

media has meant that copyright holders want added protection, particularly in light of the increasing ease with which copyright infringements occur. A 2003 report by the Allen Consulting Group suggested that technological developments were undermining the incentives provided by copyright law and that protection should therefore be extended.¹⁸ However, what is at issue there is not the period of copyright protection per se, but rather the width of protection whilst copyright subsists. Piracy will occur regardless of the term, and what is important is finding better methods to enforce authors' rights rather than providing them with the same rights for a longer period.

CONCLUSION

There is little evidence that Australia should be embracing an extra 20 years of protection for copyright works. Whilst extending the term will provide some benefits in the form of easier copyright management and harmonisation with major trading partners, these are overwhelmingly outweighed by the detriments it will bring. The extension is highly unlikely to provide any greater incentives for creation and it reduces the public domain of works. It also offers little in the way of economic advantages since

Australia is a net importer of copyright material. Given that Australian material already receives life plus 70 years of protection in the US, extending the term here only benefits US copyright owners.

The decision to extend the term is best understood as a trade concession provided to the US in the course of concluding the Free Trade Agreement. Perhaps the negotiators believed that overall Australia had more to gain than lose from the Agreement and were thus willing to make the desired changes to copyright. However, the decision has wide-ranging effects on the public availability and development of copyright works, making it a real 'boo boo'.

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1 The draft version of the agreement can be found at: http://www.dfat.gov.au/trade/negotiations/us_fta/text/index.html. The legislation will not be retrospective.

2 <http://www.worldhistory.com/wiki/Y/Yogi-Bear.htm>.

3 Kanwal Puri, 'The Term of Copyright Protection: Is it too Long in the Wake of New Technologies?' (1989) 23(6) *Copyright Bulletin* 19.

4 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation Under the Competition Principles Agreement* (2000) 80-84.

5 *Government Response to Intellectual Property and Competition Review Recommendations* (2000), available online at www.ipcr.org.au.

6 Copyright Law Review Committee, *Report of the Committee to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959) [48].

7 Amicus Curiae brief to Supreme Court of the United States in *Eldred v Ashcroft*, 'The Copyright Term Extension Act of 1998: An Economic Analysis' 4.

8 Jenny Dixon, 'The Copyright Term Extension Act: Is Life Plus Seventy Too Much?' (1996) 18 *Hastings Communications and Entertainment Law Journal* 945, 955.

9 Amicus Curiae brief to Supreme Court of the United States in *Eldred v Ashcroft*, 'The Copyright Term Extension Act of 1998: An Economic Analysis', 8.

10 *Eldred v Ashcroft* (2003) 56 IPR 608, 644.

11 Zechariah Chafee, 'Reflections on the Law of Copyright' (1945) 45 *Columbia Law Review* 503, 511.

12 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs* (2003) 12-13.

13 Section 107 of the Copyright Act (Title 17, U.S. Code).

14 Allen Consulting Group, *The Economic Contribution of Australia's Copyright Industries* (2000) iv.

15 Tim Dodd, 'Trade Deal Bites Unis on Copyright Costs'. (2004) *Australian Financial Review* (February 14) 16.

16 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, above n 12, 30.

17 European Union Directive 93/98/EEC on Copyright Term of Protection.

18 Allen Consulting Group, *Copyright Term Extension: Australian Benefits and Costs*, above n 12, 35.

Broadband Wars

David McCulloch provides a perspective on the recent ACCC moves against Telstra's wholesale and retail broadband pricing.

Australia is at a critical point in the growth of broadband. This is reflected in the serious battles being waged between Telstra and its wholesale internet service provider (ISP) customers over Telstra's broadband pricing. The Australian Competition and Consumer Commission (ACCC) stands in the middle of the fray, seeking to adjudicate.

STATE OF BROADBAND IN AUSTRALIA

To set the scene for the hostilities it is necessary to take a snapshot of the state of broadband in Australia. Currently, there are about 600,000

broadband subscribers, or about 7% of households. At the retail level about half of these services are provided by Telstra, either on its Hybrid Fibre Coaxial (HFC) cable, or via DSL, which uses the traditional copper phone line, commonly known as the public switched telephone network (PSTN), as the conduit.

With the exception of about 130,000 customers on the Optus HFC cable, most of the remainder of subscribers acquire their services from ISPs who are reselling Telstra's DSL service.

