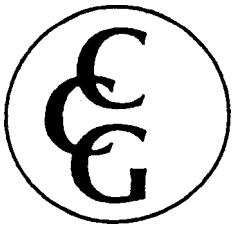

HIGHWAYS TO CHANGE

Copyright in the New Communications Environment

Report of the

Copyright Convergence Group

August 1994

Contents

Introduction

In recent years, the dramatic changes in [he communications sector have generated growing concerns about the capacity of existing copyright legislation to cope with the new technological realities.

By the end of 1993 it was clear to all concerned that the need for urgent amendment to the *Copyright Act,* enacted in 1968 in a communications environment now totally altered, had become pressing.

The arrival of satellite. MDS and cable subscription television is imminent. Australia faces it plethora of other new information and entertainment services and the prospect of broadband digital delivery systems. New services under the *Broadcasting Services* Act *1992* are now commencing. These developments have resulted in it considerable level of consternation on the part of copyright owners and users.

in the newly digitised communications environment, traditional modes of exploitation of copyright material are universally acknowledged as becoming marginalised, or in some cases, irrelevant. Similarly, traditional concepts of categories of copyright protection and appropriate accompanying rights are being challenged by an environment where previous distinctions are becoming increasingly blurred. The comfort of the relative certainty of the era since the inception of the Beme Convention has, in the face of new technological challenges, substantially disappeared, and it is apparent to all that the *Copyright Act 1968* its it stands is no longer adequate to deal with the new communications environment we are now entering.

In recognition of this situation, on 28 October 1993, at the 6th Copyright Law and Practice Symposium, the Minister for Justice, the Hon. Duncan Kerr MP. announced that he would establish the Copyright Convergence Group to report to him with proposals for legislative change to address the need for urgent and considered amendment to the *Copyright Act* and to make it consistent with the *Broadcasting Services Act.*

As it was recognised that many of the Terms of Reference of the Copyright Convergence Group would have a significant impact on the arts and communications, Minister Kerr indicated that the Group should work closely with the Department of Communications and the Arts and the expert groups which will be reporting to the Hon. Michael Lee M. P., Federal Minister for Communications and the Arts.

The Minister for Justice announced the membership of the CCG on 7 January, 1994. The Members of the Group areas follows:

Victoria Rubensohn (Chair)	Chair, National Film itnd Sound Archive Chair, Telephone Industry Services Standards Council Communications Consultant
Mark Armstrong	Director, Centre for Media and Telecommunications Law and Policy (Melbourne University) Chair, Australian Broadcasting Corporation
Peter Banki	Partner, Phillips Fox Chair, Australian Copyright Council
Malcolm Colless	General Manager, Corporate Development, News Limited.

The Group had the invaluable assistance of Bridget Godwin, CCG Co-ordinator and Marea Allen, Executive Assistant.

Terms of Reference

The CCG'S Terms of Reference were announced by the Minister for Justice in February 1994. They are:

> "The Copyright Convergence Group is asked to consider, having regard to the fundamental changes which are occurring in the manner in which copyright materials are being used and the need to facilitate such uses while providing appropriate protection for copyright owners and creating a positive environment for the development of industry, and having regitrd to Australia's current international obligations and ongoing consideration in relevant international fora, the adequacy and appropriateness of protection under the *Copyright Act* 1968

(the Act) for broadcasts and other electronic transmissions rind the underlying copyright materials used in those transmissions, in particular:

(i) the scope of the diffusion right grunted to authors of original works (s.31), the makers of cinematograph films (s.86) and the operation ofs. 26 of the Act (references 10 subscribers to a diffusion service) and to what extent (if any) the rights of authors and makers of cinematography films to control the electronic transmission of their works should-be. varied or extended; .

(ii)' whether the owners of copyright in sound recordings, and television and sound broadcasts should have the same exclusive right with respect to cable and other electronic transmissions its are currently afforded to authors of works and makers of cinematograph films and to what extent (if any) the rights of the owners of copyright in sound recordings and television and sound broadcasts to control the electronic transmission of those recordings and broadcasts should be varied or extended;

(iii) whether copyright' should subsist in electronic transmissions which are currently not the subject of protection under the Act and if so. the nature of any such copyright;

(iv) the operation of section 199 of the Act (reception of broadcasts):

(v) the need for regulation of the unauthorised use of secured or encoded transmissions,

(vi) amendments which mity be consequential on any of the above."

Convergence

The term convergence is one which is used with increasing frequency, but a comprehensive definition of the term remains elusive.

In 1992, the OECD released a report entitled *Telecommunications and Broadcasting: Convergence or Collision* ? The report identifies convergence as a phenomenon occurring at three levels: networks, services and corporate organisations.

is mode available to the public, a system of law conceptually linked to the medium, such as copyright, must inevitably undergo some dramatic rethinking.

Such a fundamental rethinking is beyond the scope of the CCG's terms of reference. The Group's aim has been to propose changes to the *Copyright Act* which bring it into line with today's communications environment and the immediately foreseeable future. There is no doubt that some of the changes proposed by the CCG will in time require re-exitmination along with the rest of [he ACL However, 'in the interim, it is essential for both commerce and creative development that our copyright law can cope with the changes in the ways of utilising copyright material which we already confront. The urgent need to provide a copyright framework to support investment in new Australian audiovisual enterprises requires immediate and specific legislative change.

The Government has made a strong commitment to technology neutrality in the field of communications legislation in its *Telecommunications, Radiocommunications and Broadcasting Services Acts*. All were enactedin the last three years. It is essential that our copyright law is able to facilitate the government's aim in this area and to provide consistency in the regimes affecting the communications environment. For example, in the case of the transmission of copyright materials in intangible form, our *Copyright Act* currently grants rights to copyright owners based on the means of delivery employed by the person making the transmission. This technology specific approach has led to a number of anomalies in the Act which will have inequitable results for copyright owners and the industries based around exploitation of copyright material. The CCG believes that to accommodate the reality of the new communications environment as far as is practicable and *to* facilitate government policy, the *Copyright Act* should be technology neutral.

There itre it number of areas in which the CCG has not made recommendations. In the opinion of the CCG, these issues require further detailed consideration, and it would not be appropriate to attempt to deal with them in the short time frame allotted to the CCG for its work. The need for further consideration in some cases should not delay urgent reform in 1994. In many instances, the environment is not yet certain enough to make firm recommendations. In others, the specific effects of any proposed changes require extensive. focussed discussion before a decision can be made as to the best possible way to proceed. in some of these cases, the CCG has expressed a view as to the manner in which it feels the longer term issues might be resolved.

The information platform capacity created by the new technological developments, especially digital/broadband delivery systems will facilitate rapid and economic access to a vast range of entertainment and information services.

These ncw information networks and associated industries will have the capacity to enhance all levels of national social and economic endeavour. They will link Australia more firmly into the global economy. But the promise of these information structures can ontybc fully realised if the product they exist to transmit - the-content - is effectively protected. The challenge for copyright law in this new environment is to demonstrate that it can continue to effectively provide a just and acceptable balance between the valid interests of intellectual property rights owners and the public interest in fair and reasonable access to a wide range of information.

In its recommendations. the CCG has kept as the foundation of its analysis the requirement in its Terms of Reference that it must have regard to the manner in which copyright materials are being used and the need to facilitate such uses while providing appropriate protection for copyright owners and at the same time creating is positive environment for the development of industry.

Executive Summary

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*. (Paragraph 1.3)

The new transmission right should:

- cover the transmission of copyright material in intangible form to the public by wry 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 *Copyright Act 1968* its "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* and should be it 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 *Copyright Act 1968* 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 [o subscribers to a diffusion service should be deleted from the *Copyright Act* 1968. In particular, section 26 should be repealed. (Paragraph1.3.4)

Recommendation 5: Subsistence of Copyright in Broadcasts and Other Transmissions

(i) Reference to specific broadcasters and legislation in section 9 I should be removed from the *Copyright Act 1968.* The section should be itmended to provide that copyright subsists in all broadcasts which irre lawfully mirde from it place in Australia, and which are capable of being lawfully received by members of the public. (Paragraph 2.3)

(ii) Section 99 of the *Copyright Act* should be amended to remove the reference to specific broadcasters and statutes itnd 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 irmended 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 itre intended for reception in Australia, should be the subject of copyright prelection 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 Copyright *Act 1968* specifies who is the maker of it broadcast. The section should be amended as set out in Recommendations 5(ii) above, and reference to the maker of it 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)

Recommendation 9: Transmissions Originating from a Satellite

A new section should be inserted in the *Copyright Act 1968* 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)

Recommendation 10: Retransmission of Broadcasts

Section 199(4) of the *Copyright Act 1968* 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 itny 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 itmendments will be required to section i 99(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).

Recommendation 11: Rebroadcast of Broadcasts (Section 25(3))

Retransmissions of broadcasts should be dealt with in a technology neutral manner. Ail retritnsmissions should be dealt with in it single section as set out in Recommendation 10 and section 25(3) of the *Copyright Act 1968* should be repealed.

Recommendation 12: Unauthorised Reception of Transmissions

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 *Copyright Act 1968* (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 new 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 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 iie against copyright infringers. (Paragraph 5.2)

Recommendation 13: incidental Cable Services Where Persons Reside or Sleep

Section 26(3) of the *Copyright Act 1968,* 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)

Recommendation 14: Ephemeral Copying

The ephemeral copying provisions in the *Copyright Act 1968* should operate for the benefit of all broadcasters, but at present, and pending further review, should not be extended to all manumissions to the public.

Recommendation 15: Statutory Licence for the Use of Sound Recordings in Broadcasts

(i) The scope of the statutory licence for the use of sound recordings by broadcasters in section 109 of the *Copyright Act 1968* should apply only 10 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 hits been proposed by the Minister for Justice.

Recommendation 16: Section 212 of the *Broadcasting Services Act 1992*

The operation of section 212 of the *Broadcasting Services Act* should be narrowed to make it consistent with the circumstances in which retransmission is permitted set out in Recommendation 10. Section 212 should be amended to make it subject to the provisions of the *Copyright Act 1968*. Retransmission outside [he licence area of the primary broadcast should not be permitted without the permission of the copyright owner.

PART 1

1. Broad Based Transmission Right

In its Terms of Reference, the Copyright Convergence Group was asked to consider the rights currently granted to authors of works and owners of cinematograph films m control the electronic transmission of their' works and whether" these rights ought to be extended. The Group was also asked to consider whether owners of copyright in sound recordings and broadcasts should have the right [o control *the* electronic transmission of their copyright material.

1.1 Current Rights Granted Under the *Copyright Act 7968*

Rights currently granted to owners of copyright under the Act are summarised in Table 1.

