

11 June 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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(No of Pages: 25)

Dear Mr Andrews

INQUIRY INTO THE ENFORCEMENT OF COPYRIGHT IN AUSTRALIA

Thank you for the opportunity to provide a written submission on the terms of reference for the above inquiry.

The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced with the Broadcasting Services Act, 1992.

ASTRA represents the new and emerging broadcasting and narrowcasting services which provide competition and consumer choice in broadcasting and communications in Australia. These new services have added to the mix of traditional broadcasting services that have dominated Australia's broadcasting landscape for the past 42 years.

ASTRA was formed in September 1997 with the amalgamation of the Federation of Australian Narrowcasting Subscription Services (FANSS) and the Confederation of Australian Subscription Television (CAST).

ASTRA's members include the main pay TV operators: AUSTAR; C & W OPTUS Television and FOXTEL; the channels which provide programming to the pay TV platforms; narrowcast television services; narrowcast radio services such as racing radio and tourist information radio and relevant communications companies.

A full list of ASTRA membership is at Appendix A, for your information.

1. Introduction and summary

ASTRA's pay TV distributor members, AUSTAR, OPTUS Television and FOXTEL, are providers of subscription broadcast and narrowcast services under the *Broadcasting Services Act 1992*.

The primary revenue source for these businesses is through fees paid by subscribers to receive these pay television services. There are **no legal sanctions** that ASTRA's members can rely on to prevent the unauthorised reception of the transmission of these services.

It is ASTRA's submission that urgent action is needed. Legislative provisions must be introduced which incorporate criminal sanctions in connection with the unauthorised reception of a transmission and which incorporate civil remedies in connection with such unauthorised reception.

Without such action the illegal activity will prosper and as our market grows so will the incentive for piracy.

ASTRA provides comment on paragraphs 1(a)-(e) of the terms of reference of the inquiry but these comments are specific to the issue of unauthorised reception of transmissions.

In this submission, the word 'transmission' is used in a generic sense to mean any broadcast, transmission to subscribers to a diffusion service or other communication, where receipt of the transmission is on a subscription basis.

2. Practical measures taken to prevent unauthorised reception are inadequate

To receive either AUSTAR's, FOXTEL's or OPTUS Television's services, a subscriber obtains the necessary reception equipment from the relevant operator (or an authorised agent of AUSTAR, FOXTEL or OPTUS Television). Such equipment includes software that enables the relevant service provider to track and control the subscriber's reception of the service. In consideration of receipt of the service, the subscriber is obliged to pay periodical fees.

ASTRA members attempt to protect their relevant signal by controlling the reception of the transmission through encryption. The end user must have a decoder before he or she can actually receive the transmission. Encryption does not, however, solve the problem of unauthorised reception. It is possible for viewers to purchase unauthorised decoders and hence receive the service without the authorisation of the service provider.

It is difficult to estimate the cost and impact of the unauthorised reception of the transmissions on each of the pay TV businesses (including flow on effect to channels and other service providers' businesses). ASTRA is aware of a number of operators actively selling unauthorised equipment capable of intercepting AUSTAR's, OPTUS Television's and FOXTEL's transmissions.

Pay TV service signals are encrypted to ensure that people pay for the service. A customer needs a set-top box or decoder and a smart card provided by the pay TV service provider in order to decode the encrypted signal and receive the service.

The encryption methods are complex algorithms that alter the signal, which are decoded by appropriate software in the decoder box if that box is found to be “authorised” when the signal is sent. In order to receive a service without paying the pay TV provider it is necessary to have equipment that duplicates the functions of the pay TV provider’s set-top box.

Piracy of pay TV services in Australia exists in a number of ways:

1. use of stolen decoder boxes/smart cards;
2. manufacture of a decoder box/smart card; and
3. importation, selling or hiring of a decoder box/smart card.

There is evidence that each of the above methods is currently being used in Australia for the unauthorised receipt of pay TV services.

This pirating of services means a loss of revenue to pay TV distributors and in turn to pay TV channel providers and copyright owners. Pay TV distributors pay the channel providers on the basis of subscriber numbers. If people are able to receive a service without subscribing to the distributor then there is a direct loss of revenue that flows down the supply chain. In addition there is loss of revenue to the manufacturers of decoder boxes and smart cards.

