

*Research Report No. 4*

**Capturing the Value  
of Australian Online  
Content:  
Mapping the  
regulatory domain**

**Christopher Arup**

*June 1997*

## La Trobe University Online Media Program

The primary aim of the La Trobe University Online Media Program is to undertake social and policy research related to the development and regulation of online media services. There are three strands of research. They are:

### *Research Strand 1: New Media and Communication Environments.*

Organisational, regulatory and technological change is occurring at such a rapid pace that it is difficult to predict what the future new media landscape will look like. Service providers are uncertain about the potential markets for rapidly evolving and new services. This strand of research examines the development and adoption of new services.

### *Research Strand 2: Emerging industry structures*

The shape of the media, communication, publishing and computing industries is rapidly changing. Most of those changes are being brought about through strategic alliances between discrete elements of multi-functional and often competing organisations, and linkages with smaller start-up companies which have developed innovative products and services. For the first time "carriers" are having to pay attention to "content", software-based services and consumer electronics. These industry changes are occurring as the various industries "internationalise" and as governments remove layers of regulatory control. This strand of the research program examines the restructuring of media, communication, publishing and computing industries considers the implications of those changes for industry participants and government policy.

### *Research Strand 3: Organisational innovations in research*

New media and communications services have led to the emergence of new management structures and globally dispersed organisations. This strand of the research program explores the use of online services in geographically dispersed organisations.

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## Abbreviations

ACCC Australian Competition and Consumer Commission

Berne Convention for the Protection of Literary and Artistic Works

CCG Australian Copyright Convergence Group

CLRC Copyright Law Review Committee

DOJ Department of Justice

FCC Federal Communications Commission

GATS General Agreement on Trade in Services

NAFTA North American Free Trade Association

OECD Organisation for Economic Cooperation and Development

TPC Trade Practices Commission

TRIPS Agreement on Trade-Related Intellectual Property Rights

WIPO World Intellectual Property Organisation

WTO World Trade Organisation

# Table of Contents

<b>Author Note and Abbreviations</b>	
<b>Executive Summary</b>	
<b>Part 1 - Introduction</b>	1
<b>Part 2 - Industry-Specific Regulation</b>	3
<b>Context</b>	3
The New Media	3
National Regulation	6
The Impact of the GATS	7
<b>Australian Policy</b>	8
Interests and Objectives	8
Strategies	9
<b>Part 3 - Intellectual Property</b>	11
<b>Context</b>	11
Copyright	12
The New Media	14
Software Interfaces	14
On-Line Content	14
Licensing	16
Conflict of Laws	20
TRIPs and Berne	20
<b>Australian Law</b>	24
Underlying Works	25
New Media	26
Computer Software	27
Multi-Media	27
Data Bases	28
A Transmission Right	29
Non-Voluntary Licensing	31
Conflict of Laws	32
<b>Part 4 - Competition Law</b>	35
<b>Context</b>	35
Market Power and Essential Facilities	36
Regulation of the Uses of Intellectual Property	38
Interface Specifications: Computer Platforms	39
Interface Specifications: Telecommunications Networks	41
Conflict of Laws	42
The GATS and Access Regimes	44
<b>Australian Law</b>	46
Provisions and Decisions	46
Conflict of Laws	49
Prospects	50
<b>Part 5 - Conclusions</b>	52
<b>Bibliography</b>	53
<b>Appendix 1</b> WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions	
A. Agreed Statements Concerning The WIPO Copyright Treaty	61
B. WIPO Copyright Treaty	63
<b>Appendix 2</b> Related Australian Competition and Consumer Commission Decisions	69

## Executive Summary

The report evaluates the strategies proposed for gaining a share of the value generated by the content of new on-line media. It appreciates the promise which the media itself holds to provide access to those who wish to produce, distribute and use content. Yet it argues that there is a need for regulation to ensure that some of the benefits of on-line service content production and content provision are captured by the Australian locality.

The report notes that the strategy of industry-specific regulation is being undermined by developments in the technology itself as well as by modalities of governance prevailing both nationally and internationally. In particular, it notes the impact of supra-national processes such as the General Agreement on Trade in Services. The emerging modalities of regulation are identified as intellectual property and competition law regulation. Intellectual property is extending its reach into the new media. It is moving beyond its preoccupation with reproduction of works fixed in a material form, turning its attention to the communication of works and other subject-matter which is provided on-line. The World Trade Organisation started this process with the Agreement on Trade-Related Intellectual Property Rights. It has been given a significant spurt along by the recent World Intellectual Property Organisation treaties, the Copyright Treaty and the Performances and Phonograms Treaty.

While the law of intellectual property may be a necessary protection for authors and their publishers in a world of greatly enhanced manipulation and distribution of their works, extension of its powers also gives rise to concerns in some quarters. Internet access providers are concerned that they will be held responsible for copyright contraventions. Moreover, public access organisations are apprehensive that intellectual property law will provide a means to control access to an increasingly important resource. It brings into sharp relief the qualifications placed in the past on rights such as non-voluntary licensing, and exceptions to infringement such as fair dealing.

If these concerns cannot be met in the body of intellectual property law itself, competition law is seen as offering a check on abuses of its power. Competition law is also increasingly being enlisted to promote access to other 'essential facilities' of the on-line media. But competition law is only now translating its broad concepts and processes into the situation-specifics of the on-line media markets. It must weigh the economies of scope achievable through convergence against the needs of independent producers, providers and users. Paradoxically, it must become more particularised if it is to fill the gap in regulation. Furthermore, because the on-line media are increasingly transnational in operation, it too must pursue the potential for multilateral regulatory coordination and even standardisation.

# **Capturing the Value of Australian Online Content: Mapping the regulatory domain\***

## **Part 1**

### **Introduction**

1.0 This report assesses the regulatory regimes for the promotion of Australian content in the on-line media. It takes as its benchmark the Australian Government's aim to maximise the amount of 'Australian content' in these media. The report is divided into three sections. It begins by acknowledging the traditional role of industry-specific regulation of the media but recognises a trend towards more generic, more market oriented modalities of regulation. As a result, its focus is upon the modalities of intellectual property and competition law.

1.1 Throughout each section, the report operates on two levels. The first attempts to convey some understanding of the context in which Australian policy should be fashioned. That context is multi-faceted. It is constructed out of the characteristics of the technologies and the structure and behaviour of the industries which deploy them. It is made problematic by the variety of interests which are implicated. It is conditioned also by the conceptual and methodological traditions of the law which is engaged. Its boundaries are stretched by the increasing significance of developments in other countries as they seek to compete along regulatory as well as other lines. It is framed by the prescriptions and injunctions of international agreements and conventions.

1.2 On the second level, the recent developments in legal policy for Australia are set down. A major message of the report is that the multi-faceted and unsettled environment makes it difficult for a nation state such as Australia to determine regulatory strategies that are effective in returning a benefit from the new media to the locality. From the vantage point of the academy, the report seeks to tease out those difficulties, rather than advocating that we place our bets on any one strategy. It is for others, in government, thankfully, to plump for a strategy. Nonetheless, it is hoped that the discussion helps to make such a choice a little more enlightened. Consequently, the report goes to the trouble of taking up the thorny questions of conflict of laws and the choice between stringent and relaxed standards of regulation, in the cases both of intellectual property and competition law.

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\* My thanks to Peter White, Sam Ricketson and Peter Drahos for useful inputs into the preparation of this report.



## Part 2

### Industry-Specific Regulation

#### Context

#### The New Media

2.0 There is clearly common ground among a variety of theoretical perspectives in assigning a central role to communications media in the contemporary reshaping of economies, politics and cultures. The global role of such media is most evident in the capacities they provide traders, financiers, industrialists and suppliers to transcend spatial and temporal constraints of the locality and operate in a coordinated and reflexive fashion across the world (Giddens, 1994). Such capacity proves valuable in the communications sectors or industries themselves. Communications can be projected into almost every corner of the globe, whether it be by medium of an extra-terrestrial satellite or a pocket cassette player.

2.0.1 It is said that the new on-line electronic media greatly deterritorialise and even dematerialise communications. These features of the new media present a challenge to the economic independence, political sovereignty and cultural integrity with which the locality seeks to regulate the communications media themselves. The media provide means for resourceful suppliers and users to circumvent the boundaries which have been drawn around the various sub-sectors in order to protect local communications industries. Indeed, the locality may have to decide whether it can maintain a communications industry of its own at all (such as equipment, content, infrastructure and services supply) at the same time that it seeks to slot into international networks in the hope that its industries and consumers may generally enjoy the benefits of their economies of scale and scope, investment and expertise, and other commanding assets. Such assets are needed, it is claimed, to keep traditional industries viable and to participate in the new sectors of electronic commerce.

2.0.2 These decisions about economic strategy are hard enough - how to capture a share the benefits through transport charges, intellectual property royalties, sales commissions, subscriber fees and taxation revenue, while giving up many traditional instruments of national policy such as public utilities and other ownership controls. But control over communications and information structures is increasingly central to the fate of societies generally (Lash and Urry, 1994). Communications media carry fundamental cultural and social messages for the locality. One such message is their challenge to regulatory competence. The media provide opportunities for many more users to shop for sympathetic national regulation, by manipulating the concepts used to determine location such as national and non-national, resident and non-resident, or home and host. Such regulation can range right through product standards, gambling controls, trading practices, prudential supervision, to taxation measures and industry assistance. In some scenarios, this trade in abstracted and tokenised currencies breaks free of any connection to national jurisdictions. The communications infrastructure contributes to the capacities of trade to float freely, above the nation state, in self-referential and self-regulating fields of commerce connected horizontally as 'spaces of flows' (Ruggie, 1993; Dezalay, 1995).

2.0.3 Global communications do not simply create conditions for competition between countries; they expose disjunctures within nations too. In a common scenario (Castells, 1989; Sassen, 1991), communications enhance direct linkages across national boundaries, not just within transnational corporate groups, but between global cities where design,

financing, management and associated services (such as lawyering) are concentrated. Voice and data transmission circulates through intra-corporate telecommunications circuits which are connected into the public and international networks; another proliferating private linkage is the Intranets being constructed on the platform of the Internet, the network of networks. Paradoxically, communications infrastructures reveal a spatial configuration but the configuration which emerges is an uneven one, both cross-nationally and sub-nationally. Infrastructure is thickest in the metropolitan centres of the north. Yet, at the same time, in many countries, most people do not have access to a simple telephone line; even in the relatively affluent north, personal computers are as yet present in only a minority of homes. So, the capacities of the new media also present the possibility that certain locations will be by-passed by the global flows or at least relegated to a marginal position. The configuration raises prospects of a new kind of inequity based on access to technology, knowledge and communication (Mosco and Wasko, 1988).

2.0.4 Does the new technology provide its own solution for this danger? In the past, distributors have often been able to capture and exploit economies of scale and scope, bolstered in part by their alliances with the state. But the new converging interactive technology is set to lower barriers to entry dramatically. The huge expansion of carrying capacity (fibre optic bandwidth), together with processing capacity, will enable any one to be a user or producer. With the prospect of interchangeable alternative routes, satellite for wire, cable for television, network for computer, there will be no incentive for distributors to bottle neck traffic and exclude non-affiliated content providers or small-time users. So, for example, intellectual property law, which has been one way for distributors to control channels by creating artificial scarcity, again with state support (Garnham, 1990), will assume a different complexion. While perhaps in the transition to the new media, some core content will be rationed, such as major sporting events, popular movies and iconic images, the emphasis will ultimately shift to releasing, translating and reconstituting content as widely as possible - especially where it is possible to extract payments for brief uses of a work.

2.0.5 Yet might another - as yet indistinct - means emerge to capture transactional space (White, 1997). If, for instance, as Dyson (1995) argues, property in content will no longer be central, might value be captured by those who can lock-in users and exclude non-affiliates by integrating the system in a functionally effective fashion? In particular, could those who control the fibre optic wire or the computer software exploit this position, using intellectual property power, as well as other strategies such as acquisitions and alliances, to control access to essential facilities (Solomon and Walker, 1995)? They might build on this strategic position to become the systems integrators and offer not just equipment but a range of services to those many producers and users who do not have the time or expertise to construct and operate their own networks (Noam, 1994). Such services may be targeted at the users, but they might also be designed to attract the custom of the publishers and sellers who are seeking to identify and reach a market. Many participants will continue to turn to others to provide a speedy, facile, reliable and secure service and in particular to filter, authenticate and customise messages.

2.0.6 Convergence presents an opportunity to capture this position. Convergence is said to be technical, functional and organisational (OECD, 1992). If even the largest firms today do not attempt to adopt a 'stand-alone' position and provide the whole system, they do seek to design exclusive arrangements with allies and affiliates. A feature of the current activity in the field is the exploratory alliances formed horizontally across hitherto separate markets, telecommunications and entertainment, computing and telecommunications, computing and information services (Blake and Tiedrich, 1994); another feature is the acquisitions of smaller firms with specialised assets which are needed by the large companies to incorporate in their systems (Preston, 1995). If economies of scale and scope can still be exploited, the systems integrators might be tempted not to act merely as neutral 'air traffic controllers' but to use their position to favour their own services and those of their affiliates at the expense of

independents (Mansell, 1994).

2.0.7 The prospect of this power puts many localities on the defensive. The media present a challenge to existing traditional means of promoting access locally, such as public monopolies, universal service obligations, media ownership controls and local content requirements. Yet we must question whether the configuration of the communications sector can ever entirely detach itself from the ties of the locality. At a very basic level, local cooperation is needed to overcome the physical obstacles which the local terrain presents to the building, operation and maintenance of the infrastructure (Lamberton, 1993). More subtly, local collaboration is needed to adapt communications not just to the many resilient traditional cultures and moral majorities but also to fashion appeal to post-modern audiences which split into many specialist, expressive styles (Appurdaï, 1990; Lash and Urry, 1994). 'International broadcasting satellites, not anchored in a national broadcasting culture and targeted at no audience in particular, has been a commercial graveyard' (*Guardian Weekly*, 22 May 1994).

2.0.8 What are the implications of the new media for law, which after all is conventionally located in the territoriality and sovereignty of the nation state? Paradoxically, at the same time as they undermine their independence, these communications media also call on the legal supports of the nation state (Dezalay, 1995). If national governments are increasingly reluctant to invest funds directly in communications infrastructure, the risks for private developers in an uncertain and volatile environment may still lead them to rely on the power of the state to protect them from excessive or unfair competition. But, at the same time, the form which that protection takes is changing. That power was represented in various kinds of industry-specific regulation, but increasingly it means the power of intellectual property law and the power of 'competition' law itself. These latter legal supports are the focus of this report.

2.0.9 But can nation states still choose the levels of intellectual property and competition law regulation they wish to provide? It is worth noting at this starting point that, in the complex relationship between the global forces and local regulation, while the choices left to national governments seem to be narrowing or converging in many ways, it is not simply a matter of global traders playing off localities for the same kind of support in a game of regulatory arbitrage or 'delocalised blackmail'. In the fields of intellectual property protection and competition law regulation, as well as industry-specific regulation, localities retain some capacity to maintain differences. Even if the law begins to converge at the level of legislative arrangements, the action 'behind the border' only reveals further layers of institutional and cultural resistance to standardisation: the simile sometimes employed is one of 'peeling an onion'. Given their inherent complexity and diversity, the complexions of both intellectual property and competition laws must depend to some extent on the individual judicial decisions produced by litigation and the practices of the administrative and enforcement agencies.

2.0.10 At the same time, one notable response to this differentiation and competition is the increasing resort to the disciplines of supra-national conventions and institutions (Sassen, 1996). Those national governments, industrial interests and social campaigners which are unhappy with this differentiation, seek to control the competition through the standardisations of a multilateral accord. On this score, this report notes specifically the intercession of the World Trade Organisation agreements, the General Agreement on Trade in Services and the Agreement on Trade-Related Intellectual Property Rights, and the World Intellectual Property Organization Treaty, the Berne Convention for the Protection of Literary and Artistic Works, embellished now by the Copyright Treaty and the Performances and Phonograms Treaty.

## National Regulation

2.1.0 In the recent past, the regulatory approach of the nation state has been to regulate competition on a categorical basis. Thus, local industry was protected from foreign competition, for instance through limits on the level of direct foreign acquisition or establishment in sectors regarded as sensitive (Joseph, 1995). Restrictions have also been placed upon cross-border supply, by way of private telecommunications circuits or satellite services departing from nationally organised and often publicly owned grids. Canadian and Mexican controls of this kind were a target in the NAFTA negotiations (Shefrin, 1993). Of course, communications has involved a cross-national dimension but it has largely taken the form of the division of the market between national monopolies. Both in telecommunications (Alleyne, 1995) and satellites (Joseph and Drahos, 1996), such partitions have lately come under stress. Another form of protection consisted of the limits placed upon imports of personnel, programs and signals. The European Union's local content quotas for television have attracted the displeasure of the major importers from the United States (Konigsberg, 1994; Smith, 1993) and France has so far been unable to obtain its partners' agreement to extend the quotas to the new interactive audio-visual media (Ungerer, 1996). Not all controls have targeted foreign competitors directly; incumbents were further shielded by general cross-media ownership controls and lines of business restrictions. Moreover, in some sectors, whether by region or otherwise, licensing restricted the number of competitors overall; governments also of course have supported public ownership, in some sectors in a monopoly position. But latterly, in both television and telecommunications sectors for instance, governments have allowed in more participants and privatised state-owned incumbents.

2.1.1 Latterly, such industry-specific national regulations have been characterised as protections from 'competition'. They were justified on the basis that investments were high and resources were scarce (such as frequency spectrum or advertising revenue). But it should be remembered that, as well as guaranteeing the viability of the operators, the state had an interest in favouring a limited number of local operators because it created a point at which to extract concessions towards local equipment or content purchase, the carriage of certain public good contents or services, and the cross-subsidisation of indigent users. Not all sectors benefited from this kind of direct protection but we can argue that intellectual property provides an analogous, though much milder, sort of state security against competition for others such as those in book, record and software publishing sectors. Again, in return, the state has extracted certain concessions from the property holders.

2.1.2 Of course, another rationale for the immunities was that the absence of such regulation would lead to more concentration rather than less. Public power would be replaced by private power. Given the role of the media, this power could even comprise a threat to democratic forms of local decision making. If governments are to contemplate relinquishing these traditional modes of regulation, what do they put in their place? Uncertainty seems the prevailing characteristic of the policy environment. Some suggest that a new modality must be devised if localities are not to succumb, one by one, to private power: 'liberalisation does not necessarily mean libertarianism' (Noam, 1994). Even the OECD (1992: 101) remarked in a recent report: 'Where there is perfect competition, the regulator may even be put out of a job, but that day has not yet arrived in the communications industry. On the contrary, the job of the regulator seems set to become more involved and more detailed than ever before.' The World Bank has suggested that for the time being developing countries should not privatise their national telecommunications instrumentalities (Drahos and Joseph, 1995). But some developing countries are going ahead with privatisation of their telecoms and looking to another modality of regulation, to be cast, for now at least, as a hybrid mix of industry-specific regulation with generic intellectual property and competition law regulation. Such developments are most notable in Latin America and Eastern Europe but even certain Asian countries are now taking up this model. Australia is a case in point too.