JTERARY, DRAMATIC AND MUSICAL	ARTISTIC	:OUND :ECORDINGS	CINEMATOGRAF II FILMS	IROADCASTS	PUBLISHED EDITIONS
o reproduce the work n , material form	to reproduce the work in * material form	o make a copy of the ound recordings	to make a copy of the film	n the case of a levision broadcast in o far as it consists of sual images - to ake a cinematograph ilm of the broadcast, r a copy of such a ilm. n the case of a sound roadcast, or of a levision broadcast in o far as it consists of ounds - to make a ound recording of the roadcast, or a copy f such a sound :ording	to make, by a means that includes a photographic process, a reproduction of the edition
o publish the work	to publish the work				
operform the work . public		ncause the recording to beheardin public	to cause the film, in s far as o consistsof visualimages,to be seen in public		
o broadcast the work	to include the work in a television broadcast	to broadcast the recording	to broadcast the film	n the case of a levision broadcastor f a sound broadcast - a re-broadcast	
n cause the work to e transmitted to ubscribers to a iffusion service	to cause a television programme that includes the work to be transmitted to subscribers to a diffusion service		to cause the film to b transmitted to subscribers to a diffusion service		
o makean adapt- tion of the work					
o do, in relation to a ork that is an daptation of the first entioned work, o any f the acts specified have					

1.1.1 The right to broadcast

With the exception of owners of copyright in published editions, owners of copyright in all categories of copyright material have the right to authorise the broadcasting of their copyright material. Two issues arise when the scope of the right to broadcast is considered in the contemporary context:

(a) technology limitations

Section 10 of the *Copyright Act* defines "broadcast" as to "transmit by wireless telegraphy to the public'*. This excludes transmissions over wires or other material paths. This approach is in accordance with the provisions of the international copyright conventions to which Australia is party, and in particular the Berne Convention. These conventions distinguish between wired and wireless transmissions and only recognise wireless transmissions its broadcasts. However, the CCG considers that the separation of what may be [he same activities by a service provider into two separate categories of protection based on the means of delivery of the service is no longer equitable in today's communications environment, isnd that this anomalous distinction should be removed from the Act.

The Act also distinguishes between sound and television broadcasts for certain purposes. Although the distinction does not seem to give rise to any immediate difficulties for copyright owners, its relevance and utility is no longer apparent, and the CCG is of the view that it should be removed.

(b) "the public"

in order to be a broadcast, a transmission must be "to the public". There is no definition in the *Copyright Act* of "the public". The CCG received a number of submissions which called for the public to be defined. Concern was expressed that the concept of the public may exclude a number of new services, in particular point-to-point services.

The scope of "the public" hits been considered by the Courts in is number of cases, most of which have dealt with the right to authorise a work to be performed in public.

In cases dealing with performance "in public'", the courts have made usc of a number of concepts in defining the scope of the phrase. A number of cases have made references [o the notion of the copyright owner's public (eg. *Rank Film Production Ltd v Colin Dodds* (1983) NSWLR 553. *APRA v Canterbury Bankstown League Club Ltd (1964)* S FLR 415. *Jennings v Stephens* (1936) Ch 469.)

Another concept considered in relation to "the public" was the distinction between "public" and "domestic'" or "private" (see *Rank Film v Dodds*. *APRA v Commonwealth Bank of Australia 25* IPR 157. *APRA v Telstra Corporation)*. Courts have also emphasised that it is the nature of the audience which is important. in *APRA v Commonwealth Bank*, Gummow J stated that if a performance occurs as an adjunct to a commercial activity. the performance is likely to be regarded as public.

The requirement that a broadcast be "to the public" was most recently considered by the Federal Court in *APRA v Telstra Corporation Ltd* 27 IPR357. The decision in that case has been appealed to the Full Federal Court. Whatever the outcome of *the* appeal, it is doubtful that it will remedy the concerns raised with the CCG that new uses of copyright material may not be controllable by copyright owners in this context. In part, these difficulties are the result of the scope of the diffusion right. This is " discussed further at I. I.2 below. However, the Court's view of the operation of the concept of "the public" in the broadcasting context has generated some discussion.

The *APRA v Telstra case* concerned the delivery of music-on-hold over telephone wires. APRA contended that this service was either a transmission to subscribers to a diffusion service, or in the case of mobile phones, a broadcast. The Court considered that a distinction could be drawn between the expression "in public"' for the purpose of performance in public, and "to the public" for the purposes of broadcasting. Gummow J considered that "to the public" was more restrictive than "in public" and would normally involve some form of general distribution. If the more restrictive view of "public'* for the purposes of broadcasting is accepted, doubts arise as to whether certain services, for example narrowcasts, would fall outside the scope of the broadcast right. Were [his to be the case, copyright owners would be unable to claim remuneration for the use of

their works as part of such services. and this is clearly an undesirable outcome.

However, the Court also went on to say that it was the essential nature of the manumission which was relevant, not just the number of recipients. While the CCG is of the opinion that wireless narrowcast and subscription services would be considered to be "to the public" for the purpose of [he broadcast right, the fact that certain other services provided on a point-to-point basis may not be licensable by copyright owners is of concern.

New services which will be available in the near future, such as "on-demand" services, will mean that the distinction between the concepts of "public" on one haad and "domestic" or "private" on the other will become blurred. There is no meaningful distinction from the point of view of the copyright owner between it service delivering copyright material to a number of people simultaneously or a service delivering the same material to the same number of people one at a time. .

Two of the fundamental considerations relevant to this issue which have arisen in case law are:

(i) who is the copyright owner's public for [he purposes of exercising the statutory monopoly conferred on the copyright owner to authorise certain uses of his or her materials; and/or

(ii) is the delivery of the material to the end user an adjunct to a commercial activity or for a commercial purpose?

Despite some of the uncertainties associated with the use of the term "the public", its removal does not seem practical at this stage. The term is used in international conventions, and there are obvious advantages in maintaining an approach consistent with international treaty obligations and the laws of other countries. A comprehensive definition of the public remains elusive.

One consideration in this context is whether the notion of the public is appropriate for on-demand and other point-to-point transmissions which are not receivable by a section of the public but will become a growing sector of the new communications. environment. A definition of the public which

attempted to achieve this result would be even further removed from the commonly understood meaning of the word.

During the course of the CCG's seminar on 23 June. it was suggested by the Australian Copyright Council that a useful approach to this difficulty could be to retain the use of the concept of "the public'". but introduce an additional circumstance in which a transmission would infringe copyright if , made without authorisation-. This additional circumstance would be where the transmission is made for a commercial purpose. The CCG is of the view that this approach would ensure that copyright owners would be entitled to remuneration in all appropriate circumstances where their works are made available to the copyright owner's public, and would obviate the need for it definition of the public.

1.1.2 Transmission to subscribers to a diffusion service

The *Copyright Act* currently gives authors of literary, dramatic and musical works and the owners of copyright in cinematograph films the right to cause the work or film to be transmitted to subscribers to a diffusion service.

Section 26 of the Act defines what is meant by the expression "transmission to subscribers to it diffusion service". This expression and the scope of section 26, were [hc subject of judicial interpretation in *APRA v Telstra Corporation*. As noted above, the decision in that case has been appealed.

The provisions of section 26 are highly technical and their interpretation has tested the best judicial minds. Regardless of the detailed construction of the section, it is clear that the right to transmit to subscribers to a diffusion service is inadequate and confusing and, therefore, undesirable.

irrespective of the outcome of the APRA appeal, the CCG is concerned that the right as it currently stands is inappropriate in the emerging communications environment. If the decision at first instance is affirmed, serious consequences result for copyright owners. Whatever the legal position, the CCG is of the view that as a matter of policy, the use of music in services such as music-on-hold is clearly a commercial use of copyright material and should therefore require the permission of the copyright owner. It also appears to be. the. kind of use of

copyright material contemplated by Articles 11(1)(ii) or 11 bis(1)(i) of the Berne Convention.

On the other hand, if the decision at first instance is overturned. it is possible that Telstra, in its capacity as a common carrier, could be responsible for the content of the services provided by means of its infrastructure. This too is an undesirable outcome.

Another aspect of the diffusion right is that the service must be provided to "subscribers" rather than to the public. This restricts the class of people to whom copyright owners may authorise distribution of their work. In the opinion of the CCG, there is no justification for narrowing the ability of copyright owners to authorise commercial use of their material on the basis that the use is made by means of wired rather than wireless technology.

in addition, in the case of authors of dramatic, dramatico-musical and musical works, the current diffusion right may not comply with Australia's obligations under the Berne Convention to provide them with the right to authorise the communication to the public of the performance of their works. The CCG also takes the view that it would be inconsistent and inequitable to extend the diffusion right for certain categories of works and not for others, particularly given the fact that no distinction is currently made between authors of literary, dramatic and musical works and makers of cinematograph films.

In view of the deficiencies highlighted above, the CCG believes that the diffusion right currently contained in the Act is in urgent need of amendment to make it both fair and easily understood. The CCG's recommendation in this respect is to abolish references to transmissions to subscribers to a diffusion service and replace the existing diffusion right with it broad transmission right. This recommendation is further discussed at 1.3 below.

1.1.3 Artistic works

While other categories of works are accorded the right to cause their work.. to be transmitted to subscribers to a diffusion service, authors of artistic works are granted the right to "cause *a television program* that includes their work to be transmitted to subscribers to a diffusion service" (section 31).

The narrow expression of the "cable right" given to authors of artistic works confines them to authorizing "television programs" containing their works being sent by cable. This would exclude the author from being able to authorise transmission of an artistic work as part of any other type of service. such as transmissions of artworks from an image brink. The result is that authors of artistic works have lesser rights than those accorded to authors of other categories of works.

While acknowledging that under the terms of the Beme Convention (article 11bis I (ii)), Australia is only required to accord authors of artistic works with the right to authorise the communication to the public by wire or [he rebroadcasting of a wireless broadcast of their work. the CCG is of the view that current levels of protection accorded to authors of artistic works are insufficient in the new communications environment. New technologies provide opportunities for artists to take advantage of the commercial potential of their work, and for service providers to exploit that potential. The CCG can see no reason why visual artists should be denied the same right to exploit their creations as is afforded to other copyright owners.

1.2 Lack of a Cable Right for Some Categories of Copyright Material

While some works and films have the narrow "diffusion"' right discussed above, some copyright owners have no control over the transmission of their property over cable, regardless of the type of service or the audience reached. Each of these categories is discussed below.

