With proper planning; a company's e-business development efforts can be enhanced by designing structures to minimise the taxes resulting from its e-business initiatives. The net value created by e-business transformations can be increased through tax planning by 20% or more if the right business facts and tax planning are present.

SINK OR SWIM

In the same way that companies at the beginning of the industrial revolution knew business was changing but did not know how it was going to turn out, no one can predict the next wave of the technological revolution. However, it is clear that the bottom line is e-business and that e-markets appear to be the next wave in this phenomenon.

Not only does business need to ensure that it takes advantage of the e-markets and the benefits they have to offer, it is vital that proper consideration is given to tax and legal issues arising for both the e-markets and its participants.

E-markets present companies with an opportunity to revolutionise the supply chain and save money, but e-business is just business evolving and therefore must be approached with the same degree of caution as any other business venture.

The views expressed in this article are those of the authors and not necessarily those of their firm or their clients.

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The New Digital Copyright Law

Raani Costelloe examines the Copyright Amendment (Digital Agenda) Act 2000 providing both an insightful analysis and in depth discussion of this long awaited revision to the Copyright Act.

The *Copyright Act 1968* ("**Copyright Act**") has finally been overhauled to address the digital revolution and the internet by introducing a new right of communication for copyright material and numerous other amendments which reflect the outcome of intense lobbying by owners and users of copyright works and other subject-matter. This follows more than six years of deliberation, it being that long since the Copyright Convergence Group ("**CCG**") was appointed in 1994 by the then Federal Labor Government to consider the need for changes to the way in which the Copyright Act protected broadcast and other electronic transmissions with regards to changes in technology and communication.

In that time there has been a shift in focus from traditional media such as satellite and cable broadcasting towards interactive media and the issues raised by the ubiquitous digitisation and reproduction of copyright material on the Internet.

The *Copyright Amendment (Digital Agenda) Act 2000 (6th)* ("**Digital Copyright Act**"), which substantially amends the *Copyright Act 1968* (6th), was enacted in early September 2000 and will come into effect in early March 2001. The rationale behind the amendments commencing six months after enactment is to allow affected parties to consider and/or re-negotiate present practices, contracts and arrangements in light of the major changes which have been made to the Copyright Act.

This article focuses on the evolution of the copyright reform process, the effect the changes will have on the media and communications industry and the outcomes of tensions between rights holders and copyright users, in particular:

- the new right of communication to the public;
- the scope of licensing regimes and online use of music;
- the status of temporary reproduction in the course of internet browsing;
- liability issues relating to telecommunications carriers and Internet Service Providers;
- the re-transmission of free-to-air broadcasts by pay television operators; and
- technological protection measures and protection of rights management information.

The Digital Copyright Act also deals with a range of other issues which will not be discussed in this article, such as fair dealing in the digital environment, use of copyright by educational institutions and the protection of computer software.

THE RIGHT OF COMMUNICATION TO THE PUBLIC

The period since 1994 has seen fundamental changes in the focus of the copyright lobby and the communications industry generally. Initially, the main concerns related to new forms of broadcast technology and business models which were being introduced in Australia in the early 1990s, namely satellite and cable pay television and the re-transmission of free-to-air broadcasts by pay television operators.

Since then, the focus and language of rights has significantly changed to reflect the transformation in the way copyright material may be reproduced, transmitted or communicated over the internet and other cable and wireless networks, such as broadbanded cable and mobile wireless application protocol ("**WAP**").

The gaps in the existing broadcast and diffusion rights

In 1994, the CCG recommended that the existing broadcast and diffusion rights be replaced by a broad technology-neutral transmission right. The current broadcast right is limited to wireless transmission. The diffusion right, while related to transmission over a material path, is restricted to subscriber services.[1] In addition, sound recordings do not have a diffusion right. The effect of this is that owners of copyright in sound recordings do not have a right against any person transmitting sound recordings over cable or wire networks.

The other effect of the definition of broadcast being restricted to wireless transmission relates to a broadcast being a copyright subject-matter in itself. That is, the Copyright Act recognises that a separate copyright exists in the actual broadcast transmission by a television or

radio station. Attached to the right in the broadcast is the exclusive right to make copies of the broadcast and re-broadcast the transmission.[2] Under the current Copyright Act, broadcasts do not have any cable right and copyright does not subsist in cable transmissions. This means that cable pay television operators do not have any copyright in their transmissions and broadcasters' re-broadcast rights do not extend to re-transmission of their broadcasts via cable.

