Broadcasters and the Copyright Act 1994

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For broadcasters, copyright and the protection of intellectual property are obviously matters of considerable importance. Broadcasters are amongst the largest disseminators of copyright works; they also produce works which are the subject of copyright protection. It is for this reason that broadcasters must be fully awake to the nuances of copyright law and active in the protection of their own copyright works. In 1993 TVNZ successfully brought proceedings against a company which breached its copyright by selling transcripts of its programmes. (*TVNZ Ltd v Newsmonitor Services Ltd.*[1] Although there were commercial implications, it was equally important, as a matter of principle, to be seen to be protecting TVNZ's copyright material.

In this context, the clauses of the Copyright Bill provided concerns and challenges for broadcasters, both as creators and users of copyright material. The Department of Justice and the Ministry of Commerce were galvanized into legislative action by the GATT (Uruguay Round) and particularly the requirement to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights ("the Agreement on TRIPS"). The speed with which the new legislation was introduced was disconcerting, given the complexity of the issues to be considered.

At the time of the draft Bill, TVNZ expressed reservations about the intention to enact legislation by 1st January 1995, particularly in view of the formation of the Copyright Convergence Group in Australia. TVNZ's concern was that there could be a divergence between the copyright laws of the two countries and cited the Intergovernmental Memorandum of Understanding on Business Law Harmonization, which committed both countries to an examination of the scope of the harmonization of business laws and regulatory practices in a number of areas, including copyright law. We are not yet in a position to discover the extent or otherwise of this harmonization. Australia has been left behind in the legislative race and the final shape of its copyright law is still to be determined. However, the decision of the New Zealand legislature—to essentially copy the provisions of the United Kingdom Copyright Designs and Patents Act—was probably the most practical course of action in the circumstances. Of course there are differences in local conditions between New Zealand and the United Kingdom and in some cases this has lead to anomalies.

Cable operators

The areas of copyright most hotly debated by broadcasters recently have been the provisions relating to cable operators. The 1962 Copyright Act, itself a copy of the 1956 United Kingdom Act, provided that cable companies could simultaneously transmit

1 [1994] 2 NZLR 91.

broadcast signals without payment for the broadcast or any of the underlying rights contained in the broadcast. This situation arose because traditionally in the United Kingdom cable operators had been simply retransmitters of broadcast signals to areas where the signal quality of broadcasts was inadequate. The Copyright Bill contained similar terms. However the 1994 Act does not permit the simultaneous transmission by cable of satellite or encrypted transmissions or of broadcasts made from outside New Zealand. Neither does it permit the retransmission of broadcast signals by cable operators "if and to the extent" that a licensing scheme is in place.[2] The scheme must authorize *both* the reception and immediate transmission of the broadcast *and* any work included in the broadcast. The practical effect of this is that in terms of television, TVNZ and TV3 can give licences only where they are in a position to licence a transmission of any work included in the broadcast as well as the rebroadcast of the broadcast itself. To the extent that the television broadcaster does not have a right to authorize the retransmission of the underlying works in the broadcast—the scripts, the music, the performances and so on—the broadcaster cannot grant a licence and therefore the cable operator can take the signal without payment. If the cable operator is dissatisfied with the terms of the licence—most obviously, of course, the costs involved—the matter may be referred to the Copyright Tribunal. Section 166 provides that, in considering what charges, *if any*, should be paid for such licences, the Tribunal shall have regard to the extent to which the copyright owner has already received payment from the broadcaster in respect of the transmission. This is expressed to apply only where the cable transmission is to the same geographical area as the broadcast transmission, which is the case at present for most television transmissions in New Zealand.

It is TVNZ's view that this latter provision is contrary to the provisions of the Berne Convention, to which New Zealand is a signatory. Article 11 bis (1)(ii) provides that the author of a copyright work has the exclusive right to authorize "any communication of the work" to the public by wire or by the rebroadcasting of the broadcast of the work. Clearly this does not apply to the broadcast itself, which is not protected by the Berne Convention, but it does apply to the authors of the underlying works in the broadcast. As well as contravening Berne, the provisions of s 166 are at odds with any philosophy of the free market, and, for that matter, basic equity. Further, cable diffusion is a different mode of transmission from broadcast, and copyright law has traditionally recognized that different uses of a copyright work should be the subject of separate licences and should be paid for separately and distinctly.

This was recognized by the Australian Copyright Convergence Group, which, referring to a similar Australian provision, stated in its publication, "Highways to Change : Copyright in the New Communications Environment":

> This exemption for cable operators 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.

2 Section 88.

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.

