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The Politics of Culture

Martin Cooper critiques the Federal Government's "Creative Nation" policy statement

The release by Paul Keating of his grand plan for Australia's culture, "Creative Nation", is a timely reminder of the importance of the arts vote to successive recent Labor Governments.

The assiduous cultivation of arts industries such as the film industry immediately prior to the "unwinnable" 1993 election demonstrates the importance which the Keating Government in particular attaches to this traditionally supportive group.

If the Government received its reward for such cultivation at the election, the arts community certainly received its reward in the pages of "Creative Nation - Commonwealth Cultural Policy" October 1994 ("Creative Nation").

In fact, it is difficult to remember a major policy statement purporting to cover Government policy in relation to a whole industry sector being accepted with such universal acclaim and so little criticism. Further, this statement can almost be said to enjoy universal approval of the entire arts community from plastic artists to performing artists to film and television producers, to multi-media practitioners and all of those whose careers depend upon these persons.

the policy and the dollars

The Government's stated policy is that it has "a responsibility to maintain and develop Australian culture (which) means, among other things, that on a national level:

- innovation and ideas are perpetually encouraged;
- self-expression and creativity are encouraged;
- our heritage is preserved as more develops; and
- all Australians have a chance to participate and receive - that we invigorate the national life and return its product to the people.

Such noble sentiments could hardly be the subject of criticism but is what follows in the 100 pages of the policy document an accurate reflection of these noble goals? Firstly it must be remembered that the Commonwealth Government currently spends in excess of \$1 billion per annum (including funding of \$515M to the ABC and \$75M to the SBS) on the arts.

\$117M is provided to the Australian Cultural Development Office, \$33M to the National Library, \$19M to the National Gallery, \$9M to the Film and Sound Archive, \$13M for the Australian National Maritime Museum, \$30M for the Australian Archives and \$6M for the National Museum.

The Australian Film Commission received \$18M in 94/95 and the Australian Film, Television and Radio School \$10M as well as the Film Finance Corporation receiving \$54M, Film Australia \$6.4M and the Australian Childrens Television Foundation \$2M in 1994/1995. Finally the Australia Council receives \$59M, of Australian Opera \$7M, the National Institute of Dramatic Art \$3M and the Australian Ballet School some \$0.6M.

bureaucracy

All of this funding represents an extraordinarily comprehensive intrusion into the cultural life of the country by the Federal Government and its bureaucracy.

Given that the report finds that some 336,000 Australians are employed in "cultural related industries", the Government is clearly stimulating a major part of the economy by its actions.

The proper balance between the bureaucracy, with its fundamental brief to protect the public purse, and the basically immeasurable or unquantifiable value of cultural expenditure is probably the central problem which policy in this area must confront.

Creative Nation addresses the perceived problems of the Australia Council and opts for a vastly strengthened Council because of its "accumulated knowledge from dealing with thousands of artists over the years of its existence, its skilled staff and its formidable research base".

Having decided that the Australia Council will be the major purveyor of Government largesse for the development of new artistic endeavours, the report goes on to place heavy emphasis upon the development of new "markets for our cultural products off-shore", the vital role which the Council must play in encouraging "the translation of the arts to screen based media" and the need for the Council to give "a high priority to the process of generating Australian content for the information highway".

Creative Nation then proceeds to deal with the arts under traditional headings of "performing arts", "music", "literature", "dance", "visual arts" and "crafts" and then "film", "television" and "radio". Each of these is given a number of constructive and in some cases, bold initiatives including the creation of a number of new training

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institutions, an emphasis on funding for specific programs to develop new talent and an encouragement of Australian drama production.

the multi-media emphasis

However, the most innovative and interesting area of the report is its very heavy emphasis upon "multi-media - cultural production in an information age". Consistent with its determination to apply economic rationalism to the arts and see creative endeavour become part of the new industries to help balance Australia's international trade, the Government has promised \$84M over a four year period for a number of initiatives designed to promote the development of a significant Australian involvement in the international communication super highway.

These initiatives include the creation of the Australian Multi-Media Enterprise, the establishment of co-operative multi-media development centres, the initiation of a series of national multi-media forums, the commissioning of CD-ROMs involving material from our major cultural institutions for Australian schools under the Australian On CD Program and specific assistance to foster our film agencies moves into multi-media.

Bold in its concept but very short on detail, Minister Lee has promised that details of the Australian Multi-Media Enterprise and the way in which the \$84M will be expended will be provided "before Christmas or thereabouts". Nothing has been heard since the date of publication but perhaps one should have asked which Christmas.

The report recognises that one of the most difficult areas facing the arts is the question of protecting Australia's creators' copyright. Nobody working with multi-media can be unaware of the enormous complexities of protecting ideas and product in that area and of the gross inadequacies of present copyright law to deal with "the new technologies".

issues

While the initiatives set out in the *Creative Nation* statement are unexceptionable, it does raise three vital issues which need to be addressed:-

One - Is the continued direct subsidy of the cost of creative endeavour justifiable?

The Australian film industry is a classic example of a developed industry which is totally dependent upon continuing Government assistance. It is unarguable that the industry would cease to have any real substance in the absence of ongoing major Government input.

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Needless to say, this is not uncommon in most developed cultures in the world with the exception of the United States (although even there, there are considerable indirect subsidies through tax breaks and so on). It is proper that the question should be regularly asked whether, if public moneys are to be spent in such quantities, the public is getting "what it wants" for its dollar and is the process too "hit and miss"?

Given that the Australian film industry has received well in excess of \$1 billion in total Government subsidies in the last 15 years, one is obliged to ask whether the Australian public has had "a good return" on this investment.

Two - Is a Government cultural policy which places major emphasis on training and culturally supportive institutions preferable to one which provides substantial ongoing subsidy for individuals and companies which actually "produce" cultural material?

This age old debate has no clear resolution and the *Creative Nation* statement does not purport to provide any answer to those whose complaint is that cultural policy constantly encourages the establishment of new "creators" but it does not sustain those creators over time (unless you are the happy recipient of a so-called "Keating Award").

Three - to what extent should cultural bureaucrats be making creative choices?

Obviously, when there is a greater demand for funds than funds available choices must be made but the question still remains whether these should be on purely economics or also take into account qualitative issues of cultural value. It is interesting to note that the Film Finance Corporation having started out as being entirely "deal driven" has steadily and inexorably intruded further and further into qualitative issues. More and more frequently it is determining that an otherwise qualifying project will not be funded unless an additional producer is appointed, or has a different director or, in the documentary area particularly, that the script is re-worked.

The FFC now demands a "presentation credit" above the title of films in which it invests rather than an end credit acknowledging its financial support for the film. This is a significant change of emphasis and "style".

Whether these types of intrusions are good or bad is not dealt with or resolved by *Creative Nation*. In fact, they are compounded to some extent because *Creative Nation* talks about creating market and the exploitation of the arts which must, inherently, involve creative decisions being made in favour of "popular" artforms as against traditional high culture.

Sum

Creative Nation is a bold, precise and clear statement of the involvement of a Government which genuinely believes that culture is essential to the creation of a coherent and worthwhile nation state.

The linkage between cultural policy and this Government's aspirations to republicanism should not be overlooked - it

is difficult to shed an entire cultural heritage in the process of becoming a republic if you do not have a sound and complete culture within the newly independent nation state. The significance of this linkage could be overstated but the emphasis upon institutions in *Creative Nation* would seem to confirm the linkage.

Martin Cooper, Martin Cooper & Co., Lawyers.

The real issues in "Who Weekly"

**Kaaren Koomen reports on the issue of identification and
identifying the real issue.**

In June 1994, *Who Weekly*, a magazine with a distribution of approximately 112,000 copies in the NSW and ACT each week, published a photograph of Ivan Milat, the person presently facing trial in relation to the seven "backpacker murders", along with a charge of attempted murder, armed robbery and unlawful possession of firearms. The photograph was featured prominently on the front cover of the magazine and a smaller copy was on page 29. In the photo Mr Milat was depicted singing at a private gathering at his family home. The facial features and upper torso of the accused were clearly visible from the photograph.

Following the publication the Attorney General brought an urgent application for injunctive relief against the publisher of the magazine, Time Inc. Magazine Company Pty Ltd ("Time"), on the basis that the publication of the photographs involved a triable issue for contempt of court. Charges for contempt were brought against Time and the editor the next day.

The interlocutory hearing came before the NSW Court of Appeal (Kirby P; Handley and Sheller JJA) on 7 June 1994.

Implied right of free communication

Time argued that the case involved balancing the right of free expression and the right to fair trial, and that, at least at the interlocutory stage of proceedings, the balance favoured free expression. Reference was made to the implied Constitutional right to free communication, referred to by the High Court in *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd and Ors v The Commonwealth of Australia*. (The interlocutory proceedings were heard before *Theophanous v The Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd*).

Kirby P, with whom Handley and Sheller JJA agreed, said that in deciding whether to grant an injunction in these types of cases it was necessary to not only consider whether there was a triable matter of contempt but also the impact of such an order on free expression and communication.

The Court said that it was established as part of the law of Australia that the Court will usually seek to defend the right of free communication ordinarily enjoyed by all members of the community (*Council of the Shire of Ballina v Ringland*, unreported, Court of Appeal (NSW), 25 May 1994). This was "a precious right" which was in addition to any constitutional right of free expression or communication.

However the Court said that also at stake in this case was another "precious right" - that of an accused person to a fair trial. Kirby P described this as a right to "have that trial conducted before a jury and with witnesses uninfluenced by relevant matters which have been published and which may adversely affect that right".

The Court explained that the right to a fair trial was not only a right of the accused person but also of the Crown, representing the community, to ensure that in appropriate cases a person who is in fact guilty can be properly convicted according to law in a manner which can withstand appellate scrutiny. Kirby P stressed that it is in cases where the alleged crimes of the accused are already notorious and of high media interest that our commitment to this right is truly tested.

In balancing of the competing rights of freedom of communication and fair trial Kirby P found that, at least to the degree of satisfaction required to grant interlocutory relief, it is not the case that "the Constitution or any right of free communication which is implied in it, diminishes the right of the accused to fair trial which the courts must

protect." Kirby P said that the right of fair trial "appears to be just as much a part of the fabric of the law which the Constitution defends through its judiciary as that which establishes or assumes to be the right of free communication".

Identification and prejudice

The basis of the interlocutory proceedings was that the publication had the tendency to interfere with the due course of justice. The modern test is whether "a particular publication presents a real risk of serious prejudice to a fair trial, ie. a serious injustice" (*Hinch v Attorney General for the State of Victoria*). It must be shown that there is a "real risk" of prejudice, "not mere fanciful speculation".

Time argued that the Attorney General had failed to establish by admissible evidence that identity would be an issue at trial in a way which would be affected by the publication, and accordingly it had not been shown that the publication carried a "real risk" of impeding the fair trial of the accused. However, the Court of Appeal said:

"It is enough that identity might be in question. That possibility can rarely, if ever, be excluded in a serious charge such as murder".

sketches vs photographs

One of the arguments raised by Time was that a lifelike sketch of the accused had been published in *The Age* newspaper in Melbourne before the photograph in question was published by Time. Time said that there was an insufficient difference between sketches and photographs for one to constitute contempt whilst the other apparently does not.

The Court of Appeal disagreed, Kirby P stating that there was "a great difference" between a "photographic representation of an accused person and a drawing". It is difficult to accept that this distinction is as great as Kirby P suggests. Whilst a photograph may convey a more precise and realistic image than a drawing or sketch, this distinction really depends on the quality of the artist and how realistic the drawing or image is. It is questionable whether this is a satisfactory basis for such a distinction.

Kirby P also made the point that the drawing of the accused in a newspaper published primarily in Victoria meant that this publication did not take place in the main catchment area from which jurors for the accused trial are likely to be drawn and where many or most of the witnesses live. It

is important to note that at the full hearing it was conceded by the Attorney General and accepted by the Court that there was no question of jurors being prejudiced by the publication of a photograph of the accused. Accordingly, the issue of identification was considered only relevant in relation to potential witnesses.

orders not futile

Time argued that as the actual distribution of the magazine was the responsibility of a distributing company it had no effective control over the distribution or retrieval of the relevant edition of the magazine. On this basis Time argued that the orders sought by the A-G were futile and thus should not be invoked.

The Court of Appeal did not accept this proposition, finding that an order against Time would deal with those copies of the magazine which had been returned to Time and would also prevent any further resale of the material to local or overseas interests. More importantly, Kirby P said:

"[t]he fact that entire success could not be secured does not establish that the provision of the relief sought would be a futility. It would not be. At the very least, the orders, once made, would uphold the legal rule long established in this country defensive of the right to fair trial".

This suggests that the deterrent or educative role of an order of this kind could overcome any practical defects in the effectiveness of the order itself.

The Court also held that Time should be obliged to take "resolute and vigorous" steps to effect the order, rejecting Time's argument that it should only be obliged to take those steps which were "reasonably necessary". However, the Attorney General did not object to the variation of the order which allowed Time to sell copies of the relevant edition of the magazine to which "immovable" plain black adhesive stickers had been affixed to obscure the face of the accused.

the full hearing

At the full hearing in August 1994 a differently constituted Court of Appeal (Gleeson CJ, Sheller and Cole JJA) heard fresh argument on all legal and factual questions regarded by the parties as being material. The Court held that the test for contempt of the kind alleged in this case was "whether the clear tendency of the publication was, as a matter of practical reality, to interfere with the due course of justice in the prosecution in

question".