1.2.1 Sound recordings

Owners of copyright in sound recordings currently have the exclusive right to make copies of the recording, to cause the recording to be heard in public, and to broadcast the recording. They do not have the right to authorise the "cable distribution" of the recording (section 85).

The "cable right" is something which is presently accorded to owners of copyright in cinematograph films, itnd to authors of works. The CCG believes

there is no logical reason why the owners of copyright in sound recordings should not also have this right.

International copyright conventions have traditionally distinguished between wireless and wired transmissions. However, in the modern context, the desirability of this distinction is now questionable. The rights of the owner of a sound recording are defined by reference to delivery technology. Owners of sound recordings **may authorise the broadcast of "their recordings by wireless telegraphy but if an identical service is provided bycable the permission of the owner of sound recordings** used as part of that service is not necessary, itnd no payment is due to that owner.

The problem is of course not confined to broadcast uses. There are a number of planned new services such its subscription audio or music-on-demand, many of which will be delivered by cable. These would also be unlicensable by owners of copyright in sound recordings if delivered by cable.

1.2.2 Broadcasts

Like the owners of copyright in sound recordings, owners of copyright in broadcasts do not have the right to prevent cable service operators from retransmitting their broadcasts. Under existing copyright legislation, new cable services may be enhanced by "bundling*' them with existing free-to-air broadcasts, enabling the cable service provider to offer an enhanced package of services.

Alternatively, a cable service operator may choose to "cherry-pick'" parts of a broadcast and combine them with other material. Because they lack it "cable right", no permission would be required from the broadcaster for this activity. As far as underlying rights in broadcasts itre concerned, see the discussion of retransmission provisions in the Act at 4 below.

The Act provides broadcasters with the exclusive right to authorise the re-broadcast of their broadcasts (section 87). Because of the existing definition of broadcast in the Act, the right is limited 10 rebroadcasts by means of wireless telegraphy. The CCG is of the view that it is inappropriate to confine the right of broadcasters to control-the use which is made of their broadcasts to rebroadcasts

by wireless telegraphy. Cable originated services are commencing and being negotiated now. Continuation of the existing limitation on wireless broadcasters to control the commercial exploitation of their services will place them in an increasingly inequitable position *vis a vis* cable service operators.

There may be instances where the retransmission of broadcasts without the authorisation of the broadcaster (or the owners of underlying works) is justified on public policy grounds. The issue of retransmission of broadcasts is further discussed at 4 below.

1.2.3 Published editions

The owners of copyright in published editions currently only have the right to make a reproduction of the edition. Published edition copyright was introduced to protect the labour and investment of publishers in the typeset of their publications from photographic techniques of copying. However, as we enter the erit of digital transmission of information, the traditional role of the publisher. and the nature of copyright in published editions becomes less clear.

The Copyright Law Review Committee hits considered the question of digital reproduction of the published edition. In its Draft Report on Computer Software projection (1993), the CLRC recommended that the infringement of published edition copyright ought not be confined to reproductions made using it photographic process, and that editions in a computer or machine readable format should be the subject of copyright protection. The Committee formed the view that the storage of it published work by scanning and reformatting did not constitute it reproduction of the published edition and, if the digital form of the work was reproduced whilst stored, again, no reproduction of the published edition took place.

The CCG is mindful of the CLRC's consideration of the scope of the published edition copyright. "However, it is possible for published editions to bc electronically transmitted for the purpose of being received in the same typeset and layout as the original. Newspapers, for example, place great value in layout. The "look" of a paper is often the main reason for purchase, and it seems likely that this will continue to be the case in theera of electronic delivery.

Bearing in mind the deliberations of the CLRC on this issue, the CCG recommends that owners of copyright in published editions should have the right to authorise the transmission of their edition, but that this right should be confined to circumstances in which the transmission of the published edition results in the reproduction of the edition.

1.3 CCG Recommendations

in the CCG's view, it is clear from the areas of concern and inconsistencies outlined above that urgent amendment to the *Copyright Act 1968* is required. in the new communications environment, it is no longer possible to adequately protect copyright owners or to facilitate the development of industries based around the exploitation of copyright material under the existing Act.

The current legislation gives copyright owners the right to authorise wireless transmissions of their works, but they are unable to extract remuneration for some other transmissions to the public of their works by different means of technology. Copyright owners face the imminent prospect of commercial exploitation of their works taking place without their permission.

One approach to these difficulties would be to adopt the model in the *UK Copyright Designs and Patents Act 1988*. This Acl defines broadcasts as transmissions by wireless telegraphy. Transmissions by wire are licensable itnd protected its cable programme services. A similar result could be achieved in the Australian *Copyright Act* by retaining the existing wireless broadcast provisions and extending the existing diffusion right.

The Australian Government has signalled a firm commitment to technology neutrality in its broadcasting, telecommunications and radiocommunications legislation, and its communications policy as a whole. 1 t has indicated that it wishes to adopt a consistent approach in its copyright laws.

There are a number of provisions in the Act which accord broadcasters special rights or which allow special uses to be made of broadcasts. It appears to the CCG that it is inconsistent to confine the operation of these provisions to some services licensed under the Broadcasting Services *Act* 1992 and not others. Conversely, in many instances it would not be appropriate. to extend the operation. of-these sections to non-

broadcast services. Therefore, what is required is some technology neutral characteristic which distinguishes between some services and others. The CCG is of the view that as far as possible, legislation regulating the carriage and provision of services and legislation which affects the manner in which copyright material may be used in those services should be consistent. Maintaining the distinction between wired transmissions and wireless broadcasts in the *Copyright Act* would not achieve this result.

In light 'of these considerations, the CCG is strongly of the view that the most appropriate solution to the deficiencies which have been identified in the Act is to introduce a broad-based right of transmission to the public. This is a similar concept to the right of "communication to the public" which has *been* discussed in international fora such as WIPO. The ncw right would encompass the existing rights to broadcast and to transmit to subscribers to a diffusion service. The CCG believes that the new transmission right should be given to all copyright owners, including owners of copyright in sound recordings itnd broadcasts, although a slightly more limited transmission right is proposer-l for published editions at 1.2.3 above.

1.3.1 Scope of the new right

The CCG is of the view that the proposed new transmission right should have the following characteristics:

- The right should be technology neutral, encompassing both wired and wireless transmissions. The CCG suggests that the expression "to transmit" should remain undefined and carry its ordinary dictionary meaning. This is the general approach followed in telecommunications, broadcasting and radiocommunications legislation.

  The right should encompass the ability to transmit visual images, sounds or other information in intangible form by any means or any combination of means whatsoever. This would exclude the distribution of copyright material in material form such as books, records etc, and would also avoid specifying any particular technology for delivery of signals.

- The right should be clearly separate from the existing right to perform a work in public. The CCG believes that there is value in retaining the public

performance right as a separate right from the transmission right, particularly in view of current licensing practices. While the CCG can see merit in merging broadcast and diffusion rights into a single right because they both involve the transmission of material by electronic or similar means to the public in a manner which is only perceivable with the assistance of a device, this does not apply to performance in public, and the two rights should not be amalgamated without considerable further investigation into any such proposal. The CCG considers that this objective could be achieved by defining a transmission to the public as one which is capable of being received by a reception device, itnd that reception device would be appropriately defined to mean apparatus which made that which was not directly perceivable or useable by human beings able to be perceived or used. Apparatus such its recording-only devices would therefore be excluded. Public performances, which are directly perceivable without assistance, would therefore not be encompassed by the right. The CCC notes the provisions of section 27(I) of the Act which allow for the presentation of public performances by means of wireless telegraphy apparatus. Clearly [he operation of such apparatus in relation to public performance would need 10 be distinguished frum the operation of reception devices for the purpose of the transmission right.

- It is essential that the right to transmit to the public exclude certain transmissions from its scope, such as certain interactive and other communications of an essentially private kind, for example, ordinary telephone conversations, telebanking or videoconferencing services. The requirement that transmissions be "to the public" would exclude such services. This element of the right is further considered at 1.3.4 below. However, in the interests of clarity and certainty, the CCG considers that it would be desirable to specify that certain non-commercial, private *or* domestic communications are excluded from the scope of the transmission right. These exclusions are further discussed at 1.3.5 below.

The CCG does not consider that it is necessity to specify who is the maker of a transmission to the public in the Act. This would be determined on a case by case basis, as is currently the position with other infringing activities, In this context the notion of authorisation contained in section 101 of the Act is also relevant. An illustration of this principle is found in the case of *University of NSW v Moorhouse* (1974-75) 133 CLR 1.

Concern has been expressed to the CCG that common carriers should not be liable for transmissions made by service providers using the carriers' infrastructure. but for whose content the carrier is not responsible in any way. a principle with which the CCG agrees.

The CCG is of the view that the case law *on* authorisation would exempt common carriers from copyright liability for services provided using their facilities, and that 'this" should continue to be the case. However, the government may wish to examine the desirability of amending the Act to clarify the position of common carriers.

1.3.2 The broadcast right

The Act contains a number of provisions which refer specifically to broadcasting which are intended to allow for the use of material in broadcasts and the uses of broadcasts by third parties. These provisions recognise a difference between broadcasting and other copyright industries. In addition, broadcasting as a distinct activity is often the subject of commercial arrangements itnd licences. For these reasons, the CCG is of the view that the right to broadcast, as distinct from the broad right of transmission to the public, should continue to be recognised as a separate activity for the purposes of the Act but one which is a sub-se! of the broader activity of transmitting to the public, and which is incorporated by reference into the new transmission right.

However, the current right of broadcasting contained in the Act is confined to transmissions made by wireless telegraphy. The CCG does not consider this limitation to be a meaningful or equitable one in the current broadcasting and communications environment, and in the context of the. government's commitment to technology neutrality discussed earlier in this Report.

Having removed the technological distinction between broadcasts and other types of transmission, it becomes necessary to consider what does distinguish the activity of broadcasting from other services transmitting copyright material. In the view of the CCG, the defining characteristic of broadcasting is the fact that it takes place pursuant to a licensing scheme imposed by legislation. The CCG therefore recommends that the current definition of broadcast be extended to incorporate any transmission which is made pursuant to a licence under. the

Broadcasting Services Act, or as pan of a national broadcasting service rts defined in that Act.

Taking a similar approach to that of the *Broadcasting Services Act*, a broadcast could be defined as the transmission of television or radio programmes by irny means or combination of means whatsoever to persons having the equipment appropriate for receiving such transmissions. A transmission shall not be a broadcast if it is part of a service' which provides no more than data or text, makes copyright material available on demand on a point-to-point basis, including a dial-up service, or has otherwise been ruled not to be a broadcasting service for the purposes of the *Broadcasting Services Act*.

