

# **gearing up for the autobahn**

**The Copyright Convergence Group reports to the Federal Government**

**T**he CCG's report "Highways to Change - Copyright in the New Communications Environment" ("the Report") has been presented to the Minister for Justice, Duncan Kerr MP. Extracted below is the Executive Summary of the Report, setting out the Group's recommendations for legislative amendment.

(Ed: the CCG's Terms of Reference were reproduced in Communications Law Bulletin Vol 13 No 4; Paragraph references in the Executive Summary are to the body of the Report).

## **recommendation 1: a new right of transmission to the public**

A technology neutral, broad based right to authorise transmissions to the public should be introduced into the *Copyright Act 1968* ("the Act") (Paragraph 1.3).

The new transmission right should:

- cover the transmission of copyright material in intangible form to the public by any means or combination of means which is capable of being made perceivable or used by a receiving device;
- encompass the existing right to broadcast and replace and extend the right to transmit to subscribers to a diffusion service;
- remain separate from the existing public performance right;
- be given to all copyright owners, including owners of copyright in sound recordings and broadcasts.

## **recommendation 2: the right to broadcast**

The right to broadcast should be retained in *the Act* as part of the new transmission right. The definition of broadcast for this purpose should include all transmissions made by providers of broadcasting services under the *Broadcasting Services Act 1992*, or as part of a national broadcasting service of the ABC or SBS, but exclude other transmissions to the public such as on-demand services, interactive services and computer networking of material. The definition of broadcasting should be linked to the definition of broadcast services in the *Broadcasting Services Act 1992* and should be a specifically defined use of copyright material which falls within the scope of the right to transmit to the public. (Paragraph 1.3.2)

## **recommendation 3: the public**

A definition of "the public" should not be introduced into *the Act* and that term should remain subject to judicial interpretation. (Paragraph 1.3.3)

However, a new provision should be inserted in *the Act* to the effect that transmissions of copyright material by electronic or similar means which are made for a commercial purpose should be deemed to be transmissions to the public. (Paragraph 1.3.3)

## **recommendation 4: the diffusion right**

In view of recommendation 1 to introduce a right of transmission to the public, references to transmission to subscribers to a diffusion service should be deleted from *the Act*. In particular, section 26 should be repealed. (Paragraph 1.3.4)

## **recommendation 5: subsistence of copyright in broadcasts and other transmissions**

- (i) Reference to specific broadcasters and legislation in section 91 should be removed from *the Act*. The section should be amended to provide that copyright subsists in all broadcasts which are lawfully made from a place in Australia, and which are capable of being lawfully received by members of the public. (Paragraph 2.3)
- (ii) Section 99 of *the Act* should be amended to remove the reference to specific broadcasters and statutes and to provide that the owner of copyright in the broadcast is the person who makes the broadcast. Section 22(5) of *the Act*, which deals with who is the maker of the broadcast should be amended to provide that the maker of a broadcast is the person who is responsible for the content of the broadcast and also makes the arrangements necessary for its transmission. (Paragraph 2.3)
- (iii) Copyright protection should not be extended to transmissions other than broadcasts in the extended sense proposed in recommendation 2. (Paragraph 2.3)

## **recommendation 6: transmissions originating from Australia**

- (i) Where a transmission originates from Australia and is intended for reception by the public outside Australia, the maker of the transmission should be required to obtain the licence of the copyright owner in Australia to do so. (Paragraph 3.3)
- (ii) Broadcasts intended for reception by the public outside Australia but originating in Australia should be the subject of copyright protection in Australia. (Paragraph 3.3)

## **recommendation 7: transmissions intended for reception in Australia**

- (i) The CCG accepts the principle that where a transmission originates outside Australia but is intended for reception by the public in Australia the maker of the transmission should be required to obtain the licence of the owner of copyright in Australia. Given the international complexities of the issue, the CCG considers that the appropriate means of implementing such a right requires further examination. (Paragraph 3.3)
- (ii) The CCG recommends that broadcasts originating from countries outside Australia and which are intended for reception in Australia, should be the subject of copyright protection in Australia. (Paragraph 3.3)

## **recommendation 8: satellite broadcasts (section 22(6))**

- (i) The maker of a satellite broadcast (and therefore the owner of any copyright in the broadcast) should be the person responsible for the content of the service, as is the case for other broadcasts. Section 22(5) of *the Act* specifies who is the maker of a broadcast. The section should be amended as set out in recommendations 5(ii) above, and reference to the maker of a satellite broadcast should be removed from section 22(6). (Paragraph 3.5)
- (ii) Section 22(6) of *the Act* should be reworded to provide that the place from which a satellite broadcast is made is the place from which the signals carrying the broadcast are transmitted to the satellite. (Paragraph 3.5)

