1 October 1999

Mr Kevin Andrews MP, Chair
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

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Dear Mr Andrews,

Inquiry into Copyright Amendment (Digital Agenda) Bill 1999

FACTS thanks the Committee for the opportunity to make a submission on the Bill.

Introduction

FACTS members:

- own copyright in a wide range of audiovisual works;
- are a substantial licensor and licensee of copyright; and
- are licensed broadcasters of commercial television services under the *Broadcasting Services Act 1992 (BSA*).

FACTS therefore believes that it is able to provide a balanced view, based on an understanding of the many interests to be weighed up in relation to the digital agenda reforms, and in particular, the reforms affecting broadcasters. There are a number of aspects of the Bill that need refinement to provide broadcasters and others with greater certainty regarding their rights, and the ability to protect those rights in the digital environment.

Summary

In summary, our concerns are as follows:

- An exception from the application of proposed section 21 should be provided to broadcasters in relation to the conversion of analogue material into digital format, and vice versa.

- The broadcast decoding provisions of the Bill need amending to include a prohibition on the use or possession of a satellite decoder to receive a free to air signal outside its intended licence area.

- The transitional provisions appear to contain drafting errors. In addition, two policy issues need to be addressed. First, an assignment of *all* copyright should carry with it the communication to the public right. Second, the updated definition of broadcast in the Bill should travel with prior licences and assignments of the broadcast right.

- In the provisions of the Bill dealing with the retransmission of free to air broadcasts, the obligation on the retransmitter to keep records of broadcasts should be limited to the basic log of program information.

- The statutory licences at sections 65, 66 and 67 should be extended to communications.

Digital conversions for the purposes of digital television services

The extension of the terms "copy" and "reproduction" to include digital conversions under the proposed section 21 will impose onerous obligations on broadcasters who are required to simultaneously transmit both analogue and digital programs, under *Schedule 4* of the BS*A*. FACTS strongly opposes such an extension without adequate exemptions that are needed to ensure that television broadcasters are able to comply with their obligations under the Television Broadcasting Services (Digital Conversion) Act 1998 (DCA) to simulcast a broadcaster's analog signal in digital mode during the specified transition period.

Schedule 4 of the BSA requires that metropolitan television services be transmitted digitally by the year 2001. From that date, television services must be transmitted in both analogue and digital format. To comply with these obligations, all broadcasters need to digitise their analogue films, on a regular and on-going basis. However, under the proposed amendments, digital conversions are now classified as reproductions. This means that broadcasters would have to obtain the consent of copyright owners in the analogue films to convert them into digital format for digital transmission. Without consent, the broadcaster is placed in the position of either breaching copyright, or its obligations under the DCA.

Furthermore, works and subject matter are routinely converted from analogue to digital and vice versa as part of the process of getting the material to air, and during the transmission process. The exception in the Bill relating to temporary copies made in the course of a communication would not cover the conversions that are necessary in getting the works/subject matter to air.

The Government should provide an exception to the application of this provision to television broadcasters in relation to the conversion of analogue material into a digital format, and vice versa.

The following suggested amendment would address the issue:

> <u>Subsection 21(1)</u>
>
> (1A) Subject to subsection (1B), [etc: as per the Bill at page 8]
>
> <u>Insert New Subsection:</u>
>
> (1B) Subsection (1A) does not apply to the conversion of a work from analogue form into digital form or digital form into analogue form if the conversion is made by a broadcaster for the purpose or in the course of making an authorised broadcasting of the work.
>
> <u>Subsection 21</u>
>
> Amend subsection 6 [at page 8 of the Bill]

6(a) Subject to subsection 6(b), [etc: as per ss6 in the Bill]

Insert New Subsection:

6(b) Subsection 6(a) does not apply to the conversion of a sound recording or cinematograph film from analogue form into digital form or digital form into analogue form if the conversion is made by a broadcaster for the purpose, or in the course of, making an authorised broadcast of the sound recording or cinematograph film.

Broadcast Decoding Devices/Unauthorised Interception of Encrypted Signals

The final Bill now includes provisions concerning the use of broadcast decoding devices. However, those provisions fail to deal with broadcast decoding devices as they relate to free to air broadcasts.

The broadcast decoding provisions of the Bill need amending to include a prohibition on the use or possession of a satellite decoder to receive a free to air signal outside its intended licence area.