In relation to photographs of the accused, reference was made the leading authority in *Ex Parte Auld re Consolidated Press Ltd* in which Jordan CJ said:

"The test to be applied in order to determine whether the publication of a photograph of an accused person, in such a way as to state or suggest that it is he who is accused, is a contempt of court, ... is to see whether, as at the time when the photograph was published, there was a likelihood that the identity of the accused would come into question in some aspect of the case, so that publication of the photograph would be likely to prejudice a fair trial. ..."

The rationale for this approach is the view that the publication of the accused's photograph might impair the reliability of the evidence of witnesses on the issue of identity. For example, after viewing a photograph, a witness may displace the image in their mind of the person who they saw on a previous occasion with the (different) image of the person in the photograph.

Time's submissions

The Court of Appeal addressed four of the submissions put by Time. First, it was argued that having regard to the extensive police operation and publicity that had taken place by the date of the publication (and indeed hearing), the likelihood of further witnesses coming forward to give evidence on the issue of identification was, in all practical reality, low.

It was common ground that both witness "A" and witness "B", the only two known identification witnesses who were to give evidence in relation to the charges of attempted murder and attempted robbery, had made their identification of the accused before the relevant publication from photographs shown to them by the police. The Court accepted that there was no real risk that their evidence will be contaminated. Moreover, witness A resided at all relevant times in the United Kingdom where *Who Weekly* does not circulate, but where other photographs of the accused had been published by the British press.

Further, contrary to the interlocutory proceedings, it was accepted at the full hearing that there was no real likelihood of a photograph of the accused affecting jurors.

Time's second argument related to the principle of open justice. It was said that one of the functions of the media is to act as the "eyes and ears" of the general public and

report on matters heard in open court which, because of time and geographic constraints, as well as the physical limitations of the court itself, many members of the public are unable to attend and obtain information on themselves.

As Mr Milat had appeared in open court, many people had exercised their right to attend the court and had seen the accused in person. Hundreds more may do so during the trial. By publishing a photograph of the accused Time was exposing no more than what members of the public would have seen had they had the opportunity to attend the Campbelltown court in person. To be consistent with the defence of fair report, which is specifically designed to protect media accounts of proceedings heard in open court, Time argued that the publication of a photographic image of an accused person who has appeared in an open court ought not to be regarded as contempt.

Time's third argument was that, relying on the defence of fair report of proceedings in open court, much information about the accused had already been made available to the public, including his age, racial background, approximate height, eye colour. By the time of the hearing there had also been a number of sketches made of the accused as he sat in open court which had been published on television programs and in newspaper articles, some of which had made no attempt to obscure the image of the accused.

Time said that it was unreasonable and unrealistic to presume that a photograph may contaminate the evidence of a witness in a way which was different from an artist's sketch or a vivid verbal description of the accused. Further, Time argued that the content of the *Who Weekly* article was balanced and was far less prejudicial to the accused than other material which had been published by way of fair report of the proceedings.

Accordingly, Time argued that the practical impact of the *Who Weekly* publication on the fair trial of the accused, even if the emergence of a new identification witness was viewed as a possibility, would be that "of a snowflake in a furnace" and would not constitute a "real risk" to the evidence of witnesses or the due administration of justice.

the CA's findings

Without addressing these arguments in any detail, Gleeson CJ, with whom Sheller and Cole JJA agreed, took the view that a

case of contempt had been made out.

"[I]n the circumstances that existed at the time of the publication of the photograph, the clear tendency of the publication was, as a matter of practical reality, to interfere with the due course of justice. Identity was a central issue in the case. There is a real and definite possibility that the evidence of people who might come forward as witnesses for the Crown, or the defence, will be contaminated by their having seen the photograph of Mr Milat before performing an act of identification".

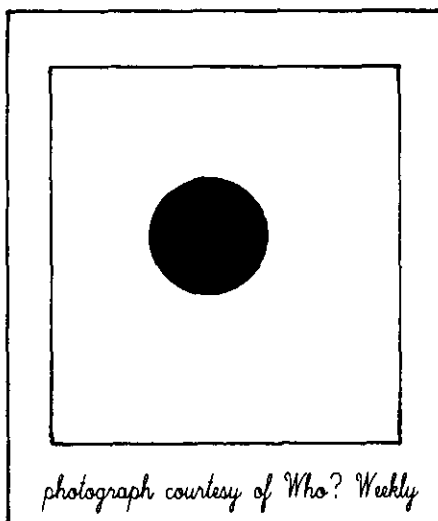
Time had also said that the way in which photographic images of accused persons have hitherto been considered by the law now contravened the implied right of freedom of communication or expression recently established by the Commonwealth Constitution.

The Court of Appeal curtly dismissed this argument with the comment that, whilst it was perfectly legitimate for a magazine such as Time to "seek profit from providing information and entertainment", they had "no right, under the Constitution, or at common law, to do so at the expense of the due administration of justice".

Fines of \$100,000 and \$10,000 were ordered against Time and the editor of the magazine respectively. Time was also ordered to pay the Attorney-General's costs.

High Court appeal

Time has sought special leave to appeal to the High Court. One of the grounds upon which special leave is sought is that in practical terms the Court of Appeal's decision results in a virtual strict liability offence. This is because in almost every case in which a photograph of an accused is published it is theoretically possible that a



new witness who "might" have seen the photograph "might" come forward at some future stage, notwithstanding that where the accused has appeared in an open court, anyone, including possible witnesses, could have attended the court and seen the accused in person.

Further, Time has asserted that this hypothetical "possibility" of prejudice to a fair trial, referred to by Gleeson CJ, is disproportionate to the impact which this would have on the Constitutional guarantee of free communication, recently affirmed in *Theophanous v The Herald & Weekly Times Ltd* and *Stephens v West Australian Newspapers Ltd*.

Time also seek to argue that the view taken by the Court of Appeal is inconsistent with the law and practice of many other Western democracies, including the United States, United Kingdom, New Zealand, Canada and South Africa. In reference to the United States, Time has argued that US courts have consistently held that the publication of information, images and photographs relating to an accused person who has appeared in an open court at which the public may freely come and go is irreconcilable with the constitutional protection afforded by the first and fourteenth amendments to the United States Constitution.

It is argued that the fact that Australian law, having recently recognised the implied constitutional right to free expression, is out of step with other democracies, and in particular the way in which the US courts have upheld the media's right to free expression in relation to matters seen and heard in an open court, renders the case of contempt against Time a matter which the High Court ought to review.

conclusion

Whilst the issue of identification was the focus of the proceedings before the Court of Appeal, the sub-text of Time's case is the way in which the implied rights of free communication in the Constitution will affect the Australian media in the future. Also in issue is the ability of the law of contempt to accommodate technological change in the form of photography in courtrooms and, in time, possibly even the televising of Australian court proceedings.

The outcome of the application to the High Court, to be heard on 17 February 1995, is awaited with great interest.

Kaaren Koomen, Lecturer in Law, Charles Sturt University - with thanks to Roy Williams, Allen Allen & Hemsley, Solicitors, for his assistance.

MULTIMEDIA - WHAT'S ALL THE RACKET

Multimedia: The DOOM of Television

Ian McFadyen muses on the shift from passive medium to active art form.

One day about a hundred years ago a young glove salesman named Samuel Goldfish was walking along a New York street contemplating his future. Samuel had not yet hit on the career which he felt would make the most of his entrepreneurial talents.

Having an hour to kill he dropped into one of the new Nickelodeons which had sprung up in American capital cities. These tiny cinemas charged patrons a nickel for the privilege of viewing short, fuzzy, jerky black and white films of such simple subjects as a train leaving a station or a baby waving from a pram.

Samuel had never seen a motion picture before but as he sat there watching the jumpy, blurry images and more importantly, the people gazing at them, mesmerised, he knew he had discovered the business he wanted to be in. He knew he was watching the birth of a new medium.

It may seem strange but cinema was not immediately perceived as a medium of entertainment.

The motion picture camera was originally regarded as purely a scientific instrument, a means of analysing movement, and even when its potential for entertainment began to be realised, it was still only in terms of reproducing existing works.

Samuel Goldfish got together with a family of New York impresarios called the De Mille's and embarked upon filming the hit Broadway plays of the day. Their vision was that through cinema, people all across America could watch the same Broadway plays as the people in New York. Silently of course. Remarkably, the most successful early films in America were films of operas. Despite the obvious drawback of not being able to hear the singing, opera worked because opera singers had an acting style big enough to convey emotions on a silent screen.

Twenty years later, when Goldfish had moved to the west coast, changed his name to Samuel Goldwyn and founded MGM, the cinema had developed its own techniques, its own audience, its own aesthetic quite separate from theatre. It went on to develop sound, colour, wide screens and, in a variation known as television, the ability to be recorded and broadcast simultaneously to audiences of millions. It has been,

without a doubt, the communication and artistic and educational and entertainment medium of the 20th century.

Gazing at another technology

What has this got to do with Multimedia? The answer is that as we reach the end of this century we, like Sam Goldfish, are gazing at another technology which although now primitive, is poised to dominate the next century just as cinemas and television has dominated this one.

Multimedia is not just the presentation of audiovisual material via a computer. It is audiovisual material which is for the first time under the control of the user.

Despite all the technical, creative and artistic achievements of film and cinema over this century, the medium is still limited by the fact that the audience is passive. This is not to say that the audience does not take part in the action emotionally. But no matter how exciting, how moving, how romantic, how visually beautiful such a film or TV show is, the audiences' participation is still purely vicarious.

The ability, through computers, to make the audience part of the story, opens up a whole new approach to art and entertainment which is already capturing the hearts and minds of millions.

You are the protagonist

As the parent of a 12 year old, I can't help but notice that kids no longer go to school and talk about what they saw on TV last night. They talk about how to solve *Kings Quest*, *Ultima*, *Pagan*, *Leisure Suit Larry*, *Myst*. "The Age" Green Guide has increasingly less space devoted to television and more devoted to questions and answers about computer games - "I'm stuck in the cave of the *Bat Spiders*, how do I get the key to open the Wizard's box."

Which brings me to *Doom*. *Doom* is currently the most popular computer game on sale. It is macho, noisy, scary, incredibly violent and totally compelling. In *Doom* you, the player, are a soldier moving around a series of labyrinths populated with demonic, toxic, homicidal monsters with appalling conversation skills which you must either kill or be killed by.

The important point about the game is that it is totally Point of View. You see on the screen what the character sees. You operate the character, you are the character. You must move forward, turn left, turn right, open doors, throw switches, aim, shoot and, when necessary, run. In other words it is virtual reality in a simple but very accessible form.

By contrast, a game like *Myst* is totally cerebral. In *Myst* you are on an island surrounded by strange fragments of classical architecture, Victorian machinery and the sound of the wind and lapping waves. Your task is to solve the mystery of the island, but you don't even know what the mystery is. This game comes with no manual, simply an empty notebook in which to write down what you discover. There are no other inhabitants, no guns, no monsters and yet *Myst* is just as compelling as *Doom*, and just as scary. Maybe even more so. The point is that once again you, the player, are the protagonist in the play.

But there is more going on here than just participation. You get participation from a cheap arcade Grand Prix racing game or an F-18 cockpit simulator. What we're starting to see here is computer games with characters, mood, tension, music, stories. We're starting to see sophisticated individual aesthetics which go beyond a simple choice of fonts and graphics. In other words we're starting to see something with all the elements of literature and art.

The paradox

So are these games which are more than games a threat to television or cinema? There's a simple test. Put a computer with CD-ROM and some of these games in your kid's room and see how much time they spend watching TV. The answer is you won't see them for weeks. Or rather, you will, because you'll be in there with them.

For herein lies the paradox. Television, which is designed to be watched by the whole family, actually stultifies family interaction. A computer which is designed to be operated by one person, stimulates interaction between family members. My

four year old insists that I help him play the computer - "Daddy, what do I type now? Can you do the moving?" - two of us squashed on a single chair. I will offer a reward here and now for the first computer manufacturer to make a machine with two keyboards.

"But", I hear you thinking. "People don't want to come home after a hard day at work and have to solve problems in a computer game." Not true. After a hard day at work, there's probably nothing more satisfying than picking up a gigantic gun and blasting several hundred mutant cacodemons into Bolognaise sauce. Yet the idea persists that people just want to relax - that they just want to sit and be entertained.

Let's be clear about this. People want to sit and be entertained by television and videos because that's what a hundred years of cinema and television has trained them to do. A century ago the idea of a whole family sitting on a couch staring at a box for several hours every night was inconceivable. There were parlour games, musical instruments, painting, drawing, carving, cooking, sewing, weaving, home renovation, sports. But 20th century technology and the economics behind that technology created the century of watchers. Sports, home renovation, travel and family interaction are now things to watch on TV rather than things to actually do.

Now a new technology is creating a new generation of actors rather than watchers. Simulated action it may be but at least it is

some form of action. Twenty years from now people will be amazed that passive entertainment was ever so popular.

