

30 September, 1999

The Committee Secretary
House of Representatives
Standing Committee
on Legal & Constitutional Affairs
Parliament House
CANBERRA ACT

Dear Secretary,

Inquiry into Copyright Amendment (Digital Agenda) Bill 1999

We act for the Federation of Australian Radio Broadcasters Limited (FARB). FARB is the industry association of commercial radio broadcasters licensed pursuant to the terms of the *Broadcasting Services Act 1992*.

We have previously made submissions on FARB's behalf on the Exposure Draft of the Bill released by the Attorney-General earlier this year. A number of the matters raised by the industry have been addressed in the Bill presented to the House. There are one or two aspects of the Bill, however, which remain of concern to FARB members. Those issues are contained in the submissions accompanying this correspondence.

We thank you for the opportunity to provide comments on the Bill. Please do not hesitate to contact us, if any aspect requires clarification.

Yours faithfully,
BOYD HOUSE & PARTNERS

Per: Tracey Meredith
Consultant

COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999

SUBMISSIONS OF THE FEDERATION OF AUSTRALIAN RADIO BROADCASTERS LIMITED **(“FARB”)**

Conversion from Analogue to Digital

The proposed amendments at section 21 of the Copyright Act (“Act”) have the effect that the conversion of works and other subject matter into digital form will constitute the act of reproduction or copying. As the Committee may be aware, it is contemplated by the Government that in due course, radio services will move to digital transmission and we understand planning is well underway in this regard. As part of this process, it is accepted that there will be a lengthy period of simulcasting, whereby commercial radio stations will transmit simultaneously in digital and analogue form.

FARB is particularly concerned that amended section 21 will give rise to a liability on its members, where works and other subject matter are routinely converted from analogue to digital and vice versa, in the course of preparing material for broadcast, and broadcasting, using digital technology. While the legislation dealing with digital transmission of radio services has yet to be promulgated, it is likely that there will be a mandatory period of simulcasting. FARB respectfully submits that broadcasters should not be exposed to a potential liability to obtain copyright clearances for works and other subject matter reproduced in these circumstances. FARB believes the Government should provide an express exception for broadcasters where such conversions are made for the purpose, or in the course of, making an authorised broadcast of the copyright material, so that the matter is beyond doubt. The rationale for the amendments at s.21(1A), as contained in the Explanatory Memorandum accompanying the Bill, (that “reproduction be clarified with respect to works stored electronically”) does not justify the application of the right in these circumstances, in FARB’s submission.

Transitional Provisions

We believe the transitional provisions at Schedule 2 of the Bill require amendment for the following reasons.

In summary, the transitional provisions appear intended to:

- . grant the new communication right to works and other subject matter made before or after the commencing day (Item 2);
- . provide that a licence of the broadcast or diffusion right made prior to the commencing day will not include the new communication right, unless there is a contrary intention expressed in the agreement. “Broadcast” under such a licence will be confined to a transmission by wireless telegraphy (ie: the present definition under the Act) (Item 3(1));
- . provide that an assignment of the broadcast or diffusion right made before the commencing day will not be taken to include the new communication right. Again, “broadcast” in respect of such assignments will be construed as a transmission by wireless telegraphy (Item 3(2));

Drafting

The drafting at Item 3(2) produces an effect which we assume to be an error. We believe as presently drafted, an assignment of the broadcasting or diffusion right in a work or other subject matter made before the commencing day will cease to have effect after that date. This occurs, in our view, because:

- . the broadcast right and the diffusion right are repealed by the Bill;and
- . the communication right deemed to apply at Item 2 of the Schedule does not apply in relation to an assignment; and
- . there is no provision which preserves the operation of the Act, as occurs in respect of licences at Item 3(1) of the Schedule.

Over and above this technical difficulty, however, FARB has a number of concerns with the policy underlying these provisions.

The Meaning of “Broadcast”

FARB believes there is no justification for confining a broadcast right which has been licensed or assigned prior to the commencing day, to a definition which has been overtaken by the amendments in the Bill. The present definition of “broadcast” in the Act reflects the previous definition of “broadcast” contained in the legislation which regulated broadcasting services in Australia until 1992, namely the Broadcasting Act 1942. The Broadcasting Services Act 1992, which replaced the Broadcasting Act, amended the definition so that the activity of broadcasting, as regulated, was technology neutral. Properly, an amendment to the Act should have been effected at that time. That did not occur, in part, in our view, because various inquiries into amendments of a substantial nature to the Act were initiated, but the results not actioned, prior to a change

in government. A change of definition to that contained in the Bill has been forshadowed, and uncontentious, since 1992.

Over and above issues of consistency, in FARB's view the separation of licences which grant a broadcast right into "pre-1999" and "post-1999" will create a totally unworkable situation for media and rights owners alike.

Assignment of Rights

As presently drafted, FARB believes this provision produces an inequitable result where there has been an assignment of all copyright prior to the commencing day. Whilst the section refers to only an assignment of the broadcast or diffusion right, an assignment of all copyright would necessarily include the broadcast and diffusion right. An assignment of all rights can be distinguished, from a policy perspective, from a licence of rights. Under an assignment, the assignor expressly transfers, for valuable consideration, all interest in the work or other subject matter. Failing a specific provision, there is no expectation of, or entitlement to, a re-assignment of the interest. In practical terms, the assignee becomes the proprietor of copyright and in turn, may on-licence or assign the rights themselves. In these circumstances, FARB submits that there is no justification in extinguishing by statutory prescription the communication right of a copyright owner who has previously acquired all rights by assignment.

It is also FARB's view that an assignment of the broadcast right or diffusion right alone cannot necessarily be assumed to have been intended, in all circumstances, to be confined to those activities as presently defined under the Act. If there has been an assignment under which the assignor has granted broadcast or diffusion rights which extend beyond the present definition, we believe it is inappropriate that these rights be extinguished by statute without regard to the parties intentions.

In summary, FARB submits that the transitional provisions should be amended to the following effect:

1. In respect of a licence of the broadcast and/or diffusion right, or rights which include the broadcast and/or diffusion rights, granted before the commencing day:
 - . "broadcast" should have the meaning ascribed under the Act, as amended (consistent with the Broadcasting Services Act 1992);
 - . the provisions of the Act (as unamended) should apply unless there is a contrary intention in the agreement.
2. In respect of an assignment made prior to the commencing day which is limited to an assignment of the broadcast and/or diffusion rights:
 - . "broadcast" should have the meaning ascribed under the Act, as amended;

- . the provisions of the Act (as unamended) apply unless there is a contrary intention in the assignment
- 3. In respect of an assignment made prior to the commencing day which is an assignment of copyright including, but not limited to, the broadcast and diffusion right, such assignment should be construed as including the new communication right.

Boyd House & Partners
30 September, 1999