

The New Media Landscape

Paul Mallam reviews the new media landscape unfolding in Australia

Few legislative changes have had such a long gestation, chequered history and dramatic passage as the recently enacted media ownership reforms.

This paper gives an overview of:

- the new media ownership rules;
- the key underpinning concepts of the new rules; and
- some practical examples of how they could apply.

Over the past 20 years media ownership in Australia has been regulated by a pastiche of legislation. The *Broadcasting Services Act 1992* (Cth) (**BSA**) sets out the cross-media and media concentration rules. The foreign ownership restrictions are enforced through a combination of the BSA and the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), while the *Trade Practices Act 1974* (Cth) (**TPA**) provides an overarching completion framework. In practice, the operation of the cross-media rules have limited the role of competition regulation.

New Media Ownership Rules

Schedule One of the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) (**new Act**), which implements many of the new rules, commenced on 1 February 2007. The combined effect of the new rules and the repeal of the foreign ownership restrictions in Division 4 of Part 5 of the

BSA on a date to be proclaimed will abolish the foreign ownership restrictions on commercial television and pay television (although in the latter case they have always been dead letter). After the proclamation expected in the first half of 2007, all foreign ownership of media will only be regulated by the FATA. Media will remain a sensitive sector for the purposes of the FATA. While it cannot be assumed that all foreign ownership proposals will be "rubber stamped" by the Treasurer under the FATA, the experience of radio is that foreign ownership has been permitted up to 100%. Whether or not the same levels are permitted in commercial television and print media, there will nevertheless be a substantial rise in foreign ownership, in part driven by the strength of the private equity market.

The new Act will not change the existing media concentration rules. Instead, it actually reinforces those rules, by providing that the new media diversity rules operate only in respect of media groups which comply with the media concentration rules, known in the new Act as the "Statutory Control Rules".

The central and most complex part of the new Act is, of course, the new media diversity test. The new test is not really an abolition of the cross-media rules, but a form of cross-media re-regulation. This is especially so with last minute amendments which limit the number of mainstream media which can be controlled

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by one person in any one market to 2 of 3 out of commercial radio, commercial television and major print media which are on the Associated Newspaper Register.

Media Diversity Rules

Turning then to the media diversity rules. There are two central prohibitions. First, a prohibition on transactions that result in a "situation of unacceptable media diversity." Second, a prohibition on transactions that result in an "unacceptable 3-way control situation."

As has been well publicised, the media diversity rules require a minimum of 5 media groupings in the major State capital cities of Sydney, Melbourne, Brisbane, Adelaide and Perth. A minimum of 4 media groupings is required elsewhere. The media grouping test is based on a hierarchy of concepts. First, groupings are determined by reference to commercial radio licence area. While those areas are largely co-terminus with major population centres (and in regional areas, the hinterland for those centres), this potentially leads to some odd results, discussed below. A media operation is any of a commercial radio licensee, a commercial television licensee or an

associated newspaper in relation to that commercial radio licence area. A media grouping is determined by reference to common control of any media operations. For this purpose the elaborate control test established by the BSA applies. Consequently, common control could arise through a wide range of means, and not merely by holding a company interest which exceeds 15% in respect of 2 media operations. For example, common control, and therefore a media grouping, could arise through contractual arrangements.

Another aspect of the rules which deserves observation is that the 5 media groupings test applies only in the 5 major capital cities. Thus, quite large markets such as Canberra, Newcastle, Wollongong, Geelong and to a lesser extent Hobart and Darwin are regional markets for the purpose of the test. On one view this is an advantage, because the lower of the two media groupings test (four minimum groupings rather than five) will apply to those markets. However, especially for commercial radio licensees the sword is very much double-edged, because those markets are also subject to the highly prescriptive local content requirements which will apply to all regional markets, as

a result of the very publicised pressure brought to bear by the National Party.

Register of Media Controllers

To ensure transparency of the new regime, a new register of media controllers will be created and administered by the Australian Communications and Media Authority (ACMA). Within 5 days after 1 February 2007, all media controllers were required to provide a statutory notification to the ACMA. This included controllers of associated newspapers, which were not previously subject to these reporting requirements. The scope of the new Act, in applying to the print media, is a significant enlargement from the BSA in its present form. However, this mechanism was necessary in order to ensure a public and certain process by which the number of controllers in a market – and therefore compliance with the media diversity rules – could be determined, not only by the ACMA but also by media companies and their advisers.

There is also a significant benefit in being registered as a media controller. If registered, then the ACMA is precluded from exercising its consid-

erable divestment powers in order to cure any subsequent breach by requiring divestment in respect of the control previously notified, except in very limited circumstances. This is a considerable advantage in relation to, for example, a fiercely contested takeover. The party which first crosses the 15% control threshold, and is therefore notified on the register, has some advantage over another party that launches a subsequent takeover for the same media asset. The minimum voices test has been said to encourage first mover advantage, with a prospective scramble for media mergers and acquisitions taking place in the very near future. The creation of the register and the benefits of registration also encourage this outcome.

Impact of Commercial Radio Licenses

A further observation to be made is the importance of the number of commercial radio licenses in a market, when determining the total number of media groups. For example, when comparing Sydney and Melbourne, both markets have 2 associated newspapers (one published by News and the other by Fairfax), each of the 3 commercial television networks and in the case of Sydney, a total of 8 radio groups, while Melbourne has 7 such groups. On current calculations this gives rise to a total of 13 media groups in Sydney and 12 media groups in Melbourne prior to the commencement of the legislation. That suggests a considerable degree of flexibility, in relation to prospective media mergers, with several mergers taking place before the minimum number of 5 media groupings is likely to be approached. However, when Brisbane is taken into account, the situation is quite different. Brisbane has one print group (News), all 3 commercial television networks and 4 radio groupings, giving a total of 8 media groups. Nearly all of the groups represented in Sydney and Melbourne are also represented in Brisbane, with the result that when considering a possible media "marriage", its effect on the Brisbane market requires careful scrutiny. The number of mergers and acquisitions

which could be undertaken, before hitting the minimum number of 5, is considerably lower, once Brisbane is taken into account. Obviously enough, the point is that when structuring a media transaction, the market with the lowest number of voices in which the relevant media operate, needs to be the base line to determine if the transaction would breach the new rules.

This point is further amplified once regional markets are considered. For example, Katoomba has a total of 6 media groups. Those groups consist of News, Fairfax, the 3 commercial television networks and Australian Radio Network. Consequently, while the driver in relation to any marriages between those media would be the metropolitan markets, the impact on Katoomba would also need to be considered.

Even further afield is the example of Darwin, which has only 4 media groups – the minimum number for a regional market. These are News, Nine, Southern Cross and Grant Broadcasters. Consequently, a merger between any of those parties could not take place without an immediate breach of the media diversity rule in Darwin.

These examples can be multiplied around Australia, with a great many differing and sometimes idiosyncratic results.

Such examples highlight the importance of the prior approval regime created by the new Act. This regime is similar to the regime already in place under section 67, under which prior approval can be obtained from the ACMA in relation to breaches of some of the existing media rules. In many respects the new prior approval regime mirrors the section 67 process, with which a variety of media groups are familiar, particularly in regional radio, where section 67 has most often been used. However, under the new prior approval process, the ACMA is not subject to a time limit when first granting approval, but must use its "best endeavours" to make a decision within 45 days. Here, the policy arguments compete. No doubt on the one hand there will be a good volume

of material and a number of sensitive issues which the ACMA needs to consider, in determining whether to approve a potential breach and also to determine the period of dispensation from the breach. On the other hand a prior approval for breach is usually requested in circumstances where time is of the essence. At least in my experience, the ACMA and its predecessor the ABA have been very helpful in seeking to accommodate the commercial imperatives of parties who have used this process. However, the lack of a time limit for an approval does underline that, where 2 parties are competing for control of a common media asset, the party that does not require prior approval in relation to a potential breach, has a clear advantage in obtaining control of the contested asset.