The industry sees broadband as an area of considerable growth. Telstra has a publicly stated goal of acquiring at least 1 million customers (retail and wholesale) by the end of 2005.

Whilst Australia's broadband penetration rates are behind countries like Hong Kong at 53% and Canada at 35%, there is a sense that a tipping point has been reached. In part, this is because there is a ready market for broadband - dial up internet users. How quickly broadband penetration can increase is reflected in the Canadian experience, which increased from 2% penetration to its current level of 35% in only three years.

CATALYST FOR HOSTILITIES

To meet its goals Telstra needed to drive take-up, and increase both its retail and wholesale customer base. At the same time, Optus - the second largest player in the market - needed

to expand the reach of its broadband network, which was limited to 1.3 million addressable homes on its HFC network in Sydney, Melbourne and Brisbane. As Telstra knew from past experience in mobile telephony, the entry of a sizeable competitor acts as a stimulant, and drives takeup.

These complementary goals lead Telstra and Optus to negotiate a deal for Optus to re-sell Telstra's DSL product. This deal was finalised in November 2003, and meant an effective tripling of the size of the Optus network.

Ironically, this mutually beneficial agreement has set the stage for current hostilities.

TELSTRA'S PRICE REDUCTIONS

The day before the launch of Optus's DSL consumer broadband offering in mid-February 2004, Telstra announced significant reductions in retail offerings across all of its plans. Most significantly, Telstra reduced its entry level 256/64kbs service from \$39.95 per month to \$29.95 per month. And when you examine price reductions across all Telstra plans from the time of the Optus wholesale agreement with Telstra in November 2003 to the launch of Optus DSL product, you find price decreases of between 45% to 50%.

At issue was the fact that Telstra did not offer corresponding price reductions to its wholesale customers (the ISP resellers). This caused an outcry from those ISPs, who claimed they were being caught in an anti-competitive price squeeze, and were unable to make an adequate margin. For Telstra's entry level \$29.95 product, the wholesale price was many dollars above the retail price, meaning that the ISP resellers would be making losses if they sought to match Telstra's retail price for this product.

COMPETITION NOTICE SOUGHT

The ISPs complained en masse to the ACCC seeking the issuing of a Competition Notice under Part XIB of the *Trade Practices Act 1974* (Cth)

(the *Act*). Such a Notice is a mechanism designed as a deterrent to anti-competitive behaviour.

In issuing a Competition Notice, the ACCC must have reason to believe that a carrier has engaged in anti-competitive conduct. This will be the case if the carrier has market power, and takes advantage of that power with the effect, or likely effect, of substantially lessening competition in a telecommunications market.

The ACCC can issue either a Part A or a Part B Competition Notice. The Part A Notice is normally the first step following the forming of the relevant belief by the ACCC. However, the Part A Notice need not specify the particular conduct.

The Notice gives the ACCC – as well as affected parties – the right to take court action based on the conduct from the time that the Notice is given, and to seek damages. The ACCC can seek damages for each contravention of up to \$10 million, and \$1 million for each day that the contravention continues.

The Part A Notice is designed to open the gate for court action, and to warn the recipient to cease the conduct.

The next stage is the issuing of a Part B Competition Notice, which must set out the particulars of the alleged contravention. The Notice then is taken to be prima facie evidence of the matters in the notice. This then reverses the onus of proof, and makes it easier for the ACCC to succeed in court action.

THE COMPLAINT OF THE ISPS

Some of the arguments in support of Telstra's having engaged in anti-competitive conduct are as follows.

The conduct in question is Telstra's creation of the price squeeze. Telstra has taken advantage of its dominance in the wholesale market by lowering retail prices without corresponding wholesale reductions. If the wholesale market were competitive, Telstra would lose market share if it did not lower wholesale prices.

In addition, Telstra was able to time its pricing announcement, because as

a wholesale provider to Optus it had much greater knowledge of Optus' activities than would have been the case were Telstra not the supplier.

This conduct causes a substantial lessening of competition in a number of markets, including:

- in the *retail broadband market*, other providers would be unable to compete, and thus Telstra would establish a dominant market share, leaving it unconstrained to raise prices in the medium term. The conduct was particularly critical at this "tipping point" in broadband's market development; and
- in the *wholesale broadband market*: constraining retail entry would have an impact on future wholesale competition, because building a retail customer base is an essential stepping stone for other providers to build their own DSL networks.

