



Broadcast Australia

Submission to ALRC

16 November 2012

Background to Broadcast Australia

Broadcast Australia (BA) is the country's largest owner of radio and television terrestrial broadcasting sites and towers and the largest provider of terrestrial transmission services for free-to-air radio and television broadcasters.

We have strong interest and expertise in converging communications technologies and the implications of these for regulation and the future commercial environment. Over the last decade, Broadcast Australia has been centrally involved in rapid technological changes within the broadcasting and on line sectors.

The emergence of online service offerings and the continuing evolution of digital broadcasting technologies will ensure that the current pace of change is maintained with implications for the industry, government, consumers and the general public.

Consistent with both our commercial interests and what we believe to be in the manifest general public interest, we are strong advocates for the unique consumer value proposition provided by Australia's free-to-air television and radio services and the terrestrial radiated delivery platform which overwhelmingly carries them to the general public. Broadcast Australia believes that this model will be central to Australians' consumption of professionally produced audiovisual and audio content for the foreseeable future. The 'right' to receive free-to-air television and radio services without having to pay access or ongoing consumption charges lies deep within the psyche of the Australian public.

Background to BA ALRC Submission

This submission does not provide any substantive responses to any of the ALRC's questions in relation to the Copyright and Digital Economy Inquiry. BA may make some substantive comments regarding these questions as the ALRC Inquiry progresses and other opportunities arise.

The submission is more to (potentially) assist the ALRC to work its way through a labyrinth of difficult technology and media and communications issues in undertaking its work in relation to paragraphs 210 through to and including 230 of its Issues Paper.

In particular this submission centres on a potential practical working definition for services which may go under a number of labels but which on the one hand might be often referred to as "internet TV" or "over the top (OTT) TV" and on the other hand be referred to as "internet protocol TV (IPTV)".

We believe these terms are often used indiscriminately and interchangeably and therefore quite wrongly. We believe that at least in the current Australian Broadcasting and Copyright Law context the two generic types of services covered by these much misused and misunderstood terms need to be differentiated.

We sense that the ALRC Issues Paper itself has had difficulty grappling with the difference between these two product concepts, see extracts from paragraphs 216, 217 and 237 and two questions (Q37 and Q38) from the Issues Paper (the underlining is ours):

216. Section 135ZZJA of the *Copyright Act* provides that the retransmission regime 'does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the Internet'.

217. Consequently, on one view, Australian law makes retransmission of television broadcasts over the internet 'legally impossible'. However, the application of s 135ZZJA to internet protocol television (IPTV) is not clear. In particular, whether retransmission by an IPTV service 'takes place over the Internet' may depend on the functional characteristics of the service.

237.....it has been suggested that an IPTV retransmission may fall within the operation of the statutory licensing scheme because 'while the retransmission occurs over infrastructure shared by an Internet connection, as a direct feed from ISP to customer at no point is connection to the Internet by either ISP or customer necessitated'.

Question 37. Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?

Question 38. Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?

We think that as well as the history of the interaction of retransmission and the Copyright Act covered in paragraphs 210 – 216 of the Issues Paper it is important to take into account the statutory review undertaken by the then DCITA in the middle of 2000 concerning whether making radio and television programs available via the internet represented 'broadcasting' pursuant to the Broadcasting Services Act (BSA).

Following this review "the Minister for Communications, Information Technology and the Arts announced on 21 July 2000 that the government had decided that Internet audio and video streaming should not be regarded as a broadcasting service for the purposes of the Act"¹. The germane part of the Minister's resulting determination of 12 September 2000 was as follows:

Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000)

I, RICHARD KENNETH ROBERT ALSTON, Minister for Communications, Information Technology and the Arts, under paragraph (c) of the definition of "broadcasting service" in subsection 6(1) of the *Broadcasting Services Act 1992*, determine that the following class of services does not fall within that definition:

a service that makes available television programs or radio programs using the Internet.....

Dated 12 September 2000

¹ <http://www.comlaw.gov.au/Details/F2004B00501/Explanatory%20Statement/Text>

We sense that the conundrum the Issues Paper outlines in paragraphs 216, 217 and 227 may have been partly imported from this DCITA review and the resulting BSA 'internet' related broadcasting definition determination.

It appears that Section 135ZZJA of the Copyright Act was part of Government amendments to the Copyright Amendment (Digital Agenda) Bill 1999 [2000] outlined in the Supplementary Explanatory Memorandum (amendment 90)² and subject to second reading debate in the House of Representatives on 28 June 2000 and the Senate on 14 August 2000.

On its face it would seem the statutory review and the resulting determination in relation to the BSA and the Section 135ZZJA Copyright Bill amendment 90 were contemporaneous and dealing with much the same definitional subject matter. As such it is likely they would have been discussed within the bureaucracy contemporaneously as well.

We suspect that similarly potential changes to the BSA, and in particular to the workings of the 'retransmission' Section 212 flowing from government consideration of the CRC final report, might best be looked at contemporaneously with any suggestions for changing the 'retransmission' regime in the Copyright Act.

Obviously both the September 2000 determination and amendment 90 raised the issue of what comprises the "internet". Equally they raised significant questions concerning what does "using the internet" mean. Clearly in the BSA domain the determination removed services providing audio-visual and audio-only programs "using the internet" from the regulatory obligations that apply only to Broadcasting Services under the BSA.

To borrow and rearrange a phrase of the Convergence Review Committee (CRC), the determination created significant opportunity for lack of regulatory parity between like electronic media services to arise.