Signal theft is extremely difficult to discover because, by its very nature, it involves ensuring that the pay TV provider is not aware of the receipt of the service. However, watching trends in increasing churn rates, picking up on local rumours and contacts and relying on feedback from customers complaining or informing of people who are receiving the service without payment are methods of discovering cases of theft. Contractors who perform installations of pay TV equipment and equipment suppliers are also a source of information.

Evidence has shown that at least one operator in Lakemba in New South Wales has been trading in pirate boxes since 1996. This operator has apparently also set up a franchise distributorship business throughout Australia. Cable and Wireless Optus, through its Fraud Control division, has worked constantly with the NSW police to initiate action against this operator. This case is yet to be tested. (see copy of press article at Appendix B).

Pay television is a relatively new industry in Australia. In the United States where pay television is more established, concerns in relation to ‘signal piracy’ were expressed as far back as the early 80’s. The US is still trying to stem the problem. ASTRA submits that as pay television grows in Australia and new technology provides a greater choice of ‘subscription services’ for consumers, the issue of signal piracy will become increasingly significant. Without legislative action, piracy is a growth industry.

ASTRA has also sought assistance from the European association for the protection of copyright (AEPOC – Association Europeenne pour la Protection des Oeuvres et services Cryptes) in relation to pirate activity in Europe and provides the following information as evidence of the extent of the problem if allowed to continue unabated.

Since its formation in 1997, AEPOC has been engaged in the study of the pirate market in Europe. It has calculated that the piracy caused by illicit decoding devices results in more than 200 million euros in lost revenues in Europe, each year. This is based on 1996 data on the market for satellite based pay television using analogue transmission technology. (source: AEPOC “*Combating Counterfeiting & Piracy in the Single Market*”, page 3)

According to AEPOC, the proportion of trade in piracy varies considerably throughout Europe, depending upon effectiveness of legislation. In some states, a combination of effective national legislation and technical measures has limited piracy to well under 20 percent of the market.

“In other states, the proportion of piracy has provoked the collapse of the legitimate market in protected services. For example in Greece, the first pay television broadcaster, in the late 1980’s withdrew from the market because he could not compete with the piracy of his broadcasting. More recently a scrambled sports channel in northern Europe also failed for the same reason. In more mature markets, it has been reported that one-half of the decoding devices in certain Nordic territories are illicit.”(page 3)

The 200 million euros lost to piracy has resulted in fewer jobs needed for service provider infrastructure; diminished royalties for the creative community; a block on the introduction of new services; and fewer, competing service providers.

It is AEPOC’s contention that there are a number of causes for piracy and the illicit market for decoding devices. First there is a commercial market for such devices as they provide access to protected services more cheaply than legitimate devices. Second, there is a commercial market where the legitimate devices are not readily available, (for example the protected service is not offered in a territory for copyright reasons). Finally, because there is an attraction to the “aura of illicitness” associated with the piracy. (page 2)

Without an effective strategy to combat the illicit market in encryption technology, the legitimate broadcasting industry will continue to incur, not only significant loss of revenue, but also continuing significant costs in upgrading encryption technology; replacement of encryption systems and constant monitoring of the market. (page 6)

In view of the above, ASTRA urges the Government to act now to enact express legislative provisions to make signal theft an offence, as is the case in other countries such as the USA, the UK and New Zealand.

For the industry, time is of the essence. The larger the problem becomes the more difficult it will be to contain.

3. There is no Copyright protection

The *Copyright Act 1968* does not enable ASTRA's members to control the reception of their transmissions.

There are no express provisions in the *Copyright Act* which directly address the unauthorised reception of transmissions.

A pay television operator may deliver its signal by means of satellite, cable or microwave multipoint distribution system (MDS). To the extent that such delivery constitutes a 'broadcast' under the Act (ie satellite & MDS) the primary copyright in respect of the broadcast, is to re-broadcast it. This means that the unauthorised reception of a broadcast does not amount to infringement of copyright in the broadcast.

To the extent that delivery of a pay television service does not constitute a broadcast (for example, where delivery is by cable which is, under the *Copyright Act*, a transmission to subscribers to a diffusion service) the *Copyright Act* affords no protection whatsoever.

4. There are no other effective legal sanctions against unauthorised reception

Although a number of statutory provisions prohibit various acts in relation to telecommunications and radiocommunications, these do not effectively prevent the unauthorised reception of transmissions.

In particular ASTRA notes that none of the following acts provide adequate protection:

- *Crimes Act 1914* (Part VIIB);
- the *Broadcasting Services Act 1992*;
- the *Radiocommunications Act 1992*;
- the *Telecommunications Interception Act 1979*;
- the *Trade Practices Act 1974*.

