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IP Rights Trump Competition Law: TV Transmission Spat Highlights Issues for Businesses

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Many IP rights are carved out of the competition law regime. However, businesses with IP need to take care to protect these rights, in this complex area.

The tension between IP rights and competition law is illustrated by issues between Pay TV and Free to Air channels

It's challenging to get the right balance between:

- protecting intellectual property rights (IPR); and
- fostering positive outcomes under competition law.

This is so even though both have some overlapping objectives, such as encouraging innovation and investment (i.e. dynamic efficiency). They approach those drivers in different (and generally conflicting) ways.

IPR carve-outs in the Commerce Act

The New Zealand Commerce Act has carve-outs for IPR that go further than many other jurisdictions. These carve-outs predominantly relate to statutory rights such as under the Copyright Act, the Trade Marks Act, etc.[1] Other IPRs such as trade secrets and Fair Trading Act "rights" are not covered.[2]

The legislation is challenging to interpret and to apply. This can lead to some difficult questions such as how far the carve-out goes beyond the specific statutory IPR to surrounding circumstances; the position relating to licensing of IPR such as software; the treatment of trade secrets and know-how; and so on.

IP owners, developers, licensees, and others can take advantage of these carve-outs. But they have to take care to get it right as the legislation is difficult to interpret and implement. As Ian Eagles notes about the Commerce Act's treatment of IPR:

> "The end result of all this is an intellectual property/competition law interface that privileges some forms of economic activity over others by treating them as economics free zones in which black letter formalism reigns supreme. Admission to the privileged zones depends on arbitrary categorisations that make little economic sense and which encourage market participants to game the competition regime in ways that in other contexts are sternly discouraged."[3]

Pay TV versus Free to Air Broadcasts

The tension between IPRs and competition law (as well as other policy drivers such as free speech) is demonstrated by the TV channels' reaction to proposed change to copyright legislation. This is the Bill to change the Copyright Act 1994, to reflect the digital environment.[4]

The current Copyright Act has a carve-out that enables cable TV operators (such as

[1] Sections 36(3) and 45 of the Copyright Act. Note: (1) Section 7(2) (which applies to confidential information) might be argued in favour of carving out some non-statutory IPRs from the competition law regime. (2) The IPR carve outs don't apply to the provisions which usually apply in an M&A context (Part III of the Act)

[2] Although there might be coverage where the IPR has an overlapping statutory IPR as well.

[3] Ian Eagles, *Regulating the Interface Between Competition Law and Intellectual Property in New Zealand* [2007] New Zealand Business Law Quarterly Review, pg 95.

[4] Copyright (New Technologies and Performers' Rights) Bill 2007.

TelstraClear in Wellington and Christchurch) to broadcast Free to Air programmes (such as TVNZ and Canwest broadcasts).[5] This is a right they can exercise unilaterally and without paying anything to the Free to Air channel.

The Bill would see this right ditched. But Pay TV, Sky, wants the right retained and clarified so it extends to cover satellite and other non-terrestrial transmissions.[6]

The Free to Air broadcasters oppose this. If their wishes are granted, chances are they will end their agreements to allow Sky to broadcast their channels. TVNZ has already said they won't allow Sky to broadcast the new channels coming on stream shortly, assuming of course the transmission right is not extended by Parliament.

This doesn't necessarily mean the end of Free to Air programmes on Sky; that would be up for commercial negotiation.

All this plays out against the background of the introduction of the Freeview platform, with its considerable government support and funding. We've outlined the background in our recent article on this area.[7]

If Sky gets its way, there could be a significant dent in the success of Freeview. Viewers would only need Sky's service, and Set Top Box[8], to get access to most or all channels. Viewers may not need the Freeview service and Set Top Box.

Given Sky's market penetration (and the lack of cable TV competition in New Zealand), this could heavily impact TV broadcasting.

This all has profound competition, regulatory and commercial implications, and policy issues such as freedom of speech arise too. This plays out in a broader environment, including the governmental review of digital broadcasting.[9]

So, the choice of IPR carve-outs can impact on competition policy, whether it's happening under the Copyright Act or the Commerce Act.

As ever in a regulatory environment, there are complex issues to be balanced, with no simple solution. But we'd bet a bottle of Cold Duck on Pay TV channels losing the right to unilaterally choose to transmit Free to Air channels.[10]

[5] Section 88 Copyright Act 1994
[6] For a summary of the position, including competing arguments, see the Independent Financial Review; 31 October 2007
[7] "September 2007 Update: Convergence of Telecommunications, Broadcasting and the Internet: A Regulatory Perspective" http://www.wigleylaw.com/Articles/LatestArticles/september-2007-update-convergence-of-telecommunica/
[8] Assuming for present purposes that Set Top Boxes (or some latter day equivalent) are dedicated only to the one provider (Sky or Freeview)
[9] For more information see our article, "September 2007 Update: Convergence of Telecommunications, Broadcasting and the Internet: A Regulatory Perspective" http://www.wigleylaw.com/Articles/LatestArticles/september-2007-update-convergence-of-telecommunica/
[10] In any event, we are late in the legislative process and change (which would revamp Section 88 rather than repeal it) looks like a long shot.

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