

## media & entertainment insight

June 2008

### Producer offset update

On 15 May 2008, the Film Finance Corporation Australia released amended Guidelines in respect of the Producer Offset (**Guidelines**). The Guidelines are substantially similar to the previous guidelines; however they do contain the following notable changes.

- Verification of distribution for an eligible project must now indicate that the relevant project has been produced for Australian public release rather than general public release.
- A clear intent for public exhibition must be shown to exist both before and at the commencement of principal photography of a project. Evidence may take the form of a bona-fide, legally binding deal memo or distribution agreement, and non-binding deal memos or letters of intent are not considered sufficient. If an applicant can show relevant intention at the time of provisional certification, this intent will be taken to continue to exist for final certification also.
- An applicant will not be eligible to claim the Producer Offset if that production company has received a final certificate for the Refundable Film Tax Offset for the project.
- Residuals may only be claimed as qualifying Australian production

expenditure (**QAPE**) if paid to cast members before production is completed and where the payment relates to production activities undertaken in Australia.

- Travel costs to Australia that relate to production activity undertaken in Australia will be considered QAPE where that travel relates to incoming journeys for non-Australian personnel only.
- A trailer must be manufactured during production and shot in Australia to qualify as QAPE.
- Applications for official treaty or memorandum of understanding co-productions must provide a copy of the agreement between the co-producers of the relevant film, and evidence from the Commonwealth of Australia and from the relevant co-producer's film authority that the film is an official co-production when making a provisional certification application and again at final certification.

A copy of the revised Guidelines is available at [www.ffc.gov.au/producer\\_offset](http://www.ffc.gov.au/producer_offset).

By way of background, the Producer Offset is a financial incentive offered

under the Income Tax Assessment Act 1997 (Cth) to producers of eligible projects in the form of a tax offset. A company which is an eligible applicant for an eligible project is entitled to receive an offset against tax incurred (and a refund if applicable) in relation to a percentage (a feature film receiving the highest percentage of 40%) of the QAPE incurred on the project.

The Producer Offset can be applied for at any time prior to completion of a project (provisional certification), and/or after all expenditure in relation to the film has ceased and the film is complete and the project has evidence of distribution (final certification). Additionally, as a project must have "significant Australian content", and provide for sufficient QAPE, it is possible to apply for provisional certification in respect of either or both of these aspects of the production to provide greater certainty as to whether a project will be eligible for final certification.

The Producer Offset is administered by the Film Finance Corporation (**FFC**). However, from 1 July 2008 the FFC will be incorporated into a "super" Australian film agency, known as Screen Australia. The final details of Screen Australia, including the composition of the governing board, have not yet been confirmed.

# Nine Network wins appeal against IceTV

A Full Court of the Australian Federal Court has allowed the appeal by Nine Network Australia Pty Ltd (**Nine**) in respect of the publication on the internet by IceTV Pty Ltd (**IceTV**) of a program information guide to Australian television programs.

## Background

Each week Nine provides to third parties for publication in print and internet television guides 5 components in respect of its television programs, being the time, title and date (**Program Information**), in addition to the classification and synopses of the programs. Those third parties publish a compilation of all of the television networks' Program Information in public television guides (**Public Guides**).

Nine alleged that IceTV infringed its copyright by publishing on the internet the 'IceGuide' (**IceGuide**), a program guide which included a close to 100% reproduction of Nine's Program Information which was available in the Public Guides. Nine alleged that IceTV only infringed the copyright in its Program Information, being 3 of the 5 individual components of the total information available and not the information regarding the classification and synopses of the programs.

## Original Federal Court decision

In August of last year, the primary judge held that, although copyright subsisted in Nine's program information schedules (**Nine Schedules**) as an original literary work under the Copyright Act 1968 (Cth) (**Act**), Nine had failed to establish that IceTV infringed the copyright in its Program Information as IceTV produced the IceGuide by ascertaining Nine's Program Information by IceTV's own independent inquiry based on observations of Nine's past programming behaviour.

