

**SUBMISSION TO THE**

**HOUSE OF REPRESENTATIVES STANDING  
COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**by the**

**MOTION PICTURE ASSOCIATION**

**Copyright Amendment (Digital Agenda) Bill 1999**

**A Bill for an Act to amend the  
*Copyright Act 1968*,  
and for related purposes**

Motion Picture Association  
Singapore  
October 1, 1999

**COMMENTS BY THE  
MOTION PICTURE ASSOCIATION**

**ON THE  
COPYRIGHT AMENDMENT  
(DIGITAL AGENDA) BILL 1999**

On behalf of the Motion Picture Association ("MPA"), we would like to submit the following comments on the Copyright Amendment (Digital Agenda) Bill 1999 which was introduced to the House of Representatives on September 2, 1999 (the "Bill").

The MPA is a trade association representing seven of the major international producers and distributors of theatrical motion pictures, home video entertainment and television programming. Its members include Buena Vista International, Inc. (Walt Disney); Sony Pictures Entertainment Inc. (Columbia/TriStar); Metro-Goldwyn-Mayer Inc. (MGM/United Artists); Paramount Pictures Corporation; Twentieth Century Fox International Corporation; Universal International Films, Inc; and Warner Bros.

The MPA has already submitted comments regarding its concerns with the Exposure Draft and Commentary, and on the draft Copyright Amendment (Digital Agenda) Bill released in February 1999 through a joint U.S. copyright-based industry alliance submission submitted by the International Intellectual Property Alliance (IIPA).

The following comments on the Bill will address certain issues that are specifically relevant to the audiovisual industry such as the retransmission right, private copying of television broadcasts, term of protection for audiovisual works, presumption of ownership and ownership in the broadcast signal. Comments specifically addressing the provisions in the Draft Bill intending to implement the WIPO Copyright Treaty, which will incorporate the MPA's comments on this important issue, will be submitted on behalf of the copyright-based industry alliance by the IIPA.

The IIPA is a coalition of seven trade associations representing the U.S. copyright-based industries, including the computer software, audiovisual, music, sound recording, and book publishing industries -- in bilateral and multilateral efforts to improve international protection of copyrighted works.

The MPA commends the Government of Australia for taking the initiative to update its Copyright Act 1968 (the "Copyright Act"), especially with respect to its recognition of the influence of new technology on copyright. To that end, Australia has ratified the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) and thus recognized that the digital age is already upon us posing new threats to copyright owners' interests worldwide. A modern copyright law must be updated in accordance with the needs for and developments in copyright protection in this digital age to provide at least minimum standards of protection now needed by creators of intellectual property, who will otherwise suffer irreparable harm.

The Government of Australia should take this occasion to include essential provisions in its Copyright Act that would move Australia forward on the path toward full implementation of the WIPO Treaties. We appreciate the opportunity to provide the following comments and hope they are useful to you and your colleagues in your further

work on this important matter.

Please do not hesitate to call on us if we may answer any questions or assist in your efforts in any other way. Thank you again for the opportunity to comment. The MPA, through its Singapore office, is available to respond to specific questions about these comments.

## **SUMMARY OF THE MPA'S RECOMMENDATIONS**

### **I. Retransmission Right**

- The MPA recommends that copyright holders be granted an exclusive retransmission right under Article 31, rather than imposing on the copyright holder a statutory licensing scheme with the payment of equitable remuneration as is proposed under the Bill.
- The definition of "retransmission" should be revised to exclude any means of retransmission other than traditional cable and should specifically exclude any activities considered as taking place "online".
- The definition of "retransmitter" should be revised to specify that it is limited to cable pay-TV operators.

### **II. Delayed Retransmissions**

- Proposed Section 135ZZK (2) and (4) should be revised because these sections extend beyond the scope of the internationally recognized concept of a delayed retransmission, thus violating the copyright owners exclusive reproduction right.
- The recordings or copies should be limited to one copy of a work per authorized retransmission.
- This Section should provide that the only purpose for which a copy is being made is for both technical and time zone purposes.
- Authorized copies should be limited to those made by the retransmitter by means of its own facilities and to exclude recordings made by an agent or some other outside body.
- Authorized copies should be destroyed within 24 hours after the copy is made.

### **III. Collective Management**

- The MPA believes significant revision is needed to the proposed Sections establishing the collection system for the statutory licensing scheme for retransmissions proposed under the Bill. The proposed collection system is severely prejudicial against the copyright owners and also prejudicial against the collecting society. Administratively, the provisions appear

unnecessarily complicated and likely unworkable.

#### **IV. Private Copying**

- Insufficient notice is taken in the Bill of the development and influence of digital technology on copyright. The Bill should make a distinction between conventional analog and digital private copying (and high definition analog). Otherwise, a major gap will be created in Australian law which, if not remedied, will undoubtedly result in the devaluation of intellectual property and copyright in general in Australia.