The issue of concern is that satellite broadcast decoders enabled by remote satellite broadcasters are moved into other licence areas. Their most identifiable and damaging use has been by pubs receiving and making available to their patrons live sporting events. Those sporting events have otherwise been subject to a "blackout" in the location in question.

This activity not only threatens licence area integrity (an essential component of Australia's broadcasting framework), it is commercially damaging to the rights holder of the sporting event. For example, in the case of the Golden West Network, their inability to prevent their signal being made available in the Perth metropolitan area at one point caused the 7 Network to indicate its intention to deny the Golden West Network the live AFL football coverage. The 7 Network, as the rights owner, had a contractual obligation with the AFL to enforce the "blackout".

The announcement by the Golden West Network that it would not provide the AFL live caused a public uproar in Western Australia. Eventually, negotiations did ensure that the game was provided live.

The Golden West Network has made significant attempts to identify and deactivate "rogue" decoders that are used for commercial purposes in other licence areas. As this requires either physically inspecting the decoder to identify the serial number, or recording the signal on a VCR to later identify a trigger fingerprint embedded in the signal, this has been very difficult in the pub context. The broadcaster has no ability to take legal action to prevent the use of decoders in this way.

This is an issue that should be dealt with in the broadcast decoding device provisions of the Bill. The Bill should include a prohibition on the use or possession of a satellite decoder to receive a free to air signal outside its intended licence area.

Prohibition against use or possession is crucial. Given that the unauthorised reception occurs with exactly the same device as authorised reception (just in a different location) prohibitions on dealing in devices do not make sense in this context.

We understand that the Government was concerned that prohibiting use or possession in the domestic context of Pay television piracy would be too heavy handed. Given that the use or possession of the device in the free to air context is for a commercial purpose, any policy concerns along those lines are not relevant in this case.

We also note the Government's commitment at paragraph 100 of the commentary to the draft Digital Agenda Bill in relation to provisions dealing with the interception of encrypted signals:

> "Remedies in relation to the unauthorised reception of encrypted broadcasts will not be implemented as part of the Digital Agenda Bill as such unauthorised reception is not an infringement of copyright in the broadcast or underlying copyright materials. The provision of such remedies is therefore not a law with respect to copyright."

Paragraph 101 went on to state:

> "These remedies are intended to be included in other legislation. Detail of the remedies, including identification of appropriate legislation to implement them, is being considered."

Any interception provisions must relate to both the reception of broadcasts and other program carrying signals. The Seven Network has had instances of its network feed being decoded and displayed in pubs in Melbourne. Like the Golden West Network, this has involved live AFL football which, due to "blackout" restraints, has not been telecast by Melbourne licensees. Network feeds are not broadcasts as they are not "to the public". If the broadcast decoding provisions of the Digital Agenda Bill were to be amended in the way we have suggested, there would be no remedy as the decoder is not being used to intercept a broadcast.

Negative consequences, both for licence area integrity and the commercial interest of broadcasters flow whether the signal is properly defined as a broadcast or as a program carrying signal. Provisions to prevent the fraudulent reception of signals are necessary and should not be limited to broadcasts.

In summary:

(i) The broadcast decoding device provisions of the Bill should be amended to include a prohibition on use or possession of a satellite decoder to receive a free to air signal outside its intended licence area.

(ii) Provisions need to be included – whether in copyright, broadcasting or other legislation - dealing with the act of interception itself. These should include the interception of both broadcasts and program carrying signals.

(iii) Consideration needs to be given to extending copyright protection from broadcasts to program carrying signals.

The first issue needs to be addressed in the context of this Bill. The second issue needs to be addressed at the earliest opportunity in accordance with the Government's commitment. The third issue needs to be addressed in due course.

Transitional Provisions

We wish to raise both drafting issues and policy issues concerning Schedule 2 of the Bill which contains the transitional provisions.

Item 2 of Schedule 2 applies the communication right to all works and subject matter in which copyright subsisted immediately before the commencement of the legislation and in relation to all works and subject matter made on or after that day.

Item 3 deals with licences and assignments of the broadcast right and the cable diffusion right in force before the commencement of the legislation.

Item 3(1) deals with licences. A licence of the broadcast right and/or the cable diffusion right will continue to have effect but, subject to contrary intention, will not carry with it the new rights granted under the Bill, i.e. the communication to the public right.

