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Retransmission and broadcast issues

Introduction

5.1 In consequence of restructuring the rights of copyright owners to encompass a right of communication, the Bill amends the definition of 'broadcast'. The new definition of 'broadcast' is narrower than the former one because the old definition is in part subsumed into the definition of 'communicate'. The new definition, inserted by item 1 of the Bill, refers to a communication delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* (the BSA). The new definition thus includes most television and radio programs, including those provided by cable services, apart from data-only, text-only and on-demand programs.

5.2 Proposed s. 99, inserted by item 86, stipulates that copyright in a broadcast is owned by the person who makes it. Item 84 amends s. 87(c) to include amongst the rights that belong to the owner of the copyright in a broadcast the right to re-broadcast (re-transmit) it, and the right to communicate it to the public otherwise than broadcasting it. At the outset, the Committee notes that it does not accept the Motion Picture Association's (MPA) submission that copyright in a broadcast should be retained by the copyright owner of the works incorporated into the broadcast.

5.3 The Bill contains a number of provisions to deal with specific issues that arise with respect to the broadcast of radio and television programs. The two main issues are the unauthorised reception of broadcasts and the retransmission of free-to-air broadcasts. Additional issues that arise in this context include the subsistence of copyright in non-broadcast

communications, and the conversion of films from analogue to digital format.

Unauthorised reception of broadcasts

5.4 Evidence to the Committee established that the reception of radio and television programs without the permission of the broadcaster is a significant problem affecting both free-to-air and subscription broadcasters. For subscription broadcasters, unauthorised reception represents a real loss of revenue.[1] Unauthorised reception also compromises licence area integrity and the commercial interests of free-to-air broadcasters.[2]

5.5 In response to industry comment on the Exposure Draft of the Bill, the Government has introduced enforcement provisions to deal with unauthorised reception. The Bill provides in item 105, proposed Part VAA, civil remedies and criminal sanctions against the manufacture and dealing in devices for unauthorised reception of encoded broadcasts.[3] Proposed Part VAA has been welcomed by most industry bodies.[4] However, they have identified a number of concerns in the new enforcement provisions to which they drew the Committee's attention.

Free-to-air broadcasts

5.6 The first concern, raised by the Federation of Australian Commercial Television Stations (FACTS), is that proposed Part VAA applies only to subscription broadcasts, and not also to free-to-air broadcasts: see the definition of encoded broadcast in proposed s. 135AL. FACTS pointed out that free-to-air broadcasters often encode their signal in order to prevent it from being received outside intended licence areas, areas in which the signal is intentionally 'blacked out'. FACTS reported that some establishments in blacked out areas have used decoding devices in order to receive the signal and display programs for a commercial benefit.[5] The most common example of this has been the unauthorised broadcast of

1 Lynette Ireland, Australian Subscription Television and Radio Association (ASTRA), *Transcript*, p. 214.

2 Federation of Australian Commercial Television Stations (FACTS), *Submissions*, p. S119.

3 Attorney-General's Department & Department of Communication, Information Technology and the Arts, *Submissions*, p. S602.

4 ASTRA, Submissions, p. S263; FACTS, *Submissions*, p. S118.

5 FACTS, *Submissions*, p. S118.

sporting events in pubs. This has created commercial difficulties for free-to-air broadcasters who are often contractually bound to observe black out constraints. The Committee sympathises with this concern.

5.7 The joint submission from the Attorney General's Department and the Department of Communications, Information, Technology and the Arts (AGD and DCITA) indicated that the Government views the unauthorised reception of encoded free-to-air broadcasts as a matter that may be dealt with by provisions in broadcasting legislation.[6] The submission recognises that the enforcement measures in proposed Part VAA do not strictly relate to the infringement of copyright, but rather to the avoidance of contractual obligations between broadcasters and receivers.[7] Yet the unauthorised reception of encoded free-to-air broadcasts is also a matter which strictly does not form part of copyright. In the Committee's view, it is appropriate to deal with all aspects of decoding devices in the one piece of legislation, and in the one place.

