



**COPYRIGHT AND THE DIGITAL ECONOMY  
FOXTEL RESPONSE TO ALRC ISSUES PAPER  
NOVEMBER 2012**

## **INTRODUCTION**

Foxtel welcomes the opportunity to make a submission to the Australian Law Reform Commission (**ALRC**) in response to its issues paper, *Copyright and the Digital Economy* (the **Issues Paper**), dated August 2012.

Foxtel is one of Australia's most progressive and dynamic media companies and is a key player in Australia's digital economy. Foxtel directly employs approximately 2,500 people and delivers a diverse subscription television service (**STV**) to both regional and metropolitan areas over cable, satellite and broadband distribution.

We offer a better entertainment experience every day to each one of our 2.3 million subscribing homes through delivery of exclusive and inspiring programming across all genres, the world's most popular channel brands, and investment in high quality local content.

As constant champions of innovation we have brought customers the latest personal digital recording technology, Australia's largest HD offering, Foxtel 3D, and this year, the most comprehensive Olympic Games coverage Australia has ever seen.

The *Copyright Act 1968* (Cth) (the **Act**) is one of the fundamental pieces of legislation underpinning Australia's digital economy. It is absolutely critical to our success that the Act operates effectively in a converged environment. As explained in this submission, appropriate copyright protections are central to us being able to offer excellent programming to our subscribers and, in so doing, support large numbers of Australian jobs and make a valuable contribution to Australia's digital economy.

Foxtel's submission is structured as follows:

1. The **Executive Summary** outlines Foxtel's key submissions.
2. **Part A** sets out Foxtel's views on the role of copyright protection in building the digital economy and steps that must be taken to protect Australia's creative industries from piracy.
3. **Part B** sets out Foxtel's comments on key issues dealt with in the Issues Paper.
4. **Part C** provides a brief response to each question asked in the Issues Paper.

## **EXECUTIVE SUMMARY**

Our submissions in Part A include Foxtel's views on the following matters:

- **The role of copyright law in driving growth of the digital economy**—where we submit that our investment in content must be protected by copyright law so that we can continue to make a substantial contribution to the digital economy, with benefits flowing to the Australian production sector.
- **Social norms relating to copyright**—where we submit that social norms which condone illegitimate use of copyright material, or would be used to justify unreasonably broad exemptions to copyright infringement, should not be allowed to outweigh rights holders' legitimate interests in protecting their intellectual property.
- **Reforms to reduce piracy**—where our submissions include that an industry code of practice between internet service providers (ISPs) and content providers should be urgently introduced in relation to online copyright infringement and that urgent legislative reform is also required.

Our submissions in Part B and C are focussed on the following aspects of the Issues Paper:

- **Copying for private use**—where we demonstrate that any changes to the law to more freely permit time shifting and format shifting of digital content will seriously undermine rights holders’ ability to exploit their content and extract value from distribution windows.
- **Retransmission of free-to-air broadcasts**—where we submit that there is no case for altering current rules governing retransmission of free-to-air broadcasts.
- **Fair use and other proposed exceptions to copyright infringement**—where we oppose the introduction of a broad US style “Fair Use” defence and the other proposed exceptions canvassed by the Issues Paper, and query whether there is any evidence justifying a departure from the current regime.
- **Contracting out**— where we submit that to encourage and protect creative investment, content owners should be able to negotiate business specific and certain terms which take precedence over generic statutory exceptions.

## **PART A: FOXTEL’S VIEWS ON COPYRIGHT PROTECTION**

### **Copyright protection is key to a prosperous digital economy**

In 2011–12 the Australian STV sector invested \$667 million in Australian content, employed 6,461 people and is estimated by Deloitte Access Economics to have made an overall direct contribution to the Australian economy of \$1.4 billion.<sup>1</sup> The STV industry—comprised of over 30 organisations, including Foxtel—also exports an increasing amount of Australian programming internationally with programs like *Tim Winton’s cloudstreet*, *Grand Designs Australia* and *Killing Time* being seen across the world. The investments Foxtel and our partners make help develop Australian production, acting and writing talent—building capacity to tell Australian stories and developing skills and experience that attracts international production to Australia.

Foxtel has a record of innovation and is a key participant in the Australian digital economy. Indeed, we share the ALRC’s observation that:

*[f]or some time the Australian economy has been recognised as increasingly relying on moving from low-efficiency, labour-intensive industries to high-efficiency knowledge-intensive industries involving cultural goods and services.<sup>2</sup>*

It is Foxtel’s strongly held view that our substantial investments must be appropriately protected by copyright law.

The ALRC is interested in current and future desirable uses of copyright material in the digital economy. In our view, in order to grow the contribution we make to the Australian digital economy we must be able to rely on copyright law to enable us to gain appropriate returns on our investments. We must be able to monetise the content we create, protect the content we acquire and take action against individuals and other corporations who seek a free ride on our investments.

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<sup>1</sup> Australian Subscription Television and Radio Association, Media Release, *Subscription TV industry investment in Australian content production increases by 13%*, 31 October 2012 – available at [http://www.astra.org.au/ArticleDocuments/116/ASTRA\\_AustralianContentSurvey\\_Announcement\\_31Oct12.pdf.aspx?Embed=Y](http://www.astra.org.au/ArticleDocuments/116/ASTRA_AustralianContentSurvey_Announcement_31Oct12.pdf.aspx?Embed=Y).

<sup>2</sup> Australian Law Reform Commission, *Copyright and the Digital Economy, Issues Paper 42* (August 2012). (‘Issues Paper’), page 11.

## Social norms relating to copyright

The ALRC suggests that the *'context and political economy of copyright law is changing as copyright has a more direct impact on disparate users and producers, extending beyond rights holders and institutional rights users'*.<sup>3</sup>

The Issues Paper places some weight on social norms relating to copyright, with the implication appearing to be that if certain laws do not fit with community expectations or practice—no matter the legitimacy of those expectations or practices—then they may no longer be fit for purpose.<sup>4</sup>

While we agree with the ALRC that *'[c]opyright law needs to be able to respond to changes in technology, consumer demand and markets'*,<sup>5</sup> we do not agree that the credibility of copyright law will be undermined merely if it fails to recognise common practice—irrespective of the nature of that common practice.

We submit that the ALRC must not allow social norms which condone illegitimate use of copyright material, or would be used to justify unreasonably broad exemptions to copyright infringement provisions, or to dictate amendments to copyright law which will diminish the ability of content creators and owners to appropriately exploit their protected works. To do this would undermine our ability to make increasingly valuable contributions to the digital economy.

