COPYRIGHT ISSUES RELATING TO SATELLITE

SATELLITE TRANSMISSION promises a great deal: benefits to users – because of the possibilities for fresh programming and other new services – and considerable attractions for entrepreneurs – because of prospective new markets. The advent of Australia's own domestic satellite clears the way for this potential to be fully realised. Arguably there will be a much wider dissemination of many more materials than has been possible until now.

In social policy terms, complex questions must be decided before the satellite can be used. These are now being considered in relation to program services by the Australian Broadcasting Tribunal. Ultimately, however, many of the issues will be resolved by the political process.

In terms of the policy of the satellite, the copyright issues will be among the least controversial. The copyright implications (the Tribunal is also considering these) are unlikely to create too many difficulties for the legislators. As far as I can see there are three main issues.

- Should there be a copyright in satellite transmissions, as there is for broadcasts under Section 91 of the **Copyright Act;**
- Should the transmission by satellite of material in which copyright subsists be an act comprised in the copyrights concerned; and
- If the answer to either of these questions is *yes* then how should these new rights or acts be characterised – as a broadcast, or as a new species of rights under the **Copyright Act.**

The hard issues in copyright are likely to be the practical problems confronting those who license programs distributed by signals transmitted via satellite. They will need to be especially vigilant in their legal relations with licensees and in general, in their arangements to market their programs.

The point is that copyright "know how" is bound to become increasingly important for program makers and marketing executives. Broadcasters, too, will need to be able to discriminate between particular copyright packages when they negotiate for rights to use programs.

I think that as technology becomes more sophisticated legal arrangements will need to be more precise. Legislation must provide a firm base for effective contracts; but it is the agreements themselves that have to properly define the forms of use the parties contemplate. the exception to this is the piracy of signals.

The provisions of the Copyright Act

The Act does not refer specifically to satellites or to distribution by satellite. It refers only to broadcasting.

"Broadcast" means broadcast by wireless telegraphy, and "broadcasting" has a corresponding meaning;

"Sound broadcast" means sounds broadcast otherwise than as part of a television broadcast;

"Television broadcast" means visual images broadcast by way of television, together with any sound broadcast for reception along with those images;

"Wireless telegraphy" means the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy;

"Wireless telegraphy apparatus" means an appliance or apparatus for the purpose of transmitting or receiving sounds or visual images by means of wireless telegraphy.

These definitions appear in Section 10 (1) of the Act. In addition, Section 25 purports to define what is meant by "a broadcast", but what the provision actually does – in fact the combined effect of all of these provisions – is to explain the manner of broadcasting, rather than the meaning. "Broadcast" itself is not defined in the Act.

A number of commentators have suggested that a broadcast must be public; that is, capable of reaching the public at large. Point to multipoint transmissions therefore qualify as broadcasting, but point-to-point transmissions do not. If this is correct, then direct broadcast satellite transmissions would be covered by the meaning of "broadcast" in the **Copyright Act**, but the type of transmission commonly expected in the provision of satelite program services would not.

If one looks at the **Wireless Telegraphy Act** one finds that "broadcast program" is defined as meaning:

> ...matter intended for reception whether by means of a broadcast receiver or a television receiver.
>
> [Section 2(1)]

Whilst this appears to refer only to the substance of a broadcast; again, the suggestion is that broadcasting has an element of communication to the public.

The same is true of the Berne Convention – the prime copyright convention – in which broadcasting means telecommunication for reception by the public at large.

Obviously, some doubt exists as to whether point-to-point satellite transmissions amount to a broadcast within the meaning of that term in the Copyright Act.

This problem was recognised by the Whitford Committee – the 1977 United Kingdom committee to consider the law on copyright and designs. The Committee's report states that "... it is by no means clear that transmissions to satellites are broadcasts" within the meaning of the Act. [The U.K. Act is similar to the Australian Act with respect to satellites.] The Committee felt that this type of transmission should be protected in principle and recommended that "broadcasting" in the new **United Kingdom Copyright Act** should include the distribution by satellite of programs intended for public reception (with or without the intervention of a ground station.)