The definition would therefore exclude services such as on-demand services (regardless of the means of transmission) and computer networking of material. These would be included in the wider right of transmission to the public, and therefore would be licensable by copyright owners.

1.3.3 The diffusion right

The CCG recommends that the right to transmit to subscribers to ii diffusion service should be removed from the Act, and that this right should be encompassed within the brooder right of transmission 10 the public. Where appropriate, some activities which may formerly have qualified as transmissions to subscribers to a diffusion service may qualify its broadcasts under the CCG's proposed extended definition of broadcasts, its well as being covered by the general transmission right.

In light of this recommendation, there would be no need to retain the provisions of section 26 of the Act, which provide it guide to the interpretrrtion of the existing diffusion right, and the CCG recommends that this section should be repealed.

1.3.4 The public

The utility of introducing a definition of the public was widely discussed at the CCG's seminar. Australia is required by tlie Berne Convention to provide-that

certain transmissions to the public infringe copyright, irrespective of the commercial relationship between the person transmitting and the person receiving. The notion of the public as it is currently understood covers provision of radio and television programs where the transmission is funded by advertising. grant or donations.

Having given the matter careful consideration. the CCG is of the view that a definition of the public should not be introduced. However, new communications technologies enable direct connection of an author or service provider with it user. The public sphere is eliminated in these cases. There is a need to ensure that certain uses of copyright material which irre provided on it point-to-point basis and which may therefore not be "to the public'", such its on-demand services. are nevertheless licensable by copyright owners. Rather than attempting to artificially extend the concept of the public by means of a definition, the CCG considers that unauthorised transmissions made for a commercial purpose should also infringe a copyright owner's rights. It therefore recommends that it provision be inserted into the Act which deems transmissions of copyright material which are made for a commercial purpose to be transmissions to the public.

1.3.5 Exclusions from the general transmission right

As discussed above, the CCG is of the view that it may be helpful to specify those services which are excluded from the general transmission right. The CCG considers that the exclusions to the definition of a cable programme service listed in section 7(2) of the *UK Copyright Designs and Patents Act* 1988 provide useful guidance on this issue. Put broadly, the services excepted from the definition are:

- interactive services,
- services run for the purpose of a business, or by an individual for domestic purposes, and which are entirely within the control of such business or individual and are not connected to any other telecommunications system;
- a service operating in or connecting premises in single occupation (except where the services form part of the amenities provided for residents or inmates of premises run as a business) and not connected to itny other telecommunications system:

- services run for persons providing broadcasting services or programmes for such services.

The interactive services exclusion ensures that what are generally regarded as private telecommunications are not transmissions to the public. Examples of other types of services which would be exchtded would be home shopping, or remote medical diagnosis services. It is possible that a service may consist of interactive and non-interactive elements. Some information 'may be transmitted for reception by the general public. These would be non-interactive and therefore would be transmissions to the public. There may also be genuinely interactive elements which would not be transmissions to the public. To take the example of home shopping, initial transmissions of advertising material to subscribers would be it transmission to the public, but the purchaser's order in response to the advertising material and the confirmation of that order by the service provider would not be.

As far as internal business networks are concerned, although internal electronic circulation of documents is of concern to copyright owners its being analogous to mass photocopying of material, the CCG is of the view that such activities are more properly dealt with by means of an adequate construction of the reproduction right and appropriate licensing arrangements, rather than as a form of transmission to the public.

The UK Act also makes provision for the Secretary of State to add or remove exceptions by order, and the CCG believes that it similar provision should be adopted in Australia, by way of the making of regulations or of ministerial directions.

1.3.6 Considerations of national treatment

The CCG is mindful that the recommendations outlined in this chapter are in excess of Australia's international obligations under the copyright conventions to which it is a signatory. Where it is possible to do so under these conventions, the CCG recommends that the new right be enacted on a reciprocal basis. In the case of works covered by the Beme Convention, this will of course not be possible and the extended rights recommended will need to be implemented on the basis of national treatment. In view of this obligation, the CCG recommends that the

effect of the implementation of the transmission right should be monitored where national treatment is granted.

The introduction of the new transmission right places Australia at the forefront of international copyright law reform. However. the principle that the combination nf ncw technologies and old laws are likely to result in inequities for copyright owners and that this should be remedied. has been widely discussed at the international -level. Differences of-opinion -do. exist over the best manner of implementing new rights for copyright owners, and in particular whether the distinction between wired and wireless transmissions should bc maintained. However, there is general acceptance at the international level that broader rights are needed to adequately protect copyright owners and encourage copyright based industries.

The CCG recommends that the government should actively pursue opportunities to discuss with its major trading partners the urgent need for movement in the field of copyright law in the manner recommended by the CCG. In the coming years, information-based industries will become increasingly vital to the Australian and the global economy. It is essential that creators and industries arc provided with the most positive environment to encourage the development of creative product and its exploitation.

In making its recommendation that it transmission right be introduced, the CCG regards as noteworthy developments in this area in the case of two major trading partners.

The United States has recently released a Green Paper on Intellectual Property and the National Information Infrastructure, which recommends amendments to the copyright laws in that country to accommodate the new world of digital, electronic transmission; in particular, to take into account the fact that copies of works can be distributed to the public by transmission, and to introduce a right of digital transmission for the owners of sound recordings.

In the UK, the effect of the broadcast and cable programme service rights is not significantly broader than the new transmission right proposed in this Report. The rights cover both general entertainment services as well as on-demand services, and databases whose materiel is available to the general public. On a regional level, New Zealand has also recently released a bill for new copyright legislation which broadly. adopts the UK approach.

Therefore, despite the fact that in some circumstances the new transmission right may result in Australia according a higher level of copyright protection to copyright owners than some of its trading partners, the CCG is firmly of the view **that it is both equitable and timely that [he new right should be introduced. Australian investment in new audiovisual developments must be supported by providing an adequate copyright framework.**

2. Subsistence of Copyright in Broadcasts and Other Transmissions

In its Terms of Reference, the Copyright Convergence Group was asked to consider the adequacy of copyright provisions currently applicable to television and sound broadcasts and whether copyright protection ought to be extended to other electronic transmissions which are not currently the subject of copyright protection.

2.1 Current Subsistence and Ownership Provisions Under the Act

2.1.1 Section 91

Section 87 of the *Copyright Act* 1968 specifies the nature of copyright in television and sound broadcasts. Section 91 of the Act limits subsistence of copyright to certain broadcasts. A broadcast will be protected if it is made from a place in Australia by:

- the ABC;
- the SBS;
- a prescribed person who is the holder of it licence or permit under the *Radiocommunications Act 1983;* or
- a person who is the holder of a licence granted under the *Broadcasting Act 1942.*

References to the *Radiocommunications Act 1983* have been changed to the *Radiocommunications Act 1992 by* provisions in the *Broadcasting Services (Transnational Provisions and Consequential Amendments) Act 1992.*

References to broadcasting legislation still require updating to reflect the enactment of the *Broadcasting Services Act 1992.*

The CCG notes that there are a number of other provisions in the Ac[which also refer to the *Broadcasting Act 1942.* These are sections 199, 184, 152 and 47A and the CCG recommends that references to the *Broadcasting Act 1942* in those sections be changed to the *Broadcasting Services Act 1992.*

A further consideration is that the *Broadcasting Services Act 1992* makes provision for certain services to be operated pursuant to class licences, for example, open or subscription narrowcasting services and subscription radio broadcasting services. A class licensee is able to operate its service within certain generally applicable licence conditions without a process of licence grant. The wording of section 9 I requires the licence to be "granted", which would result in difficulties for such, licensees.

The subsistence and ownership of copyright in broadcasts originating from it place outside Australia has been the subject of some debate and was raised in a number of submissions to the CCG. The *Copyright (International Protection) Regulations* were amended in January 1992 to deem authorised broadcasts from Rome Convention countries to be made from a place in Australia. Some commentators have suggested that Regulation 4(6) may not affect the additional requirement which remains in section 91 that in order for copyright to subsist in it broadcast the maker of the broadcast must have been granted a licence under the *Broadcasting Act 1942,* or be a prescribed person.

The matter is a technical one, and [he CCG is of the opinion that the effect of the subsistence and ownership provisions should be clear on the face of the Act itnd its Regulations. The CCG's suggested amendments to sections 91 and 99 in 2.3 below should clarify this point by removing references to specific statutes and particular licensees. No amendment to the Regulations would be required. Transnational transmissions itre further discussed at 3 below.

2.1.2 Section 99

Section 99 of the Act deals with the ownership of copyright in broadcasts. In order to own copyright in a broadcast, the maker of the broadcast must be one of the persons specified in section 99. The categories in section 99 are similar to those in section 91 and similar issues arise in the operation of section 99 as outlined in 2.1.1 above in relation [o section 91.

Consistency between broadcasting and copyright legislation is necessary in this context. A broadcaster operating within the relevant licensing regime should not be required to undertake further investigation to determine subsistence and ownership of copyright in its broadcasts.

2.2 Transmissions in Which Copyright Does Not Subsist

Broadcasts made by wireless telegraphy itre the subject of copyright protection pursuant to sections 87 and 1 0 of the Act. Where a service provider delivers its signal over wires the same transmission does not attract copyright protection. Although this state of affairs reflects the traditional differentiation between wired and wireless transmissions contained in international instruments and there is currently no obligation to grant operators of cable services copyright-protection. the basis of the distinction in the treatment of wireless broadcasters and cablecasters is no longer justifiable.

Copyright which currently subsists in wireless broadcasts under the Act reflects the investment in copyright works and, it is argued by some, a creative endeavour on the part of the broadcaster. It also enables a broadcaster to control the unauthorised use of its service.

The reality, recognised by the *Broadcast ing Service.r Act, is* that broadcast services may be provided by a number of technological means. Limiting the copyright protection afforded to service providers according to the means by which they make their transmissions is inconsistent and inequitable, and in the opinion of the CCG should be remedied.

The use of cable technology will not be confined to delivery of traditional broadcast applications. In coming years, we will see the development of new types of entertainment and information services, delivered to the home in the same manner as broadcasts. These services will include dial-up *'on-demand" services for film and music, and information networks for the delivery of data, text. audio-visual and audio material. Under its Terms of Reference, the CCG is required to consider whether it is necessary or appropriate to extend copyright protection to these services.

The CCG received a number of submissions which suggested that cable broadcasters ought to enjoy the same level of protection as that extended to wireless broadcasters, However, the need for such protection for non-broadcast transmissions of copyright material is not clear.