Approval of a breach can be given for a maximum of 2 years, with an extension for the lesser of the original period of the approval or 1 year. This mirrors the existing mechanism under section 67. The new regime provides for enforceable undertakings, which are to be taken into account in the approval process. This is likely to result in a strong preference by the ACMA for undertakings to be preferred as part of an approval process.

Coupled with the prior approval process, are very considerable powers of divestment. These powers will potentially need to be exercised not only in relation to those who run the gamut of regulation, but also innocent parties. For example, in a simple case of 2 contemporaneous and confidential media transactions, it may be that completion of either of those transactions takes the number of media groups in a market to the minimum. In that circumstance the party which completes second, will be in breach of the law. This situation may have arisen through no fault of the party itself. For this reason a period of up to 2 years is available to divest assets which would rectify a situation of unacceptable media diversity, where the person in breach acted in good faith and took reasonable precautions. An extension of 1 year is also available. While these periods appear generous, many of us would struggle

to explain to a client that after spending handsomely on a bevy of advisers and investing tens, hundreds or even billions of dollars in a media transaction, divestment was required.

The new regime has been fortified with some very prescriptive requirements in respect of regional radio (which, as indicated above, includes commercial radio licensees serving markets such as Wollongong, Newcastle, Geelong and Canberra), which will commence between 1 February 2007 and 1 January 2008. Upon a trigger event taking place, a regional commercial radio licensee must submit a local content plan and comply with various prescriptive local content requirements. While these requirements are subject to review by the ACMA, they are nevertheless

a throwback to media regulation of the kind not seen since the Australian Broadcasting Tribunal. Furthermore, a trigger event could occur in a wide range of situations. As a simple example, a trigger event includes a change of control. However, there are many situations in which a change of control can occur quite innocently, such as the death of a shareholder or a company restructure undertaken for entirely unrelated tax or accounting reasons, where there is no change in ultimate control. These are trigger events which would require the hapless regional radio licensee involved to comply with the new regime.

Conclusion

From the political sidelines it is easy to be critical of the new Act. As has

been well publicised, it is a compromise and therefore highly compromised. Leaving to one side the policy debate of whether cross-media reform is a necessary or good thing, and the compromises themselves, it is very clear that the new Act is in many areas, complex. It will have reverberating effects and consequences – no doubt, some of which will be unforeseen or unintended. That is usually good news for lawyers and various other advisers. However, it is also contrary to the policy objective of simple streamlined regulation, in which the role of regulators and therefore the advisory industry which grows up around them, is as unobtrusive as possible.

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Focus On Copyright

Fair Use and Copyright in Australia

In August 2006, the Attorney General, The Hon Philip Ruddock MP addressed the Communications and Media Law Association to set the scene for the amendments to Australia's copyright laws that ultimately came into effect in December 2006. The address provides an insight into the Federal Government's main concerns about the challenges digital media present for copyright regimes the world over. We have reproduced it here in full with the Attorney General's permission.

Fair Use and Copyright in Australia

Firstly, may I acknowledge the traditional owners of the land we meet on and pay my respects to their elders, both past and present.

I am delighted to be with you to talk about the changes we are making to copyright law.

Many of the issues we are facing are not new – copyright recognition in one form or another has been traced back to ancient times. Even the dark

ages of Europe had the occasional dispute over the right to copy. For example, some of you may be familiar with the story of the dispute in the sixth century between two Irish monks – Abbot Finnian and Columba.

While accounts of the disagreement differ – not surprising after 1400 years – they agree on the key facts. Columba copied without permission a rare psalter of St Jerome belonging to Abbot Finnian thereby reducing its value. Abbot Finnian complained to the King. The King ruled Columba

should hand over his copy to Abbot Finnian with the words: *"To every cow her calf and to every book its copy"*.

According to some reports this was not the end of the matter – Columba's clan successfully contested the King's decision in a bloody battle in which thousands were killed. The controversy and resulting warfare doesn't seem to have irreparably damaged the reputation of either man. Columba apparently went on to live an exemplary life and both were canonized after death and were made Saints!

Happily copyright disputes today, even if vigorously contested, rarely result in bloody battles. But there's not a lot of saints around either!

Achieving a Balance

When Johannes Gutenberg developed the first commercial printing press around 1436 – he not only set the scene for an explosion in knowledge – he also unwittingly set in train the processes which have ultimately led to the issues facing us today.

With mass publication, and the commercialisation of the creative process, came the need to adjudicate between competing rights – while at the same time protecting the community's interest in encouraging the dissemination of ideas and the development of new technology. It goes without saying that the number of competing rights has increased exponentially over the centuries. So "adjudication" of what should be the right "balance" has become more challenging for governments.

Technology is developing at an overwhelming rate. In Gutenberg's day law makers only had to deal with the printing press. Today technology is everywhere. We have DVDs, TVs, MP3s, iPods, and Blackberrys. A Blackberry used to be something you ate – not something you talked into and read messages on! And I have four different remote controls on my coffee table!

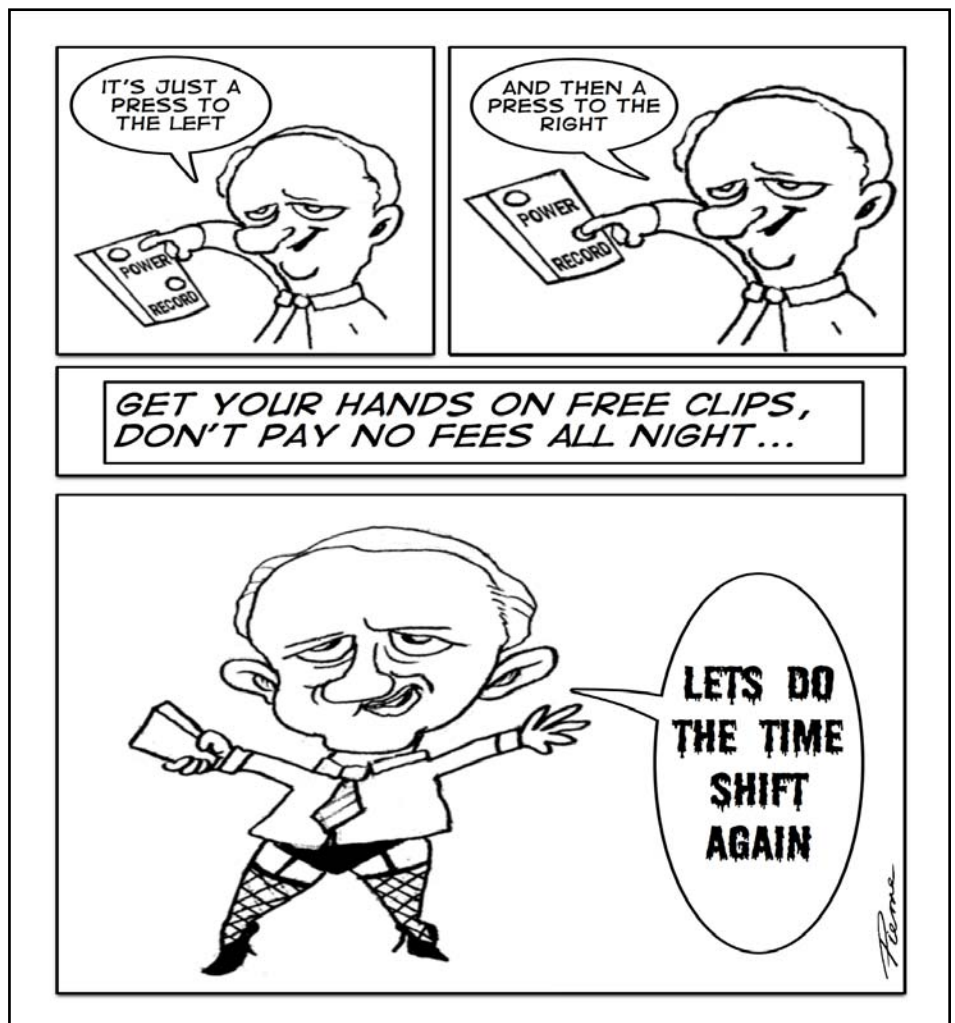
I believe our current system of copyright has served us very well. However, it is imperative it keeps up with the pace of change to ensure a balance is maintained. Crucial to this is effective enforcement and anti-piracy measures. As you know, I have recently announced major reforms to our laws which I will introduce into Parliament in 2006.