Stepping into the screen

Let's look at some of the prospects for future entertainment. First, we can assume that, as with cinema, the audiovisual quality will improve. Screens will become huge and fine grained. They will become more immersive either by being worn as helmets or by becoming so wide as to give an impression of a total surround screen. Audio will become fully directional. Games will get bigger, longer and more realistic. There will be characters that you speak to, listen to you and interact like real people. There will be exotic locations, amazing special effects. In other words it will be like movies are today except that you will be IN the movie.

When Steven Spielberg, or his equivalent, makes Jurassic Park II, you will not sit in a cinema watching a T-Rex chase people in a car - you will be wearing a Virtual Reality helmet, and the T-Rex will be behind you, and getting closer. It is Purple Rose of Cairo in reverse - the audience steps up into the screen. It is Alice passing through the Looking Glass.

Not only this, but several people will be able to share the same experience. You can already play Doom on a network. This means you see other soldiers in the labyrinth who are actually other players playing the same game at the same time.

You have the choice of co-operating with these other players, or treating them as the enemy.

But, again, as with cinema, the appeal of this medium will not lie with technical sophistication. The cinema captured the public imagination when it stopped showing trains pulling out of stations and started dealing with the eternal themes of life: love and death, tragedy and comedy. When a new generation of multimedia artists learn how to deal with these themes in this unbelievably powerful medium it will become the art form for the next century.

Ian McFadyen, Media Arts Television Pty Ltd



Converging Cultures

Jock Given expounds - what's going to happen as royalty-based industries converge with fee-based industries and everyone wants to acquire and publish everything?

In simpler times, publishers produced books, record companies made records and filmmakers made films.

These days, some publishers, some record companies and some filmmakers, along with some computer software and games companies, are developing the same products - for the most part, CD ROM.

It's a convergence of product lines that is requiring established businesses to acquire new skills and new business practices.

overlaps in the past

Not that the idea of overlaps in the products of different media is itself new. Books have always been turned into films, films have

spawned soundtrack albums and merchandise or been turned into books, and stars from all media have been the subjects of biographies.

The producers of the "original" products have always tried to ensure at least that they are rewarded from the success of any such spin-offs. They have often also tried to control spin-offs, so that subsequent exploitation can be managed as part of an overall strategy for the "concept".

For the film and music industries, this has not been a matter of controlling the "cream" - "nice-to-have" revenues on top of their primary business. They've seen the whole nature of their business change, many times. If they hadn't worked out how to control the new revenue streams, they wouldn't be around.

Recording and broadcasting provided new revenue streams not previously available to musicians whose only form of

remuneration was the sale of tickets to public performances. These "new" forms of exploitation now typically earn far more money for the creators than live performance. Television and subsequently video provided new revenue streams to distributors and filmmakers whose primary form of remuneration had been the sale of cinema tickets. Cinema release now often returns very little to the primary creators. It's often as much a marketing platform to give a title profile in the TV and video markets where it has to earn the real money.

For publishers, this is newer terrain. The types of books may have changed (paperbacks as well as hardbacks) and the ways of selling books may have diversified (book clubs, department stores, supermarkets as well as traditional bookstores and libraries) but the core of the business has still been books. Although CD-

ROM is "book-like" in so much as it is a physical item which is exchanged for price, electronically delivered information or books printed on demand are a very different scene.

As the range of possible products which can result from the same "concept" (a book, a band, a movie) increases, the traditional tension between the commercial and creative interests of the primary creator and those of the organisation which invests the time and money to turn the creator's ideas into saleable products, is heightened.

It becomes more important for the producer/publisher to control all the possible forms of commercial exploitation because no-one can be quite sure what the most important revenue streams will be for a particular title in the distant future.

But creators become less prepared to relinquish the rights that might be used to adapt their work to a wider range of forms. Commercially, they're not sure of the value of the rights they're selling. Creatively, they're not sure what they might find their ideas being turned into.

Several key aspects of the relationship between the creators and the producers/publishers are being affected - what is being acquired, who is acquiring it and how the creator is to be remunerated for its commercial exploitation.

what is being acquired and what can be done with it?

As anyone will tell you, there's no such thing as a standard deal.

Still, there are standards about what is being dealt with. Publication rights, translation rights, theatrical rights, free-to-air broadcast rights, pay TV rights. The parties know what these terms mean and negotiate simply about the price.

Multimedia products are a different story. There are currently many different approaches to acquiring the rights necessary to produce and sell them. Publishers have long acquired "electronic publishing rights" or "electronic reproduction rights". Some people are trying to acquire "multimedia rights", others "interactive rights" or "digital rights".

It's all complicated by the fact that people from different industries - publishing, music, film, television - are trying to acquire these same rights so they can do the same sorts of things with them.

David Noakes, Investment Manager responsible for documentaries at the Film Finance Corporation says there is "a lot of confusion about it". He thinks there are three kinds of uses of film and television program footage which are being

contemplated for multimedia product. They provide a useful model for other "primary product" like books and recorded music:

- "Stock footage" deals where someone wants to acquire small bits of footage from a film or TV program. "The fact that the proposed use might be interactive is irrelevant. Its no different from existing stock footage deals. You sort out the media and the territories and you do a deal," says Noakes.
- Deals where "some of the narrative structures of the film are being used as the basis for, say, a CD-ROM". That is, more substantial segments of the film are being intercut within the CD-ROM. "We are approaching these project-by-project," says Noakes. "We're not prepared at this stage to settle on a standard deal for "interactive rights".
- Deals where the bulk of the CD-ROM is made up of the film - "the CD-ROM of the film". This becomes "a significant use of the copyright in the film which is capable of affecting the distribution of the film. It's more like an ancillary use of the film. We don't mind someone acquiring these rights, so long as they're not bundling them up under the same fee or royalty".

who is acquiring them?

Robert Sessions, Publishing Director at Penguin Books Australia, says publishers have tended to "acquire widely and publish narrowly ... We've always acquired, for example, electronic and photocopying rights, anthology and quotation rights, digest rights and second and subsequent serial rights. But we've tended to 'sub-contract', for example, film rights to filmmakers. Any self-respecting agent or author asks 'What is best for this product?' They have got to believe we can exploit the rights we acquire".

Agent Rick Raftos says "We would always argue that filmmakers make films and book publishers publish books". But most publishers "will end up with some control of the film adaptation rights", or at least a share (10-20% is common) of any payment for such rights. This acknowledges that the publisher's investment in the production and marketing of the book has contributed to the value of the film rights. "It all depends on who is doing what. The publisher obviously deserves remuneration if they actually do the selling of the film rights to producers". A reversion of rights if the licensee/assignee has not exercised them within a certain period is also common.

As companies consolidate, single organisations acquire the capacity to publish books and records, make films, interactive multimedia product and everything else. There is greater pressure

to acquire from the creator all the rights which might be necessary to permit the exploitation of an idea in all its forms. Producer/publishers are less likely to be satisfied with just a share of returns from other forms of exploitation and more likely to want to control that exploitation themselves.

After all, it's precisely those synergies which were supposed to have justified the corporate consolidation in the first place.

how is payment calculated?

The central issue is choosing fees or payments which reflect use.

Fees mean one-off payments regardless of the actual sales or use of the product. Payments which reflect use mean rights holders are rewarded according to the commercial success of their products. Because everyone expects to be a success, they all want some kind of payment which reflects use, although the cautious know the value of fees.

The two approaches are not mutually exclusive. Publishers' contracts will often include an advance against royalties. If the actual royalties calculated don't exceed the advance already paid, the deal becomes, effectively, a fee. In rare cases (superstar authors), only part of the advance may be recoupable by the publisher out of royalties.

In general, publishing is a royalties/advances industry. Authors generally contract for a percentage of the recommended retail price (RRP) of copies sold. This is a "gross receipts" concept. The costs of publication and marketing are met by the publisher and are rarely part of the deal with the author. The percentage of RRP is likely to increase beyond certain thresholds of copies sold ('rising royalties').

Music is also primarily a royalties/advances industry, except that record companies generally don't pay royalties until their costs (recording, marketing, promotion, film clips etc.) have been recovered. This is a "net receipts" concept. The percentage royalty will vary depending on whether it is based on retail ('published price to dealer') or wholesale ('wholesale dealer price') price.

By comparison, film is a much more fee-based industry. Screenwriters, directors, performers and others are generally paid a flat fee for their work, although the fee is set to reflect the rights being acquired. For example, in Australia, performers' awards require basic rates to be increased by certain multiples depending on the territories where the product is to be screened. "Residuals" are payable in some circumstances to creative participants where the product is exploited beyond the uses agreed in the original contract.

However most writers, directors performers and others are unlikely to be

directly affected financially by the success or failure of their product in the marketplace, as authors and musicians are. This is especially the case in television, where television networks pay flat licence fees, sometimes complicated by facilities deals, for the final product. The success or failure of one product affects the "author's" next product, through higher/lower/no offers, more than the current one.

Senior creative personnel (director, lead cast, writer) are often able to negotiate "profit participation" (proportions of the producer's share of any net profits earned by the production). However, these rarely amount to any money in practice because so few productions go into profit. Revenues generally come back to the producer after everyone else's costs have been deducted. What on paper is a "fee-plus-profit share" deal usually amounts in practice to a straight fee.

who gets their money out first

It's all a question of who gets their money out first. In publishing, the author typically gets their money out at the same time as everybody else - a share of the retail sale (although they won't actually receive it for some time). In music, the songwriter gets some money out first (APRA fees). Musicians generally have to wait until the record company gets its money out before they receive anything, but then they're paid according to sales of the product. In film, and television, the creators generally get something out at the start (fees), but the few who are entitled to anything else wait, usually in vain, until everyone else has recouped.

Convergence of products means convergence of these different business practices - convergence of the ways the producers/publishers of media products and services sell them and deal with, and pay, the creators.

Robert Sessions says "Multimedia, today, means CD-ROM and it's like a book. It's tangible, protectable and has a point of sale. Copyright can be identified, and a price paid for it. Once you move to on-line services - perhaps in a couple of years - everything changes".

"CD-ROM is a royalty-based structure of payments. We can't answer yet how on-line services will work out. It's likely that suppliers will have to make an up-front payment to get their information onto the system, and then earn on-going income based on usage".

measuring use

Usage can be a complicated concept and it can cost a lot to measure it. Broadcast uses are much harder than point-of-sale products and services. Advertisers and broadcasters employ ratings to assess the use being

made of TV and radio advertising. They also need surveys of consumer behaviour and the extent to which it has been influenced by particular advertisements to see if they have actually been "used" in a way valuable to the advertiser.

Copyright collecting societies like the Australasian Performing Right Association (APRA - covering the public performance of musical works), the Audio Visual Copyright Society (AVCS - off-air taping by educational institutions) and Copyright Agency Limited (CAL - copying of printed materials) use sampling to assess use. It's simply too expensive to measure all the valuable transactions individually, but it means large sums of money depend on adequate survey methodologies.

Publishers of CD-ROM products are already confronting a particular aspect of this problem in relation to use of their products on networks. An organisation (a library or a law firm) which might have bought several copies of a paper publication buys one copy of a CD-ROM which is accessible from many terminals.

This is being handled, by some, through a kind of "honour system". Libraries are required to estimate the number of simultaneous users of a particular product and pay accordingly. The Law Book Company has set fees for its CD-ROM edition of *The Laws of Australia* which reflect the number of users of it.

"Initially," says Peter Mariani, Electronic Publishing Manager at the Law Book Company, "we were charging for electronic print based on the number of terminals which could access the product. But that meant we were over-charging. Large organisations might have hundreds of terminals which could access the product, but only six people were actually making regular use of it".

Peter Banki, Chair of the Australian Copyright Council and a member of the Copyright Convergence Group told a recent Phillips Fox seminar "It is hard to see how [adequate monitoring and payment] can be achieved without the intervention of copyright collecting societies, to create and maintain the necessary databases and develop the required systems. International electronic networks will make it virtually impossible for individual owners of copyright to manage their own rights successfully".

With the uses to which new kinds of product may be put still so unclear and the capacity to measure at least some of them still so limited, it's not surprising that people are approaching multimedia deals very cautiously.

Adrian Fitz-Alan, Business Affairs Manager at Sony Music Australia, told the National Entertainment Industry conference in Sydney on 3-4 September 1994 he thought music used in multimedia

product would eventually be paid for through a royalty based on use. "The problem is how to measure use. At the moment, there are no standard rates and people are signing deals for limited terms to allow for renegotiation if industry practice changes". Over time, he expects more specific contracts as uses become clearer, more standardised rates and "more total packages as record companies become all-purpose entertainment conglomerates".

"authorship"

A key issue in standardising industry practice is the widening variety of "authorship". Some authors will continue just to write text. Others will be more involved in the conceptualisation and development of products with sounds, images, graphics, games and the like. Inevitably, they will demand higher levels of payment for such services, although publishers will argue in response that the total cost of getting a multimedia product into the market place will be higher than for a conventional book.

If the collaborative medium of film is a foretaste, it is more likely that an individual will be defined as undertaking additional specific tasks, and be paid for them discretely, than that the general rate of payment for authors or illustrators will increase.

uncertainty - take the money and run?

Uncertainty can tempt different responses. You can try to hold onto as many rights as you can, until you see what they're worth. You can let them go, but make sure you're getting a cut of whatever action there is. Or you can take a fee now, recognising that a dollar in the hand might be better than a share of a market that turns out to have been all hype.

