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Retransmission of Free-to-Air Broadcasts International experience

Legal History of Retransmission

Berne Convention and TRIPS

Retransmission has a long history in international law. Retransmission was specifically introduced into the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) at the Brussels Revision Conference in 1948 which inserted Article 11*bis*(1)(ii):

“Authors of literary and artistic works shall have the exclusive right of authorizing... any communication to the public, by wire or by rebroadcasting of the broadcast of the original work, when this communication is made by an organization other than the original one.”

The retransmission right is regarded as separate from the broadcasting right in Article 11*bis*(1)(i).

In addition, the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) requires that contracting parties comply with the Berne Articles including the relevant retransmission provisions.

Who are the underlying rights holders?

The underlying rights holders in copyright include producers, writers, composers and publishers.

North America

Cable retransmission has occurred in the USA since the 1960s. In 1976 section 111 of the US Copyright Act was introduced to cover remuneration for cable retransmission. In 1988, section 119 was introduced to cover satellite retransmission.

Europe

A European Council Directive in 1993 harmonised EU law on retransmission. (Council Directive 93/83/EEC).

Article 9 of the Directive facilitates collective administration of rights for the purposes of licensing retransmission.

Australia

Pay television began retransmitting without remunerating rightsholders under a loophole in Australian law designed for self help as opposed to commercial retransmission.

In 1995, the (then Opposition) Coalition Arts Policy, *Arts for All*, included a promise to bring Australian law in line with international experience and require equitable remuneration for retransmission by pay television.

In 2001, the Copyright Act was amended to create Part VC which is a remunerated exception for retransmission via all media (with the sole exception of the Internet which is not covered by the exception). Payment must be made by Pay TV networks to retransmit free-to-air TV networks, the actual figure to be set by the Australian Copyright Tribunal.

In May 2006 the Copyright Tribunal released a judgment providing that Australian pay TV operators, including Foxtel, Optus, Vision and Austar, would have to pay A\$3.5 million a year for retransmitting five free-to-air channels on their platform. This was calculated at the rate of 23.39 Australian cents per subscriber per month for five network channels. The Chief Executive of Screenrights stated, following the judgment, that the payment of a copyright fee in these circumstances was “common practice in the US, Canada, Europe and Japan and an obligation imposed by the World Trade Organisation.”

Collections to Rights Holders

Collective administration

In practice, to lower transaction costs, retransmission is administered collectively by rightsholders. This is also important to the retransmitters as there is not always an existing commercial relationship between the retransmitter and the underlying rightsholders in the retransmitted free to air broadcasts.

AG/COA

Although the individual fees for retransmission tend to be low, in aggregate the amounts are substantial and represent a significant input to the production sector.

Producers are represented in Europe by AGICOA a non-profit copyright society based in Geneva.

AGICOA represents more than 6,000 rightsholders across 44 countries.

In 2005, AGICOA distributed 97.3 million Euros to rightsholders for retransmission in 33 countries in Europe.

New Zealand's Position

Current Law

Section 88 of the Copyright Act 1994 provides a limited copyright exception for retransmission over cable systems.

Importantly, the exception does not operate if there is a licence available for the retransmission. In other words, this "use it or lose it" style provision allows rights holders to license their works if they wish to. Equally, in the absence of a licence retransmission is not held up by unwilling or absent copyright owners.

S88 does not cover satellite retransmissions. A retransmission by satellite would theoretically require the permission of all the relevant copyright owners. The vast majority of retransmission is by satellite (Sky).

Broadcasters may have licensed the retransmission of the broadcast signal in return for remuneration or other consideration such as channel position, program guide rights, etc.

To SPADA's knowledge, underlying rightsholders have not directly licensed retransmission, and have not received remuneration for the retransmission.

Uniquely in the developed world, producers have not received remuneration for retransmission in New Zealand under the current legal regime.

Based on the Australian figure of 23 cents per subscriber per channel per month, the royalties that Sky would need to pay in New Zealand under a legislative regime would be in the order of \$1.2 million per year.

Proposed amendment

The Copyright (New Technologies) Amendment Bill proposes to delete section 88.

This would leave the Act silent on retransmission.

Initially this may seem to favour copyright owners' interests over Pay TV retransmitters' interests. However, such an amendment will do nothing to address the anomaly in New Zealand whereby this is the only territory in the developed world where rights holders are not being remunerated for retransmission of their copyright works.

If the Copyright Act is to be reviewed the anomaly of New Zealand rights holders not being paid for the retransmission of their works needs to be addressed.

SPADA recommends that New Zealand law is brought into line with international experience and requires equitable remuneration to rights holders for retransmission by pay television. There are two possible means of achieving this outcome:

1. Retain section 88, extending it to permit satellite retransmission, but at the same time providing for an enforced/ compulsory payment regime to rights holders by pay TV operators for retransmission.
2. Delete section 88 from the current copyright legislation, leaving it silent on retransmission, while committing to working towards a legislated regime for royalty payments to underlying rights holders in New Zealand.

SPADA is of the view that the second alternative would be preferable, from both a legislative and pragmatic point of view, and therefore recommends commitment towards a legislated regime of royalty payments to rights holders for retransmission on pay TV.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Penelope Borland'. The signature is fluid and cursive, with a large initial 'P' and 'B'.

Penelope Borland
Chief Executive
SPADA