5.8 The Committee concludes that the use of a decoding device for the unauthorised reception for commercial purposes of free-to-air broadcasts should be prohibited. As the offending activity relates to free-to-air broadcasts, and as the damage suffered by the broadcaster is primarily contractual in nature, the Committee considers that a criminal sanction is in the circumstances inappropriate. In the Committee's opinion, the most valuable remedy to free-to-air broadcasters is likely to be an injunction. FACTS submitted a proposed draft amendment to the Bill which the Committee considers would be effective in implementing a civil remedy. The proposed amendment is included as Appendix D to this report. The Committee endorses the recommendation submitted by FACTS in relation to the retransmission of free-to-air broadcasts.

Recommendation 21

5.9 **The Committee recommends that the Copyright Amendment (Digital Agenda) Bill 1999 or other appropriate legislation be amended to provide a civil remedy for the use for commercial purposes of a decoding device in order to receive an encoded free-to-air broadcast.**

6 AGD & DCITA, *Submissions,* p. S615.

7 AGD & DCITA, *Submissions,* p. S615.

Personal use of decoding devices

5.10 A second, and wider, concern with the proposed enforcement measures was voiced by copyright owners.[8] The Australian Subscription Television and Radio Association (ASTRA) argued that the Bill should prohibit the use of decoding devices for the unauthorised reception of subscription broadcasts, not only their manufacture and supply. ASTRA advanced a number of reasons in support of this argument. They pointed to Part VIIB of the *Crimes Act 1914* and the analogous prohibition contained therein relating to defrauding a carrier or carriage service provider.[9] The pointed to provisions of United Kingdom and New Zealand legislation, making reception of broadcast with intent to avoid paying the applicable charge a criminal offence. They noted the recommendation of the Copyright Convergence Group, that similar provisions be included in the Copyright Act.[10]

5.11 The prohibition on manufacture and dealing in decoding devices reflects the Government's enforcement policy generally, in targeting preparatory commercial activities rather than individual acts.[11] In relation to decoding devices, the joint submission from AGD and DCITA also argued that

> Enforcement actions against individuals for the use and possession of broadcast decoding devices could involve heavy handed intrusion into the private sphere.[12]

5.12 On this point ASTRA submitted that if the legislation were to prohibit the use of decoding devices, this would

> deter people from purchasing them. The only people who would suffer would be those who have consciously decided to breach the law.[13]

5.13 ASTRA further argued that in order to prevent piracy, it is crucial that criminal and civil sanctions be introduced prohibiting fraudulent reception of broadcasts.[14]

5.14 The Committee concludes that the Bill should include a criminal sanction against the fraudulent reception of subscription broadcasts. However, in the opinion of the Committee, a civil remedy is not necessary. This is

8 See *Transcript*, p. 218.

9 Section 85ZF of the *Crimes Act 1914*.

10 Report of the Copyright Convergence Group, *Highways to Change*, August 1994, p. 54.

11 AGD & DCITA, *Submissions*, p. S615.

12 AGD & DCITA, *Submissions*, p. S615.

13 ASTRA, *Submissions*, p. S264.

14 ASTRA, *Submissions*, p. S264.

partly because the strength of the enforcement measure lies in its deterrent effect, which will be adequately achieved through the creation of a criminal offence. It is also because s. 21B of the *Crimes Act 1914* (enabling a court to make a reparation order) makes it possible for subscription broadcast providers to recover any loss they suffer as a result of the fraudulent reception from convicted defendants. In relation to the wording of the provision, the Committee notes the endorsement given by the Copyright Convergence Group to the United Kingdom provision, which appears in Appendix E.[15]

Recommendation 22

5.15 **The Committee recommends that proposed Part VAA of the Copyright Amendment (Digital Agenda) Bill 1999 or other appropriate legislation be amended to make it a criminal offence to dishonestly receive a program included in a broadcast from a place within Australia with intent to avoid payment of any charge applicable to the reception of the program. For the purposes of the amending provision, 'program' would have the same meaning as in the *Broadcasting Services Act 1992*.**

Retransmission of free-to-air broadcasts

5.16 The Bill introduces a statutory licence scheme for the retransmission of free-to-air broadcasts. In this respect, the Bill detracts from the exclusive right of the owner, contained in s. 87(c), to authorise the retransmission of the broadcast. MPA submitted that the exclusive right should remain, arguing that European experience demonstrates that subscription broadcasting and public access to broadcasts can flourish without a compulsory licensing scheme.[16] The Committee notes that the industry support that exists for a statutory scheme and therefore concludes that it should not be abandoned.[17]