The CCG's proposed transmission right would have remedied these shortcomings in relation to sound recordings and broadcasts.

The right of making available

However, the concept of a transmission right quickly became inadequate in dealing with the use of copyright material on the internet. Rights holders argued that placing their content on internet servers was a use which should be controlled by them and wasn't covered by a concept of transmission which is non-interactive and rooted in broadcast technology where material is disseminated from a transmission point to multiple points of reception.

There is a great level of uncertainty as to whether uploading copyright material onto the internet constitutes an exercise or infringement of the diffusion right notwithstanding that any copying of such material in the process would constitute an exercise or infringement of reproduction and copying rights.

This led to a recommendation in 1997, arising from the Coalition Government's review, that a right of 'making available' be created in addition to a broad-based technology neutral transmission right.[3] The right of making available was proposed to cover the use of copyright material in interactive online services where the use of copyright material is best characterised as making it available, rather than transmitting it, to end-users.

The new right of communication to the public

Ultimately, the Government decided to create one right of communication to the public which replaces the broadcast and diffusion rights and conceptually combines the previously proposed separate rights of transmission and making available.

Owners of copyright works (literary, dramatic, artistic and musical works) and other copyright subject matter (sound recordings, cinematograph films and broadcasts) will have a new exclusive right of communication to the public.[4] Communicate is defined broadly as:

> *'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter.'*[5]

This amendment will make it clear that rights holders have the exclusive right to make their copyright material available online. For example, owners of copyright in sound recordings will effectively have exclusive online and cable rights where they once only had limited wireless broadcast rights. As noted above, sound recordings currently do not have a diffusion right which effectively allows non-owners of sound recordings to transmit sound recordings via cable without infringing any right.

Some copyright regimes overseas, such as that of the United States, do not even grant owners of sound recordings a basic broadcast right. This is due to the historical power of the American radio industry. The wireless broadcast right was created in Australia in 1968 with the enactment of the Copyright Act and was followed by a refusal by Australian radio stations to broadcast and pay for the right to broadcast Australian sound recordings. Australian copyright law does not recognise a broadcast right in American sound recordings on the basis that American law does not grant such a right to American or foreign sound recordings. Australian broadcasters argued that they promoted the sale of Australian music and should not have had to pay any fees. This "pay for play" stand-off was ultimately resolved.[6]

Retention of and expanded definition of broadcast

While the broadcast right is to be replaced by the right of communication to the public, the definition of broadcast will be retained in the Act with respect to broadcasts as a copyright subject-matter. It will be expanded to cover wireless and cable transmissions by bringing the definition in line with the definition of broadcasting service under the *Broadcasting Services Act 1992* ("**BSA**")[7] which is a transmission based definition, i.e. a broadcast will not include making copyright material available online. This is achieved by defining a *broadcast* as a communication to the public delivered by a broadcasting service within the meaning of the BSA.[8]

The reason for the retention and expansion of the definition is two-fold. Firstly, it expands the protection for broadcasts in which copyright separately subsists. Cable pay TV operators will have exclusive re-broadcast and communication rights in their cable broadcasts and free-to-air broadcasters will effectively have a cable re-transmission right which they presently do not have, as well as a communication right. The effect of the communication right will be that owners of copyright in broadcasts will have an exclusive right to transmit or make their broadcasts available over the internet.

Secondly, the Government has decided that the licensing regimes under the Copyright Act with respect to the broadcasting of copyright material should not extend to the broader communication of such material, particularly making such material available online. This is discussed further below.

Clarification of broadcast and transmission issues

The Digital Copyright Act deals with a number of issues which have required clarification for some time, namely:

- *Ownership of copyright in broadcasts:* The Copyright Act has been amended to provide that a broadcast is taken to have been made by the person who provided the broadcasting service by which the broadcast was delivered.[9] The effect of this is two-fold. Firstly, coupled with another amendment[10], it makes it clear that the broadcaster is the owner of copyright in the broadcast, and not service providers such as telecommunications carriers and transmission services (e.g. satellite uplinks and downlinks). Secondly, it makes it clear that the broadcasting licensee (as opposed to a channel content provider which is particularly relevant to the pay TV industry) is ultimately responsible for obtaining licences for the broadcast of underlying copyright material contained in the broadcast channel.