#### **V. Exceptions**

- The exceptions to the reproduction right in the Bill must include some limitations -- otherwise the legitimate interests of the copyright holder are unreasonably prejudiced.
- A clear statement is required in Australian law establishing the superiority of essential technological measures by which copyright material will be protected at the digital age, over any such exceptions or limitations to copyright.

#### **VI. Term of Copyright Protection**

- The MPA recommends that the Copyright Act be revised to provide audiovisual works with a term of copyright protection of 95 years from the beginning of the year following the year of first publication which would correspond to the modern international trend.

## **VII. Ownership in the Copyright in the Broadcast Signal**

- The MPA recommends that Australia allow the copyright in the broadcast signal to be retained by the copyright owner of the works incorporated in the program. If Australia decides to establish a statutory licensing scheme and grant the broadcaster the copyright in the broadcast signal, then any provisions granting broadcasters the right to authorize a retransmitter to retransmit their broadcasts should be included in the Bill.

## **VIII. Presumption of Copyright Ownership**

- The MPA recommends the revision of Section 126 to provide that:
  - (1) a presumption of ownership and subsistence extend to both civil and criminal proceedings; and
  - (2) a person who puts ownership or subsistence of copyright in issue must provide evidence which would give a Court reasonable grounds to require the owner to provide proof of those issues.

## MPA'S DETAILED COMMENTS

### I. Retransmission Right

The MPA welcomes Australia's efforts to meet its international obligations by correcting the deficiency in its Copyright Act which gives copyright holders no rights with respect to the retransmission of broadcasts containing the copyright holder's underlying protected works.

Australia is a member of the World Trade Organization (WTO) and is, therefore, obligated to implement the principles set forth in the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (the "TRIPs Agreement"). Under Article 9 of the TRIPs Agreement, Australia's Copyright Act must comply with Articles 1-21 and the Appendix of the Berne Convention (1971 Paris Text).

Thus, we are pleased to see in the Bill the deletion of Section 199(4) of the Copyright Act which is inconsistent with both the TRIPs Agreement and the Berne Convention. Section 199(4) establishes that if a party retransmits, via cable, an authorized television broadcast, that party is deemed to have been granted a license by the copyright owner of the broadcast and of the work(s) or film(s) included therein. Article 11bis(1)(ii) of the Berne Convention provides right holders with the exclusive right to authorize "any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one."

Countries adhering to the Berne Convention, such as Australia, must provide in their copyright laws that authorizing or prohibiting retransmissions is the exclusive right of the right holder. Member states of the Berne Convention are given the option to abridge that right by making it subject to a compulsory license which provides "equitable remuneration" under Article 11bis(2).

Although we welcome your efforts under the Bill with respect to the retransmission issue and for your efforts to meet and conform to your international obligations as a member of the Berne Convention and the WTO, the MPA still has several serious concerns regarding Australia's proposed scheme for correcting this long-standing deficiency.

## **A. Scope of Retransmissions**

Section 135ZZK of the Bill proposes a statutory licensing scheme for the retransmission of free-to-air broadcasts.

Currently proposed Section 135ZZK provides:

- "(1) The copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by the retransmission of the broadcast if:
  - (a) a remuneration notice given by, or on behalf of, the retransmitter to the relevant collecting society is in force; and
  - (b) the free-to-air broadcast was made by a broadcaster specified in the remuneration notice; and
  - (c) the retransmitter complies with section 135ZZN.
- (2) The copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by the making of a copy of the broadcast for the sole purpose of enabling a delayed retransmission of the broadcast to be made.
- (3) Subsection (2) does not apply if the retransmission of the broadcast would infringe the copyright in the broadcast.
- (4) If a copy of a broadcast made for the purpose referred to in subsection (2) is not destroyed within 7 days after it is made, subsection (2) does not apply, and is taken never to have applied, in relation to the making of the copy.
- (5) In this section, a reference to the making of a copy of a free-to-air broadcast is a reference to making a cinematograph film or sound recording of the broadcast, or a copy of such a film or sound recording."

The MPA recommends that proposed Section 135ZZK of the Bill be revised to clarify that it is not the intention of the legislators now or in the future to subject retransmissions over any means other than cable television networks, especially including the Internet, to the proposed statutory licensing scheme under that section. Under Section 199(4), cable retransmission is traditional but this proposal allows invasion of other markets by retransmission.



While Section 135ZZK proposes a scheme for retransmissions of free-to-air broadcasts, the definition of "retransmission" lacks any limitations as to the delivery means of the retransmission. Indeed, the Explanatory Memorandum released in tandem with the Bill states that "Differences in the techniques used to achieve a retransmission compared to the techniques used to achieve the original transmission will not be relevant to the question of whether a retransmission is a retransmission for the purposes of the Copyright Act".