5.17 The statutory licence scheme for the retransmission of free-to-air broadcasts contained in items 200 and 201 of the Bill differs significantly from that contained in the Exposure Draft. The scheme adopted in the

15 Report of the Copyright Convergence Group, *Highways to Change*, August 1994, p. 54.

16 Motion Picture Australia (MPA), *Submissions*, pp. S183–4.

17 Screenrights, *Submissions*, p. S154; ASTRA, *Submissions*, p. S263.

Exposure Draft was modelled on s. 109 of the Copyright Act. The submission from AGD and DCITA indicated that in response to concerns, the scheme would be difficult to administer, it has been remodelled in the Bill to resemble that in Part VA of the Copyright Act.[18] The remodelled scheme has general support from industry bodies. However, the Committee has considered modifications which have been suggested by some organisations.

Scope of retransmission scheme

5.18 The Committee received submissions in relation to the scope of the scheme from two different perspectives. On one front, the subscription broadcast providers argued that the scheme should apply to other types of broadcasts in addition to free-to-air broadcasts. ASTRA submitted that Part VC should extend to the

> retransmission of primary services, enhanced services, multichanelling and any other services that a broadcaster permits a retransmitter to retransmit.[19]

5.19 In so submitting, ASTRA noted that the Government is currently reviewing whether other services (for example, multichannels and datacasting services) should be retransmitted.

5.20 The Committee agrees that it is appropriate that other broadcast services come within the scheme in proposed Part VC. This would involve amending the definition of 'retransmitter' in proposed s. 135ZZI amongst other things. In the Committee's view, however, it is desirable to wait until the types of other broadcast services which may be retransmitted have been identified.

5.21 On another front, copyright owners, including the Australian Performing Right Association (APRA), the International Intellectual Property Alliance (IIPA) and one of its member associations, the MPA, submitted that the statutory licence scheme should be restricted to retransmissions by subscription broadcast providers.[20] They pointed out that s. 135ZZI as currently drafted applies to retransmissions in any medium, including over the Internet and through the telephone system. MPA argued that the potential harm caused to copyright owners by Internet retransmissions

18 AGD & DCITA, *Submissions*, p. S602.

19 ASTRA, *Submissions*, p. S265.

20 MPA, *Submissions*, p. S700; Steven Metalitz, International Intellectual Property Alliance, *Transcript*, p. 230.

being subject to proposed Part VC is enormous.[21] For this reason they suggested that the definition of 'retransmitter' should be confined to retransmission by means of a cable.

5.22 The Committee agrees that the operation of proposed Part VC has the potential to be much wider in scope than can be intended under policy. The Committee concludes that it is desirable to restrict the operation of the proposed part. Before considering how this may best be done, it is necessary to consider another potential problem with its operation.

Subscription broadcasts of sound recordings

5.23 The Australian Performing Right Association (APRA) reasoned that proposed Part VC would also apply to the retransmission of free-to-air radio broadcasts through the telephone system; for example, as 'music-on-hold'. APRA submitted that this consequence which is clearly unintended.[22] The Committee disagrees that this consequence is necessarily unintended. The joint submission from AGD and DCITA stated that the amendment provides a means of ensuring that subscription broadcasters have access to musical content on reasonable terms.[23]

5.24 The Committee is of the view that the primary type of subscription broadcasts to which proposed Part VC is intended to apply is television. The Committee is strengthened in its view by the example given in the Explanatory Memorandum as to the type of broadcasters who will be subject to the proposed part: cable pay TV operators.[24]

5.25 APRA argued that it would be 'absurd' if subscription broadcasters were required to observe the procedures stipulated in the statutory scheme, when the licensing of sound recordings can handled in a straightforward, voluntary fashion.[25] The Committee sympathises with the APRA's desire to avoid complexity in administering the retransmission of sound recordings. For this reason, the Committee concludes that proposed Part VC should not apply to sound recordings, and that proposed s. 135ZZI should be amended accordingly.

5.26 The Committee notes that the Bill impacts on the broadcast of sound recordings in a second way. Section 136 defines those licences that are subject to the jurisdiction of the Copyright Tribunal. Item 201 amends

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21 MPA, *Submissions*, pp. S178–S180, S700.

22 Brett Cottle, Australian Performing Right Association (APRA), *Transcript*, p. 229.

23 AGD & DCITA, *Submissions*, p. S619.

24 *Explanatory Memorandum*, para 339.