## **Impact of the GATS**

2.3.0 If, in response to internal pressures, many countries are now unilaterally liberalising their audio-visuals and telecommunications markets, the expansion of world trade and investment is adding another legal dimension to the framework for policy formation. Bilateral and regional agreements begin this process but the multilateral WTO agreements, and specifically the General Agreement on Trade in Services (the GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), are now shaping the framework too.

2.3.1 The GATS is having an impact on industry-specific regulation. It establishes a normative and institutional framework for the progressive dismantling of national measures that restrict trade in services. It opens up a potentially huge field at the multilateral level by rejecting the argument that the regulation of the supply of services is not a trade related matter (Drake and Nicolaidis, 1992). Sceptics had argued that it was not a proper subject for the WTO because it involves activities which occur substantially behind the border and touch on sensitive regulatory domains. The agreement resists this view, most notably in encompassing all possible modes of service supply, not just the cross-border mode of supply which is most clearly trade-related but also supply through the presence of natural persons and commercial presence (including the presence of juridical persons) in the territory of another country. It also took an expansive view of the range of service sectors that could be exposed to liberalisation, choosing only to exclude services that are supplied in the exercise of government authority; it defined these narrowly as services not supplied on either a commercial basis or in competition with one or more service suppliers.

2.3.2 The main role of the GATS was to construct a process by which members negotiate commitments to provide national treatment and market access to foreign service suppliers. As the GATS proceeds, there are important debates to take place over the interpretation of these norms and their fit with various kinds of national measures. But these norms were at the same time styled more as goals than obligations when the agreement adopted a hybrid approach to listing commitments. The GATS listing approach permitted countries not to enter individual sectors in their schedules of commitments to national treatment and market access; they also had the opportunity to register limitations on their commitments in those sectors they did inscribe.

2.3.3 The commitments made to the end of the Uruguay round were generally conservative. In the audio-visuals sector, inscription opens up to scrutiny a range of local arrangements such as limits on foreign ownership, bans on certain kinds of programs or advertisements, refusal of work permits to foreign artists and technicians, local content requirements for television, and production subsidies for local ventures. An inspection of the schedules reveals that a significant number of countries chose not to inscribe their audio-visuals sectors in their schedules at all (World Trade Organisation, nd). These countries included developed countries, such as Australia, Canada and members of the European Union, which felt exposed to the economies of scale and cultural imprecations of the American entertainment industries (Given, 1990; Broadman, 1994; Fraser, 1996). Even a standstill agreement would have limited a member's options to existing modalities and levels of regulation and left exposed the rapidly developing new media markets. Yet it should be noted that the GATS ties members of the WTO to successive rounds of liberalisation and the next round is due to commence by the year 2000.

2.3.4 By the end of the Uruguay round, forty-eight countries had scheduled commitments on telecommunications, given over mostly to the valued-added sub-sectors, but with twenty-two inscribing basic telecommunications and making limited commitments, for instance in regard

to mobile and cellular telephony (World Trade Organisation, nd). Yet, like audio-visuals, many countries chose not to inscribe telecommunications sectors in their schedules at all. Inscription opens up to scrutiny the restrictions which many countries still place on foreign ownership and operation of services and the controls they apply to the circumvention of public switched networks. Given the lack of response, a Decision was taken at Marrakesh to continue negotiations on basic telecommunications on a voluntary basis (World Trade Organisation, 1994).

2.3.5 A closing date of April 1996 was set for these negotiations. Further progress was made, but the United States continued to express concern about the value of the market access offers being made by the other participants such as certain Asian countries, and threatened to apply an MFN exemption to the sub-sector. At the death, the negotiations froze, but the Director-General of the WTO successfully proposed that the participating countries preserve the offers they had made and re-examine them during a thirty-day period beginning 15 January, 1997. This further round produced improved offers amounting to fifty-five schedules of commitment from sixty-nine members. It created a fourth protocol to the GATS which will come into force at the beginning of 1998.

2.3.6 The further negotiations also stimulated work on conceptual, technical and regulatory issues (World Trade Organisation, 1996a). The regulations in focus included those which might constitute barriers to trade, such as non-discriminatory limitations on the number of providers, but the work was also to do with the character of the national regulations which were seen as necessary to safeguard liberalisation. The topics included: licensing, frequency and numbering, standards and type approval, tariffs and accounting rates, termination services, rights of way and universal services. Given the continuing role of regulation in this sector, transparency and impartiality were also key issues. The terms and conditions for interconnection between telecommunications and other service suppliers, together with the nature of the safeguards required to prevent abuse of power by dominant network operators, were to be high on the agenda. The report returns to this aspect of the GATS in part three.

## **Australian Policy**

2.4.0 In such a context, where should 'Australia' place its emphasis in fashioning a legal policy to suit this global context? To view law instrumentally and strategically, that is to regard law as policy, it is common today to identify the stakeholders and to project the impact of the adoption of different rules and regimes upon each of them. Some would say that this is a rather innocent view of the way in which law can be shaped but it does at least help to advance awareness and inform choices.

## **Interests and Objectives**

2.4.1 In its 1996 paper, which it styled 'Copyright reform: consideration of rationales, interests and objectives', the Copyright Law Review Committee (CLRC) identifies several interests as being represented in the Australian copyright regime. They include: (1) creators of intellectual productions (2) entities employing such creators (3) entrepreneurs funding or otherwise supporting the efforts of creators (4) entities marketing, performing or distributing intellectual productions (5) entities responsible for the administration on a collective basis of one or more rights (6) entities assisting the ultimate users of intellectual productions (7) the ultimate users and (8) the public interest generally.

2.4.2 The paper concedes that many of these roles or standpoints overlap but it also says

that the law should endeavour to achieve a balance between these interests where they compete. It then proceeds to differentiate even further in identifying carriers and network access providers as well as performers as having distinct interests. But the public interest is not immediately located. Perhaps it could be expected to emerge out of a balancing of the interests of the specified groups but in truth this expectation would be far too simple a position to take. One vital question is whether the interests ought or indeed can be defined as 'Australian'. After all, the consideration is directed to reform of the copyright legislation of the 'sovereign' Australian parliament. However, we are worldly enough today to appreciate that the Australian interest cannot be simply unified or aggregated. The paper offers several objectives that might, if achieved, enure to Australia's benefit; they include rewarding creative Australians, increasing investment by copyright industries, maintaining access to materials, promoting the free flow of information, knowledge and ideas, and supporting Australia's national interests generally, for example by enhancing the competitiveness of Australian industries.

## **Strategies**

2.4.3 Yet, even if we can agree on these objectives, it is becoming harder in a global economy to determine which strategies provides the best return on them to the locality which is Australia. Much of the CLRC paper is taken up with this problem of designing a copyright regime that might achieve such objectives. By way of illustration, let us now refer to the recommendations made in the Cutler report for ways to promote participation in an on-line economy (Cutler and Company, 1995). That report is one of the most concerted efforts to date to work up a successful strategy. The Cutler report follows up the former Government's decision to nominate content as the area in which Australia could best compete. The Government wished to see Australian content represented in on-line media services, not just in local markets but also in regional and world markets.

2.4.4 But what is Australian content? It can be defined in a traditional and narrow way as creative intellectual productions but, in the context of the on-line economy, it might be more profitably cast in a broader fashion to encompass art, information, entertainment, business and financial transactions, and technology. The Cutler report talks of the rights of content providers, on-line service providers and users, to protect their information and intellectual property - their content. By referring to intellectual property, this conceptualisation is narrow in one sense and almost begs the question. But it is broad in another, for it takes in more than creative intellectual contributions. In the on-line context, a very expansive way in which content is defined is by its distinction from carriage. Thus the GATS Annex on Telecommunications (see below) defines carriage services as typically involving real-time transmission of customer supplied information between two or more points without any end to end change in form or content - that is by lack of value-added. So too, the new Australian telecommunications legislation defines content services in contradistinction to carriage services.

2.4.5 Nevertheless, what would make that content, even as broadly defined, Australian? One way of asking this question is to consider which strategy would bring home benefits to the Australian locality. This is the challenge of operationalising the objectives - designing an institutional and regulatory structure. In this regard, Cutler recommends a recipe of up-dated intellectual property rights, made accessible by an efficient system for voluntary clearances and collection of revenue (the sale of use rights). These transactions would be supported by a competitively cheap and good quality carriage system, bolstered by its own access regime. There would also be a tax friendly - low tax regime, and a liberal (lax?) regulatory climate for content and finance (a Channel Islands strategy).

2.4.6 This approach sacrifices some of the strategies countries conventionally employ to capture the benefits of such flows, especially taxation, and to control their costs, such as regulation. Do we know enough about the attractions of different kinds of intellectual property regimes - when they are compared worldwide - to be sure that Australia's version will prove a success? What if competing countries offer more (or less) property protection? Moreover, what constraints do international agreements and conventions place on the choices by Australia, and by other countries, of a suitable regime? Furthermore, is it the case that the content providers and distributors need to locate their production and commercial activities in any country in particular in order to operate successfully? Do the on-line media place further stress on the usual conceptualisations of location? They may further enhance the manipulation of the siting, not only of the direct media activities, but also of the entities involved in them. The same considerations apply to the design of a competition law regime.

## Part 3

### Intellectual Property

#### Context

3.0 Where civil society reaches no consensus about rights, intellectual property is very much a social relation constructed by the state. The state offers a legal means to capture the value of an intellectual resource where other strategies, such as technical and economic strategies, prove ineffective. Because of the intangible and indivisible nature of such resources, producers can find it difficult to contain access to them materially. The new media present fresh opportunities to capture and exploit intellectual value but they also create new ways to access and copy without authorisation (Michalowski and Pfuhl, 1991). But of course, ultimately, the legal option is often used in conjunction with these other strategies (Arup, 1993). When the existing corpus of intellectual property law is enlisted in this desire to appropriate the new sources of value, its centre of gravity may shift, residual elements moving from a peripheral to a central position. One such contemporary shift in emphasis is away from the property concerned with the techniques for making products and towards the assets of marketing these products such as images and associations (Lury, 1993; Gaines, 1991). At the same time, the innovations expose both conceptual and practical gaps in the coverage of existing intellectual property (Reichman, 1993). Despite the legitimacy to be gained by identification with established categories, attempts to fit them to the new media sometimes proves unsatisfactory and fresh hybrid forms must be constructed.

3.0.1 Such dramas have of course been played in earlier periods of innovation over new media like photography and cinematography (Edelman, 1979). Today, national governments are again being pressed from several quarters to adjust their regimes unilaterally, in order to 'catch up' with the new media - the law must not be left behind. The pressures come increasingly from foreign exporters or rather transnational suppliers of intellectual value, whether the value is embodied in finished consumer goods, industrial technologies and know-how, or now electronic transmissions. At the same time, local secondary producers and end users, especially in countries which predominantly import intellectual property, may press to contain or qualify the protection which the nation state affords to claimants.

3.0.2 Yet the issue of intellectual property protection becomes far more complex than these simple dichotomies would suggest. It reveals fissures within national arenas, even in the exporting countries. If the division between interests is classically cast as the clash between producer and user, a notable tension today is the divergence, at a certain point, between the interests of the original authors and their publishers on the one hand, and, on the other hand, the industrial corporations involved in the adaptation, commercialisation and distribution of the works, often in reconstituted form, as commodities. But the shift from simple mass market items (economies of scale) to multi-media manifestations (economies of scope) means that more participants can find themselves changing between these roles. So the claims surrounding intellectual property law formation are much more subtle than straight-out support or opposition; they engage the specifics of the scope of its subject-matter, the uses which are to be controlled by exclusive rights of prohibition and authorisation, the transferability of the property, the permissible practices for licensing uses and the exceptions allowed to infringement.

3.0.3 If finessing these specifics is not a hard enough policy task, the nation state is faced with an enormous challenge in calculating, in a global competition, the 'net' consequences of making one regime available rather than another. It faces a regulatory design problem. The deterritorialisation and dematerialisation of both the copying and transmitting technologies mean that it is increasingly difficult to devise a strategy which captures the benefits of

intellectual property for any one locality. If national laws differ substantively, there is also competition between locations over whose laws apply. The ambitions for a multilateral compact may start with agreement on the proper national 'locus' for legal prescription and adjudication, together with cooperation on investigation and enforcement when that locus finds that activities and entities are beyond its reach for some reason. Another early goal is commitment to norms of non-discrimination, so that foreigners receive treatment under local laws which is no less favourable than the treatment accorded to locals (national treatment). But if countries continue to maintain differences, the multilateral effort may move up to the level of standards of substantive protection. We shall refer to each of these possibilities in the ensuing discussion of current developments.

## Copyright

3.1.0 Intellectual property law does not enjoy the assistance of a unifying principle in the sense of a shared rationale that would determine whether new subject-matter should attract protection. Perhaps the civil law countries try harder for a synthesis, but overall countries are particularistic in their approach. The new intellectual value must fit the requirements of one or other of the existing categories. Thus, in relation to the on-line media, a full survey of the field would refer to the enlistment of patents to safeguard encryption programs which employ algorithms functionally, say for electronic payment systems; trade secrets and confidential information to shield data bases and know-how provided for use in closed circles; and trademarks and the expanding forms of protection for business goodwill, character merchandising and image association to strengthen investments in the economy of signs. Pacesetting jurisdictions are also now criminalising directly the techniques of interception of signals, circumvention of locks and breaking of codes.

3.1.1 Nonetheless, in the realm of the new media, copyright is the most established category and both its substance and legitimacy are reason why it is again at the centre of debate. Copyright is the main intellectual property form for those who wish to capture value in the new media, whether it be by way of a strategy of assimilating these media to the well recognised copyrightable works or by obtaining copyright recognition for new subject-matter. Already of course it has extended its reach in some jurisdictions from the original works such as musical scores or literary texts, to sound recordings, broadcasts and performances. Yet even in this respect, divergences are apparent: some countries have seen fit to afford only 'neighbouring rights' to these modern audio-visual media, thus providing a lesser level of substantive protection (see Stewart, 1989 for examples).

3.1.2 The modern audio-visual media point up how one original form of an intellectual work may be translated, adapted or reworked into other media as a way of exploiting economies of scope. Issues then arise about the rights to be enjoyed among the various producers and distributors over the uses of the original materials which are embodied in - or 'underly' as it sometimes said - the new media. But the law must also decide whether to recognise the new media as the subject-matter of intellectual property themselves. Production within the new multi-media format makes it necessary to track down and obtain clearance from the sources of their many components (Jones, 1996). But multi-media may also prove difficult to fit into an existing category of intellectual property such as the computer program or the cinematograph work.

3.1.3 One customary way in which the issues surface is in the delineation of the subject-matter which is protectable by copyright - in which copyright subsists. A key point is the line to be drawn between ideas and expressions; copyright is said to protect the form of expression of works and not the underlying ideas and knowledge. Another point at which control is exercised over the subject-matter is the requirement of originality or authorship.

Both these criteria, along with the limited term for the copyright, are meant to ensure that a wealth of material is in the public domain, accessible for all to mine. These criteria present problems however for those who wish to protect investments in the more utilitarian and functional works such as the compilations of data, which often also involve translation from one medium into another. If these characteristic copyright criteria cannot be fitted satisfactorily - witness the difficulties fitting software to the copyright concept of a literary work - then the claims may be met with a *sui generis* right. An apt example is the recent European Union's Directive to recognise the investment, time and effort involved in obtaining, verifying and presenting data to users, by protecting against 'unfair extraction' (Kaye, 1995). The *sui generis* protection provides an opportunity to tailor the form to the circumstances of the particular media.

3.1.4 Copyright has never conceded every use which the holder might wish to control, either by excluding others or licensing subject to conditions of various kinds. Another way in which copyright is restricted is in the bundle of rights which its subsistence attracts. Copyright has not been a right of wholesale exploitation, that is a right to control all uses of the subject-matter (Van Caenegem, 1995). The primary right it confers is the right to control reproduction and this emphasis makes an issue of the nature of infringement - the nature of copying. For example, to attract copyright protection, the subject-matter has had to be fixed in a material form. So, to memorise or even to read a poem out loud is not an infringement, unless copyright provides further rights to catch such activities such as a right to broadcast a work or perform it in public.

3.1.5 Internationally, as well as domestically, a great concern of holders is copyright piracy. Piracy usually consists of direct or literal copying of the whole of the work. The concern about piracy is to ensure that sales of such popular items as books, videos, compact discs and software programs are not undermined by such a practice. The new technology has provided more and more effective means to make unauthorised copies and distribute them widely (Adelstein and Peretz, 1985). In some sectors, we can legitimately question whether the copying has been at the expense of purchases, but in others such as academic publishing the threat is very real, and it is feared that the new media will aggravate the problem. At the same time, some users may employ only a part of the work for their own purposes such as to incorporate in their own works. We might call this a derivative use but it can still involve the copying of the original work. Here the concern is not so much the simple transposition or translation of the original into another medium, for this step has not proved sufficient to avoid infringement.

3.1.6 One way the question of infringement of the reproduction right is approached is through an enquiry into what copyright jurisprudence terms 'substantial similarity'. If a small part is reproduced, as it is with music sampling for instance, does that make the later work substantially similar and is the measure of substance to be one of quality or quantity? One chord might epitomise a popular song. Another more searching way of casting the question is the level at which the expression is being copied. For software programs this approach has strained the idea/expression distinction: if it is possible to write variations on the form in which the code is expressed, is the measure to be whether it performs the same function as that part of the original program? But would that amount to protection of the idea behind the program, the conceptualisation of the problem and its solution? Even protection of the expression might do so if there was only one way to express an underlying idea. The courts in many jurisdictions are littered with decisions on this score, oscillating between protection and licence, and the jurisprudence at this level has been a significant source of national differentiation (Reichman, 1993). Certain suppliers have pursued aggressive strategies of litigation, meeting however with mixed results. In the software field, Apple was an active litigant; now Murdoch's satellite companies are trying to restrain the production of 'smart cards' which enable access to encrypted signals.

## **Software Interfaces**

3.2.0 But, instead of pursuing these elusive distinctions, the real concern might be the purposes for which the work is reproduced or the independence with which it is done. The main practice worth considering in this relationship between 'genuine' competitors is the reproduction of the copyright holder's interfaces necessary to make a competitor's peripherals or applications compatible with the core facility. Reproducing software interfaces for compatibility, and even the activity necessary to discover them if the holder is not prepared to release the codes, that is decompilation or reverse engineering, may constitute an infringement. Of course, in deciding whether to litigate an infringement, the purpose of the copying might be a consideration in the holder's mind. The interfacing device might simply be designed to enable circumvention of the original program - such as smart cards to activate access without payment, a real problem as noted above for satellite television suppliers. But the purpose of the reproduction may rather be to make the add-on work with the core facility so that it can be competitive with the core holder's own add-ons. By asserting copyright, the holder is seeking to extend its power into related markets. Should copyright be used to deter such compatibility?