This is very dangerous because the means of delivery of works in the global context of the digital age must be considered. The rapid pace of change requires legislators to consider the technological growth, adapt laws to such changes, and grant copyright owners adequate protection against unauthorized exploitation of their works by any new medium. Thus, the definition of "retransmission" should at a minimum be revised to exclude any means of retransmission other than traditional cable and should specifically exclude any activities considered as taking place "online".

The new definition of "broadcast" proposed under subsection 10(1) states that "broadcast means a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*" (the "BSA"). The definition of "broadcasting service" under the BSA includes an expansive list of delivery means, including "radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, ... ." This definition is too flexible because it in turn allows retransmission of a broad spectrum of services, not just traditional terrestrial television broadcasts as we believe the drafters intended.

Furthermore, the term "retransmitter" is defined under the Bill very broadly. Section 135ZZI of the Bill defines "retransmitter" to mean a person who makes a retransmission of a free-to-air broadcast. This term, therefore, is not limited to cable pay-TV operators or a particular type of technology, and applies to retransmitters generally. The result is that the term "retransmitter" as is currently drafted could potentially include persons who retransmit free-to-air broadcasts via the Internet. The MPA recommends that the definition of "retransmitter" be revised to specify that it is limited to cable pay-TV operators.

Indeed, under proposed Section 135ZZK, retransmitters may even be allowed to capture Internet transmissions and retransmit them under a compulsory license. This is not the intent of proposed Section 135ZZK.

The MPA understands that the intent of the Australian legislators was to only allow retransmission of traditional terrestrial broadcasts over cable systems under the statutory licensing scheme. However, the proposed text is **far to broad and should be** revised in a more narrow fashion with greater clarity to meet this goal. **Without such revisions, it could** endanger the development of other media in Australia, **which might be considered subject to** unfettered retransmission rights **under the current text.**

The possibility of such harm to copyright holders should a global system of retransmissions be subject to a compulsory licensing scheme is enormous. There would be considerable difficulties as a practical matter for collection of any remuneration due. Furthermore, there would be no way to enforce any limitations on acts by the retransmitters and thus no remedies to the copyright holders.

The market value of audiovisual works would be seriously impaired. Consider the fact that very soon a digital broadcast will be able to be received into a computer. The protected work contained in the program can then be recorded and stored into a digital file on the computer. That file can then simply, easily and quickly be sent as an attachment via email to millions of people all over the world. Under Australia's statutory licensing scheme as presently proposed, the retransmitter of that primary digital broadcast does not have to seek authorization to retransmit that protected work, but rather merely pays equitable remuneration to the right holder.

Furthermore, a country that allows any type of compulsory licensing system to operate with respect to certain Internet transmissions may be in violation of the Berne Convention. Since Article 11 *bis*(2) does not permit the imposition of compulsory licenses in the case of cable-originated programs, it should not permit the imposition of compulsory licenses in the case of many of the media, including Internet-originated programs, that might be subject to this retransmission scheme.

Importantly, the copyright owners appear to be afforded limited ability under the proposed provisions in the Bill to protect works through technical copyright protection measures. Thus it is critical that the Copyright Act clearly dispel any notion of subjecting any means other than cable television networks (especially including the Internet) to a compulsory licensing scheme.

## **B. Delayed Retransmissions**

The MPA recommends the revision of proposed Section 135ZZK (2) and (4) because these sections extend beyond the scope of the internationally recognized concept of a delayed retransmission, thus violating the copyright owners exclusive reproduction right.

Currently, proposed Section 135ZZK(2) provides that:

"The copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by the making of a copy of the broadcast for the sole purpose of enabling a delayed retransmission of the broadcast to be made."

The MPA believes that the conditions under which audiovisual works may be retransmitted and recorded (for retransmitting purposes) is a matter for the retransmitter and the copyright owners to agree among themselves. The granting of a retransmission right, whether granted by the owner of the exclusive retransmission right or by way of a statutory licensing scheme, should not include the right to make copies. When the making of a copy is required (e.g., when the retransmitter needs to make a copy of the original broadcast for the purposes of a delayed retransmission), the retransmitter should seek authorization by the copyright owner, or alternatively, by the rights holder in the broadcast signal.

While the MPA welcomes the protection extended by virtue of the language "...for the sole purpose of enabling a delayed retransmission of the broadcast to be made", Section 135ZZK(2) should be revised in the following respects to adequately ensure that works are protected from piracy:

1. The recordings or copies should be limited to one copy of a work per authorized retransmission. Currently, there is no clear limitation in this Section and so an undetermined number of copies of a work could be made. There is no need to go beyond one copy for authorized retransmission purposes.
2. The Section should specifically provide that the only purpose for which a copy is being made in relation to a delayed retransmission is for both technical and time zone purposes.

3. The Section should be revised to limit copies to those made by the retransmitter by means of its own facilities and to clearly exclude recordings made by an agent or some other outside body. This is especially important in the digital age where every copy of every work is a perfect copy.

The MPA recommends the revision of Section 135ZZK(4) to provide that copies authorized for delayed retransmission purposes be destroyed within 24 hours after the copy is made.