Rick Raftos says the last can be very tempting. "The danger is that we will take fees now while the value of the new markets is uncertain, and by the time their value is clear, it will be too late for industry practice to change".

Marius Coomans from Firmware thinks "participation" is the way to go. "If we do this right, we can create an industry where creative people share the rewards, but we need to be prepared to share the risk".

Jock Given is currently based at the Centre for Media and Telecommunications Law and Policy at the University of Melbourne, co-editing with Mark Armstrong a book of Australian communications law and policy sources for the Law Book Company.

Multimedia and the Superhighway

Bridget Godwin provides some thoughts on "multimedia", copyright and the licensing of works.

This article looks at some of the general implications for copyright law of the building of the superhighway, and one product which will be available on the superhighway - multimedia. It also looks at some specific problems with the Copyright Act ("the Act") which among others will need to be addressed to enable the provision of services on the superhighway.

multimedia issues

One of the new products we might expect to be delivered on the superhighway - multimedia - raises particular issues.

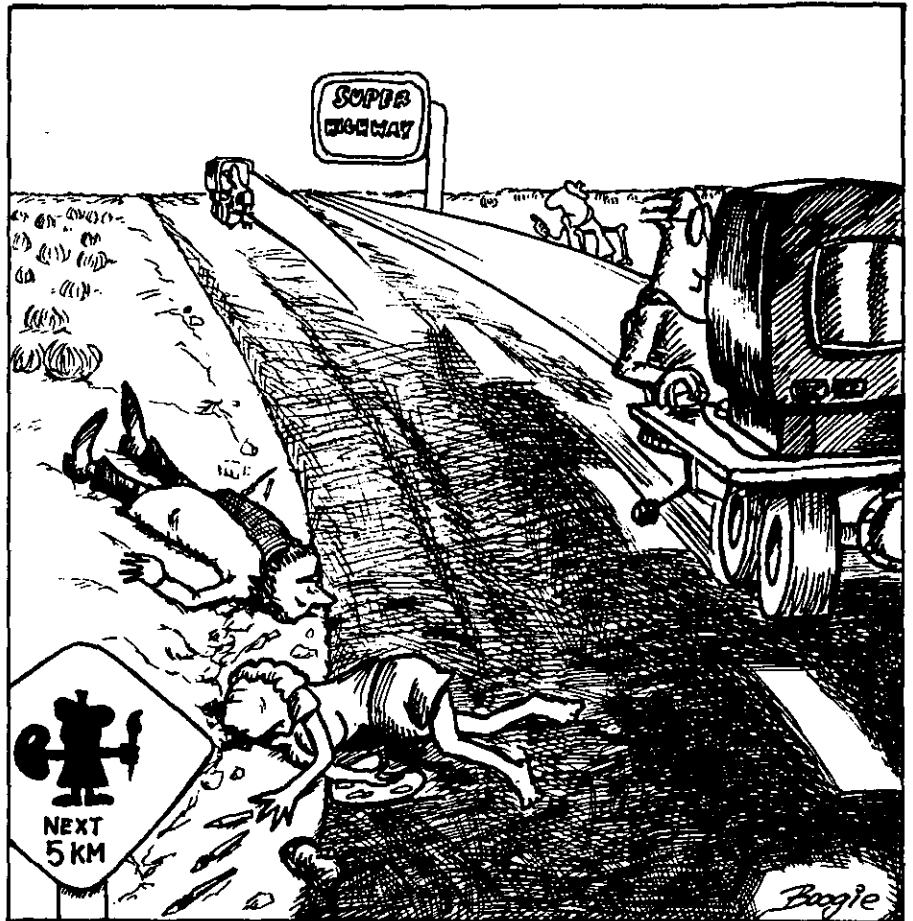
Next to the words "information superhighway", the most popular word in the techno-junky's vocabulary is "multimedia". What is multimedia? At a seminar, a speaker pointed out that the large and expensive conferences convened to discuss various aspects of the multimedia industry still contain sessions entitled "What is multimedia?" If the people making the products are still asking the question, what hope do the rest of us have? Definitional problems abound.

However, leaving aside the semantic uncertainties, most people seem to understand multimedia works to consist of combinations of text, visual images (still or moving) and sound stored in a digital form. The work may also include software to search, retrieve and manipulate a work.

There are two issues which multimedia producers most often highlight as causing difficulties. The first of these is the question of subsistence of copyright in multimedia works themselves. The second issue is licensing of copyright works for inclusion in multimedia products.

subsistence of copyright

In order for copyright to subsist in a work, there must be some level of originality. This requirement is usually fairly easily satisfied. For example, copyright subsists in tables of commonly available information, such as weekly television programs. Quite apart from any original software a multimedia producer might create, and the separate copyrights in underlying works, it seems reasonable to view a product which combines various elements which are generally available to create a new product with its own flavour as a product which incorporates the necessary level of originality.



The question is then: what category do multimedia works fall into for the purposes of copyright protection? Opinion is divided on this issue.

Some commentators have suggested that multimedia works may be protected as computer software. It will often be the case that although the multimedia producer needs computer software to enable the user to search, retrieve and manipulate the various component parts of the product, the producer is not the author of the necessary software. It may be just another original work utilised by the multimedia producer in order to create the final product. Even where there is original software in the product, what about the other bits, and what about the product as a whole?

It is also possible the work may be protected as a database or compilation. This means that it would be protected as a literary work under the Act.

However, the copyright category which bears most resemblance to the multimedia product is the cinematograph film, and it seems logical to accord it similar levels of protection. Like films, multimedia products

involve the combination of individual constituent parts to form a new entity which while incorporating each of the individual underlying works, brings into being a whole which is greater than the sum of its parts.

The difference is that multimedia products may also be interactive. The order in which the action or information unfolds is up to the user. Do multimedia products fall within the definition of cinematograph film in the Act? The answer is maybe, or sometimes, or sometimes not. The definition of a cinematograph film in section 10 of the Act requires the work to be capable of being shown as a moving picture. Not all multimedia works meet this criterion. Some may not incorporate any moving pictures. Even if they do, it is still open to some question whether a product which is intended to be stopped and started and where the viewer may move between windows at will is really capable of being shown as a moving picture.

The cry has gone up for the creation of a new copyright category: the multimedia work. As mentioned earlier, "multimedia work" is an amorphous term whose scope is

unclear even to those involved in the industry. This is not a promising starting point for a new copyright category.

It may be useful to consider whether multimedia works are so different from existing categories of protected materials that they require special treatment. It would seem more logical to expand the category for cinematograph films to make room for multimedia products than to create a separate category for a similar, but undefinable, product. The term "cinematograph film" is one of those categories found so often in the Act which are linked to particular technologies. Views have been expressed at the international level which call for the replacement of the term "cinematograph film" with a new category of protection for audio-visual works. Films may or may not need to be a sub-category of audio-visual works, depending on whether they are deemed worthy of special treatment.

licensing of works

Multimedia products, and often the individuals and industries involved in their creation, are outside the pre-existing categories of creative endeavour with which we are familiar and which may contribute to a multimedia work such as books, music and film.

However, to create a multimedia work, a producer will need to obtain the agreement of authors, actors, writers, directors, musicians, composers and computer programmers. Each owner of underlying rights wants to contract on the basis of established business practices in each of their relative industries. This makes the process of putting a multimedia product together a difficult and often frustrating process.

Some producers of multimedia products have called for a statutory licensing scheme and the establishment of a specialist collecting society for multimedia copyright clearances. Film makers have been negotiating the ability to combine various separate works into one work for some time. It is difficult to see why producers of multimedia products will not be able to do likewise once the commercial and practical uncertainties associated with the value of the licensed material and monitoring of subsequent uses of multimedia works are closer to resolution.

Recent developments at the international level in copyright are moving away from notions of compulsory licensing. Statutory licences are intended to draw a balance between the rights of the copyright owner and the public interest that particular persons have access to the copyright material without the necessity of obtaining

the copyright owner's permission. Voluntary collective licensing may be a more appropriate path to take for the inclusion of works in multimedia. Multimedia producers may wish to establish a clearing house to chase down copyright permissions from established collecting societies.

Copyright owners are understandably nervous about granting permission for the use of their works in the new digital environment. The ease with which their property may be reproduced and manipulated from digital formats and the uncertainty as to what is a reasonable sum to charge are all factors which cause anxiety and therefore inaction. Copyright owners are not sure what it is they might be giving away. However, the answer is surely not to force copyright owners to leap into the unknown by means of government imposed licensing schemes.

New uses of copyright material are ultimately in the interests of copyright owners, as they provide new sources of remuneration. That is of course dependent upon the ability to control subsequent uses of the new product. Without these, the licensed material loses its value once it is incorporated into the multimedia work. The solution to the difficulties faced by multimedia producers in obtaining rights and copyright owners in licensing them is ultimately going to be a commercial and

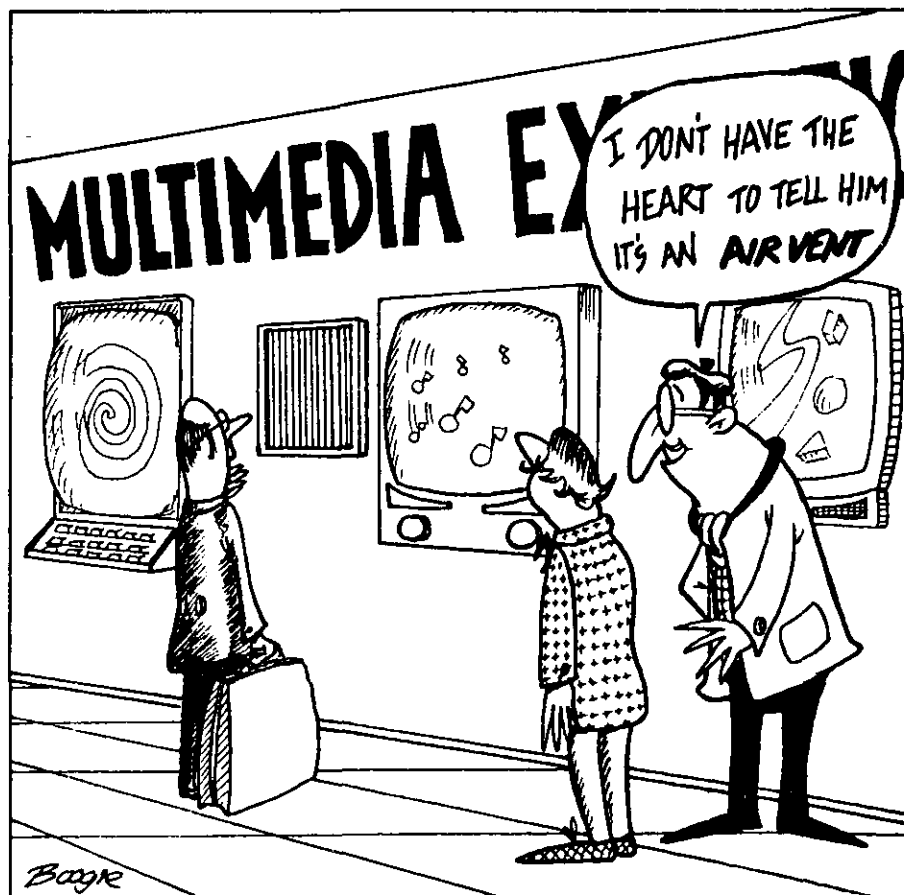
possibly partly a technical one. Multimedia is a new industry - both sides will need to feel their way into it and cautiously formulate new business practices and industry norms.

Of course there will be casualties along the way. There will be the rights owner who charged too little and the licensee who paid too much. These events are unavoidable in an environment where the sands are constantly shifting. It happened to the Beatles and countless others in striking deals in the earlier days of the record industry. The boundaries of licensing practices will be pushed by both sides until a mutually satisfactory point is reached.

While I am not without sympathy for the losers along the way, it is doubtful whether the fallout from ordinary commercial rough and tumble could be avoided by means of legislation, or whether business dealings should be heavily regulated without there being a clear public benefit. The development of the multimedia industry is not one which raises these sort of pressing public policy concerns.

This article is an edited extract from a paper by Bridget Godwin (Co-ordinator, Copyright Convergence Group) entitled "Entertainment Services on the Superhighway".

Bridget Godwin, Solicitor, ABC Legal & Copyright Department.



Licensing Issues for Converging Technologies

Michael Perkins looks at a lexicon and suggests a system for indexing of works.

At the outset please let us recognise that "convergence" is used in this paper in the sense recognised by the Copyright Convergence Group - i.e. as the deconstruction of boundaries between industries and (by implication) between commercial sectors.

When one considers the book (or print media), film and music industries, the licensing practice in each sector has evolved into distinct and not necessarily reconcilable approaches in dealing with authors rights. While each media sector was bound to be relatively isolated from each other by virtue of the characteristics of their delivery media and associated target markets, the emergence of digital delivery media and interactive multimedia has forced these sectors to recognise that no one has the definitive answer in dealing with authors rights, and along with copyright itself, the paradigms for describing and licensing copyright works for digital media publication need to be revisited afresh.

