

TEL: +61 2 9200 1486
FAX: +61 2 9200 1966
MOBILE: 0418 236 174
EMAIL: richardd@astra.org.au

Wharf 8, Pyrmont
NSW Australia 2009

1 October 1999

Mr Kevin Andrews, MP
Chair, House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600
By Facsimile: 02 6277 4773

Dear Mr Andrews

Re: COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999

We refer to the Copyright Amendment (Digital Agenda) Bill 1999 (the "Bill") and the explanatory memorandum (the "Explanatory Memorandum") introduced into the House of Representatives on 2 September 1999. ASTRA is pleased to have the opportunity to comment on the Bill and the Explanatory Memorandum. ASTRA has provided a previous submission to the Attorney General's Department in relation to the exposure draft and commentary released on 26 February 1999.

ASTRA is pleased that the Department has taken into account the bulk of ASTRA's submissions in preparing the present draft. However, ASTRA has a number of outstanding concerns, which it would like to draw to the Committee's attention.

1. ENFORCEMENT MEASURES

ASTRA commends the introduction of Part VAA of the Bill which introduces both civil and criminal actions against those that commercially deal in broadcasting decoder devices however ASTRA is still concerned that there are no sanctions against persons who fraudulently receive broadcasts or that possess and/or use unauthorised broadcast decoding devices. ASTRA submits that these amendments are required for the following reasons:

- (a) failure to introduce such legislation would create an inconsistency within the laws ie. it is no different to theft of any other tangible good. Such examples include possession of drugs for personal use, receipt of stolen goods and the provisions of Part VIIB of the Crimes Act, in particular Section 83ZF which contains a prohibition against an individual defrauding a carrier of a rental fee;

- (b) it creates a further inconsistency in that commercialisation is unlawful but personal use is lawful;
- (c) 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 or broadcasts will deter those persons from purchasing unauthorised equipment and will be a disincentive for individuals to manufacture and/or sell such equipment;
- (d) it will encourage commercial operators to sell unauthorised equipment 'off-shore' to avoid liability under Part VAA. As it would not be illegal to own a device at a personal level, the public will be encouraged to purchase those devices. The only effective way to suppress off-shore activity is by prohibiting the use of unauthorised equipment from off-shore operators.

We have attached as Annexure 1 to this submission copies of information we have obtained from web sites which are evidence of the extent of this kind of activities;

- (e) piracy diverts finances away from investment in other areas such as new productions, employment and training and new technology. In addition, each operator is required to divert finances to monitoring piracy, upgrading encryption systems and swap outs. AEPOC has calculated that lost revenue in Europe through piracy already exceeds 200 million ecus annually (AEPOC Decrypted Newsletter No. 98/1.2). This indicates that revenue loss in Australia could also be significant once the market becomes established;
- (f) piracy is not a victimless crime ie. the victims are the creative community, the producers and the operators who lose revenue through illegal receivers; and
- (g) the European experience illustrates that the introduction of such laws is the only truly effective deterrent. Piracy in Norway is fairly low as the legislation prohibits personal use however Sweden has not extended its laws to personal use and possession. In 1996, 50% of Sweden's subscription television viewers were obtaining the service illegally (AEPOC decrypted No. 98/1.2 at Page 3).

We have attached as Annexure 2 to this submission a summary of the legislation in various overseas jurisdictions which prohibit personal use and possession. This summary was also tabled before the House of Representatives Standing Committee Inquiry into the Enforcement of Copyright in Australia on 6 September 1999. ASTRA also notes that the Copyright Convergence Group in its report "Highways to Change" (August 1994) recommended the introduction of legislation similar to sections 297 to 299 of the UK Copyright, Designs and Patents Act 1988

For these reasons, ASTRA submits that it is critical that both criminal and civil sanctions be introduced prohibiting fraudulent reception of broadcasts. While ASTRA recognises that there could be public policy concerns in relation to how personal use would be proved and the concerns about "raids upon private homes". However, ASTRA submits that the fact that legislation prohibited such use would deter most people from purchasing the devices. The only people to suffer would be those people who have consciously decided to breach the law.

In addition, the failure to prohibit and use should be weighed against the potential loss of revenue to operators, channel providers and underlying rights holders.

2. RETRANSMISSION –INTERACTION WITH THE BSA AMENDMENT BILL

Paragraph 116 of the Explanatory Memorandum notes that the amendment to Section 87 (c) is intended to ensure that the current rebroadcasting right in respect of the broadcast will include the cable transmission of broadcasts. The new right will therefore allow broadcasters to control the retransmission of their broadcasts irrespective of the means of delivery of the service.