3.2.1 A statutory exception to infringement of the holder's rights is a way of recognising competing interests within the body of intellectual property law. But these exceptions may be hard fought. In an instance bearing on our study, the United States lobbied to dissuade the European Union from building an exception into its software protection directive which would allow reproduction for the purpose of inter-operability (Styracula, 1991; Waters and Leonard, 1991). Hedged in with conditions, the exception was ultimately confined to the act of reverse engineering to discover the interfaces. In Australia, a combination of IBM, Novel and Microsoft successfully lobbied the Keating Government to resist a recommendation by the CLRC (1995) to provide an exception for decompilation. With the change in Government, the fate of that recommendation is still unclear. All the same, it should be noted that the provision of such exception in regard to one subject-matter of copyright, such as computer programs, may only inspire attempts to place the work in question in an alternative category which does not concede that exception (Jones, 1996). A generic approach, and one to be explored below, is to grant rights without such exceptions within the body of the intellectual property law, but then to place faith in competition law as the way to discipline the uses of those rights, such as the withholding of licences from competitors in related markets (see Part 3).

## **On-Line Content**

3.3.0 The role of intellectual property in promoting the inter-operability of the technology is not a new issue. But the transmission of material on-line, including music, text and software, has created a broader conceptual and policy challenge to copyright's protection against unauthorised reproduction. In the usual practice of distributing copyright material, the work is 'published' and the public is often permitted to consult copies of a book which have been bought by a shop or a library or to listen to a tape or compact disc, before deciding whether to purchase. They do not pay for this service directly. But the equivalent activity on-line will be an infringement, if such acts as the temporary storage of a work or other subject-matter in an electronic medium, such as a Random Access Memory or a hard drive, its display ephemerally or transiently on a screen, and its relay to other computers in a network, are to be regarded as acts of reproduction (Christie, 1996; Blakeney, 1995; Dreier, 1993).

3.3.1 Copyright material is being made available for free over the Internet, sometimes for

commercial purposes, sometimes in an emancipatory way. Now the object of claims to control this practice may be to protect the sales of the hard copies of the books, disks and other works from erosion (John, 1996). Record companies are especially apprehensive about the challenge the on-line media present, when digitisation can deliver recordings with great rapidity and fidelity. The holders want to be able to control distribution by suing those who provide the facility for this material to be transmitted, such as the access and service providers (eg the bulletin board operators), because it is extremely difficult of course to enforce the law against the end users at home who might well be making their own permanent copies. The law has entertained the idea of joining such intermediaries, as it has the providers of photocopy machines or cassette recorders, for contributing to or authorising the infringements. But the application of these laws has proved problematic. Furthermore, the distributor lobby is apprehensive about finding itself cast in this role by other copyright holders. Strengthening these offences has met with opposition in the United States House of Representatives during the hearings on the rewrite of the Copyright Act and so far held up passage of the legislation (World Intellectual Property Report, 1996(10): 259). In this vein, John (1996) complains that the distributors rather than the authors seem to be driving the copyright agenda.

3.3.2 In any case, it is the nature of the on-line media as the carrier of a service rather than a finished product which creates the most difficulty for efforts to control transmission as a kind of reproduction (Kaye, 1995). The value which is to be captured resides in providing information which is actually useful to the consumer, partly through the opportunities provided for interaction. The costs associated with effective use of information are sometimes overlooked; an abundance of information supply means little without a capacity to use it (Lamberton, 1993). At the moment, a consumer has to contemplate buying the whole of a newspaper or book, only to scan it in order to find parts which are relevant. Indeed, it is not always feasible to browse it first before deciding whether to buy, or to memorise the bits you wish to use (Adelstein and Peretz, 1985). Of course, magazines and books have become more specialised but then they must also try to reach a dispersed audience. Often instead they have to be marketed as something more than information, which is why so much thought goes into their design and presentation.

3.3.3 On the other hand, the provider of an information service may be able instead to extract a fee from the user through a metering device for the information actually used, partly by being much more selective and attuned to the requirements of the individual user. Searchable indexes or abstracts, with follow-up delivery of selected items, are an example of this kind of service. The provider may want to be able to attract users, not so much to levy them for exclusive services, but rather to charge suppliers for delivering an audience or market; the provider earns revenue from advertising or commissions on sales. Recognition and reputation will play a part in the marketability of these services and already disputes have arisen about entitlements to trade marks for Web sites.

3.3.4 So the focus becomes the legal means to control access to a service which is provided on-line (Christie, 1995); for some to criminalise theft of a service (Oman, 1993). But then critics are fearful that control of access will present a threat to freedom of communication, for the underlying ideas and knowledge will be just as inaccessible as the forms of expression to those who cannot pay the visitation fees (Van Caenegem, 1995; Elkin-Koren, 1996). As the on-line media replace other sources of content, it is possible that material will be generated in its entirety for the medium and will not be available for use elsewhere at all. But it is perhaps just as possible that it will have been available else in other media and it will be the way in which it packaged and customised by on-line service providers which provides its value. The protection of intellectual property may in fact be needed to provide the original authors and publishers of the underlying material with something with which they can bargain. Already, in Australia, the performers' rights association has made a claim on Internet service providers for a royalty for providing subscribers with musical

services on demand.

3.3.5 Yet, even if other sources remain in existence, on-line service delivery creates the prospect of a new resource inequity, an unequal distribution of opportunities to tap into a powerful and useful medium of supply, so that certain firms and individuals obtain an advantage in terms of access to information that is reliable, timely and purposeful (Mosco and Wasko, 1988). Or rather the prospect is a stratification of services distribution again, the ordinary user only able to afford basic, undifferentiated services such as popular entertainment, home shopping and electronic gambling. However, it might be said that, ultimately, the access problem lies not so much with the availability of content that is intellectual property but with the availability (including cost) of the facilities needed to utilise it effectively.

3.3.6 In any case, copyright must be stretched and indeed distorted to assimilate these new media. Perhaps, the closest analogy to these new information services is the customised industrial techniques and know-how which are not meant for publication and are kept in-house, legally protected by trade secrets, the law of confidential information and contractual arrangements. But these other legal forms are only now assuming international recognition. In part, it is copyright's legitimacy which makes it such a target for claims to new values, a key aspect being its established international dimension in the longstanding copyright conventions such as the Berne Convention.

3.3.7 Attempts have been made to assimilate the right to control on-line transmission to other kinds of rights which have received partial recognition within some copyright regimes, either national or international. This tack shifts the focus from protection of the content to control of its uses through a right to broadcast or communicate a work to the public. A right of communication has received some recognition and on-line transmission could be deemed 'communication to the public' in some instances, though selective subscriber services or services which are triggered by users individually accessing such services strain the concept (Rubin, Fraser and Smith, 1996). A right of distribution might also hold out potential for capture of the on-line content. In traditional copyright, the 'first sale doctrine' has meant that the legal purchaser could do as she wished with her copy, except to reproduce it. But the new media mean that value can be extracted from ways of making content available other than sale. Thus, the right to control electronic transmissions could be viewed as a right of distribution. So far a fully fledged distribution right has achieved little acceptance outside the United States (Kurtz, 1996), except in the support given to commercial rental and lending rights in the European Union (John, 1996; Cutler and Company, 1995). But the European Union rejected an analogy between rental and on-line transmission (Hoeren, 1995). One country that aims to be a pacesetter in this respect and attract the business of on-line services is Australia; draft legislation foreshadows a fully fledged 'transmission' right, though not of course without some limitations (Peach and Gilchrist, 1996; Yastreboff, 1996) (see below).

## **Licensing**

3.8.0 In the great media industries, firms layer their manufacturing and marketing values on to the original works and indeed commission employees, contractors and partners to create for these forms. In strategies to capture economies of scale and scope, intellectual property is assigned, licensed and pooled. Partly, the capture is achieved through integration into organisations but in uncertain times risks are hedged and options kept open by contracting out to small firms and forming strategic alliances between large firms. While copyright is foremost an exclusionary property right, commercialisers want it at the same time to be transferable as an economic commodity according to freedom of contract. On this model, it is

important that the law permit the copyright to be transferred, in advance of origination if need be, to others along a chain of supply to the ultimate consumer. Indeed, transfer can be facilitated by default rules in the law. Legal or juridical persons as well as natural persons should be enabled to take transfers. But some countries place limits on the scope and terms of such assignments.

3.8.1 Where works are being manipulated, altered and recontextualised, a notable point of international friction has been the notion of moral rights. Often this is presented as a clash between a European concept of authors' rights and an American concept of economic or industrial rights (Oman, 1993). Post-modernists also have fun with the idea of attributing authorship to works (Saunders, 1992); interactive media may realise this problem. Concepts of originality, novelty and individuality also present an obstacle to the use of intellectual property law by indigenous communities to protect against the appropriation of their cultural heritage in all sorts of inappropriate and unremunerated ways, especially when assumptions are made that these works, such as 'world music', are not authored.

3.8.2 In some countries, the same processes of multiple use drive the operation of statutory or non-voluntary licensing schemes. The licence may be limited by the subject-matter and rights which it makes available to others. In this context, it is to be appreciated that article 9(2) of the Berne Convention allows parties to license reproduction of works in this way only if it is a special case. It goes on to add that the licensing must not conflict with a normal exploitation of the work. This seems to mean that it should not license a use which undermines a normal exploitation of that work such as the sale of hard copies (Ricketson, 1987). A very relevant consideration is the amount of copying that takes place. Furthermore, the licensing must not unreasonably prejudice the legitimate interests of the right holder; here, the requirement that a fair fee be paid (equitable remuneration) is usually regarded as enough to make it reasonable.

3.8.3 In my view, these licensing schemes are usually introduced as a way of facilitating clearance (for a fee) so that the works may be employed in other media, such as sound recordings on radio - where the transaction costs to obtain clearance individually would prove too expensive. They are also instituted to ensure a revenue stream to holders where enforcement would be impractical, for example by levying blank tapes which are used to copy sound recordings for home enjoyment.

3.8.4 Provision for non-voluntary licensing is not the same as the exceptions to infringement which are allowed for certain limited kinds of use. In terms of reproducing content, the most common is fair dealing or fair use, that is making a copy for the purpose of private research or criticism; public libraries and educational institutions often do this for individuals and of course we know that they make multiple copies on occasions. Again, where a country is a party to the Berne Convention, the exception must come within the bounds of article 9(2), unless it happens to meet one of the few very narrow exceptions which the Convention expressly allows elsewhere. However, for developing countries, the Convention has made a more generous allowance: a schedule installed in 1971 allows developing countries to resort to (non-exclusive and non-assignable) licences in order to translate and reproduce works for the purposes of systematic instructional activities or, in some cases, for teaching, scholarship and research (Ricketson, 1987).

3.8.5 Should the new subject-matter and the new rights be subject to the same kinds of licensing provisions and exceptions? If suppliers are to capture value from the provision of a service rather than the high volume of sales of a mass product, and they are confident that they can extract payments from users of the service on a pay per view or use basis, they may resist the extension of the fair dealing exception into the electronic media (Kaye, 1995; Australian Copyright Council, 1996). But of course this resistance has serious implications for public libraries and schools. Thus, perhaps the content industry is likely to be more

sympathetic to the non-voluntary licence. But it is not likely to want non-voluntary licensing to be extended where it thinks it can still operate by private agreement and enforcement - as in the case of computer software. If non-voluntary licensing is applied only selectively, it may be to the disadvantage the original authors and publishers as against the new media intermediaries.

## **Conflict of Laws**

3.9.0 If all countries were to standardise their laws, then no conflict of laws should arise. In an open and competitive economy, national law is said to gravitate to a world best practice benchmark. Leading countries, such as the United States, promulgate laws to act as a model for emulation elsewhere (Nimmer and Krauthaus, 1992). While the momentum is with convergence on a liberal legal model, which we have argued involves security as well as access for traders, the maintenance of differences remains rational and significant (Sell, 1995). Countries with large home markets and export industries in intellectual property apply the coercion of bilateral trade sanctions and other pressures to change laws in foreign markets. Some countries will only extend protection to transmissions into their jurisdiction to the nationals of countries which reciprocate in their own jurisdictions. The United States action on its trade legislation powers, sections 301 and 337, has been influential in intellectual law formation in the eighties and nineties. But gaps remain and the multilateral convention becomes the focus of efforts to promulgate standards.

3.9.1 While differences are still alive, one basic objective of foreign suppliers is that they do not experience discrimination either in contrast to local suppliers or to nationals of other countries. In other words, whatever the level of substantive protection offered by a particular country, it is to be equally available to them. The multilateral convention becomes a means of obtaining such non-discriminatory treatment. Of course a country may not see why it should accord such treatment to the nationals of other countries unless its own nationals receive that treatment in return. So the treatment may only be extended to the nationals of countries which are signatories to the convention. Yet, unless the convention mandates common levels of substantive protection, one country may still end up offering greater protection to foreigners than other countries do.

3.9.2 In a world of difference, suppliers and users have an interest in which national law governs their activities and finally which law determines what amounts to infringement. Can they exercise some choice in these matters? Even if producers have an ally in their home government, which agrees to provide strong protection, the challenging or undermining activity may be located elsewhere, in a host country. It can readily be seen that the Internet and like media generate multinational permutations that provide the potential for a clash of laws. The multinational character stems from the mix of the nationality or domicile of the owner of the work, the site of the origin of the work, the site of a contract of assignment of the work, the site or sites of infringement of the rights to the work (such as unauthorised reproduction or communication), and the nationality or domicile of the infringer (Kloss, 1985).

3.9.3 Private international law is said to involve the resolution of three issues: governing law, judicial forum, and recognition of judgements; another way to put this conundrum is the location of three functions: legislation, adjudication and enforcement. These decisions interact in a very, very complex manner (Ginsburg, 1995). For practical as well as perhaps doctrinal reasons, the owner may need to litigate in a host jurisdiction where a real purchase can be obtained on the infringing activity or the infringing entity. But this necessity may affect the governing law; the forum may well be disposed to apply its own local law rather than a foreign law. Application of the foreign law would be regarded as extra-territorial. Note though that the multinational character may provide the plaintiffs with some options about the place

where protection is sought. For instance, a home jurisdiction may be able to establish an effective as well as formal connection with the infringing activity or entity. But this complexion also provides the defendants with opportunities to manipulate the location either of the activity or indeed of themselves. Competition in conflicts law as well as substantive law occurs unless an international agreement can be reached on standard criteria.

3.9.4 If the locus is to be where the subject-matter is exploited or infringed, rather than the nationality of the holder or the site of its invention, origination, publication or first sale (for instance), the holder is at the mercy of the host country. Producers cannot manipulate location as a strategy to obtain the best protection unless the host countries see it to be in their interests to offer protection. As a feature of regulatory competition, we might expect countries unilaterally to strengthen their protection in order to become more attractive locations, not only for the local exploitation of intellectual property but also, given the advent of electronic commerce, for the routing of intellectual property to other locations in acting as a (regional) distribution hub or clearing house (Cutler and Company, 1995).

3.9.5 However, conflicts of laws might defeat their choices. Some countries might see advantage in withholding protection, either to support local secondary producers or even to act in transnational commerce as piracy 'havens'. At the same time, if pro-intellectual property jurisdictions want to attract the business of the distributors, they may feel the need to offer flexibility in the deployment of rights such as clearances according to freedom of contract and the moderation of authors' rights such as the elimination of moral rights and rights to compensation.

3.9.6 So, depending on a range of considerations, including of course the participant's role in the media, regulatory shopping can provide incentives to go either way. The Internet presents such openings on a range of legal policies, including privacy, product liability, defamation and obscenity. The regulatory competition between countries may extend to the law of conflicts of law itself. Such 'conflicts in conflicts law' make it difficult for firms to plot a strategy, at least without very sophisticated legal services; it also makes it difficult for a government to gauge the benefits of adopting a particular legal policy, given that there is a downside to both stronger and weaker degrees of protection. One has to suspect that the position will as much be an article of faith as a hard-headed calculus of costs and benefits. Of course, whatever the cost-benefit account in material terms, commitment to strong intellectual property regimes may afford a country legitimacy in the eyes of the international economic community, acting as an attraction for such desired assets as foreign direct investment and technology transfer.

3.9.7 Differences in governing law are compounded by differences in procedures. For practical purposes, the holder may wish to be heard in the court of the host country, whether that court is prepared to apply the law of the home country or not; or, at the least, if enforcement is to be effective, it may need the host country court to recognise a judgement obtained in the home country (Jooris, 1995). Yet a host forum may not offer the same procedural facilities as are available in the home country such as speedy, dispassionate and compelling relief. So procedural, as well as substantive standards diverge.

3.9.8 For international transactions, choice of law is said to be increasingly voluntary. Almost autonomously, the parties choose their own governing law by virtue of a contractual provision. They may also choose their forum: a trend is the reference of disputes to private international arbitration. Some content issues might be characterised as contract rather than property matters (Kloss, 1985). Contract might act as an instrument to regulate relationships for licensing arrangements and subscription services; contract might manipulate the choice of law which was apply to matters such as the calculation of royalties. But such choice only works where the parties are *ad idem* in a continuing relationship. And the forum must be prepared to respect their choice. Even when the parties have an agreement, courts might

still balk at applying such law if there were no apparent connection to their territory. Some jurisdictions display preferences regarding the principles of contract law. One consideration is the treatment of a weaker party and this concerns extends at times to the circumstances in which agreement to choice of law clauses is obtained.

3.9.9 For infringements of intellectual property, there will often not be such mutuality. But, in any case, intellectual property is said to be territorially based. Recognition must be obtained in each territory in which protection is desired. Property rights are less mobile or detached than contract rights. Efforts by one country to assert property rights beyond its jurisdiction, that is to say, extra-territorially, are likely to meet resistance in other countries. So the issue of the locus can hardly be avoided. Extra-territorial reach can be asserted if it implicates participants in the activity who can be attached locally but are infringing off-shore, for example, transmitting material overseas which is under copyright at home; extra-territorial reach can also involve attacks on local host infringements such as the importation of infringing goods or the reception of infringing transmissions where the source is overseas; another reason why control over distribution becomes important.

3.9.10 So as a matter of conflicts law is it possible to say what the criterion for the territorial connection in copyright law will be? The international conventions do not provide a clear guide, though, if anything, they lean to the place where the copyright is exploited (Hoeren, 1995). There are proposals now to define the criterion as the origin of the copyright work, that is, the site from which it is sourced, or even the nationality of the copyright holder. In the case of transmissions, the matrix is however even more complicated, for the underlying material may be sourced in one country, while the transmission may be sent from another country and received in a third country. Intriguingly, such complications have held up an European Union proposal for a common criterion (see World Intellectual Property Report 1996(10): 353).

3.9.11 Even if a certain locus was to be acceptable politically to other countries, it would not wipe away all arguments about location, especially in regard to electronic transmissions which are so transient and ethereal. Who for instance is the transmitter? If it is to be the service provider, can't the servers which hold and transmit content be readily switched? In a sense, such problems are inherent in the notion of intellectual property, for it is property in something intangible and as such more a relation between people than command over a material object which can be physically connected with a location. Corporate groups and wealthy individuals have used physical mobility and legal fictions to good advantage in the case of tax avoidance (Picciotto, 1992). Here, because the natural or juridical person has to come down to ground somewhere, home governments have still known where to apply sanctions if they thought the havens were going too far, and a curious coexistence has developed between these fora of convenience and the home countries. The Internet makes this kind of pursuit much more problematic; it is difficult to pin down the locations and corral the effects of such practices (Mitchell, 1995).