Over the coming days and weeks I will be issuing various parts of the exposure draft of the Bill for public comment. You will first have an opportunity to comment on Australia's approach to implementing its new technological protection measures scheme consistent with the Australia-US Free Trade Agreement. These reforms will clearly strengthen the protection regime for copyright owners and make a real difference to effective enforcement in the online environment.

This will be followed by draft provisions on other new enforcement measures and new exceptions for users as well as other significant reforms.

We will endeavour to stagger the submission dates so you will not be overwhelmed.

We aim to introduce the legislation in mid October and anticipate it will



be referred to a Senate committee. We are aiming to have the legislation passed by the end of the year 2006.

I do not propose to say anything today about the technological protection measures. Our changes will be announced shortly. However, I can say that, with the Bill, we have tried to give copyright owners assistance to tackle the problem of copyright piracy while attempting to maintain users' access to information.

As you will appreciate this requires the balancing exercise I referred to earlier.

The Reforms

The new measures will make our laws fairer for consumers and our educational and cultural institutions. They are intended to encourage the creative industries. And they will make it tougher on copyright pirates thereby maintaining the integrity of the system, and retaining the confidence of the public on which it depends.

The reforms are commonsense amendments which will maintain Australia's copyright laws as the best in the world for the benefit of our creators and copyright owners and for the many Australians who enjoy creative works. It is important that reforms such as these present initiatives succeed in re-vitalising copyright as an effective tool of public policy.

The Reforms – A "Fair Use" Exception?

Most of you are already familiar with the reforms so I will concentrate on the major issues and the reasons behind our decisions.

As you know, laws in most countries allow for particular uses of copyright material that do not infringe copyright. These exceptions recognise the public benefit in permitting copyright material to be used for purposes such as news reporting, education, research and criticism and review. To date, Australia has provided for this

by means of a number of specific exceptions and statutory licences. This is designed to provide certainty to copyright owners and users as to what can and cannot be done. However, a key issue is whether this system is flexible enough to respond to rapidly changing technology which can render a specific copyright exception out-dated or its scope uncertain.

When we were drawing up our reforms we looked at whether we should move to a general exception, which would allow the courts to determine on a case-by-case basis whether particular uses should qualify as an exception to copyright. US copyright law has a general "fair use" exception of this kind.

We found little support for doing away with our present system of specific exceptions – although some user groups did want to add a new general exception in addition to the present exceptions. They argued that this would restore balance to the Act by recognising the rights of consumers, allowing some flexibility, and assisting cultural and educational institutions to make better use of new technology for public functions.

Most copyright owners strongly opposed a general exception.

They were concerned that such a provision, superimposed on the existing system, could result in confusion and increased litigation unless there were other major legislative changes.

After looking at the various options, I decided that the US fair use approach – as the main exception to copyright – is not the most suitable model for Australia.

It could cause confusion and uncertainty if introduced here. Even in the US context the extent of user rights is often unclear because appeal courts have not made a final ruling on whether particular uses of copyright material is lawful.

I also recognise there is uncertainty concerning whether a US-style fair use exception would comply with Australia's obligations under international copyright treaties.

Reforms – Specific Exceptions

However, I do recognise that reforms are necessary in two areas.

First, the Government will be legislating a new extended dealing exception to ensure copyright law has some flexibility where material is used for non-commercial purposes by Australian educational bodies, libraries and other cultural institutions. It will also assist people with a disability. This exception will be an important part of the copyright balance between private rights and the broader public interest. I remind you that the first copyright act, the Statute of Anne [of 1709] was not simply concerned with protecting the interest of the author or bookseller. Fundamentally it was intended to encourage the spread of education and the production of useful books. I hope the new exception will provide some of the flexibility and public benefits of the US fair use exception, albeit within clearer limits.

Secondly, new exceptions will allow certain copyright material to be used for private and domestic use. We will be amending the law to allow consumers to "time shift" – to record television and radio programs in their own homes so they can view or listen to them at a later time. However, this exception will not allow a recording to be used over and over again or distributed to others. We will also be amending the law to permit a person who has purchased a legitimate copy of some categories of copyright material to make a copy in a different format. Its greatest impact will be to allow individuals to store their personal music collections recorded on CDs, audio tapes or vinyl records in the memory of an MP3 player or home entertainment personal computer. We are also aware that consumers may want to use technology to copy audiovisual material to other devices as well. We have made no decision about that for the moment. However, we will be reviewing the issue in two years time following developments in the market to see whether the law should be expanded to audio-visual material in a way which complies with our international obligations.

The reforms we are proposing will legalise practices which commonly occur in many Australia homes. To continue to treat them as copyright infringements diminishes both the credibility of the Act and respect for copyright law, and increases public tolerance of more damaging commercial piracy. Everyday consumers should not be treated like copyright pirates. Copyright pirates should not be treated like ordinary consumers.

Tougher Copyright Piracy Laws

Copyright piracy is theft. It harms not only our creative industries – like composers and film makers – but also those businesses relying on the creative industries including small businesses like cinema operators and video shops. The Government has already introduced significant amendments in 2000 and 2004 targeting copyright criminals. I'm sure you're familiar with these. However, technological advances continue to make it easier to commit copyright piracy on an even larger and more damaging scale. This applies to both the online environment and the physical market place. Copyright owners and law enforcement agencies need stronger, up-to-date and more straightforward measures to combat the problem.

The new measures we will be introducing include:

- On-the-spot fines
- Proceeds of crime remedies
- Giving a court additional power to award larger damages payouts, and
- A change in presumptions in litigation to make it easier to establish copyright piracy.

We have also commissioned the Australian Institute of Criminology to undertake research about the extent and impact of piracy within Australia. The research is underway and once completed will provide the Government with further information to help identify options to address this global issue. We are also working with enforcement agencies to try to develop practical measures to tackle

piracy. Finally, we are also trying to tackle the issues at source, by getting greater cooperation from some of the countries in our region where piracy is a great problem. During my recent visit to China and Indonesia ways of improving cooperation on intellectual property enforcement were discussed. We will continue this dialogue with them.

Conclusion

It took more than two hundred and

fifty years after the invention of the printing presses for England to progress – from copyright administration by a system of royal privileges – to statute. Nowadays, the pace of technology change is so swift that it is impossible to say with any certainty, what new technologies we'll be using in ten years time – or even in twenty – let alone in two hundred and fifty years.