The speed with which these differences impact commerce is being slowed somewhat by the current practice of bringing to market titles which are in the most part reprographic usages of existing or newly created copyright works. This has led to a false sense of security that the existing licensing regimes will be sufficient to serve the interactive multimedia industry. As one starts to see the impact of digital processing on copyright works, it is becoming clear that this sense of security is already being challenged as the processing of a work creates a new digital work in which it is impossible to reconcile objectively the precise differences between two works.

a new set of semantics

So if the objective is the creation of a new overarching paradigm to manage the licensing of works in digital media form, let us also start this journey with a new set of semantics to describe that which we are

trying to control. Some examples follow.

"A *multimedia computer system*" is one that is capable of the input or output of more than one medium.

"*Encoding*" means a convention used to represent information. It may exist in conjunction with or in layers associated with other encodings. One or more encodings may be used as a base for another medium of expression. Each medium may in turn be combined with other encodings and the complete work may comprise one or more delivery technologies. Consider the implications of a CD-ROM based work which, transparently to a user, is interoperable with network information sources and in concert with the network information source, provides the user with a unified presentation of information such that the user is unable to discern what information is sourced locally and what information is collected from the network. What is the extent of the work, when it is an integral part of a "system"? At what point does a "system" become a virtual machine and that machine become patentable?

"*Medium*" means medium of expression.

"*Single - Media*" means any one medium other than multimedia and which, amongst other things, shall include: cinematographic film, print media works, photographs where they exist independently of expression in another medium, sound recordings and videotape recordings.

"*Multimedia*" means a medium which through a process of authorship using authoring tools, incorporates and / or encodes two (2) or more other single media with a single communication delivery technology.

"*Communication Delivery Technology*" means the science, means or process of conveying information by electronic or mechanical means.

"*Digital Communication Delivery Technology*" means the science, means or process of conveying information by electronic systems using digital format storage - eg. CD-ROM, CD-I, Interactive TV, HDTV.

"*Digital Multimedia*" means a medium

which through a process of authorship using software and other authoring tools, incorporates and / or encodes two (2) or more other single media with a single digital communication delivery technology.

A "*multimedia work*" is a work consisting of text, visual images (which may be still and moving) and sound (including music, ordinary speech and dramatic performance) stored in digital form and may include software to search, retrieve and manipulate such content."

Once you start considering the above definitions of encoding and digital multimedia, it becomes clear that a multimedia work is most closely akin to a compilation or anthology. As a work it is a combination of original creative effort as well as the product of the effort of others. The difficulty is in discerning and controlling the dividing lines between the various contributions to a work, especially in the face of digital processing of copyright works held in digital form.

proposed framework

In my view, in the face of these realisations, it becomes clear that a robust system for the indexing of not only digital media works, but of all components within their structure, is required in order to manage the creation of the work, let alone its licensing. Once identification of components and authors becomes recordable in a robust central administrative core, the management of downstream licensing becomes relatively easy in that:

- the existence, instance and scope of the work becomes subject to objective description and hence authority to use can be based confidently on this description;
- this descriptive structure can be easily extended to contain the licence percentages in which the revenue stream from the work is to be shared by the contributing licensors. This applies to media irrespective of its source;
- this structure can be integrated with

EFTPOS and electronic banking services to streamline the split of royalties, with payments coming from publishers or directly from on line usage licencing.

Happily, Copyright Agency Limited, the Australian Society of Authors and the National Library have all recently taken initiatives which when considered together sees the foundation of the real world infrastructure to support such a comprehensive vision of "delivery media independent" licencing. What must be now dealt with is a multiplicity of vested interests, legal uncertainties in the overall semantics of copyright and the inexorable move of our communications infrastructure to broadband network services.

some problems

The purpose of this paper is to highlight key foundation issues in licencing for digital media. Some problems which arise which require further examination are:

- to foster the development of robust semantics for describing the scope of permitted use of a work. This must be

carefully considered when controlling moral rights exhaustion in digital media content creation;

- to consider the feasibility of the Government setting up a form of Statutory "Errors and Omissions" insurance for works of imperfect parentage which nonetheless satisfy a test of due diligence for rights holder location. This is further developed in the paper co-authored with Pacific Advanced Media Studio entitled "Streamlining Content and Copyright";
- to consider the institution of formal "Chain of Title" protocols to ensure that commercial value is given to the works of strongest provenance;
- the emergence of the proposition that copyright is evolving into an authors equitable right to remuneration. Should this proposition be advanced to more substantial endorsement?
- how do principles of consensus and contractual certainty operate to defeat existing "all rights" assignment clauses in existing publishing contracts. Can existing copyright assignees truly say in the context of the present law on unconscionability and fair trading, that they automatically have a right which

was never in the reasonable contemplation of the parties at the time the contract was formed?

- how do common law tests of "reasonable foreseeability" sit with the emerging reality of technology convergence when applied to existing publishing contracts?

not the final word

The final word in this debate is nowhere near being said. I trust this brief outline elicits some further advancement of the debate on the best approaches to solve the practical reality of dealing with these issues. The faster lawyers can foster the emergence of best practice in this area, the stronger the contracts they draw will be and the better they will serve the interests of their clients.

I would encourage all lawyers interested in this paper to contribute to the discussions on Multimedia and Digital media publishing, currently being moderated on First Class Law, the communications hub being established for the legal profession by the Law Foundation of NSW.

Michael Perkins, Hooton & Perkins, Solicitors

COMMUNICATIONS AND MEDIA LAW ASSOCIATION (CAMLA) ESSAY PRIZE

The Communications and Media Law Association is holding an essay competition in 1995.

The purpose of the competition is -

- to encourage high quality work in undergraduate communications and media law courses; and
- to improve links between those studying and practising in the area.

The prize will be given for -

- a previously unpublished essay which is the original work of the author
- completed by a student enrolled in an undergraduate or postgraduate course, possibly as part of that course
- on a subject relating to communications or media law
- of 1000-3000 words.

A prize of \$1000 and a one year membership of CAMLA will be awarded to the winner. The winning essay will be published in the Communications Law Bulletin.

The winning entry, to be selected by a panel of experienced communications and media law practitioners, is likely to demonstrate original research, analysis or ideas. The panel will not necessarily be seeking detailed works of scholarship.

The award will be made at the annual CAMLA Dinner or Christmas Function.

Please send three copies of each entry typed well-spaced on A4 paper. The name,

address and telephone/fax contacts for the author should be included on a separate, detachable sheet. The author's name should not appear on the pages of the essay.

Entries should be submitted to:

The Administrative Secretary
Communications and
Media Law Association
PO Box 545
GLEBE NSW 2037

by 30 September 1995

The present status of telecommunications evolution in Europe

Alain Valle of the Directorate General of Posts and Telecommunications, France, expounds.

Before 1993, all telecommunications policy decisions were oriented towards building the single European market and opening up to competition.

In order to achieve this objective, European Directives were necessary. Thus, during 1990, the following Directives were adopted as the basis of the telecommunications policy for the coming years:

the "Services Directive" liberalising all telecommunications service provision except voice telephony offered to the public; and

the "Open Network Provision" (ONP) Directive, organising access to the public network.

then and now

During 1993, there were no spectacular developments. However, looking back to the "pre-1993" period, and then comparing it with the current situation, the two appear quite different. This is seen in the following three examples.

First. Today, in the French market, British Telecom (BT) is a major competitor of France Telecom on the big user segment, for all international services - VPN, VAN, data transmission. All national markets within Europe are more or less in a situation where the incumbent carrier is facing competition from dynamic international operators, for the most profitable segment of the market.

Second. In the mobile market, European countries have opened up the provision of Group Special Mobile (GSM) services to competition. In France, competition was introduced for analogue services in 1987, and for GSM services in March 1991. In February 1994, the Ministry issued a call for tender for a third cellular licence based on DCS 1800 technology. Furthermore, the international roaming arrangements should intensify competition. Mobile licences are granted on a national basis, but it is possible, within the European Union, to subscribe to a GSM service from a mobile operator authorised to operate in another Member State. The case appeared when a Danish operator proposed to German users to subscribe to the Danish service, and consequently to the service within Germany.

Third. For VSAT (Very Small Aperture

Terminal), France, Germany, the Netherlands and the UK have signed an agreement on the mutual recognition of licences. This means that a licence granted in one of these countries may automatically be extended to the others if the licensee so wishes.

Step by step, a competitive European telecommunications policy has taken root and is now quite active.

However, the market is evolving constantly and the policy makers frequently need to review the status of their policy. Consequently, in 1993, the European Commission decided to review its telecommunications policy: new objectives, a new agenda, new networks, new organisation of the industry are now on the table.

the new agenda

In 1993, the "White Paper on Growth, Competitiveness and Employment" filed by the European Commission, recognised that telecommunications policy will form an important component in integrating the continent, including the emerging markets in Central and Eastern European countries, and pulling Europe out of the current recession.

Then, the European Union's policy of opening up the telecommunication sector will be subject to further developments.

The European Union decided to fully liberalise telephone service provision within the Union, by 1 January 1998. This decision, and the January 1998 deadline, which now have been accepted by the whole industry, raise three major issues:

- the future of universal service. Competition means a new context for the provision of universal service. A common definition and common conditions governing the provision of universal service need to be agreed on in order to guarantee its provision throughout the community;
- the re-balancing of tariffs;
- the liberalisation of telecommunications infrastructure provision. The European Commission will file a Green Paper on this issue later this year (1994). The basic question is whether it is possible to liberalise the provision of all services whilst maintaining restrictions on infrastructure provision. Cable TV

systems, private networks, and utilities' telecommunications networks could rapidly be authorised to provide telecommunications services on their own infrastructure. This raises certain questions - is such competition sustainable? Would it be possible to have a common policy on this matter, and under which conditions?

the future network

The European Union plans to establish a pan-European interactive broadband network.

A report submitted to the European Council by the European Commission Vice-President, R. Bangemann, and industry representatives (the group is known as the High-Level Group on the Information Society), recommends:

- fully liberalising the telecommunications industry;
- removing all non-commercial constraints imposed on public telecommunications operators;
- creating a European regulatory authority;
- ensuring interconnection of networks and interpretability of service as a high priority;
- speeding up the standardisation process;
- ensuring reciprocity with non-European countries.

In such a context, the private sector would be ready to invest in new telecommunications infrastructures.

Intellectual property rights, privacy and media ownership will be key issues for the development of multimedia services. Specific applications should speed up the development of the multimedia market - including - teleworking, teletraining, research networks, applications for small and medium sized businesses.

At the European level, this report is the first building block for European Information highways.

The emergence of a Personal Communications environment is also a key factor of the development of this new network. The Green Paper on Mobile and Personal Communications proposes market structures which will transform the role of wireless-based services from today's premium services to mass market

deployment, alongside the fixed network, by the end of the decade. The launch of the DCS 1800 services in the UK, Germany and France and the new digital systems such as DECT and HERMES, will build Europe's technological strength in digital mobile technologies.

restructuring the European telecommunications industry

Privatisation and international alliances are high priorities in telecommunications policies in Europe.

Danish Telecom and PTT Nederland have been partly privatised and were floated in early 1994. Portuguese Telecommunications should be privatised next year after a complete reorganisation of the industry. DBP Telekom and France Telecom privatisations are on the table although political problems are slowing down the process. However, due to the consequences on the financial market of the privatisation of very big corporations, it is evident that small operators are more easily "privatisable".

After the BT-MCI deal last year, France Telecom and DBP Telekom reached a parallel agreement with Sprint late in June 1994. Then, soon after, Unisource signed with AT&T. This is evidence of European operators' intentions to be involved in the globalisation of the telecommunications market.

conclusion

Three years ago, the 1993 single market deadline was the major issue for policymakers. Now, trans-continental stakes have to be taken into account to fully understand European telecommunications policy. This is the case for:

- competition policy, where the issue of reciprocity will be a key factor in the future international trade negotiations;
- operators' strategy within the alliances mentioned above;
- multimedia services market development where the issue of intellectual property rights, royalties and any other form of "content ownership control" will be a major topic. Clearly, lawyers will have to deal with this, but I am convinced that politicians will also have to address the question in order to promote, and even protect national identity and culture.

This is an edited version of a presentation to the Communications and Media Law Association in Sydney by Alain Vallee, PhD.

Alain Vallee is Head, Policy Analysis Department Directorate General of Posts and Telecommunications (Ministry of Industry, Post and Telecommunications and International Trade - France). The DGPT is the regulator for the telecommunications industry. Vallee's international responsibilities at the DGPT include chairmanship of the Committee of European Regulators on accounting principles and interconnection regulation. Vallee also lectures at various universities and engineering schools in Paris.

CAMLA comes to Brisbane

Wednesday, November 9 saw the first-ever CAMLA function to be held in Brisbane, expected to be the first of many such get-togethers for Brisbane-based CAMLA members and others interested in communication/media law and policy.

More than 50 attendees enjoyed the opportunity for informal discussion with old friends and new acquaintances, a passable luncheon and a wide-ranging overview of the future of converged communications by luncheon speaker, Brian Johns, Chairperson of the Australian Broadcasting Authority.

Organized by a small steering committee comprising Brisbane barrister Lorenzo Boccabella, solicitor John Garland and Brisbane-based CAMLA committee member Dick Rowe (with substantial and much appreciated support from John's firm, Freehill Hollingdale & Page), the lunch was an occasion for Brisbane's communications industry and media law community to get together.