Rather, as set out below, we believe there is a role for both Government and industry to better educate the public about the economic importance of copyright protections and appropriate uses of copyright material. We agree with the ALRC that *'[p]art of the challenge for copyright law is how it might become better understood and more effectively communicated so as to enable Australians to be lawful digital citizens'*.<sup>6</sup>

## Reducing online piracy

Foxtel believes that the issue of online piracy must be urgently addressed by the Federal Government. This issue is a key priority for Foxtel and an area in which we believe that it is important that media and communications industries, and Government, work together. Access to illegal content via the Internet is growing and will only become more prevalent as data speeds increase. Based upon current information there is expected to be a 42% increase in peer to peer pirated downloads using the services offered by Australian ISPs in the 2012 calendar year as compared to the 2011 calendar year. This growth only reflects peer to peer downloads and excludes content obtained via streaming.

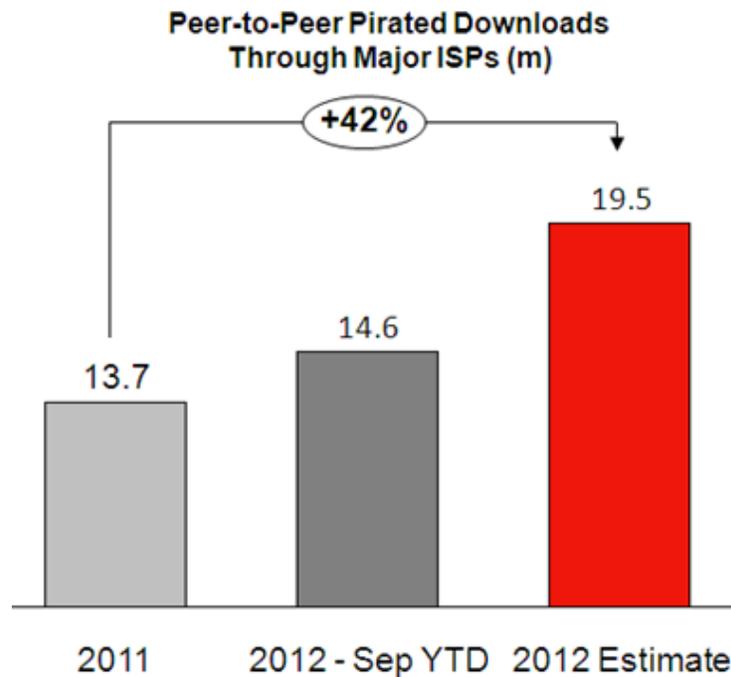
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<sup>3</sup> Issues Paper, page 14.

<sup>4</sup> For example, it is suggested in the Issues Paper that *'[i]rrelevant laws, which do not fit with community practice and seem incapable of change, are not suitable for assisting in the development of an innovation-based economy'*—see Issues Paper, page 14.

<sup>5</sup> Issues Paper, page 20.

<sup>6</sup> Issues Paper, page 14.



Source: Irdeto 2012

In designing product, educational and regulatory responses to piracy it is important to take into account robust evidence of consumer attitudes and not rely just on anecdotal evidence. The following is a summary of recent research on common practices and attitudes to illegal downloads.

***An evidence base: attitudes to piracy***

The Intellectual Property Awareness Foundation commissioned research in 2012 by Sycamore Research and Marketing (the IPAF Study) as part of an annual series looking at the attitudes and actions of Australians in relation to piracy of film and television shows by way of illegal downloads.<sup>7</sup>

Findings of the research included that:

- Just over one quarter of Australians (27 per cent) are currently active illegal downloaders (classified by the researchers as either 'persistent' or 'casual' downloaders).
- Importantly, 71 per cent of respondents believe that piracy is stealing or theft.
- Most respondents believe they are responsible for preventing piracy—67 per cent nominated individuals as being responsible for taking action, followed by internet service providers (ISPs) (45 per cent), the movie and TV industry (40 per cent) and Government (39 per cent).

<sup>7</sup> Intellectual Property Awareness Foundation, *Sycamore research 2012*, available at <http://www.ipawareness.com.au/research/2012>. Research was conducted via a Newspoll online omnibus survey of 1,654 Australian adults aged 16–64.

## ***Industry action to reduce piracy***

The results of the IPAF Study show that Australians consider that piracy prevention is a shared responsibility. The results support our view that cooperative action against online piracy should be taken by content owners, the ISPs whose service is used to access pirated content, and Government.

That is why Foxtel supports both the introduction of a code of practice for dealing with ISP customers engaging in piracy and the introduction of a legislative framework to address illegal streaming sites. The introduction of a code and legislation to address access to illegal streaming sites must occur as a matter of urgency to protect copyright owners and bring Australia into line with other key overseas jurisdictions including each of the US, UK, NZ, France and Korea. Foxtel recognises that any such Code should operate on a non-discriminatory basis and apply to all ISPs operating within Australia.

We believe that the code should provide for a series of graduated responses, starting with notices to infringers. Foxtel believes that a notice scheme would result in a significant proportion of those illegally downloading content to change their behaviour and cease downloading.

### ***International success with graduated response schemes***

A graduated response to dealing with online copyright infringement has been legislatively implemented in a number of international jurisdictions, including:

- the UK (*Digital Economy Act 2010* (UK));
- New Zealand (see the amendments to the *Copyright Act 1994* (NZ) introduced by the *Copyright Amendment (New Technologies Act) 2008* (NZ)); and
- France (Creation and Internet (HADOPI) Law 2009 (France) (*Haute Autorité pour la diffusion des oeuvres et la protection des droits sur internet*)).

A graduated response program has also recently formed the subject of a commercial agreement between ISPs and the music and film industries in the US.<sup>8</sup>

Analysis by French authorities of the impact of the HADOPI Law showed the marked and positive impact a graduated response scheme can have. An assessment of the law was undertaken a year and a half after its commencement (the HADOPI Report), showing that between October 2010 and December 2011:

- 95 per cent of those of those who received a first-time notice relating to illegal behaviour on P2P networks did not need a second notice; and
- 92 per cent of those who received a second notice did not need another.<sup>9</sup>

The HADOPI Report indicates that 71 per cent of French P2P users surveyed would stop downloading illegal content if they received a recommendation from HADOPI.<sup>10</sup>

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<sup>8</sup> See an October 2012 update on the Copyright Alert System from the Centre for Copyright Information at <http://www.copyrightinformation.org/node/709>.

