



Seminario El TLC & el Derecho de Autor

INICIO

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RETRANSMISSION OF TELEVISION SIGNALS ON THE INTERNET: THE FTA REGULATION

- Australia-US Free Trade Agreement (AUSFTA) art 17.4.10 allows **exceptions** to **exclusive rights** in accordance with the 3-step test as in the Berne Convention, the TRIPs Agreement and the WIPO Internet treaties, but art 17.4.10(b) expressly does **not** allow retransmission of television signals (whether terrestrial, cable or satellite) on the Internet without the authorisation of the right holder or rights holders, if any, of the content of the signal and of the signal. (There is a minor difference between the draft Colombian FTA and AUSFTA art 17.4.10(b).)
- What do the Australian and draft Colombian FTAs with the USA require in the way of **relevant exclusive rights**?
 - The AUSFTA requires the contracting countries to adhere to or affirm their obligations under: the Berne Convention on copyright, the Brussels Satellites Convention and the WIPO Copyright Treaty and Performances and Phonograms Treaty and the WTO TRIPs Agreement.
 - Berne Convention—art 11bis and art 14bis give owners of copyright in **works** (including **films**) an exclusive right over over-the-air and cable **retransmission of broadcasts** of their works, but art 11bis(2) allows the right to be made subject to a statutory licence.
 - Brussels Satellites Convention—protection is confined to satellite transmissions and does not extend to transmissions to the public.
 - TRIPs Agreement—contains no Berne-plus protection as regards retransmission of broadcasts.
 - WIPO Copyright Treaty—art 8 establishing the 'on-line right' is expressed to be without prejudice to Berne art 11bis(1) and art 14bis. An agreed statement concerning art 8 preserves reliance on Berne art 11bis(2).
 - WIPO Performances and Phonograms Treaty—does not appear to give performers or sound recording producers mandatory rights over retransmission of broadcasts of their sound recordings.
 - AUSFTA art 17.5 requires right of communication to the public for authors of **works** without prejudice to the provisions of the Berne Convention already mentioned.
 - AUSFTA art 17.6.3(a) requires right of communication to the public for **sound recording producers** and **performers**. This right would appear to include Internet transmission. However, art 17.6.3(b) provides that notwithstanding art 17.6.3(a) and 17.4.10 (already quoted), the application of this right to traditional free over-the-air (ie, non-interactive) broadcasting, and exceptions or limitations to this right for such broadcasting activity shall be a matter for each [contracting] Party's law. In turn, art 17.4.10(b) is expressed to apply notwithstanding art 17.6.3(b). AUSFTA art 17.6.3 (c) provides that each [contracting] Party may adopt limitations to [the] right [in art 17.6.3(a)] in respect of **other non-interactive transmissions** in accordance with art 17.4.10...This appears to cover Internet streaming so far as it is accessed via cable.
 - The FTAs do not require conferring exclusive rights on **broadcasters**, but AUSFTA art 17.1.1 does allow more extensive protection of IP than the minimum required by the AUSFTA.
 - There appear to be provisions in the draft Colombia-USFTA corresponding to those AUSFTA provisions.
 - Other relevant multilateral agreements in force or under negotiation
 - Rome Convention
 - Retransmission of a broadcast of a performance expressly excluded from **performers'** protection (art 7(1)(a)).
 - **broadcasters'** right in art 13 is limited to over-the-air retransmission by another broadcasting organisation (USA is not a member of Rome).
 - Draft WIPO broadcasters' rights treaty – exclusive right for **broadcasters** over retransmission of their broadcasts 'by any means, including rebroadcasting, retransmission by wire and retransmission over computer networks'.
 - Canada sought a restriction on the proposed exclusive right but has not received much support.

- Still no consensus on allowable exceptions to exclusive rights, but 3-step test already referred to enjoys most support.

- What is meant by 'retransmission on the Internet' in AUSFTA art 17.4.10(b)?

- o It is understood to mean simultaneous retransmission, ie, real time streaming

- The Rome Convention defines 'rebroadcasting' as **simultaneous** broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.
- Draft WIPO broadcasters' treaty proposes to define 'retransmission' as the **simultaneous** transmission to the public by any means of a transmission...
 - o Whereas a broadcast – even via satellite – covers a limited reception area, the Internet is accessible worldwide if access is not restricted.
 - o In insisting on inclusion of AUSFTA art 17.4.10(b), it is understood that the US concern was to forestall the recurrence of a case like ICrave TV, which threatened commercial operations of regional broadcasters based on market segmentation.

