

IPTV - licence issues

Because an IPTV service that uses the Internet is unlikely to fall within the definition of broadcasting service, this also means that IPTV suppliers will not require a licence and so even though they will be in competition with TV broadcasters they will not be subject to the same regulatory regime. That regime currently places significant burdens on licence holders, including compliance with licence conditions, industry codes and cross media ownership laws.

Unregulated content

Viewers watching live programming via the Internet (amorous housemates anyone?), could well be able to view content which is not subject to the content classification regime.

Anti-siphoning issues

IPTV suppliers are likely to be unaffected by the anti-siphoning provisions. Currently, only broadcasters with a subscription television broadcasting licence are prevented from acquiring the right to televise certain gazetted events unless a commercial or national broadcaster has first had the opportunity to do so. Therefore, the obligation to comply with anti-siphoning provisions would not apply to IPTV suppliers.

What do the Regulators think?

Graeme Samuel, Chairman of the ACCC, sees the Internet as a "key driver of the next wave of competition to the current media players" and while providing a "stimulus for higher quality, lower prices and greater diversity" also sees it as posing challenges for policy makers and regulators³.

In a recent speech to the National Press Club, Senator Coonan in referring to the evolution of media had this to say:

*"For the Government's part, these new platforms are challenging the effectiveness of existing regulatory structures ... In a converged environment it will become almost impossible, and certainly counterproductive, to stop new players and new services from emerging. In my view, regulatory strategies need to move away from relying on controlling market structures in the way they have to date ..."*⁴

Winners and losers

Content providers and telcos are likely to be the winners. Consumers too will benefit with the choice of platforms from which to receive content. The losers? Over time the main loser is likely to be the local video rental shop as Internet-based video-on-demand via IPTV becomes commonplace.

Conclusion

As a result of convergence the demarcation between content accessible via the Internet and through more traditional means is gradually diminishing. Consequently traditional models of content regulation are also being challenged. The Regulators are currently struggling with the regulation of VoIP. IPTV throws up far more regulatory challenges, so it is also likely to be a significant time before we see significant regulatory change. It is easy to say "it's broke", much harder to create the solution.

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¹ Determination under paragraph (c) of the definition of "broadcasting service" (No 1 of 2000), No GN38, 27 September 2000

² Telecommunications Service Provider (Mobile Premium Services) Determination 2005 (No 1)

³ Henry Mayer Lecture, Media Convergence and the Changing Face of Media Regulation, 19 May 2005.

⁴ The New Multimedia World, 31 August 2005.

Fair Use and Other Copyright Exceptions in the Digital Age

Raani Costelloe looks at the scope of the Federal Government's current review

Issues Paper

On 5 May 2005 the Federal Attorney-General's Department released an Issues Paper entitled Fair Use and Other Copyright Exceptions – An examination of fair use, fair dealing and other exceptions in the Digital Age. The Issues Paper sought submissions by 1 July 2005 and over 160 submissions were received.

Background to the Review

The Federal Government's 2004 election policy included a plan to review the existing fair dealing provisions of the *Copyright Act 1968* (**Copyright Act**) in

light of the recent amendments to copyright law arising from the Australia-US Free Trade Agreement (**AUSFTA**) which strengthen copyright owners' rights and the widespread digital copying of copyright content by Australians evidenced, for example, by:

- the widespread use of blank recordable CDs for storing unauthorised copies of commercial sound recordings;
- the substantial take up of MP3 players (such as the iPod) and unauthorised copying of sound recordings – people are copying their own (and

other people's) existing recorded music collection (CDs) into digital files for transfer onto MP3 players – known as format-shifting or space-shifting; and

- the increased popularity of digital video recorders (also known as personal video recorders (**PVRs**)) which allow for copying and storage of broadcast programming for watching later – PVRs have greater functionality and storage capacity than analogue VCR recorders – known as time-shifting in relation to 'recording for watching later'.

The Copyright Act contains a number of specific fair dealing exceptions/defences to copyright owners' exclusive rights in copyright subject matter which allow a

copyright user to use copyright material without the owner's permission or requirement to payment to the owner:

- research or study (ss 40 and 103C);
- criticism or review (ss 41 and 103A);
- reporting of news (ss 42 and 103B); and
- professional advice given by a legal practitioner, patent attorney or trade mark attorney (s 43(2)),

provided that it constitutes fair dealing.