25 Brett Cottle, APRA, *Transcript*, pp. 229–30.

s. 136 to include a licence to broadcast a sound recording in a broadcast transmitted for a fee payable to the person who made the broadcast. The Australian Record Industry Association and the Phonographic Performance Company of Australia (ARIA and PPCA) argued this gives subscription broadcasters of audio only programs a de facto statutory licence to broadcast sound recordings. They submitted that copyright owners should have the right to decide whether sound recordings are licensed to subscription broadcasters, and on what terms. ARIA and PPCA are concerned that a proliferation in subscription audio only broadcasters may undermine the market for the sale of sound recordings.[26]

5.27 The Committee understands the concerns of ARIA and PPCA. The Committee is uncertain how great a threat subscription audio-broadcasting would pose to the market for sound recordings. The Committee is mindful of the stated desire to allow subscription broadcasters access to musical content on reasonable terms. The Committee does not believe that the inability of the parties to approach the Copyright Tribunal will result in prohibitive fees for the retransmission of audio broadcasts. For this reason, the Committee concludes that item 201 should not include subscription audio broadcasting.

Recommendation 23

5.28 **The Committee recommends that the Copyright Amendment (Digital Agenda) Bill 1999 be amended to provide the statutory licence scheme for the retransmission of free-to-air broadcasts in proposed Part VC is to apply only in respect of subscription broadcasting of television programs.**

Recommendation 24

5.29 **The Committee recommends that item 201 of the Copyright Amendment (Digital Agenda) Bill 1999 be amended so that the definition of licence in proposed section 136 does not include a licence to broadcast a sound recording as part of a subscription broadcast.**

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26 Australian Record Industry Association & Phonographic Performance Company of Australia, *Submissions*, pp. S495–6.

Recommendation 25

5.30 **The Committee recommends that the Government review the need for a statutory licence scheme for the subscription broadcasting of sound recording as part of its proposed three year review of the legislation.**

Number of collecting societies

5.31 Proposed Part VC empowers collecting societies to collect and distribute payments made by retransmitters to underlying copyright holders. Proposed s. 135ZZT allows the Attorney-General to declare one collecting society for all copyright owners, or multiple collecting societies, each in respect of a class of relevant copyright owners.

5.32 A preliminary issue in respect of proposed s. 135ZZT, raised by ARIA and PPCA related to who should exercise the power to declare collecting societies. ARIA and PPCA submitted that the power should be conferred on the Copyright Tribunal in order to ensure transparency in the declaration process.[27]

5.33 The Committee does not consider that there is any danger of bias in the power being conferred on the Attorney-General.

5.34 Argument before the Committee was directed towards the appropriate number of collecting societies. Screenrights argued that a single collecting society would be more efficient, both administratively and economically. They further argued that it would avoid the possibility of multiple Copyright Tribunal determinations in respect of one retransmission, as well as the possibility of judicial review applications in respect of declarations of collecting societies.[28]

5.35 ASTRA agreed on behalf of the copyright users, in this context the subscription broadcast providers, that there should be only one collecting society. The proposal for a single collecting society was also supported by one copyright owner, the Screen Producers Association of Australia (SPAA).[29]

5.36 Screenrights, FACTS and the Federation of Australian Radio Broadcasters (FARB) all pointed out by virtue of proposed s. 135ZZZC, proposed Part

27 ARIA & PPCA, *Submissions*, p. S494.

28 Screenrights, *Submissions*, p. S155.

29 Nick Herd, Screen Producers Association of Australia (SPAA), *Transcript*, p. 226.

VC does not prevent a copyright owner from directly licensing their work to subscription broadcast providers.[30]

5.37 ARIA and PPCA argued in favour of multiple collecting societies. They submitted that as subscription broadcast providers would already have licence arrangements with PPCA in respect of commercial sound recordings, PPCA should also collect payments in connection with the retransmission of sound recordings in subscription broadcasts.[31] ARIA and PPCA also objected that the requirements in proposed s. 135ZZT(3) that a body has to satisfy before it can be declared a collecting body are infeasible for a number of collecting societies.[32]

5.38 The joint submission from AGD and DCITA stated that the existing provisions, allowing for both a single collecting society as well as multiple collecting societies, provided the scheme with flexibility.[33]

5.39 The Committee notes that in Part VA of the Copyright Act, dealing with the copying of transmissions by educational institutions, there is provision for only one declared collecting society. In the view of the Committee, Part VC lends itself to administration by one body. However, the Committee agrees that the statutory scheme should ensure flexibility and the Committee has therefore decided against prescribing one collecting society.