On the basis of the success of this first up effort, it seems certain that further CAMLA activities in Brisbane will follow in 1995.

Performers' Rights: some recent developments

Libby Baulch outlines the 1994 Copyright Bill and the MIAC report on performer's copyright.

Except for a reference to meeting Australia's obligations under the GATT TRIPS agreement (Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods which forms part of the General Agreement on Tariffs and Trade), the issue of performers' rights was notably absent from the Federal Government's cultural statement Creative Nation, released in October. The Government's intention regarding further review of performers' rights is thus unclear.

This article briefly discusses the amendments affecting performers in the Copyright (World Trade Organisation Amendments) Bill 1994 ("the Bill"), and the report on performers' copyright released by the Music Industry Advisory Council ("MIAC") in August.

The Bill

The Bill was introduced into Parliament on 21 September 1994. It is one of a number of pieces of legislation intended to put Australia in a position to join the World Trade Organisation, the body which will administer the GATT. The Bill has been considered by the Senate Economics Legislation Committee, which was due to provide its report on 28 November. Following the report, the Bill will be scheduled for debate, and is intended to be proclaimed by the end of 1994.

The three main changes for performers as a result of the Bill will be:

- a longer period of protection for certain performances;
- change to the "connecting factors" for protection, so that more performances will be eligible for protection; and

- new criminal provisions relating to certain unauthorised recordings made in the past.

In relation to the second and third aspects, the Bill does more than the minimum required by the TRIPS agreement.

In addition to the amendments to the Copyright Act, the Government will also need to amend the Copyright (International Protection) Regulations ("the Regulations") to provide the protection for foreign performers required by TRIPS. The ambit (as opposed to the duration) of protection for performers in the TRIPS agreement is lower than that required by the Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations - Australia became a party to the Convention in 1992), and the protection of foreign performers required by the TRIPS agreement is different to that

required by the Rome Convention.

The Attorney-General's Department has said that the *Regulations* may be amended by introducing new provisions applying to countries which are members of the World Trade Organisation but not party to the Rome Convention, and by adding a new part in Schedule 1 of the *Regulations* which will list those countries.

Briefly, the provisions in the Bill affecting performers are as follows.

protected performance

A performance will be eligible for protection if it takes place in Australia or is by a "qualified person", being an Australian citizen, protected person or resident. This change will also affect the protection of performances by nationals and residents of countries listed in Part IV Sch. 1 of the *Regulations* and performances which take place in those countries.

The current provision is that the performance must both take place in Australian and be by a qualified person.

criminal provisions

Some changes to the existing criminal provisions, and the introduction of new criminal provisions relating to certain uses of sound recordings of performances. The new criminal provisions relate to acts done on or after the commencement of Part 4 of the *Copyright (World Trade Organisation Amendments) Act* in relation to performances given at any time before that date.

The current provisions only apply to certain performances which take place in Australia after 1 October 1989; certain performances which take place in, are recorded in or broadcast from a country listed in Part IV of Sch. 1 of the *Regulations* after 1 January 1992; and certain performances which take place in, are recorded in, or broadcast from, the United States after 3 May 1994.

The offences include:

- making copies of unauthorised sound recordings of performances;
- having equipment for the making of unauthorised copies;
- selling or hiring unauthorised sound recordings of performances; and
- importing unauthorised sound recordings of performances to sell or hire.

There are no civil rights of action proposed for performances which took place before 1 October 1989. According to the Attorney-General's Department, this is because of concerns that such provisions

may not comply with requirements of the Constitution regarding acquisition of property on just terms.

protection period

The protection period will be 50 years, rather than 20 years, for the purposes of:

- the new criminal offences contained in s 248QA, relating to certain uses of sound recordings; and
- certain rights and offences relating to unauthorised sound recordings of performances - such as making a direct or indirect sound recording of a performance; making a copy of a sound recording of a performance.

rental right

The Bill will also introduce a rental right for owners of copyright in sound recordings and owners of copyright in works recorded on sound recordings. A rental right has not been granted to performers.

MIAC Report on Performer's Copyright

In August 1994, MIAC released a report prepared by a sub-committee appointed to consider whether there is a need to extend the rights of performers under the Copyright Act. The sub-committee comprised representatives of the Musicians Union of Australia; Media Entertainment and Arts Alliance (MEAA); Coalition of Independent Record Companies of Australia; Australian Record Industry Association; Federation of Radio Broadcasters; Australian Music Retailers Association and a performer.

MIAC was established by the Federal government in 1992, following recommendations by the Prices Surveillance Authority in its 1991 report on prices of sound recordings. MIAC's function is to advise the government on matters affecting the music industry, including performers' rights. MIAC comprises representatives from a variety of areas in the music industry, including composers, performers, performers' unions, managers, record companies, music publishers and broadcasters.

The report notes the support for performers' copyright by the MEAA and Musicians Union of Australia; the opposition by record companies, commercial television and radio stations and SBS; and the acceptance of the concept of performers' copyright (subject to a number of reservations) by the ABC. The report sets

out the justifications for these positions, and also contains a model for performers' copyright proposed by the MEAA and Musicians Union of Australia.

future consideration of Performers' Rights

In its August 1994 report, the Copyright Convergence Group ("CCG") identified performers' rights as one of the matters requiring further urgent consideration by the Government. In its *Creative Nation*, the Federal Government said it accepted the recommendations of the CCG.

The Federal Department of Communications and the Arts has indicated its intention to commission a study on performers' rights, including performers outside the music industry and thus not considered by MIAC. This proposal was put on hold in the lead up to the release of the Federal Government's cultural statement in October, and there has been no indication to date as to whether the Department intends to follow through with the proposal. If not, there will need to be some other mechanism for further review of performers' rights if the Government accepts the CCG's recommendation that this is an area in need of urgent consideration.

Libby Baulch, Executive Officer,
Australian Copyright Council.

APPLICATIONS for EDITOR

After the next edition (Vol. 14 No 3) Anthony Mrsnik will retire from the editorship of the Communications Law Bulletin. CAMLA is therefore calling for applications for a new editor.

This is high profile position which brings the editor into contact with a wide range of people across the entire communications and media sector. It is accompanied by a modest honourarium.

Expressions of interest in the position, together with a curriculum vitae, should be sent to:

The Secretary,
CAMLA,
Box 545, Glebe
NSW 2037

FEATURE

unjust enrichment and unfair competition - is appropriation per se wrongful

Professor Harvey S. Perlman discusses the US tort of misappropriation and why it has received such little support.

December 23 1993 marked the Seventy-fifth anniversary of the United States Supreme Court's decision in *International News Service -v- Associated Press*, 248 U.S. 215 (1918). That decision, in the view of many, purported to apply a general cause of action for "misappropriation" in favour of market competitors against those who are unjustly enriched from the efforts of others or, as the Court put it, those who "reap where they have not sown".

In broad and passionate language the Court discovered a legally protected, quasi-property interest in the intangibles associated with a business enterprise, in this case a news service, beyond the protections available under the copyright and patent systems.

During these past 75 years, the case has resembled the shirt-tail relative who periodically arrives unannounced for dinner, to the surprise of all but the delight of only a few. Notwithstanding the efforts of some distinguished judges and scholars to give it a polite burial, the case has been utilised by courts infrequently but importantly, to support cases creating new or extended property rights for intangible assets of businesses.

Most recently, the American Law Institute considered and approved Tentative Draft No.4 of the new Restatement (Third) of Unfair Competition. Section 38 restates the common law in such a way as to foreclose a general tort of misappropriation, at least in disputes between market competitors. As one of the Reporters for the Restatement, my bias should be clear, but the purpose of this article is to describe briefly the American experience with a general tort of misappropriation and the reasons why it has received such little support.

The INS -v- AP decision

During World War I, British censors prevented the Hearst news service ("INS") from using the transatlantic cable. In order to

provide Hearst newspapers with news from the European theatre, INS acquired an early morning edition of an Associated Press newspaper in New York and transmitted that news to its own subscribers. Because of time differences, INS subscribers on the West coast would often print the news before AP subscribers. Although there were other allegations against INS, such as bribery of AP employees to obtain advance copies of the news and failure to inform readers that their news was from AP, the Supreme Court did not consider these traditional claims of wrong. Limiting itself to the question "whether defendants may lawfully be restrained from appropriating news ... for the purpose of selling it to defendant's clients," the Court declared in broad language:

In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organisation and the expenditure of labor, skill, and money, and that defendant in appropriating it and selling it as its own is endeavouring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorised interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterising it as unfair competition in business.

In dissent, Justice Brandeis argued that any property right accorded to the news should be accompanied by corresponding obligations and that only a legislature could draw a proper balance between the extension of property rights and the curtailment of the free use of knowledge:

But the fact that a product of the mind has cost its producer money and labor, and has a

value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions - knowledge, truths ascertained, conceptions, and ideas - become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it. These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. But by no means all such are endowed with this attribute of property.

Justice Holmes also dissented, arguing that a cause of action for unfair competition required some misrepresentation and that the only wrong here was failure of INS to give AP credit for the news.

undermining of the decision

Although the INS decision acquired considerable fame, the broad tort of misappropriation it announced was not widely applied. Early lower court decisions interpreted the case narrowly or cited the decision to support liability in cases, such as trademark infringement, where it was unnecessary or duplicative of other well established law. Judge Learned Hand, one of the most respected judges of his time, in a 1929 case involving imitation of dress designs, refused to apply the INS doctrine beyond its peculiar facts in order to avoid rights that would "flagrantly conflict" with Congressional action establishing the patent and copyright systems.

The INS decision was further undermined in 1938 when the Supreme Court held that the federal courts should no longer decide matters of common law but should apply the law of the state out of which the controversy arose. Because INS had been decided as a matter of federal common law, this new limitation on the federal courts deprived the decision of its precedential value. State courts and federal

courts interpreting state law could still find the decision's reasoning persuasive and some occasionally applied the misappropriation doctrine.

In 1964 the Supreme Court handed down two decisions that had an even greater impact on the viability of the misappropriation doctrine. The Court made explicit what Judge Hand had urged decades before - that under our federal system, a state law doctrine of misappropriation may not interfere with the protective regime of the copyright and patent systems enacted by Congress. Such interference occurs when the states protect items not eligible for protection by a copyright and patent.

The Court held that federal law preempted any state law purporting to prohibit the copying of anything that is within the general class of subject matter of writings or inventions eligible for protection under the copyright or patent statutes. Because these statutes tend to be broad in their subject matter coverage, the range of opportunity for applying a common law misappropriation cause of action has been considerably narrowed. In recent years the Supreme Court has continued to reaffirm the preemption doctrine and in the 1976 Copyright revision, Congress enacted a preemption provision that is largely consistent with the Court's views.

applications of the decision

Notwithstanding these limitations, lower courts have found a misappropriation periodically in factual situations similar to the taking of news without permission. For example, the unauthorised broadcasting of a sporting event from a vantage point outside of the stadium or arena was enjoined on the basis of INS [*Ed. cf. Victoria Park Racing*]. However, even this view was not universal; for example, in 1991, a federal court in Massachusetts refused to enjoin the unauthorised broadcast of the Boston Marathon holding that INS was not applicable.

The INS decision briefly protected sound recordings against unauthorised use or appropriation. In a line of famous cases, the Pennsylvania state courts held that INS prohibited the unauthorised radio broadcast of a sound recording of plaintiff's orchestra. Judge Learned Hand, sitting as a federal judge applying New York law, denied an injunction on similar facts finding INS inapplicable.

Subsequently, the New York Court of Appeals expressly adopted the misappropriation doctrine when it enjoined the sale of unauthorised sound recordings

of the Metropolitan Opera's radio broadcast. The INS decision was also employed in the late 1960's to enjoin tape and record pirates from making unauthorised copies of hit sound recordings. These decisions survived any conflict with the copyright statute because sound recordings were not protected under the copyright law. However, beginning in 1972, Congress extended copyright protection to sound recordings.

The INS decision also had a momentary importance in regulating an infant cable television industry. Cable operators profited by appropriating broadcast signals and selling them in remote areas, sometimes in competition with the broadcaster. The analogy to the facts of INS are striking. Although the misappropriation tort was initially applied to cable operators by some courts, the relationship between broadcasters and cable television shortly became the subject of extensive preemptive regulation, both under the Copyright laws and by the Federal Communications Commission (the FCC).

The Restatement (Third) of Unfair Competition

The purpose of the American Law Institute's series of Restatements of the Law is to clarify and give coherence to the decisions of the various courts at both the state and federal level. The first edition of the Restatement of Torts, published in the 1930's had considered elements of the law of unfair competition but in the late 1960's, the Institute began the undertaking of a Restatement of Unfair Competition as part of its "third" series of restatements. Section 38 of the Restatement (Tent. Draft. No.4, March 25, 1993) introduces the final chapter of the Restatement which is devoted to the rules governing appropriation of trade values. Section 38 restates the law of appropriation as follows:

One who causes harm to the commercial relationships of another by appropriating the other's intangible trade values is subject to liability to the other only if:

- (a) the actor is subject to liability for an appropriation of the other's trade secret under the rules stated in SS 39-45; or
- (b) the actor is subject to liability for an appropriation of the commercial value of the other's identity under the rules stated in SS 46-49; or
- (c) the appropriation is actionable by the other under federal or state statutes or international agreements or under the doctrine of common law copyright as preserved by federal copyright law.

