

29 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

Broadcast Decoding Devices

One of our submissions to the Committee has been that 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.

At last week's hearing, we promised to provide the Committee with draft amendments that would achieve this. Our suggested amendments are attached.

The effect of the provisions is to provide a civil remedy where a person possesses and uses a broadcast decoder to receive an encoded signal without the authority of the broadcaster, and where the use of the decoder results in a commercial benefit.

The definition of encoded broadcast has been expanded to include a commercial television broadcasting service. For practical purposes, that expansion will only apply to the newly proposed 135AN as the remainder of the provisions (concerning dealing and manufacture and imposing criminal sanctions) remain limited to the subscription context.

It is important to emphasise that the extension of the provisions to provide a remedy in relation to use and possession in both the subscription and the free to air context only applies where the use is for a commercial purpose. That will address the situation that free to air broadcasters are concerned about, namely pubs owners broadcasting blacked-out sporting events to their patrons, but would not cover a situation where interception occurred in a purely domestic setting.

We have not proposed a criminal sanction in relation to use or possession.

Conversion Analogue to Digital

We had also submitted that the Bill needed amending to provide an exception from the application of proposed section 21 to broadcasters in relation to the conversion of analogue material into digital format, and vice versa. PPCA had some difficulties with our proposal. However, there seemed some room for compromise, and we advised the Committee that we

would see if agreement were possible. The issue is still being considered and we would hope to be able to advise the Committee of the outcome of discussions early next week. I understand that Mr Candi of PPCA has flagged this in telephone conversions with you.

Yours sincerely

David McCulloch
Director Broadcast Policy

COPYRIGHT (DIGITAL AGENDA) BILL 1999
PROPOSED AMENDMENTS IN RESPECT OF
UNAUTHORISED USE OF BROADCAST DECODERS
FACTS

1. Make Part VAA referable to “Broadcast Decoders and Broadcast Decoding Devices”.
2. Amend Division 1 to include the following definition:

“Broadcast Decoder” means a device (including a computer program) that by its operation enables the reception of an encoded broadcast signal.”

Amend the definition of “encoded broadcast”:

“Encoded Broadcast” means:

- (a) in the case of a subscription broadcasting service:
 - (i) a broadcast delivered by a broadcasting service that is made available only to persons who have the prior authorisation of the subscription broadcaster and only on payment by such persons of subscription fees (whether periodically or otherwise); and
 - (ii) access to which in an intelligible form is protected by a technical measure or arrangement (including a computer program).
 - (b) in the case of a commercial television broadcasting service:
 - (i) a broadcast delivered by a broadcasting service, access to which in an intelligible form is protected by a technical measure or arrangement (including a computer program).
3. Insert a new Division 2 in the following terms and renumber the balance of the Part appropriately:

“Division 2 – Actions in relation to broadcast decoders”

135AN Actions in relation to broadcast decoders

- (1) Subject to subsection (2), this section applies if:

- (a) a person has a broadcast decoder in their possession, custody or control without the authority of the broadcaster whose signal is encoded; and
 - (b) the person uses or authorises the use of the broadcast decoder to receive the encoded broadcast signal without the authority of the broadcaster; and
 - (c) the use of the broadcast decoder results in a commercial benefit to the person in or in connection with a trade or business carried on by, or in association with, the person.
- (2) Subsection (1) does not apply unless the person knew or ought reasonably to have known that the broadcaster had not authorised the person to have possession, custody or control of the broadcast decoder.
- (3) This section does not apply in relation to anything lawfully done for the purposes of law enforcement or national security by or on behalf of:
- (a) the Commonwealth or a State or Territory; or
 - (b) an authority of the Commonwealth or of a State or Territory.
- (4) Subject to subsection (7), if this section applies, the broadcaster may bring an action against the person.
- (5) The relief that a court may grant in an action under this section includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.
- (6) If, in an action under this section, the court is satisfied that it is proper to do so, having regard to:
- (a) the flagrancy with which the defendant did the acts described in paragraph (1)(b); and
 - (b) any benefit shown to have accrued to the defendant as a result of using or authorising the use of the broadcast decoder; and
 - (c) all other relevant matters;
- the court may, in assessing damages, award such additional damages as it considers appropriate in the circumstances.
- (7) An action cannot be brought against a person under this section in respect of the act described in paragraph (1)(b) after the expiration of 6 years from the time when the person did the act