3.9.12 To overcome such conflicts or competition in conflicts law, it is likely once again that an international institution will be needed to standardise the criteria, together with agreement to enforce each other's judgements where jurisdiction is settled. But the most effective solution to conflicts is the multilateral standardisation of the substance of intellectual property protection. For instance, the OECD has recently called for a debate of jurisdiction in cyberspace, but also for the harmonisation of cryptography and the strengthening of intellectual property regulation.

## **TRIPs and Berne**

3.10.0 The enlistment early in the eighties of the GATT (now the WTO), which viewed intellectual property as an essential component of the provision of secure market access for international traders, was a major development in the standardisation of that law (Arup, 1993a). The TRIPs agreement became part of a package of commitments taken on with membership of the WTO. Well over one hundred countries became members of the WTO and some significant others, including the People's Republic of China and Russia, are now seeking to join. TRIPs required protection to be extended in many areas of national law relevant to the new media such as patents, trademarks and confidential information. The TRIPs agreement required countries to offer its levels of protection to the nationals of other countries, whether natural or legal persons. Accession also involves obligations of non-discrimination, both the most favoured nation obligation which has implications for the bilateral strategies adopted by countries like the United States, and the obligation of national treatment.

3.10.1 Because it is concerned with standardisation, TRIPs did not specify conflicts of law criteria but it was at pains to promote the institution at the national level of legal infrastructure for the resolution and enforcement of claims to intellectual property and, in the longer term, this demand may have a profound general effect on legal cultures in many countries.

3.10.2 In respect of copyright, its primary role was to incorporate the provisions of the Berne Convention within its agreement. The Berne Convention for the Protection of Literary and Artistic Works is the long-standing international agreement (1886) on copyright which is administered by the World Intellectual Property Organization (WIPO). The effect of incorporating many of its provisions is to increase the reach of the Berne Convention and to back them with trade sanctions. However, the Convention's provision for moral rights was left out of TRIPs. The United States has been particularly slow to take on board this idea and indeed the United States did not become a signatory to the Convention at all until 1989. In TRIPs, the attribution of rights does commence with the idea of an 'author' but the agreement's references to successors in title and other rights holders clearly envision transfer.

3.10.3 TRIPs gives copyright protection to that subject-matter falling within the Convention's concept of 'works' while stating that protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. To overcome any doubts, TRIPs expressly requires that computer programs, whether in subject or object code, should be protected as literary works under Berne - that is, assimilated to the concept of works within Berne which does not explicitly mention such new media. Members of the WTO are also required expressly to afford protection to compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents, constitute intellectual creations.

3.10.4 The agreement incorporates Berne's right of reproduction. The matter of distribution rights was broached, with rights to control the commercial rental 'at least' of films and software. It is doubtful whether the existing Berne reproduction right takes in distribution (Ricketson, 1987). Yet even the TRIPs stopped short of direct protection for the new media such as rights of control over digital transmissions on wire or wireless. It also failed to mandate copyright rather than neighbouring rights for sound recordings, broadcasts and performances in general, though at the same time it did insist that the neighbouring rights for producers of sound recordings include commercial rental rights.

3.10.5 The TRIPs agreement incorporated a range of Berne provisions relating to non-voluntary licensing. In its own provision for limitations and exceptions, article 13, it employs the language of article 9(2) of the Berne Convention in requiring members to confine limitations or exceptions to exclusive rights to 'certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of

the right holder'. But it should be appreciated that this provision applies to all exclusive rights, not just the right of reproduction. At the same time, TRIPs allows members to retain systems of equitable remuneration in respect of the rental of sound recordings provided that such licensing is not giving rise to the material impairment of the exclusive rights of reproduction. On the same basis, they can choose not to extend the rental rights to films.

3.10.6 The gaps in the agreement's coverage revived interest in a longstanding discussion about adding new Protocols and Instruments to the Berne Convention (Ricketson, 1995). Early in 1996, urged by the United States and the European Union, WIPO agreed to convene a diplomatic conference. The producer countries proposed that the conference address the question of copyright protection for computer software as well as deal with the new challenges in digital technology (World Intellectual Property Report, 1996(10): 82). Some countries were also interested in providing protection for performers and the producers of sound recordings within the rubric of the Convention. The United States proposed that digital transmission be included within the scope of a distribution right, as it has proposed to do within its own new national model. But such a right would have to be related to the existing Berne rights of reproduction, communication to the public and public performance. Proposals were also being made for an international *sui generis* protection for non-original data bases along the lines of the European Union Directive, though to be additional to other existing protection such as copyright.

3.10.7 In the various attempts at scheduling a diplomatic conference, it has proved difficult to reach a consensus on the limitations and restrictions that might attach to such copyright (Ricketson, 1995). At the same time, there have been proposals from the European Union, and, interestingly, Argentina and Uruguay, to phase out provisions for non-voluntary licensing. The United States government showed support for phasing out these provisions but was mindful that its own recording and music industries have interests in such licensing; on-line services providers in Europe were said to share this outlook (Ungerer, 1996). On questions of non-voluntary licensing, Oman (1993) exhorted the industry in the United States to adopt a consistent line if it hoped to get other countries to agree to rights over electronic transmissions; also if it hoped to win a share of the revenue which is collected in such schemes abroad and especially in the European Union. The lack of national treatment in the distribution of revenues from collective licensing and levy systems was another unresolved issue in the TRIPs negotiations.

3.10.8 In August 1996, WIPO released a set of proposals for the diplomatic conference, drafted by the chairman of its committees of experts (see World Intellectual Property Organisation, 1996). They would make clear that the Berne right of reproduction takes in direct and indirect reproduction, whether permanent or temporary, and in any manner or form. This elaboration would catch, for example, temporary storage on a hard disc, together with uploading and downloading whether to or from memory. A right of distribution would be added, with two versions providing a choice between national and regional exhaustion or international and global exhaustion. The People's Republic of China is reported to have joined with Uruguay, Canada, the European Union and the United States in supporting the stronger formulation. The proposals also contained a right of rental of originals or copies of works.

3.10.9 In a recognition of the interests of the original authors and their publishers, the Berne's right of communication to the public would be strengthened to provide protection to works which are made available by interactive on-demand acts of communication. This approach seemed to be the preferred option for catching transmissions not covered by the right of reproduction, though some countries had the distribution right in mind too. Argentina, Australia, Canada, Japan and the United States lined up in support of the communication right; Latin American and Caribbean countries expressing recognition of a general right too.

3.10.10 The proposals also included obligations to abolish non-voluntary licensing in respect

to primary broadcasting and to works for sound recording. Here, Latin American and Caribbean countries joined with Argentina, Uruguay, Canada and the European Union but the People's Republic of China and a group of African countries took issue. In addition, the concessions in article 9(2) to non-voluntary licensing were to be explored, with consideration being given to the status of transitory copies created when using public library networks or own-use copies made when downloading from subscriber services.

3.10.11 With involvement from seventy-five countries, the Conference was able to settle on a Copyright Treaty (see Appendix 1). As foreshadowed, the Treaty required protection for computer programs as literary works. The Treaty is most expansive in augmenting the range of rights that attach to copyright in literary and artistic works. But the Conference did not take up the issue of protection for on-line transmissions in their own right rather than through the underlying content which they transmit.

3.10.12 The Treaty installs a right of distribution as the exclusive right of authorising the making available to the public of the original or copy of the work through sale or other transfer of ownership. However, it leaves countries free to determine the conditions, if any, under which exhaustion of the right applies after the first sale. It institutes a rental right for authors of computer programs, cinematographic works and works embodied in phonograms. A set of agreed statements which accompany the Treaty make it clear that these rights of distribution and rental relate only to fixed copies that can be put into circulation as tangible objects (see appendix 1).

3.10.13 Ultimately, the Conference decided not to extend the right of reproduction explicitly to electronic media, but instead to leave the issue to be resolved through reference to the existing international norms. However, the agreed statements did specify that the reproduction right does fully apply in the digital environment, in particular to the use of works in digital form. It is to be understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of the Convention.

3.10.14 In a major innovation, the Treaty affords authors of literary and artistic works the exclusive right to authorise any communication to the public of the works by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

3.10.15 At the same time, the Treaty allows countries to provide for limitations of - or exceptions to - the rights under the Treaty along the lines of article 9(2). The agreed statements declare that the Treaty provisions permit the parties 'to carry forward and appropriately extend into the digital environment, limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention'. Similarly, these provisions should be understood to permit parties to devise new exceptions and limitations that are appropriate to the digital network environment.

3.10.16 The Treaty also obliges countries to provide adequate legal protection and effective legal remedies against the circumvention of the technological measures which authors use in connection with their rights. They should also protect against the removal or alteration of rights management information.

3.10.17 In a Performances and Phonograms Treaty, equivalent rights were extended to performers and the producers of sound recordings. This Treaty too must be regarded as a major innovation, for previously their rights internationally were limited to neighbouring rights. One shortfall was control over the use of performances in audio-visual media such as films. Another sticking point was the extent to which countries could qualify these rights with schemes of equitable remuneration for non-voluntary use in broadcasting and communication

to the public.

3.10.18 Consideration of the proposal for protection of non--original data bases was postponed. The conference did not have enough time to resolve the difficulties which many countries had with this proposal.

3.10.19 The Treaty provides a good example of the way globalisation reveals intra-national as well as inter-national disjunctures. The United States Government saw the Conference as a way to overcome the deadlock which had been reached in the US Congress over the National Information Infrastructure Copyright Protection Act. Entertainment and publishing companies, the content industries, were reported to be backing the Government move for copyright protection (*The Australian*, 24 December 1996). On the other hand, telecommunications companies, together with on-line access and service providers, sought to educate WIPO representatives about their concerns regarding liability, while public access organisations such as the Association of Research Libraries and the Digital Future Coalition expressed fears for the freedom to cache, browse or transmit on-line. In addition, computer hardware manufacturers opposed the proposal to outlaw circumvention devices (see World Intellectual Property Report 1996(11): 31).

3.10.20 Some of these concerns were assuaged by the decision not to translate the reproduction right explicitly into the digital arena (*Australian Financial Review*, 6 February 1996). On the sore point of liability, a note to the proposals had stressed that they did not attempt to define the nature or extent of liability at the national level; instead, who is to be liable and the extent of liability were for national legislation and case law according to the legal traditions of the contracting party. The agreed statements concerning the Treaty declared that: 'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of the Treaty or the Berne Convention'.

3.10.21 In addition, the Conference revealed interesting twists to the customary North-South divide. Producer groups within certain African and South American countries pressed for stronger copyright protection for musicians, composers and performers whose work is appropriated to recordings, videos, films and broadcasts in the Northern markets; they also opposed non-voluntary licensing for musical works. But these groups encountered opposition from the United States and they were only partially successful in their claims.

## **Australian Law**

3.11.0 In Australia, the intellectual property field is alive with inquiries and recommendations concerning changes to the law. An endeavour has been made to record their output in the bibliography to this report. Much of the policy development concerns the rights which copyright holders should enjoy under the law. Policy makers are very conscious that innovations in the media are presenting opportunities to exploit creative works and other subject-matter in new ways. Providers of the new media want access to these resources while, on the other hand, they have an eye to obtaining protection further down the line because the innovations also provide opportunities for users to gain access to their services without authorisation or payment.

3.11.1 Policy is increasingly being shaped in a strategic way. Perhaps, intellectual property policy was always an instrumentally driven body of law, for law makers were historically attuned to the economic and social consequences of making different rule choices, and such deliberations extended to the role which such rules might play in international competition. Certainly, today, a major concern lies with international competitiveness. One tangible sign of

this orientation is the participation of communications experts and participants in the process of intellectual property policy formation. They have been added to the traditional legal policy advisory committees; and the Department of Communications and the Arts has become involved in the development of legislation alongside the Attorney-General's Department.

3.11.2 Yet, paradoxically, international competition makes it more difficult for small territorial units such as the Australian nation state to calculate the overall consequences of adopting any one particular strategy and to use it to capture the benefits of such trade and commerce.

It also reveals a variety of affiliations and flows that cut across the neat unitary conception of the national interest.

3.11.3 In all this shaking out, it is worth remembering that the Australian policy circle has been very much predisposed to intellectual property protection. Australia unilaterally extends protection and it takes pride in its model building; sometimes its exports include the provision of intellectual property law services to other countries. There has been little sustained critique of a strong protectionist policy. The questions raised in the 1984 report of the Australian Industrial Property Advisory Committee (on patents) are an early exception. The pro-intellectual property culture led several of the economists involved in the Committee's inquiry to complain that policy was determined by unworldly lawyers. Indeed, the recent signs of scepticism within Australia about the value of stronger protection have come from laissez-faire economists, for instance at the Australian Prices Surveillance Authority (1990) and the Australian Office of Regulatory Reform (1995). Intellectual property protection could get in the way of the kind of competition which would lower prices for consumers and provide openings for small firms.

3.11.4 Nonetheless, it remains clear that such reservations are only partial. One would never expect Australia to dispense with an intellectual property regime and become a haven for pirates or even secondary producers. Of course policy choices are not made in a vacuum. A policy choice has symbolic associations as well as instrumental objectives. Quite naturally, Australia sees itself as a law abiding country, committed to the virtues of free trade and market capitalism. As a small nation, it sees its best chance of success in an internationalising economy to be linked to the trade rules of a multilateral agreement like the WTO. Still, the doubts about the value of stronger protection have the virtue of making the current process more open than the past. At last, the issues are being seen as serious and complex; no longer are simple assertions of fact and articles of faith seen as an adequate response.

3.11.5 Before identifying the focus of the recent discussions around intellectual property law and policy, it is useful to provide a little background on the relevant law in Australia. The Copyright Act 1968 (Cth) provides for copyright to subsist in literary, musical and artistic works. Of course these works are often enjoyed in their own right but they can also be used as content for goods and services, for instance the music is put on a recording, the play broadcast on television, the book read on tape or the painting printed on a shirt. So in addition to determining which works attract copyright at all, producers want to know which uses of the material can be controlled. In the case of works, the exclusive rights conferred on the copyright owners are the rights to: reproduce the work in a material form, publish the work, perform the work in public, broadcast the work, cause the work to be transmitted to subscribers to a diffusion service and to make an adaptation of the work.

3.11.6 In Australia, copyright is additionally created in subject-matter other than works, these being sound recordings, cinematograph films, television and sound broadcasts, and published editions of works. Here, the exclusive rights are more limited. For sound recordings, they are to make a copy of the sound recording, cause the recording to be heard in public, and to broadcast the recording; for films, to make a copy, to cause the film to be seen or heard in public, to broadcast the film and to cause it to be transmitted to subscribers

to a diffusion service; for broadcasts, in the case of a television broadcast, to make a film of the broadcast or a copy of the film, in the case of a sound or television broadcast, to make a sound recording or a copy of such a recording, or to rebroadcast; and finally, in the case of a published edition, to make a reproduction of it.

3.11.7 Performances are also given protection under the Act against unauthorised fixation (bootlegging). Control does not extend to uses once fixation is authorised. This falls short of copyright protection.

## **Underlying Works**

3.12.0 The on-line media first have implications for the holders of copyright in the original content inputs we have just recognised. Do their rights of prohibition and authorisation extend to their exploitation through the new media? Thus, they also have implications for the operators of the new media: what responsibilities do they have for the copyright of the original content producers? Recalling the fundamental criteria for the subsistence of copyright, it is safe to say that the new media will contain both protectable and unprotectable elements, such as expressions and ideas, original and non-original expressions, and materials in and out of copyright. Some of the protectable content may have been created by the maker of the multi-media, such as computer art or music, but much must be obtained from elsewhere.

3.12.1 If the use which the maker wishes to make of the external material would be an infringement of the copyright holder's rights, the rights must be acquired or licensed by way of contracts made 'voluntarily' in the marketplace; in other words, clearances must be obtained.

An adequate clearance system becomes a key concern, especially if the media make use of copyright content from a large number of sources. Transaction costs can act as a deterrent for the makers, though in some situations they might instead discourage the holders from enforcing their rights. One of the critical areas of innovation lies in the technologies for administering the gaining of permissions and the payment of fees, often across the world.

3.12.2 Apart from the question whether copyright subsists at all in the works which are to be incorporated, the main threshold question is whether the rights which have been attached to works or other subject-matter envisaged the means of expression and communication employed in the new media, such as lending out hard copies for use or the transmission of images and sounds on-line. If they did not, then the makers are free to use the material without permissions. But if they did embrace these means, the question remains whether the assignments and licences which have already been made were enough to authorise such uses or whether additional clearances are now needed (Leonard, 1995; Rumphorst, 1996).

3.12.3 On the other hand, if new rights are now to be attached to the copyright, the question would be whether they might apply retrospectively to works which have already come into being, such as those archives and catalogues of popular materials which continue to find a market today (Rumphorst, 1996). If they were so applied, then clearances would be needed again.

3.12.4 Primarily to overcome the obstacles which transaction costs present, the Copyright Act provides statutory or non-voluntary licences: for certain users to make limited uses of some works or other subject-matter. It also affords recognition to systems of collective administration of non-voluntary (and voluntary) licensing, including the facility of a Copyright Tribunal to resolve disputes about the terms and fees payable for use. But it should be evident that these non-voluntary licensing schemes may also be tied by their terms to the earlier technologies.

3.12.5 Australian law essentially permits the transferability of rights according to the exercise of freedom of contract in the marketplace. Parties can be confident that their contracts will be upheld. Indeed, Australia is a place where they can obtain enforcement of their contracts in the courts. While legal costs can be high, delay can be overcome by injunctive relief, and remedies are forceful - at least within the bounds of Australia. The legal system is relatively free of corruption. These attributes comprise a competitive advantage over certain other jurisdictions.

3.12.6 Australian law has not placed much emphasis on the idea of the author's moral rights. However a discussion was initiated in 1994 (see Australian Minister for Justice and Minister for Communications and the Arts, 1994), and a new Copyright Bill foreshadows the introduction of several such moral rights, for authors of works and directors and producers of films - rights of attribution and integrity. The latter right, in particular a creator's right to object to derogatory treatment of a work which prejudicially affects the creator's honour and reputation, will demand respect by the makers of multi-media. This could be significant because post-modern media specialise in playful, irreverent uses of cultural icons and the appropriation of all sorts of existing works.

## **New Media**

3.13.0 But the further question arises whether the sum - which is more than the parts - might meet the criteria for copyright protection itself. Do the new media fit a copyright category as a work or other subject-matter? The form of expression might be assimilated to an existing category or a new category might be needed to accommodate it, at least to settle any doubts. It must also meet the criteria which apply to all categories of copyrightable material such as the requirement of originality.

3.13.1 The evolutionary model expects the law to be accommodating enough to subsume innovations without the need arising for new categories to be created. At stake here is not merely the conceptual or definitional integrity of copyright but fidelity to the values of copyright. Should a photograph be regarded as an artistic work? The Australian Copyright Act now says it must be. Principles are not applied in a mechanically logical way but are shaped by shifting perceptions of inherent worth and just deserts.

