

# STOPPING SIGNAL PIRACY

Signal piracy is a growing problem for television operators in Australia. Mark Bamford reports.

Among the legislative reforms being undertaken by the Government at the moment in the areas of copyright, broadcasting and electronic communications, one issue at risk of being overlooked is 'signal piracy'.

At present this issue looms largest for pay television operators. A pay television operator may deliver its service by means of satellite, cable or microwave multipoint distribution system. The program-carrying signal is encrypted by the operator using algorithms that alter the signal. A subscriber then gains access to the service by obtaining reception equipment which decodes the signal. In this way, the operator is able to track its signal and charge each customer periodical fees.

Unfortunately, it is possible for non-subscribers to intercept the program-carrying signal by purchasing unauthorised decoding equipment. In such a case, the operator is not paid the ongoing fees on which its business is dependent.

Free-to-air broadcasters may also be subject to signal theft, for instance where an encrypted satellite transmission to an area licensed for broadcast is intercepted and accessed outside the licensed area.

Currently, there is no effective legal recourse against such "signal piracy".

## LACK OF REDRESS UNDER CURRENT LAW

There are no express provisions in the *Copyright Act 1968* ("Act") which directly address the unauthorised reception of encrypted transmissions.<sup>1</sup> To the extent that delivery of a television service constitutes a "broadcast" under the Act, the principal copyright in respect of the broadcast is to re-broadcast it. This means that the unauthorised reception of a broadcast does not amount to infringement of copyright in the broadcast.

To the extent that delivery of a television service does not constitute a broadcast (for example, where delivery is by cable which is, under the Act, a transmission to



subscribers to a diffusion service) the Act affords no protection whatsoever.

Although a number of statutory provisions prohibit various acts in relation to telecommunications and radiocommunications, these do not directly and effectively prevent the unauthorised reception of encrypted transmissions.<sup>2</sup> A transmitter's only course of action is often to rely on trade practices or trade mark claims which are not suited to adequately deal with this issue.

## WHAT IS NEEDED

Legislation should be introduced for the specific purpose of preventing the unauthorised reception of an encrypted transmission. Such legislation could incorporate the following elements:

- criminal sanctions against the unauthorised reception of an encrypted transmission;

- criminal sanctions against the commercial dealing in equipment which has the purpose of enabling unauthorised reception of an encrypted transmission;
- civil remedies in relation to the unauthorised reception of an encrypted transmission;
- civil remedies in relation to commercial dealing in equipment which has the purpose of enabling unauthorised reception of an encrypted transmission.

## IS SIGNAL PIRACY A COPYRIGHT ISSUE?

The exposure draft of the *Copyright Amendment (Digital Agenda) Bill* ("Bill") introduces new enforcement measures:

- to provide criminal sanctions and civil remedies for the making of, and

commercial dealings in, devices for the circumvention of technological copyright protection measures;<sup>3</sup> and

- to provide criminal sanctions against the tampering with electronic rights management information.<sup>4</sup>

In the commentary on the exposure draft of the Bill, the introduction of remedies in relation to the unauthorised reception of encrypted broadcasts is specifically excluded on the basis that such unauthorised reception is not an infringement of copyright in the broadcast or underlying copyright material.<sup>5</sup>

This basis would seem somewhat inaccurate and inconsistent with other aspects of the exposure draft of the Bill. Such remedies are no less associated with copyright than are the proposed technological copyright protection measures and rights management information provisions introduced by the Bill.

The copyright affected by the unauthorised reception of an encrypted transmission may include copyright in the "broadcast" (as defined in the Act) and significantly, the underlying copyright material. Such material includes cinematograph films and the literary works, musical works and sound recordings adapted to create such films. A television operator will have acquired rights in such material for the purpose of its transmission.

The unauthorised reception of a television operator's transmission will not only diminish the value of the transmission but also the underlying copyright material.

The UK legislature has had no difficulty finding signal piracy an issue with respect to copyright, making it an offence under its copyright legislation to fraudulently receive programs, and to make, sell, import or let for hire an unauthorised decoder.<sup>6</sup> Similarly, legislative protection

has subsisted in the New Zealand copyright legislation for some time.

Subsequent to the release of the exposure draft of the Bill, the House of Representatives Standing Committee on Legal and Constitutional Affairs invited submissions from the public in relation to the effective enforcement of copyright in Australia. The terms of reference for the Standing Committee's inquiry include the adequacy of criminal sanctions against copyright infringement and the adequacy of civil actions in protecting the interests of plaintiffs and defendants for copyright infringement.

If it is accepted that piracy is a copyright matter, then there would seem no better opportunity than at present to incorporate relevant provisions into the Act.

### **AMENDMENT TO OTHER LEGISLATION?**

If the government is unwavering in its view of signal piracy as a non-copyright issue, then there is other legislation which could incorporate amendments to deal with the issue.

As far back as 1994, the Copyright Convergence Group recommended that criminal offences relating to the unauthorised use and reception of encrypted signals be introduced.<sup>7</sup> The difficulty with introducing measures against signal piracy into the *Crimes Act 1914* is that such legislation is not appropriate for civil sanctions.

Perhaps a better alternative is the *Broadcasting Services Act 1992*, being the legislation under which broadcasters and narrowcasters are licensed.

As signal piracy has been pressed with the government as an issue for some time, most important now is the "end" rather than the "means". The worst result would be for the issue to be deflected from one legislative initiative to another so that it is not dealt with substantively at all.

### **CONCLUSION**

In 1997, pay television operators estimated that there were 2,500 – 5,000 recipients of pirated signals in Australia. Such figures are not, in absolute terms, astounding. They are, however, significant given the infancy of pay television in Australia.

In the US where pay television is more established, as far back as 1992 signal theft was estimated as resulting in US \$4.7 billion in unrealised revenue annually.<sup>8</sup>

As pay television grows in Australia and new technology provides a greater choice of "subscription services" for consumers, the issue of signal piracy will become increasingly significant. The introduction of appropriately framed legislation to prevent the unauthorised reception of encrypted transmissions will provide benefits to copyright holders with no contrasting burden or adverse effect on the public.

1 Except where otherwise expressly provided, the word "transmission" is used in a generic sense to mean any broadcast, transmission to subscribers to a diffusion service or other communication.

2 Regulatory provisions prohibiting various related activity include the following: *Crimes Act 1914* (Cth) (Part VII B); *Broadcasting Services Act 1992* (Cth); *Radiocommunications Act 1992* (Cth); *Telecommunications Interception Act 1979* (Cth).

3 Items 85, 87 and 88.

4 Items 9 and 87.

5 Exposure Draft – Commentary, paragraph 100.

6 See *Copyright, Designs and Patents Act 1988* ss 297-299.

7 'Highways to change, Copyright in the New Communication Environment', August 1994 p13.

8 Federal Communications Council report 97-053, 11 February 1997.

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