- *Definition of "to the public":* This has been defined to mean the public within or outside Australia.[11] The Copyright Act did not define the term or provide copyright owners with the exclusive right to control transmissions that originate from Australia but are intended only for reception by the public outside Australia as they are not broadcasts to the public in Australia as required by the Copyright Act. The

amendment will allow Australian copyright owners to control the transmission of material from Australia directed to overseas audiences.[12]

- *Digital terrestrial broadcasting:* A range of amendments have been made which deal with the introduction of digital terrestrial broadcasting in Australia and in particular the requirement under the BSA that broadcasting licensees simulcast their broadcasts in analog and digital mode in the period before the phase out of analog services.[13] In essence, broadcasters will not infringe copyright in the underlying works and other subject-matter included in a film or sound recording where a copy of the film or sound recording is made solely for the purposes of simulcasting.[14]

Effect on compulsory broadcast licences and licence schemes

The Government has decided to retain the existing compulsory statutory licences and Copyright Tribunal jurisdiction in relation to the broadcasting of works and other subject-matter and not extend these licences to apply in relation to broader online and interactive communication. For example, the compulsory licence for broadcasting sound recordings allows free-to-air television and radio broadcasters to broadcast sound recordings provided that the broadcasters pay the fee determined under the scheme.[15] This scheme is subject to the Copyright Tribunal's jurisdiction and the Tribunal may determine an amount of equitable remuneration upon application by either the copyright owners' or broadcasters' representative. The Phonographic Performance Company of Australia ("**PPCA**") administers the broadcasting rights in sound recordings.

Free-to-air, subscription broadcasters of musical works, and subscription broadcasters of sound recordings upon the commencement of the Digital Copyright Act amendments, are subject to licensing regulation where the Copyright Tribunal has jurisdiction to determine a reasonable charge in circumstances where a copyright user claims that the rights holder has refused or failed to grant a licence in accordance with an existing licence scheme, has failed to grant such a licence within a reasonable time, or the grant of such licence is subject to unreasonable charges or conditions.[16] The Australasian Performing Right Association ("**APRA**") administers public performance and broadcast rights in musical works.

Consequently, while there is strictly only a compulsory licence with respect to the free-to-air broadcast of sound recordings and other uses of copyright material[17], section 157 of the Copyright Act - the provision giving Copyright Tribunal jurisdiction over the determination of disputes over licences[18] relating to the broadcast of musical works and subscription broadcast of sound recordings - effectively creates a de facto compulsory broadcast licence in relation to musical works because the determination of usage and fees is subject to statutory review. However, it does not afford copyright users the ease of usage afforded by the compulsory licences because it is subject to conditions.

The policy rationale behind these licence schemes is to provide a framework which balances the interests of rights holders (owners of copyright in music and sound recordings and other copyright material) and copyright users (broadcasters).

From a copyright user perspective, the restriction of the licence regimes to traditional broadcasters and non-extension to internet content providers means that rights holders will have a substantial amount of power in determining the terms on which internet service providers may use copyright material because users will have no recourse to the Copyright Tribunal. However, note there is some ambiguity as to whether the section 157 regime applies to Internet transmission of works over the internet, which is discussed below.

Conversely, copyright owners believe that this is necessary to allow them full control over the exploitation of their intellectual property on the internet due to the ease with which it can be illegally reproduced and distributed, as well as the unfettered freedom to create business models on which such intellectual property may be economically exploited.

It is important to note that the section 157 licence regime will apply to the electronic transmission of a work (other than in a broadcast) for a fee payable to the person who made the transmission.[19] It is arguable that this may extend the de facto compulsory licence regime to the streaming of musical, literary and artistic and dramatic works over the internet as part of subscription services. For example, a subscription internet service which continuously streams content to end-users could be characterised as electronic transmission for a fee payable to the person who makes the transmission. The Supplementary Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* explains that this amendment includes in the definition of licence the elements of the cable diffusion right which are not covered by the new definition of broadcast and does not refer to its operation in relation to making works available on the internet.