Moral rights

A major new concept for New Zealand copyright law introduced by the 1994 Act is that of moral rights, which are, however, far less extensive than those granted in European jurisdictions. For the purposes of the Act "moral rights" consist of the "right of attribution", or the right to be identified as the author of a literary, dramatic, musical or artistic work, or as the director of a film; and the "right of integrity"—the right to object to the derogatory treatment of a work. Treatment of a work is derogatory if "whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author or director". In terms of the right to be identified, there are a number of exceptions for broadcasters. The most important of these are where the copyright in the work first vests in the director's employer, where a work is copied incidentally, and where a work is used for criticism or review or news reporting.[3] At the time of the appearance of the Bill TVNZ was concerned that, technically, a television commercial was a film, and therefore attribution would have to be given to the directors of all television commercials. TVNZ was also concerned about the possibility of having to identify the director where parts of the film appeared incidentally in another film and where a minor part of a film was broadcast on television. These have appeared in the Act as exceptions to the right to be identified.[4] Another requirement for the subsistence of the right to be identified is that the author or director "assert" this right, either at the time of assignment or by instrument in writing.[5]

The exceptions to the right to object to the derogatory treatment of a film include where a film is made for the purpose of reporting current events, and where there is compliance with a duty imposed by s 4 of the Broadcasting Act 1989. These duties relate to the responsibility of broadcasters for programme standards, including the observance of good taste and decency, the maintenance of law and order and the privacy of the individual. The right is not infringed by any act done for the purpose of avoiding the commission of an offence or of complying with a duty imposed by or under any enactment.[6] TVNZ was also concerned with the necessity to sometimes make cuts in films and television programmes in order to accommodate commercial breaks, a practice that does not always find favour with viewers. The Ministry of Justice accepted TVNZ's submissions in this regard and consequently the Act provides[7] that the right to object to the derogatory treatment of a film is not infringed where a broadcaster is obliged to fit the film into the time scheduled to show it, to comply with guidelines as to the programmes

3 Section 97.
4 Section 97(8)(a), (b).
5 Section 96.
6 Section 101.
7 Section 101(6).

that may be shown in particular time periods, to transmit the film in separate parts because of its length, or to use a clip of a film in an advertisement for the showing of that film.

A further difference between the provisions of the Copyright Act relating to moral rights and the European model upon which they are loosely based is that it is possible under s 107 for any person to waive these rights by instrument in writing. In some cases it will be essential for broadcasters to obtain these waivers. An obvious example is where it is intended that the work form part of a multimedia programme in which excerpts from all sorts of different works, for example films, scripts, music and photographs can be accessed at different times and in different combinations by the operator.

Transcription companies

There have been some changes to the law relating to the sale of transcripts of television programmes by transcription companies, which are referred to in the Act as "media monitors". Section 91 provides for a compulsory licence in favour of media monitors on payment to the copyright owner of "an equitable remuneration". The section then provides that this does not apply "if or to the extent that licences authorizing the making of transcripts are available under a licensing scheme and the person making that recording knew that fact". The new provisions have not made any practical difference to the position of broadcasters with respect to transcript companies—there has never been opposition to the granting of licences to such companies in consideration of the payment of royalties.

The new legislation in respect of media monitors has, however, eliminated a provision in the 1962 Act which allowed any "servant or agent" of the Crown to make copies of a work used within a government department, free of charge, so long as no more than twelve copies were reproduced in any period of twelve months. This provision, it could have been argued, gave transcription companies carte blanche to provide transcripts to government departments without payment to broadcasters.

Fair dealing and incidental copying

The fair dealing provisions of copyright legislation have always been important to the media. For practical purposes, these provisions remain essentially the same as under the 1962 Act. However, the ability to use artistic works, including photographs, has been restricted by the new Act. Section 20(3) of the Copyright Act 1982 provided that the copyright in an artistic work—which included a photograph—was not infringed by the inclusion of the work in a film or a television broadcast, "if its inclusion therein is only by way of background or is otherwise incidental to the principal matters represented *or is for the purpose of reporting current events*." The words, "or is for the purpose of reporting current events" were added by the New Zealand draftsman to a similar section of the 1956 United Kingdom Act, and had the effect of allowing the use of a photograph generally for the purpose of reporting current events by film or television, whether such use constituted fair dealing or not.

Section 42(2) of the 1994 Act provides that fair dealing with a work for the purpose of reporting current events by means of a sound recording, film, broadcast or cable programme does not infringe copyright in the work. This section is broader than the United Kingdom legislation, which, as a result of the photographer's lobby, excludes

photographs from the fair dealing provisions for these purposes. However, the distinction may be meaningless as it is difficult to see how one can use a photograph in such a way as to constitute "fair dealing" within the meaning that that term has come to have.