In the light of this, and the CCG's recommendations concerning the unauthorised reception of signals at 5 below, the CCG is of the view that copyright protection should not be extended to transmissions other than broadcasts, in the extended sense

discussed at 2.1 above. The Government mity wish [o refer this issue for further consideration in a future review of the Act.

2.3 CCG Recommendations

The CCG is strongly of the view that the distinction between wired and wireless transmissions for the purposes of copyright protection of broadcasts should not be maintained. Copyright should subsist in all transmissions made by licensees under [he *Broadcasting Services Act* 1992. The wording of sections 91 itnd 99 should be amended so that it is not necessary for there to be it process of licence grant in order for copyright to subsist in a broadcast made pursuant to a licence under the *Broadcasting Services Act*. This would ensure that class licensees were placed in a sirnihtrposition to other broadcast licensees. References to the *Broadcasting Act* /942 should be updated.

2.3.1 Section 91

In the CCC's opinion, there are two relevant factors in determining whether copyright should subsist in a broadcast. Firstly, the service should be operated pursuant to the relevant broadcast licensing scheme. Secondly, if it transmission is lawfully receivable in Australia, copyright owners ought to be able to control whether their material is included in the transmission, and the person responsible for the transmission ought to have the right to control its exploitation by others. These principles are also relevant to transnational transmissions, which are further discussed at 3 below.

The CCC is of the view that section 91 should be amended to provide that copyright subsists in all broadcasts (in the extended sense recommended in *2.1* above) which are lawfully made from it place in Australia, and which are capable of being lawfully received by members of the public. This would have the effect that in order for copyright to subsist in it broadcast, the transmission must be made in accordance with the relevant regulatory scheme, and would eliminate reference to specific statutes or particular broadcasters.

Copyright legislation in the UK has a specific provision for encrypted transmissions, which clarifies that such services itre lawfully received and

therefore are protected as broadcasts provided that the decoding equipment is generally available to the public. The CCG recommends the adoption of a similar provision to complement the amended section91.

2.3.2 Section 99

The CCG is of the view that the owner of copyright in a broadcast should be the maker of the broadcast. Section 99 should be amended accordingly.

Section 22(5) currently specifies who is the maker of a broadcast. The CCC recommends that this section should be amended in a similar manner to section 6(3) of the UK Act, which specifies that the maker of a broadcast must be the person responsible to some extent for the content of the broadcast. In the opinion of the CCC, the maker of a broadcast, and therefore, the owner of copyright in it, should be the person who is responsible for the content of the transmission, and who makes the arrangements necessary for its transmission. This would also ensure that common carriers would not be the owner or maker of a broadcast for the purposes of the Act, as they would not be responsible for the content of the transmission.

2.3.3 Transmissions which are not broadcasts

The CCG considers that it is not necessary at this stage to extend copyright protection to transmissions other than broadcasts. Underlying works contained in such transmissions would of course have the benefit of copyright protection applicable to them. This issue may require further consideration as the new communications environment evolves.

Clearly, there are significant international legal and trade implications in implementing legislation which purports to operate outside Australia, or to affect activities which may take place outside Australia. and these should be given serious consideration. The dilemma posed by this situation is not simply a question of the adequacy of the laws in other countries, but also the difficulties of giving our laws extra-territorial effect.

3.3 CCG Recommendations

The issues surrounding international transmission of copyright material in our region are enormously complex, given the disparity of intellectual property regimes which exist. The CCG is of the view that the following approaches to transnational transmissions should be adopted:

(i) Where a transmission originates from Australia and may lawfully be received directly by the public in the intended country of reception, the maker of the transmission should be required to obtain the licence of the copyright owner to do so as would be the case if the transmission were receivable in Australia. That is, all transmissions made in Australia which are to the public should be control lable by the Australian copyright owner, whether the public is the Australian public or not. This recommendation is in no way intended to limit the legitimate activities of transmitters from Australia in sending copyright product overseas.

(ii) Transmissions which are intended for reception by the public outside Australia, but which originate in Australia and which, had they been receivable by the public in Australia, would constitute a service which would be licensable under the provisions of the *Broadcasting Service.r Act, 1992* should be protected its broadcasts in Australia.

(iii) Where a transmission originates outside Australia but is intended for reception in Australia, the CCG supports the proposition that the maker of such a transmission should be required to obtain the licence of the owner of copyright in Australia. However, the enactment and operation of any such provision raises extremely complex considerations of private international law. In addition, such a right would only have practical significance where the maker of [he transmission had some. nexus with Australia. The CCG therefore.rnakes no firm . .

recommendation on this point, except to suggest [hat the matter should be given urgent and careful consideration in the wider review of the Act which has been proposed by the Minister for Justice. The objective should be to implement some form of protection for copyright owners in respect of transmissions which originate outside Australia.

(iv) Transmissions originating from countries outside Australia and intended for reception in Australia should be [he subject of copyright protection in Australia. in those instances where, hrrd the transmission originated in Australia, it would have been governed by the licensing provisions of the *Broadcasting Services Act*.

The CCC notes that by virtue of the notification deposited under Article 6(2) of the Rome Convention, this projection extends only to broadcasts which itre made from a country which is a party to the Rome Convention and by a broadcaster which is headquartered in such a country. The CCG's suggested amended section 91 discussed in 2.3.1 above would retain this state of affairs, as in order for copyright to subsist in it, it transmission must be from a place in Australia (as that term is modified by the *Copyright (International Protection) Regulations*).

3.4 Section 22(6)

A number of commentators have pointed out the technical difficulties in the interpretation of section 22(6) of the *Copyright Act 1968*. The section concerns satellite broadcasting itnd is intended to clarify who is the maker of the satellite broadcast and when it is made. The section deems a broadcast by satellite to be made at the time when, and from the place from which, the material is transmitted from earth.

There are a number of problems with section 22(6). The person who makes the broadcast is the person who makes the broadcast from the satellite. This section does not make clear that it is the person who is responsible for the compilation of the signal, rather than the facilities operator or the transponder lessee or the satellite operator, who is the maker of the satellite broadcast. Thus, in actions for copyright infringement by means of satellite broadcast, it is difficult to identify who should be sued, or in whom copyright in the broadcast should vest.

International opinion is in favour of treating the separate stages of a satellite transmission (uplink, intra-satellite link and downlink) as forming one transmission. This is not the effect of section 22(6). The wording of the section appears to mean that a broadcast originating from it satellite is deemed to be made from earth, rather than deemed to be part of the transmission originated from earth.

3.5 CCG Recommendation

The CCG recommends that section 22(6) should be amended. The maker of a satellite broadcast and therefore the owner of any copyright in the broadcast should be the person responsible for the content or compilation of the signal its is the case for other broadcasts. If the amendment to section 22(5) suggested in 2.3 above is adopted there would be no need to specify the maker of the broadcast in section 22(6). The maker of a satellite broadcast would be the same as the maker of any other broadcast, and would come within the scope of the CCG's amended section 22(5). The CCG can see no reason to differentiate between satellite and other broadcasts in this regard.

The stages of the satellite transmission should be deemed [o be a single act of broadcasting, made from the place where the signal is uplinked. The CCG suggests rewording section 22(6) along the lines of section 6(4) of the UK ACL The section would therefore read:

> "'in the case of satellite broadcasts, the place from which the broadcast is made is the place from which the signals carrying the broadcast are transmitted to the satellite."

3.6 Transmissions Originating From a Satellite

It is possible for pictures and data to be created on a satellite and beamed back to earth, for example weather information. No information is uplinked from the earth for transmission back to the earth. The question of computer-generated works and their authorship is currently under consideration by the CLRC as part of its Computer Software reference, and the CCG does not intend to comment on the issue of ownership of copyright in such works.

Leaving aside the question of authorship, a further question arises as to whether such transmissions should be broadcasts in which copyright subsists. Currently, these transmissions would not be protected as broadcasts because they do not fall within any of the categories listed in section 91 of the Act, nor are they from a place in Australia. However, such transmissions could form part of a broadcast service.

Transmissions originating from a satellite, where they are lawfully and directly receivable by" the public, are analogous to live sporting broadcasts, except for the fact that they do not originate on earth. No previously existing work is transmitted to the public, but the sender of the transmission may wish to protect it as a subject of copyright.

3.7 CCG Recommendation

The CCG is of the view that transmissions originating from a satellite, as opposed to transmissions sent from earth via a satellite, should be the subject of copyright protection as broadcasts in the following circumstances:

- where the transmission is directly and lawfully receivable by the public in Australia; itnd
- where [he transmission, had it been made from Australia, would have been licensable under the *Broadcasting Services Act. 1992.*

For the purposes of the ***Copyright Act,*** such transmissions should be deemed to be made from Australia. As with other broadcasts, the maker of the broadcast would be the person responsible for the content of the broadcast and who makes the arrangements necessary for its transmission.

4. Retransmission of Broadcasts

The CCG was asked in its Terms of Reference to consider the operation of section 199 of the *Copyright Act* 1968, and also whether itny changes were needed to the existing rights of broadcasters to control the electronic transmission of their broadcasts. in addition to the need to provide broadcasters with the right to authorise cable transmission of their broadcasts discussed above, it is necessary to consider the operation of existing provisions in the *Copyright Act which* allow for the retransmission of broadcasts and the underlying works contained in those broadcasts.

4.1 Section 199(4)

Section 199(4) of [he *Copyright Act* provides that a person who retransmits an authorised broadcast to cable subscribers shall be deemed to have the licence of the copyright owners of the works or films included in the broadcast to do so.

This exemption was included in the Act at a time when the use of cable technology to originate services was not contemplated. The provision was intended to augment reception in areas where signal quality was inadequate. The only use contemplated for cable systems was to simultaneously retransmit radiated broadcasts in such areas.

The appropriateness of this provision is now questionable. The availability of optic fibre, compression techniques and the development of cable originated services, alter the environment for copyright owners and users, and necessitate a re-examination of the justification for the section. The effect of section 199(4) is that copyright owners have no choice as to whether to allow cable service operators to use their material in a commercial manner. Furthermore, there is no obligation to pay either broadcasters or other copyright owners in respect of such use.

Section 199(5) provides immunity from prosecution for cable service operators who retransmit an unauthorised broadcast. However, the cable service operator's retransmission of the works or films contained in a broadcast may be taken into account in assessing damages in any proceedings brought against the infringing broadcaster.

The CCG acknowledges that there may be situations where an exemption to allow for simultaneous retransmissions of broadcasts. would. be.in the.. public. interest,.such.as in

those areas where reception is poor. Government policy is to allow retransmission in such circumstances, and retransmission by so-called "self help" broadcasters is provided for in section 212 of the *Broadcasting Services Act 1992*.