Currently, Section 135ZZK(4) provides:

"If a copy of a broadcast made for the purpose referred to in subsection (2) is not destroyed within 7 days after it is made, subsection (2) does not apply, and is taken never to have applied, in relation to the making of the copy."

There are three time zones in Australia. Therefore, there is no need whatsoever to keep a copy of an audiovisual work any longer than 24 hours for delayed retransmission purposes. Any extension beyond 24 hours should be a violation of the copyright owner's reproduction right under the Berne Convention and the TRIPs Agreement.

Furthermore, Australia is migrating to digital television, as are the U.S. and the U.K. Increasingly, programs sourced from these markets (which comprise a substantial proportion of those broadcast on Australian networks) will be in digital format. Australia must recognize appropriate measures to protect these digital works from pirates. Analog and digital television signals have different transmission characteristics. Copies made of analog works (where there would be a decline in quality of the copy as each new copy is made) should be treated differently than copies made of digital works (where very little change in quality will be recognized in each new copy made). Digital works and digital broadcasts will require greater protection through technological measures and these protection measures should be available and applied to any copies made for purposes of delayed retransmissions.

### **C. Exclusive Retransmission Right**

Fundamentally, the MPA believes that copyright holders should be granted an exclusive retransmission right (under Article 31), rather than imposing on the copyright holder a statutory licensing scheme with the payment of equitable remuneration as is proposed under Section 135ZZK

of the Bill. The right to authorize or prohibit the retransmission of copyright material, including audiovisual works is consistent with both the TRIPs

## Agreement and the Berne Convention.

While the member states of the Berne Convention are given the option to make the retransmission right subject to a statutory license provided that the copyright owner is compensated with equitable remuneration, the MPA believes that copyright holders and retransmitters should freely determine, on the basis of the marketplace, how to apportion the value of the right to retransmit the work.

With respect to proposed Sections 135ZZK - 135ZZW providing a compulsory licensing scheme that provides payment to the copyright holder of equitable remuneration for the retransmission of copyrighted works such as that proposed in the Bill, the MPA acknowledges that it is a great improvement for copyright holders. Currently, in Australia retransmission of copyrighted works requires neither the permission of, or compensation to, the originating broadcasters or the copyright holders of the works retransmitted.

Unfortunately, a number of significant problems will remain even with such a compulsory licensing scheme in place; problems that would not exist if copyright holders held an exclusive retransmission right. Some of these problems include:

- A pay TV operator might retransmit a satellite signal containing an audiovisual work where the signal originates outside of Australia (i.e., a satellite overspill signal) prior to the licensed terrestrial broadcast of that same audiovisual work in Australia.
- A cable television service might retransmit a signal from one region of Australia into another where the programming on the signal has not yet been licensed for exhibition.
- Compulsory licenses unnecessarily introduce third party rate setting bodies into a purely private process and create enormous administrative costs which take revenue away from the production and creative community.

Australia should take note that many countries have adopted exclusive cable retransmission rights which benefit Australian copyright holders. The European experience demonstrates that cable systems in Europe, where copyright owners are granted an exclusive retransmission right as required under the European Cable and Satellite Directive, are thriving without a compulsory license scheme.

New technology has led to more diversity of programming and increased competition among delivery systems. The television program marketplace today includes television broadcast stations, cable, satellite and microwave multipoint distribution services (MMDS), and soon

telephone companies and digital broadcasting, all involved in the delivery of programming to be viewed on a television broadcast receiver which one day may include a computer. The number of copyrighted works being disseminated over cable is rapidly increasing as new technologies are continuously being developed and refined. As a result, the value of cable companies is increasing. Competition in the marketplace is assured and compulsory licensing of retransmissions is not necessary to ensure the public's broad access to protected works.

#### **D. Collective Management**

The MPA recommends significant revision to proposed Sections 135ZZL to 135ZZW which establish the collection system for the statutory licensing scheme for retransmissions proposed under Section 135ZZK. There are a number of problems with the proposal.

The proposed system is severely prejudicial against the copyright owners whose protected works are contained in the broadcasts that are being retransmitted. It is also prejudicial against the collecting society which will be set up to collect on behalf of, and distribute the equitable remuneration to, the copyright owners.

##### **i) Notice**

The remuneration notice system is, administratively, very complicated. Under proposed Section 135ZZL and 135ZZN, a notice becomes "in force" when a retransmitter sends a notice to the collection society specifying the amount of equitable remuneration to be paid based on a record system established and maintained by the retransmitter. Each retransmitter apparently sets up its own record system subject to agreement with the collection society and failing such agreement, the Copyright Tribunal will step in. As drafted, it is unclear whether this procedure is necessary each and every time a retransmitter retransmits a broadcast.