What uses would fall within this type of licence? In some sense, this amendment reproduces and keeps alive the ambiguity which exists in relation to whether the diffusion right applies to the making available or transmission of works on the internet.

Telephone music on-hold services are an example of subscription based transmissions which would not fall within the expanded definition of broadcast and would be covered by the amended section 136 of the Copyright Act. This would only apply to musical works, and a person providing music on-hold services would require a licence from owners of copyright in sound recordings. Any disputes over such a licence would not be within the Copyright Tribunal's jurisdiction.

As discussed above, the section 157 scheme has been amended to include the subscription broadcasting of sound recordings within the Copyright Tribunal's jurisdiction. Record companies unsuccessfully lobbied against the inclusion of audio-only subscription broadcasting services (pay radio) within licence schemes under the jurisdiction of the Copyright Tribunal on the basis that it gives such services a de facto statutory licence to broadcast sound recordings. As with their successful arguments relating to the non-extension of the licensing regimes to the interactive use of music, they argued that they should have the sole right to decide whether sound recordings should be licensed to subscription radio services and the terms of such licences, given that a proliferation in such services may undermine the market for the sale of sound recordings.[20]

The Government recently made a determination under the BSA in relation to the definition of broadcasting service which effectively excludes television and radio programs made available using the internet from the definition (other than internet services delivered over the radiofrequency spectrum of the broadcasting services bands). The determination provides that:

'a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands does not fall within the definition of broadcasting service.'

While this determination was made for non-copyright policy reasons (to exclude cable and wire delivered internet television and radio services from the operation of the BSA's licensing regime), it has the effect of making it clear that such services will not be able to take advantage of the section 109 compulsory licence relating to non-subscription broadcasting of sound recordings or the section 157 licence regime relating to the subscription broadcast of sound recordings.

TEMPORARY REPRODUCTION IN THE COURSE OF BROWSING

The Digital Copyright Act amends the Copyright Act to provide that the copyright in copyrighted subject-matter is not infringed by making a temporary reproduction or copy of the subject-matter as part of the technical process of making or receiving a communication provided that the making of the communication is not an infringement of copyright.[21]

DIRECT INFRINGEMENT LIABILITY AND AUTHORISATION LIABILITY OF CARRIERS AND ISPS

Under the Copyright Act, the copyright in a musical work, sound recording or film is infringed by a person who, not being the owner of copyright, and without the licence of the owner of copyright, *does* in Australia, or *authorises* the doing in Australia of, an act comprised in the copyright.[22]

Direct infringement liability

Telecommunications carriers and service providers such as Internet Service Providers ("ISPs") will not be liable for direct infringement of the communication rights in copyright subject-matter in instances where they do not determine the content of communications made by others on their networks and services. The Digital Copyright Act amends the Copyright Act to provide that a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.[23]

For example, a telecommunications carrier which provides its own music on-hold service to its customers without the licence of the rights holder will be directly liable for copyright infringement because it is determining the content of the communication. Conversely, the carrier will not be liable for direct infringement in the instance of a small business using the carrier's network to provide music on-hold to callers without the licence of the relevant rights holders in the music.

Authorisation liability

Authorisation liability has particular relevance in the communications industry given that telecommunications carriers and service providers are potentially exposed to authorisation liability in relation to infringing acts performed by users of their services who reproduce, transmit or make available copyright material without the licence or permission of copyright owners.

New provisions will clarify the authorisation of infringing actions. In determining whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a copyright subject matter, without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- the extent (if any) of the person's power to prevent the doing of the act concerned;
- the nature of any relationship existing between the person and the person who did the act concerned; and
- whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.[24]

This will provide carriers and other service providers with some certainty and means of avoiding liability for authorising copyright infringement by users of their services. These amendments, combined with service providers' comprehensive terms of use and the Internet Industry Association of Australia's Code of Practice, will go a long way towards creating certainty for ISPs.

Carrier and carriage service provider liability for authorisation

The amended Copyright Act also expressly provides that a person (including a carrier or carriage service provider) who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright in a work or an audio-visual item *merely* because another person uses the facilities so provided to do something which is included in the copyright.[25]

RE-TRANSMISSION OF FREE -TO-AIR BROADCASTS BY PAY TV OPERATORS

The re-transmission debate

One of the major copyright issues in the television industry since the commencement of pay television in Australia in the early 1990s has been the re-transmission of free-to-air television broadcasts by cable pay TV operators as part of the pay TV operators' services to their customers. Re-transmission is attractive because it provides customers with clearer pictures and ease of switching between pay channels and the re-transmitted free-to-air channels.