This black-letter recognises two major branches of appropriational law: the appropriation of trade secrets and the appropriation of the commercial value of another's identity (the new, evolving right of publicity). The section acknowledges that in addition there may be legislatively created causes of actions and a narrow area of protection provided by what remains of common law copyright. However, beyond these specifically mentioned doctrines the section rejects a general cause of action for misappropriation.

the instability of the doctrine

As Reporters for the Restatement, my colleague Robert Denicola and I arrived at this result from our analysis of the case law as well as the broader systemic policies that define the law of unfair competition. Particularly telling was the fact that since the INS decision, courts had been unable to fashion a coherent cause of action for misappropriation. In the discreet contexts in which the doctrine had been applied, the results were quickly replaced with legislative regulation.

This history seems to suggest the instability of the idea that appropriating another's effort is *per se* wrongful.

The line of cases recognising the preemptive effect of the patent and copyright laws suggests that a general misappropriation doctrine would have a very narrow field on which to play. The patent system prevents the development of a state misappropriation theory with regard to almost all utilitarian "inventions" and designs. The only category of constitutional "writings" not accorded copyright protection are those that are not fixed in a tangible medium of expression, hardly an area of vast importance.

If it is clear that one may copy the design of a pole lamp unprotected by a patent or copyright (as the Supreme Court has held), then it seems equally plausible that one may copy a street dance or an impromptu performance in a park. And, although the copyright statute specifically preserves state laws that provide protection "not equivalent to" that protected by copyright, there seems little doubt that a cause of action based on "taking" or "misappropriation" or "copying" another's efforts is equivalent to a cause of action for copyright infringement.

Moreover, courts are incapable of fashioning a generally applicable and socially responsible principle for deciding cases involving the appropriation of intangible business values. For tangible assets, a general rule against appropriation

is likely to enhance social welfare. For example if B steals A's automobile, A is deprived of its use. As between A and B the automobile is a scarce resource. In order to assure that the value of B's use is higher than A's, we acknowledge A's property rights and require B to purchase the automobile at a negotiated price. However, with intangible values such as ideas, the appropriation by B does not prevent a continued use by A. These intangible values are what economists call "public goods"; once produced they can be shared widely at little if any marginal cost. Once the idea is produced, society is clearly better off if both A and B can exploit the idea rather than if A has a monopoly in its use. The catch is, of course, that unless A is granted protection for the ideas A creates, A has less incentive to produce ideas in the first place.

The creation of property rights in writings and inventions through the copyright and patent systems is justified precisely on the ground that protection will encourage inventors and authors to invent and write. But how much encouragement should be given to writing and inventing over other important social activities such as farming and lawyering. The scope of the property right we grant an inventor or author will determine, at least at the margin, the extent to which resources flow into inventing and writing. But how much incentive is enough? Policy makers must balance the claims of those who invent against the claims of those who would (at no marginal cost, remember) benefit from an absence of property rights.

The copyright and patent systems of most countries reflect very hard fought and intensely negotiated compromises, usually of an ad hoc nature, regarding the scope of protection for particular classes of writings or inventions. This balancing does not lend itself to the principled decision-making associated with judicial decisions but rather the give and take of the legislative process.

misappropriation and competition

The theory of unjust enrichment cannot provide a rational basis for measuring the metes and bounds of the property right at issue in these cases. To be sure there is a powerful moral imperative to the abstract idea of "reaping only what one has sown" which animates the decision of INS. But on closer analysis, one recognises that the advance of civilisation has depended on both the development of original ideas and their appropriation by others. In both the arts and sciences, progress comes by the accretion of modest originality onto the accumulated efforts of others.

Copyright and patent systems recognise this by limiting the scope of the right and the time in which the right can be exercised. On a more mundane level, the gains derived from most economic activity are attributable, at least in part, to the efforts of others - a "reaping" of unsown grain. The small shop at a shopping mall directly profits from the customer traffic generated

by the investment of the larger department store. Book publishers profit from the invention of electric lights. Hot dog vendors outside a stadium profit from the investment of the football team. In a multitude of interdependent ways, one's economic activity "appropriates" or builds upon the sowing of others.

The flip side of "misappropriation" is competition. Competition requires that multiple sellers offer to sell similar goods to the same buyers. Competition is accordingly reduced to the extent that a doctrine of misappropriation confers exclusive rights in ideas, styles, and designs. A rational legal system will attempt to balance the societal returns from increased investment in development resulting from the grant of property rights against the social gains derived from an increased competition resulting from allowing others to freely copy. In our view the INS case has not served as a springboard for achieving such a balance.

Whether the Courts will explicitly accept the analysis of the Restatement and applaud the burial of the INS decision remains to be seen. In practical effect, however, they have already done so for the decision is seldom acknowledged and even less frequently applied. It stands as a stone monument to a pitched battle between two news agencies against the backdrop of World War I. It seems to have little practical relevance to the modern world.

Harvey S. Pearlman, Dean and Professor, University of Nebraska, College of Law.

Continuous Disclosure - an additional legal obligation

David Williams describes enhanced disclosure obligations and their impact on film investments.

On 4 March 1994 the *Corporate Law Reform Act 1994* ("the Act") received Royal Assent after wide debate associated with its passage through the Houses of Parliament (since 1992).

The Government's intention in passing the Act was to apply "enhanced" disclosure obligations on all entities (not just entities listed on the Australian Stock Exchange) in which the public invest with the aim of enabling investors to make informed investment selections.

The Act has very significant implications not just for listed companies and trusts but also for fund managers who have unlisted products in which the public is invited to

invest or has been invited in the past to invest.

The changes to the Corporations Law made by the Act of most relevance are those relating to continuous disclosure (including financial reporting) and to the prospectus provisions of the Corporations Law. These provisions commenced on 5 September 1994. In addition, the Corporations Regulations implement certain aspects of the continuous disclosure regime.

This article looks at the continuous disclosure implications of the Act from the point of view of a manager of unlisted products. This article does not cover the altered reporting requirements.

who is affected?

The enhanced disclosure provisions of the Act apply to "Disclosing Entities".

A Disclosing Entity is a body or undertaking which issues securities which are "ED Securities" (a shorthand term used in the Act for enhanced disclosure securities).

Units of a unit trust and other prescribed interests (together "prescribed interests") will be ED Securities if:

- they are listed; or
- a prospectus in relation to those prescribed interests has been lodged

and prescribed interests have been issued pursuant to the prospectus and there have been at least 100 holders of prescribed interests at all times since the prescribed interests were issued under the prospectus.

An important consequence of this is that many "closed" unit trusts or other prescribed interest offers which are no longer being marketed but at some time previously have issued prescribed interests pursuant to a prospectus will be Disclosing Entities (for so long as they have at least 100 holders).

This will cover most film investment where there has been a prospectus (but probably not those where the funds were raised using an offer document that fell within section 215C of the former Companies Code).

Securities that are quoted on the Australian Bloodstock Exchange Limited are declared not to be ED Securities.

what must be disclosed?

Section 1001A applies to a listed disclosing entity, and requires compliance with stock exchange rules relating to continuous disclosure (including Listing Rule 3A(1)).

In the case of an unlisted disclosing entity, section 1001B applies.

The continuous disclosure rules apply to information which:

- is not generally available; and
- a reasonable person would expect to have a material effect on the price or value of the Disclosing Entity's ED Securities, i.e. it is "price sensitive".

Information is "generally available" if:

- it is readily observable; or
- it has been made known to investors in securities of a kind whose price or value might be affected by the information and a reasonable period of time has elapsed since the information was made known for it to be disseminated among such investors.

Information is likely to have a material effect on the price or value (i.e. is price sensitive) if the information would or would be likely to influence the investors described above in deciding whether to subscribe for or buy or sell the securities. The fact that there is no buy-back covenant and that there may be no market in the relevant securities (as is the case in many prescribed interest schemes) will not automatically mean information is not "price sensitive".

These concepts follow closely the insider trading provision of the Corporations Law.

Importantly, the threshold test in determining whether information is generally available refers to investors and not their advisers. The information must therefore be widely disseminated to reach

those investors who invest in securities whose price or value might be affected by the information.

In contrast to the continuous disclosure rules for listed entities (especially the revised Listing Rule 3A(1)), there is currently no express exception for commercially sensitive information where the release of such information would cause a detriment that arguably outweighs the benefit of disclosing the information to the market.

how and when is information to be disclosed?

The obligation to disclose information arises when the manager of the Disclosing Entity becomes aware of the information.

Such obligation is satisfied by the manager of the Disclosing Entity lodging the information with the ASC as soon as possible. Information that has been lodged is not required to be sent to the holders of the prescribed interests.

Information is not required to be lodged with the ASC if the information would be required to be included in a supplementary or replacement prospectus.

This means that the continuous disclosure requirements will generally not adversely impact on a manager of a prescribed interest fund which has a prospectus on issue so long as that manager is fully complying with its obligations to issue supplementary or replacement

prospectuses. However, a manager of a Disclosing Entity which does not have a current prospectus on issue (or where the information specifically does not relate to that prospectus) will be required to lodge relevant information with the ASC.

contravention

A contravention of the continuous disclosure rules as they apply to prescribed interest schemes will occur if the manager of the Disclosing Entity intentionally, recklessly or negligently fails to disclose the required information.

A person involved in that contravention may be civilly liable to a person who suffers loss or damage as a result.

It is a criminal offence if the failure to disclose is intentional or reckless.

exemptions and modifications

The ASC has the power to exempt specified persons from all or specified disclosing entity provisions.

In addition, regulations may be made to exempt specified persons from all or specified disclosing entity provisions or to declare specified securities of bodies not to be ED Securities.

It is not clear in what circumstances exemptions or modifications will be made.

David Williams, Partner, Mallesons Stephen Jaques.

Telecommunications after 1997 - Carriage, Convergence, Consumers

Helen Mills, Director, Communications Law Centre reports on the

CLC's conference held on 9 November 1994.

One of the most engaging features of the conference was hearing debates between the major telecommunications players on licensing, regulation, interconnect arrangements, universal service and other critical aspects of the post - 1997 arrangements, at a point just before submissions were due to be sent to government.

Not surprisingly, perhaps, Telstra is adopting a purist pro-competitive position on these issues; Optus favours continued involvement by the regulator and policy makers to keep the rules of the game; and the service providers argued that they were already effectively bearing many of the

burdensome obligations of carriers, while getting none of the benefits (eg: interconnect at carrier rates).

Why Limits on Telecommunications Providers

Optus Director of Corporate and Regulatory Affairs, Andrew Bailey, argued that while Telstra has control of the customer base, sunk infrastructure costs and the advantages of its diverse network, it will enjoy advantages which cannot be neutralised simply by the operation of general competition law. Hence Optus supports continuation of a regulator which

is able to intervene promptly, with both formal arbitration and informal facilitation. Whether that regulator stands apart from or is integrated with the proposed Australian Competition Commission as a specialist arm, is still an open question, from their point of view. (Peter Waters of Gilbert & Tobin, Optus legal advisers, put forward an eloquent argument for a specialist regulator - this is discussed later in this article).

On interconnect, Bailey challenged the embedded margin for Telstra in the negotiated interconnect rates, which he claimed was a significant factor in the (then) plans for Optus Vision - the proposed fibre optic cable network which would piggy back telephony onto pay television and interactive services.

Optus's point is that without its own infrastructure it can't effectively compete in local calls, because of the high interconnect charges it pays to Telstra. Infrastructure development can't produce returns on investment in the short term, so carriers should continue to have the advantages of carrier interconnect rates and land access powers - that is, the carrier/service provider distinction should outlast 1997. About the only area of flexibility Bailey was prepared to concede is in service providers getting into the business of building their own line links after 1997.

Deena Shiff, Telstra specialist regulatory counsel, started from two propositions: the duopoly will end in 1997 and will not be resurrected as a triopoly or any other form of oligopoly; and that the national competition framework will to the greatest extent possible determine the rules on access and competition post 1997.

In bold pro-competitive mode, Telstra urges reliance on the market and converging technologies to set the pace for industry development.

Shiff argued that carrier privileges (exclusive rights to install infrastructure, land access powers and interconnect rights) are being eroded in value as switched resellers are able to benefit from off-shore liberalisation of simple resale, and thereby shape their cost structures more along carrier lines. And the Optus Vision structure illustrates how the legislative concept of the carrier falls short of covering all companies engaged in infrastructure development. The ability of service providers to deal directly with customers, effectively sub-contracting to network operators for connectivity, meant they were getting the advantages of carriers without the burdens of universal service contribution, accountability for quality of service and consumer protection obligations.

Remedy? Any operator who carries public communications (voice, text, data or video) to or from customers using telephone or data address numbers should be able to become a "carrier", regardless of

the bandwidth or technology employed. Access and interconnection - including operators' access to customers, whether by preselection or some other method, and network interconnections arrangements (ensuring that customers of one network can call those connected to other networks) - should be handled under general competition rules. While the present proposals need fine-tuning - for example, facilities and services needed for end-to-end connectivity should be deemed essential services - the competition policy legislative framework is adequate, and better than dreaming up some special interconnect regime which will be technologically outpaced, anyway.