The United Kingdom Government has accepted the Committee's recommendation but has yet to legislate on the matter. [The Cable and Broadcasting Bill now before U.K. Parliament deals with some of these issues.]

As far as direct broadcast satellites are concerned, the United Kingdom Government regards broadcasting by this means "to be the same in principle,if not in degree, as broadcasting

by means of a terrestrial transmitter, and says that it should be protected as such.

In summary, the position under the present Act is as follows:

- DBS transmissions and most point-to-multi-point satellite transmission are protected as broadcasts. Copyright subsists in Australia in "Television broadcasts" made from a place in Australia, by:
  - (i) The Australian Broadcasting Commission;
  - (ia) The Special Broadcasting Service;
  - (ii) The holder of a licence for a television station; or
  - (iii) Any prescribed person, being a person who is, at the time when the broadcast is made, the holder of a wireless telegraphy licence.
- Point-to-point satellite transmissions probably do not "qualify" as broadcasts and are therefore not protected.

As mentioned earlier, there appear to be three main issues:

1. Should there be copyright protection for satellite transissions?

If we accept that these transmissions should be protected on policy grounds there seems to me to be no reason why they should not be accorded the same legislative protection as terrestrial transmission. In which case, the **Copyright Act** will need to be amended either to equate satellite transmissions to broadcasts, or to confer protection on satellite transmissions as a new species of copyright.

If the Government chooses the former - which in my view is the better alternative – at least two changes will be necessary:

- "Broadcast" in the **Copyright Act** will need to be amended to include transmissions ultimately intended to be communicated to the public (i.e., point-to-point transmissions).
- Satellite transmissions will have to be deemed by the Act to have been "made in Australia" where the transmission takes place from a satellite licensed in accordance with the appropriate legislation (e.g. the **Wireless Telegraphy Act 1906**).

2. Whether transmission by satellite should be an Act comprised in the copyright in works, films and records?

i.e. Whether owners of copyright should be able to control satellite transmissions of their material.

Under present law, "broadcasting" is clearly within their control. This covers broadcasts from Australian ground stations of materials received by transmissions from satellite and also covers direct satellite transmissions. The question remaining is whether it is also necessary for copyright owners to control the first "leg" – i.e., the transmission of material from the ground to the satellite.

There are those who argue that control of the down – or second – leg is sufficient. They say that since this leg constitutes a broadcast (within the meaning of that term in the Copyright Act) the owner of the copyright in what is "broadcast" will be able to bring an action for any unauthorised broadcast once the broadcast occurs. Therefore, it will be unnecessary to characterise the first leg as a broadcast, or, for that matter, any other act comprised in the copyright.

Now, it seems to me that this proposition should be rejected by owners of copyright in works and other broadcast subject-matter:

- It would be considerably easier for plaintiffs to obtain relief if they had an additional cause of action regarding the initial transmission to the satellite;
- It would be easier too to succeed in an action brought in the plaintiff's own jurisdiction, which he would be able to do if he has control over the first leg transmission. If he does not control this then he will have to rely on an action in the place or places of distribution - there may be distribution to a multiplicity of receivers.

Thus if the policy is to protect copyright owners from the unauthorised transmission of their material by satellite, in my view, protection should extend to both the up and down legs of the satellite transmission.

The last question for the legislator is:

3. How should satellite transmissions be described for copyright purposes?

In my opinion the answer to that is that if broadcasts generally are to be protected by copyright then satellite transmissions that are intended ulitmately to be communicated to the public should be similarly protected.

The copyright law presently regulates broadcasts made in Australia. The existing provisions enable copyright owners to control "re-broadcasting" and, in some cases, wired diffusion. The satellite transmission itself may not be an act comprised in the copyright, but the public ("non-wired") distribution of programs will constitute a broadcast. "Programs" in this context includes works and other copyright subject-matter: In particular, literary, musical, dramatic and artistic works, cinematograph films, television and sound broadcasts and sound recordings. The rights comprised in the copyright in these materials are set out in sections 31, 85, 86 and 87 of the Act. Each of these copyrights includes a broadcast right.

An alternative to copyright is a penal code regulating the piracy of satellite transmission.