##### **ii) Collection and Distribution of Equitable Remuneration**

While there are a great number of details proposed on the administrative side, there seem to be no provisions regarding, importantly, the collection and distribution of the equitable remuneration to the members of the collection society (i.e., the copyright owners whose

protected works are contained in the broadcasts that are being retransmitted).

There is no formula or guidance of any kind on which to base the amount of equitable remuneration due from the retransmitter to the collection society, just that it is determined by agreement between the

retransmitter and the collecting society (Section 135ZZM(1)). This is a very unrealistic proposal. Failing agreement, which will occur most of the time, the Copyright Tribunal steps in and determines the amount. If either party does not like the determination the first time, it has up to 12 months to apply to the Tribunal for a new determination.

The Bill should be revised to provide that the retransmitter is obliged to continue to pay under the notice in force until such determination is made. Currently, there are no provisions in the Bill for the retransmitter to make any kind of provisional payment to the collection society during either the first determination or the second, which, again, gives the parties up to 12 months to make the request for a new determination. If such measures are not in place, the retransmitter has no motivation for coming to agreement with the collecting society on the amount. Taking a determination to the Copyright Tribunal will become the norm and merely a cost of doing business. Since there are no provisional payment procedures and the remuneration appears to be held by the retransmitter during pendency of any outcome, it is simply in the best interest of the retransmitter to not come to agreement as to the amount of equitable remuneration owed.

The MPA recommends the revision of Section 135ZZK(1) to include a new subparagraph (d) to read as follows:

- "(1) The copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by the retransmission of the broadcast if:
- (a) a remuneration notice given by, or on behalf of, the retransmitter to the relevant collecting society is in force; and
  - (b) the free-to-air broadcast was made by a broadcaster specified in the remuneration notice; and
  - (c) the retransmitter complies with section 135ZZN.
  - (d) the retransmitter pays the equitable remuneration (as established hereunder) to the collecting society not later than one month from the date of the retransmission.

A condition such as proposed in subsection (d) will ensure that the retransmitter pays the equitable remuneration owing. It is not enough to only meet the conditions as proposed under this Section. For example, as currently drafted, the retransmitter does not infringe the copyright in a work if Section 135ZZN(1)(c) is complied with. However, Section 135ZZN (Record System) only requires the retransmitter to maintain records of its retransmissions. Proposed Section 135ZZN requires no records be kept on amounts payable as equitable remuneration on the retransmissions and no payments of equitable remuneration are required under the Section. Such a flaw to the fundamental purpose of the statutory licensing scheme must be corrected.

### **iii) Time Limitations**

Importantly, there are no time limitations on when a retransmitter has to respond to a notice (i.e., pay out the equitable remuneration). In fact, where a notice is in force, Section 135ZZS seems to indicate that the collecting society has to apply for the equitable remuneration from the retransmitter and request that the remuneration be paid within a reasonable time. Although it is a function of a collecting society to protect its right holder's interests, this scheme places an unfair burden on the collecting society.

Furthermore, the Bill should include a provision requiring the Copyright Tribunal to come to a determination within a specified time with respect to the first determination. With respect to the second determination, the Bill provides that the parties have 12 months to file. This is an unnecessarily long period which is unfair to the members of the collecting society who will eventually receive the remuneration. In connection herewith, a provision should be included which provides that the copyright holder (or the collection society) will receive payment of interest on any amounts determined by the Copyright Tribunal to be due and owing by the retransmitter.

### **iv) Collecting Society**

It is unclear from both the Bill and the Explanatory Memorandum what specifically the role and responsibilities of the collecting society would be to its members, the copyright owners. For example, there is no indication in the Bill of how, when or if the copyright owners will be paid.

Furthermore, the MPA believes that copyright holders should be free to organize themselves and to voluntarily establish their own collective management system for the administration of the retransmission right. There is no need for Australia to mandate the use of any certain collecting society or societies. A collective management system established by and for the copyright holders will provide the most effective and cost-efficient system for the collection and distribution of cable retransmission royalties in Australia.



The MPA recommends that the Government take under review certain systems utilized in other countries for the collection and distribution of cable retransmission royalties. A good example of a voluntary collective management system in Europe where copyright owners are granted an exclusive retransmission right is AGICOA. Since 1986, the Association for the International Collective Management of Audiovisual Works ("AGICOA"), a non-profit service agency, has provided an effective and cost-efficient system for collecting and distributing royalties, on behalf of copyright holders, for the cable retransmission of audiovisual works in Europe. AGICOA negotiates with cable operators (or national associations of cable operators) to establish royalties payable by cable systems for the right to retransmit television signals.

Furthermore, AGICOA identifies works retransmitted by cable systems (as well as collects and distributes royalties) with a high degree of accuracy and at a very low cost. Thus, AGICOA provides an effective system to identify retransmissions, collect and distribute royalties for copyright holders, and it enables cable systems to effectively and easily clear rights for cable retransmissions through a collective management system established by copyright holders.