Prior to the commencement of the Digital Copyright Act amendments, broadcasters do not have an exclusive cable re-transmission right because, by definition, the re-broadcast right of the broadcaster is limited to a wireless re-broadcast. As a result, cable pay TV operators do not infringe the re-broadcast right of the broadcaster. Also, section 199(4) of the Copyright Act, a section originally enacted in relation to self-help re-transmitters[26], has the effect of allowing pay TV operators to re-transmit the copyright works and films contained in the broadcast by deeming them to be in possession of a licence to do so from the relevant copyright owner. A broadcaster may indeed own the copyright in the underlying content as well as the broadcast copyright, particularly news and current affairs programming.

In 1995, the free-to-air networks failed in their litigation against Foxtel, a pay television operator which re-transmits free-to-air broadcasts to its cable subscribers.[27]

There are a number of competing arguments surrounding this re-transmission issue. Free-to-air broadcasters and underlying rights holders in the programming which is re-

transmitted argued that they should be compensated by pay TV operators. In addition, free-to-air broadcasters demanded control over their signals and the requirement that pay TV re-transmitters obtain permission to do so. Pay TV re-transmitters have argued that compensation constitutes a double-dip and that unaltered re-transmission benefits free-to-air broadcasters and their advertisers through ensuring better signal quality and greater reach within licence areas.

Upon its election in 1996, the Coalition stated that it would recognise the re-transmission rights of free-to-air broadcasters and underlying rights holders through amending the Copyright Act and BSA to require re-transmitters to obtain the broadcasters' consent.[28]

The re-transmission regime

The Government has sought to implement its policy decision through amendments to the Copyright Act and the BSA. As presently formulated, it consists of:

- a de facto consent regime whereby pay TV re-transmitters must obtain a licence from free-to-air broadcasters, otherwise the re-transmitter would infringe the broadcasters' expanded re-broadcast right. It is de facto in the sense that it differs from the United States' regime which expressly provides that consent be obtained. However, such a licence will not be required until the Government makes further amendments to the BSA, which presently grants re-transmitters immunity from suit in relation to copyright infringement; and
- a compulsory licence regime with respect to the payment of underlying rights holders in the broadcast programs. As with the United States, the compulsory licence fee is payable even if the re-transmission occurs within the broadcaster's licence area. This is different to the Canadian and British regimes.

Expanded re-broadcast right

The broadening of the definition of broadcast under the Copyright Act to cover any means of delivery (rather than only wireless transmission) has the effect of expanding the re-broadcast right to include cable re-transmission. Consequently, cable re-transmitters will infringe the re-broadcast rights of free-to-air broadcasters as well as cable broadcasters unless they obtain a licence to do so.

Underlying rights in re-transmitted content

The Digital Copyright Act creates a statutory licensing regime with respect to the re-transmission of underlying copyright subject-matter contained in the re-transmitted broadcast.[29] That is, a re-transmitter does not infringe the copyright in a work, sound recording or film included in a free-to-air broadcast provided that the re-transmitter pays a collecting society equitable remuneration. The regime is similar to the educational statutory licence regime in the Copyright Act. This means that a re-transmitter does not need to obtain a direct licence from the rights holders in the re-transmitted content before it commences re-transmission.

With the imminent introduction of digital terrestrial free-to-air television in Australia and the variety of additional services that may be offered utilising digital technology under the BSA, pay TV operators submitted that the statutory licence should extend to the re-transmission of primary broadcasts, enhanced programming and multi-channel broadcasts.[30] This issue has been left unclear.

Similar compulsory licence regimes regarding the re-transmission of underlying content in broadcasts exist in other countries such as the United States and Canada. By contrast, the copyright law of the United Kingdom provides that copyright in any underlying works contained in the broadcast is not infringed if the re-transmission is made within the licence area of the original broadcaster.[31]

Importantly, the re-transmission statutory licence does not apply in relation to a re-transmission of a free-to-air broadcast if the re-transmission takes place over the Internet[32] and by definition, a re-transmission of a subscription broadcast. This means that a service which sought to re-transmit a television or sound broadcast over the Internet would require a direct licence from the broadcaster and the owners of copyright in all content contained in the broadcast.