If the Government decided to legislate along these lines it might consider it appropriate for the protection of broadcasts generally to be a matter of criminal jurisdiction. This would necessarily involve repealing existing provisions whereby broadcasts are protected copyright subject-matter.

I am not suggesting that broadcasting organisations should be denied the type of rights they presently enjoy under the **Copyright Act**, merely that the substance of these rights could be enjoyed under a new uniform code.

The piracy of program-carrying signals transmitted by satellite is

COPYRIGHT ISSUES RELATING TO SATELLITE DISSEMINATION OF MATERIAL AND SIGNAL PIRACY

regulated internationally by the so-called **Satellites Convention** – the convention relating to the distribution of program-carrying signals transmitted by satellite.

Eight States have ratified this convention: Austria, the Federal Republic of Germany, Italy, Kenya, Mexico, Morocco, Nicaragua and Yugoslavia.

Articles 2 (1) and 8 (2) state: "each contracting state undertakes to take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor from whom the signal emitted to or passing through the satellite is not intended. This obligation shall apply where the originating organisation is a national of another contracting state and where the signal distributed is a derived signal".

The effect of these provisions is that contracting states can protect foreign transmissions made by an organisation constituted under the laws of a foreign country, or made from a place in that country – but not both.

The Convention applies only to encoded signals and only to signals carrying programs "emitted for the purpose of ultimate distribution" [definition of program, Article 1 (ii)]

CONVENTION

Section 184 (f) of the **Australian Copyright Act** states that the Act applies: "... in relation to television broadcasts and sound broadcasts made from places in that country by persons entitled under the law of that country to make such broadcasts in like manner as those provisions apply in relation to television broadcasts and sound broadcasts make from places in Australia by the Australian Broadcasting Commission, by the Special Broadcasting Service, by a holder of a licence for a television station, by a holder of a licence for a broadcasting station or by a person prescribed for the purposes of sub-paragraph 91 (a)(iii) of 91 (b)(iii)".

In other words, the Act applies to "transmissions" both made from a foreign country and by a "competent" organisation. An amendment to the Act would therefore be a necessary precondition to ratifying the Convention.

The Satellites Convention would appear to provide the legal means for combatting signal piracy internationally, but I thing it would be unwise for the Government to ratify the Convention until such time as all the components of programs that might be transmitted are fully protected under Australian law.

At present, for example, there is inadequate protection for the performers of works comprised in transmissions. This should be guaranteed in the form of the minimum level of protection envisaged by the Rome Convention before the Government contemplates Australia's adherence to the **Satellites Convention**.

As I mentioned at the outset, satellite transmission may raise fresh considerations for licensing the use of copyright materials.

For example, it has always been necessary to specify accurately the territorial limits of copyright licences. However, the added technological capacity of transmission by satellite may make this an even more important feature of the drafting of agreements. I am sure it will become critical for film producers and music copyright owners, for instance, to develop clear definitions for the new territorial arrangements that satellite transmission makes posible.

Another feature of the drafting that might need to be clarified is the definition of the site of a broadcast or transmission. This can be significant in interpreting the scope of broadcasting contracts and, in particular, in difining the rights of the broadcaster or other transmitter – in the event that a satellite transmisson is deemed not to be a broadcast.

Other issues include:

- Defamation and privacy (discussed by Henric Nicholas in his paper); and
- Property law questions – which are not new but may perhaps become more involved than we have been used to in this field.

All in all, I think that the advent of satellites means a lot more to the consumer than it does to the copyright lawyer.

(Extracted from a paper by **Peter Banki, Executive Officer, Australian Copyright Council,** *for the Australian Communications Law Association's Satellite Law Symposium in Sydney, May 4, 1984.*

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Performers seek 'simple social justice'

FROM PAGE 6

compilation of segments of film by third parties) could be prevented if performers were given a copyright, no present owner of copyright enjoys full moral rights in Australia.

Not even the Rome Convention which seeks to establish a minimum level of protection for performers (and record companies and broadcasters) is of assistance in the area of moral rights.

The Rome Convention, which was referred to by a number of speakers, obliges contracting states to give performers the "possibility of preventing" such acts as the unauthorised fixation and broadcasting of their live performances and may also provide for equitable remuneration for performers for secondary uses of recorded performances.

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