In contrast to Europe, there is a compulsory licensing system in Canada where the Copyright Board is authorized to establish a manner of determining the overall amount of the retransmission royalties and the allocation of the royalties among several collecting bodies. The amount paid by retransmitters under this system is determined by tariff set by the Copyright Board for a period of three years. The cable companies (i.e., the retransmitters) pay monthly in arrears.

Whether the copyright owner is granted an exclusive retransmission right as in Europe, or a compulsory licensing scheme is implemented as with Canada, the MPA recommends that the Bill (or related regulations to the Copyright Act) include fundamental and necessary criteria for the establishment of a workable system.

## **E. Copyright Tribunal**

Although the MPA believes that copyright holders should be granted an exclusive retransmission right, if a statutory licensing scheme is imposed with corresponding collection and distribution of equitable remuneration by a collection society, then the activities of the Copyright Tribunal set forth in the Bill with respect to the statutory licensing scheme require greater clarity.

The need for specificity with respect to the role of the Copyright Tribunal is important because, as noted above, we believe the failure to include critical provisions will mandate the Tribunal's involvement regularly. Indeed the Explanatory Memorandum all but states so: "As with the current scheme, the new scheme does not attempt to prescribe what is equitable remuneration, where the boundaries of fair dealing lie and what is an appropriate system for determining the amount of equitable remuneration. If the parties fail to agree on the amount of equitable remuneration payable or the appropriate system to determine this, the parties can take the matter to the Copyright Tribunal." (Emphasis added.)

Experience has shown that Copyright Tribunal hearings take a very long time, even where there is a very efficient tribunal in place (e.g., U.K.). Also, there is a risk that the retransmitter could go out of business in the interim. The Bill should be revised to provide that interim payments should continue to be paid by the retransmitter until proceedings on the matter are concluded. (See Section 119 (2) of the 1988 U.K. Copyright Act and Section 273 (3) of Ireland's Working Draft Copyright Bill 1998.)

## **F. Conclusion**

If Australia intends to move forward with imposing a compulsory licensing scheme then we would like to urge that the provisions in the Bill proposing this scheme be greatly improved by redrafting to incorporate our suggestions above. Proposed Division 2 (Sections 135ZZK to 135ZZW) requires much greater clarity and lacks many necessary provisions that make such compulsory systems in other countries operate in a fair, effective and efficient manner to the benefit of the retransmitter, the copyright holder and the consumer.

## **II. Term of Copyright Protection**

The MPA recommends that Section 94 of the Copyright Act be revised to provide audiovisual works with a term of copyright protection of 95 years from the

beginning of the year following the year of first publication. Sections 33 and 34 of the Copyright Act should be also revised to provide a basic term of copyright protection of 70 years following the death of the author of literary, dramatic, musical and artistic works.

Currently, the Copyright Act establishes a basic copyright term of 50 years following the death of the author, and a term of copyright protection for a cinematographic work of 50 years after the expiration of the calendar year in which the film was first published.

Many countries have already extended, or are considering extending, the term of copyright protection for audiovisual works. A term of copyright protection of 95 years from publication roughly equates the term of life of the author plus 70 years. This increased term would recognize the increasing value of audiovisual works to Australia and would correspond to the modern international trend reflected in the Duration Directive of the European Union.

### **III. Private Copying of Television Broadcasts**

The MPA urges Australia to revise Section 111 of the Copyright Act to explicitly exclude digital and high definition analog copying from the scope of the exemption. Presently, Section 111 of the Copyright Act allows the copying of television broadcasts for private purposes without requiring the authorization of the copyright owner. However, the Bill may be interpreted as to expand the scope of television broadcasts to include digital broadcasts.

The new expanding digital environment requires explicit confirmation that private copying, especially of digital and high definition analog works, be subject to an exclusive right of reproduction. Australia's failure in its current law and proposed amendments to make a distinction between conventional analog and digital and high definition analog private copying creates a major gap in copyright protection, which, if not remedied, will undoubtedly result in the devaluation of copyright in general in Australia.

It is imperative that Australia recognize in its Copyright Act that "digital and high definition analog are different;" these types of copies are perfect copies, easily transmitted to a multitude of other users. A digital or high definition analog copy is identical to the original master copy and the failure in the Copyright Act to prohibit such private copying of works in these new formats is a serious omission. Unless there are effective technological protection measures available to the copyright owner and rights granted to the copyright owner to use such measures, digital and high definition analog copying technology will provide millions of consumers and pirates with the ability to conveniently make perfect copies, and copies of those copies, of an audiovisual work with the stroke of a key.

It is extremely important that the Copyright Act be revised to explicitly

exclude digital and high definition analog private copying from the scope of the exemption contained in Section 111 as soon as possible, in view of Australia's plans to begin to make digital broadcasts on January 1, 2001.