We must constantly monitor the effectiveness of our laws. We must

ensure they achieve the balance we need to foster the creative industries, benefit consumers, defeat the copyright pirates and serve the community in the widest sense.

I look forward to taking your questions. If hundreds of years ago, two Irish Saints could disagree on copyright laws, I'm sure a roomful of lawyers in the twenty-first century will have plenty to say. To paraphrase the Irish King, *"To every cow her calf, to every lawyer, his – or her – own opinion!"*

Copyright Law Reform

Catherine Mullins summarises the Copyright Amendment Act 2006

The *Copyright Amendment Act 2006 (Act)* seeks to ensure that it is the copyright pirates who are penalised for flouting the law, not ordinary consumers who have legitimately purchased copyrighted products.

Introduction

On 19 October 2006, the Senate referred the provisions of the *Copyright Amendment Bill 2006 (Bill)* to the Standing Committee on Legal and Constitutional Affairs for inquiry and report by 10 November 2006 (and then 13 November 2006).

The Bill described a range of major amendments to the *Copyright Act 1968 (Copyright Act)*, many of which implement outcomes of the Federal Governments Copyright Law Reviews in 2005 and 2006 as well as other policy initiatives.

The Bill was passed (without amendments) and commenced on 11 December 2006.

The Changes

New Exceptions for Private Use

"Time Shifting" and "Format Shifting" are the two new exceptions to copyright infringement relating to private use:

- Time Shifting (Schedule 6, Part 1) – these provisions allow an individual to copy from television and radio without permission in order

to replay it "at a time more convenient than the time when the broadcast is made". Once made the copy can then be watched by household members, but can not be more widely distributed. These provisions do not impose any obligation on the individual to check the commercial availability of the material.

- Format Shifting (Schedule 6, Part 2) – these provisions allow an individual who owns copies of certain types of material to copy that material into different formats, for instance:
 - hard copy photos can be copied into digital form and digital photos can be copied into non-digital form;
 - VHS cassettes can be copied onto DVDs;
 - magazines can be scanned so as to be used in a digital device;
 - personal CD collections can be copied into MP3 or other digital formats for use in an iPod or computer.

Importantly the Act does not provide for:

- digital audio visual material to be copied onto another device such as a portable player;

- a backup copy to be made of a CD;
- computer games to be copied;
- somebody else to make a copy;
- a copy to be made for yourself from an item owned by somebody else;
- a recording downloaded from the internet to be copied; or
- getting someone else to make a copy for you.

New Flexible Dealings Exceptions

The Act's new flexible dealings exceptions allow for the use of copyright material for certain purposes which, in general terms are (Schedule 6, Part 3):

- non commercial uses by libraries, museums and archives, for instance copies of parts of historical documents can be included in materials for visitors;
- non commercial uses by educational institutions for the purpose of teaching, for instance old VHS educational tapes can be copied onto DVDs;
- uses for or by a person with disabilities, for instance a person with print disabilities can copy a book into a format that they are able to read; and
- uses for parody and satire.

Schedule 6 also includes amendments clarifying the existing exception related to "fair dealing" for the purposes of research or study (Schedule 6, Part 4) the effects of which being to limit the

extent of fair dealing for research or study to the definition of a "reasonable portion" regardless of whether or not the work is out of print, or out of print and only available in one library or archive in Australia.

Also included in the Act are changes to exceptions related to official copying and archive material (Schedule 6, Part 5).

Technology Protection Measures

Technological Protection Measures (TPMs) are technical locks such as passwords, encryption software and access codes, used by copyright owners in order to stop their copyright material from being copied or accessed. While liability for the manufacture and commercial supply of devices or services circumventing TPMs was already established under the Copyright Act, the Act creates new offences for circumventing TPMs and gives effect to Australia's remaining intellectual property obligations under the Australian - United States Free Trade Agreement.

The Act aims to help combat piracy by introducing civil remedies and criminal penalties where a person circumvents an access-control TPM and builds on the current scheme whereby criminal penalties are imposed for dealings in circumvention devices and services.

Under the Act, copyright owners will be able to take legal action against somebody who:

- circumvents an access-control;
- manufactures, distributes, imports, offers, provides or communicates a device to circumvent either an access-control or a copy-control;
- provides a service to circumvent either an access-control or a copy-control.

In some cases these activities also constitute criminal offences. Criminal penalties provided by the Act are of 5 years imprisonment and/or fines of 550 penalty units (currently \$60,500).

Copyright Tribunal Jurisdiction

The Copyright Tribunal's Jurisdiction is extended under the Act to enable it to determine how much is payable for



some additional uses of copyright material administered by copyright collecting societies. (Schedules 10 & 11)

Removal of Cap on Copyright Fees for Broadcasting Sound Recordings

The Act removes the 1% cap currently payable by broadcasters to owners of copyright in sound recordings for broadcasting sound recordings, and replaces it with an obligation to pay "equitable remuneration". If the amount of "equitable remuneration" can not be agreed upon, the matter will be decided by the Copyright Tribunal.

Strengthening of Copyright Enforcement

The range of new measures contained in the Act to "tackle piracy" include:

- new offences relating to "substantial infringement on a commercial scale";
- "on-the-spot" fines for acts of piracy will be able to be issued by the police;

- access to, and recovery of, profits made by pirates;
- new presumptions of copyright ownership in Court proceedings;
- increased penalties for criminal infringement including when infringement involves digitisation of all materials; and
- a broader range of offences in relation to pay TV piracy.¹

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(Endnotes)

¹ A detailed discussion of the amendments as passed in their final form will be contained in the Australian Copyright Council's discussion paper to be published in around June 2007 – *Recent Developments in Copyright 2007*. An information sheet on the reforms is available on the Council's website.

Protecting the Copyright Balance in Cyberspace

Adam Sauer looks at the competing philosophies (protection/control vs access/freedom) at play in conventional copyright regulation and where TPMs fit in the mix.

Introduction

The digital form in which information exists on the internet and the communal way in which much of it is developed challenges the existing Australian copyright regime and, as usually happens when a system is challenged, concerns have been raised. A primary reason for concern is that technology is developing exponentially while the law is playing the "perpetual game of catch-up".¹ This being so, from the copyright owners' perspective there is a fear that the existing copyright regime cannot sufficiently protect their work in cyberspace. To bolster the protection provided under the *Copyright Act* 1968 (Cth) (**Copyright Act**) copyright owners are increasingly utilising Technological Protection Measures (**TPMs**) which are designed to control access to and the use of digitised works.² TPMs were initially given legislative support by the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) (**Digital Agenda Act**) which relevantly prohibits their circumvention; the need for this support which was supplemented in the amendments to the Copyright Act which came in effect on 1 January 2007, highlights the fact that just as a work can be protected, protective measures can be broken.

Depending on one's viewpoint, TPMs either reinforce existing copyright protection under the *Copyright Act* or extend it beyond its legitimate boundaries. From a user's perspective TPMs and the anti-circumvention provisions impinge upon their use of a copyrighted work and in some cases, override their rights under the *Copyright Act*. At the heart of the TPM debate is the extent to which the balance is maintained between copyright owners' and users' rights in relation to copyrighted works.

Australian law in its present state coupled with the extent to which TPMs can "lock-up" a work seriously threatens to tip the balance in favour of copyright owners and thus undermine copyright law.