Shiff took issue with Bailey about the government's role in ordering the market; their differences on this point took on greater salience at the end of November 1994, when Minister Lee announced the access rules for broadband services and cable-delivered pay tv. Bailey's position was that if the private sector is funding infrastructure development, it must be able to make its own decisions about demand and supply, in order to get adequate cash flow and rate of returns. Service providers must demonstrate that they are "extending the value proposition" by real innovation, beyond just extending the marketing reach of the carriers, before they can legitimately expect to be dealt into the main game through access rights.

Alan Horsley, Managing Director of Vistel Ltd, a Victorian government owned company providing telecommunications services to the public sector in that State, gave the users' perspective (he's also a member of the Broadband Services Expert Group). Horsley said that the role of policy was to ensure equal opportunity to providers of content, which required transparency of commercial arrangements - possibly even commercial separation within organisations which have multiple roles. From the end user perspective, equity of access depends on tariff flexibility and the availability of options, rather than tariff structures designed by the carriers to suit their own purposes. In his view we need "an enabling and pro-active regulator", one which "makes things happen within the policy framework". The task is to ensure there is a balance between privileges and obligations on industry participants, in order to ensure there are commercial benefits and that applications development is seriously addressed.

Carriers & Convergence After 1997

The services providers' perspective was put by Brian Perkins, AAP Telecommunications, and Dough Clements, Managing Director of

Paynet.

For Perkins, access to infrastructure is the dominant issue, and the Hilmer competition policy structure offers no answers for the telecommunications industry, because it is designed to force access to monopoly facilities. The focus should be on "key facilities" and "bottleneck control"; the weakness of the current arrangements is that service providers have no access to vital facilities such as the customer information base.

Clements maintained that post-1997 pay television operators should be able to compete to offer telephony, as well as interactive services, and other services such as meter monitoring and demand management for electricity utilities. With pay tv as the driver for building infrastructure, there is a good business in combining telephony, given reasonable penetration rates.

Who Manages What Shop

AUSTEL's new chairman, Neil Tuckwell, identified two different levels of regulation: a minimum level, that which is necessarily required, and a second level which responds to the broad range of industry stakeholders. There have been at least two "paradigm shifts" from the pre-1991 position of preservation of monopoly and public ownership, the 1991 reforms driven by a micro-economic reform agenda, leading to the introduction of competition and a level of private ownership.

We may be moving to a new paradigm, which could be characterised by a focus on convergence, or on furtherance of micro-economic reform, or on delivering social goals - or by some balance of all three. The consideration of Optus Vision's access arrangements by AUSTEL, the ABA and the TPC tests the limits of the current paradigm.

Tuckwell sees four main regulatory options - industry self-regulation; function-specific bodies such as the Spectrum Management Agency, and Standards Australia; an industry specific body incorporating AUSTEL's functions; or a general economic regulatory body as proposed in the national competition policy. Which option is adopted may be determined by paradigm decisions.

Prof Henry Ergas, consultant to the TPC, analysed three common problems for competition policy in de-regulated industries. They are access, abuse or market power by the still-dominant supplier, and consumer protection and public service obligations. These problems can be addressed by industry-specific, economy-wide or Hilmer-type "hybrid" regulatory approaches.

Industry-specific regulation suffers the weaknesses of industry "capture" of the

regulator, idiosyncratic definitions of anti-competitive behaviour, which introduce regulatory uncertainty which is particularly harmful where industry boundaries are blurring, as in broadcasting and communications. On the other hand, economy-wide competition laws enforced through the courts produce reactive results, allow an incumbent to burden new entrants with litigation (as in New Zealand), and hence allow market failure. The "Hilmer Hybrid" is a specific scheme for de-regulating industries, and sets up a common policy body and a common enforcement agency. It is capable of accommodating industry-specific legislation - which can deal with specific issues such as access and interconnection and stronger consumer protection for the telecommunications industry, within general principles applying across all de-regulating industries.

Peter Waters of Gilbert & Tobin argued that a universal regulator is a "dangerous concept", and the idea of a universal access regime applying across the whole economy "elevates a tool for policy to policy itself". Waters argued you should always start by asking what are the public policy considerations which lead you to take up the tool? If you want to avoid duplication of infrastructure, a thorough-going access regime is the answer. But if you want a diversity of facilities, you would be better to allow private operators to have an incentive to build them, by allowing private closed networks.

In Waters' view, the reforms introduced by the Telecommunications Act had yet to run their course, competition still needed nurturing, and it was premature to rely on trade practices principles alone. The answer was to have a separate sector of the NCC/ACC structure to deal with communications competition and interconnect, and able to manage the complex relationships between the parties to keep competition working.

Now

Submissions are now in to the government's review of telecommunications policy. A foretaste of the next paradigm may have been given by the Minister's statement on 24 November 1994, mandating open non-discriminatory access to broadband capacity on cable networks, while allowing pay tv network providers to control access (and hence share revenue from the content) to pay tv channels for at least two years.

But the questions canvassed at the conference are still largely open.

The conference "Telecommunications After 1997: Carriage, Convergence, Consumers" was hosted by the Communications Law Centre and sponsored by Gilbert & Tobin.

The case for competition in satellite delivered telecommunications services

Gregg Daffner, of PanAmSat, argues.

As Australia embarks on its eagerly awaited telecommunications policy review, an issue of fundamental importance is the extent to which competition in the provision of domestic telecommunications services via satellite should be authorised. The review of telecommunications policy provides the Australian Government with an opportunity to introduce genuine market driven consumer choice in the provision of telecommunications services and extend Australia's leading role as a progressive free trading advocate in the Asia Pacific region.

These issues are of particular relevance in the light of the recent launch by PanAmSat of its PAS2 satellite which services the Asia Pacific region and the impending launches of APSTAR2 and ASIATAS2. PanAmSat is the world's first private international satellite system operator with nearly 300 customers in over 70 countries.

The review by the Government of post 1997 telecommunications policy comes at a time when the Government is deciding upon its response to a request from PanAmSat to provide certain limited telecommunications services within Australia. In July 1993, pursuant to section 106 of the Telecommunications Act 1991 ("the Act") PanAmSat requested the Minister for Communications to direct AUSTEL to authorise the immediate supply by PanAmSat of certain telecommunications services within Australia for broadcast programs and for private telecommunications networks. The 2 general carriers, Telecom and Optus, have voiced their opposition to PanAmSat's request.

PanAmSat did not challenge Optus' exclusive right to provide until mid 1997 satellite facilities for subscription television nor did it seek to compete with the general carriers' reserved rights regarding public switched telecommunications traffic. In the lead-up to 1997, PanAmSat's request offers the Government the opportunity to fulfil its self imposed mandate to establish the premier telecommunications infrastructure in the region.

The Carriers' Reserved Rights

Under section 92 of the Act, the general carriers (as the primary providers of Australia's public telecommunications infrastructure

and networks) enjoy certain reserved rights until mid 1997. These reserved rights include the provision of domestic telecommunications services via satellite. Only a general carrier or a person acting for or on behalf of a general carrier may supply domestic telecommunications services by the use of satellite-based facilities. Australian customers can only use private satellites if services are provided through Optus or Telecom. The Minister is, however, empowered under section 106 of the Act (after consulting with each general carrier) to provide AUSTEL with directions to authorise the provision of reserved services.

The alternative to obtaining a direction from the Minister would be for the satellite operator to provide domestic telecommunications services for or on behalf of a general carrier under section 96 of the Act. However, the competitive benefits of direct customer access to a satellite operator would be significantly diminished for the following reasons:

- any agreement with a general carrier would necessarily increase the price of satellite services and derogate from the ability to provide competitively priced services;
- PanAmSat's experience is that customers, particularly those in the broadcasting industry, prefer to deal directly with facilities providers (eg: the ABC and the Nine Network in their dealings with PALAPA in respect of their Asian services);
- regulatory constraints affecting a general carrier's pricing and other terms of supply restrict a satellite operator's ability to provide services competitively;
- long term contracts with customers which operate beyond 1997 are usually contemplated.

Ministerial Authorisation

Section 106 of the Act gives the Minister the authority to authorise provision of domestic telecommunications services by a satellite operator other than a general carrier if doing so "will not erode unduly the practical value of the general carriers rights". The decision process under section

106 of the Act is in many respects the reprise of an age old conflict: consumer interests versus carrier rights. Limited liberalisation of the competition rules would not only serve the best interests of the Australian public but would also promote the pro-competitive policy goals identified as the general objectives of the Act including:

- achieving optimal rates of expansion and modernisation for Australia's telecommunications infrastructure and networks;
- promoting the introduction of new and diverse telecommunications services;
- enabling all sectors of the Australian telecommunications industry to participate effectively in Australian and overseas telecommunications markets on a commercial basis and making Australia more attractive as an international telecommunications centre;
- promoting the development of other sectors of the Australian economy through the commercial supply of a full range of modern telecommunications services at the lowest possible prices.

effect on competition

Competition in the provision of domestic telecommunications services via satellite will produce a variety of benefits including rapid introduction of advanced satellite technologies, wider regional coverage and price competition.

Such benefits enhance the efficiency, viability and coverage of public broadcasters and RCTS remote services, educational and health services, services for government and private corporate users. Satellite service competition will also enhance Australia's attractiveness as an international hubbing centre, promote the development of hybrid domestic/international networks and increase Australia's competitiveness in the Asia-Pacific region, not least by matching New Zealand's existing competitiveness.

Liberalisation of regulations governing use of satellite-based facilities will also encourage the development of private networks in Australia. Various Australian telecommunications users have acknowledged that the development of VSAT private network services have been severely retarded because of Optus' pricing policies. Liberalisation would also produce consequential Australian business development opportunities for "spin-off" industries (eg: the manufacture of earth

stations, VSAT and antenna equipment).

Perhaps the most cogent reason for authorising the competitive domestic telecommunications services via satellite is that it will allow customers to use a single satellite for a hybrid domestic/international network. If a customer has locations within Australia and outside Australia to communicate to, it currently would need to lease capacity from Optus for domestic coverage as well as an international system for international connectivity. This is both costly and inefficient. Ministerial authorisation under section 106 of competitive domestic satellite services would enable the supply of domestic and international connectivity by the same satellite at a single price and would force Optus to make available to customers a "fair deal" if Optus hopes to keep this business.

Against this background must be balanced the possibility of "unduly eroding the "practical value" of the general carriers' rights". In assessing the effect on the practical value of the general carriers it should not be sufficient for the carriers to claim some anticipated theoretical harm, such as a threat to proposed future VSAT private network services, but rather they need to show a real and substantial threat to services currently provided by them.

The Act provides little guidance as to how much "eroding" would constitute a violation of the general carriers' rights. PanAmSat has, however, confronted similar criteria in the US Government's analysis of whether PanAmSat's operations would cause "significant economic harm" to Intelsat under Article XIV(d) of the Intelsat Treaty. The US Government concluded that a prohibition on PanAmSat's provision of public switched telephone services (since repealed) would effectively shield Intelsat's core revenues from competition and on this basis authorised PanAmSat's operations. In recent years, Intelsat has admitted that competition from PanAmSat and other satellite systems has in fact not resulted in a loss of traffic or revenues and rather has led to greater market stimulation and an increase in Intelsat traffic and revenues. It is likely that similar considerations will apply to Telecom and Optus particularly in view of the limited competitive services to be offered by PanAmSat. A host of Australian companies and trade associations support an affirmative decision by the Minister.

With regard to broadcasting services, it should be noted that Australian broadcasters already have been granted special status under the existing regime. Broadcasters are entitled to install or

maintain terrestrial line links used for supplying broadcasting services despite the general carriers' reserved rights (section 99 of the Act). It appears anomalous that no such exemption has been allowed with respect to the use of satellite-based facilities for such purposes. So much for technology neutral telecommunications regulation.

Finally, the recently reported decision by Optus to "park" its B3 satellite until there is sufficient demand to warrant it being commissioned into service would seem to demonstrate that there is unlikely to be any undue erosion of the general carriers' rights. It appears incongruous for PanAmSat not to be authorised to provide a satellite service for which there is customer demand when Optus has chosen not to make additional satellite capacity available.

The issue is a political one

The issue therefore is not a question of legality - it is a political one. On the one hand there are the carriers (possessing extraordinary political clout) fighting to maintain their reserved rights. On the other hand is customer choice and competition. A stalemate is a win for the carriers because no action by the Minister preserves the status quo.

In this context it is interesting to note the words of Optus' Chief Executive Officer, Bob Mansfield in 1993: "There is no doubt that competition in Australia has already brought levels of customer focus, service and price reductions not previously seen in the telecommunications industry in this country. Overseas experience has shown that the introduction of competition leads to service improvements and price reductions for customers, and reduced market share but improving revenues for the incumbent carrier" (Optus' 1993 Annual Report).

There is no doubt that the introduction of competition in the supply of domestic satellite services will also lead to enormous benefits both to the Australian telecommunications industry and Australian customers. Therefore, Dear Minister, please grant our request so that we can get on with it.

Gregg Daffner is PanAmSat's Vice President for Market Development and Regulatory Affairs. Prior to joining PanAmSat, he was Director for International Policy with the National Telecommunications and Information Administration US Department of Commerce where he was responsible for, among other activities, promulgating US satellite policy. In a previous life he was a film maker.

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