for home use, in the same way that books are. Multimedia producers may benefit from the introduction of rental rights that extend to educational institutions. The publishing industry faces text book hire rental in educational institutions and the rental of literary works in other formats eg. talking books on CD. The improved durability of the multimedia format makes rental an attractive proposition.

Rental Rights in Australia

(i) The Current Legislation

Australian legislation does not currently confer a specific 'rental right' upon owners of copyright material. The Act confers a defined bundle of rights upon a copyright owner. This includes forms of distribution such as reproduction and publication, but does not include rental, although it is clearly a form of distribution.

There is an argument that the publication right may be broad enough to encompass rental. Section 29 of the Act provides that a work is published if reproductions have been supplied to the public 'whether by sale or otherwise' (emphasis added). However, in the 1990 decision of *Avel* v. *Multicoin*[22], it was decided the section did not extend to rental[23].

Despite the fact that there is currently no rental right in Australia, rental of material may be prohibited in limited circumstances. The Act provides that it is an offence for a trader to rent an infringing copy of a work[24] or a film or record embodying works[25] if that trader knew or ought to have known that that copy was an infringing copy or the work was imported into Australia without the consent of the Australian rightsholder and the trader knew or ought to have known this. These sections have the anomalous effect of prohibiting rental of imported works, yet are not sufficient to prohibit the rental of local work. However, the very existence of the sections recognises that rental may be prejudicial to the interests of rightsholders and that the right could fall within the ambit of copyright protection[26].

Rightsholders could, alternatively or additionally, attempt to control rental through contractual provisions. This would be binding on the contracting parties, but would not be effective in binding third parties. It is therefore a limited means of controlling rental of works in which copyright exists from outlets to hirers.

(ii) The need for a rental right

The Federal Government rejected a call for the introduction of rental rights in 1991, but indicated that it was prepared to reconsider in the light of the blank tape levy case and international developments.

This overlooked the fact that the levy compensates for exploitation of reproduction rights – rental is a different form of exploitation. However, this does raise the issue of the relationship between

rental and home copying. For example, CD rental shops have been known to sell blank tapes too. The common practice was to rent a few CD's, then tape the ones you liked. This is likely to increase. New technology is making it easier to make good quality reproductions of copyright works, eg. DAT, CDE and CD-R. Owners of works in CD can no longer rely on the fact that CD produces better quality and more durable sound than a magnetic tape. Computer software rental companies rent relatively expensive programs at low fees. There is currently no fee payable to the copyright owner for this use, yet the commercial income of the rightsholder is reduced and there is no compensatory income. This effect threatens to discourage further development and marketing of computer software. These arguments can be extended to other forms of works, including multimedia works.

In any case, Australia's international obligations now require that we implement a rental right.

(iii) Rental Rights in Australia post 1 January 1996

The *Copyright (World Trade Organisation Amendments) Act 1994* will amend the Act to introduce a commercial rental right into Australia, with effect from 1 January 1996. There will be a new section 30A in the Act:

"commercial rental arrangement", in relation to a work reproduced in a sound recording, signifies an arrangement that has the following features:

(a) however the arrangement is expressed, it is 'in substance an arrangement under which a copy of the sound recording is made available by a person on terms that it will or may be returned to the person;

(b) the arrangement is made in the course of the conduct of a business;

(c) the arrangement provides for the copy to be made available:

(i) for payment in money or money's worth; or

(ii) as part of the provision of a service for which payment in money or money's worth is to be made."

The definition also applies to sound recordings and computer programs[27].

The amending Act specifically states that "It is not the intention of the Parliament that a lending arrangement should be regarded as a commercial rental arrangement for the purposes of 'commercial rental arrangements' as defined" [28]. A lending arrangement is one where '... the true nature of the arrangement is that it is an arrangement for the lending of a copy of a sound recording or computer program under which no amount, other than a deposit to secure the return of the copy, is payable.'[29]

Section 31(1) is amended by adding

"; and (c) in the case of a literary work ... or a musical or dramatic work, to enter into a commercial rental arrangement in respect of the work reproduced in a sound recording; and

(d) in the case of a computer program, to enter into a commercial rental arrangement in respect of the program."[30]

The provisions will only apply where the sound recording or computer program was purchased before the commencement of the amendments, the rental arrangement is part of the ordinary course of business of the 'record owner' and the 'record owner' was involved in the same or a similar business when the purchase was made. This gives owners of copyright in sound recording and computer programs the exclusive right to authorise commercial rental of these products.

(iv) Rental Rights and Multimedia

The amendments do not make it clear whether multimedia works will be protected, to the extent that they are more than computer programs. The current categories of works and subject matter are the first elements of the Act to be reviewed by the CLRC, and to be reported on by late February 1996.