5. The introduction of rights against unauthorised reception of transmissions

Legislation should incorporate provisions for the purpose of preventing the unauthorised reception of a transmission.

Such provisions should incorporate the following elements:

- (a) criminal sanctions against the unauthorised reception of a transmission;

- (b) criminal sanctions against commercial dealing in equipment which have the purpose of enabling unauthorised reception of a transmission;
- (c) civil remedies in relation to the other unauthorised reception of a transmission;
- (d) civil remedies in relation to commercial dealings in equipment which have the purpose of enabling unauthorised reception of a transmission;
- (e) the burden of proof in any civil action should be no more onerous than the balance of probabilities;
- (f) the requisite mental element required to prove any civil claim should be no more onerous than knowledge that, or reckless indifference as to whether, the prescribed activity was unauthorised. If such mental element is required at all it should be for the defendant to disprove it once the prescribed activity is proven; and
- (g) the provisions set out above should be available irrespective of the delivery mechanism of the transmission, provided that the transmission is subscription based.

In relation to paragraphs (a) to (d), it is crucial that both criminal sanctions and civil remedies are introduced. Apart from the fact that the requisite behaviour should be illegal, parties such as AUSTAR, OPTUS Television and FOXTEL should be given the opportunity to take action for any commercial loss they suffer.

In relation to paragraphs (a) to (d), it is important that criminal sanctions and civil remedies apply to both persons who receive unauthorised transmissions and persons who commercially deal in equipment for such reception. A blanket prohibition will be a deterrent against the creation of a 'black market' in unauthorised reception equipment. Criminal sanctions and civil remedies against persons who receive unauthorised transmissions will deter those persons from purchasing unauthorised equipment and will be a disincentive for individuals to manufacture and/or sell such equipment.

In relation to paragraphs (e) and (f), the matters set out in relation to the burden of proof and mental element are both fair and reasonable. ASTRA notes that such matters reflect the approach of the legislature to technological copyright protection measures under the exposure draft of the *Copyright Amendment (Digital Agenda) Bill 1999* ('the CA(DA)B').

Legislation has been introduced both in the United Kingdom and the United States in relation to the unauthorised reception of transmissions. Appendix C includes the relevant provisions of the *Copyright, Designs and Patents Act 1988 (UK)*. Appendix D includes the relevant provisions of the *Communications Act 1934 (US)* (which has been held by US Courts to apply to pay television signals). Appendix E includes legislation recently enacted by the European Parliament.

These provisions provide a useful point of reference as to how appropriate provisions might be introduced into legislation in Australia.

ASTRA would be more than happy to provide its recommendations as to how the provisions should be worded.

6. The Appropriate Legislation

ASTRA is aware that there are several initiatives currently being undertaken by the government for reform in the areas of copyright, broadcasting and electronic communication. In particular, ASTRA and its members have made submissions to the Attorney General's Department on the exposure draft of the *CA(DA)B*.

The current provisions of the *CA(DA)B* are very limited as they have the effect of only catching circumvention devices used for infringing the copyright in the broadcast ie. used for the purpose of rebroadcasting a broadcast or copying the broadcast.

In the commentary on the exposure draft of the *CA(DA)B*, the introduction of remedies in relation to the unauthorised reception of encrypted broadcasts was specifically excluded on the basis that such unauthorised reception is not an infringement of copyright in the broadcast or underlying copyright material (paragraph 100). This basis is both inaccurate and inconsistent with other aspects of the exposure draft of the *CA(DA)B*.

Such remedies are no less associated with copyright than are the proposed technological copyright protection measures and rights management information provisions introduced by the *CA(DA)B* are laws with respect to copyright.

ASTRA notes that the UK legislature has found no difficulty in incorporating unauthorised reception provisions into its copyright legislation (as indicated above).

The copyright effected by the unauthorised reception of a transmission includes copyright in the 'broadcast' (as defined in the *Copyright Act*) AND significantly, the underlying copyright material. Such material includes cinematograph films and the literary works, musical works and sound recordings adapted to create such films. A pay TV operator will have acquired rights in such material for the purpose of its transmission.

The unauthorised reception of a pay television operator's transmission will diminish the value of the transmission and the underlying copyright material.