The Internet: Construction, Culture & Content

The internet is "a decentralised, global medium...[which] no single entity... administers"³ and no one individual can claim to have invented.⁴ Information as it exists in cyberspace is in digital form; descriptions of digitised information highlight its "detach[ment]... from the physical plane" and have it floating, disembodied and "darting" to individual computers as requested.⁵ Barlow notes that prior to digital technology, by and large, "to express was to make physical" and "the value was in the conveyance...not the thought conveyed."⁶ Hence, the problems applying traditional copyright law, which protects the expression not the idea, to cyberspace and digital works.

The internet is an interactive medium where users are "active interpreters of what they find in culture and...continually exchange their ideas with [one another]."⁷ In a similar vein, Gibson notes that cyber-culture "no longer... use[s] words like appropriation or borrowing to describe those very activities", these terms are archaic now and the activities they describe are inherent in internet use.⁸ The practice of cooperative development and building upon knowledge has lead one writer to refer to the "cut and paste architecture of the internet."⁹ Thus the way information is developed in cyberspace also challenges traditional copyright law and its ability to restrict certain uses of works.

Technical Protection Measures Explained

The *Copyright Act* defines a TPM as

"...a device or product, or a component incorporated into a process...designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work...by either or both of the following means:

- (a) ...ensuring that access...is available solely by use of an access code or process... with the authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanism."¹⁰

The majority of the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment (Sony)* accepted the definition of "technological protection measure" given by Sackville J in the Federal Court:

"...a device or product which utilises technological means to deny a person access to...or limits a person's capacity to make copies of a [copyright] work...and thereby...prevents or inhibits... acts which, if carried out, would or might infringe copyright in the work."¹¹

A TPM can control the use of a work in a number of ways, such as: denying or restricting access; only allowing access via specific devices or programs; limiting the number of times and the time period of access; and inhibiting copying, modification, downloading or redistribution. In the context of denying user rights, aside from the practical denial of access, it is not so much TPMs that are the operative factor but the legislative prohibitions on circumventing TPMs.

Amendments to the *Copyright Act* to expressly prohibit the use of a circumvention device come into effect on 11 December 2006 and supplemented

earlier prohibitions on certain dealings with such devices, which in reality made obtaining a circumvention device difficult.¹²

The Need for TPMs and Anti-Circumvention Provisions

Prior to the *Digital Agenda Act* the *Copyright Act* protected works on the internet just as it protected works in the "real world", so one may question the need for any further protection. In regards to TPMs, one reason these are being used is that the copying and dissemination of information is far easier and faster on the internet than it is in the real world. The key reason for their use though is that the internet and associated technologies have developed at a pace that far outruns the law. Cornish believes

"technical control...seems the only hope for preserving...copyright industries [as they exist on the internet] in something resembling their present form."¹³

This is because in cyberspace law is defined not through a statute but through the code that governs the space¹⁴; quite simply in cyberspace code is law.¹⁵

TPMs are an example of code at work and are an attempt to fight technology with technology. It may be said that she who controls the code controls the work. This is very true in respect of technologically protected works, works which in the physical world would have primarily been protected by copyright law but in the digital domain are protected by code. The law plays a supporting role by inhibiting circumvention of TPMs but ultimately protection of digital works is "not so much [by] copyright law as copyright code."¹⁶

The anti-circumvention provisions arise from the simple fact that technology can also be employed to circumvent or disable TPMs.¹⁷

Problems with TPMs & the Anti-Circumvention Provisions

The Assumption of Illegitimate Use and Restrictions on Legitimate Use

Anti-circumvention provisions imply that users will infringe copyright, however not every user has illegitimate motives. Concerns have been raised by both the Federal Government and international bodies regarding the extent to which TPMs and anti-circumvention legislation curtail non-infringing use of works.¹⁸ Legitimate use, but also access generally, is a major issue given that information is increasingly being transmitted in digital form. It is widely acknowledged that illegitimate use of copyrighted works, especially those in the digital domain, occurs and owners should be able to protect against this. It is the responsibility of the legal system to regulate TPMs so illegitimate uses can be minimised whilst legitimate use can be maximised.

"Übercopyright"

Copyright law involves the balancing of the rights of owners and users of copyrighted works, the respective interests are essentially protection/control and access/freedom. This balance is a delicate one¹⁹ which some fear the *Digital Agenda Act* and subsequent TPM legislation has upset to the extent that it created a "paracopyright" or 'übercopyright' in favour of copyright owners.²⁰ Copyright holders are able to limit or prevent the exercise of users' full enjoyment of the protected work and their rights under the *Copyright Act*. That TPMs and anti-circumvention provisions create too strong a body of rights for owners and go beyond the existing protections under the pre-amended *Copyright Act* is a major concern.

The majority of the High Court in *Sony* warned that in defining TPMs:

"it is important to avoid an over-broad construction which would extend the copyright monopoly rather than match it."²¹

However, the current state of the law arguably does extend the monopoly. As the eBook example illustrates, there is the risk of private bodies co-opting shared works via technological methods and effectively claiming proprietorship over works in the public domain. It also illustrates that TPMs do not just give copyright owners the power to protect their interests but the power to infringe the public's statutory rights.

Control in the hands of copyright own-

ers is also a cause for concern because owners owe no responsibility to the public in terms of the copyright balance and are thus free to outstretch the provisions of the *Copyright Act*. Unlike laws, codes are developed and applied by private individuals or corporations and unlike legal control mechanisms, for the most part code is not subject to any external review or curtailment. Inherently "unlike law, code has no shame"²² and while a state of total control, via TPMs and supporting law, is not foreseeable (some checks exist) the level of control may still reach an unacceptable level.

Locking-up Culture: The Impact on Creativity

Daryl Williams, then Attorney-General, stated in his second reading of the *Copyright Amendment (Digital Agenda) Bill 1999* that its

"central aim...is to ensure...copyright law continues to promote creative endeavour and, at the same time, allow reasonable access to copyright material in the digital environment."²³

The creative endeavour referred to is that rewarded by copyright protection, not that which utilises the copyrighted material.

There is no general exception to the anti-circumvention provisions in the *Copyright Act* for creative exploitation or research and while there are some exceptions, none apply to the general private user.²⁴ The anti-circumvention provisions in their current state come dangerously close to giving copyright owners (who are often corporations and whose ultimate concern is commerce not culture) undue "control over the use of culture."²⁵

Creativity, to an extent, is spurred by inspiration from pre-existing works (witness the cut-ups), thus present copyright law and TPMs may be seen as a form of creative censorship; the eBook example illustrates how fair dealing rights may be negated. This is worrying in its impact on artistic creativity and education, which also plays a part in the development of art.²⁶ A negative impact on society in general will also occur if cultural items are under technical lock and key, both in

terms of restrictions to access and the potential for owners to inflate prices for access.

The Limits of Control & Alternatives to TPMs

Justifying Circumvention of TPMs

Motivations for circumventing TPMs are not all illegitimate, for example it may be done in the name of "justice" where users are denied their legal rights in respect of a work.²⁷ There is perhaps also an argument that it is ethically permissible to circumvent TPMs in order to "level the playing field" given that TPMs and anti-circumvention laws strengthen owners' rights. Some inhabitants of cyberspace may further justify circumvention on the basis that they develop their own norms and "laws" and governments have "no moral right" to regulate cyberspace.²⁸ However, cyberspace has not been "inhabited...long enough or in sufficient diversity to have developed a Social Contract"²⁹; this seems to undercut the idea of a cohesive "cyber society" which since "commercialisation" of the internet has arguably failed to exist on any meaningful level.