The key findings were as follows:

1 Nine had exercised 2 distinct kinds of skill and labour to produce the Nine Schedules, being:

- skill and labour in selecting and arranging television programs for each week; and
- skill and labour in incorporating into the Nine Schedules information such as the classification of programs, synopses of programs and consumer advice.

The first category was merely preparatory to the creation of the Nine Schedules, which are compilations of information for the purposes of the Act.

2 Nine's main purpose in deciding which programs to broadcast and when to broadcast them was not to create a literary work, but to decide upon its programming schedule.

3 To the extent that the Program Information was taken from the Nine Schedules for the purpose of preparing the IceGuide, the primary judge found that the information was insubstantial having regard to the actual extent of copying, the quality and originality of what was taken and the nature of Nine's interest protected by its copyright in the compilation. To determine this question, the primary judge considered whether or not the Program Information in the Nine Schedules was 'qualitatively more important than the synopses'.

## Full Federal Court decision

The Full Court agreed that copyright subsisted in the Nine Schedules as an original literary work under the Act. In respect of the findings of the primary judge, the Full Court found that (adopting the same numbering as above):

- The primary judge erred in finding that the skill and labour in selecting

and arranging the programs was 'preparatory' to the exercise of skill and labour in preparing the Nine Schedules, and said that past cases:

"...recognise that the originality in a compilation, such as a listing of programs to be broadcast in a future period, may well lie primarily in the skill and labour expended by the compiler in selecting and ordering the programs. The decisions reject the notion that that kind of skill and labour should be disregarded when assessing the originality of a compilation".

- Although there are cases where a dichotomy is justified between preliminary work and the actual transcript of a compilation if the work was done with no ultimate intention of a compilation, the Full Court rejected this argument on the basis that the "Nine Network engaged in the so called preliminary work precisely in order to create the compilation in which it claims to have copyright." Accordingly, the Full Court affirmed the principle that copyright protection will attach to a compilation, whether or not the selection is made on business or literary grounds.
- The primary judge applied the incorrect test in determining whether a substantial part of the copyright work had been taken. The primary judge considered whether or not the Program Information was 'qualitatively more important than the synopses', which was not the correct test. The Full Court affirmed that the correct test to determine whether a substantial part of the copyright work has been taken is to "inquire into the importance of the part taken to the copyright work as a whole by asking whether it is an 'essential' or 'material' part of the work". The Full Court

found on the facts that this was established as the Program Information was a crucial element of the compilation, and was of particular interest to potential viewers.

On the issue of causation, IceTV argued that the requisite causal connection was not present in this case because the

information in the Nine Schedules was separated and reassembled into the Public Guides with the corresponding information provided by the other Australian television networks. The primary judge held, and the Full Court agreed, that IceTV had indirectly copied the Program Information from the Nine Schedules on the basis that the Public

Guides were assembled with permission and under a licence from Nine and, accordingly, the causal connection was present.

Accordingly, the matter is being remitted to the primary judge for hearing and to make a determination in relation to the relief sought by Nine.

## ACCC issues legislative instruments for the assessment of digital radio access undertakings

On 27 May 2008, the Australian Competition and Consumer Commission (**ACCC**) released 2 legislative instruments for its assessment of digital radio access undertakings, being the Digital Radio Multiplex Transmitter Licences (Decision-Making Criteria Determination 2008 (**Decision Making Criteria Determination**)) and the Digital Radio Multiplex Transmitter Licences Procedural Rules 2008 (**Procedural Rules**).

### Background

On 1 January 2009, it is intended that digital radio will commence broadcasting in the state capital cities of Australia using Digital Audio Broadcasting technology. The Australian Government has established its policy and framework for digital radio under which the Australian Communications and Media Authority (**ACMA**) will allocate digital radio multiplex transmitter licences following an application process. After the digital radio multiplex transmitter licences have been allocated to licensees (**Multiplex Licensees**) the ACCC will oversee the access regime including to assess access undertakings provided by Multiplex Licensees and arbitrate disputes.