5.40 The Committee therefore also concludes that the requirements that a body has to meet in order to qualify as a collecting society, be modified so as to allow a wider class of bodies to act as collecting societies. The Committee recognises that the criteria in proposed s. 135ZZT(3) have been prescribed in order to safeguard the interests of underlying rights holders represented by collecting societies. However, in the Committee's view there are alternate structures for collecting societies that safeguard those interests equally well. ARIA and PPCA submitted a proposed draft amendment to the Bill which the Committee considers would be effective in appropriately expanding the definition of collecting society. The proposed amendment is included as Appendix F to this report.

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30 Tracey Meredith, FACTS & Federation of Australian Radio Broadcasters (FARB), *Transcript*, p. 228; David Brennan, *Transcript*, p. 229.

31 Emmanuel Candy, ARIA & PPCA, *Transcript*, pp. 227–8; ARIA & PCCA, *Submissions*, p. S495.

32 ARIA & PCCA, *Submissions*, p. S495.

33 AGD & DCITA, *Submissions*, p. S618.

Recommendation 26

5.41 **The Committee recommends that proposed sections 135ZZT(3), (4) and 135ZZU of the Copyright Amendment (Digital Agenda) Bill 1999 be amended in accordance with the proposal contained in Appendix F.**

Record keeping requirements

5.42 The record keeping requirements of the scheme for the retransmission of free-to-air broadcasts have been criticised as overly onerous in a number of submissions received by the Committee. Proposed s. 135ZZN requires a retransmitter to keep a record of each retransmission made of each broadcast specified in the remuneration notice.

5.43 FACTS argued that the record keeping requirement is unclear.[34] ASTRA maintained that it was unnecessary to require anything more than a basic log of program titles, as all other information is available to the relevant collecting society by virtue of the free-to-air reporting obligations.[35] FACTS supported this proposal.[36]

5.44 The Committee agrees that proposed s. 135ZZN as currently drafted is unclear about the level of detail required in the record keeping system. The Committee concludes that an amendment to clarify the requirement is necessary.

Recommendation 27

5.45 **The Committee recommends that proposed section 135ZZN(2) of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to require the record system to provide for a record to be kept of the title of each program included in each broadcast in each retransmission made by, or on behalf of, the retransmitter.**

5.46 ASTRA submitted that the powers contained in proposed s. 135ZZP enabling collecting societies to inspect the records kept by retransmitters were unnecessarily broad, given the public availability of

34 FACTS, *Submissions*, p. S121.

35 ASTRA, *Submissions*, p. S266.

36 FACTS, *Submissions*, p. S121.

retransmissions.[37] The Committee understands ASTRA's concern to the extent that it relates to disclosure of sensitive commercial information. However, on balance the Committee does not consider that proposed s. 135ZZP places too great an obligation on retransmitters.

Remuneration of directors

5.47 Discussion before the Committee in relation to proposed Part VC raised the issue of whether directors should be included in the class of underlying rights holders who are to be remunerated under the scheme. Currently, the scheme provides for the remuneration of the owners of the copyright in literary, dramatic, musical and artistic works, sound recordings and cinematograph films included in a broadcast. Section 90 provides that the owner of the copyright in a cinematograph film is the maker of the film; in other words, the producer or production company.

5.48 The Australian Screen Directors Association (ASDA) and the Australian Screen Directors Authorship Collecting Society (ASDACS) argued that directors should be amongst the group of underlying rights holders to be remunerated for the retransmission of free-to-air broadcasts. ASDA and ASDACS were supported in their argument by the Australian Copyright Council and the Arts Law Centre of Australia.[38]

5.49 On this issue, the joint submission from AGD and DCITA pointed out that in common law jurisdictions, film directors are not specifically recognised as the owners of copyright in film.[39] However, in this regard the Committee notes that amendments in 1996 to the *Copyright, Designs and Patents Act* (UK) recognised directors as co-authors of films and television programs.[40]

5.50 AGD and DCITA further submitted that the Government never proposed to change the position of directors in the Bill, although it will have regard to the directors' concerns when considering its response to Part 2 of the CLRC's Report on *Simplification of the Copyright Act*.