#### **IV. Exceptions for Libraries and Archives**

Australia's Copyright Act provides a number of exceptions to protection that could easily transgress the limitations contained in Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement by conflicting with a normal exploitation of a work or unreasonably prejudicing the legitimate interests of a right holder. Article 13 of the TRIPs Agreement provides that the use of a work without authorization of the copyright owner is limited to "[s]pecial cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rightholder."

The Bill would allow a library or archive to make a digital copy and to further communicate such copy in any circumstance in which it is authorized under existing law to make hard copies (e.g., at the request of the researcher, for another library, etc). Digital copies are perfect copies, easily transmitted to a multitude of other users. The digital copying of even a small portion of the work, even as little as the 10% of the work in electronic form proposed in the Bill, has a much greater risk of further copying outside the fair dealing doctrine than does the copying of a printed or analog version of the work.

The revision of Sections 49, 51A, 110A(c) and (d), and the proposed new Section 110B(2A) and (2B) are highly objectionable because they would allow, among other things, copying of whole works for distribution to patrons, digitization of entire works (since the definition of reproduction has been expanded under proposed Section s.21(1A) which clarifies that the conversion of a work to or from a digital form is a reproduction of the work), unlimited networked distribution of digitized works within library premises and to other libraries, all without permission or compensation to the right holder. In this dramatically expanded form, this exception far exceeds the applicable Berne/TRIPS standards.

#### **V. Exemptions for Educational and Other Institutions**

The proposed amendments to Part VB of the Copyright Act would allow educational institutions to distribute to their students online, for educational purposes, portions of works under the same circumstances under which they are now permitted to make multiple hard copies of works. The risk of further unauthorized reproduction or communication of portions of works is far greater in a digital environment than it is in the hard copy world. Such difference should be reflected in the Bill.

## **VI. Presumption of Copyright Ownership and Subsistence**

Section 126 of the Copyright Act creates a civil presumption that copyright subsists in the subject matter of the case, and that the plaintiff owns that copyright, unless the defendant “puts in issue” the question of ownership. Since the defendant can put subsistence and ownership “in issue” without any evidentiary support, these presumptions are of very limited practical value. Indeed, there is no requirement that the defendant present any evidence on these matters at all, even though this requires the submission of extensive and complex evidence by the plaintiff. For example, right holders must prove these threshold questions through the laborious testimony of live witnesses.

The resulting added time and expense raises questions about whether civil enforcement procedures are “unnecessarily complicated or costly,” in violation of Article 41.2 of the TRIPs Agreement. For a presumption to be of practical use to copyright owners, it must apply “until evidence to the contrary is proven”. To dispel these questions, the MPA recommends that Australia amend its law to give effectiveness to these presumptions.

Moreover, Section 126 of the Copyright Act which sets out certain presumptions as to subsistence and ownership of copyright only applies in relation to civil actions. The member companies of the MPA have had a long standing problem of proof of copyright ownership *in criminal cases*. In June, the MPA filed a submission with the Australian House of Representatives Standing Committee on Legal and Constitutional Affairs in response to its “Inquiry into the enforcement of copyright in Australia.” We urge you to review that submission, which is available upon request from the MPA's Singapore office, on this important subject.

One of the important recommendations made by the MPA in the submission is to revise Section 126 to provide that: (1) a presumption of ownership and subsistence extend to both civil and criminal proceedings; and (2) a person who puts ownership or subsistence of copyright in issue must provide evidence which would give a Court reasonable grounds to require the owner to provide proof of those issues. The MPA will continue to actively participate in subsequent Committee inquiries and hearings on this subject, but strongly recommends that the Bill be revised now to reflect the two recommendations set forth in this paragraph.

## **VII. Public Performance of Broadcasts**

The MPA recommends that the exemptions provided for in Section 199(1), (2), and (3) of the Act be amended. Section 199(3) of the Act provides that “a person who, by the reception of an authorized television broadcast, causes a cinematograph film to be seen or heard in public shall be treated, in any proceedings for infringement of the copyright, if any, in the film under Part IV, as if he had been the holder of a license granted by the owner of that copyright to

cause the film to be seen or heard in public by the reception of the broadcast.”

All communications of protected works should require authorization of the copyright owners with the exception of the noncommercial communication of a protected work which takes place privately among family members in the same household. Thus, the public performance of a copyrighted work by means of a receiving device in an establishment should be subject to the authorization of the copyright owner. There should be no permitted exceptions to the copyright owners exclusive right to decide whether, when and in what manner their works may be viewed by the public and whether any fees are payable to the copyright owners for the public performance of their works.

If the scope of the definition of broadcast provided in Section 10 of the Act is expanded, as applied to the exemptions set forth in Section 199(1), (2) and (3), the resulting outcome may be that digital “broadcasts” could also be exempted from licenses. Such broad exceptions were not intended to be applicable to digital technology and should not be used in a manner which may unreasonably prejudice the interests of copyright owners. These exemptions were developed in the past, do not account for the effect of digital technology and are inappropriate in this digital era.