Item 3(2) deals with assignments. It appears to intend that an assignment of the broadcast right and/or the cable diffusion right will not carry with it the new rights granted under the Bill, i.e. the communication to the public right. However, unlike the licence provision, the provision is not qualified by an intention to the contrary.

Drafting Problems

There are two problems with Item 3. First, it is not clear why the assignment provision does not contain the same qualification as the licence provision concerning intention to the contrary. Secondly, Item 3(2) does not operate as appears to be intended. A proper interpretation of 3(2) is that the assignment will have no effect after the legislation comes into effect. This occurs because:

(i) the broadcast right and the diffusion right are repealed by the Bill; and

(ii) the communication right deemed to apply to works and other subject matter at Item 2 of Schedule 2 does not apply in relation to an assignment; and

(iii) there is no savings provision which applies the present terms of the Copyright Act, as is the case at Item 3 (1) in respect of licences, etc.

We assume this to be a drafting error. We also assume that the failure to provide that Item 3(2) is subject to an intention to the contrary is also a drafting error.

Policy Concerns

There are two concerns.

First, it is difficult to see why an assignee of *all* copyright (as opposed to specific rights) should be treated less favourably than the owner of copyright. The person who assigns all copyright clearly intends to divest him or herself of all interest. There is no good policy reason to deny the assignee the benefit of the communication to the public right.

While it is arguable that such an assignment establishes the contrary intention required, the issue should not be left unclear. The transitional provisions should be amended to provide that a prior assignment of *all* copyright will carry with it the communication to the public right.

Furthermore, there may be circumstances where an assignment of the broadcast right or diffusion right is intended to convey future rights analagous to these rights. An assignment of the broadcast or diffusion right alone cannot be assumed in all circumstances to be confined to those activities as presently defined under the Copyright Act. It would appear inequitable to extinguish by statute rights which the parties may have contemplated under an agreement.

Secondly, the transitional provisions have the effect that prior licences and assignments of the broadcast right will be limited to the technology specific broadcast right in the current Act - "transmit by wireless telegraphy to the public". The Bill, however, amends the definition so that it is technology neutral and consistent with the definition of a broadcasting service in the BSA. It has been understood for some time that the definition of broadcast would updated in this way.

Given that understanding, the new definition of broadcast should travel with prior licences and assignments of the broadcast right, and the provisions should be amended accordingly. Otherwise, a broadcaster may be in a position where the broadcast right has been acquired, but it is unable to broadcast the work consistent with its rights under the BSA, i.e. where the broadcasting service is provide otherwise than by wireless telegraphy.

Retransmission – Keeping of Records

The retransmission provisions of the Bill impose an obligation on the retransmitter to keep a record of each transmission made (section 135ZZN). It is not clear what level of detail is required. Neither the retransmitter (or the originating broadcaster) is in a position to maintain or provide information relating to the underlying works and subject matter. That information is properly obtained by the relevant collecting society.

Under the scheme for the copying of transmissions by educational institutions, the declared collecting society, Screenrights, obtains basic information from the relevant institutions which it uses to obtain information concerning underlying rights holders through its own sources. This scheme is most analogous to the retransmission provisions and appears to have been used as the model in the drafting of the provisions.

The scheme should operate similarly in this case. The legislative obligation to mainatin records should be limited to the basic log of the broadcasters output.

The Statutory Licences

FACTS is concerned at the Government's proposal that the statutory licences at section 65, 66 and 67 will not be extended to communications. These sections provide that copyright in certain artistic works is not infringed by including it in a television program.

Examples of this could be the incidental filming of a building in the course of live sporting coverage (such as the Sydney to Hobart Yacht Race or the Melbourne Grand Prix). These types of television programs would be broadcast in Australia. They may also however, be communicated to other organisations overseas. The programs may be used some time later both in Australia and overseas in a way which would not constitute a broadcast as that term

is proposed to be defined under these amendments. Specifically, any point-to-point service or a delivery of television programs on demand would be outside the definition of a broadcast. If the statutory licence is not extended to communications outside the scope of a broadcast as that is defined under the Act, a program filmed for television but used later or simultaneously in a non-broadcast context, may be at risk of infringing these rights.

We would be pleased to have the opportunity to expand on these comments before the Committee.

Yours sincerely

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