Self help re-transmitters

Under the BSA, re-transmitters are immune from suit in relation to the re-transmission of programs. This includes immunity from copyright infringement proceedings by broadcasters and underlying rights holders in relation to their respective re-broadcast and broadcast rights.[33]

Amendments to the BSA which will come into force upon the commencement of the Digital Copyright Act will make it clear that this immunity will not extend to re-transmitters who are not *self-help providers* (as defined under the amended BSA).[34] Self-help providers will not have to pay licence fees to broadcasters or underlying rights holders. As a result, self-help providers will not be subject to the statutory licence regime.

Pay TV re-transmitters and the re-broadcast right

Upon the commencement of the Digital Copyright Act in March 2001, pay TV re-transmitters of a broadcast will be infringing the re-broadcast right of the broadcaster if they have not obtained a licence from the broadcaster to do so. As discussed above, this is the result of the expanded definition of broadcast which will have the effect that cable re-transmission will constitute an exercise of a broadcaster's exclusive re-broadcast right.

However, the Government has retained the general immunity from suit for all re-transmitters in relation to the infringement of a broadcaster's re-broadcast right. In the short-term, pending the outcome of further consultations on the re-transmission issue, section 212 of the Copyright Act has be retained to ensure that re-transmitters will not need to seek the consent of, or remunerate, broadcasters in relation to the re-broadcast right under the Copyright Act.[35]

TECHNOLOGICAL PROTECTION MEASURES

The Digital Copyright Act provides copyright owners with remedies against manufacturers, sellers, distributors and importers of circumvention devices which circumvent technological protection measures.[36] Technological protection measures are devices, components or products which are designed to prevent or inhibit the infringement of copyright in copyright material through such means as limiting access by encryption or copy control mechanisms.[37] There are also criminal sanctions against such activities.

Similar provisions exist in relation to the removal electronic rights management information and commercial dealing with copyright material whose electronic rights management information has been

removed.[38] Such information includes information attached to, or embodied in, copyright matter that identifies the copyright matter and its owner or author, or identifies or indicates some or all of the terms and conditions on which the copyright matter may be used.[39]

These provisions are important in the current climate where copyright owners are developing ways of ensuring that digitised intellectual property such as software, films and music can be exploited through secure methods of transmission and authorised reproduction.

Rights holders lobbied the Government to introduce criminal and civil provisions against the *use* of such circumvention devices. However, the Government decided against introducing remedies against users on the basis that it believed the most significant threat to copyright owners' rights lies in preparatory acts for circumvention, such as manufacture, importation, making available online and sale of devices, rather than individual acts of circumvention.

Broadcast decoding devices

The pay TV industry successfully lobbied for the introduction of provisions which grant broadcasters rights against the making of and dealing with broadcast decoding devices.[40] A broadcast decoding device is defined as a device (including a computer program) that is designed or adapted to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster by circumventing, or facilitating the circumvention of, the technical means or arrangements that protect access in an intelligible form to the broadcast.

As with the technological protection measures and electronic rights management information provisions, there are also criminal sanctions against such activities.

Broadcasters will also be able to bring actions against persons who use or authorise the use of unauthorised broadcast decoding devices for the purpose of, or in connection with, a trade or business.

1 Broadcast is defined under section 10(1) of the Copyright Act as *transmit by wireless telegraphy to the public*. Section 26 of the Copyright Act sets out the interpretation of the right to cause a work or other subject-matter to be transmitted to subscribers to a diffusion service. The problems in interpreting the diffusion right are evident in the *Australasian Performing Right Association Ltd v Telstra Corporation Ltd* music-on-hold case (1995) 31 IPR 289. The application of the diffusion right to the Internet is unclear and has not been decided upon although APRA, the administrator of public performance rights in a substantial repertoire of musical works, commenced an action against OzEmail, an Internet Service Provider, which contended that OzEmail's service was a diffusion service and that OzEmail caused musical works to be transmitted to subscribers to a diffusion service without APRA's licence. This action was subsequently settled.

