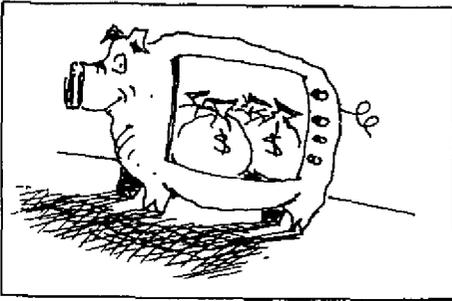


Pay TV in Focus



The film industry has responded with enthusiasm to the government's commitment to the introduction of pay TV services. The presumption is that this service will provide an additional and lucrative source of revenue for Australian production material. This brief commentary focuses exclusively on copyright in film, with a view to assessing whether the current section 86 of the *Copyright Act* (1968) ("the Act") provides an adequate structure in which owners of copyright in film (the "Copyright Owners") can take full advantage of the opportunities presented by satellite delivered pay TV services.

Satellite piracy: problems with the current law

Protection against piracy of satellite transmission is a major priority for Copyright Owners. In order to properly protect Copyright Owners of program material, it will be necessary to ensure that once a foreign satellite transmission is received within Australia, any subsequent rebroadcast or transmission of the underlying program material is subject to copyright restrictions protecting the broadcast. This is not the case at present.

The Act does not provide rights over the end-user for private reception of broadcasts (authorised or unauthorised). There are no licensing requirements for reception of broadcasts, and therefore a lack of regulatory mechanism to control and protect against unauthorised private access to restricted access services.

The public performance right is the only right which focuses on the end-user. The public performance right is however subject to the compulsory licence provisions expressed in section 199 of the Act. Whilst a public performance right exists in theory, in practice the exercise of that right is frustrated by the

Satellite-delivered pay TV services: the film copyright issues

Nathalie Curtis argues that the Copyright Act must be amended to take full account of pay TV opportunities

compulsory licence granted in subsection 199(3). Furthermore, where the broadcast is not originally authorised by the Copyright Owner in the film, the end user is still sheltered from an action for infringement of copyright, although the infringement is to be taken into account in proceedings against the maker of the unauthorised broadcast (subsection 199(5)). There is an absence of mechanisms in place to prosecute unauthorised reception of satellite broadcasts, including rights against the manufacture and sale of decoders of satellite signals which operate without the authority of the broadcaster. These difficulties may to some extent be overcome by the development of effective encryption and scrambling technology.

The structure of the section 199 compulsory licence creates significant disadvantages in the administration of the rights of Copyright Owners in films. The underlying principle operating in section 199 appears to be that the author or maker of the various copyright material is assumed, when granting the original broadcast licence, to grant a licence to an entire potential audience, irrespective of the manner in which that audience is reached. The Copyright Owner loses control once the initial broadcast licence is granted, and all potential additional claims to remuneration.

The operation of section 199 is, arguably, inconsistent with the exercise and administration of the rights contained in section 86. Whereas the underlying principle governing the grant of rights under section 86 of the Act is that Copyright Owners of the film are entitled to adequate remuneration for the broadcast, transmission to a diffusion service, and public performance of the film, section 199 provides for an automatic licence for end users receiving the broadcast. The approach taken in section 199 frustrates the exercise of the rights expressed in section 86 and results in the loss of opportunity for additional revenue in licensing the copyright in the film.

Subsection 25(3) further allows for a broadcast received in one area to be received and rebroadcast or transmitted

to another reception-area without the subsequent broadcast incurring any copyright liability.

The scheme outlined in this section protecting secondary broadcasts from copyright liability, was initially designed to allow the use of translator stations or community service antennae to boost local community reception and protect broadcast activity which was ancillary to the primary broadcast. New satellite related services, however, extend the potential of rebroadcast activities beyond activities ancillary to the primary broadcast.

Some solutions

The difficulties highlighted above provoke consideration of the following:

1. Legislative Reform

The introduction of:

- (a) a full copyright in the satellite transmission and recognition that each further transmission could become a new category of subject matter in which copyright exists;
- (b) a clear right to license diffusion of the work, as a separate act to the "broadcast". (This would require removal of the existing free compulsory licence granted for diffusion services).

The introduction of adequate sanctions for infringement is an essential part of effective control of pirate activities.