Section 212 provides that the licensing framework established by the *Broadcasting Services Act* does not apply to services which do no more than retransmit national, community and/or commercial free-to-air services. It provides immunity from any action, suit or proceedings against a person in respect of such retransmission. This would include protection from actions for defamation, contempt itnd copyright,

The purposes of the *Broadcasting Services Act is* to establish it regulatory environment and a licensing scheme for the operation of broadcasting services. In the case of the retransmission of services which are licensed under the *Broadcasting Services Act,* the primary broadcast is already subject to the licensing conditions of that Act. and there would seem to be no necessity to impose additional licensing requirements on services which do no more than retransmit such broadcasts. The objects of the *Broadcasting Services Act are* satisfied by applying the regulatory framework to the initial service.

However, the CCG is of the view that considerations other than the applicability of the licensing provisions of the *Broadcasting Services Act* apply in the case of retransmissions of broadcasts. Retransmission provides a significant opportunity for the commercial exploitation of broadcasts itnd the material contained in them. The licensing provisions of the *Broadcasting Services Act* are not concerned with whether a commercial use is being made of copyright material.

The CCG believes that while it may be appropriate for such activities to remain outside the scope of the licensing framework of the *Broadcasting Services Act*, it should not be possible to make commercial use of copyright material without the permission of the copyright owner. Except in cases of genuine difficulty in receiving a freely available signal, the ability to retransmit a broadcast should be subject to the ordinary principles of copyright, and require the permission of the relevant copyright owners.

4.2 Section 25(2)

Section 25(2) defines what is meant by the phrase 'to do an act by the reception of a broadcast", which is the language used in section 199. The operation of section 25(2)

is unclear because of the complex manner in which it is drafted. For example. it is not entirely clear whether the act must be simultaneous with the original broadcast. If the expression "to do an act by the reception of a broadcast" is to be retained in the *Copyright Act*, the drafting of section 25(2) should be closely examined and amended to enable it to be more easily interpreted. **The CCG believes that in the interests of clarity, it** would be preferable to remove the expression from section 199 altogether, and refer to the specific act of retransmission of a broadcast by any means, which would remove the need for section 25(2).

4.3 CCG Recommendation

The CCG is of the view that section 199(4) of the *Copyright Act* should be amended, and consequent changes made to section 199(5). (6) and (7). The section should be replaced with it provision which allows for retransmission by genuine self-help broadcasters only.

The CCG recommends that section 199(4) should provide for retransmission without the consent of the copyright owner in the following circumstances:

- the retransmission takes place within the intended reception area of the primary broadcast; and
- the retransmission is simultaneous with the primary broadcast; and
- the content of the primary broadcast is not altered in ttny way in the retransmission: and
- the retransmission is for the purpose of enabling reception of the primary broadcast where the signal quality of that broadcast available to [he public is inadequate.

Certain amendments may benecessisrytosection212 of the *Broadcasting Services Act* to ensure that the two statutes operate in a complementary manner.

The Group is aware that the section 199 exemption may have a significant ractical effect in the case of transmission of subscription television by cable (as opposed to MDS or satellite). At the present time, cable subscription services are planning to

utilise a set top unit which in the absence of the section 199 exemption could require manual switching between free-to-air and pay services by the subscriber.

The existing section 199 exemption would allow a cable broadcaster to retransmit free-to-air broadcasts, thus avoiding manual switching. However, in this context, it is important to note the implications of retaining section 199 if a wider definition of broadcasting is adopted in the Act. This switching problem does not arise in MDS and direct satellite transmissions: **The practical effect of retaining s.199(4) would be to allow cable pay services to retransmit free-to-air signals,** while satellite and MDS services were precluded from doing so.

The Group has also been advised that it would be possible to resolve the manual switching problem in a technical manner, by designing a switch which could be operated by a remote control (as is apparently the case in the US).

The CCC is firmly of the view that a technical solution to this problem is preferable to enshrining a provision in the *Copyright Act* to remedy it technical difficulty.

4.4 Section 25(3)

Section 25(3) provides for the simultaneous rebroadcast of broadcasts. **Where this** occurs, records of sound recordings and copies of cinematography films itre deemed not to have been used by the secondary broadcaster. The use of the sound recordings and films themselves are not the subject of the provision. In addition, the section does not purport to deal with the use of underlying works or the broadcast itself. The section also operates regardless of whether the retransmission is outside the original area of transmission, or whether the broadcast has been altered or combined with other services.

The section was intended to enable the use of repeater stations for signal boosting and networking. One possible approach to this issue is to make the scope of the section clear. Alternatively, perhaps such arrangements are more appropriately dealt with by contract. In any case, the distinction between simultaneous retransmissions according to whether they are made by wireless or cable is no longer desirable.

If there are public policy grounds for permitting retransmission of broadcasts, it would be preferable to deal with these in a single section, along the lines suggested in 4.3 above, and to make no distinction as to the means of retransmission. Signal

amplification and enhancement and networking of broadcasts outside of these public policy areas should be a matter for broadcasters to arrange on a contractual basis.

5. Unauthorised Reception of Transmissions

The Copyright Convergence Group was required by its Terms of Reference to consider the need for regulation of the unauthorised use of secured or encoded transmissions. In the converging world, the ability of copyright owners to take action against those persons who facilitate unauthorised reception of restricted access electronic transmissions will become an increasingly important adjunct to primary copyright rights.

5.1 Existing Legislation

Australia does not have general legislation which concerns the unauthorised use or reception of encrypted signals, There are a number of statutory provisions which prohibit various acts in relation [o telecommunications or radiocommunications. These create criminal offences, rtnd not privately enforceable rights.

in 1989, offences relating to the unlawful use, manufacture and sale of telecommunications equipment were removed from the telecommunications legislation itnd inserted into a new Part VIIB of the *(Cth) Crimes Act 1914*, dealing w .th Offences Relating to Telecommunications Services. The Part contains a range of offences concerned with use of equipment for unlawful purposes and activities such as manufacture, advertisement, display or side of unauthorised call switching devices and prohibited interception devices.

The Radiocommunications Act 1992 aiso contains a regime of standards and technical regulation for equipment which uses the radio-frequency spectrum. A number of offences are created relating to radio emission.

The *Telecommunications .Interception Act 1979* prohibits the interception of a communication passing over a telecommunications system without the knowledge of the person mirking the communication. A communication includes music, data, text and visual images as well as speech. However, systems for carrying communications solely by means of radiocommunication are not covered by these provisions.

Copyright law does not enable a copyright owner to control the reception of transmissions. However, the unauthorised reception of encrypted services, without retransmission is like] y to becomes significant cause for concer[n] in coming years.

5.2 CCG Recommendation

Many potential operators of encrypted services and copyright owners consider that the current state of the law is inadequate to deal with signal theft. The CCG is of the view that the *UK Copyright Designs and Patents Act 1988* provides a helpful model to deal with this issue. Sections 297 to 299 of the UK Act create criminal sanctions and civil remedies in cases of unauthorised reception of broadcasts. The approach in the UK Act is as follows:

- it is an offence to dishonestly receive a programme included in a broadcast or cable service with intent to avoid payment of the applicable subscription;
- it is an offence to knowingly make, import, sell or let for hire any unauthorised decoder;
- a person who makes charges for the reception of programmed included in it broadcast or cable service is entitled to the same remedies its it copyright owner has in respect of an infringement of copyright. These rights are infringed by the manufacture, importation, sale or letting for hire of any apparatus or device which is designed or calculated, or the publication of any information which is calculated, to enable or assist persons to receive the programmes without payment.
- it is possible to extend the effect of these provisions to services which originate outside the United Kingdom.

The CCG recommends that similar legislation should be enacted in Australia. Criminal sanctions may be more appropriately included in Commonwealth Crimes legislation than the *Copyright Act 1968.*

6. Other Issues

6.1 Incidental Cable Services Where Persons Reside or Sleep

Section 26(3) of the *Copyright Act 1968* provides that a cable service of distributing broadcast or other matter should be disregarded where the service is only incidental to it business of keeping or letting premises at which persons reside or sleep.

in introducing its *Copyright Designs and Patents Act 1988,* the UK repealed a provision similar to 26(3), which allowed free and unrestricted distribution of cable programme services as an incidental service in hotels, fiats or other premises where persons reside or sleep. The Whitford Committee in 1977 stated that it could see no justification for the provision, as it authorised the commercial exploitation of works, wi thout equi table remuneration for the owners of those works.

The provision of entertainment services in blocks of apartments, hotels, private hospitals and holiday resorts (other than the retransmitting of certain broadcasts in limited circumstances as discussed in 4 above) is clearly a use of copyright material from which the provider of the service may derive commercial benefit. It would seem inequitable to grant this commercial benefit at the expense of the copyright owner. However. it is also worth noting that in any case the effect of section 26(3) is somewhat curtailed by the public performance right (see *Rank v Dodds (1983)* NSWLR 553).

The CCG has recommended in 1.3.3 above that section 26 should be repealed from the Act. The CCG's intention is to specifically include section 26(3) in making this recommendation.

6.2 Ephemeral Copying

Section 47 of the *Copyright Act 1968* enables broadcasters to copy literary, dramatic and musical works for the purpose of broadcast where permission to broadcast the work has been granted or is not required. These copies must be destroyed within 12 months or delivered to the Australian Archives and may not be used for other purposes or provided to third parties without appropriate permission and pityment.

Similar provisions apply to sound recordings in section 107 of the Act and to films of artistic works in section 70. These provisions only apply where the broadcast of the material would not constitute an infringement of copyright.

The ephemeral copying provisions enable broadcasting organisations to make recordings of programs for the purpose of making repeat broadcasts or compiling a program for broadcast at a later time.

The issue to be addressed is whether these provisions ought to extend to broadcasters other than wireless broadcasters and to other non-broadcast service providers. The CCG's recommendations on the extended definition of broadcasting would extend the scope of the ephemeral copying provisions to all broadcasts by whatever means. The CCG considers that this is an appropriate modification to the scope of the ephemeral copying provisions. The effect of the provisions are of little effect provided the copy is only used for the purpose originally agreed, and the CCG is of the view that it would be unfair for the provisions to operate in favour of some broadcasters and not others. As far as the interests of copyright owners are concerned, the exception is still very narrow, and in the majority of instances contractual arrangements would avoid reliance upon it.

As far as other transmissions to the public are concerned, the CCG is not convinced that it is necessary to extend the ephemeral copying provisions to cover these services at this stage. The CCG suggests that the necessity for any such extension of the ephemeral copying provisions should be given further consideration in the wider review of the Act, proposed by the Minister for Justice.

