The media and the Australia – United States Free Trade Agreement

Karen Gettens and Johanna O'Rourke consider the impact of the Australian-United States Free Trade Agreement on Australian copyright laws

Major changes to Australian copyright law came into effect on 1 January 2005 as a result of the *Australian-United States Free Trade Agreement* (**"AUSFTA"**). Some of those changes will affect the media, with greater protection of encoded broadcasts, greater performer's rights, and continuing Australian content quotas for television and advertisements.

The major amendments affecting the media are as follows:

Terms of Copyright

From 1 January 2005, most copyright works (for example, artistic, dramatic, musical and literary works) will now have copyright protection for the life of the author plus 70 years. This is an increase of 20 years from the previous term of protection for these works. The term of copyright protection for sound recordings and films has also increased by 20 years, to 70 years after first publication. However this extension only applies to works that were still within copyright as at 1 January 2005.

Not all copyright works have had copyright protection extended. The exceptions are:

- TV and Sound Broadcasts – remain 50 years from the end of the calendar year of first broadcast;
- Published Editions – remain 25 years from the end of the calendar year of first publication; and
- Government owned works – remain 50 years from the end of the calendar year of first publication.

The most substantial extension of copyright is for photographs. Prior to the AUSFTA the duration of copyright in a photograph was generally 50 years from the date the photograph was first published. After the AUSFTA, photographs are protected for the life of the author plus 70 years.

New Performers Rights

Performers have now been given an economic interest in any sound recordings made of their performances. In the past performers had a right to control the unauthorised recording of their performance; now they also have the potential to control authorised recordings of their performance because of their new copyright interest in the recording. A substantial limitation to these new rights however is that they do not apply where the performer has been commissioned or is undertaking the performance in the course of their employment, therefore for most commercial media uses of performances, the new rights will not apply.

The amendments have strengthened the protection of encoded broadcasts by widening the scope of both criminal and civil liability for unauthorised use.

Tougher Penalties Relating to use of Broadcast Decoding Devices

As a result of the AUSFTA, a series of amendments have been made to the encoded broadcast provisions in Part VAA of the *Copyright Act 1968* (Cth) (**"Copyright Act"**). The amendments have strengthened the protection of encoded broadcasts by widening the scope of both criminal and civil liability for unauthorised use. A broadcast decoding device is a device used to obtain unauthorised access to broadcast subscription services, usually pay television or free to air television that has been limited geographically.

Criminal liability will now extend to the commercial use of encoded broadcasts which have been accessed without the authorisation of the broadcaster through the use of a broadcasting decoding device. Criminal liability also extends to the distribution of a decoded broadcast without authorisation irrespective of whether the distribution is for commercial advantage or profit.

The amendments also extend the scope of the civil liability provisions under the Copyright Act which previously applied only to the use of a broadcast decoding device for the purpose of, or in connection with, a trade or business. Standing to seek civil remedies has also been extended from broadcasters only, to channel providers and any other person with an interest in the copyright in the content of the encoded broadcast.

The amendments to Part VAA apply to encoded broadcasts regardless of the mode of delivery. In adopting a technology neutral approach, Australia has gone further than is required by its obligations under the AUSFTA by capturing both cable and satellite signals.

Preservation of Australian Content Quotas

In negotiating the AUSFTA, the Australian Government committed not to raise the Australian content quotas for free to air commercial television above the current 55% quota for overall programming between 6am and midnight, and the 80% quota for advertising between 6am and midnight.

Under the terms of the AUSFTA, these commitments are subject to a 'ratchet' mechanism. This means that if the 55% and 80% requirements were to be reduced

in the future, they could not thereafter be increased (not even to return to current levels).

Section 122 of the *Broadcasting Services Act 1992* (Cth) has therefore been amended to incorporate those elements of Australian content requirements that are subject to the ratchet mechanism to ensure that they cannot be reduced in the future, except through a legislative amendment.

Conclusion

Many amendments implementing the AUSFTA are relevant to the media. Organisations dealing with copyright works should be aware of the new term of protection. The widening civil and criminal liability relating to broadcast decoding devices and the broader standing to seek civil remedies should come as good news to broadcasters and channel providers while the changes to the *Broadcasting Services Act* ensure that future changes to Australian content quota requirements will not be onerous.

