



## ARTICLE

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### ***Book Review “Retransmission and US Compliance with TRIPS” by David Brennan (Kluwer Law International, 2003)***

**Article for Copyright Reporter**

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In the Foreward, Professor Sam Ricketson states that in this work, David Brennan fulfils the roles of “the peel[er] of an onion; the puppeteer pulling the strings of his marionettes; and the conductor of an orchestra”. This is a very accurate metaphor for Brennan’s work and a reader will not be disappointed in the content and presentation of research which follows in subsequent chapters.

The work seeks to analyse the deceptively simple question of whether the US cable and satellite retransmission statutory licences comply with the minimum standards set out in the TRIPs Agreement. In particular, it focuses upon the contentious issues of local area retransmission (where retransmission occurs within the area served by the primary broadcast or to “no new public”) and the meaning of “equitable remuneration” in the international context. The work contains 7 chapters, the first of which introduces the general aims, significance and approach of the research.

In Chapter 2, Brennan undertakes an extensive investigation of the retransmission rights as a TRIPs minimum standard. It commences with an outline of the basic logic behind the Berne Convention as well as a detailed discussion of the early recognition of statutory licences, the obligation to pay equitable remuneration to copyright owners and the development of the retransmission right in Article 11*bis* of the Berne Convention from the 1928 Rome Conference to the present day. In particular, Brennan also discusses the relationship between the Berne Convention and TRIPs and the interpretation of Article 11*bis* within TRIPs. He concludes with some comments on the content of the retransmission regime.

Chapter 3 applies economic theory to define the term “equitable remuneration” in light of how retransmission services are bundled together with other exclusive-to-pay channels. Brennan begins by exploring the broader notions of copyright as an excludable public good, and its amenability to private supply. Included in this analysis is the effect of this exclusion on business models for the retransmission market, the value added paradigm, rational behaviour in information good markets as well as valuation methodologies and retransmission. He concludes the Chapter with some comments on the optimal level of payments for transmission and economic efficiency.

In Chapter 4, Brennan analyses the meaning of “equitable remuneration” in the context of the same factual scenario as the previous chapter, by reference to the principles pertaining to restitution-based monetary awards in England, Australia and the United States. He commences with a discussion of different restitution-based awards and different values which he uses as a steppingstone for an in-depth analysis of general and copyright-specific awards determined by proceeds, profit or market value in each of the three jurisdictions. Finally, Brennan examines the factors to consider when determining equitable remuneration for retransmission based on restitution doctrines. In this chapter, the focus is more on identifying the quantum of equitable remuneration, rather than the establishment of a justification of liability.

Chapter 5 contains a detailed examination of the United States cable statutory retransmission licence. Essentially this is a blanket licence, which covers both local and distant signals. Included in this discussion is retransmission reform before the enactment of the licence in 1976; the April 1976 Agreement; the role of the

Copyright Royalty Tribunal in adjusting royalties; regulations issued by the Copyright Office which attempted to clarify problematical provisions in the licence; and proposals for reform prepared in 1992. Brennan observes that the regulation of cable transmission could be said to be an area where congressional priorities placed interests of the broadcast industry first; cable industry interests second; and interests of copyright owners as a distant third.

A similar analysis is conducted in Chapter 6, where Brennan examines the United States satellite statutory retransmission licence. In particular, Brennan reviews the context and scope of the satellite retransmissions statutory licence; rate adjustments in 1992 and 1997; and the legislative reforms in 1994 and 1999. Brennan considers that by 1999, the copyright royalties seem to have almost been regarded as a tax levied by government, rather than the price for use of copyright material. He further notes that at that time, there appeared to be no regard to the TRIPs obligation to accord to copyright owners, as a minimum standard, the right to obtain equitable remuneration for the retransmission of works.

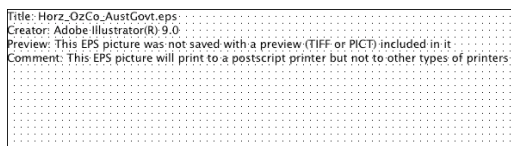
Chapter 7 brings together the issues raised in previous chapters and provides some conclusions on whether the US cable and satellite retransmission statutory licences comply with the minimum standards set out in TRIPs. In the first part, Brennan assesses the relationship between US national law and international instruments to which it is a party. In the second, he analyses US cable and satellite retransmission regimes in light of the minimum standards set down by TRIPs for retransmission. He concludes that both the cable and satellite retransmission regimes do not meet the minimum standard required by TRIPs, and consequently gives rise to a prima facie violation by the United States.

This work is an interesting and compelling examination of whether the US cable and satellite retransmission regimes comply with TRIPs minimum standards. It contains a wealth of information and Brennan's attention to detail in dealing with such vast resources is obvious throughout the entire work. He uses clear and concise language and has structured the work in a manner which guides the reader through the sometimes complex analysis of international instruments and domestic legislation. As the work concerns such highly specialised issues and argument, it will be of interest to academics, copyright practitioners and policy reformers.

## Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



*The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body, through its Policy, Communication and Planning Division.*

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