The incidental copying provisions of the 1962 Act, which permitted the incidental inclusion of an artistic work in a film or television broadcast,[8] have been widened to include all works.[9] The ambit of the exception is further widened by the elevation to the status of "works" of sound recordings, films and broadcasts from their previous rather dismissive categorization as "other subject matter". It will now be permissible without clearance to show in a television production a character watching a film or listening to a sound recording.

An interesting application of the provisions of the United Kingdom equivalent of s 42 was the use by British Satellite Broadcasting Ltd of excerpts taken from BBC live broadcasts of goal scoring or near misses in World Cup matches. The excerpts varied in duration from four to 37 seconds, were taken from ten matches, and were each broadcast up to four times over a period of about three weeks. The Court held that as the matches were current events "albeit confined to news of a sporting character" and no more had been taken by Satellite Broadcasting than was reasonably necessary for a television news report, the defence of fair dealing was made out.[10] The BBC accepted this finding with some ill grace, attributing Justice Scott's decision, as they expressed it, to: "a doctrinal factor—namely a 'Thatcherite' or free market approach to competition."

Satellite broadcasts

An area in which new technology has called for the extension of copyright laws is that of satellite broadcasting. By way of background, there are two major forms which this may take. First, a fixed satellite service ("FSS") uses relatively low-powered communication satellites and transmits signals which are picked up by a large receiving dish and rebroadcast from there to home viewers. Direct broadcast satellites ("DBS") provide direct-to-home services by transmitting signals sufficiently strong to be received by small domestic dishes. These are the satellites that cause such consternation to the governments of countries which would prefer that their citizens do not receive news from abroad. Currently there are laws in several countries providing for the dismantling of all DBS dishes, and understandably so. Rupert Murdoch has described this technology as posing "an unambiguous threat to totalitarian regimes everywhere". The definition in the Act of a "broadcast" clearly includes a satellite broadcast as a "transmission of a programme by wireless communication capable of being lawfully received in New Zealand or elsewhere by members of the public, or for presentation to members of the public in New Zealand or elsewhere". The reference to "presentation to members of the public" envisages transmissions that are not directly available to the public, but are presented to public audiences in particular venues, for example relays of sporting events or concerts to a stadium or theatre where at least part of a chain of transmission is by wireless communication. Section 20 provides that a broadcast qualifies for copyright protection if it is

8 Section 20(3) of the 1962 Act.
9 Section 41(1)(a) of the 1994 Act.
10 *British Broadcasting Corp Ltd v British Satellite Broadcasting Ltd* [1992] Ch 141.

made from a place in New Zealand or a prescribed foreign country, namely any country which is a member of an international copyright convention to which New Zealand is also a member, or a country to which the provisions of the Copyright Act have been extended by Order in Council. For this reason it is important to establish the criteria for determining where a broadcast is made from.

Before the enactment of the 1994 Copyright Act it could have been argued that a satellite broadcast was "made" at the place at which it was received for onward transmission (the "down-leg"). The second possibility was that the satellite itself made the broadcast, so that a satellite broadcast was not, as such, made from anywhere. Section 3 of the 1994 Copyright Act provides that a satellite broadcast is made from *the place from which the signals carrying the broadcast are transmitted by satellite* — in other words, the "up-leg" part of the satellite broadcast.

The next question is therefore: who owns the copyright in the satellite broadcast? Section 5(c) provides that it is the person *making* the broadcast. Under the United Kingdom Act it could be argued that the owner or lessor of the satellite is the person who "makes the broadcast" and therefore that person is the owner of the copyright in the broadcast. This interpretation has been avoided by the New Zealand Copyright Act, which provides specifically that the person "making" a satellite broadcast is the person who *transmits signals to the satellite*.[11]

Educational television

Another area in which the Act has clarified the law is that relating to educational television. Section 21 of the Copyright Act 1962 provided an exception for the recording off-air and showing in schools of "school broadcasts". The difficulty was that the term "school broadcast" was defined as "any broadcast made for reception and use in schools" and, for practical purposes, there were none. TVNZ was constantly being asked by schools and universities if it could give permission for the recording and showing of instructive programmes in schools. With the best will in the world, it was unable to do this because of the inadequacy of the exceptions included in the Copyright Act 1962, and the fact that TVNZ often did not own the copyright in the programmes sought. The draft Copyright Bill went to the opposite extreme and provided that educational establishments could record and show programmes without payment to either the broadcaster or the owner of the copyright in the programmes. TVNZ's submissions to the Department of Justice included the point that this would put New Zealand in the position of being the only OECD country which allowed the blanket use of copyright material without recompense in this way, and would be contrary to the provisions of the Berne Convention and the Universal Copyright Convention.