The CLRC in its Final Report on Computer Software Protection briefly considered rental rights. One organisation, RAN, submitted that a rental right should be extended to owners of copyright in all works - not just computer programs, on the basis that the rental of limited numbers of copies of electronic charts constituted a 'valuable exploitation of the database'[31]. The CLRC refers to its recommendation made in para. 9.73 of the Draft Report -

... [rental rights] should not automatically carry over to other categories of copyright works or subject matter and that the case for a similar right in respect of those other works or subject matter would have to be separately made out.

It then states that 'in the absence of other submissions this is too narrow a basis for reaching any firm conclusion. Accordingly, it draws attention to the matter without making a recommendation.'[32] To date, we have little else to go on in determining the likely scope and extension of rental rights to multimedia products.

Application of Rental Right

It is unclear exactly which categories of works the rental right will apply to. In the United Kingdom, sound recordings, films and computer programs are covered but literary, dramatic, musical or artistic works are not. In some countries, motion pictures are excluded - in others, such as Belgium and France, all works could be covered.

Under the EC Directive, it is likely that rental rights will not apply to buildings and applied art. Under the GATT, rental rights apply to 'at least' computer programs, films, sound recordings. The Berne Protocol refers to a wide range, including audio visual works, performances in sound recordings, computer programs, databases and sheet music.

As mentioned above, rightsholders of other works can stipulate rental in contract, but this option reviews questions of privity and relative bargaining powers.

In a WIPO memorandum citation, it was stated that "The types of works for which the right of rental will probably become more and more important include, in particular, computer programs and electronic data bases embodied in CD ROMS"[33]. This highlights the danger of limiting rental rights to defined categories, thereby excluding emerging forms of communication and storage such as multimedia.

It also suggests that rental rights may be extended to cover works other than computer programs, including multimedia, if and when a sufficiently strong need can be shown. I suggest that it will not be long before such a case can be made out.

Control of Rental Rights

If there is only one author of a work, it is a simple matter to determine who should control those rental rights in that work. However, if there are multiple owners, the question becomes more complex as ownership is fragmented. This is particularly in issue in the case of films and multimedia works where there are numerous authors and layers of contributors and investors. To what extent do each of these parties have a right to control or profit from the rental of the work. International instruments refer to 'authors', so perhaps it is a question of interpretation for member States.

In Australia, the question of who owns and controls rental rights in multimedia works may depend upon the classification of

a multimedia work as a compilation, computer program or film, or as part of a new category. It would seem to be unworkable if individual rightsholders controlled rental in a multimedia work, as in the case of films.

Nature of Rental Right

There has been considerable debate about the nature of a rental right, namely whether it should consist of a right to authorise rental (ie. to grant or refuse) or merely a right to payment for rental. Generally, the right to authorise is favoured on the basis that it allows rightsholders to be able to decide when rental should occur. This may affect the market for works, particularly immediately following release of a product. The rightsholder can refuse to permit rental, but in order to facilitate access, the government has the power to introduce compulsory licensing.

Alternatively, a combination of a right to authorise and right to payment could be adopted. In Japan, the right to authorise rental expires after a limited period, after which the right to payment remains.

In the United Kingdom, the right applies to all commercial rental arrangements, including libraries that rent works. This then raises the question of whether the cost recovery amount that some libraries charge for 'loans' constitutes lending or rental. There is a trend for libraries to adopt a more commercial approach towards lending of works, so the new rental right may impact on them, as well as the existing lending right schemes.

Rental rights provide protection for the duration of other exclusive rights.

The rental rights to be introduced in Australia appear to constitute an exclusive right. There is no provision for compulsory licensing, nor for a mere right to remuneration after a limited period. It would also appear to apply to all sectors of the community, including rental businesses and public libraries.

Administration of Rental Rights

As with copyright rights, it is essential that the administration of rental rights are practicable. The existing lending right schemes exclude books where there are more than five contributors. In computer programs, sound recordings and films, there are often more than five contributors and in multimedia works, there may be thousands, depending upon the nature of the work. This fragmentation may cause difficulties in administering rental rights.

In Japan, rental rights are collectively administered. Rental shops obtain licences from the collecting society representing the relevant rights and payments are made either per rental or average rentals or tariffs agreed via negotiations.