It is ASTRA's submission that the *Copyright Act* is the appropriate place to incorporate provisions relating to an unauthorised reception of a transmission. However, ASTRA would have no objection to the requisite provisions being incorporated into legislation other than the *Copyright Act*. ASTRA's primary concern is that the government does not further delay the introduction of the appropriate provisions by referring them from legislation under review to other, unspecified legislation (such as in paragraph 101 of the commentary to the exposure draft of the *CA(DA)B*).

In this regard, we note that the Copyright Convergence Group, in its report entitled 'Highways to Change, Copyright in the New Communications Environment' (August 1994) commented that the introduction of any criminal sanctions relating to the unauthorised use or reception of encrypted signals might be appropriately included in Commonwealth Crimes legislation.

Whilst ASTRA has no objection to this proposal, the introduction of relevant provisions in Commonwealth Crimes legislation should not preclude the introduction of civil remedies, as discussed above.

7. International Conventions

The introduction of legal protection and effective legal remedies against the other unauthorised reception of transmissions is consistent with Australia's obligations under international treaties.

Article 11 of the 1996 WIPO Copyright Treaty provides as follows:

'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restricts acts, in respect of their works, which are not authorised by the authors concerned or permitted by law'.

This obligation is broadly worded and consistent with the introduction of legal protections against the unauthorised reception of transmissions.

In relation to transmissions via satellite, Article 2 of the 1974 Convention Relating To The Distribution Of Program-carrying Signals Transmitted By Satellite provides that:

'Each Contracting State undertakes to take adequate measures to prevent the distribution *on or* from its territory of any programme-carrying signal by any distributor for whom the signal emitted to, or passing through, the satellite is not intended.'

Whilst this undertaking places a clear obligation in relation to satellite transmissions, as stated above, there are compelling reasons to extend it across other forms of transmission.

Attached at Appendix F is the Draft European Convention on the Legal Protection of Services Based On, Or Consisting Of, Conditional Access (1 February 1999) for the Committee's information.

8. Closing Comment

Enforcement of copyright is an important issue for a number of Australian industries, and ASTRA welcomes the Committee's inquiry.

In relation to the pay television industry, the issue of unauthorised reception of transmissions or signal piracy is crucial. The issue is likely to become more

significant for both pay television and other subscription based broadcasting and transmission services as technologies permit the electronic delivery of material in new ways.

Legislation to prevent the unauthorised reception of transmissions will provide benefits to copyright holders with no contrasting burden or adverse effect on the public. Such legislation should be introduced as a matter of urgency.

ASTRA is more than willing to provide further evidence or comment on this matter at any public hearing initiated by the Committee.

Yours sincerely

Debra Richards
Executive Director

APPENDIX A

The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced with the Broadcasting Services Act, 1992. (the BSA).

These new services added to the mix of existing categories of service, being the national broadcasting services (ABC and SBS); commercial broadcasting services (commercial TV and radio); and community broadcasting services (previously public broadcasting).

ASTRA was formed in September 1997 with the amalgamation of the Federation of Australian Narrowcasting Subscription Services (FANSS) and the Confederation of Australian Subscription Television (CAST).

ASTRA's members include:

- the main Pay TV operators – AUSTAR; C&W OPTUS Television and FOXTEL
- channel providers – The Value Network (Australia); Pan TV; Artist Services Cable Management; Odyssey Channel; XYZ Entertainment Pty Ltd; Movie Vision Pty Ltd; Discovery Channel; TV 1; Nickelodeon; Learning Network Pty Ltd; UK TV Pty Ltd; MTV; Sky News Australia; The Premium Movie Partnership; Premier Sports Australia (Fox Sports); Disney Channel; Satellite Music Australia; BBC World; and National Geographic
- narrowcast television services – Sky Channel Pty Ltd; Television Oceania; CFM Technology; Information Television; Westlink - Dept of State Services; and Arnbridge
- narrowcast radio services – 2KY Racing Radio; Really Really Big Productions; Western Visitor Radio; Nashville FM (formerly Eazy 88FM); Radio Austral; Free FM; I&G Pty Ltd; Radio Newcastle; Radio Uno; Tourist Radio Devonport (TCT FM); Fresh Media Woolgoolga; 2CR; and Asia Space, and
- communications companies – AAPT; C&W Optus Communications; Telstra; PanAmSat; Australian Satellite and Cablevision Services; CSIRO Radiophysics Division; News Ltd; Totalisator Agency Board of NSW; Peter Pratt; Orbit Electronic Media; and Comsyst (Australia) Pty Limited.