<sup>9</sup> Hadopi, *Hadopi, 1 ½ Year After The Launch (the HADOPI Report)*, page 3 – available at <http://www.hadopi.fr/sites/default/files/page/pdf/note17EN.pdf>. These successes have been reported to have continued. For example, see the reference to a 2012 French Government report referred to in the online publication *Copyright and Technology* (B. Rosenblatt, 'The Future of HADOPI', *Copyright and Technology*, 26 October 2012 – available at <http://copyrightandtechnology.com/2012/10/26/the-future-of-hadopi/>). Further, the percentage of people who received second notices but not third ones rose from 90 per cent to 98 per cent from 2011 to 2012.

## Legislative reforms

In relation to P2P piracy, the need for legislative reform to assist in determining ISP liability was expressly recognised by French CJ, Crennan J and Kiefel J in the recent High Court decision in *Roadshow Films Pty Ltd v iiNet Ltd*<sup>11</sup> (the **iiNet case**) when they noted:

*...the concept and principles of the statutory tort of authorisation of copyright infringement are not readily suited to enforcing the rights of copyright owners in respect of widespread infringements occasioned by peer-to-peer file sharing... The difficulties of enforcement which such infringements pose for copyright owners have been addressed elsewhere...<sup>12</sup>*

Furthermore, in the iiNet case Gummow J and Hayne J noted that ‘...Parliament is more responsive to pressures for change to accommodate new circumstances than in the past. Those pressures are best resolved by legislative processes...’<sup>13</sup>

In relation to illegal streaming, we submit that Parliament should provide the Courts with the power to order ISPs to block specific sites. This power would be exercised after application by a rights holder and result in the issuing of an injunction that applies to all ISPs.<sup>14</sup> This legislation would be similar to that used in the UK to block piracy sites such as The Pirate Bay. UK ISPs were ordered by the High Court to block access to The Pirate Bay on 30 April 2012, traffic to The Pirate Bay following the High Court’s order is illustrated on the following graph:



Source: Nielsen Net Ratings<sup>15</sup>

<sup>10</sup> The HADOPI Report, page 6.

<sup>11</sup> *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16 (20 April 2012).

<sup>12</sup> [2012] HCA 16, at [79].

<sup>13</sup> [2012] HCA 16, at [120].

<sup>14</sup> An approach of this nature has been implemented in the UK—see section 97A of the *Copyright, Designs and Patents Act 1988*(UK) and sections 17 and 18 of the Digital Economy Act 2010. The latter Act empowers the relevant Minister to make regulations specifying circumstances in which a Court can issue a blocking injunction.

<sup>15</sup> Source: Nielsen Net Ratings, available at <http://www.bbc.co.uk/news/technology-20026271>

### ***Increasing access to legitimate content and education***

We understand that we also have a role to play in making content available widely at an attractive price and in a timely manner. Foxtel does this by expanding choice and offering services like Foxtel On Demand and our recently launched Foxtel Go service, which enables subscribers to access 21 linear channels and catch-up content from many other channels on their tablet devices, whenever and wherever they want. Foxtel Go is available to all subscribers to Foxtel's primary broadcast service at no additional charge. Our recently announced 'Express from the US' strategy seeks to fulfil the demand of customers who might otherwise seek content illegally by bringing popular US television series to Australia very quickly after the US premiere.<sup>16</sup>

In addition, education about the impact of piracy is vitally important, including education about the negative effects piracy can have on the Australian production industry. We believe that both Government and industry should commit to education initiatives.

### **Legislative reform to address issues arising in the digital environment**

Foxtel is concerned that the Act is currently unable to address a variety of issues arising in the digital environment and is failing to keep pace with international developments. In particular, we submit that a change must be made to the Copyright Act to deal with the lack of sufficient copyright protection for factual databases such as television schedules.

#### ***Database protection***

An example of the Copyright Act being out of step with overseas jurisdictions arises from the decision of the Full Court of the Federal Court in *Telstra Corporation Limited v Phone Directories Company Pty Limited* [2010] FCAFC 149, upholding the decision of the Federal Court of Australia in *Telstra Corporation Ltd v Phone Directories Company Pty Ltd* [2010] FCA 44.

The Full Court's judgment means that copyright no longer subsists in factual databases such as telephone directories and program schedules. The trial judge, Justice Gordon, observed that the absence of a database right is '*a matter for Parliament and in my opinion, a matter which they should address without delay*'.<sup>17</sup>

Chief Justice Keane, notes that the decision '*may give rise to a perception of injustice*' and stated '*Whether or not that means that legislative reform of the kind adopted by the European Union by the Directive of the European Parliament and the Council on the Legal Protection of Databases is warranted is a matter for the legislature*'.<sup>18</sup>

In considering whether to introduce any new exceptions which will further erode the scope of copyright protection in Australia, Foxtel urges the ALRC to have regard to the ways in which overseas jurisdictions are strengthening copyright protections.

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<sup>16</sup> The Express from the US strategy is a major initiative to deliver television series to Foxtel customers within seven days of the episode screening in the US, and in many cases within hours. For example, HBO's Boardwalk Empire Season 3 premiered on Foxtel just five and a half hours after the US premiere.

<sup>17</sup> [2010] FCA 44, at [30].

<sup>18</sup> [2010] FCAFC 149, at [97].

## **PART B: KEY ISSUES DEALT WITH IN THE ISSUES PAPER**

### **The ALRC's guiding principles for reform (Question 2)**

The ALRC seeks feedback on the principles that should guide its approach to the Inquiry, particularly its assessment of the adequacy and appropriateness of exceptions and statutory licences currently contained in the Copyright Act.

With respect to methodology, we submit that any proposed amendments to the Act must be based on clear evidence that the intervention is warranted. To the extent that the market is addressing a perceived problem, no intervention is necessary. Where the ALRC is minded to recommend a change to the law, we submit that economic analysis of the impact of the proposed amendments on all interested parties must be undertaken.