- What does the Australian Copyright Act provide?

- o Copyright in works, films, sound recordings, broadcasts includes a right of communication to the public.
- o Communicate is defined to mean make available online or electronically transmit, whether by cable or over the air.
- o Broadcast is defined as a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act.
- o A statutory licence allows retransmission of free-to-air broadcasts within their service area, subject to payment of equitable remuneration to the owners of copyright in materials included in the broadcast ('underlying materials'). The broadcaster is prevented from exercising control over, or claiming any remuneration for, such retransmission.
- o However, the Act also expressly provides that the statutory licence does **not** apply to any retransmission over the Internet.

- What Canada did, following the ICrave TV case, under pressure from its own broadcasters and USA:

- o Legislated to confine access to the compulsory retransmission licence to **licensed** retransmitters, so that other entities who wish to retransmit over the Internet cannot rely on the compulsory licence and must therefore negotiate the consent of the holders of rights in the broadcast.
- o Internet transmission is still permitted under the Canadian statutory licence when done by licensed retransmitters. This would seem to contravene AUSFTA art 17.4.10(b), which requires any retransmission to be licensed by all rights holders. However the AUSFTA does not apply to Canada and the NAFTA, which does, was concluded before the ICrave TV case and against a history of Canadian cable retransmission of US broadcasts.

- What is meant by 'signal'/'broadcast' as object of protection – when does it begin and end?

- o Rome Convention, draft WIPO broadcasters' treaty are silent.
- o Brussels Satellites Convention—protects 'program-carrying signals' and defines 'program' as a **body of** live or recorded material consisting of images, sounds or both, embodied in signals (art 1(ii)).
- o Decision in Australian case (Channel 10 v Channel 9).
- o Presumably US concern behind AUSFTA art 17.4.10(b) would be raised only by continual Internet retransmission, not isolated retransmissions of snippets.

- Delayed retransmission—is it covered by the FTA ban?

- o Australian statutory licence allows it—including the necessary reproduction—only so as to permit putting the transmission to air at the same time in a different time zone, of which Australia has basically 3. The exclusion of Internet retransmission also applies to this element of the statutory licence.
- o The draft WIPO broadcasters' treaty proposes, in addition to the right over retransmission (art 6), a right over 'transmission following fixation' of the broadcast (art 9). The notes on art 9 say that transmission as used there includes 'transmission over computer networks' (ie, the Internet).

- Some relevant new developments:

- o Podcasting—the making available on-line of a recording of audiovisual material, which may or may not include recorded broadcasts, for on-demand downloading. It does not seem to constitute 'retransmission' as used in AUSFTA art 17.4.10 (b).
- o Posting on the Internet of episodes of TV series—a form of unauthorised podcasting and also distinguishable from retransmission.

- **Conclusion**

- The FTAs do not require protection of broadcasters, so owners of rights in works, films, sound recordings and performances used in broadcasts are the required beneficiaries of the FTA prohibition on unauthorised Internet retransmission.
- Rights holders of works and films enjoy rights over retransmission of broadcasts of their works under the Berne Convention. However the right can be subject to a statutory licence. Rights holders in sound recordings of performances may have rights over retransmission of broadcasts of the recordings under the WPPT but the rights could be the subject of a reservation.
- The FTAs reaffirm those rights but do not appear to add to those of rights owners in works and films. Sound recording producers and performers appear to have at least right to remuneration for Internet streaming of their recordings, while under the WPPT that right can be subject to reservation.
- Because the rights can be made subject to statutory licence or reservation, and having regard to the ICrave TV case, it appears the USA wanted to make sure that Internet retransmission would not be allowed under statutory licence in FTA partner countries. The FTAs also lock the USA into the prohibition on unauthorised Internet retransmission.
- Australian copyright law allows retransmission of free-to-air broadcasts within the service area of those broadcasts, but expressly excludes Internet retransmission—that exclusion was enacted before the negotiation of the AUSFTA.
- If I have correctly understood the US motivation for seeking the FTA prohibition on unauthorised Internet retransmission, simultaneous retransmission may be the main object of the prohibition. Usage in the context of relevant WIPO treaties suggests that it is questionable whether a reference to simply 'retransmission', as in the FTA prohibition, applies to deferred retransmission as well as simultaneous retransmission.