6.3 Statutory Licence for the Use of Sound Recordings in Broadcasts

Section 109 provides that it is not an infringement of the broadcast right in a published sound recording for a person to broadcast the recording if it licence fee is paid or agreed to be paid. If the parties are unable to agree, the Copyright Tribunal may determine the fee. Section 109 was enacted to balance the interests of broadcasters, the public and owners of sound recordings. It was intended to prevent record companies from refusing to licence broadcasters.

The CCG believes that the continued justification for this licence requires further detailed examination. It hits been suggested by WIPO that similar compulsory licences

for the broadcasting of works should be phased out. and the issue has also been raised in discussions concerning the possible new instrument for performers and phonogram producers.

Until such further review of the need for the licence is undertaken, the CCG is of the view that the scope of the statutory licence for the use of sound recordings by broadcasters in section 109 of the Act should apply only to those broadcasts (as the CCG has recommended that the term should be extended) which are not offered in return for valuable consideration. In effect, this will freeze the effect of the licence to its current field of operation (although any "free-to air" cable services would also be included), pending more detailed consideration of the relevant issues as part of the government's proposed wide ranging review of the Act.

6.4 Section 212 of the *Broadcasting Services Act 1992*

Section 212 of the *Broadcasting Services Act* provides immunity from prosecution where a person dots no more than retransmit programs transmitted by a national broadcasting service, a *commercial* broadcasting licensee or a community broadcasting licensee. However, the section does not confine itself to actions under the *Broadcasting Services Act*, and could conceivably provide immunity from actions under the *Copyright Act 1968*. The CCG is of the view that the operation of this section should not extend to immunity from actions for copyright infringement, and that the copyright principles relevant to retransmission discussed in 4.1 above should apply to all retransmissions. The CCG believes that circumstances in which a retransmission does not infringe copyright, as opposed to breaching broadcasting licensing requirements, are more appropriately set out in the *Copyright Act*.

The CCG is mindful of Government policy to allow genuine self-help broadcasters to make free use of certain broadcast.., and hits taken this policy into account in its recommendations in 4.2 above. It therefore recommends that section 212 of the *Broadcasting Services Act* should be amended to provide that the immunity from action, suit, or proceeding contained in section 212(2) is subject to the provisions of the *Copyright Act*.

In the opinion of the CCG, it is inequitable to allow the commercial exploitation of copyright material without the permission of the copyright owner. Without amendment, this is the effect of section 212 of the *Broadcasting Services Act*. In

addition, the section denies free-to-air broadcasters the opportunity afforded to their subscription counter-parts to commercially exploit the value of their service.

Section 212(1)(b)(ii) permits retransmission outside the licence area of the primary broadcaster with the permission of the Australian Broadcasting Authority. The CCG is of the view that the permission of the primary broadcaster should be required in such circumstances as discussed in 4.1 and 4.2 above, and that this sub-section should be repealed.

The CCG is aware that there are some self-help broadcasters who already operate outside the licence area of the services they are retransmitting with the permission of the Australian Broadcasting Authority, and with the co-operation of the broadcasters whose services are affected. In order not *to* adversely affect these established services, transitional provisions may be required to enable their continued operation. However, the CCG is firmly of the view that in all other cases, permission of the primary broadcaster [o retransmit outside the licence area should be required.

PART 2

7. Agenda for Further Review

In addition to the recommendations for immediate legislative amendment contained in Part 1 of this Report, a number of other areas of concern in the *Copyright Act 1968* have been drawn to the attention of the CCG during the course of its inquiry. Although these issues are affected by technological convergence and fall within the Terms of Reference of the CCG, the Group is of the view that they raise matters requiring further concerted study and that they should therefore form the basis of an agenda for further investigation, possibly as part of the wide ranging review of the *Copyright Act*. which has been foreshadowed by the Minister for Justice. The CCG has expressed views on some of these issues, but believes they require closer consideration than the Group wits able to allow given the time constraints of its inquiry.

There were a number of issues which were raised in the CCG's Issues Paper which the Group has not commented *on* in this Report. These are moral rights, rental rights and distribution rights. In the case of the first two of these, the CCG understands that the Government is moving to implement legislation in these areas. The CCG considers the question of distribution rights to be outside the scope of this review although recognizing that the matter is one which is worthy of further consideration.

7.1 The Expanding Role of Libraries

The CCG received six submissions from libraries. There is a considerable level of concern from copyright owners and libraries at the effect of convergence on the role of libraries and the adequacy of library-specific provisions in the *Copyright Act* in the electronic age. In view of this level of concern and the range of issues involved, the CCG believes that it would be of great benefit to copyright owners, libraries, community resource centres and the general public for the Government as soon as is practicable to initiate a conference to bring together copyright owner and user interests to discuss the issues relevant [o libraries, ssnd develop guidelines in the new environment for, fair uses of copyright materials by libraries and those who use them,

Digital delivery of information raises a number of important issues relating to public libraries. Information available to and provided by libraries will substantially increase. That information will be accessed not by removing books from shelves, but by viewing the screens of computer terminals. The traditional role of libraries and their activities will also evolve and expand. Indeed this is already taking place. In their efforts to supplement shrinking funding for libraries while continuing to provide public access to information, libraries have understandably had to investigate ways of maximising financial retur" from the provision of information. The effect of these developments is that the balance between the public policy of free access to information in libraries itnd the right of copyright owners to receive equitable remuneration for their works will increasingly be tested as some libraries add commercial information provision to their traditional role as physical repositories of information for the public benefit.

Part 111 Division 5 of the Act exempts various instances of library copying from copyright infringement, including copies provided to individuals for research and study purposes, inter-library loans and preservation purposes. The scope of these provisions is further considered at 7.3 below.

A number of the provisions relevant to copying done by libraries contain technology specific requirements which may not be appropriate in the electronic age, such as the requirement for written requests and signed declarations in section 49 and provisions which deal with the making of copies. These provisions do not allow for electronic transmission of requests for material, nor do they adequately encompass current, let alone future, preservation techniques. An important question is whether such provisions should be extended to electronically delivered information, and extended or clarified to facilitate new forms of storage of such information.

In coming years, libraries will increasingly be able to provide access to copyright materials electronically. They will no longer be limited in [heir role" its information providers by what physical objects are on the shel f. At issue is whether such access, with or without the making of permanent copies, should be viewed in the same manner as traditional library lending access activities. It is relevant to note in this context the CLRC's deliberations on the question Of copyright in screen displays isnd other copyright issues relevant to libraries in its Draft Repot-t on Computer Software.

The CCC is of the view that the issues arising from the changing role of libraries have not yet been sufficiently defined. The CCG recommends that these questions should be considered in more detail in the conference which the-group has recommended and

in the proposed review of the Act. In particular. the following matters should be addressed:

- copying of subject matter other than works by libraries for the purposes of preservation;
- electronic transmission of requests for materials for interlibrary loan:
- viewing/copying of electronically transmitted material 'held" by 'libraries;
- application of legal deposit provisions in section 201 to cover electronically networked information:
- the conditions applying to the copying of works for preservation and other purposes in section 51A in relation to the reformatting of electronic information, as well as standard current preservation techniques.

7.2 Educational Copying of Broadcasts

The *Copyright Act* contains a scheme in Part VA which is intended to provide educational institutions with access to television and radio programs in return for the payment of equitable remuneration to relevant copyright owners. The scheme is currently limited to services delivered by wireless telegraphy. The CCG's proposed widening of the definition of broadcast would extend the scope of the scheme to all broadcasts, including narrowcasts and pay television services.

No strong views were expressed which opposed such an extension of the educational copying of broadcasts scheme. However, given [he fact that new broadcasting and narrowcasting services are only now commencing, the CCG suggests that the views of such service providers as they arise should be monitored. The CCG is of the view that the scheme should not be extended to subscription broadcast and subscription narrowcast services until the effect of such a scheme on them can be more accurately ascertained. In the meantime, the existing statutory licensing scheme for the copying of broadcasts by educational and other institutions should operate in respect of all broadcasts made by whatever means, which are not offered in" return for valuable consideration.

7.3 Electronic Transmission and Existing Licensing Schemes

The *Copyright Act* contains a number of statutory licences which permit the copying of works. The most relevant of these are the provisions which permit copying by educational institutions in Parr VB of the Act. This licence provides for remuneration to be paid to copyright owners, and the relevant collecting society for the copying of literary works is the Copyright Agency Limited. in its Draft Report on Computer Software, the CLRC expressed the view that it was doubtful that the licence extended to scanning a work onto a database but that in the Committee's view the licence should apply to this activity.

The Act also allows libraries to copy some works free of charge. At present the provisions of Division 5, Part 111 of the Act allow copying of articles and other material in periodicals, unpublished works, and other works for preservation purposes. Some copying by libraries of films and sound recordings is permitted pursuant to sections 11 OA and 110B. Parliamentary libraries may make copies of various materials pursuant to section 104A. There are also schemes permitting the copying of works by institutions assisting handicapped readers and the intellectually handicapped.

Electronic delivery and copying of materials is becoming increasingly common. In light of this development the CCG believes that a re-examination of the scope of these statutory licence schemes may be appropriate. Non-remunerable licence schemes may raise special issues related to their purpose and scope in [his context. In particular, careful consideration should be given to the question of whether these schemes would be inequitable to the copyright owner if they included the electronic transmission and copying of works.

The CCG suggests that the government should give detailed consideration to whether existing statutory licence schemes allowing the copying of works should be extended to cover electronic copying and downloading.

7.4 Definition of Cinematography Film

The CCG received a number of submissions which suggested that the definition of "cinematograph film" should be replaced by a new category of "audio-visual work". There were a number of reasons for the suggestion. The term "cinematograph film is dated and refers to a particular form of film-making technology. In addition, certain

other sort.. of works which bear resemblance to films, such as multimedia works, may not presently be the subject of copyright protection. Suggestions have been made that such works may be protected as literary works or cinematography films, but this is by no means certain. If copyright protection is lacking for such works. this is clearly a deficiency in the Act which should be remedied. The CCG believes that further consideration needs to be given to the continuing adequacy and appropriateness of maintaining "cinematography film" as a category of copyright protection. The Group favours the introduction of a new broad category of "audio-visual work'" to replace "cinematography film". and recommends that this issue be included as part of a future broad review of the *Copyright Act*.