The provisions finally appearing in the Act in relation to copying television programmes off-air for educational purposes,[12] are essentially the same as those in the United Kingdom Act. The showing of television programmes recorded off-air can take place before an audience of students or staff at an educational establishment without payment unless and

11 Section 3(4)(b).
12 Sections 45, 47.

to the extent that licences are available for this purpose. In the United Kingdom the Education Recording Agency Ltd was established shortly after the passing of the U.K. Act. Included in its members were BBC Enterprises, Channel 4, the Independent Television Association and collecting agencies such as Phonographic Industry Ltd and the Mechanical Copyright Protection Society Ltd. The Education Recording Agency has the authority to issue licences for educational establishments. An annual fee per student is charged depending on the type of establishment seeking the licence. TVNZ will shortly be setting up similar licences in New Zealand in conjunction with other copyright owners.

Section 163 provides that where the Copyright Tribunal is considering what charges should be paid for such licences, it shall have regard to the extent that the owners of the underlying rights in the programmes have already received payment from the broadcaster. TVNZ's objections to this are, of course, the same as with the equivalent provisions for cable operators' licences.

Recording company royalties

Among the provisions of the Copyright Act 1994 that concern radio broadcasters in particular is the retention of the right for record companies to receive payment for the broadcast of their recordings. This right has been the subject of dispute between recording companies and broadcasters for years. From the broadcasters' point of view this situation is completely anomalous, as the broadcasting of recordings is without doubt the most effective publicity for such recordings. Record manufacturers respond that without recordings many radio stations would cease to function. This argument is somewhat undermined by the well-known practice in the United States of manufacturers paying radio stations to promote particular recordings—a practice known as "payola". Further, the broadcasters' stance is not that they cease paying any royalties at all in respect of the use of music. The claims of, for example, composers of music, are regarded as valid. A concern of many broadcasters is the complete lack of reciprocity between New Zealand and that major source of popular recordings, the United States. There is no provision in United States law for the payment by broadcasters of royalties to record companies for the broadcasting of records. When record companies tried to enforce an existing statutory right in Canada, the right was abolished. Consequently, New Zealand broadcasters pay royalties to companies based in the United States and Canada while receiving nothing for the broadcast in those countries of New Zealand recordings. There is legislation on this subject being considered in the United States at present, but it appears that the only circumstance in which a broadcaster will be liable to pay royalties will be where the broadcaster transmits a *digital* signal in a mode which allows members of the public to download a complete sound recording—because the digital signal is argued to have technical qualities which make it competitive with commercial recordings. There is no requirement under the TRIPS Agreement for payment by broadcasters to recording companies. In fact, the Agreement specifically provides that a member can accede to the Rome Convention while excluding that part of the convention which relates to payment by broadcasters of royalties to record companies.

There were a number of options opened to legislators in dealing with payments by broadcasters to record companies. One was to do what the Governments of Canada and Singapore did: simply abolish the broadcast right in respect of sound recordings. Another

course would have been restrict, under s 233, the application of the broadcasting right in recordings to those countries giving adequate protection to New Zealand recordings. This would have left intact the right to broadcasting royalties by New Zealand record manufacturers but would have had the effect of removing the anomaly of the lack of reciprocity to which I have referred. The retention of the recording companies' right will result in a net outflow from New Zealand of millions of dollars annually in royalties, with no possibility of reciprocal payments from the United States.

Film archives

Another of TVNZ's copyright concerns was that its extensive film archive was inaccessible to the public. The fair dealing provisions did not extend to permitting the screening of archive material to the public for purposes of general interest—a situation analogous to a museum which admits research scholars but excludes the general public. The 1994 Act addresses this concern by providing that, subject to a number of conditions, the TVNZ Film Archive and the New Zealand Film Archive may show films at the archive premises to an audience consisting of members of the public without infringing the copyright in the film or any work included in it. Similar concessions are made in respect of Radio New Zealand's sound archive.

General

There are a number of other matters which broadcasters will be addressing shortly. An important concern is legislation providing that the making available of unauthorized decoders for encrypted television signals should constitute a criminal offence. The Department of Justice will be dealing with this matter by way of regulation later this year.

The Act as a whole has followed in the well-established tradition of the 1913 and 1962 Copyright Acts of largely duplicating United Kingdom legislation. This has the obvious merit of tapping into the much larger resources of the United Kingdom in respect of conducting extensive background research and in the immediate availability of interpretive case law. With some additions and deletions to more appropriately meet local requirements, the Copyright Act 1994 has, in general, and apart from a number of anomalies to which I have referred, achieved, from the point of view of the broadcaster, a fair balance between the competing claims of the creator and user of copyright material.