On 11 December 2007, ACMA published a notice inviting licence applications from eligible joint venture companies for foundation category 1 digital radio multiplex transmitter licences (**Category 1 Licences**). The closing date for applications for Category 1 Licences was

9 May 2008 and ACMA will announce and issue the Category 1 Licences to the successful Multiplex Licensees in due course. Following the commencement of digital radio services in each licence area, a 6 year moratorium on the issue of new commercial digital radio licences in each licence area will apply.

### Access Undertaking

Within 3 months after being issued with a Category 1 Licence by ACMA, each Multiplex Licensee will be required to lodge with the ACCC an "access undertaking" (**Access Undertaking**). Each Access Undertaking must specify the manner in which the Multiplex Licensee will provide access to transmission capacity to individual digital radio broadcasters in each licence area.

The Access Undertaking is an undertaking which states that the Multiplex Licensee will comply with the access obligations, being standard access obligations and excess-capacity obligations (as explained further below), which are set out in the Radiocommunications Act 1992 (Cth) (**Radcoms Act**).

The standard access obligations under the Radcoms Act provide that:

- each incumbent commercial broadcaster has a standard access entitlement equal to one-ninth of the total transmission capacity under each Category 1 Licence; and

community broadcasters share a total of

two-ninths of total transmission capacity under each Category 1 Licence via a community broadcasting representative company.

The excess-capacity access obligations under the Radcoms Act provide that Multiplex Licensees have 90 days from the start-up date to ascertain the level of demand for excess capacity (which the ACCC has calculated will occur at each multiplex). If demand exceeds supply, within 60 days after ascertaining the level of demand and supply of excess capacity, each Multiplex Licensee must conduct a transparent auction process for the excess capacity.

### Decision Making Criteria Determination

The Decision Making Criteria Determination sets out the high level principles that guide how the ACCC will assess Access Undertakings.

The stated purpose of the Decision Making Criteria Determination is to "promote transparency in decision-making by setting out the criteria that the ACCC must apply in deciding whether to accept an access undertaking or a variation of an access undertaking given to the ACCC in relation to a digital radio multiplex transmitter licence."

The Explanatory Statement to the Decision Making Criteria Determination further clarifies the criteria that Access Undertakings will be required to address to comply with Division 4B of Part 3.3 of the Radcoms Act and includes:

- **whether the Access Undertaking unduly restricts competition in related markets** - which includes consideration of pricing, differentiation between foundation access seekers and non-foundation access seekers, and a prohibition on interference;
- **whether the terms and conditions of access specified in the Access Undertaking are reasonable** - as the Multiplex Licensee is required to provide multiplex services to commercial, community and data service operators, it will be required to consider issues such as the business interests, public interest and operational and technical requirements in its terms and conditions of access;
- **whether the terms and conditions of access specified in the Access Undertaking includes access prices or pricing methodologies which are reasonable** - the ACCC will request each Multiplex Licensee to provide a pricing methodology or estimate of the licensees indicative prices, based on reasonable assumptions;
- **whether the Access Undertaking includes an obligation on the Multiplex Licensee not to hinder access to services** - an obligation

not to hinder services is required in the Access Undertaking including in relation to the implementation of certain technology or standards which have the effect of hindering particular access seekers; and

**whether the terms and conditions of access specified in the Access Undertaking provide for a reasonable dispute resolution mechanism** - the ACCC will assess whether the dispute resolution mechanism in the Access Undertaking facilitates the fair, timely and efficient resolution of disputes.

In addition, the Decision Making Criteria Determination provides that, in deciding whether to accept a variation to an Access Undertaking, the ACCC must have regard to the matters set out above.