Currently, the following activities are acts of infringement under Australian copyright law unless the existing exceptions apply in specific circumstances:

- making back-up copies of recorded music or films contained on CDs/ DVDs; this activity may also infringe technological protection measures if content is copy-protected;
- the copying of sound recordings from a person's CD to digital files for transfer to that person's personal digital music device (eg. iPod), ie. format-shifting; and
- copying the films and other content contained in broadcasts for personal use in time-shifting broadcast programming; s111 of the Copyright Act contains an exemption from copyright infringement in a broadcast if a person copies a broadcast but does not extend the exemption to the infringement of underlying films, recordings and other copyright in the broadcast.

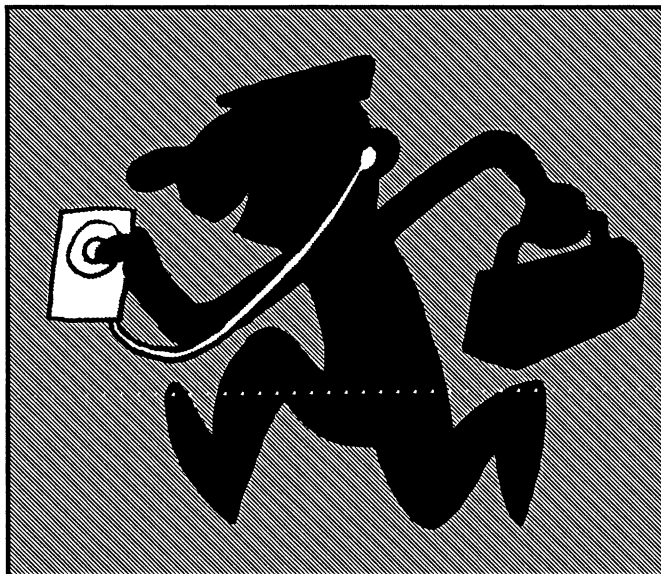
Scope of the Review

The Federal Government's review sought submissions as to whether the types of unauthorised uses of copyright material referred to above should be made the subject of exceptions and if so, how?

The options canvassed in the Issues Paper include the creation of:

- a general 'fair use' exception similar to the US 'fair use' doctrine;
- further specific 'fair dealing' exceptions to the Copyright Act for back-up copying, format-shifting or time-shifting of copyright material; or
- some other regime, eg. immunity from infringement for private copy-

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ing combined with levies on blank CDs which are distributed to rights holders.

The review does not consider the removal of the existing fair dealing exceptions.

Options 1 & 2 - General US type 'fair use' exception alongside existing exceptions

Exemptions of this kind would follow the US model of an open-ended fair dealing exception which provides for factors a court must take into account in determining whether something comes within the exception. This approach was recommended by the Copyright Law Review Committee (CLRC) in 1998 who put forward a model which:

- consolidated the current fair dealing exceptions into a non-exclusive list;
- created an open-ended model which provided that a court must look at a number of non-exclusive factors which are currently used in deter-

mining fair use for the purpose of research or study, including:

- *the purpose and character of the dealing;*
- *the nature of the work or adaptation;*
- *the possibility of obtaining the copyright subject matter within a reasonable time at an ordinary commercial price;*
- *the effect of the dealing upon the potential market for, or value of the copyright subject matter; and*
- *the amount and substantiality of the part of copyright material taken in relation to the whole copyright material.*

Options 1 and 2 described in the Issues Paper are variations of this model. Option 1 is essentially the same as the CLRC proposal while Option 2 involves no consolidation of the existing exceptions but the addition of an open-ended exception.

Arguments for Options 1 and 2 are that they promote flexibility for copyright users - in that they do not limit circumstances in which exceptions to infringement may apply and could therefore be expected to accommodate future technological developments.