5.51 The SPAA opposed the recognition of directors in the statutory retransmission scheme. They argued that remuneration of is adequately

37 ASTRA, *Submissions*, p. S266.

38 Arts Law Centre of Australia, *Submissions*, p. S510.

39 AGD & DCITA, *Submissions*, p. S618.

40 Australian Screen Directors Association (ASDA) & Australian Screen Directors Authorship Collecting Society (ASDACS), *Submissions*, p. S331.

dealt with through industrial awards and commercial negotiations.[41] They further argued that the Bill

> is an inappropriate place to make significant changes to Australia's copyright and intellectual property rules that directors' copyright entails.[42]

5.52 In their submission, ASDA and ASDACS acknowledged that

> seeking a director's retransmission right is pre-empting the larger issue of film authorship but we believe that there are compelling arguments and international precedents that clearly outweigh any administrative inconvenience of introducing such a retransmission right for directors.[43]

5.53 The Committee has considered the arguments put forward by ASDA and ASDACS, many of which the Committee finds persuasive. The Committee notes that a number of European jurisdictions have recognised director's copyright, and that the CLRC has made recommendations in its review of the Copyright Act that have a similar effect.

5.54 ASDA and ASDACS suggested introducing the concept of a 'relevant rights holder', which is broader than a copyright owner. The Committee appreciates that this may be a feasible solution to the problem of remunerating directors for retransmission of their work. The Committee recognises that to remunerate directors for retransmissions of broadcasts may be to pre-empt consideration of whether they should have more extensive rights in films. Nevertheless, the Committee considers it appropriate that the contribution of directors be acknowledged in the retransmission scheme.

Recommendation 28

5.55 **The Committee recommends that proposed Part VC of the Copyright Amendment (Digital Agenda) Bill 1999 be amended to include film directors amongst the class of underlying rights holders who are to receive remuneration under the statutory scheme introduced by that Part.**

41 SPAA, *Submissions*, p. S420.

42 SPAA, *Submissions*, p. S423.

43 ASDA & ASDACS, *Submissions*, p. S329.

Commencement of Part VC

5.56 In correspondence to the Committee, Screenrights alerted the Committee to a potential problem in the operation of proposed Part VC.[44] The BSA currently contains a provision which would render the statutory scheme implemented in proposed Part VC ineffective.[45] On one interpretation of the problem section, a retransmitter could avoid making payments under the statutory licence scheme. The problem section of the BSA is to be repealed by the Broadcasting Services Amendment Bill (No 1) 1999 which is currently before Parliament.

5.57 The Committee notes the inconsistency between the problem section in the BSA and items 200 and 201 of the Bill. The Committee is of the opinion that a solution to the inconsistency, that would enable proposed Part VC of the Bill to operate effectively, needs to be urgently found.

Recommendation 29

5.58 **The Committee recommends that the Government urgently address the relationship between items 200 and 201 of the Copyright Amendment (Digital Agenda) Bill 1999 and provisions of the *Broadcasting Services Act 1992* to enable the statutory licence scheme introduced by items 200 and 201 to operate notwithstanding any possible inconsistencies.**

Conversion of analogue to digital broadcasts

5.59 The Committee received submissions from broadcasters identifying a problem that will arise in relation to the broadcast of sound recordings and films. Schedule 4 of the BSA and the *Television Broadcasting Services (Digital Conversion) Act 1998* place various obligations on free-to-air broadcasters to transmit their broadcasts in digital format. Many films are stored in analogue format, and thus require conversion to digital format before they are broadcast.

5.60 Proposed s. 21(6) provides that a sound recording or cinematographic film is taken to have been reproduced if it is converted into or from digital form. Thus the conversion of films from analogue to digital format for the purposes broadcasting the film will be a reproduction of the film, and will

44 Screenrights, Correspondence to the Committee, dated 23 November 1999.

45 Section 212 of the BSA.

expose the broadcaster to liability for infringement. The broadcasters argued that an exemption needs to be created so that they can lawfully broadcast in digital format.[46] They also pointed out that works and subject matter are routinely converted from analogue to digital format and vice-versa as part of the broadcasting and transmission process.[47]