With a number of qualifications, Foxtel is broadly supportive of the guiding principles identified by the ALRC in the Issues Paper. In particular, we agree with the ALRC that:

- **Copyright law should provide incentives for innovation in technologies and access to content** (ALRC principle 1). However, this does not mean that copyright owners should be required to give up control of their copyright material in a way that undermines their ability to obtain a fair return on their investment.
- **Reforms should encourage innovation and competition and not disadvantage Australia internationally** (ALRC principle 2). We believe that Australia must retain copyright protections that are comparable to other relevant jurisdictions—if this is not the case, international content owners may become reluctant to licence use of their content to Australian platforms owners such as Foxtel or to otherwise invest in Australia.
- **Reforms should recognise the interests of rights holders and be consistent with international obligations** (ALRC principle 3).
- **Reforms should take place in the context of 'real world' consumer behaviour** (ALRC principle 6). However, as noted above, this does not mean that copyright theft should be condoned or normalised, or that exceptions or statutory licences should unfairly allow others to free-ride on content owners' investments.
- **Reforms should provide clarity and certainty for all stakeholders** (ALRC principle 7). While flexibility should be encouraged so as to facilitate innovation in the exploitation of rights, this must be balanced with the need for certainty. In particular, we believe that clearly defined statutory exemptions are very important in promoting clarity and certainty.

In addition, Foxtel submits that a number of other principles and distinctions should be taken into account by the ALRC during the Inquiry:

- Copyright law should not impede the development of knowledge or freedom of political communication, but this should be distinguished from the theft of copyright material for entertainment and the free-riding of commercial entities on the investment of copyright owners.
- As detailed below, the Inquiry should distinguish personal use and social use of copyright material, where social use which is not licensed by the copyright owner frequently provides commercial advantage to owners of social media platforms.
- To encourage and protect creative investment, content owners should be free to determine the terms on which their content is distributed.

## Copying for private use (Questions 7 – 10)

Foxtel does not believe there is a need for amendments to the current time shifting and format shifting exceptions.

Following extensive public consultation, the format shifting and time shifting exceptions were recently introduced into the Copyright Act in 2007. Among other matters, these exceptions were designed to facilitate more convenient use of broadcast copyright material by consumers. The balance between rights holders' interests in a fair return and consumers' interests in flexible use was carefully considered at the time of introduction of these exceptions, and Foxtel submits the balance struck by the current regime is the right one.

The ALRC notes in its Issues Paper that *'one policy justification for introducing such exceptions is that Australians routinely make copies for their private use, and do not believe that this should be against the law'*<sup>19</sup>. While we understand the Government's desire to ensure that Australian copyright law keeps pace with legitimate consumer practices, simply because digital technology is available which makes copying and storing content easier does not mean that the law should be amended to legitimise infringing conduct. As we outline above in the section 'Social norms relating to copyright', we urge the ALRC not to allow illegal consumer practices, no matter how widespread, to dictate proper policy.

Any loosening of the time and format shifting exceptions, or a new exception allowing consumers to make back-up copies of content, has a real risk of undermining the ability for content owners and distributors to monetise their content and extract fair value from distribution windows. As the ALRC correctly identifies in its Issues Paper, *'copyright owners may license users to make multiple copies of copyright material, or otherwise access copyright material from multiple computers phones, tablets and other devices'*<sup>20</sup>, which is precisely what subscription content providers like Foxtel are increasingly doing.

Distributors who make their content available on a temporary basis must have the ability to determine how their content is accessed, used and stored. The question of who makes the recording is critically important. Foxtel invests millions of dollars each year in local and overseas content and incurred significant start-up losses, turning its maiden profit in 2006. Expanding the scope of the current exception so as to allow unlicensed third parties to profit at the expense of those who invest in the creation of content would be entirely inequitable.

In relation to the proposed amendment to allow back-up copies, we submit that any such exception must only apply where a person has legally acquired a permanent copy of the copyright material. If not, there is a real risk that such an exception may undermine digital rental models and subscription based services which enable customers to have access to digital content only for the duration of their subscription. Similarly, while we support the principle of technological neutrality and believe that simplification of the Copyright Act (where possible without upsetting the balance struck under the Act) is in the best interests of industry and consumers, it is important that any single format shifting exception is precise and not drafted too widely. In particular, for the reasons explained above, we would be concerned if a broad "digital-to-digital" exception were to be introduced in respect of cinematograph films. We are of the view that any relaxation of the laws in this respect may ultimately result in the facilitation of further online piracy.

## Retransmission of free-to-air broadcasts (Questions 35 - 39)

The ALRC has asked a series of questions about the existing statutory licensing scheme for retransmission. This is the scheme under which unaltered retransmissions of free-to-air broadcasts are

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<sup>19</sup> Issues Paper, page 28.

<sup>20</sup> Issues Paper, page 29.

permitted so long as equitable remuneration is paid to the underlying rights holders of the content in the free-to-air broadcast (which, in many cases, is the free-to-air networks themselves<sup>21</sup>).

A threshold question is whether this ALRC Inquiry should be looking at the issue of retransmission. In its March 2012 Final Report the Australian Government's Convergence Review Committee declined to make a recommendation on the issue of retransmission, proposing instead that it be examined by the ALRC.<sup>22</sup> And yet, in this Issues Paper, the ALRC queries whether questions about the scheme '*...are more a matter for the Australian Government to consider within the context of communications policy*'.<sup>23</sup>

### **Proposal for a must carry regime**

Must carry regimes are aimed at ensuring that consumers are able to access free-to-air television services, and that free-to-air broadcasters and advertisers are able to reach their target viewers. These conditions already exist in Australia.

Free-to-air services are retransmitted on Foxtel for the convenience of our subscribers—that is, they are included on our platform so that subscribers are able to move between free-to-air and subscription channels using the one Foxtel interface, not because they do not have access to the free-to-air channels terrestrially (or via satellite).

There is no impact on the advertising revenue of commercial free-to-air broadcasters as a result of retransmission of their services on Foxtel—advertisements on the free-to-air channel still reach their relevant audience because Foxtel may not alter the broadcast. In addition, Foxtel pays equitable remuneration as determined by the Copyright Tribunal to Screenrights to distribute to the underlying rights holders and the retransmission must occur in the same licence area as the original transmission<sup>24</sup>.

The retransmission of free-to-air broadcasts on Foxtel has been successfully achieved over time through commercial negotiation with commercial and national broadcasters and we believe there is no case for altering current legislative arrangements.

The commercial free-to-air broadcasting industry is the main proponent of changes to current retransmission arrangements, suggesting the implementation in Australia of a technology-neutral scheme based on United States-style 'must-carry' arrangements under which broadcasters can elect to either:

- require that free-to-air services are carried on a cable television provider's platform (referred to below as the 'must carry rule'); or
- require that the free-to-air broadcaster is remunerated directly where the cable provider chooses to retransmit the signal (referred to below as 'retransmission consent' arrangements).