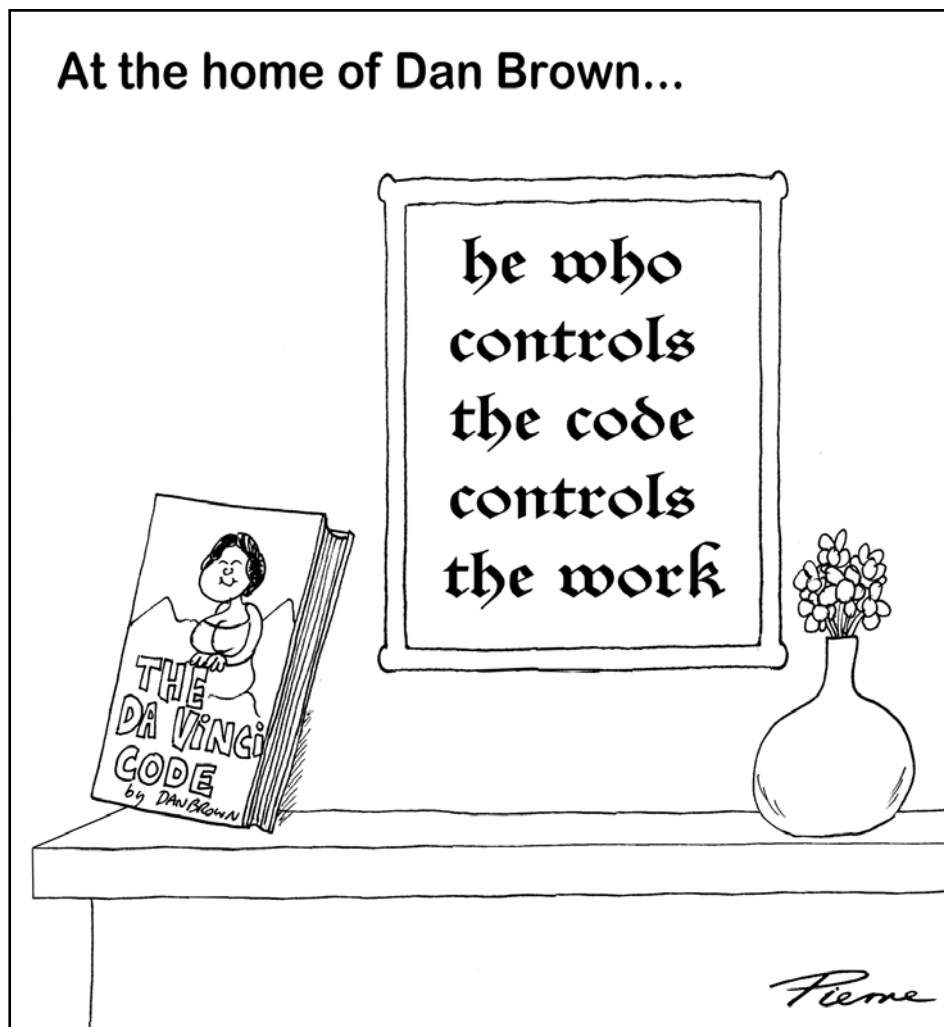
It is difficult to give credence to circumvention based on outmoded notions of a cyber community, whereas until the law recognises the legitimate user's dilemma, it is justifiable for them to (illegally but not immorally) circumvent TPMs.

Fair Use?

For Barlow, existing copyright laws cannot accommodate the internet since they are predicated on notions of physical property, whereas the digital domain is incorporeal.³⁰

One obvious solution is that new laws are developed, though the idea that the internet is such a novel medium that it requires its own specific legislative regulation has not found favour with the High Court.³¹

It may be that Australia needs to widen the current "defence" of fair dealing as it exists under the *Copyright Act* so it is more akin to the fair use provisions under United States copyright law. This proposal was the subject of a Federal Government Issues Paper but was not adopted in the reforms that have been



implemented based upon it.³²

The US defence is an "open-ended" and more flexible exception which "allow[s] the courts to determine whether a particular use of copyright material is "fair" and...lawful."³³ However, the US concept of fair use is grounded in legislatively implemented doctrines and rights which are not as explicit in Australia, therefore it may be artificial to graft it onto Australian law.³⁴

Further, Australian law regarding fair dealing is not entirely settled, so it is prudent to resolve the problems in our own jurisdiction before turning to alternatives in other jurisdictions.³⁵

Alternatives to Copyright

The internet community is developing alternatives to the traditional copyright regime. The Free Software Foundation (FSF), copy left licences and Open Source all allow open access to the source code of particular programs and unrestricted rights to copy, adapt, improve and distribute the works.

Burroughs' approach to the written word as regards the cut-ups is akin to the philosophies behind the aforementioned licences. These licences are not completely user-sided, for instance under a FSF licence the creator can charge a licence fee but cannot limit the uses to which the purchaser subjects the software to. Under a copy left licence users are granted rights on the basis that if they redistribute the code or versions thereof they do so under the same licence. A similar regime is a Creative Commons licence which again grants more user rights than the traditional copyright system. The aim of all these licences is to ensure "democratic access to information and technologies."³⁶

It remains to be seen to what extent these approaches are adopted, whilst they are appealing to creators in cyberspace it is unlikely they will be embraced by large scale commercial owners of copyright who in reality control access to the majority of and most commercially valuable copyrighted works.

Conclusion

The impact of the internet and digital information once more sees the law trying to balance the interests of two opposing groups. There is a struggle to find some common ground where copyright owners can protect their work from unlawful use, while at the same time not preventing legitimate users accessing such works and exercising their rights in relation to them. With the implementation of the *Digital Agenda Act* and *Copyright Amendment Act 2006* it seems the law has sided with the copyright owners. There is no valid reason why users should have fewer rights in respect of digital works than they do physical works.

If the current state of affairs continues, user rights will foreseeably be further diminished by TPMs. Furthermore, owners will gain more power as TPMs become more advanced and are applied to a greater variety of digital works and will thus also obtain greater control over culture in general.

The law can no longer afford to remain "two steps behind" the evolution of technology, for it risks becoming less relevant in an increasingly technological society and being subsumed by TPMs and the like. Licensing regimes proposed by some in cyberspace will not adequately safeguard the user given that they are unlikely to be widely embraced. Rather than forcing users of copyrighted works to illegally circumvent TPMs to exercise their rights, the *Copyright Act* should be for the amended to allow legitimate users their legitimate access to works.

Adam Sauer commenced his Articles of Clerkship in October 2006 at Norton White Lawyers Melbourne. Adam would like to that Dr Melissa de Zwart, Senior Lecturer Monash University for her support and guidance in writing this article and wishes to acknowledge the assistance of David Sauer.

(Endnotes)

¹ William Gibson, 'God's Little Toys: Confessions of a cut & paste artist' (2005), *Wired* <<http://www.wired.com/wired/archive/13.07/gibson.html>> at 14 April 2006

² All references to a "work" include "other subject matter".

³ *American Civil Liberties Union v Reno* 929 F

Supp 824 (1996) (District Court) at 831-832. Kirby J makes similar observations in *Dow Jones v Gutnick* [2002] HCA 56 at 80.

⁴ Lawrence Lessig, *Free Culture* (2004), p. 7

⁵ John Perry Barlow, *The Economy of Ideas* (1993) Electronic Frontier Foundation

<<http://homes.eff.org/~barlow/EconomyOfIdeas.html>> at 14 April 2006

⁶ John Perry Barlow, *The Economy of Ideas*

⁷ Jack M Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 *Sydney Law Review* 5, p. 14

⁸ Gibson

⁹ Lessig, *Free Culture*, p. 105

¹⁰ s.10(1)

¹¹ [2005] HCA 58. Gleeson CJ, Gummow, Hayne and Heydon JJ at 38.