## **Computer Software**

3.13.2 The production which has been the most demanding of copyright law in Australia in recent times has been computer software. IN 1984 the Australian government responded with alacrity to a judicial finding that the legislation of copyright in works did not embrace some of the forms in which computer programs are expressed, most notably their electronic digital expression as object code. It conferred protection by assimilating them to the concept or, to put it more accurately, by deeming them to be literary works. A literary work is now defined to include a computer program. The concept of a computer program then receives legislative definition and judicial interpretation. Subsequent decisions by the courts have placed an expansive construction on the forms in which such copyright subsists; also on the acts which amount to infringement of the copyright. In particular, this new medium has tested the meaning of reproduction in the Act. The CLRC has completed a thorough report which recommends ways to close many of the remaining gaps in the coverage of the technology (Australian Copyright Law Review Committee, 1995).

3.13.3 Computer software comprise an important part of the new on-line media, for they

make them work for the users, but they do not represent of course the final product. The Act's definition captures this role. A computer program is an expression of a set of instructions to cause a device having digital information processing capabilities to perform a particular function.

## **Multi-Media**

3.13.4 While government and industry are showing a great deal of interest in the promotion of multi-media production on-shore, the appropriate intellectual property policy has not yet been the subject of a major recommendation or amendment to the law.

3.13.5 If multi-media are the combination of text, music, art and instructions, they implicate the protection of rights in original copyright material. If the main right associated with the copyright of works in the past has been reproduction, then does the use made of them in multi-media amount to their reproduction, or copying in the case of sound recordings and films? One familiar issue relates to their use of parts of a work. The Act says acts done in relation to a substantial part of a work or other subject-matter are deemed to be done in relation to the whole.

3.13.6 Multi-media products often involve the transformation of such subject-matter into other media, for example by way of digitisation. Can this act be regarded as reproduction; here the requirement of objective similarity might prove an obstacle. The right which attaches to works is to reproduce them in a material form, and material form is now defined by the Act to include any form (whether visible or not) of storage from which the work (or its adaptation) can be reproduced. It need not be in the original form. The definition was expanded to ensure that computer programs in machine readable forms were adequately protected. Here, the concept of storage needs to be explored, because some forms of on-line transmission require that information be stored temporarily on disk or in computer memory. The CLRC (1995) recommended that this uncertainty be resolved.

3.13.7 Yet, if this right extends to the act of storage in a computer medium, it may still not catch the acts of display or networking. The CLRC (1995) recommended that displays of works stored in the memory of a computer not be treated as reproductions in a material form. May other of the existing rights be invoked, where they control, for instance, performance in public, broadcast, or transmission to subscribers to a diffusion service? Each of these rights evinces conceptual limitations linked to its historical origins. Leonard (1995) suggests that broadly based rights are needed as much as broadly based subject-matter. We take this up below.

3.13.8 This inquiry now moves on to the subsistence of copyright in the multi-media product itself, and the right to prohibit or authorise users from reproducing or otherwise using that product through the on-line media. The CLRC report on computer software (1995) remarked that multi-media created no special need for a new category of subject-matter. For instance, a film is currently defined as an aggregate of images (plus sounds) embodied in an article or thing. An interesting question is raised here about images that are synthesised on the screen in an interaction between the program and the user. The report went on to say that it might be worth considering a more appropriate alternative such as an audio-visual work and the CLRC looked to its own broader review reference to pursue this question. That reference charges the Committee: 'to inquire into and report on (a) the feasibility of subsuming the existing exclusive rights comprising copyright in works and other subject matter, into a smaller number of broad based rights and (b) the desirability of maintaining the existing distinctions between different categories of works and other subject matters having regard to the impact of technological developments on the ways in which such materials are created

and used in new products.' In considering these new products, the Committee was also consider the implications of moral rights for multimedia. The CLRC is still considering this reference.

## Data Bases

3.13.9 Data bases clearly overlap with multi-media in format, but on the whole can be regarded, being mainly text and instructions, as more informational, more functional and utilitarian than many multi-media products. The new media may make a data base which appears in hard copy available on computer. Like multi-media, this supply may be effected by way of installing a CD-ROM but increasingly it may be provided, amended and even constructed, for example out of an interaction with the individual user's requirements, on-line.

3.13.10 Pursuing the analysis employed above, it can be said that the data may be drawn from other sources and some of this content is subject to copyright itself, for example as a literary work. Clearances are needed to reproduce or use this data in certain other ways. However, some of it is likely not to be subject to copyright because it comprises ideas rather than expression, it lacks originality, or it is material out of copyright.

3.13.11 Nonetheless, copyright may subsist in the compilation of data itself. The Australian Act states expressly that a literary work may include a compilation. It remains the case that the compilation must meet the basic criteria for subsistence, of which originality is the most relevant. How exacting is the requirement of originality? It is worth repeating that the work does not need to satisfy any demand of literary merit. It can be prosaic. Still, it needs to distinguish itself from previous material in the sense of having originated from some authorial source. In respect of compilations, the trend is to say that the necessary originality lies in the selection and arrangement of the factual material. The standard varies from jurisdiction to jurisdiction but of Australia the observation has been made that the standard expected of originality is low; an input of skill and labour suffices. Hence, when the TRIPs agreement required that compilations of data be given copyright protection which, by reason of the selection or arrangement of their contents, constitute 'intellectual creations', the Australian government did not think it necessary to introduce additional provisions into the Act.

3.13.12 However, even if this standard remains the same, it is true that some data bases employ well tried methodologies of collection and presentation, some involving automation of these functions (Yastreboff, 1996). The CLRC's report on computer software made reference to the European Union's directive which aims to give *sui generis* protection to non-original data bases. At the time, the Directive was in draft form and the CLRC suggested that the advancement of the law in Australia wait until the Directive was settled and it was considered as part of the CLRC's broad review.

3.13.13 Originality may lie of course in the computer programs run to collect and present the data. The CLRC report did recommend the construction of a new copyright category of computer generated creations but distinguished works made with the assistance of computer programs. It did not seem to have data bases in mind here but rather media like computer art.

3.13.14 Data bases raise similar questions about the reach of the copyright holder's rights to the ways in which communication is now taking place. The Act's definition of a literary work speaks of compilations which are expressed in words, figures or symbols, whether or not in a visible form, but this definition identifies the subject-matter in which copyright subsists rather than the acts which are controlled through the rights attached to the copyright. It was noted above that reproduction in a material form extended to any form of storage whether visible or not.

## A Transmission Right

3.14.0 The recurrence of this issue suggests there might be interest in Australia in a transmission right. Already, Australia has seen skirmishes in court over the legality of uses which go beyond the longstanding concerns about the 'hard' copying of books, recordings and videos. Because the single items which embody the works and other subject-matter have become more durable, the interest has turned to rental and lending rights. In this respect, the TRIPs requirements have since been introduced into the Copyright Act (Peach and Gilchrist, 1996). But the status of on-line transmissions remains unresolved. In a decision, which has since been appealed to the High Court, the Australasian Performers Rights Association was successful in invoking several of the existing rights to strike at Telstra's practice of making music available for customers to play to their mobile telephone callers while on hold (see *Australasian Performers Rights Association v Telstra Corporation* (1995) 31 Intellectual Property Reports 289). The free to air broadcasters were unsuccessful on the other hand in preventing the Pay-TV operator, Foxtel, from retransmitting their broadcasts to its subscribers (see *Amalgamated Television Services v Foxtel Digital Cable Television* (1996) 34 Intellectual Property Reports 274). Whatever the potentialities in the existing rights, it is likely that gaps will be revealed by the new media. In anticipation, the Australian Copyright Convergence Group (CCG) (1994) recommended to the Government that a broadly based technology-neutral transmission right be introduced.

3.14.1 The Keating Labor government included such a right in a package of reforms to the Act that were not to wait until the CLRC completed its broad review. An exposure draft of a Bill was circulated in early 1996 (Australian Minister for Justice, 1996). The change of Government overtook the Bill and possible legislation remains under scrutiny in the Department of Communications and the Arts. It has been reported that the Attorney-General is prepared to proceed with the legislation of the right. The issue of a retransmission right for pay-TV was proving the sticking point to the Bill going forward (*Australian Financial Review*, 4 October 1996). There is enough momentum to the right to make a short analysis worthwhile, even if modifications to the Bill are always possible.

3.14.2 The Bill would introduce a new right to transmit to the public. This right is to be enjoyed by holders of the presently recognised categories of works and other subject-matter. In particular, the Bill makes a distinction between broadcasts and other transmissions to the public. The official notes, which accompany the Bill, say that 'it should be emphasised that the maker of a transmission other than a broadcast will not own copyright in that transmission'. Thus, the new right is to apply to current copyright owners, including broadcasters, producers of films and sound recordings and the owners of copyright in musical, literary, dramatic and artistic works.

3.14.3 In the current Act, the concept of a broadcast is limited to a transmission by wireless telegraphy to the public. In the exposure draft of the Bill, it is expanded to afford protection to all licensees under the Broadcasting Services Act, that is broadcasters by cable as well as over the air. (The notes to the exposure draft of the Bill refers to them as operators of systems of cable distribution of radio and television programs.) 'Broadcast' is defined to mean transmit to the public where the sound and/or visual images transmitted constitute sound or television programs. But the definition expressly excludes transmissions in connection with: (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service. In keeping with the recommendations of the CCG (1994), the notes say that on-demand services, interactive services and computer networking of material, are not meant to be included.

3.14.4 But what acts will the copyright holders so identified be empowered to prohibit or authorise? The holders of such copyright subject-matter will have a right to control 'transmission to the public'. To transmit is defined as meaning electronically transmit (whether over a path provided by a material substance or otherwise) sounds and/or visual images that are not capable of being heard or seen except by use of reception equipment. While this definition is broad and takes in the exclusions from the act of broadcast which have been recounted above, the right is confined to transmissions to the public. The 'public' is not identified in the Bill but a provision is contained which sets out that 'if a fee is payable to the maker of a transmission for the reception of the transmission, the transmission is taken, for the purposes of this Act, to be a transmission to the public'. It is not clear that this is to be the only way a transmission may be to the public but, nevertheless, the wording is significant. Mason (1996) contends that a library, which charges a fee to a user on a cost recovery basis, for material provided on-line, would be caught.

3.14.5 The main effect is to exclude in-house communications, even if they are made for a commercial purpose as for example they may be made within businesses. A note to this section says that private telephone conversations and facsimile messages are not intended to be caught by this provision because, even though fees are payable by subscribers to the carrier, they are not payable to the maker of the transmission. Under the Act, a transmission is taken to have been made by the person who was responsible for determining the content of the transmission.

3.14.6 It should also be remembered that broadcasts are uses of works and other subject-matter as well as subject-matter in their own right. Broadcast is defined as a form of transmission to the public but can still be distinguished from other acts of transmission, for example when broadcast rights are assigned or licensed without necessarily licensing the entire transmission right. The notes also make it clear that the transmission right is separate from the public performance right; also from 'physical distribution of copyright material in material form'.

3.14.7 The Act's identification of the maker of a transmission also has the purpose of determining who is liable if copyright in the underlying material included in the transmission is not respected. The person who makes a broadcast transmission will be the person who is responsible for determining its content. Again, this is meant to absolve cable providers of broadcasting services from liability for transmissions made by service providers using their infrastructure but for whose content they are not responsible in any way. The maker of a transmission other than a broadcast is the person responsible for the content, not the 'mere provider of the technical means'. The relevant note makes it clear that it is the common carrier who is not to be liable for transmissions made by service providers using their infrastructure, where the common carrier is not responsible for their content in any way. Even if this rather circumlocutory approach relieves the common carriers (in their capacity as common carriers), it still leaves a question to be settled as to which kinds of service providers may be regarded as 'making' transmissions. The difficult distinction between the providers of carriage and content services is engaged.

3.14.8 In more familiar guises, such as photocopying, Australia has seen litigation to determine whether certain third parties have contributed to infringement of copyright rights over reproduction. In the United States, litigation has resulted in on-line service providers being held liable. It seems though that merely making the means available for others to transgress is not enough, some control over the acts is required (see now Loughnan, 1997). The CLRC (1995) broached this issue by remarking that data base operators ought to be open to liability for authorising infringements if subscribers made hard copies of material from the data base, however, something more than the mere networking of a data base should be needed to amount to authorisation. The CLRC distinguished the position of bulletin board operators. They were not in the business of providing copyright material, rather just a facility

for people to post and download material, the contents of which they were not always even aware. The overall issue of liability was referred on to the broad review.

### **Non-Voluntary Licensing**

3.15.0 The Copyright Act already contains limited statutory or non-voluntary licensing. The new media raise the question whether these licences could be interpreted to apply to the new subject-matter or the new uses of old subject-matter. If they do not, then should the licences be extended or indeed additional licences be provided. For example, the Copyright Agency Ltd, has asked the Copyright Tribunal to rule to what extent the digital scanning, storage and transmission of works are permitted under the existing statutory licences given to educational institutions and to strike a rate for doing so where the practices are licensed.

3.15.1 At present, the licences relate foremost to the copying of works and broadcasts by educational institutions, the recording of musical works by the producers of sound recordings, the recording or filming of works for the purpose of ephemeral broadcasting, and the broadcasting of sound recordings. The home taping of sound recordings was also permitted, until the legislation was found to be beyond the Commonwealth's constitutional powers. With the aid of the legislative provisions, arrangements have developed for the administration of these licences. These arrangements have involved the collectivisation of copyright holders in 'collecting societies' such as the Copyright Agency Ltd, the Audio-Visual Collecting Society and the Australasian Performers Rights Association. For example, the Audio-Visual Collecting Society presented an opportunity for educational institutions to negotiate a remuneration scheme for making off-air copies of television and radio broadcasts.

3.15.2 In its report on software protection, the CLRC (1995) thought there was no need to give 'electro-copiers' statutory licences. It raised in particular the narrow scope of the allowance in article 9(2) of the Berne Convention for signatories to grant licences. In his review of the copyright collecting societies, Professor Shane Simpson (1995) counselled against introducing non-voluntary licences where voluntary licences would work well, for instance to provide access to the new multi-media.

3.15.3 The Bill has not sought to add to the existing provisions - with one exception. In the Bill, the existing licence to broadcast a published sound recording is confined to free-to-air broadcasts and does not extend to subscription broadcasts. However, in the case of the licences for educational institutions to copy broadcasts and for broadcasters to copy works, films and sound recordings, the definition of broadcast has not been so limited to non-subscription broadcast.

3.15.4 The present Act also concedes, as an exception to infringement of copyright, fair dealing with works and other subject-matter. The most prominent of these is fair dealing for the purpose of research or study. Where, for instance, the dealing is by way of copying works, factors such as the purpose of the dealing, the availability of the work, and the substantiality of the part copied, are to be taken into account. The provisions for libraries to make copies for users can be allied to this allowance. The CLRC (1995) was of the opinion that the reproduction of works, as stored on computer database, could constitute fair dealing. It thought that libraries might provide copies to individual users, but to digitalise works systematically and make them available to the public so that they could browse on screen, was a questionable practice. The current provisions are indeed hedged in many ways and the whole issue needs clarification (see also Australian Copyright Council, 1996).

## Conflict of Laws

3.16.0 In designing new legislation, Australia is trying to determine whether there are risks attached to being a high protection jurisdiction. Of course, it must extend some protections because of its public international law obligations under the TRIPs agreement and the Berne and other WIPO Conventions. It must accord those protections to nationals of the other member or signatory countries. These protections are the common standards; Australia should be able to count on them being available elsewhere too, at least where other countries are party to the agreement or signatory to the convention. But, as we noted above, the substance of these protections is only now being extended fully to the new media, the very media which is so international (if not transnational) in its configuration. Remember too that once Australia institutes such copyright protections unilaterally, then under the national treatment obligations of the TRIPs agreement and Berne Convention, it must (in the case of works) extend them to the nationals of other members.

3.16.1 If Australia offers a high level of protection unilaterally, it must count on it proving attractive enough to electronic commerce to offset any of the drawbacks. Protection must be effective. If we move beyond the substance of the law (the choice of law question) there remains the jurisdiction question. Can Australian law reach those who need to be regulated if protection is to be enforced? In designing strategies, policy makers must try to ascertain the impact of the law on the behaviour of several different participants. Australia might have to be prepared to flout some common conflicts criteria to do so, notably by extending its reach to what others regard as an extra-territorial jurisdiction. But even so some of the infringers will be entirely off-shore. It then has to decide whether to sheet home responsibility to those participants who are in reach. They may resist this imposition.

3.16.2 If the focus is on transmissions, Australia can seek to apply its law to transmissions as they come into and out of Australia. Its strategy may be to offer high protection to both the material underlying the transmissions and the transmissions themselves. Such a law might run into conflict, not only with the countries emitting or receiving the transmissions as the case may be, but also with countries from which the underlying material originates. Even so, for the regulation of transmissions from Australia to be effective, it must assert jurisdiction over the maker of the transmission. For the regulation of transmissions into Australia, it will often have to be the receiver. Given the nature of the media, the only person within jurisdiction might in fact turn out to be a carriage service provider.

3.16.3 The CCG (1994) recommended that the makers of transmissions - from Australia but intended for reception overseas - should obtain clearances from the owners of copyright in Australia. But it did not demand that clearances be obtained from the owners in the receiving countries. Note that the owners would be the same person in some cases. Of course the protection contained in this obligation could only apply in Australian territory; it could not be applied in the countries where the signal was received. But if Australian copyright owners were not to receive remuneration for acts that take place in Australia, Australia would be regarded as a copyright haven.

3.16.4 Nonetheless, the Committee divided evenly on whether the protection should extend to transmission to another person outside Australia if it were on a point to point basis rather than a broadcast. Two members of the Committee thought that the ensuing onus to obtain clearances would undermine Australia's attempts to become a regional hub for electronic commerce. In other words, the addition of another layer of protection unilaterally, when other countries in the region did not demand the same thing, might actually discourage the siting of such activities here.

3.16.5 The CCG recognised the virtues of providing protection for copyright owners in Australia for transmissions originating outside Australia but intended for reception in Australia.

It saw the threat that these transmissions posed if the country of emission did not apply protection. But it conceded the difficulty of enforcing such protection against the makers of such transmissions. It suggested that the matter be taken up in the broad CLRC review.

3.16.6 The Bill defines transmission to the public as the public within or outside Australia. It requires the makers of transmissions from Australia to obtain clearances from the Australian owners of copyright. As noted above, it identifies the makers as those who are responsible for the content of the transmission. It concedes that protection outside Australia is beyond Australian law.

3.16.7 The owners of Australian copyright could be foreign nationals. Maybe tangible benefits could be derived from the provision of this protection. But it would be provided without being sure that the same protection was available in their countries, say for individuals or companies that were Australian. In October 1996, it was reported that the legislation would make such protection conditional on material reciprocity; the country in which the content was produced would have to agree to provide a transmission right too (*Australian Financial Review*, October 15, 1996). Now, where other countries accede to the WIPO Treaties, this strategy should not be necessary.



## Part 4

### Competition Law

#### Context

4.0 Competition law is a modality of regulation with origins in the market economy of the United States but which is now pursued of course in the European Union and other Western economies. It is in different stages of 'development' in other countries. Yet competition law is ultimately a very sophisticated regulatory approach and many countries have not instituted such regimes. To introduce a competition policy is still seen as a major step. It can have profound implications for existing industry structures and economic relationships, both public and private. Fully fledged, it represents a great faith in the power of a market-based modality of regulation to derive general social benefits from liberalisation. When both negative and positive potentials are being attributed to it, the focus of policy becomes the content of competition law. Where competition law regimes are established, they display significant differences, for example in institutional structure, legislative prescriptions, allowance for exemptions, and practices of enforcement.