In the recent Review of Copyright Collecting Societies, Shane Simpson suggests that Private Audio Copyright Collecting Society (PACCS) 'may be a suitable vehicle to administer the income derived from CD rental remuneration ...'.[34] PACCS was established by Australian Mechanical Copyright Owners Society ('AMCOS') and Australian Record Industry Association ('ARIA') for the purpose of administering the blank tape levy. Simpson notes that

'no consideration has been made by this Review, of the structure or intended function of PACCS ... it will be a Declared Society and subject to consequent scrutiny, ...' It remains to be seen whether the rental right will be administered by PACCS and if or when, rental is extended to multimedia, whether PACCS administers that right in a similar fashion.

In the future, new methods of technical device and anti-circumvention methods may assist in tracking access to digital works by rental and lending. In this manner, rental payments would be more accurate and impose a lighter administrative burden in monitoring loans.

Final Comments

I have made a number of predictions - lending rights are still being extended, rental rights are still to be introduced and multimedia is still a developing market. It is possible that the future will offer us multilayered and diverse means of access to copyright material. We may be able to access works on-line and pay for view or download the work. The role of lending and rental needs to be reviewed on an ongoing basis. I have attempted to provide a sketch of the current state of play and likely developments.

However, for now, rental rights will be restricted to certain categories of works. It appears that in Australia, it is at least recognised that there may be a need in the future to extend the application of rental rights to include other forms of work, including multimedia. This may be an issue that is considered by the CLRC in the course of its review and simplification of the current legislation. It is also likely that international developments will consider the extension of rental rights to multimedia as a specific form of work - Australia may then follow in accordance with its international obligations.

I could suggest that there is a 'chicken and egg' argument here. Rental is a growing form of exploitation of works. The government is committed to encouraging the development and export of intellectual property (*Creative Nation* statement and (Australia on CD) programs). By implementing an extension of rental rights to multimedia works, the development of multimedia works for public lending and rental will be encouraged. If the government waits until the multimedia producers are facing widespread exploitation without remuneration, producers will simply invest their expertise in something more profitable, and it will be too late.

This paper was written by Bridget McKenna, Copyright Information Officer with CAL, and presented by Michael Fraser, Chief Executive of CAL to a recent conference on legal developments in copyright convergence and multimedia.

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Telecommunications and the Disability Discrimination Act

Rachel Francois examines the recent decision of the Human Rights & Equal Opportunity Commission (the 'Commission') under the Disability Discrimination Act.

The telecommunications industry has felt the first sting of the *Disability Discrimination Act 1992* (Cth) (the 'Act'). In June this year Sir Ronald Wilson, president of the Human Rights and Equal Opportunities Commission ('the Commission') and former High Court judge ruled that Telstra Corporation Ltd ('Telstra') discriminated unlawfully against Australians with profound hearing loss by refusing to supply them with telephone typewriters (TTYs)[1].

The case is the first in relation to telecommunications to be decided under the Act. The decision is a landmark for the rights of people with profound hearing loss and will not only affect Telstra, but will act as a strong precedent to Optus if they extend their service to supplying telephones. The decision is also a warning to all broadcasters, both free to air and pay TV, of their potential liability under the Act if they do not address the need for program captioning.

Case Background

The case against Telstra was brought by an individual, Mr. Geoffrey Scott, and by Disabled People's International (Australia) on behalf of all Australians with profound hearing loss, an estimated 21,000 people.

The complaints alleged that Telstra discriminated unlawfully in that Telstra provided hearing people with a standard handset so that they could access the telecommunications network, but refused to provide people with profound hearing loss a TTY which would enable them to access the network in a similar manner[2].

The complaint was lodged under section 24 of the Act. Section 24 makes it unlawful to discriminate against a person on the basis of their disability in the provision of goods, services and facilities. The definition of 'services' includes 'services relating to telecommunications'.

Issues

There were 3 main issues to be decided by the Commission: first, the nature of the 'service' Telstra provided; secondly, whether or not Telstra discriminated in the manner in which they provided the services; and finally, whether providing the service in a non-discriminatory manner would impose an 'unjustifiable hardship' on Telstra.

Telstra's 'services'

The complainants contended that Telstra's service was providing 'access to the telecommunications network'. Telstra's case was that their service was simply providing the network, the telephone lines and a standard handset (the T200). It submitted that providing TTYs would be a new service and that while the Act may oblige a party to change the manner in which it provides a service it cannot require it to provide a new or different service.

Sir Ronald Wilson accepted that the Act cannot require a party to provide a new or different service. However, he found in favour of the complainant as 'it is unreal for the respondent to say that the services are the provision of the products (that is the network, telephone lines and T200) it supplies, rather than the purpose for which the products are supplied, that is, communication over the network'[3]. Sir Ronald also adverted to the definition of 'services' under the Act which includes telecommunications services, as showing a clear legislative intention that the services provided by Telstra be covered by the Act.