APPENDIX B

Press article

Daily Telegraph
Wednesday 19/5/99, page 17

APPENDIX C***COPYRIGHT, DESIGNS AND PATENTS ACT 1988 S 297*****PART VII
MISCELLANEOUS AND GENERAL***Fraudulent reception of transmissions***297 Offence of fraudulently receiving programmes**

(1) A person who dishonestly receives a programme included in a broadcasting or cable programme service provided from a place in the United Kingdom with intent to avoid payment of any charge applicable to the reception of the programme commits an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

In relation to a body corporate whose affairs are managed by its members 'director' means a member of the body corporate.

[297A Unauthorised decoders

(1) A person who makes, imports, sells or lets for hire any unauthorised decoder shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(2) It is a defence to any prosecution for an offence under this section for the defendant to prove that he did not know, and had no reasonable ground for knowing, that the decoder was an unauthorised decoder.

(3) In this section:

'apparatus' includes any device, component or electronic data;

'decoder' means any apparatus which is designed or adapted to enable (whether on its own or with any other apparatus) an encrypted transmission to be decoded;

'transmission' means any programme included in a broadcasting or cable programme service which is provided from a place in the United Kingdom; and

'unauthorised', in relation to a decoder, means a decoder which will enable encrypted transmissions to be viewed in decoded form without payment of the fee (however imposed) which the person making the transmission, or on whose behalf it is made, charges for viewing those transmissions, or viewing any service of which they form part.]

298 Rights and remedies in respect of apparatus, &c for unauthorised reception of transmissions

- (1) A person who:
 - (a) makes charges for the reception of programmes included in a broadcasting or cable programme service provided from a place in the United Kingdom; or
 - (b) sends encrypted transmissions of any other description from a place in the United Kingdom,

is entitled to the following rights and remedies.

- (2) He has the same rights and remedies against a person who:
 - (a) makes, imports, or sells or lets for hire any apparatus or device designed or adapted to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so; or
 - (b) publishes any information which is calculated to enable or assist persons to receive the programmes or other transmissions when they are not entitled to do so,

as a copyright owner has in respect of an infringement of copyright.

(3) Further, he has the same rights under section 99 or 100 (delivery up or seizure of certain articles) in relation to any such apparatus or device as a copyright owner has in relation to an infringing copy.

(4) Section 72 of the *Supreme Court Act 1981*, section 15 of the *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985* and section 94A of the *Judicature (Northern Ireland) Act 1978* (withdrawal of privilege against self-incrimination in certain proceedings relating to intellectual property) apply to proceedings under this section as to proceedings under Part I of this Act (copyright).

(5) In section 97(1) (innocent infringement of copyright) as it applies to proceedings for infringement of the rights conferred by this section, the reference to the defendant not knowing or having reason to believe that copyright subsisted in the work shall be construed as a reference to his not knowing or having reason to believe that his acts infringed the rights conferred by this section.

(6) Section 114 of this Act applies, with the necessary modifications, in relation to the disposal of anything delivered up or seized by virtue of subsection (3) above.

299 Supplementary provisions as to fraudulent reception

- (1) Her Majesty may by Order in Council:
 - (a) provide that section 297 applies in relation to programmes included in services provided from a country or territory outside the United Kingdom; and
 - (b) provide that section 298 applies in relation to such programmes and to encrypted transmissions sent from such a country or territory.

(2)

(3) A statutory instrument containing an Order in Council under subsection (1) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(4) Where sections 297 and 298 apply in relation to a broadcasting service or cable programme service, they also apply to any service run for the person providing that service, or a person providing programmes for that service, which

consists wholly or mainly in the sending by means of a telecommunications system of sounds or visual images, or both.

(5) In sections 297 [297A] and 298, and this section, 'programme', 'broadcasting' and 'cable programme service' and related expressions, have the same meaning as in Part I (copyright).

APPENDIX D

Section 605 of the *Communications Act of 1934*, Pub. L. No. 73416, 73 Stat. 1064 (codified in scattered sections of 47 U.S.C. (1964)) provides in pertinent part:

‘No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.’

APPENDIX E

"The manufacture, assembly, modification, import, export, sale, distribution, possession, commercial promotion or advertising of decoding equipment that is designed to enable unauthorised decryption of an encrypted service by those outside the audience determined by the encrypting organisation is unlawful".

Enacted by the European Parliament (end 1998)

APPENDIX F

“Draft European Convention on the Legal Protection of Services
based on, or consisting of, conditional access”

1 February 1999