Free TV Australia, the industry group for commercial free-to-air broadcasters, appears to be mostly concerned about new entertainment services such as IPTV and internet television using its members' signals outside the current retransmission scheme; and, the ongoing access of its members to homes in the NBN-environment where it is concerned IPTV services may be become dominant.<sup>25</sup>

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<sup>21</sup> Free-to-air broadcasters are significant owners of underlying rights themselves and currently receive a substantial proportion of the payments made under Part VC of the Copyright Act.

<sup>22</sup> Australian Government, *Convergence Review – Final Report*, March 2012, page 33.

<sup>23</sup> Issues Paper, page 61.

<sup>24</sup> *Broadcasting Services Act 1992* (Cth), s 212.

<sup>25</sup> For example, see submissions from Free TV Australia to the Convergence Review Committee in February 2012—available at [http://www.freetv.com.au/media/submissions/2012\\_0003\\_SUB\\_FINAL\\_Convergence\\_Review.pdf](http://www.freetv.com.au/media/submissions/2012_0003_SUB_FINAL_Convergence_Review.pdf).

Leaving aside the fact that free-to-air broadcasters already provide their content over the internet (for example, via services such as Plus7 and ninemsn video)—availability of which will only be enhanced by the roll-out of the NBN— in principle Foxtel is not opposed to an extension or clarification of the current retransmission arrangements to include retransmission by way of IPTV services.

However, the fact that the current scheme does not cover internet retransmissions is in no way a justification for moving from current arrangements for STV broadcasters to a must carry regime. As set out below, we submit that the ALRC should reject arguments that there are parallels between current Australian market conditions and those which led to the introduction of must carry arrangements in the US and/or the European arrangements. In addition, any decision in relation to retransmission by way of IPTV must not result in a change to a well established and fair framework.

### ***The US must carry regime***

In the US, the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (Cable Act) established a two-pronged retransmission regime under which every three years terrestrial broadcasters must elect between a must carry or retransmission consent regime.

The key objective of the scheme was to ensure that consumers could continue to receive free-to-air channels in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials.

In relation to retransmission consent, the US Federal Communications Commission notes that:

*Since 1934, broadcast stations that use the programming of other broadcast stations have been required to obtain the prior consent of the originating station. This requirement was made applicable to cable systems because the absence of this requirement was distorting the video marketplace and threatening the future of over-the-air television broadcasting.<sup>26</sup>*

This is very different from Australia, where the population currently has almost universal access to free-to-air terrestrial television (or has access via satellite) and the Government has spent a considerable amount of tax payers' money on programs to guarantee access after the digital switchover.<sup>27</sup> This Government support and policies that provide competitive protections to free-to-air broadcasters (such as anti-siphoning rules providing preferential access to sport) mean that Australian free-to-air broadcasters retain a very privileged position in the Australian marketplace.

Furthermore, to the extent that the US must carry rule was designed to address the situation where independent stations and affiliates of minor networks were not always carried by dominant cable providers—and so their access to local advertising markets may have been limited—again, this problem does not exist in Australia where local and national free-to-air services alike enjoy near universal access to homes.

### ***European retransmission regime***

Article 31 of the European Commission Universal Service Directive states that member states may impose must carry obligations on electronic communications networks used for the distribution of radio or

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<sup>26</sup> See the FCC website at <http://www.fcc.gov/guides/cable-carriage-broadcast-stations>.

<sup>27</sup> By the end of 2013, all free-to-air television signals will be switched from analogue to digital and Australian households will have access to improved quality digital signals from all terrestrial broadcasters. Unlike in the US, there is no evidence to suggest that there is a pattern of Australian consumers removing their antennas and therefore being unable to access terrestrial channels other than through STV services.

television broadcasters to the public "where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts".

We submit that this rationale of "universal accessibility" is a critical qualifying factor to the European regime that is not applicable in Australia. It cannot be said that a "significant number" of Australians rely on STV broadcasters as the "principal means" to receive television broadcasts in circumstances where terrestrial penetration remains near universal and STV penetration is approximately 35% of the Australian population.

Further, Article 31 states that must-carry obligations "shall only be imposed where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent". This reflects the principle of regulatory forbearance and that further regulation should not be introduced unless there are sound public policy rationales for doing so.

In summary, we submit that the commercial and regulatory environments of the Australian media industry are significantly different to those in other jurisdictions—especially the US—and that it is inappropriate and erroneous to draw comparisons to justify an overhaul of retransmission rules.

### **Fair Use and other proposed new exceptions (Questions 11 - 18 and Questions 44 - 53)**

The existing exceptions under the Copyright Act are well established. As noted by the ALRC in its Issues Paper, the 'socially useful' exceptions for the purposes of research and study, criticism and review, reporting the news and the administration of justice are long-established exceptions.<sup>28</sup> The newer parody and satire and time and format shifting exceptions were introduced, following extensive consultation, in 2006.

As a general comment, we are concerned that a number of questions identified by the ALRC in the Issues Paper relate to the introduction of specific new exceptions or a new US-style "fair use" exception, without any consideration of how copyright protections could be strengthened in the face of the tide of Internet piracy. That said, our particular concerns with the various possible new exceptions canvassed in the Issues Paper are outlined below.

#### ***Fair Use***

We strongly oppose the introduction of a broad US-style "fair use" exception. As noted in the Issues Paper, this issue was considered as recently as 2005 pursuant to the Australian Government's 2005 Fair Use review.

Australian copyright law sets a fair and finely struck balance between the rights of rights holders and those of end users. In our view, there needs to be clear and indisputable evidence to justify upsetting this balance. We submit that there is no evidence that a broader "fair use" or "reasonable use" test is needed in order for Australian copyright law to keep pace with technological developments. As we discuss below in the context of social networking, companies like Google and Facebook have very successfully established their Australian operations within the bounds of the existing regime. We also note that the UK Hargreaves inquiry found that *'the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated'*<sup>29</sup>.

The UK Hargreaves enquiry considered this issue at length and ultimately recommended that the UK not introduce a fair use exception into UK law. The Hargreaves inquiry ultimately reached its decision not to recommend "fair use" based on *'the economic benefits of a more adaptive copyright regime...and because there are genuine legal doubts about the viability of a US case law based legal mechanism in a*

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<sup>28</sup> Issues Paper, page 15.

<sup>29</sup> I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011), page 45.