Arguments against Options 1 and 2 are that they create uncertainty for both owners and users - which may give rise to costly litigation in order for the courts to determine whether a type of use falls within the fair dealing exception. In the US, analogue time-shifting has been held to be fair use (*Sony v Universal Studios* (1984)) but there is some uncertainty as to whether format-shifting recordings for use on MP3 players is fair use (*RIAA v Diamond Multimedia* (1999)). Amendments to the Copyright Act of the type described in Options 1 and 2 in the Issues Paper will likely involve the courts (rather than Parliament) deciding how the fair use exception to copyright infringement will apply to future technologies.

The CLRC's proposal was rejected in 1998 on the basis that it did not offer sufficient benefits to justify its costs and uncertainties.

Option 3 – Creation of further specific exceptions rather than an open-ended regime

The fair dealing model described in Option 3 in the Issues Paper proposes the addition of certain specific exceptions to the existing list of exemptions to copyright infringements set out in the Copyright Act, rather than the creation of an open-ended fair dealing exception. Specific exceptions might, for example, include one or more of the following:

- a back-up copy exception for recordings and films, similar to the existing computer program exception (s 47C);
- a time-shifting exception which is broader than existing s111, so as to cover underlying content in a broadcast – both UK and New Zealand copyright law presently have such an exception; and
- a format-shifting exception which would allow a person who buys a sound recording in one format to copy that sound recording for personal use in another format (eg.

MP3 format for playing on an iPod). This exception to copyright infringement would not allow copying from another person's CD collection or unauthorised copies from a peer to peer network. Such a proposal is currently under consideration in New Zealand.

Arguments for changes to the Copyright Act that adopt the Option 3 approach are that it would give greater certainty to copyright owners and users than Options 1 and 2, and would be more reflective of Government policy rather than requiring broader judicial consideration of an open-ended exception.

Arguments against an Option 3 approach are that it is not flexible and, by removing any scope for court interpretation, will require further legislative review in the future to determine how the fair use exceptions should apply to new technological developments.

For copyright owners, Option 3 would possibly undermine the market value of copyright material and hinder new business models (eg. allowing format-shifting of music would arguably affect the sale of digital music downloads).

Option 4 – Retain current exceptions and add a statutory licence for private copying

This model involves legalising the copying of copyright matter onto new media for private use (eg. sound recordings copied onto blank CD-Rs) and imposing a tax on the sales of recordable media (eg. CD-Rs) which is distributed to rights holders by a collection society. This approach is similar to the proposed blank tape levy which was held to be unconstitutional by the High Court in *Australian Tape Manufacturers v Cth* (1993). A number of European countries have similar regimes in place.

Arguments for an Option 4 approach are that it provides for some remuneration to rights holders - which does not presently occur even though copying of their material is widespread. The approach has at some times had the support of some copyright interests, particularly collecting societies (eg. APRA/AMCOS (musical works) but not the owners of sound recordings (e.g. record companies as represented by ARIA).

Arguments against an Option 4 approach are that it would not provide adequate compensation to owners and that blank media are likely, in any event, to be superseded in the short to medium term by other less tangible media (eg. computer hard-drives; MP3 players and mobile phones). Option 4 also places the burden to compensate copyright owners on blank media producers. Were this approach to be adopted a likely result is that the cost of blank media would go up, including for people who do not use blank media for copying protected material (eg. personal data, photos and video).

The relationship between fair dealing and technological protection measures

Copyright owners have introduced technological protection measures and digital rights management systems which attempt to prevent or limit the extent of copying of copyright material (eg. copy protection measures on music CDs, film DVDs and computer games) to prevent piracy or establish new business models.

The circumvention of these measures is prohibited under Australian copyright law and it is unlikely that fair dealing would be a defence to circumvention, unless specifically addressed in legislation.

The next step

In November 2005, the Attorney-General Mr Philip Ruddock announced that his Department had completed its review of the submissions and identified the options which would be taken to Government as including:

- supplementing the exceptions with a new extended dealings exception that can apply to a wide range of permitted uses; and
- adding new exceptions to recognise some everyday forms of private copying that in the Attorney-General's view do not harm copyright owners such as time-shifting (eg. taping a TV show to watch at later time) and format-shifting (eg. putting a CD you have bought onto your iPod).

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