ASTRA submits that once agreement has been obtained from the relevant commercial, national or community broadcaster under the Broadcasting Services Amendment Bill (No. 1) 1999 (the “BSA Bill”), then the retransmitter must be deemed to have a licence to rebroadcast or to broadcast the primary broadcast under the Copyright Act. This licence should also apply for the duration of any grandfathering of current arrangements.

ASTRA believes that the Federal Government’s policy intention was that the retransmission arrangement would be governed by the BSA Bill and, provided agreement was reached with the relevant broadcaster and payment was made to the relevant collecting society in accordance with the statutory licence scheme established under Part VC of the Bill, then a subscription television operator would be entitled to retransmit.

ASTRA also believes that it is critical to this right in the Bill as the right to rebroadcast is in the nature of a copyright which is granted to the primary broadcaster under the *Copyright Act*.

3. PART VC – RETRANSMISSION OF FREE-TO-AIR BROADCASTS

(a) Meaning of “free-to-air broadcaster”

ASTRA submits that Part VC should create a statutory licence in respect of the retransmission of the primary service, enhanced services, multichannelling and any other services that a broadcaster permits a retransmitter to retransmit under the relevant provisions of the BSA Bill. The critical issue is that the broadcaster has consented to the retransmission under the provisions of the BSA Bill.

ASTRA notes that there are currently various digital reviews investigating the extent that amendments may be required to the laws of the Commonwealth in respect of digital retransmission. The current provisions of Part VC refer to the retransmission of a “broadcast” which is defined by reference to the Broadcasting Services Act 1992. The problem is that the Government is currently reviewing whether other services should be retransmitted (eg. multichannels and datacasting services) and it is likely that the definition of ‘broadcast’ will not cover these services. ASTRA believes that it is critical that the Bill anticipates the outcome of these reviews to ensure that retransmitters are not placed in the position of being entitled to retransmit services however being unable to do so as this would constitute a breach of the underlying rightsholders works;

(b) Multiple collecting societies

ASTRA members have discussed with Screenrights the implications of the Attorney-General being able to declare multiple bodies to administer the licence scheme established under Part VC.

Screenrights is preparing a submission to the Committee in relation to this specific issue highlighting the difficulties of having to deal with multiple collecting societies. ASTRA members would prefer to deal with a single administering body for its licence as the declaration of more than one society will only duplicate expenses and the administration involved with this licence.

In addition, ASTRA members would prefer to engage in negotiations with one society to avoid the administration involved in numerous negotiations and the potential for multiple Copyright Tribunal determinations.

(c) Record keeping requirements

ASTRA members are concerned that the Bill envisages the establishment and maintenance of a record system. ASTRA submits that it is unnecessary to require more than a log of program title information as contemplated in our submission to the Attorney-General dated 9 May 1999 together with Screenrights. Any requirement for a more comprehensive system will prove expensive and be merely duplicating information that is already accessible by the relevant society by virtue of the free-to-air reporting obligations. In addition, the multiple society scenario has the potential to create an administrative nightmare for retransmitters.

While ASTRA recognises that this issue could be dealt with through negotiation, ASTRA believes that it is essential that it be recognised in the Bill to avoid a collecting society misusing the requirement.

ASTRA also sees no need for the extensive provisions relating to inspection of records contained at section 135ZZP of the Bill. Those provisions reflect the provisions in the Act relating to the statutory licence granted to educational institutions. However as the records required to be kept will be different from those required to be kept by educational institutions, such provisions are inappropriate particularly due to the public nature of a retransmission. It is possible to understand the need for this system where there is private copying.

(d) Calculation of equitable remuneration

ASTRA members are also concerned that subsection 135ZZL (2) of the Bill provides that “the amount of equitable remuneration is to be assessed on the basis of the records to be kept by the retransmitter under section 135ZZN”. ASTRA submits that the linking of equitable remuneration to the records limits the method of calculation of remuneration. ASTRA members suggest that the words “is to be assessed on the basis of the records to be kept” should be deleted to ensure that the means of calculating equitable remuneration is as wide as possible and left to be negotiated between the collecting society and the retransmitter as contemplated under Clause 135ZZM.

ASTRA would be pleased to provide the Committee with any further information required in relation to the matters discussed above.