*European context*<sup>30</sup>. We submit that these conclusions are equally applicable in the Australian context. These findings are also consistent with those of the 1998 CLRC simplification review that fair dealing is more adaptable to changing technologies and more precise and recognisable than fair use.<sup>31</sup>

The existing Australian defences are well established and supported by legal precedent established over many years. Dr George Barker notes that the current Australian exceptions to copyright are limited to areas where there may be associated public benefits, for example in research or study, criticism or review.<sup>32</sup> Broadening the exceptions to areas without public benefits would imply imposing costs in areas without commensurate public benefits.<sup>33</sup>

A weakening of the copyright law via the introduction of ill defined exceptions and safe harbours would have significant negative economic costs and little or no benefit.<sup>34</sup> Dr Barker refers to Singapore which adopted the fair use system adopted in the US to replace the Australian or European style laws in force. Research illustrates that prior to the introduction of the fair use laws, Singapore copyright industries had an average growth rate of 14.16% however this slowed to 6.68% for the period after the amendments were introduced.<sup>35</sup>

Foxtel is concerned that the scope of a broad “fair use” exception would be wide, vague and uncertain. It would require continual testing by way of expensive and time consuming litigation to establish its boundaries. It would significantly erode the scope of copyright protection, which is so critical in protecting investment in Australia’s cultural industries.

In the absence of clear compelling evidence of the benefit of a broad “fair use” exception, and without properly considering at the same time how copyright protections can be strengthened in the digital environment, Foxtel does not support the introduction of a fair use defence or any new specific exceptions. Australian copyright law sets a fair and finely struck balance between the rights of rights holders and those of end users. To protect creative innovation and encourage investment, that balance must be maintained unless there is clear evidence of the benefits offered by any new exception.

### ***Online use for social, private or domestic purposes***

We are concerned that the premise of questions 12 and 13 appear to accept that there are legitimate “non-commercial” uses of copyright works on the Internet which infringe copyright.

The development of digital technologies has made it increasingly easy for consumers to make (often unauthorised) digital copies of broadcast content and subsequently make that content available online. This fact does not create a reason for justifying what would otherwise be an illegal use. Content that Foxtel has the exclusive right to distribute in Australia is increasingly being made available online via social networking websites and other online platforms. However, it is fundamental to the effective operation of copyright that the rights holder continues to control use of their work in the digital environment.

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<sup>30</sup> Ibid, page 52

<sup>31</sup> Issues Paper, page 75.

<sup>32</sup> Barker, Dr George R (26 November 2012): “*Estimating the Economic Effects of Fair Use and Other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*” (the **Barker Paper**), page 10 – available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2180769](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180769).

<sup>33</sup> Barker Paper, page 10.

<sup>34</sup> Barker Paper. Page 26.

<sup>35</sup> R Ghafele & B. Gilbert (2012) The Economic Value of Fair Use Counterfactual Impact Analysis In Singapore, Oxfirst at page 6 available at: [http://works.bepress.com/roya\\_ghafele/12](http://works.bepress.com/roya_ghafele/12)

Given communications via the Internet (particularly social networking websites) are increasingly monetised, we query whether use of copyright works in a digital context can ever truly be non-commercial. Facebook and Google (operator of YouTube) are huge multinational corporations that principally earn revenue in respect of their social networking websites through advertising. Further, Facebook and YouTube have clearly been able to establish their (very successful) operations in Australia within the scope of the current exceptions provided for in the Act.

Foxtel therefore believes that, as per the existing provisions of the Act, communications of copyright works via the Internet can only be legitimate if they are:

- authorised by the copyright owner (as frequently occurs when a copyright owner uploads their copyright material to a social networking website pursuant to the terms and conditions of that website); or
- covered by one of the existing fair dealing or other exceptions in the Act.

Otherwise, Foxtel submits that the balance will swing too far in favour of those who profit from consumer use of social networking services and unreasonably prejudice the legitimate interests of copyright owners and distributors.

### ***Transformative Use***

We do not support the introduction of an exception for transformative use. It is the copyright holder's exclusive right to allow reproduction or an adaptation of a work. It is not appropriate to impede this right simply because digital technologies make it easier to create ancillary works.

We also believe that there is no demonstrated need for an exception for transformative use. As the ALRC correctly identifies, many so called "transformative" uses may already be within the scope of the existing fair dealing defences, such as fair dealing for the purpose of parody and satire.<sup>36</sup> It is entirely appropriate that consumers and businesses who wish to make use of a substantial part of a work, for a purpose that is not covered by one of the existing exceptions, obtain permission to do so.

In relation to question 16, we submit that the concept of a '*publicly available work*' is problematic. Rights holders rarely make their works freely available for unrestricted use. A concept of this nature may validate (incorrect) consumer perceptions that works accessible via digital technologies are freely available to consumers to use as they see fit, which is rarely the case.

For the reasons explained above, the concept of '*non-commercial use*' in the digital environment is a misnomer. While an individual may create a "mash up" of content purely with the intention that it is for personal use, it is increasingly likely that such content may then be uploaded to a social networking website or other publicly available website which contains advertising. In such circumstances, social networking and other websites would receive revenue from the use of the content at the expense of rights holders.

### **Contracting Out (Questions 54 and 55)**

Consistent with Principle 2 of the ALRC's Guiding Principles for reform, Foxtel strongly believes that to encourage and protect creative investment, content owners should be free to determine the terms on which their content is distributed. Accordingly, we would be concerned if the Act were to be amended to prevent contracting out of some or all of the copyright exceptions, or if the Act were to be amended to make agreements that purport to do so unenforceable.

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<sup>36</sup> Issues Paper, page 37.

Freedom of contract is fundamental to commercial negotiations. We submit that if two parties acting rationally agree that the terms of their bargain should override the parties' rights at law, then parties should be free to do so except in exceptional circumstances.

It is not our usual practice to contract out of the statutory exceptions to copyright. However, the agreements under which we licence copyright materials to and from others are highly detailed and reflect the complexities of the audiovisual content market in which we operate. These negotiated agreements, tailored to our particular business needs and complexities, offer Foxtel and our counterparties greater certainty than the broad statutory exceptions. In these circumstances, we do not support an amendment to the Act which would effectively result in the generic statutory exceptions taking precedence over business specific commercial agreements, or worse, such agreements becoming unenforceable.

## **PART C: RESPONSES TO QUESTIONS IN THE ISSUES PAPER**

### **The Inquiry**

**Question 1.** The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;
- (b) affects the introduction of new or innovative business models;
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or
- (d) places Australia at a competitive disadvantage internationally.

As key participants in the digital economy, Foxtel and other content owners are being adversely affected by the failure of copyright law to prevent online piracy via peer to peer networks or streaming services.

Piracy undermines the investment of content owners in the production and distribution of content, which affects our ability to support Australian jobs in the sector. Without strong copyright protections businesses may be less willing to continue investing and to take a risk on new and innovative services, thereby reducing benefits that would otherwise flow to consumers.