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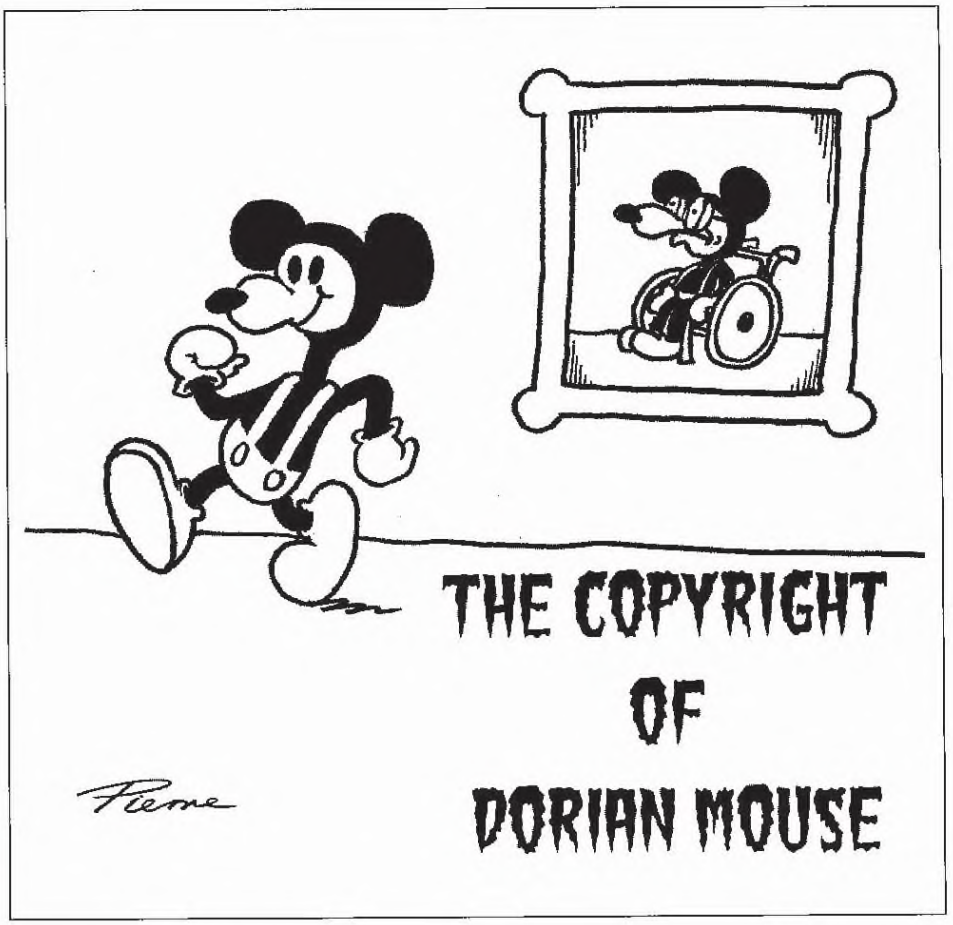

The Development of a Telecommunications Network Colocation Regime in New Zealand

Shane Barber and Bridget Edghill critique New Zealand's developing approach to telecommunications network colocations.

Introduction

Until relatively recently, New Zealand had not adopted a telecommunications specific regulatory regime, but rather relied on broader competition legislation.

Since the introduction of its industry specific regime in 2001, the New Zealand government has been slowly building its telecommunications industry arsenal of legislation, regulation and codes, no doubt with an eye on developments not only across the Tasman in Australia, but in Europe and the United States.

During the course of 2005, a number of new entrants have expressed interest in rolling out new GSM and 3G mobile networks throughout New Zealand to compete with the relatively small numbers of existing networks (for example, Telecom NZ's CDMA network, Vodafone NZ's GSM network and the network of Telstra Clear).

These new participants are currently putting pressure on the New Zealand government and its regulatory authorities to ensure that the regulatory regime is responsive to the needs not only of these new entrants, but also the consumers they seek to serve. What has become apparent is that considerable development is still required in the fledgling New Zealand regulatory regime in order to meet these goals.

In this article, we critique just one essential element of a successful telecommunications regulatory regime, being the ability to foster the rollout of competitive networks in a manner which encourages co-location of infrastructure to avoid both the proliferation of facilities and the community backlash which same inevitably creates.

The existing New Zealand regulatory framework in relation to co-location

No price regulation

The *Telecommunications Act 2001 (NZ)* ("**Act**") establishes the regulatory regime applicable specifically to telecommunications in New Zealand. An access system is set out in Part 2 of the Act and is based on the concepts of Designated Services and Specified Services, which are described in Schedule 1 of the Act.

Pursuant to Part 3 of Schedule 1 to the Act, the co-location of mobile network infrastructure is currently a Specified Service.

The Act does not stipulate all terms of access to be adhered to when a party seeks access