7.5 Definition of Record and Film

International conventions require an element of fixation as part of the definition of sound recordings and films. The suitability of this requirement has been questioned by a number of bodies, including WIPO, given that records and films produced by digital technology are not necessarily fixations of sounds or images. This uncertainty also exists in the *Copyright Act*. It is not clear whether the Act (in particular section 24) requires that sounds or visual images must exist prior to the treatment of any article or thing. Sounds or visual images may be created by means of writing a code and being emitted as the result of their embodiment in the article or thing, rather than being created and then recorded. The CCG is of the view that the Act should be clarified to ensure that such creations constitute sound recordings or films, and that this issue should be addressed in a further review of the Act.

7.6 Definition of Copy and Reproduction

The *Copyright Act 1968* gives the owners of copyright in works and published editions the right to authorise the reproduction of their properry. There is no definition of reproduction in the Act. The term hits been the subject of judicial interpretation in a number of cases. The result of these cases is that in order for a reproduction to have taken place, the infringing work must sufficiently resemble the copyright work, and must have been produced by the use of the copyright work. There has been much debate over the requirement that there be some objective similarity between the original work and the reproduction. This requirement was most recently considered by

the High Court in *Autodesk Inc. v Dyason 1992* 173 CLR 330. While the Court did not abandon the requirement of objective similarity, the decision in *Autodesk* has been interpreted by a number of commentators to mean that reproduction is not limited to duplication of a work in the same material form,

Some concern wits expressed to the CCC that a definition of reproduction wits needed in the Act to ensure that new uses of copyright materials would be controllable by copyright owners. The CCG notes that the CLRC has given this matter length y and detailed consideration in its Draft Report on Computer Software. The Committee's view was that no definition of reproduction is required. However, the CCG suggests that it may be appropriate to further consider this issue in a wider context than computer programs in a future review of the Act, although the Group expresses no view its to whether such a definition is required.

Owners of sound recordings, cinematograph films and broadcasts are given the right to authorise the rooking of copies of their copyright material. Again, the CCG received some comments that the definition of "'copy" was inadequate in the new communications environment. Concern wits expressed that material stored in a non-permanent medium such as electronic memory may not constitute a copy. While noting that the definition of copy in section 10 of the Act extends only to cinematograph films, the CCG suggests that this issue may be considered along with further consideration of the scope of the right of reproduction to ensure that this is not the case. If this form of copying is not controllable by copyright owners, they may suffer adverse consequences.

7.7 Publication

Concern was expressed to the CCG that the digital transmission of sound recordings may not constitute publication for the purposes of the *Copyright Act*. If this were the case, sound recordings which are electronically delivered direct to the consumers at home, but are not released in a tangible form would not be "published" for the purposes of section 29(i)(c) of the Act and therefore copyright would not subsist in such recordings, (The CCC notes the decision in *Avel Pty Ltd v Multicoin Amusements Pty Ltd* 1 8IPR 443 that section 29(1) of the Act is not relevant in considering whether a work has been published for the purposes of section 3 I (1)).

It is probable that in the nearfuture sound recordings will be made available to the public by digital delivery rather than as hard copies. If section 29(1)(c) is maintained unamended, [his could have serious commercial implications for owners of sound recordings.

Recent WIPO discussions have suggested that the definition of publication should be extended to include making material available to the public by electronic means. This would entail amendment to section 29 of the Act. The CCG nptes that any such amendment may have consequences in the areas of copying by Ii braries and compulsory licenses for broadcasting and sound recordings. The CCG is of [he view that careful consideration should be given to amending section 29 of the Act to avoid unintended adverse consequences to copyright owners, and that this should take place as part of the Government's review of the Act.

7.8 Multimedia

Concern has been expressed that multimedia works may not be the subject of copyright protection. The CCG notes that some interested parties have suggested that a new category of copyright work, the "multimedia work", should be created to address this situation. At this stage. the CCG is not of the view that this is the itppropriate solution to this problem. It is extremely difficult to define what it multimedia work is. More importantly, it is not immediately apparent why a new category is necessity rather than expanding an existing category to ensure multimedia products are the subject of copyright protection. In this regard the CCG notes the views expressed in 7.4 above concerning the expansion of the category of "cinematograph film" to become "audio-visual *work".* It also notes that while protection of multimedia works themselves may be uncertain, underlying works controlled within multimedia works are of course protected.

It has also been suggested by many multimedia producers that the development of the multimedia industry requires the establishment of new, improved or expanded licensing schemes to ensure that multimedia producers are able to access the necessary copyright works for inclusion in their product. The CCG notes that such *schemes* have not been considered appropriate for other industries such as film, and that international developments are tending away from non-voluntary licensing of copyright works. The government's review of collecting societies is also expected to address this issue. and

in view of this the CCG expresses no view as to the appropriateness or necessity for new licensing schemes.

7.9 Jurisdiction of the Copyright Tribunal

The "Copyright Tribunal currently has jurisdiction in respect of statutory licences itnd voluntary licences dealing with the use of literary, dramatic and musical works and sound recordings in broadcasts and diffusion services, and in relation to public performance of such works.

An issue which hrts been raised with the CCG is the appropriateness of extending the jurisdiction of the Tribunal to all forms of collective licensing, regardless of the nature of copyright material so licensed. In this respect, regard would need to be had to obligations under the Berne Convention which would prohibit any fettering of some exclusive rights. However, it has been suggested that the Tribunal may be able to play a role in relation to anti-competitive conduct in the field of collective licensing of copyright which is consistent with Australia's convention obligations.

This is a complex and controversial issue. The CCG is of the view that the jurisdiction of the Copyright Tribunal should not be extended without there first being a detailed review of its operations.

7.10 Performers' Rights

Performers do not currently have copyright in their performances. They have certain rights to prevent the recording, broadcast or cable transmission of their performances. Once they have consented to the initial recording of a performance, the performer hits no generallegal right to control subsequent uses of that recording irrespective of the purpose for which the recording was made (subject to the provisions of section 248G (2) (c)).

Convergence will mean that performances become an increasingly important underlying work which may be subject to a variety of forms of exploitation. Digital manipulation of performances also raises some important issues related to the ability of performers to control unauthorised digital creations of performances by them.

Some commentators have suggested that Australia is in derogation of its obligations under Article 7 of the Rome Convention. Article 7. 1c(ii) of the Rome Convention requires that performers have the possibility of preventing the reproduction without their consent of a fixation of their performance if the reproduction is made for purposes different from those for which they were originally recorded.

The CLRC has considered this issue and took the view that article 7. 1 c(ii) would be satisfied by a provision which would prevent a performer's performance fixed in a sound 'recording from being used in a film without his or her consent. The CCG considers that the adequacy of such an approach may require further examination in the new communications environment.

Another issue raised with the CCG was Australia's reservation to Article 12 of the Rome Convention which affects performers' rights to equitable remuneration for secondary uses of recordings of their performances. These issues may also fall within the general review of performers' rights being undertaken by the Music industry Advisory Council, and the CCG recommends that they be given urgent attention.

7.11 Public Performance of Broadcasts

Sections 199(I), (2) and (3) of the *Copyright Act 1968* affect the public performance right which subsists in literary and dramatic works, sound recordings and films. Where underlying works and films are broadcast into premises and are performed or exhibited to the public by means of a receiving device, the occupier of the premises would ordinarily be required to obtain a licence for that activity (sections 27(3) and (4), but subject [o sections 26(3) and 46).

The effect of sections 199(1), (2) and (3) is that a licence is not required for the public performance of extracts of literary and dramatic works, or whole sound recordings itnd films. where they are contained in a broadcast.

The relevance of these sections will undoubtedly be tested when it significant or possibly primary means of delivery of these copyright materials may be by electronic transmission. The result could be a significant inroad into the public performance right for these categories of copyright materials, particularly if the scope of the definition of broadcast is widened to include new services.

Similar considerations arise in relation to section 23 of the Act which provides that a sound recording which has been synchronised with it film is deemed not to be it sound recording. Consequently, the public performance or broadcast of the film is not it broadcast or public performance of the sound recording. New means of embodiment of sound recordings, such as CD-ROM may mean that the section significantly affects remuneration for uses of sound recordings.

The CCG believes that due to [he. development of new, services, the operation of section 199(1), (2) and (3) may exceed the scope originally intended. It is of the view that these provisions are not justified where payment is received in respect of the viewing of the broadcast. Further consideration should be given to confining the operation of these sections to their intended purpose. The justification for and effect of section 23 should also be examined.

7.12 Untraceable Owners of Copyright

The *Copyright Act 1968* does not specify any system for the use of copyright materials where the owner of the copyright is unknown or untraceable. A number of parties have expressed the view that this situation creates practical problems, and thin the electronic delivery and creation of copyright material can be expected to exacerbate the situation. It has been suggested that particularly in the new communications environment, it would be appropriate to provide a mechitnism for the use of copyright material where the copyright owner is unknown or cannot be traced. The Canadian *Copyright Act.* for example, provides for the issue of a licence to use it published work for which the owner of copyright cannot be located after reasonable efforts have been made. The CCG acknowledges that such a scheme may have advantages in providing access to copyright material. However, there may also be disadvantages for copyright owners, for example, little known authors. Accordingly the CCG recommends that the matter should be given more detailed consideration.

ANNEXURE 1: Written Submissions Received by the CCG

1. Access Cable Television Limited
2. Asia Pacific Telework Association
3. Audio-visual Copyright Society Limited (AVCS)
4. Australasian Mechanical Copyright Owners Society (AMCOS)
5. Australasian Performing Right Association (APRA)
6. Australian Book Publishing Association (ABPA)
7. Australian Broadcasting Authority
8. Australian Broadcasting Corporation
9. Australian Caption Centre
10. Australian Copyright Council
11. Australian Council of Libraries and Information Services (ACLIS)
12. Australian Film Commission
13. Australian Film Finance Corporation Ltd
14. Australian Manufacturers' Patents, Industrial Designs, Copyright and Trade Mark Association (AMPICTA)
15. Australian Music Managers Forum (AMMF)
16. Australian Record Industry Association (ARIA)
17. Australian Tape Manufacturers' Association Limited (ATMA)
18. Australis Media Limited
19. Communications Institute of New Zealand
20. Copyright Agency Limited
21. Electronic Frontiers Australia
22. Federation of Australian Commercial Television Stations (FACTS)
23. Federation of Australian Radio Broadcasters (FARB)
24. Five Arrows Films Pty Limited
25. Information Policy Board

26. Mallesons Stephen Jaques
27. Media Entertainment and Ans Alliance
28. Motion Picture Distributors Association of Australia
29. National Association for the Visual Arts
30. National Library of Australia
31. Open Access Cable Pty Ltd
32. Pacific Advanced Media Studio
33. Queensland University of Technology
34. Special Broadcasting Services (SBS)
35. State Library of New South Wales
36. State Library of Tasmania
37. Telstra Corporation Limited (Telecom)