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**recommendation 9:  
transmissions originating from  
a satellite**

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A new section should be inserted in *the Act* which provides that transmissions originating from a satellite which are directly and lawfully receivable by the public in Australia and intended for reception by that public should be deemed to be made from Australia and therefore protected as broadcasts in which copyright subsists. (Paragraph 3.7)

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**recommendation 10:  
retransmission of broadcasts**

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Section 199(4) of *the Act* should be replaced with a section which allows for retransmission by any means of a broadcast (in the extended sense suggested in recommendation 2) only in the following circumstances:

- (i) where the retransmission takes place within the intended reception area of the primary broadcast; and
- (ii) where the retransmission is simultaneous with the primary broadcast; and
- (iii) where the content of the primary broadcast is not altered in any way in the retransmission; and
- (iv) the retransmission is for the purpose of enabling reception of the primary broadcast in areas where the signal quality of that broadcast is inadequate.

Consequent amendments will be required to section 199(5), (6) and (7) of *the Act*. (Paragraph 4.2) The CCG has also recommended complementary amendments to section 212 of the *Broadcasting Services Act 1992*. (See recommendation 16).

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**recommendation 11:  
rebroadcast of broadcasts  
(section 25(3))**

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Retransmissions of broadcasts should be dealt with in a technology neutral manner. All retransmissions should be dealt with in a single section as set out in recommendation 10 and section 25(3) of *the Act* should be repealed.

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**recommendation 12:  
unauthorised reception of  
transmissions**

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Two new offences concerning unauthorised reception of transmissions should be enacted:

- fraudulent reception of transmissions;
- making, importing, selling, or letting

for hire unauthorised decoding devices.

The CCG notes that these offences may possibly be more appropriately included in Commonwealth Crimes legislation than *the Act*. (Paragraph 5.2)

A civil right of action against a person who makes, imports, sells or lets for hire unauthorised decoding devices should be introduced. (Paragraph 5.2) The civil right of action should:

- (i) vest in the person who charged a fee for the intercepted transmission, or for whose benefit such fees were collected, or the maker of any encrypted transmission;
- (ii) lie against any person who makes, imports, sells or lets for hire the unauthorised devices, and against any person who publishes information calculated to enable or assist any persons to receive services to which they are not entitled.

The same rights and remedies should be available against such persons as would lie against copyright infringers. (Paragraph 5.2)

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**recommendation 13: incidental  
cable services where persons  
reside or sleep**

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Section 26(3) of *the Act*, which permits the cable diffusion of copyright material in premises where persons reside or sleep, is inequitable in view of the commercial reasons for such exploitation. The provision should be repealed. (Paragraph 6.1)

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**recommendation 14:  
ephemeral copying**

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The ephemeral copying provisions in *the Act* should operate for the benefit of all broadcasters, but at present, and pending further review, should not be extended to all transmissions to the public.

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**recommendation 15: statutory  
licence for the use of sound  
recordings in broadcasts**

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- (i) The scope of the statutory licence for the use of sound recordings by broadcasters in section 109 of *the Act* should apply only to broadcasts which are not offered in return for valuable consideration from the recipient of the broadcast.
- (ii) Further consideration should be given to whether the statutory licence for free-to-air broadcasters should continue to operate, and that this should take place as part of the wide ranging review of *the Act* which has been proposed by the Minister for Justice.

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**recommendation 16: section  
212 of the Broadcasting  
Services Act 1992**

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The operation of section 212 of the *Broadcasting Services Act 1992* should be narrowed to make it consistent with the circumstances in which retransmission is permitted as set out in recommendation 10. Section 212 should be amended to make it subject to the provisions of *the Act*. Retransmission outside the licence area of the primary broadcast should not be permitted without the permission of the copyright owner.

# SBS: shuffling the broad and the narrow

Malcolm Long, Managing Director SBS Corporation,  
charts the new course

**A** great deal is being said about the rapid changes that are occurring in the communications business in Australia. Nowhere is change likely to be more rapid or more far-reaching than in broadcasting. It will put enormous pressure on existing broadcasters to devise strategies so they can survive and, indeed, prosper in the new audio-visual environment.

Change will come in a rush because Australian broadcasting has been protected from developments that have occurred almost everywhere else in the world in a rather more gradual way. There has been no

significant change in the shape of Australian television for more than 30 years, except for the creation of SBS.

There are a number of reasons for this. Firstly, the traditional broadcasting system in Australia with its mixed economy of healthy public and private operators has served the audience well, with a fairly high degree of program innovation and diversity. As a result, there has been nervousness among regulators about admitting new players to the scene: the current balance of broadcasting forces might be destabilised, current commercial viabilities could be threatened. Hence, new services like Pay TV were put on the back burner.