

Australian Copyright Council

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Senator the Hon Richard Alston
Minister for Communications and the Arts
MF 70
Parliament House
Canberra ACT 2600

8 July 1996

Dear Senator Alston,

Retransmission of broadcast copyright material

We understand that the Government is intending to introduce into Parliament an amended version of the draft Copyright Amendment Bill prepared by the previous Federal Government and circulated for comment in February.

We are writing to urge the Government to amend the draft Copyright Amendment Bill to grant owners of copyright in works and films an exclusive right to authorise or prohibit the retransmission of broadcasts of their material, or at least an entitlement to equitable remuneration for such retransmission.

We submit that our position is:

- consistent with the recommendations of the Copyright Convergence Group (CCG) in its August 1994 report *Highways to Change: Copyright in the New Communications Environment*;
- consistent with the Government's policy statements;
- fair, and consistent with copyright principles;
- required by international treaty obligations.

We also support a retransmission right in relation to sound recordings and recorded performances, but concede that the international treaty obligations relating to sound recordings and recorded performances are not as strong as for works and films.

This submission represents the views of the following organisations:

Audio-Visual Copyright Society (AVCS), Australasian Performing Right Association (APRA), Australian Copyright Council, Australian Music Centre, Australian Screen Directors Association (ASDA), Australian Society of Authors (ASA), Australian Writers' Guild (AWG), Media Entertainment and Arts Alliance (MEAA), and the Screen Producers Association of Australia (SPAA).

1. Recommendations of the CCG

The CCG recommended amendments to ss 199(4) and 25(3) of the Copyright Act, to allow the retransmission of broadcast material without the consent of the copyright owner only where the retransmission is for the purpose of enabling reception of a primary broadcast with poor signal quality.¹

The proposed amendment to s 199(4) in the draft Copyright Amendment Bill does not refer to the purpose of retransmission, and thus has a much wider effect than the amendment recommended by the CCG's recommendation. In addition, the proposed amendment to s 25(3) has a much wider effect than the amendment recommended by the CCG's recommendation.

2. Government's policy statements

The Government has on many occasions supported the recommendations of the CCG, including in its "Australia On-Line" policy and its arts policy.

In addition, in its arts policy the Government said:

The Coalition believes it is reasonable to expect cable operators to pay for the privilege of using intellectual property bestowed upon them.

3. Fairness and consistency with copyright principles

The purpose of copyright law is to provide incentive and reward for creative and intellectual endeavour. The law does this largely by giving owners of copyright an opportunity to be paid by others who use their work. The more their work is used, the more payment they receive.

Organisations retransmitting broadcast material are clearly benefiting from retransmitting copyright owner's material; it is an enhancement to their services aimed at making their services more attractive to customers. Copyright owners should be entitled to fair payment for that benefit.

4. International treaty obligations

As you are aware, Australia is bound by a number of international treaties which require certain standards of protection relating to copyright. These treaties include the Berne Convention, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which forms part of the General Agreement on Tariffs and Trade (GATT).

4.1. Berne Convention

Under Article 11*bis*(1)(ii) of the Berne Convention, Australia is obliged to legislate to provide authors of "literary and artistic works" with an exclusive right to authorise or prohibit:

¹ pp 49-51

any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one.

The term “literary and artistic works” as used in the Berne Convention covers a wide range of material, including screenplays, artwork, music and films (Article 2(1)).

Article 11bis(2) allows member States to determine the conditions under which retransmission may occur, but any such conditions must not prejudice authors’ rights to obtain equitable remuneration. Member States are thus not entitled to provide for retransmission of broadcast material without the copyright owner’s consent, unless the copyright owner is entitled to equitable remuneration.

The current law does not give effect to Australia’s obligations under the Berne Convention. This situation would not be rectified by the proposed amendments in the draft Copyright Amendment Bill.

In addition, there is nothing in the Berne Convention which would allow a member State to derogate from its obligations under Article 11*bis* because of a broadcasting policy it had adopted (such as a provision entitling broadcasters to compel cable operators to retransmit their signals). Thus, the Australian Government is obliged to implement its copyright obligations irrespective of its broadcasting policy, and thus must consider its copyright obligations when considering broadcasting policies which affect the interests of copyright owners.