TELSTRA AND THE ACCC'S RESPONSE

Following the price reductions on 16 February 2004, and the ISP outcry, Telstra publicly stated that it was successfully negotiating new wholesale deals with many of its customers. However, many of these customers indicated that no fruitful negotiations were occurring. The price reductions that were offered provided nothing like the margins based on Telstra's original retail prices.

The ACCC took its first formal step on 25 February by issuing an Advisory Notice. This is a non-binding notice in which the ACCC can set out how a firm can change its conduct to avoid contravening the Act. The ACCC indicated that Telstra should consider dropping its wholesale prices.

Telstra subsequently did offer some price reductions, which many wholesale customers continued to indicate were inadequate. For example, the entry level wholesale price was reduced to about 20 cents below the retail price.

The ACCC ultimately accepted that

these reductions were not sufficient when it issued a Part A Competition Notice on 19 March 2004. This is a comparatively swift timeframe for the ACCC to issue a Competition Notice.

The ACCC hoped that the notice would ensure that Telstra offered appropriate reductions in the market place. The ACCC declined to advise Telstra what those reductions should be.

Telstra continued to make public statements that it was concluding wholesale arrangements with many wholesale customers. Again, many wholesale customers indicated that meaningful negotiations were not occurring. At the same time, representatives of Telstra let it be known that pricing was not anti-competitive, and that Telstra was prepared to have the matter adjudicated in court.

However, on 1 April 2004, Telstra released new wholesale pricing which offered two packages. The first, labelled as "Protected Rates" was described as providing an effective 40% discount off retail prices. The second, a "Growth Option" was described as offering greater reductions on higher speed plans.

The ACCC cautiously welcomed these plans.

The new pricing has not placated many ISPs who indicate that the extent of the margins is not as claimed, and that they only apply to ISPs that are prepared to exactly replicate Telstra's retail offerings. Some ISPs have expressed concern that Telstra has cleverly engineered a solution that will satisfy the ACCC but not wholesale customers.

At the time of writing (early April 2004), the ACCC is reviewing these revised plans in light of ISP objections.

WHAT NEXT?

It remains to be seen whether the ACCC accepts Telstra's recent offer and, if so, withdraws the Competition Notice, or if it determines that the offer is not sufficient.

If the ACCC does not take the matter further, it is open to a disgruntled ISP to seek damages in court, based on the Competition Notice, until such time as the ACCC withdraws the Notice, or until it expires (it is in force for 12 months, unless withdrawn).

If the ACCC is not satisfied with Telstra's offer, it could seek to apply pressure to Telstra to make a better offer. The ACCC can also seek damages pursuant to the Part A Competition Notice. However, it is more likely in that event the ACCC would issue a Part B Competition Notice which would specifically outline the anti-competitive conduct. In enforcing that Notice in the court, the onus would be on Telstra to rebut the allegation.

TELSTRA'S MOTIVATION/ STRATEGY/JUSTIFICATION?

When the retail price reductions first occurred, without corresponding wholesale price reductions, it was speculated that this was because of a lack of communication between Telstra's wholesale and retail departments (even though they report to the same person).

However, the more time that transpired without Telstra making substantial wholesale reductions, the greater the speculation that this was a deliberate strategy to take market share before the regulator was able to marshal itself to act. To put it another way, the speculation was that Telstra was willing – to use an analogy – to cop a speeding fine, because the rewards for getting to its destination early were so much greater.

Telstra has variously claimed that it *has* been offering substantial reductions to wholesale customers, or that its prices were not creating an anti-competitive price squeeze. In particular, offering low entry level retail prices was a legitimate loss leading strategy.

With the issuing of revised prices following the Competition Notice, Telstra claims that those revisions should settle any question of anti-competitive conduct.

CONCLUSION

The outcome of the current pricing debate is yet to be determined, as is its impact on a competitive broadband market.

The importance of the issue is not limited to just broadband as we know it. It extends to the full range of advanced services which broadband provides the platform to potentially deliver. A key application – and the key danger to the incumbent – is voice over IP. New entrants who today provide standard broadband services to consumers may tomorrow be in a position to offer an effective substitute for traditional PSTN voice telephony services. This potentially has huge ramifications for Telstra's local access and local call revenues. This is a key reason why the current battle is being fought so hard, and why a game of brinkmanship with the regulator is being waged.

It is also why it is so important that the competition regulatory regime – and the regulator – are able to efficiently and expeditiously prevent leveraging of market dominance to stymie the development of a more competitive and advanced communications environment in Australia.

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