Foxtel strongly supports the introduction of a code of practice for dealing with ISP customers engaging in piracy. The Code should provide for a series of graduated responses, starting with educational notices to infringers. Foxtel also seeks legislative reform to provide Courts with the power to order ISPs to block specific sites.

If Australia continues to provide fewer copyright protections than other jurisdictions, investment and talent will go offshore, with negative economic and cultural impacts. In addition, overseas content owners may refuse to license content to Australian providers if their interests will not be adequately protected.

### **Guiding principles for reform**

**Question 2.** What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Foxtel agrees with the ALRC that:

- Copyright law should provide incentives for innovation in technologies and access to content—but that access should allow content creators to obtain a fair return on investment.
- Reforms should encourage innovation and competition and not disadvantage Australia internationally.
- Reforms should recognise the interests of rights holders and be consistent with international obligations.
- Reforms should recognise 'real world' consumer behaviour—but this does not mean that copyright theft should be condoned or normalised.

- Reform should provide clarity and certainty for all stakeholders.

Foxtel also believes that:

- Copyright law should not impede the development of knowledge or freedom of political communication, but this should not be used to justify the theft of copyright material for entertainment and the free-riding of commercial entities on the investment of copyright owners.
- The Inquiry should distinguish personal use and social use of copyright material, where social use which is not licensed by the copyright owner frequently provides commercial advantage to owners of social platforms.
- To encourage and protect creative investment, content owners should be free to determine the terms on which their content is distributed.
- Flexibility should be encouraged so as to facilitate innovation in the exploitation of rights, but must be balanced with the need for certainty.
- Before legislative action, there must be clear evidence that intervention is warranted and economic analysis of the impact on all interested parties must be undertaken.

### Caching, indexing and other internet functions

**Question 3.** What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Foxtel is not aware of any evidence that internet-related functions are being impeded by Australia's copyright laws.

**Question 4.** Should the Copyright Act 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

In the absence of clear evidence of a problem requiring redress, Foxtel does not support the introduction of a broad exception for uses related to the internet.

### Cloud computing

**Question 5.** Is Australian copyright law impeding the development or delivery of cloud computing services?

Foxtel does not believe that Australian copyright law is impeding the development or delivery of legitimate cloud computing services.

It is the rights holder's exclusive right to authorise a reproduction or communication of a copyright work. Commercial cloud computing services are legitimate when they are authorised by the relevant rights holder. This balance should be maintained. It would be inequitable if commercial cloud computing services operating without rights holders' permission were to profit at rights holders' expense.

**Question 6.** Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?

There is no demonstrated need for a new exception for cloud computing services.

### Copying for private use

**Question 7.** Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?

Foxtel understands the Government's desire to ensure that Australian copyright law keeps pace with legitimate consumer practices. However, simply because technology is available to enable easy copying of copyright material does not mean that the law should be updated to legalise all infringing conduct.

The Copyright Act already contains time shifting and format shifting exceptions to enable more convenient use of broadcast copyright material by consumers. The balance between rights holders'

interests and consumers' interests was carefully considered at the time of introduction of these exceptions and should be maintained. Rights holders should be able to determine the end users' terms of use.

Providing consumers with broader rights to copy materials is likely to undermine the ability for content distributors to monetise their content and extract value from distribution windows.

**Question 8.** The format shifting exceptions in the Copyright Act 1968 (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?

Foxtel supports the principle of technological neutrality and believes that simplification of the Copyright Act, where possible without upsetting the balance struck under the Act, is in the best interests of industry and consumers.

Subject to the precise terms of the proposed new exception, Foxtel would welcome the replacement of the four separate format shifting exceptions with a single exception. However, it is important that any new exception is precise and not drafted too widely; otherwise it may impact on rights holders' ability to monetise their content.

In particular, Foxtel would be concerned if a broad "digital-to-digital" exception were to be introduced in respect of cinematograph films. Any relaxation of the laws in this respect may ultimately result in the facilitation of further online piracy.

**Question 9.** The time shifting exception in s 111 of the Copyright Act 1968 (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:

- (a) should it matter who makes the recording, if the recording is only for private or domestic use; and
- (b) should the exception apply to content made available using the internet or internet protocol television?

Who makes the recording is critically important. If the recording is not made by a private individual, rights holders' ability to monetise their content may be seriously prejudiced.

There is no justification for expanding the scope of the current exception. It would be inequitable if commercial entities with no interest in the underlying content were to profit from exploiting any expansion of the current exception.

**Question 10.** Should the Copyright Act 1968 (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

It is important that any amendment to the Act in relation to back-ups applies only to the extent that the person is authorised by the rights holder to retain a copy of the copyright material.

Foxtel makes certain content available to its subscribers to stream or download for a limited period of time. The length of time content is available for such purposes is usually determined by the content owner. If an exception were introduced that allowed Foxtel's subscribers to make back-up copies of such content, this would conflict with Foxtel's and/or the rights holder's ability to exploit that content at a later time.

## Online use for social, private or domestic purposes

**Question 11.** How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?

The development of digital technologies has made it increasingly easy for consumers to make (often unauthorised) digital copies of broadcast content and subsequently make that content available online. Foxtel is aware that content it has the right to distribute in Australia is increasingly being made available online via social networking websites and other online platforms.

Online communications are increasingly monetised and where the content is made available online, it is usually through websites which contain advertising. The result is that operators of social networking sites and other online platforms profit at the expense of copyright owners and distributors.

**Question 12.** Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?

Foxtel strongly opposes the introduction of any exception for online use of copyright material without licence.

Under Australia law it is the copyright owner's exclusive right to communicate their copyright work to the public via the Internet. Copyright owners can and do elect to make their content available via social networking platforms, but it is fundamental to the principle of copyright that it is the rights holder's right to choose whether their content is made available in this way or not.

**Question 13.** How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

For the reasons explained in response to question 12, Foxtel strongly opposes the introduction of any exception for online use of copyright material. This is the case irrespective of whether such an exception applies for social, private or domestic use.

In the digital environment, Foxtel queries whether communication of copyright works via the Internet can truly be non-commercial, private or domestic.

In all the circumstances, Foxtel submits that any exception for online use of copyright materials would unreasonably prejudice the legitimate interests of copyright owners and such a test is too broad and uncertain to provide any comfort to rights holders.

## Transformative use

**Question 14.** How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

No comment.

**Question 15.** Should the use of copyright materials in transformative uses be more freely permitted? Should the Copyright Act 1968 (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?