2 Section 87 of the Copyright Act.

3 Federal Government Discussion Paper, *Copyright Reform and the Digital Agenda* (July 1997).

4 Sections 31, 85, 86 and 87 of the Copyright Act as amended by the Digital Copyright Act.

5 Section 10(1) of the Copyright Act as amended by the Digital Copyright Act.

6 The Australian "pay for play" boycott is discussed in Shane Simpson and Colin Seeger, *Music Business: Making Music Work* (Warner Bros; 1994) at page 383.

7 Section 6(1) of the BSA.

8 Section 10(1) of the Copyright Act as amended by the Digital Copyright Act.

9 Section 26(5) of the Copyright Act as amended by the Digital Copyright Act.

10 Section 99 of the Copyright Act as amended by the Digital Copyright Act provides that the maker of a television broadcast or sound broadcast is the owner of any copyright subsisting in the broadcast.

11 Section 10(1) of the Copyright Act as amended by the Digital Copyright Act.

12 Explanatory Memorandum to the *Copyright Amendment (Digital Agenda) Bill 1999* at page 27.

13 Sections 47(7), 47AA and 110C of the Copyright Act as amended by the Digital Copyright Act.

14 Simulcasting is defined in section 10(1) of the Copyright Act as amended by the Digital Copyright Act.

15 Section 109 of the Copyright Act. Note that this compulsory licence does not apply to subscription broadcasters.

16 Part VI of the Copyright Act as amended by the Digital Copyright Act, particularly section 136.

17 Other compulsory statutory licences include the reproduction of works and other subject-matter for purpose of broadcasting , the manufacture of records of musical works and educational and institutional copying of copyright matter.

18 Section 136 defines the scope of licences covered by the Copyright Tribunal's jurisdiction under section 157 of the Copyright Act.

19 Section 136(a) of the Copyright Act as amended by the Digital Copyright Act.

20 These arguments are cited in the House of Representatives Standing Committee on Legal and Constitutional Affairs' *Advisory Report on Copyright Amendment (Digital Agenda) Bill 1999* (November 1999) at paragraph 5.26.

21 Sections 43A and 111A of the Copyright Act as amended by the Digital Copyright Act.

22 Sections 36 and 101 of the Copyright Act.

23 Section 22(6) of the Copyright Act as amended by the Digital Copyright Act.

24 Sections 36(1A) and 101(1A) of the Copyright Act as amended by the Digital Copyright Act.

25 Sections 39B and 112E of the Copyright Act as amended by the Digital Copyright Act.

26 The concept of self-help re-transmissions is generally understood to mean re-transmissions made by communities to obtain or improve reception of the original broadcast.

27 *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1995) 32 IPR 323 in the Federal Court. This decision was upheld by the Full Federal Court on appeal: (1996) 34 IPR 274 . The arguments of the free-to-air broadcasters and FOXTEL are set out in articles by Paul Mallam and Christina Palms (for the free-to-air broadcasters) and Ian McGill (for FOXTEL) in the *Communications Law Bulletin*, Volumes 15(1)(1996) and 15(2)(1996) respectively.

28 The policy intention was set out in *Better Broadcasting*, the Coalition's National and Community Broadcasting Policy, January 1996.

29 Part VC of the Copyright Act as amended by the Digital Copyright Act. Section 199(4) has been repealed.

3030 A *re-transmitter* is defined under section 135ZZI as a *person who makes a re-transmission of a free-to-air broadcast* and it is unclear whether this would extend the statutory licence to non-primary broadcast material.

31 Section 73 of the *Copyright, Designs and Patents Act 1988*.

32 Section 135ZZJA of the Copyright Act as amended by the Digital Copyright Act..

33 Section 212(2) of the BSA.

34 These amendments to the BSA were made by the *Broadcasting Services Amendment Act (No 1) 1999*, which creates a new section 212(2A).

35 See Explanatory Memorandum to the *Broadcasting Services Amendment Act (No 1) 1999*.

36 Division 2A of the Copyright Act as amended by the Digital Copyright Act.

37 Section 10(1) of the Copyright Act as amended by the Digital Copyright Act.

38 Division 2A of the Copyright Act as amended by the Digital Copyright Act.

39 Section 10(1) of the Copyright Act as amended by the Digital Copyright Act.

40 Division 2 of the Copyright Act as amended by the Digital Copyright Act.

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