5.61 Discussion before the Committee on this issue focussed on the extent to which such an exemption is necessary. ARIA and PPCA expressed concern over any extension of the ephemeral period contained in ss 47 and 107, which allows copies of works and sound recordings made for the purposes of broadcasting them, to be kept for 12 months.[48] FACTS and FARB replied that digital copies of films in particular may need to be kept for periods much longer than 12 months. FACTS and FARB further argued that in many cases, a commercial solution to the problem cannot be found because of the long lifetimes of program supply agreements.[49]

5.62 The Committee recognises the need for a mechanism to allow broadcasters to convert film from analogue to digital format, in exercise of their existing rights and in accordance with broadcasting requirements. The Committee disagrees with AGD and DCITA that this is a matter that can be adequately dealt with in broadcasting legislation.[50] In relation to the Copyright Act, FACTS recommended qualifying proposed s. 21 so that the conversion of a work from analogue to digital format by a broadcaster for the purpose of, or in the course of, making an authorised broadcast of the work, does not constitute a reproduction of the work.[51]

- In the view of the Committee, the suggested qualification to proposed s. 21(6), whereby certain copies are deemed not to be copies, is too drastic a solution to the problem. The Committee is concerned that the qualification may jeopardise the control of copyright owners over the exploitation of their works. The preferable approach, in the Committee's opinion, is to introduce an exception to infringement to meet the specific needs of broadcasters. This approach is in keeping with that of the Copyright Act as a whole. The exception could be conveniently introduced through an amendment to ss 47 and 107.

46 FARB, *Submissions*, p. S100; FACTS, *Submissions*, p. S117.

47 FACTS, *Submissions*, p. S117.

48 Emmanuel Candy, ARIA & PPCA, *Transcript*, p. 219.

49 Tracey Meredith, FACTS & FARB, *Transcript*, p. 223.

50 AGD & DCITA, *Submissions*, p. S617.

51 FACTS, *Submissions*, p. S681.

Recommendation 30

5.63 **The Committee recommends that proposed sections 47 and 107 of the Copyright Amendment (Digital Agenda) Bill 1999 or other appropriate legislation be amended to allow the first digitisation of films and sound recordings, subject to the following conditions:**

- **the film or sound recording from which a digital copy is made must be an authorised copy; and**
- **the digital copy must be made by the broadcaster or intended broadcaster; and**
- **the digital copy must be solely a conversion of the analogue copy and must be made solely for the purposes of broadcasting it; and**
- **the digital copy must be used pursuant to any existing agreement between the broadcaster and the program supplier.**

Subsistence of copyright in non-broadcast communications

5.64 The term 'non-broadcast communication' is used to refer to signals used by free-to-air broadcasters in order to transmit programs between stations in their network; so called 'network feeds' or pre-broadcast signals. The Committee prefers the term 'pre-broadcast signal', as 'non-broadcast communication' is confusingly broad.

5.65 FACTS reported instances of pre-broadcast signals being intercepted, decoded and broadcast by unauthorised persons. The unauthorised reception of pre-broadcast signals adversely affects licence area integrity and the commercial interests of free-to-air broadcasters in the same way as does the unauthorised reception of free-to-air broadcasts.[52] For this reason FACTS submitted that copyright should subsist in pre-broadcast signals.

5.66 In response, the joint submission from AGD and DCITA stated that to extend copyright to pre-broadcast signals would be to go beyond Australia's obligations under the 1961 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*.[53] However, the submission noted that protection of pre-

52 FACTS, *Submissions*, p. S119.

53 AGD & DCITA, *Submissions*, p. S616.

broadcast signals is proposed as part of a new treaty to update broadcast protection. The submission further noted that the Bill will protect copyright in the underlying subject matter included in non-broadcast communications.

5.67 In conformity with the holistic approach taken to the issue of the use of decoding devices earlier in this chapter, the Committee concludes that it is appropriate to include in proposed Part VAA a specific provision prohibiting the unauthorised reception for commercial purposes of pre-broadcast signals. As in the case of unauthorised reception of encoded free-to-air broadcasts, the Committee considers that the prohibition should take the form of a civil offence.

Recommendation 31

5.68 **The Committee recommends that proposed Part VAA of the Copyright Amendment (Digital Agenda) Bill 1999 or other appropriate legislation be amended to provide a civil remedy for the use for commercial purposes of a decoding device in order to receive a pre-broadcast signal.**