Yours sincerely

Debra Richards
Executive Director



Annexure 1

Examples of website 'pirate activity'

Annexure 2

OVERSEAS LEGISLATION RELATING TO SIGNAL PIRACY AND RELATED OFFENCES

1. UNITED STATES OF AMERICA

OFFENCE	LEGISLATION	PENALTY	CIVIL REMEDIES
Manufacture, assemble, modify, import, export, sell or distribute a device knowing it will be used for unauthorised decryption of satellite cable programs.	Communications Act 1934 s.605 (e) (4)	Maximum fine of \$500,000 Maximum imprisonment of 5 years or both.	Injunction, damages (actual and statutory), full costs.
Private unauthorised reception of encrypted satellite cable programs where used for own benefit or benefit of another.	Communications Act 1935 s.605	Maximum fine of \$2,000 Maximum imprisonment of 6 months or both	As above.
Unauthorised reception of encrypted satellite cable programs for commercial advantage or private financial gain.	Communications Act 1935 s. 605 (a)	Maximum fine of \$50,000. Maximum imprisonment of 2 years or both for first conviction. Maximum fine of \$100,000 or 5 years imprisonment or both for subsequent convictions.	As above.
Private unauthorised interception or reception of a communication service offered over a cable system.	Communications Act 1934 s. 553	Maximum fine of \$1,000 Maximum imprisonment of 6 months or both.	Injunctions, damages (actual and statutory), full costs.
Unauthorised interception or reception of a communication service offered over a cable system for commercial advantage or private financial gain.	Communications Act 1934 s. 553 (b) (2)	Maximum fine of \$50,000. Maximum imprisonment of 2 years or both for first conviction. Maximum fine of \$100,000 or 5 years imprisonment or both for subsequent convictions.	As above.
Manufacture or distribute equipment intended for unauthorised reception of a communication service offered over a cable system.	Communications Act 1934 s. 553 (a) (2)	Maximum fine of \$50,000. Maximum imprisonment of 2 years or both for first conviction. Maximum fine of \$100,000 or 5 years imprisonment or both for subsequent convictions.	As above.

2. NEW ZEALAND

OFFENCE	LEGISLATION	PENALTY	CIVIL REMEDIES
Fraudulent reception of programs included in a subscription broadcast or cable program service.	Copyright Act 1994 s. 227	Maximum fine of \$5,000	
Make, import, sell or let for hire any apparatus or device used to fraudulently receive a subscription broadcast or cable program service	Copyright Act 1994 s. 228 (3) (a)		Damages, injunctions, account of profits.
Publish information to assist persons to receive programs or transmissions without authority.	Copyright Act 1994 s. 228 (3) (b)		Damages, injunctions, account of profits.
Make, import, sell, let for hire, offer or expose for sale or hire, advertise for sale or hire any device designed to circumvent a form of copy protection.	Copyright Act 1994 s. 226 (2) (a)		Damages, injunctions, account of profits.
Publish information intended to enable or assist circumvention of copy protection knowing the information will be used to make infringing copies.	Copyright Act 1994 s. 226 (2) (b)		Damages, injunctions, account of profits.

3. UNITED KINGDOM

OFFENCE	LEGISLATION	PENALTY	CIVIL REMEDIES
Make, import, sell or let for hire, offer or expose for sale or hire or advertise for sale or hire any device designed or adapted to circumvent a form of copy protection.	Copyright, Designs and Patents Act 1988 s. 296 (2)		Damages, injunctions, account of profits.
Publish information intended to enable or assist persons to circumvent copy protection.	Copyright, Designs and Patents Act 1988 s. 296 (2)		Damages, injunctions, account of profits.
Fraudulent reception of a subscription broadcast or cable program service.	Copyright, Designs and Patents Act 1988 s. 297	[Maximum fine of Level 5 on the standard scale.]	
Make, import, sell, let for hire, offer or expose for sale or hire or advertise for sale or hire an unauthorised decoder.	Copyright, Designs and Patents Act 1988 s. 297A	On summary conviction, fine not to exceed statutory maximum. On conviction on indictment, maximum imprisonment of 2 years or a fine or both.	
Make, import, sell or let for hire any apparatus or device used to enable persons to fraudulently receive a subscription broadcast or cable program service.	Copyright, Designs and Patents Act 1988 s. 298 (2) (a)		Damages, injunctions, account of profits.
Publish information to assist persons to receive a subscription broadcast or cable program service programs or transmissions without authority.	Copyright, Designs and Patents Act 1988 s. 298 (2) (b)		Damages, injunctions, account of profits.

4. EUROPEAN UNION

OFFENCE	LEGISLATION	PENALTY	CIVIL REMEDIES
Member states shall enact legislation prohibiting manufacture, importation, distribution, sale, rental or possession for commercial purposes, and installation, maintenance or replacement for commercial purposes of decoding equipment designed to enable unauthorised decryption of an encrypted service.	Directive 98/84 EC Articles 4 & 5		Sanctions must be "effective, dissuasive and proportionate" to potential impact of infringing activity including damages and injunctions.