4.0.1 It is worth making some general observations of this nature before relating competition law to the case of the new media. To the extent that generalisations can be made, the initial concern of competition laws is with direct, and even blatant, anti-competitive market conduct such as collusive price fixing. But as a system is refined, it becomes concerned with market structure and the practices of those firms with market power which might eliminate competitors or bar them from entry. The authorities are drawn into judgments that turn very much on the characterisation of the conduct and the assessment of the situation. Economic evaluation interacts with legal interpretation in deciding what is first to be regarded as pro-competitive or anti-competitive. A feature of competition policy is the volatility of the economic theory on which it must draw. No more is this competition in ideas evident than in the arguments about the conditions which are necessary to promote innovation.

4.0.2 Often, the judgements seem to depend very much on the level of expectations about competition. Today, we might say that there is little expectation that the market will be crowded with numerous competitors. But, nevertheless, the success of a single firm or a couple of large firms can be attributed to their pro-competitive activities. If they were not recognised and rewarded for this activity, they would be discouraged from investing in efficiency and innovation and consumers would not have the choice of superior products and services.

4.0.3 Intellectual property rights are supported on this basis (Kobak, 1995); so too intellectual property licencing practices may be viewed benignly, even if they amount to refusals to licence or licensing on restrictive conditions of various kinds (OECD, 1989; Australian Trade Practices Commission, 1990, 1991; United States Department of Justice and Federal Trade Commission, 1995). In the short-term, intellectual property rights exclude competitors from use of a resource which seems naturally to be a public good. But the security of property rights is often seen as necessary, in the longer term, to encourage investment in the origination, commercialisation and dissemination of intellectual assets. Crudely put, one such innovative product or service is better than none. Another way of putting this is to say that the availability of such protection contributes to dynamic or productive efficiency rather than static or allocative efficiency. From this perspective,

intellectual property is a mark of a firms' success. So what seems at first blush to be aggressive and exclusionary behaviour is characterised as pro-competitive conduct. The authorities expect the market to be a tough place where other firms are 'injured'; competition law does not shield firms from the rigours of the market and subsidise their existence.

4.0.4 Furthermore, even if the conduct can confidently be characterised as anti-competitive, the competition regimes often display ambivalence about its effects. They may take the view that the anti-competitive conduct offers countervailing public benefits. This dimension involves a more explicit weighing of the costs and benefits of the conduct than the characterisation question. In some regimes, it finds an outlet in the provisions for the exemption or authorisation of anti-competitive conduct. It may provide an opening for expression of distributional concerns such as the impact of an exclusion or consolidation on employment in a region or sector, or even today the impact on the viability of an entire domestic industry or national export champion. These concerns may militate against the insistence on local competition.

4.0.5 The upshot is that, apart from a few extreme practices which are proscribed in all situations, the emphasis is likely to lie with the control of the abuses of power by firms that already enjoy substantial market power, coupled with an examination of the mergers and other conduct that may lead to such a position of power. This approach implicates the authorities in difficult judgements about the moveable feast that is market power and the purposes and effects of the increasingly subtle deployments of such power in various market strategies (Hopt, 1987).

4.0.6 The judgements usually start with a definition or delineation of the market in question. Of course the broader the market is defined the less likely one firm is to be found to be in a dominant position. Market definition is particularly difficult to settle in rapidly innovating fields if the boundaries are to be drawn according to the range of products which are substitutable. For instance, is cable television to be regarded as a separate market from free to air broadcasting? What if we add in satellite television from abroad? Is operating systems software to be regarded as a market in its own right or can certain types of hardware, applications software or software on the network provide alternatives for customers?

4.0.7 Once the market is identified, a judgement has to be made about the extent of market power. Market power is commonly characterised as freedom from the competitive disciplines of the market in determining, for example, pricing and product strategies. Market power might be indicated by the market share that a firm enjoys when compared with its competitors but recent 'Chicago School' theory has advanced the proposition that a sole firm in a market can still be sensitive to the prospect of competition if the market is 'contestable'. We should appreciate that other policy analysts are not so sanguine (see for example First, Fox, and Pitofsky, 1991), but the Chicago School thinking has been influential in recent years in a number of countries, and under this approach the attention turns to the level of barriers to entry into a market - that is the costs which other firms would have to sink into establishment in order to be able to compete.

## **Market Power and Essential Facilities**

4.1.0 A particular concern is the cost of matching 'essential facilities' - said to be the facilities necessary to be able to compete not only directly with the incumbent but also upstream and downstream. Indeed, the cost may include the cost associated with the provision of ancillary or related services separately (Taperell, 1995). It may not be practical or reasonable to expect competitors to duplicate that facility (Furse, 1995). It is here that economies of scale and scope, together with the capacity to spend on research and

development and deploy other assets, may place the incumbent at an advantage. This concern is extremely relevant to our field.

4.1.1 Again, such a judgement may be extremely difficult to settle in a rapidly innovating field. Innovation may lower entry costs and undermine incumbency advantages; indeed, the creative destruction of radical innovation may enable arrivals to by-pass the essential facilities and build their own advantages. For example, satellite-based communications look like providing a cost-effective by-pass of the facilities owned by television broadcasters and telecommunications carriers. Incumbency becomes a draw-back. In the second phase of a new wave of innovation, when the technology starts to stabilise and standardise, it is these entrants which may consolidate their positions and emerge as the new market power. Such judgements are all the more difficult to make if the authorities are trying to anticipate and assess the impact of the incumbent's move into related or complementary markets where it does not presently dominate, even future generation markets for the same product or services.

4.1.2 For example, in the computing markets, while competition authorities concentrated on the mainframe giant, IBM, innovations were shifting the power to the personal computer and the provider of its operating software, a wave that Microsoft obviously caught. With the limelight now on Microsoft, will a different producer such as Netscape or Sun Microsystems emerge from the wash? Or will television set-top boxes prove more of a control point for the supply of future media services?

4.1.3 Of course such uncertainties may make a singular focus extremely dangerous but the prospect of market power developing somewhere, will not necessarily recede. Most small firms are likely to remain daunted by the high investment thresholds in the core of the communications markets and will tend to concentrate on specialised services and product applications which will need to be compatible with the core technology. It is in this dependent relationship that they experience aggressive practices from larger companies seeking to exclude them from access or buying them up so that the larger firms can extend their control into related markets. If the demarcations between markets are breaking down, and not even the large firms can sustain a stand-alone position, complementary assets may be combined by forming alliances with counterparts. But these alliances may be strategic between firms of similar size and resources in related areas, again at the expense of small, independent producers if these alliances are exclusive. Alternatively, small independents may be taken over and incorporated in the firm.

4.1.4 As we have noted, the old industry-specific regulation tended to make *a priori* judgements about the virtues of either vertical or horizontal integration. In return for government protection from rivals, the incumbents had many of their exclusionary and discriminatory practices regulated directly and obligations imposed on them to carry and service widely. Now the weight of argument seems very much to be tilting against such structural and particularistic regulation. With market structures and powers in the melting pot, the call is to release the shackles of this regulation so that a new configuration evolves 'naturally' out of the market. Regulation should not try to second-guess the market. If any regulation is to operate, then competition law provides the generality and flexibility suited to the task of keeping a watch out for unfair play in a volatile environment. But competition policy is also a distinctive modality: fitting the issues to its conceptualisations and processes channels them into an ineluctably partial frame of reference. It charges the authorities to weigh practices in the balance very much with an eye to the particular situation. As we shall observe, this attitude affects the process which the authorities adopt as well as the criteria which they fashion.

4.1.5 In dealing with powerful firms, competition law authorities have shaped the structure of markets too. Blocking mergers and acquisitions or alliances is the most common

precautionary device (see below). In reacting to market movements, the authorities have drawn lines of business restrictions on individual firms rather than whole industries. A prominent example was the strictures placed on AT & T, once the regional operating companies (RBOCs) had been divested, not to engage in equipment manufacture or carriage on the local loops. A milder version of this role is the requirement that there be structural and accounting separation of the businesses operating in the related markets with the aim that they deal with their affiliates at arms length. Structural separation is being advocated now as a counter to the danger that the large firm which crosses over into related markets will be able to squeeze out the smaller, independent suppliers; structural or organisational separation is the price to be paid for allowing the firm over the fence. However, any directives to separate and certainly any remaining prohibition on lines of business are being resisted, for integration is perceived to be valuable to the realisation of the possibilities of the new convergent technology (Flood, 1995) or to the achievement of the economies necessary to match it as a player with the international competition (Cutler and Company, 1995). Similar issues arise in relation to the merits of joint ventures and conglomerate mergers and have given rise especially to interest in an 'innovation market' approach to anti-trust (see Antitrust Law Journal, 64(1), 1995).

## **Regulation and the Uses of Intellectual Property**

4.2.1 The practices prioritised by competition law might once have included explicit refusals to allow access. Intellectual property practices are a case in point, though of course there are other resources which they may refuse to supply or deal. To enable access, intellectual property may have to be licensed. Core firms choose not to licence or to licence exclusively and on restrictive conditions. So experience reveals that licencing practices are employed to control chains of supply vertically, maybe on an international scale. Local manufacturers and distributors may be licenced on an exclusive basis by a multinational corporation to work an invention or to reproduce a work. In the copyright industries, allowance for 'parallel importation' has been identified as a threat to the exercise of such control. The United States Government has supported its own record, book and software companies in placing countries like Australia on a watchlist for possible trade sanctions for contemplating greater freedom for such importation.

4.2.2 As foreshadowed above, the competition law regimes may regard refusals to licence or licencing exclusively to be pro-competitive rather than anti-competitive. The power to deny access is bolstered of course by a policy of acquiring such intellectual property rights say by way of concerted production or acquisition; it is maintained by a strategy of litigating aggressively against those who seek to challenge the right by working the invention or reproducing the work without authorisation. It must be appreciated that rights to intellectual property are by no means always clearcut and the superior resources to litigate may be enough to intimidate legitimate rivals. Refusals to licence may also be deployed as a bargaining chip to tie a distributor or user to a dominant firm. The most emphatic strategy is to refuse to supply a popular product such as computer hardware or operating software unless the licensee agrees only to deal with you and not with your direct competitors; such a practice is described as 'exclusive dealing'. Another agreement which may be obtained requires the licensee to purchase other products or services from you; this practice has been characterised as tying or bundling. These blatant practices have generally been black-listed by the authorities, though they may still be supported in a discretionary approach by rationales of quality and safety control.

4.2.3 Licensing powers may be deployed to obtain other kinds of undertakings from the licensee. In the vertically integrated industry, the licensee may agree that its products will not compete with the licensor's products; its field of use of the licensed product may be limited

territorially or quantitatively; it might also agree not to challenge the intellectual property claim over the product or to license back any improvements it might make to the product which attract intellectual property themselves. Again, the authorities become involved in delicate judgements whether to regard the restrictions as a legitimate protection of the investment in the intellectual property, a necessary incentive to develop and release the product or instead as an abuse beyond the scope of the grant of power by the state.

4.2.4 A survey of the regulatory treatment of such practices in different jurisdictions takes us well beyond the ambit of this study. Here it is worth concentrating on the prospects for appropriate regulation of the control exercised over essential facilities. If firms are to be permitted to hold such facilities, then the focus of regulatory efforts shifts to affording others access to and use of these facilities on non-discriminatory and reasonable terms. It is possible that intellectual property will again be invoked to deny competitors access to essential facilities. At the moment, rights to core programming resources are a concern. Firms may buy up rights from the content producers or combine them in exclusive cross licensing arrangements. Intellectual property rights may thus be pooled in horizontal relationships which at the same time exclude independent competitors from the facilities. Industry-specific regulation has met these practices with certain safeguards; for example in the United States the Federal Communications Commission developed program access guidelines to afford cable 'over-builders' an opportunity to compete with incumbents (Olson and Spiwak, 1995). In Australia, anti-siphoning provisions were meant to preserve the access of free to air television broadcasters to major sporting events and in the United Kingdom the House of Lords rallied to retain the FA Cup final and Wimbledon for the BBC.

4.2.5 The Magill case begins to indicate that content can be regarded as essential facilities in the application of generalist competition law. In a decision finalised in 1995, the European Commission found that a refusal by television broadcasters to license copyright information about weekly programming could constitute abuse of a dominant position. Magill, the program guide competitor, had been denied access to basic information within the control of the stations. Furthermore, a licence could be compelled to remedy their anti-competitive conduct. It would not comprise a contravention of art 9(2) of the Berne Convention to do so (Vinje, 1995). Again, the stand alone position is an exceptional one to take in context of convergence. Rather, it is alliances and mergers which may have to be scrutinised because they combine too much power over programming or other content resources.

### **Interface Specifications: Computer Platforms**

4.3.0 Closer to the heart of the technological configuration is the denial of access to the interface specifications necessary to make telecommunications networks inter-connectable or computer systems inter-operable. In the section on intellectual property, we noted that the interface specifications may need to be reproduced to achieve this functionality and the owners of the core facilities may decline to licence reproduction. However, the obstacles they put in the way of non-affiliates may be more subtle than this, in part as a result of the attention they have received from competition authorities in the past. Now such firms say that they are not trying to build closed proprietary systems any longer but are moving to open systems such as the Unix standard. There are varying degrees of openness nonetheless and they might be able to disadvantage competitors by concealing code within their systems, varying elements to keep a step ahead (product differentiation) or even to set traps for others, or foreshadowing sometimes unfulfilled changes to keep the industry uncertain and dissuade customers from buying an alternative product for fear that it will turn out to be incompatible (sometimes called vapour ware).

4.3.1 Perhaps the biggest challenge to the independent producer or user is the functional

integration of software from the one house. Competitors are not denied access as such but the package proves attractive to users because of sought after qualities of facility, inter-linkage, speed, reliability, security and price. There are fewer points at which the independent minded users can readily slot in a rival's products to assemble their own package. The main supplier takes advantage of the customers' reluctance to switch - customer inertia (United States Federal Trade Commission, 1996). Integration builds on the centrality of one component such as the operating software or the network access software. Such centrality may be promoted by providing the software free or at a discount - as a 'hook' - or bundled with a hardware purchase. Cheap or even free operating and net access software can undercut competitors in these direct markets but they also help to deliver customers to allies who want to sell not only other software but content and services on-line too.

4.3.2 As foreshadowed, one way of engaging these practices is to look at them as control of essential facilities. The threshold question is whether we must regard these facilities as essential rather than merely convenient or nice to have (Taperell, 1995). How ready should the authorities be to accept that alternatives are not feasible (King and Maddock, 1996)? Denial of access may amount to anti-competitive behaviour, either directly if it is deemed so to be, or indirectly as an attempt to monopolise a market or abuse a dominant position. There are precedents for this approach. In a notable settlement with the European Union in 1984, IBM agreed to release adequate information about its hardware-software interfaces specifications and its systems network architecture in a timely fashion. It also agreed to move to an open standard for network connectivity (Raines, 1985). Yet, such a commitment was significantly missing from the settlement which Microsoft reached with the United States Department of Justice (DOJ) and the European Commission despite the concerns raised about the firm's practices in this respect (Page, 1995). Such a gap was a reason why a Federal Court judge refused to approve the settlement. The judge's main worry was that the Department had thought too little about the conduct of Microsoft as it enters new markets such as on-line information services. The parties to the settlement complained that the judge had overstepped his authority by considering allegations that were not part of the original complaint. Another judge was assigned to the case and he rapidly approved the settlement (Anderson, 1996). The Department said it would continue to keep Microsoft's Internet access practices under scrutiny. The European Union is also reported to have the Microsoft Network under investigation. Now Netscape has complained to the DOJ about Microsoft's attempts to limit the number of net connections to Windows NT Workstation, so that it can encourage customers to migrate to Windows NT Server which bundles browser and operating software.

4.3.3 Under the Clinton Administration, the Department had signalled a more robust and questioning approach to the practices of the marketplace. Assistant Attorney-General Anne Bingham had declared that she would have little sympathy for the view that near-monopolies must be tolerated for the sake of technical progress (Antitrust Journal 64(10), 1995). But the arguments against interference with the market carry much weight. The inclination to defer to the market opens up the authorities to arguments that functionality and integration are only what customers want. In this respect, the standards question has caused competition policy much soul searching (Anton and Yao, 1995). A private, proprietary standard that emerges out of success in the marketplace may be regarded as representing the producer's efficiency in product development, just as integrated systems can be seen to promise technical integrity. The presence of such standards promotes inter-system competition. It is in fact collaboration to settle on common industry standards which, conventionally, may be looked upon askance and may need competition law clearance; certainly competition authorities are reluctant to take on the technical questions directly. We can see how the European Commission is calling for a single interface decoder system for digital pay-television services but is reluctant to determine that technology itself (World Intellectual Property Report 1996(10): 213). This reluctance leaves the way free for a private operator to set a *de facto* industry standard. In the United Kingdom, the BBC is reported to have deferred to News Ltd in the specification the standards for a set-top box (*Guardian Weekly*, 29 December 1996).

4.4.4 As already suggested, a nationalist sub-text is sometimes evident in these accepting attitudes too. In the United States, a stronger stance was met with the charge that it would handicap national champions like Microsoft at a time of intense and unfair international competition (Page, 1995). Yet authorities are also alert to the value of network externalities and demand-driven economies of scale, that make duplication costly and recommend instead intra-system rivalry (United States Federal Trade Commission, 1996).

### **Interface Specifications: Telecommunications Networks**

4.5.0 If the regulation of the computing industry has always been built on a market model, telecommunications, the source of the other essential facility, has a different legacy. Liberalisation of telecommunications markets which began with peripherals equipment, intra-corporate and local area networks and value-added services, is now spreading to basic carriage transport at the same time as the functional distinctions between them is eliding. Competition has already been introduced in some countries in the long distance and international telephone markets (Arlandis, 1993). Transport networks can be seen as essential facilities if it is too costly to duplicate them. In the United States, AT&T was ordered in 1983 to allow competitors to connect to the local loop distribution facilities. While Gilder (1994) argues that by-pass is feasible in the United States, if this is true it is because it is the biggest market, and similar economies may not be available in smaller countries (Preston, 1995). Even in the United States, the densest, most built up areas with the most affluent customers would provide the attraction for the providers. Using conventional wire-line technologies, the last line to the home, especially in outlying areas, as well as inter-exchange line links, require daunting investments (Taperell, 1995). It is hoped that cellular and satellite-based services can provide the answer to this problem.

4.5.1 Industry-specific regulatory authorities have brokered codes of conduct to try to ensure that competitors enjoyed access to these lines. In the United States, the Federal Communications Commission developed the concept of open network architecture (Kelly, 1993), while the European Union has a policy of open network provision (OECD, 1992) which is now being updated and refined. Again, the technical standards for physical inter-connectivity provide a way in which discrimination could be practised; also the number of points at which connection is available. Fostering standards has been another strategy: in the European market the aim has been a single interface decoder and one set-top box for all digital pay-television services (Ungerer, 1996). But discrimination can be achieved more subtly through network load management. Where traffic is heavy and bottlenecks still occur, the scheduling and queuing of transmissions affect the speed and ease of access which competing service providers can offer. One such access is connection to the Internet over existing telephone lines. Of course, the pricing of inter-connect fees has also been a major subject of regulatory contention and litigation (Flood, 1995). In addition, it has been argued that competition is not feasible without access being given to banks of customer information and the use of subscriber management systems.