2. Identification of Infringement

The essential method of identifying infringement is the presence of a decoder. In Australia, there are no provisions that regulate the manufacture and/or sale of decoders of encrypted transmissions without the authority of the broadcaster. Consequently the use of such decoders by members of the public for private reception of programs (and in some circumstances for public reception of programs) will not infringe the copyright in either the broadcast or the underlying works.

A practical mechanism for dealing

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with fraudulent reception of transmissions is (as under the UK *Copyright and Designs Act* (1988)), to target manufacturers and suppliers of equipment used by home viewers. This includes the right to seize pirate decoders.

3. **Private Contractual Arrangements**
Copyright Owners would be advised to obtain a clear grant of rights unfettered by the existing exemptions, which would allow them to obtain payment for broadcast and diffusion of films. Copyright Owners also may wish to include in any licensing agreement a provision which obliges the provider of the satellite transmission to restrict access to the signal to the intended audience so as to protect the interests of the owners of Copyright in the programme material.

4. **Collection System for Royalties**
The introduction of a system to facilitate the distribution and collection of royalties based on the additional revenue generated from the creation of new rights. There are two mechanisms which may be considered:

- (a) contractual negotiations and collective administration of the rights negotiated therein;
- (b) a statutory licensing system with remuneration as agreed or failing that as determined by the Copyright Tribunal or other competent authorities.

In reviewing current Australian Copyright legislation, it is apparent that Copyright Owners are not adequately protected, nor immune from loss of revenue due to unauthorised reception of their programs.

A number of options for reform are canvassed in this commentary. They are a necessary step in reconciling developments in technology with the rights of Copyright Owners to receive satisfactory remuneration for use of their work.

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World Review

A survey of some recent International developments

WARC

The World Administrative Radio Conference (WARC 92) was held at Torremolinos, Spain, until 3 March 1992.

The conference was attended by over 1400 delegates from 127 member states of the International Telecommunications Union. The key decisions made at the conference included:

- The allocation of 1.5 GigaHertz for digital audio broadcasting. This motion, sponsored by Australia and Canada, succeeded despite opposition from the USA, Japan, the Commonwealth of Independent States and much of the EC. The allocation paves the way for the early introduction of DAB.
- Spectrum was allocated for future public land mobile telecommunications systems (FPLMTS) and Aeronautical Public Correspondence. FPLMTS will provide mobile telephone and data services with regional and international roaming. Aeronautical Public Correspondence will allow the provision of public telecommunications services to passengers on commercial airline flights.
- An allocation was also made for low earth orbit satellites providing telecommunications services. Low earth orbit satellites have the advantage of much lower launch costs than geostationary satellites.

Cable Regulation

In early 1992 the US Senate overwhelming passed a new Cable Regulation Bill which, if enacted, will impose a detailed regulatory regime on the cable television industry. The features of the Bill included:

- Detailed regulation of the subscriber rates offered by cable television;
- A must carry obligation imposed on cable operators, under which a local commercial television station could opt to force a cable operator to carry its signal free of charge;
- New ownership limits, which would empower the FCC to impose reasonable audience reach limits on cable operators.

Amendments to the Bill have been

moved in the House, which will reduce the impact of its provisions. Even if the Bill is eventually passed, President Bush may veto it, as he is opposed to any fresh regulation of the cable industry.

Copyright in the EC

The BBC applied to the Court of First Instance of the European Communities to annul a decision of the Commission that the BBC had infringed Article 86 of the EC Treaty by refusing to license the publication of its advance weekly listings for TV and radio programmes in Ireland and Northern Ireland for publications and sale in a comprehensive weekly TV guide. Article 86 prohibits abuse by one or more undertakings of a dominant position within the common market insofar as it may affect trade between Member States. The Court of First Instance dismissed the BBC's application, holding that the BBC had breached Article 86. The Court rejected the BBC's argument that it had merely been protecting the specific subject matter of its copyright in such programme listings, noting that the EC Treaty did not allow the protection of intellectual property to constitute a means of arbitrary discrimination or disguised restriction on trade between Member States.

Papua New Guinea

On 4 March 1992 the Papua New Guinea Parliament passed the *Radio-communications (Amendment) Act 1992*. The legislation provides for the regulation of satellite broadcasting in Papua New Guinea, which previously was unregulated. PNG currently receives a range of satellite transmitted broadcasting services. It is expected that the legislation will be used to impose program classification standards on those services, some of which appear to be broadcasting programs which would not be approved by the Censorship Board. The legislation becomes effective on the date of gazettal.

Contributions to World Review may be forwarded to the Editor