4.2. TRIPS: Article 9

Article 9 of TRIPS obliges member States to comply with Articles 1 to 21 of the Berne Convention (excluding Article 6*bis*, which deals with moral rights). Thus, Australia’s failure to implement its obligations under the Berne Convention means it is also in breach of its obligations under TRIPS.

In addition, member States have obligations relating to broadcasting under Article 14. Under Article 14, member States which do not grant broadcasting organisations a right to prohibit the rebroadcasting or communication to the public of broadcasts must:

provide owners of copyright in the subject matter of broadcasts with the possibility of preventing [rebroadcasting or communication to the public of broadcasts], subject to the provisions of the Berne Convention (1971).

Thus, if Australia does not grant retransmission rights to broadcasters, it must grant these rights to the “underlying copyright holders”. This may be relevant in practice where the retransmission is made by the same organisation which made the primary broadcast.

4.3. TRIPS: Article 13

Article 13 of TRIPS provides:

Members shall 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 interests of the right holder.

Retransmission of broadcast material has now become a “normal exploitation” of copyright material in Australia, and ss 199(4) and 25(3) clearly conflict with this means of exploitation. The proposed amendments to these sections in the draft Copyright Amendment Bill do not cure the problem. In addition, allowing retransmission without payment prejudices the legitimate interests of the rights holders whose material is retransmitted.

4.4. Recommended amendment to the Copyright Act

We submit that the Copyright Act should be amended to give copyright owners in works and films an exclusive right, or at least a right to equitable remuneration, in relation to a retransmission made by:

- a) an organisation other than the primary broadcaster (as required by the Berne Convention);
- b) a primary broadcaster to a new audience; and
- c) a primary broadcaster as part of a new service.

If the right is limited to the situation in (a), concentration of media ownership may lead to arguments about whether the retransmitting organisation is a “different” organisation, and may produce anomalous results. We also submit that the inclusion of (b) and (c) is supported by Article 14 of TRIPS.

5. Approaches in other countries

The weight of opinion internationally supports the view that member States must grant the retransmission right, whether or not the retransmission is to a “new public”.² The possibility of including a criterion of “new public” in Article 11*bis* of the Berne Convention was discussed but rejected before the introduction of Article 11*bis*.³

We understand that countries such as Belgium, Switzerland and the Netherlands give copyright owners a retransmission right irrespective of whether there is a “new public”.⁴

6. How would payment be assessed?

As stated above, our position is that owners of copyright in works and films should have an exclusive right, or at least a right of equitable remuneration, in relation to retransmission. In either case, we anticipate that the right would be administered

² See Sam Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986*, Centre for Commercial Law Studies University of London, London, 1987, at para 8.86; Ysolde Gendreau, *The Retransmission Right: Copyright and the Rediffusion of Works by Cable* ESC Publishing Limited, Oxford, 1990, at p 28; S M Stewart, *International Copyright and Neighbouring Rights* (2nd ed), Butterworths, London, 1989 at para 7.68.

³ Gendreau at p 28

⁴ Gendreau at pp 28-29; Ricketson at p 450 and fn 416a; Stewart at para 7.68 and fn 5.

collectively. Such administration could be done effectively and efficiently by existing collecting societies, such as AVCS and APRA.

As with other areas of collective administration, the Copyright Tribunal should have jurisdiction where the parties are unable to reach agreement. The Copyright Tribunal is the appropriate body, as it has experience in determining “equitable remuneration” for uses of copyright material (such as primary broadcasting). The Copyright Act and Regulations may contain guidelines for the Tribunal when assessing equitable remuneration for retransmission.

7. Position of FACTS

We understand that the Federation of Commercial Television Stations (FACTS) is preparing a written submission, and that it will make that submission available to us. Once we receive that submission, we will prepare a written response.

8. Meeting to discuss our position

We seek a meeting with you to discuss our position, and respond to questions you may have. If you would like further information about any of the issues we have raised, we would be happy to provide such information to you.

We have written in similar terms to the Attorney-General.

We look forward to hearing from you.

Yours sincerely,

Libby Baulch
Executive Officer