4.5.2 In late 1994, the European Commission ruled against a joint venture to provide technical and administrative services for pay-TV and other television communications services which had been formed between the German telecom, a publishing group Bertelsmann and a film and television program company Taurus (the MSG Media Service case, see European Commission, 1994). Rather than persist with a proprietary encryption system, the venturers were prepared to undertake to provide a common interface for the decoder base to be installed in customers' homes, so that competitors would be able to plug in their different access control systems. But the Commission felt that the venture would exploit other advantages such as its large subscriber base and knowledge of customer preferences, a catalogue of attractive programs, and the ability to offer a comprehensive

service. Even if a common interface was created, the venture could manipulate access to or delay or bury competitors' programs, citing technical problems or piracy problems. The Commission has since been reported to be investigating a joint venture between the German telecom, the same publishing group and America Online, one concern being the access of competing on-line service providers to network, services and content. But of course such alliances can offer benefits too. Alliances between telecoms may lead to an 'end to end seamless network' which overcomes national incompatibilities (Ungerer, 1996); and 'European' companies can better compete in international markets with the giants from Northern America or Japan. The critical approach taken by the Competition Directorate led to the expressions of support within the ranks of the Commission for the value of promoting such European joint ventures.

4.5.4 Standards may be imposed to safeguard the technical integrity and quality of the network and it is the case that at times the private sector's connections to the carriers have been low grade. But a much bigger concern underlies the access issue. Huge and often public investments have been sunk into the construction of the networks; it is possible that the piggy backers and over-builders will be advantaged by the terms of access. For instance should access be priced at marginal cost or a fee that reflects some of the capital investment in the infrastructure (Flood, 1995)? Cream skimming of the lucrative markets will provide an advantage to private competitors free of the universal service and other obligations of the public carrier. To remain competitive, the public carrier feels under pressure to shed responsibilities for research and development, local employment levels, domestic equipment purchases or subsidies to indigent users.

4.5.5 Faced with such a dilemma, governments continue to stage manage competition. For example, the national carrier is allowed to exclude services from access or prohibit resale of capacity if these practices would undermine the economies of its operation or obstruct performance of responsibilities like universal service. Yet this approach maintains the focus on the behaviour of the incumbent public carrier. If access is to be truly open and the network seamless, it is important that the private competitors also be obliged to carry content, services and traffic from any source. If monopolies do dissipate, then the concept of access to essential facilities must be reworked. A very live question now is how wide to define the category of carriers who are to be subject to access and other regulatory obligations.

4.5.6 Even in the United States, where the markets are huge and the ethos of private competition is strong, legislators continue to mandate access. The latest developments include the Supreme Court's decision to uphold the legislation which requires cable operators to retransmit (must carry) free to air broadcast signals. As evidence of convergence, at the same time, News Ltd is lobbying the Congress to change the copyright law in order to ensure that satellite television enjoys the right to retransmit these free to air broadcast signals.

4.5.7 Access involves users as well as rival suppliers. Even if the concept of the common carrier loses its purchase in this process, the carriers need also to make a contribution to universal service, say by way of the provision of a levy into a common fund or provision of community facilities in public places, if access is to extend to all potential end users. Otherwise, the configuration will only be one of privileged closed networks (such as Intranets) circulating on top of a more amorphous and less resourceful public grid. This goal is not made any easier by the fact that universal service needs now to extend beyond the standard telephone service to take in enhanced services such as data transmission (Australian Consumers Telecommunication Network, 1993; Australian Standard Telephone Service Review Group, 1996).

4.5.8 Perhaps it should be appreciated that, as well as contributing to resource inequities, private networks pose a threat to regulatory competence in matters of tax evasion and organised crime. The United States government has been endeavouring to come to grips

with this shifting phenomenon through the definitions contained in its Communications Assistance for Law Enforcement Act of 1994 (Ward, 1996). But the property and privacy claims complicate the pursuit of this kind of concern. As a consequence an alliance has been forged between business users and electronic 'frontiersmen' to deny government access to transmissions using a system of key escrow and encryption technology (Drahos, 1995).

## **Conflict of Laws**

4.6.0 There are many instances when the practices in question, such as collusive agreements, exclusionary dealing or mergers and acquisitions, are clearly locally situated. But as the local markets are liberalised and opened to global flows, it is equally clear that practices outside the territory can have effects at home. For example, an agreement between two major suppliers overseas to partition world markets geographically rather than compete locally, or the acquisition of a controlling interest in a parent company off-shore which holds a local subsidiary, will have an effect on the efficacy of a country's competition policy. Legal jurisdiction - which is to say not only whose laws apply substantively but also in terms of the collection of evidence and execution of judgements - is classically territorial. But what establishes a satisfactory territorial connection in a field in which the object of regulation is trade in symbolic (fictional?) forms such as contracts and corporations?

4.6.1 Before referring to the experience with competition law, it is worth making a few general remarks about this problem of regulating corporate conduct. The corporate form multiplies many times over into complex patterns of associated and related companies, parents and subsidiaries, and holding companies and operational companies. Patterns of ownership and control cut across the formal legal demarcation lines, often in hierarchies, but in some cases they seem truly dispersed in corporate networks with multiple decision making points at which regulation might effectively be applied. Such distancing and masking of responsibility is not confined to the corporate form. The trust is another key device in certain areas of economic activity. The traditional regulatory approach has to treat each company as a separate entity and not to hold one responsible for another's actions, except under general principles of law like agency. Increasingly, if responsibility is to be effectively sheeted home, not only must the veil of the corporation be pierced, but the law must be prepared to see through the formal legal structures of corporate groups and networks into the realities of their technical and economic connections (Blumberg, 1993). In his perspicacious way, Teubner (1995) argues that this insightfulness must extend to piercing the 'contractual veil'.

4.6.2 The task is complicated by the fact that the corporate group may be separated into foreign and local companies. Jurisdiction over corporations has traditionally turned on nationality. If the separate entity approach is used, nationality will be defined on the basis of the country where the particular company is incorporated or the location of its seat or head office. But if enterprise principles are applied so that the regulators can act upon the place where decision making authority or financial power resides, the regulation may need to extend to foreign affiliates in the group and become involved in what look like extra-territorial applications.

4.6.3 Host countries endeavour to assert this jurisdiction over foreign companies because they are the real force behind the activities of their local affiliates. One objective is to control the extent of foreign ownership in strategic industries. Another is to sheet home responsibility for safety and the like. Braithwaite (1993) gives the example of pharmaceutical companies which were offshore in virtually every country in which they operated. In terms of fiscal responsibility, bankruptcy law is a prime example but the issue arises in all sorts of cases of intra-group transfers. Regulating preventively, countries often insist that the connections be disclosed so investors and others can make realistic assessments. One such requirement is

the publication of consolidated accounts. In some situations, it may further a regulatory objective to require local establishment, even to prohibit certain kinds of limited presence, for example branches rather than subsidiaries. Conditions may be attached to establishment, such as levels of capitalisation or performance requirements especially in regard to transfer pricing.

4.6.4 Furthermore, home country states have increasingly asserted jurisdiction over foreign companies on the basis that their ultimate ownership or control is in the hands of shareholders resident within their borders. The existence of foreign associates free of national controls can lead to ready evasion and frustration of regulatory objectives; the use of tax haven subsidiaries has been a major concern. But other practices need to be encompassed. These include the reimportation of capital or goods and the difficulties include determining when a company is effectively foreign or not for the purposes of attracting preferential treatment. The foreign investments and activities of locally based corporations have also been attached by some governments, notably the United States, as a means to export national policies abroad. The policies have related to a range of concerns, including military security, trade practices, human rights and labour standards.

4.6.5 In the case of competition policy, some countries have asserted extra-territorial jurisdiction because anti-competitive collusive or merger practices off-shore rebound on local companies. The United States has been notable, in the role either of a host and home country, for extending its antitrust laws to activities conventionally regarded as beyond its territorial reach (Demetriou and Robertson, 1995). It has met resistance from other countries, for instance by way of the enactment of blocking statutes. But other countries too, including Canada and Australia, have been concerned about the impact of foreign mergers and export cartels as well as restrictive intellectual property licensing practices.

4.6.6 Few countries, even the United States, may be able to carry off such a unilateral policy successfully. The linking of enterprise concepts with extra-territoriality may make host countries unattractive to mobile investors making strategic locational decisions. Home country corporations may resist being put to use as agents of foreign policy. The extra-territorial extension may also clash with conflicting policies and laws in other locations. One way to surmount these problems is international regulatory coordination and we should note the formation of bilateral cooperation agreements, primarily to do with evidence collection (Ungerer, 1996) and the role of the OECD committees in the coordination on a case by case basis of national responses to mergers with transnational dimensions. Some countries may demand reciprocity: for instance, the British Telecom-MCI merger has drawn attention to the provision in the new United States telecommunications legislation that any foreign company that wants clearance to acquire more than twenty-five per cent of a United States business must be able to point to a domestic market which is open to United States firms (*The Age*, 4 November 1996).

4.6.7 But competition law coordination continues to face hurdles because countries want to retain the opportunity to maintain differences and exercise discretion so that they can, where necessary, protect their own industries domestically and bolster them externally (Joseph and Drahos, 1996). Under the influence of the domestic conditions for competitiveness school (Porter, 1990), countries may unilaterally pursue competition at home. However, if competition law is an object of regulatory competition itself now, the authorities may be reminded that the same strict standards are not being applied at the foreign competitor's home base (Page, 1995). Such disparities are one impetus for the present calls for an international mechanism to further competition policy; the allowances permitted national champions such as export cartels, mergers and research and development consortia, may be the spur for the WTO's interests in a competition policy code (Ruggerio, 1995). But national competition and international trade policy develop a complex interface which goes well beyond this concern that competition law will be administered in such a way that it favours

local industry (OECD, 1994) (see below).

## **The GATS and Access Regimes**

4.7.0 An Annex on Telecommunications to the multilateral GATS agreement addresses some of the problems of regulating access which we have identified here. The Annex applies a number of relevant obligations to members, the core obligation being to ensure that service suppliers are accorded access to, and use of telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions. The binding, multilateral nature of the Annex makes its provisions worthy of attention.

4.7.1 We can start by identifying the beneficiaries of its obligations. The Annex is said to apply to all measures of a member that affect access to - and use of - public telecommunications transport networks and services. The access obligation is for the benefit of any service supplier of any other member when supplying a service which is included in the member's schedule. So it has been included in the GATS for the benefit of service suppliers generally and not for other telecommunications suppliers. At the same time, it is confined to sectors which a member has inscribed or entered in its schedule of commitments. Thus, a country may still choose not to list its basic telecommunications sector, or any of its value-added telecommunications service sectors for that matter, with the result being that telecommunications suppliers would not obtain the benefit of the Annex in that country. But whenever sectors are listed, the obligations must be met; the member cannot hedge them. So if telecommunications is inscribed in a schedule, or, for that matter, any other service sector, such as financial services, audio-visuals, retailing or business services, then their suppliers are to enjoy the benefits of the Annex (Tuthill, 1996). Limitations cannot be applied to access or use except by way of the measures which article XVI of the GATS, the general article on market access, requires to be listed (WTO, 1994).

4.7.2 To what does the access obligation pertain? Telecommunications are defined broadly to mean the transmission and reception of signals by any electromagnetic means, a definition which can at least encompass the ascending media of fibre optics and wireless satellites (glass and air). The definition of transport networks means the telecommunications infrastructure which permits telecommunications between and among defined network termination points. The definition of transport services states that these services may include telegram, telephone, telex and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information.

4.7.3 Thus, the Annex develops a distinction between such transport networks and services on the one hand and services which attach to them and flow over them on the other. Yet the technology is quite dynamic, and the real power in the future might not lie with the lines but, as we have speculated, with computer software and other systems integration services (Noam, 1994). The Annex also states that it does not apply to 'measures affecting the cable or broadcast distribution of radio or television programming'. Consequently, it leaves part of one of the major converging sectors, audio-visual services, to separate negotiations, without the benefit of the definitions and principles of a special annex. Again, developments may be making this demarcation problematic.

4.7.4 Within the telecommunications sectors themselves, more conventionally described, the approach is to treat the 'value-added' services sectors increasingly as ordinary commercial sectors subject to liberalisation but to recognise that many countries still regard the ownership and operation of the basic carriers as a special case. While the negotiations over commitments (see above) might lead to liberalisation, for the time being, access is the

trade-off for the retention of state-owned, often monopoly carriers. Nonetheless, privatisation does not necessarily lead to a multiplicity of carriers and access may be just as problematic in the case of private carriers which enjoy market power. The Annex defines public services to be any telecommunication transport service required, explicitly or in effect, by a member to be offered to the public generally. A contrast can be made with intra-corporate or closed user group networks of various kinds. But of course there is pressure for change in this sector too, participation in the two sectors overlaps, and the technology is in fact making it difficult to distinguish between basic and other services functionally.

4.7.5 All the same, despite these inhibitions, it is important to note that the obligations of the Annex are not confined to public carriers in the sense of state-owned carriers (Tuthill, 1996). Nor do they apply only to monopoly or dominant carriers, whether they are state or privately owned. Furthermore, they are not confined to transport networks, they extend to transport services. They include private leased circuits. They run to networks and services offered within or across the borders of members. Thus, the Annex provides the scope to rope in a wider range of carriers. So, while the Annex was clearly focussed on the remaining state owned or controlled carriers, it may leave a bigger legacy. The WTO's background notes to the negotiations over basic telecommunications (1996a) begin to develop this picture: 'The specification of terms and conditions of interconnection is just as relevant in respect of dominant private sector suppliers as it is in the case of state-owned suppliers'.

4.7.6 How far does the access obligation reach? To enable access, service suppliers are to be permitted to purchase or lease and attach terminal and other equipment which interfaces with the network, inter-connect private leased or owned circuits, and use operating protocols of the supplier's choice. These entitlements are limited, for, to be effective, access might need to extend to access, as we have suggested, to customer information and subscriber management systems. The Annex goes on to say that no conditions are to be imposed on the access and use which is embraced *other than* is necessary to safeguard public service responsibilities and to protect technical integrity, as well as to limit supply to the commitments made in the member's schedule. The Annex itemises a set of conditions which are to be expected to be associated with these objectives, such as restrictions on resale, requirements for inter-operability, technical requirements relating to attachment of equipment, and restrictions on interconnection of private leased or owned circuits. In these conditions lies the potential to maintain certain local safeguards.

4.7.7 Nevertheless, the implementation of the access obligation was likely to present challenges. The negotiating group on basic telecommunications has considered whether to promote access by way of a draft model national schedule or a body of general rules and understandings, the former approach being favoured by the beginning of 1996. The group also had to decide whether it would be preferable to do so by means of international rules and regulatory requirements specific to the telecommunications sector or through the applicability of more general competition law principles relating to positions of market dominance. The extended negotiations led to offers being made which incorporated regulatory principles (see above). Now the negotiations are completed, these principles will need to be analysed.

4.7.8 The backdrop to the negotiations has been the signals that competition policy will be incorporated as a general item within the WTO's work program (Hoekman and Mavroidis, 1994; Lloyd and Sampson, 1995), for ultimately the access question is a relatively narrow one. In December 1996, the Singapore Meeting of Ministers agreed to: 'establish a working group to study issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework'.

## Australian Law

### Provisions and Decisions

4.8.0 Australia has had the benefit of trade practices legislation since 1965. There are also doctrines in the common law, such as restraint of trade, which are relevant. The principal legislation is the Trade Practices Act 1974 (Cth) which has been expanded over the years to include an extensive set of provisions. Part IV of the Act contains prohibitions on certain kinds of conduct which are regarded as restrictive trade practices. Part V contains provisions for consumer protection including the proscription of certain unfair practices. The Act has recently been augmented by Part IIA which is designed to promote access to certain essential services. The authority responsible for enforcing the provisions of the Act is the Australian Competition and Consumer Commission (the ACCC), which was formerly styled as the Trade Practices Commission (the TPC). The Australian scheme is however like the United States scheme in allowing private parties to sue for contravention of many of the provisions.

4.8.1 While not targeting their practices, the general provisions of Part IV are relevant to the conduct of competition in the on-line media sectors. Section 47 proscribes various kinds of exclusive dealing, while section 45 aims at arrangements containing an exclusionary provision or a provision with an anti-competitive purpose or effect. Section 46 takes a more generic approach in sanctioning corporations which take advantage ('misuse') of a substantial degree of power in a market, for the purpose either of eliminating or substantially damaging a competitor, or preventing its entry, or deterring or preventing its competitive conduct, in that or any other market. Section 50 addresses acquisitions of shares or other assets which would result in the substantial lessening of competition in a market. With a few exceptions, these provisions require that the conduct be shown in the individual case to be anti-competitive in purpose or effect; it is not deemed anti-competitive per se. At the same time, contraventions of sections 47, 45 and 50 (though not of section 46) may be 'authorised' by the ACCC if they would result in a benefit to the public. Parties can obtain immunity for exclusive dealing if they notify it to the Commission.

4.8.2 The ACCC is an independent government authority with a considerable amount of expertise in the regulation of trade practices. The Commission prepares guidelines for the application of the various provisions. These guidelines include the 1990 guidelines for section 46 (Australian Trade Practices Commission, 1990) and the 1996 revised guidelines for section 50 (the merger guidelines). From time to time, the ACCC also makes operational decisions about the contraventions which it will target and the strategies it will employ to obtain compliance.

4.8.3 The uses of intellectual property have the potential to cut across all the provisions we have identified. While certain licence conditions are, by virtue of section 51(3) of the Act, absolved from contravention of the legislation (except from section 46), the legislation provides no blanket immunity for intellectual property. Yet it is worth noting that the authorities have never prosecuted the use of intellectual property under the Act. Instead, the few occasions on which the issue has been aired in the courts are the product of private litigation. For example, in the realm of copyright, one case involved the status of an exclusive distributorship for a kind of computer game; another case, the withholding by a collection agency of licences to play sound recordings. The advent of such agencies has required the Commission to provide authorisations under the Act.

4.8.4 In 1991, the TPC published a background paper regarding the application of the Act to intellectual property (Australian Trade Practices Commission, 1991). It was prepared for the Commission by a private legal firm. The publication was informative and expert, however, its relevance in the current context of globally converging media markets would seem limited. The reference point it struck for its assessment of the uses of intellectual property was very

much the vertical distribution chain, in which Australian firms are on the receiving end of licences from foreign firms. The overall theme of the paper was that the authorities should be prepared to accept exclusive and restrictive licensing conditions because the alternative, which was seen as the withholding of licences altogether, would be worse for Australia.