#### **VIII. General Definition of “Cinematograph Film”**

The MPA recommends that the term "cinematographic film," which is currently defined in Section 10 of the Copyright Act 1968 (the “Act”), be replaced with the term "audiovisual works".

Section 10 of the Copyright Act defines "cinematograph film" as the following:

"Cinematograph film means the aggregate of the visual images embodied in an article or thing so as to be capable, by the use of that article or thing:

- (a) of being shown as a moving picture; or
- (b) of being embodied in another article or thing by the use of which it can be so shown;

and includes the aggregate of the sounds embodied in a sound track associated with such visual images."

Specifically, the Copyright Act should be revised to define "audiovisual works" as a general category of original works consisting of a series of related images capable of being shown as a moving picture regardless of the medium in which they are originally fixed (e.g., film, videotape or laserdisc) and regardless of the medium through which they are distributed as copies or the delivery system through which they are transmitted (e.g., television, cable or video on demand). Additionally, the definition of audiovisual works should be technologically neutral.

The term "cinematograph film" is too narrow because it appears to imply that only works that are exhibited in movie theaters are protected. However, the protection of a work should not depend upon the method of exploitation (i.e., whether the work is exploited through theatrical exhibition, television, home video, online distribution, etc.). Second, the word "film" may be said to be limited only to those works that are embodied in an article or thing and, under such a reading, protection would not be available to digitized works on, for example, the Internet.

Section 10 of the Copyright Act is incompatible with Article 14**bis** of the Berne Convention, therefore violating Article 9 of the TRIPs Agreement, and should be revised to protect audiovisual works, along with literary, dramatic, musical and artistic works, as "original works." Copyright owners in audiovisual works should be entitled to the full scope of rights and protection accorded to copyright owners of literary, dramatic, musical and artistic works.

## IX. Ownership of Copyright in the Broadcast Signal

Under proposed Section 99 of the Bill, the broadcaster will be the owner of the copyright subsisting in the broadcast (i.e., the holder of the copyright in the broadcast signal).

The MPA believes that it is unnecessary that the broadcaster hold the copyright in the broadcast signal. The broadcasters will have already been granted sufficient rights through operation of contract. If such rights are to be granted outside of the contractual agreement, they should be restricted to those provided for in Article 14 of the TRIPs Agreement as set forth below which was introduced to protect the position of the copyright owner in any work so broadcast.

Thus, the MPA recommends that, rather than the broadcaster holding a copyright in the signal, as is proposed under Section 99, the broadcaster who holds an *exclusive license* to broadcast a work should enjoy all rights of their licensors acquired through voluntary agreements, and such broadcasters (or broadcast organizations) should be entitled to enjoy and exercise their acquired exclusive rights in their own names. In addition, the MPA recommends that the broadcaster, in accordance with Article 14 of the TRIPs Agreement, and instead of holding a copyright in the signal, have the right to prohibit the following acts when undertaken without their authorization:

- (a) the fixation of its broadcasts;
- (b) the reproduction of fixations of its broadcasts;
- (c) the rebroadcasting by wireless means of its broadcasts; and
- (d) the communication to the public of television broadcasts of its broadcasts.

Broadcasters holding an exclusive license should have the right to bring infringement actions in their own name against pirates. Any of the rights granted to broadcast organizations set forth above should not detrimentally affect the protection of the rights of the copyright holders in the broadcasted works.

Protection to foreign broadcast organizations should be provided under the Copyright Act by virtue of and in accordance with any international treaty or agreement to which Australia is a signatory or party. In the absence of such treaty or agreement, foreign broadcast organizations should be protected in Australia if Australian broadcast organizations have been extended protection on substantially the same basis as that which is extended to Australian broadcast organizations in the foreign territories in which the foreign broadcast organizations are headquartered.



Fundamentally, the MPA recommends that Australia allow the copyright in the broadcast signal to be retained by the copyright owner. If Australia decides to establish a statutory licensing scheme and grant the broadcaster the copyright in the broadcast signal, then any provisions granting broadcasters the right to authorize a retransmitter to retransmit their broadcasts should be included in the Bill.

## **X. Provisions Related To Cinematographic Films**

Section 110 (1) of the Copyright Act currently allows the public performance of cinematographic films which consist mainly of images that, at the time when they were first fixed, were means of communicating news when 50 years have passed from the date in which the events depicted in the film occurred. Audiovisual works should be treated under the Copyright Act as original works, and accordingly they should receive full protection for the entire term provided for in the Copyright Act without prejudice of the existing rights in the underlying works. The MPA recommends that this section be deleted from the Copyright Act.

In addition, Section 110 (2) of the Copyright Act provides that after the expiration of the term of copyright protection in a cinematographic film, its performance in public does not infringe the copyright in the underlying works. This provision is inconsistent with Art. 14**bis**(1) of the Berne Convention, which provides that the copyright in an audiovisual work shall exist without prejudice to the rights in the underlying works. Section 110 (2) should be revised accordingly.