We dealt with these matters to some extent in two submissions to the CRC. We felt that in trying to choreograph regulatory framework change that might predispose optimum regulatory parity between like services the CRC might have over reacted when suggesting major new structural entities such as Content Services Enterprises (CSE) and perhaps overlooked the implicit flexibilities that a largely technology neutral BSA still retained.

In setting out our suggestions in this context to the CRC we needed to frame a number of 'working' definitions to assist reasonable understanding of our ideas. Some of those working definitions, together with the overall conceptual amendments to the definition of "Broadcasting Service" within the BSA, we were suggesting might be considered, may well be helpful to the ALRC in working its way through answering in particular questions 37 and 38.

Prior to repeating in full relevant sections of two of our submissions to the CRC it is worthwhile highlighting our view that both in the UK and Canadian jurisdictions 'on demand' and services delivered 'using the internet' are included within the definition of broadcasting services and hence some of the lack of regulatory parity that exists currently in Australia does not exist to the same extent in these two jurisdictions.

² <http://www.comlaw.gov.au/Details/C2004B00540/Download>

Extract of BA Submissions to CRC of November 2011 and February 2012

“For the practical purposes we see the following definitions as helping people to separate some matters which they often misuse or use incorrectly:

- *“Over the top (OTT)” means:* a general term for voice, video and data services delivered over a network and provided by an entity other than the operator of the network. OTT services are delivered ‘over-the-top’ of existing infrastructure and do not require business or technology affiliations with the host ISP or network operator. Examples include Skype and YouTube.
- *“OTT TV” hence means:* a TV like service where audio visual content is delivered to a display device (e.g. an internet enabled TV set) via IP over an unmanaged network such as broadband internet, for example BigPond Movies viewed through Telstra T-Box.
- *“IPTV” means:* a TV like service where audio visual content is delivered to a display device (e.g. an internet enabled TV set) via IP over an operator-managed network, for example Fetch TV and TransACT’s TransTV.
- *“Linear TV” means:* a TV like service where the service provider schedules programs during its hours of transmission and viewers choose from an advertised program line-up what programs they wish to watch ‘live’ and/or record for later ‘local’ ‘on demand’ viewing.
- *“On demand TV” means:* a TV like service where the service provider advertises a range of programs available from its or other servers and viewers choose what programs they wish to receive and the time of such reception for watching ‘live’ and or for recording for later ‘local’ ‘on demand’ viewing, through some form of interactive direct request system.
- In terms of the current BSA, OTT TV is covered by Minister Alston’s September 2000 exemption from “broadcasting”. However IPTV would be “broadcasting” notwithstanding the Determination and we assume that is why Fetch TV linear television channels achieved the relevant form of subscription television licences from ACMA 3 years ago.
- In terms of the current BSA, on demand TV is not “broadcasting”, while linear TV services are “broadcasting” provided they are not ‘transmitted’ “using the internet” (practically meaning via OTT TV means).

In the current BSA a “broadcasting service” is defined as:

“a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- a) *a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or*
- b) *a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or*

- c) *a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.*”

We note that paragraph (c) above provides the authority for Minister Alston’s September 2000 Determination and paragraph (b) above removes on demand TV (or radio) from being a “broadcasting service”.

Comparison to Canada and the UK

In Canada, the Broadcasting Act “broadcasting” and “program” definitions effectively mean that of the 3 effective ‘exclusions’ outlined in the Australian BSA (and through Minister Alston’s Determination) only (a) above is really excluded.

Broadcasting and Program are defined in section 2 of the Canadian Broadcasting Act as:

“broadcasting” is any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place.

“program” is sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

Back in 1999 the Canadian regulator, the CTRC, determined that pursuant to the Broadcasting Act transmissions of “programs” via the internet was “broadcasting”.

At the same time the CTRC confirmed that “broadcasting” included on demand TV services.

Similar to Canada, the Explanatory Memorandum to the Audiovisual Media Services Regulations of 2009 in **the UK** {implementing the UK end of the EU Audiovisual Media Services (AVMS) Directive dealing with on demand TV services} shows that neither OTT TV or on demand TV are excluded from being regulated as broadcasting services.

As corollaries to the above 1999 CTRC determination, the Federal Court of Appeal in Canada found, on July 7 2010, that ISPs through whose services / facilities OTT TV was delivered were not broadcasting (while the OTT TV services themselves were) and the CRTC on 5 October 2011 continued the operation of its New Media Exemption Order (which exempts OTT TV services from things like Canadian Content obligations). The CRTC began another fact finding exercise regarding this latter manner starting on May 12, 2012.

In the UK, regulatory obligations imposed by the implementation of the AVMS concerning on demand TV like services are limited to program content standard issues and do not extend to such things as UK or European content requirements.

Summary

BA believes that it may be useful for Australia to adopt an approach of redefining “broadcasting services” within the current BSA by revisiting (overturning) Minister Alston’s Determination of September 2000 and removing exclusion (b) – regarding on demand services – from the current definition.

We reiterate that in this submission we have no substantive comments to make on the composition of the Copyright Act so far as paragraphs 210 to 230 of the Issues Paper are concerned. However we feel our working definitions of Over the top (OTT); OTT TV; IPTV; Linear TV; and On demand TV together with our suggestions for considering changing the current definition of Broadcasting Services in the BSA may assist the ALRC to work its way through some of the technical and product issues outlined in paragraphs 210 to 230.

It may further assist the ALRC for us to point out that in our view services using the recently available Multicast Product from NBN Co (really developed mainly for delivery of IPTV services as defined above) and accessible from the same physical port on the NBN Co network termination equipment as the accompanying broadband internet connection will be "Broadcasting Services" pursuant to the current BSA.

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