¹² See generally s.116A. Sections 132(5A) & (5B) of the *Copyright Act* create offences in respect of the prohibitions in s.116A. Under Australia-United States Free Trade Agreement (AUSFTA) Australia was required to include in the *Copyright Act* a prohibition on the use of circumvention devices to circumvent TPMs by 1 January 2007 (Australian Copyright Council, *Information Sheet: Digital Agenda amendments* (2006), p. 3).

¹³ W R Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2004), p. 54

¹⁴ Lawrence Lessig, *Code: and Other Laws of Cyberspace* (1999), p. 20

¹⁵ Lessig, *Code: and Other Laws of Cyberspace*, p. 6

¹⁶ Lessig, *Free Culture*, p. 145

¹⁷ The provisions also satisfy Australia's obligations under the WIPO Copyright Treaty 1997 (article 11) and AUSFTA (article 17.4.7(a)).

¹⁸ See Ian A Kerr, et al., 'Technical Protection Measures: Tilting at Copyright's Windmill' (2002-2003) 34 *Ottawa Law Review* 7, pp. 33-34 in relation to the discussion of TPM at the 1997 WIPO conference; and Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, pp. 87-88; and 90; Kimberlee Weatherall, 'Submission to House of Representatives Legal and Constitutional Affairs Committee Inquiry into technological protection measures exceptions' (2005), p 8; US Senators have raised similar concerns in relation to the DMCA.

¹⁹ Commonwealth, *Hansard*, House of Representatives, 2 September 1999, 9730 (Daryl Williams, Attorney-General), p. 9748. See also Kirby J in *Sony* at 169.

²⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of Technical Protection Measures Exceptions* (2006), p. 12

²¹ Gleeson CJ, Gummow, Hayne and Heydon JJ at 47. This concern is echoed in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, see for example p. 12.

²² Lessig, *Free Culture*, p. 148

²³ Commonwealth, *Hansard*, House of Representatives, 2 September 1999, 9730 (Daryl Williams, Attorney-General), p. 9748. This philosophy has been enunciated numerous times by the Coalition Government; see for example Attorney-General Philip Ruddock's press releases at the time of the release of the *Review of Technical Protection Measures Exceptions* and subsequent speeches.

²⁴ ss.116A(2), (3) and (4)

²⁵ Lessig, *Free Culture*, p. 169

²⁶ In the context of rights associated with education, see *Copyright Act* ss.40 and 44, and also ss.49 and 50.

²⁷ Ian A Kerr, et al, p. 25. Section 3 of the *Digital Agenda Act* states one of its objects is to "provide reasonable access...for end users of copyright material online", arguably this is not achieved if user's cannot exercise their rights under the *Copyright Act*.

²⁸ See for example John Perry Barlow's 'A Declaration of the Independence of Cyberspace', which begins: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone...You have no sovereignty where we gather." (John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996) Electronic Frontier Foundation

<<http://homes.eff.org/~barlow/Declaration-Final.html>> at 14 April 2006). See also John Perry Barlow, *The Economy of Ideas*.

²⁹ John Perry Barlow, *The Economy of Ideas*

³⁰ John Perry Barlow, *The Economy of Ideas*

³¹ See generally *Dow Jones v Gutnick*.

³² Attorney-General's Department, Parliament of Australia, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005); The Copyright Amendment Act 2006 received Royal Assent on 11 December 2006.

³³ Attorney-General's Department, p. 2

³⁴ Such rights and doctrines include free speech and Constitutional powers of Congress regarding copyright related laws (Response to Attorney-General's Department, Parliament of Australia, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005) (Melissa de Zwart), p. 1).

³⁵ Response to Attorney-General's Department, Parliament of Australia, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005) (Melissa de Zwart), pp. 1-2

³⁶ Henning Wiese, 'The Justification Of The Copyright System In The Digital Age' (2002) 24(8) *European Intellectual Property Review* 387, p. 388

The Mobile Premium Services Industry Scheme

Simone Brandon reviews the Mobile Premium Services Industry Scheme approved by the ACMA in September 2006.

Introduction

The Mobile Premium Services Industry Scheme was approved by the Australian Communications and Media Authority (ACMA) on 28 September 2006 and is now in effect. The Scheme places obligations on carriage service providers and content service providers in relation to the provision of mobile premium services. The Scheme has a long history but could have a short future. So what is the Scheme and what does it achieve?

In June 2006 the Australian Government published the long awaited "Review of the Regulation of Content Delivered over Convergent Devices". When releasing the Review the Minister for Communications, Information Technology and the Arts announced that she would "soon" introduce legislative measures in relation to content delivered over convergent devices¹, including mobile devices. Pending these new legislative measures, the Mobile Premium Services Industry Scheme was registered by the ACMA.

Whilst the Scheme was made according to the requirements of the Mobile Premium Services Determination² issued in June 2005, the Scheme is the result of a two year collaborative industry effort. Representatives from each mobile carrier, the Australian Direct Marketing Association (representing premium SMS/MMS providers) and consumer groups worked together to formulate the Scheme. A public consultation process was also undertaken drawing comments from ACMA, the Office of Film and Literature Classification (OFLC), the Telecommunications Industry Ombudsman (TIO), Free TV, the Communications Law Centre, the Consumers' Telecommunications Net-

work and the Australian Consumers' Association.

The Determination and the Scheme

The Determination places obligations on content and carriage service providers, who supply mobile premium services, regarding:

- Access to adult content
- Age verification
- Use of restricted number ranges

- Safety in chat rooms
- Development of a self-regulatory scheme to address specified consumer protection matters

In this context a "mobile premium service" covers premium SMS or MMS and proprietary network services, that is, walled garden or portal content operated by mobile carriers, for example 3 mobile's *Planet 3* or *Vodafone live!*.

The Determination and the Scheme place obligations jointly or separately on carriage and content service providers. The arrangements recognise the respective roles of these parties in the supply chain, placing obligations where they are most appropriate.



The Scheme is intended provide benchmarks of behaviour for the supply of mobile premium services and address known consumer protection issues and complaint handling arrangements. The Determination set out an extensive list of matters to be dealt with by the Scheme and through close consultation with ACMA the Scheme has achieved this result. The Scheme covers the following issues:

- Informing customers
- Subscription services
- Opt-out mechanisms
- Assessment of content
- Chat room protective measures
- Advertising
- Complaint handling
- Take-down arrangements
- Compliance plans
- Membership obligations, including:
- Scheme amendments

The Scheme has been drafted to focus on defining desired outcomes via high level rules rather than prescribing detailed processes. Whilst it addresses the mandatory requirements of the Determination it does not overreach these requirements, given its intended use as an interim solution pending the government's longer-term regulatory framework review and now, proposed legislative changes.

Whilst the Scheme focuses on high-level rules in line with the requirements of the Determination, it was recognised that industry required a "how to" guide to assist in the implementation of those requirements. A companion document known as the "Guideline" was devised to provide clear, succinct rules and sufficient information on customer information and pricing messages, subscription services, advertising and content assessment, combined with practical examples. It is intended to become an industry benchmark document enforced via carrier contracts and used for complaint resolution.

The approved Scheme is the "default scheme" for the mobile industry as it is the first of its kind. Whilst the Determination allows for more than one scheme, the approval of another scheme would make industry operations more difficult. Once an organisation is a member of the Scheme, the Determination requires that a content service provider or mobile carriage service provider must not supply a mobile premium service unless the provider complies with the provisions of the Scheme.