4.8.5 The background paper discussion of section 46 guidelines allocated various kinds of practices between white, grey and black lists. Those on the black list would be viewed as contraventions of the Act. The paper placed refusals to license intellectual property rights on its 'white list', though at the same time suggesting that such practices as the accumulation of rights in order to make market entry more difficult and the initiation of frivolous or intimidatory infringement proceedings, might still constitute a contravention. The grey list included licensing arrangements where they comprise a form of leverage to obtain advantages outside the statutory monopoly of the property right such as tie-ins, grant backs and no-challenge arrangements might do.

The grey list also embraced denial of access to essential facilities. For an early insight into the application of section 46 very much related to on-line media, it is worth consulting the decision in *Pont Data vs ASX Operations* (1990) Australian Trade Practices reports #41.007. This decision viewed unfavourably the use by the operators of the Sydney and Melbourne stock exchanges of control over the dissemination of information about exchange transactions in 'real time'. They had exercised that control in order to discourage competition, first in the stock market trading markets themselves, and secondly in the markets for information about trading, especially the wholesaling of such information. Subsequently, following on from the Hilmer Committee Report and the Competition Principles Agreement between the Commonwealth, State and Territory governments, the 1995 Competition Policy Reform Act inserted the new Part IIIA into the Act. Part IIA goes beyond the general provision of section 46 by detailing provisions to facilitate access by third parties to the services of certain essential facilities. The process for obtaining access can first be activated if a service is declared. On the recommendation of the National Competition Council, the relevant Minister can declare a service if he is satisfied that, *inter alia*, (a) access to the service would promote competition (b) it would be uneconomical for anyone to develop another facility to provide the service (c) the service is of national significance and (f) access would not be contrary to the public interest. Once declared, access is to be the subject of agreement between the parties, with the ACCC afforded the power to arbitrate if a third party is unable to agree with a provider on access to a service and either of the two notifies the Commission that a dispute exists. An alternative procedure is for the provider of a service to offer an undertaking to the Commission of the terms and conditions for access to a non-declared service. The Commission may accept the undertaking if it is in the interests of the provider and those who might want access, as well as in the public interest.

4.8.7 The Part IIIA provisions were designed to promote competition in the sectors which have been dominated by public utilities, but it should be appreciated that they are not confined to these sectors. In their exploration of the Act, King and Maddock (1996) point out that the kind of services which might be declared is potentially quite wide. However, it is to be noted that the definition of a service expressly excludes the use of intellectual property (section 44B).

4.8.8 These general access provisions have been followed by draft legislation designed specifically to promote access to telecommunications carriage services. This legislation is to amend the Telecommunications Act in support of the further liberalisation of this sector which is due to take place at the beginning of July 1997. The draft legislation provides for such services to be declared subject to access requirements. In the event of a declaration, certain standard access obligations come into effect. But, apart from these obligations, access is as commercially agreed between the access providers and seekers or as determined by the ACCC through arbitration of a dispute. Again, the opportunity exists to provide an

undertaking to the Commission. The legislation also applies the general competition provisions of the Trade Practices Act to the conduct of the telecommunications carriers and carriage service providers. One modification of their application is that the anti-competitive purpose requirement pursuant to section 46 is relaxed in favour of the requirement of an anti-competitive effect.

4.8.9 There are parallels in other sectors of the media. In particular, the Broadcasting Services Act 1992 requires the Australian Broadcasting Authority to impose conditions on satellite subscription television broadcasting licences, designed to ensure that domestic reception equipment used by each licensee is accessible to other such services; likewise subscriber management systems must be accessible at a fair price.

4.8.10 The ACCC has begun work on implementing these access obligations, for example by circulating draft pricing guidelines for declared services. Of course, critical decisions concern which services to declare (*Australian Financial Review*, 22 April 1997). With convergence, it would seem artificial to confine them today to voice telephony carriage services. Already, third party Internet access providers have raised the question whether virtual points of presence should be declared. An allied question is the extent to which such services should be unbundled so that they can be purchased separately. While the focus will be on Telstra, the Optus cable network will also come under consideration.

4.8.11 Such regulatory innovations are designed to assuage concerns about a critical, but we might venture to say, relatively narrow concern about access to basic technology or infrastructure facilities. Rather as the MSG Media Service case signifies (see above), it is the many overlapping, intersecting coalescences of participants and resources which are increasing the long-term demand on regulatory capacities. Already, the ACCC workload of case by case evaluation is stepping up; it has been required to examine several proposals for mergers or joint ventures (Windybank, 1996). These proposed alliances involve the combination of a range of assets including content (core programming) and means of delivery (satellite, microwave and cable). With increasing convergence, they also implicate telephony and interactive services. They urge the ACCC to make situation-specific judgements and prognostications about the nature of markets, market power and use of market power. In Appendix 2, the report recounts some recent relevant decisions of the ACCC.

## **Conflict of Laws**

4.9.0 There are several provisions in the Trade Practices Act which provide the potential for Australian law to reach out to activities that are partly off-shore yet have an effect on local markets. The Act takes a more realistic view of the entities whose conduct can affect competition by not confining its purview to those which are actually incorporated in Australia. Its purview extends to certain conduct outside Australia which is engaged in by bodies incorporated in Australia or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia. Another point of attachment to jurisdiction is established by a relation to Australian trade or commerce. It may be trade and commerce between Australia and places outside Australia, thus catching conduct which affects export or import trade.

4.9.1 Meltz (1996) provides a careful exposition of the ways in which the legislation establishes the jurisdiction through the link with either the entity, the conduct or the impact. He considers the implications of the Act for the functions of legislation, adjudication and enforcement. Nonetheless, he observes that the presumption of territoriality continues to operate and a major consideration for the authorities and courts is international comity, that is the avoidance of clashes with inconsistent foreign laws. Jurisdiction is as much a political as

a legal problem.

4.9.2 Given the many off-shore decisions which affect competitive conditions in Australia and the ability of Australian firms to compete in international markets, it makes sense for the Australian authorities to engage in international cooperation. In a recent survey, Grimwade (1996) indicates that the ACCC maintains links of both an informal and formal nature with a number of countries. But the level of cooperation is still rudimentary even in respect of investigation and enforcement. Sovereignty is still jealously guarded and Australia itself once objected to the extra-territorial reach of United States law. If Australia is to practise competition policy at home in a whole hearted fashion, it is in its interests to see that other countries do so too. Australia has been prepared to advise law makers in other countries which are contemplating the adoption of a domestic competition policy. In addition, it has been an active contributor to international policy circles such as the OECD's Committee on Competition Law and Policy. The Department of Foreign Affairs and Trade has recently undertaken valuable conceptual work to substantiate the links between competition and trade policy (see Australian Department of Foreign Affairs and Trade, 1995, 1996). It has promoted the topic at APEC, though it remains to be seen whether other members are as willing to firm up the issue. In Singapore, Australia supported competition policy's addition to the WTO work program. In the continuing negotiations over basic telecommunications, it has also contributed to the development of regulatory principles.

## **Prospects**

4.10.0 The obstacles to the internationalisation of competition law are many, yet competition law may ultimately reveal its own intrinsic limitations in dealing with the issues of access to global communications media. These limitations become all the more important where industry-specific controls are relaxed, yet market power is potentially augmented by the availability of new intellectual property rights. Competition law authorities admit themselves that their usual battery of regulatory concepts and offences are too general and obtuse to provide the proactive and fine grained conditions required for access to be effective. The concepts leave too much room for argument. The process depends on litigation at the initiative either of the competitors in some jurisdictions or the authorities in most. Litigation is too reactive, protracted and expensive to help in many situations (Flood, 1995); it is largely the preserve of the biggest industry players (Irwin, 1987). In Australia, the head of the ACCC has reminded enthusiasts of this limitation on several occasions.

4.10.1 If they are to overcome these limitations, then, paradoxically, the authorities shift to a more familiar industry-specific regulatory approach. They develop first a corpus of lore regarding the interpretation of legislative provisions, guidelines for industry and priorities for action. They move into working relationships with industry through the monitoring of agreements and undertakings (European Commission, 1995), even brokering codes of conduct and offering arbitration services. Are they better equipped to do this than the industry-specific agencies - are they more expert, accurate and efficient (Olson and Spiwak, 1995)? Possibly, they may not be so prone to capture, though, as soon as they start mediating industry relationships and accepting private arrangements, such as interconnection agreements, it is hard to see how the smaller firms and especially the new entrants, let alone the consumer groups, will have the same say as the incumbents (King and Maddock, 1996). If it is the only regulator left, then resourcing and staffing decisions become critical. Considerable thought needs to go into designing processes which are transparent and accessible.

4.10.2 However, a more fundamental query attaches to competition law. It is in the end an economic and utilitarian outlook (Preston, 1995). It is difficult to see how it can truly

represent all the non-economic social aspirations of the locality, the locality as citizens, workers and residents as well as consumers, except to view them as a trade-off for efficiency gains. Again, in Australia, the head of the ACCC has reminded us that its brief does not run to social goals such as media diversity (*The Age*, 24 September 1996).

4.10.3 Furthermore, notwithstanding its shifts between laissez-faire and institutionalist economic theories, competition law must be largely complacent about the structures of power in the marketplace, including the power conferred by intellectual property; it deals in a sense only with the tip of the iceberg. It would certainly be an enhancement if its internationalisation involved the examination and discipline of the power exercised across national boundaries by corporate groups and networks. But even if it did so, it is not clear that a smaller region would gain much from standards that were only activated once firms had a dominant position in a global market (Preston, 1995). Specific practices would need to be prosecuted. To do this, the countries which are the home bases and the big markets would have to show more willingness to cooperate. At present, many small countries simply lack either the technical expertise, the legal jurisdiction or the political power to discipline the transnational corporations (Reichman, 1993).

4.10.4 All this points to the need for the presence of some specific regulation, but regulation which is pitched at the international rather than the national level. Perhaps the United Nations codes of conduct for multinational enterprises, regarding, for instance, restrictive business practices and technology transfer, would have been more attuned to these aspirations, had they been widely acceptable (see Nixon, 1983; Cabanellas, 1984; Blakeney, 1989; Blanpain, 1993). It may be necessary to revisit these international models and develop a transnational law of unfair trade and business practices, a new jurisprudence of corporate citizenship, which is translated into the specificities of each sector. Competition law would be part of this regime but it might need to embrace a range of positive obligations too. For example, a coordinated approach may be required to ensure that commitments to universal service can be levied on an inter-operator and inter-national basis. If intellectual property owners and other commercial participants resist being 'taxed' by national regulation to facilitate universal access, how are public libraries and schools, for instance, going to be funded to obtain the equipment and services which they need to participate?

## **Section 5**

### **Conclusion**

5.0 The report identifies a developing field for regulation of the on-line media that is both complex and dynamic. Loss of faith in industry-specific regulation places even greater demands on intellectual property and competition law formation. In Australia, the agencies involved in policy development, such as the CLRC and the ACCC, have their work cut out for them. If they feel confident about their objectives, they must still settle on viable strategies of implementation. They must meet the challenge of translating the broad concepts and processes of these laws into an entirely apposite and workable response to the on-line media situation. In part, this task requires them to proceed with a worldly sensibility. They need to appreciate the opportunities available to major participants to escape the strictures of national laws which they do not favour; at the same time they have to make the most of the supra-national regimes that endeavour to control this regulatory competition.

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**Appendix 1:**

**WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions**

- A. AGREED STATEMENTS CONCERNING THE WIPO COPYRIGHT TREATY
- B. WIPO COPYRIGHT TREATY

WIPO

**CRNR/DC/96**

**ORIGINAL:** English

**DATE:** December 23, 1996

**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

**DIPLOMATIC CONFERENCE**  
**ON**  
**CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS**

**Geneva, December 2 to 20, 1996**

**AGREED STATEMENTS CONCERNING**  
**THE WIPO COPYRIGHT TREATY**

*adopted by the Diplomatic Conference on December 20, 1996*

**Concerning Article 1(4)**

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

**Concerning Article 3**

It is understood that in applying Article 3 of this Treaty, the expression "country of the Union" in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression "country outside the Union" in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that "this Convention" in Articles 2(8), 2bis(2), 3, 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a "national of one of the countries of the Union" will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization.

**Concerning Article 4**

The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

**Concerning Article 5**

The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

**Concerning Articles 6 and 7**

As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

**Concerning Article 7**

It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

### **Concerning Article 8**

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).

### **Concerning Article 10**

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

### **Concerning Article 12**

It is understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

[End]

**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

**DIPLOMATIC CONFERENCE**  
**ON**  
**CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS**  
**Geneva, December 2 to 20, 1996**  
**WIPO COPYRIGHT TREATY**

*adopted by the Diplomatic Conference on December 20, 1996*

**Contents**

Preamble

Article 1: Relation to the Berne Convention

Article 2: Scope of Copyright Protection

Article 3: Application of Articles 2 to 6 of the Berne Convention

Article 4: Computer Programs

Article 5: Compilations of Data (Databases)

Article 6: Right of Distribution

Article 7: Right of Rental

Article 8: Right of Communication to the Public

Article 9: Duration of the Protection of Photographic Works

Article 10: Limitations and Exceptions

Article 11: Obligations concerning Technological Measures

Article 12: Obligations concerning Rights Management Information

Article 13: Application in Time

Article 14: Provisions on Enforcement of Rights

Article 15: Assembly

Article 16: International Bureau

Article 17: Eligibility for Becoming Party to the Treaty

Article 18: Rights and Obligations under the Treaty

Article 19: Signature of the Treaty

Article 20: Entry into Force of the Treaty

Article 21: Effective Date of Becoming Party to the Treaty

Article 22: No Reservations to the Treaty

Article 23: Denunciation of the Treaty

Article 24: Languages of the Treaty

Article 25: Depositary

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**Preamble**

*The Contracting Parties,*

*Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,*

*Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,*

*Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,*

*Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,*

*Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,*

*Have agreed as follows:*

**Article 1**

**Relation to the Berne Convention**

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the

Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

#### **Article 2**

##### **Scope of Copyright Protection**

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

#### **Article 3**

##### **Application of Articles 2 to 6 of the Berne Convention**

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

#### **Article 4**

##### **Computer Programs**

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

#### **Article 5**

##### **Compilations of Data (Databases)**

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

#### **Article 6**

##### **Right of Distribution**

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

#### **Article 7**

##### **Right of Rental**

(1) Authors of

(i) computer programs;

(ii) cinematographic works; and

(iii) works embodied in phonograms, as determined in the national law of Contracting Parties, shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.

#### **Article 8**

##### **Right of Communication to the Public**

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

#### **Article 9**

##### **Duration of the Protection of Photographic Works**

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

#### **Article 10**

##### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

#### **Article 11**

##### **Obligations concerning Technological Measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

#### **Article 12**

##### **Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

#### **Article 13**

##### **Application in Time**

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

#### **Article 14**

##### **Provisions on Enforcement of Rights**

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

**Article 15**  
**Assembly**

- (1)(a) The Contracting Parties shall have an Assembly.
- (b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.
- (c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
- (2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
- (b) The Assembly shall perform the function allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.
- (c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.
- (3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.
- (b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.
- (4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.
- (5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

**Article 16**  
**International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

**Article 17**  
**Eligibility for Becoming Party to the Treaty**

- (1) Any Member State of WIPO may become party to this Treaty.
- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.
- (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

**Article 18**  
**Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

**Article 19**  
**Signature of the Treaty**

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

**Article 20**  
**Entry into Force of the Treaty**

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

**Article 21**  
**Effective Date of Becoming Party to the Treaty**

This Treaty shall bind

- (i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty

according to Article 20, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

#### **Article 22**

##### **No Reservations to the Treaty**

No reservation to this Treaty shall be admitted.

#### **Article 23**

##### **Denunciation of the Treaty**

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

#### **Article 24**

##### **Languages of the Treaty**

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

#### **Article 25**

##### **Depositary**

The Director General of WIPO is the depositary of this Treaty.

[End]

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## Appendix 2

### Related Australian Competition and Consumer Commission Decisions

This summary is gleaned from the Commission's Annual Reports and regular bulletins. Some of these decisions are available for inspection at the Commission's offices.

1994 The Commission did not oppose a take-over of Infocast Australia Ltd, an equities information services company, by Reuters Nederlands B/V.

1995(1) The ACCC decided to take no action on an arrangement (under the Galaxy banner) between Australis Media and Foxtel for the carriage of each other's programs. (Foxtel is an alliance between Telstra and News Ltd). At the time, these parties controlled most of the means of delivery of pay television. The parties assured the Commission that they would continue to compete on pricing, range of programs and delivery systems. Free to air television was regarded as a competitive medium in the same market.

1995(2) The Commission examined a joint venture between Optus Communications, Continental Cablevision and Publishing and Broadcasting Ltd for pay television and telephony. The venture would exclude broadband interactive services. Publishing and Broadcasting Ltd was involved in a free to air network, channel nine. Subsequently, another free to air network, channel seven, sought to join. The ACCC accepted both participants. They would strengthen the venture against its rival, Foxtel, which enjoyed financial, marketing and programming resources world-wide.

1995(3) The ACCC further allowed cooperation between Australis Media and Continental Century under the Galaxy banner where control over the means of delivery of pay television remained high. The cooperation would strengthen Galaxy in the face of both Optus Vision and Foxtel which between them had tied up the rights to many movies and mass appeal sports. Continental Century could not expect to compete head on with these two in core programming.

1995(4) The Commission did not oppose an acquisition of Grundy Worldwide Ltd, an Australian based production house, by Pearson plc, a UK based company which owns Thames Television and the Financial Times.

1995(5) The Commission did not oppose a joint venture between Optus Vision, channel nine and channel seven, for the supply of sports program packages to pay television.

1995(6) The Commission decided not to take any action against a joint venture between Microsoft and Telstra for the supply of on-line services as On Australia. The Commission received many representations concerned the bundling of Microsoft Network access software on the operating system, third-party online access providers' ability to load their access software on the operating system, applications software development, the provision of content on the Microsoft Network, and the tariffs for data carriage. The Commission sought assurances with regard to the issues raised and resolved to monitor the venture's actions.

1995(7) The Commission decided not to oppose the acquisition of the Australian Academic Research Network (AARNet) by Telstra. AARNet is a gateway for entry by subscribers to the Internet. The Commission took the view that the market for on-line

services was evolving and that there were alternative sources of supply.

1995-1996 The Commission considered that a merger proposal between Australis Media and Foxtel would lead to a substantial lessening of competition. The merger did not proceed though Australis was reported to be looking instead to Publishing and Broadcasting Ltd for funds.

1996(1) The Commission decided not to intervene to oppose a joint venture between Australis Media and Optus Vision to share satellite infrastructure. Its judgement was made in the light of an agreement between Australis and Publishing and Broadcasting Ltd which gave the latter rights of refusal over certain of Australis programming assets. The Commission accepted an assurance that the parties would continue to compete in terms of pricing, marketing and programming content. The Commission's approval would be required before they took steps to provide combined programming. Interactive services and near video on demand were not part of the joint venture; it had no impact on telephony. The Commission did not feel that the venture gave the parties advantages in the penetration of the market, yet it had the benefit of allowing customers to use the one satellite dish and set-top box to receive both Galaxy and Optus Vision signals.

1996(2) The Commission received notifications of exclusive dealing conduct. These notifications report deals tying in telephony, telecommunications services and subscription television services through the offer of preferential and discount terms to selected customers.