Update on rental rights

Stephen Peach argues the A-G's decision not to introduce a record rental right is based on a misconception about the relationship between rental rights and the blank tape royalty

In the Summer 1990 issue of the *Communications Law Bulletin*, I discussed the concept of record rental and the potentially disastrous consequences for copyright owners (and through them recording artists and composers) resulting from this activity.

At that time, the Commonwealth Attorney-General's Department was considering the proposal by the Australian Record Industry Association Limited (ARIA) that the *Copyright Act 1968* be amended to include a right of rental as part of the copyright in sound recordings.

On 8 July 1991, the Attorney-General, Mr Duffy, announced that, for the time being, the ARIA proposals would not be accepted and that no amendment would be made to the Act to include a 'rental right'. This decision was made even though this right has been regarded as necessary in many countries, including the USA and Canada.

Blank tape royalty

Mr Duffy stated that he was not satisfied that rental had yet been transformed into a new use of copyright such as to attract copyright control. He also expressed the opinion that the extent to which rental facilitates home taping of records is a factor which would be taken into account in the determination of the blank tape royalty.

The *Copyright Amendment Act 1989* introduced Part Vc into the Act which contains the relevant provisions relating to the introduction of a royalty on the sale of blank audio tapes. That royalty is intended to compensate the owners of copyright in sound recordings and musical works for the home taping of copyright material. The royalty rate is to be determined by the Copyright Tribunal.

However, the validity of Part Vc of the Act is currently the subject of a challenge in the High Court of Australia, brought by the blank tape manufacturers and distributors, alleging that the blank tape royalty legislation was beyond the power of the Commonwealth to enact under the Constitution. The Government proposes to reconsider the question of a rental right when the High Court hands down its decision in those proceedings.

The Minister's announcement is remarkable for two reasons. First, it implies that record rental and home taping constitute the same use of copyright. Secondly, it also implies that the blank tape royalty and a licence fee obtained in respect of record rental are alternative and equivalent methods of compensating copyright owners for that use.

Michael Duffy

Same use

The notion that the blank tape royalty and any record rental licence fees are, in effect, licence fees for the same activity is fallacious. It fails to recognise that two separate and distinct uses are being made of the copyright in the sound recording even though only one of these uses is presently recognised by the Act. The blank tape royalty is designed to compensate a copyright owner for the exercise by a consumer of the owner's 'reproduction right' (the right to make a copy of the sound recording). The exploitation of sound recordings or musical works by way of rental is not, of course, an exercise of the owner's reproduction right as no copying of the recording occurs at the time of rental.

No copying is involved in the renting of a record, yet it is clearly an activity which involves the use of the sound recording for commercial gain. The fact that the consumer may subsequently seek to exercise (or, as is presently the case, infringe) the copyright owner's reproduction right is an entirely irrelevant consideration. The consumer may or may not tape a record that he or she rents. However, the consumer's decision as to whether or not a copy will be made of the record has no bearing on the rental transaction. The person renting the record will receive hire fees regardless of the subsequent use made of the record by the consumer.

Alternative methods of compensation

Without wishing to give any credence to the notion that record rental and home taping constitute the same use of copyright, the Minister has failed to recognise that the blank tape royalty is not an adequate substitute for a record rental licence fee. The blank tape royalty legislation is based, in part, on the concept of reciprocity - the royalty will be calculated by reference to, amongst other things, the use made in Australia of sound recordings and musical works from countries that have similar blank tape royalty legislation in place and which also compensate Australian copyright owners for the use made of Australian sound recordings in those countries. At present, while such legislation has been enacted in some countries (such as France, Germany and Austria), the Minister has not recognised any of those countries for the purpose of determining the amount of the blank tape royalty. It has yet to be established that any of those countries distribute any of the royalty proceeds to Australian rights holders for the use made of Australian sound recordings and musical works in those countries. For the foreseeable future, the blank tape royalty will be calculated having regard only to the use made in Australia of Australian sound recordings and musical works.

Record rental, on the other hand, involves the exploitation of sound recordings and musical works from around the world, particularly the United States of America and the United Kingdom. Accordingly, there can be no basis for the implication, inherent in the Minister's statement, that the blank tape royalty would adequately compensate copyright owners for the use made of their sound recordings and musical works through rental.

There is no justification on the part of the Minister in delaying the reconsideration of the record rental issue until the validity of the blank tape royalty legislation is determined. An immediate reconsideration is warranted.

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