#### Procedural Rules

The Procedural Rules set out the rules about the practice and procedure to be followed by the ACCC in performing its functions and duties under Division 4B of Part 3.3 of the Radcoms Act and includes provisions in relation to:

- documents provided by Multiplex Licensees to the ACCC, and the form of those documents and supporting documents and submissions;

- the information that must be provided by each Multiplex Licensee to the ACCC in the Access Undertaking and includes procedures under which the ACCC may request further information and alter Access Undertakings;
- the prohibition on the inclusion of confidential information in an Access Undertaking and the procedure that each Multiplex Licensee is required to follow to request that the ACCC does not make certain documents, supporting documents and submissions publicly available that contain confidential information;
- limits on the use by the ACCC of information submitted by each Multiplex Licensee to the ACCC;
- information sharing between the ACMA and the ACCC; and
- matters that each Multiplex Licensee must include in its annual reports that must be submitted to the ACCC within 60 days of the end of each financial year.

The stated object of the Procedural Rules is to “promote the expeditious and efficient exercise of the ACCC’s functions and powers.”

## The fair dealing defence for parody and satire

One recent amendment to the Copyright Act was the introduction of a fair dealing defence for parody and satire (ss 41A and 103AA). This defence ensures that a person cannot infringe copyright in a literary, dramatic, musical or artistic work (or adaptations of such) and sound recordings, films or broadcasts, where the use of the material amounts to fair dealing for the purpose of parody or satire.

### What is a parody or satire?

Unfortunately the Copyright Act does not include a definition of ‘parody’ or ‘satire’ and both terms are yet to be interpreted by the Australian courts.

Some guidance may be taken from the United States. The Supreme Court in *Campbell v Acuff-Rose Music, Inc* 510 US 569 (1994) considered the terms and determined that parody imitates or mimics the original work to make its

point (for example a comedy skit using parts of a movie to criticise it), whereas a satire uses the original work to attack or criticise something else such as celebrities, society or politicians.

### What is a Fair Dealing?

The Copyright Act also offers no specific guidance as to when a dealing for the purposes of parody or satire will be considered fair.

It is likely that what is 'fair' will be determined by a number of factors including:

- the amount of original material used compared with the amount of copyright material used;
- the quality of the copyright material used and whether it is the key element of the work or not;
- the purpose, context and originality of the use;
- the type of dealing, namely whether it is non-commercial or private use compared with a commercial, public use; and
- the effect of the dealing on the market for the original work.

#### Limitations with the Defence

There is debate on the relevance of moral rights to the fair dealing defence. On the one hand it has been argued that the fair dealing exception for the purposes of parody and satire should be subject to an artist's moral rights, but on the other that a fair dealing for the purposes of parody or satire be seen as acceptable to provide a defence to the infringement of moral rights. Tension certainly does exist between parody and satire and moral rights, but full consideration of both sets of laws should allow for a fair interpretation by the courts and an appropriate finding based on the facts.

Other laws that may also pose limitations on the fair dealing defence include trade

mark protection of popular marks, characters or images; contractual restrictions; and laws concerning sedition, obscenity or vilification.

#### Examples of use of the Defence

While the courts are yet to consider the exception, it is quite clear cartoonists will often be safeguarded by the defence. In the second reading speech to Parliament the Attorney-General referred to the new exception "as protecting free speech for cartoonists and comics." The defence has already been relied on by The Australian's cartoonist Bill Leak. Leak often depicts Kevin Rudd as Tintin and in May last year Crikey reported that the estate of the Tintin creator threatened legal action for breach of copyright. Leak, however, continued to depict Rudd as Tintin in reliance on the fair dealing defence. It appears that the solicitors for the creator's estate have accepted that the cartoon is a parody for the purposes of the defence, as they are reportedly no longer threatening legal action.

The fair dealing exceptions that were available before the 2006 amendments such as fair dealing for the purpose of research or study, or for criticism and review, are still in place. However the introduction of this new defence certainly opens up room for comics, writers, artists and performers to experiment with copyright material for parodic and satirical purposes in circumstances which are fair. However, until the law is tested it is difficult to determine just how far this defence will extend.

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