The Scheme will sit under the auspices of the Australian Communications Industry Forum who will manage the on-going maintenance of the Scheme including keeping a list of members, considering compliance issues, promoting the Scheme and conducting awareness raising activities. Members of the Scheme will be involved in keeping the Scheme document up to date. Amendments must be agreed by members and submitted to ACMA for approval.

Some Highlights

Key concerns of the industry and consumers in relation to mobile premium services have traditionally been:

- Customer information
- Subscription services
- Complaints handling
- Content assessment

The Scheme, supported by the Guideline, comprehensively addresses these issues.

Customer information

Content Service Providers are required to implement appropriate mechanisms to inform customers, before accessing a service, of the actual charges to be incurred in a clear and unambiguous manner. Premium service fees cannot be charged for any service or message that a customer has not explicitly requested to be supplied.

Subscription services

Content Service Providers are required to implement appropriate mechanisms to inform customers of the charges to

be incurred for acquiring the subscription service, prior to the customer's first use of the service, and each time a service subscription is reactivated. There is also a requirement to implement appropriate mechanisms to enable customers to readily and conveniently discontinue a premium content service subscription at any time. For premium SMS and MMS services compliance with a universal "STOP" command is required. Premium content charges cannot be levied for processing an unsubscribe request or discontinuing a subscription service.

Complaints handling

It is essential to ensure that appropriate measures for consumer protection are in place, including an escalated complaints handling agency able to deal effectively with consumer complaints that cannot be resolved by the carrier/content service provider. The prime escalated complaints handling body under the Scheme is the TIO who has established processes and the required expertise for complaints resolution, and is well established within the consumer community. The use of the TIO also provides a one-stop shop for the resolution of customer complaints, building on the TIO's existing jurisdiction in relation to telecommunications related customer complaints.

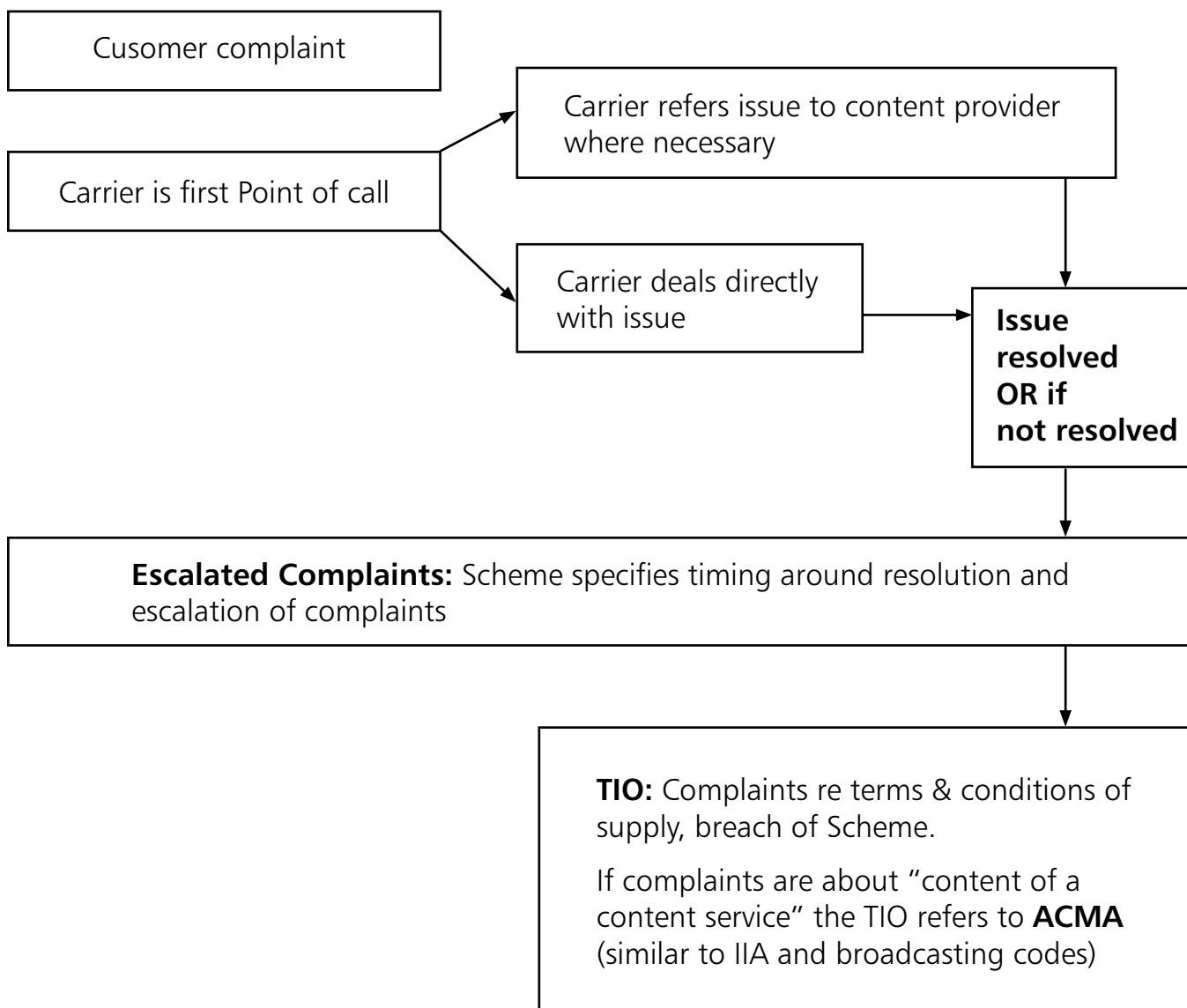
Content assessment

Under the Determination, content that falls within the MA15+ and R18+ classifications must be restricted to users 18 years and over, and only accessible following an age verification process. In determining whether premium content falls within this category, Scheme members are required to refer the relevant content services to a certified assessor. The mobile industry worked with the OFLC during 2005 to devise training for certified assessors. So far more than 100 people have attended training and are implementing these skills to assess mobile content appropriately.

The Future

Currently there is a great disparity in the regulation of content, depending on the means of its access by viewers.

How Would Consumer Complaints Be Handled?



Consider a film distributor who wishes to make a film available at the cinema, for download on its website, for distribution via mobile devices and for viewing on television. Say the film is classified as MA15+ by the OFLC. The following legal restrictions apply:

- **Cinema:** under cinema regulation viewers under 15 years of age must be accompanied by a parent or adult guardian.³
- **Internet:** under Internet regulation there is no requirement to restrict viewers by age.⁴
- **Mobile:** under the Determination the film must be restricted to viewers 18 years or over.

- **Television:** under television regulation the film could only be shown between 9pm and 5am.⁵

The Review stated that a future objective should be to harmonise the regulation of communications content and to reduce the complexity encountered by consumers, industry and regulators. Given the length of time taken to review the regulation of content delivered over convergent devices there is an understandable expectation from industry that the clear need for a consistent regulatory framework is recognised and that such a framework will be developed. What the government does next remains to be seen.

Simone Brandon is a lawyer with Hutchison Telecommunications Ltd based in Sydney

(Endnotes)

¹ Media Release "New safeguards for emerging audio-visual content" 14 June 2006

³ *Telecommunications Service Provider (Mobile Premium Services) Determination (No. 1) 2005*

⁴ *See the Guideline for the Classification of Films and Computer Games 2005*

⁵ See Schedule 5 to the *Broadcasting Services Act 1992*

⁶ See the *Commercial Television Industry Code of Practice*

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