There is no demonstrated need for an exception for transformative use. As the ALRC has identified, many so called "transformative" uses, may already be within the scope of the existing fair dealing defences, such as fair dealing for the purpose of parody and satire.

It is the copyright holder's exclusive right to allow reproduction or an adaptation of a work. It is not appropriate to impede this right simply because digital technologies make it easier to create ancillary works.

It is entirely appropriate that consumers and businesses who wish to make use of a work for this purpose obtain the permission of the rights holder to do so.

**Question 16.** How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?

Foxtel does not support the introduction of an exception for transformative use.

The concept of a '*publicly available work*' is problematic. Rights holders rarely make their works freely available for unrestricted use. A concept of this nature may validate (incorrect) consumer perceptions that works accessible via digital technologies are freely available to consumers to use as they see fit, which is rarely the case.

**Question 17.** Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?

There is no demonstrated need for an exception for transformative use.

The concept of 'non-commercial use' in the digital environment is a misnomer. While an individual may create a "mash up" of content purely with the intention that it is for personal use, it is increasingly likely that such content may then be uploaded to a social networking website or other publicly available website which contains advertising. In such circumstances, social networking and other websites would receive revenue from the use of the content at the expense of rights holders.

**Question 18.** The Copyright Act 1968 (Cth) provides authors with three 'moral rights': a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?

No comment.

### **Libraries, archives and digitisation**

**Question 19.** What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?

No comment.

**Question 20.** Is s 200AB of the Copyright Act 1968 (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?

No comment.

**Question 21.** Should the Copyright Act 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

No comment.

**Question 22.** What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?

No comment.

## Orphan works

**Question 23.** How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?

No comment.

**Question 24.** Should the Copyright Act 1968 (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?

No comment.

## Data and text mining

**Question 25.** Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?

No comment.

**Question 26.** Should the Copyright Act 1968 (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?

No comment.

**Question 27.** Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?

No comment.

## Educational institutions

**Question 28.** Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?

Foxtel is supportive of a statutory licensing scheme for schools. However, Foxtel is aware that the current regime set out in part VA of the Act is open to exploitation by third parties and requires reassessment.

Part VA of the Act confers on schools a statutory licence to make a copy of a broadcast without infringing the copyright in that broadcast (or the underlying copyright works), provided certain criteria are met. Third parties may make the copy of the broadcast on behalf of the school, and the copy of the broadcast is not supposed to be made, sold, or otherwise supplied for a financial profit. However, Foxtel has recently encountered an instance whereby a third party is selling software to schools that do not subscribe to Foxtel, to enable those schools to make copies of Foxtel's subscription broadcasts. The copies themselves are allegedly not sold for a profit, but the software is. Foxtel is of the view that this is inconsistent with the intention of Part VA and there is sufficient nexus to the copying itself that it should be prohibited.

**Question 29.** Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

No comment.

**Question 30.** Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the Copyright Act 1968 (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception? Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?

Foxtel does not support the introduction of a free-use exception, for the reasons explained in response to question 52.

**Question 31.** Should the exceptions in the Copyright Act 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

For the reasons explained in response to question 28, Foxtel submits that Part VA of the Act requires amendment to clarify that the statutory licence in respect of subscription broadcasting services and subscription narrowcasting services is only available to schools that are legally entitled to access such broadcasts.

### **Crown use of copyright material**

**Question 32.** Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?

No comment.

**Question 33.** How does the Copyright Act 1968 (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?

No comment.

**Question 34.** Should there be an exception in the Copyright Act 1968 (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?

No comment.

### **Retransmission of free-to-air broadcasts**

**Question 35.** Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?

Foxtel strongly opposes any proposed amendment to the current retransmission rules, including the introduction of a US-style 'must carry' regime as called for by Free TV Australia in its submission to the Convergence Review.

Foxtel has retransmitted free-to-air broadcasts for many years and is well placed to respond to the ALRC's inquiry in respect of retransmission. Foxtel believes that the current regime works well and there is no justification for legislative reform.

Retransmission is an extremely limited right, which only enables Foxtel to retransmit free-to-air broadcasts simultaneously with their terrestrial broadcast, in the licence area and in an unaltered fashion. Foxtel retransmits certain free-to-air broadcasts for the convenience of its subscribers being able to access those channels through the one service. However, not all Foxtel subscribers have access to all retransmitted channels.

The commercial broadcasters are ultimately remunerated for Foxtel's retransmission of their broadcasts, as viewing of retransmitted broadcasts is taken into account in measuring ratings, which play a large role

in determining advertising revenue. The commercial and national broadcasters are also often the underlying rights holders, in which case they are also eligible for disbursements from Screenrights, the collecting society for the equitable remuneration paid by retransmitters.

Whereas the commercial broadcasters' primary source of revenue is advertising, Foxtel's business is a subscription model. Foxtel does not charge its subscribers to access retransmitted free-to-air broadcasts through the Foxtel service.

Foxtel submits that it would be entirely inappropriate and unfounded to introduce a US-style "must carry" regime. The key objective for enactment of the retransmission regime in the US was to ensure that consumers could continue to receive signals in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials. This is different from Australia, where almost 99% of the population has access to free-to-air television and the Government has spent a considerable amount of tax payers' money on programs to ensure that Australians receive television either via aerial or satellite. Moreover, cable and satellite penetration in the US is now over 90% and significantly higher than STV penetration in Australia.

Free TV's submission in respect of the European retransmission regime is also based on a seriously erroneous comparative analysis. EU member states may impose must carry obligations "*where a significant number of end-users of such networks use them as the principal means to receive radio and television broadcasts*". It simply cannot be said that a "significant number" of Australians rely on STV broadcasters to receive free-to-air channels in circumstances where terrestrial penetration remains at almost 99% of Australian households and STV penetration is approximately 35% of the Australian population.

In all the circumstances and particularly where the commercial broadcasters are ultimately remunerated for STV retransmissions, Foxtel submits that there is no justification for any amendment to the current retransmission regime.

**Question 36** Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

In principle Foxtel is not opposed to extension of the current rules to include retransmission over the Internet, but submits that this is an issue of broadcast policy rather than copyright and therefore should be outside the scope of the ALRC's inquiry.

**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?

This is a complex issue that has implications for the regulatory regime for IPTV and OTT providers. Essentially this issue is one of broadcast regulatory policy and not copyright. As such, Foxtel submits that this issue would be better considered by the Australian Government in a more holistic forum.

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

For the reasons explained in response to question 35, Foxtel does not believe that any consideration of retransmission arrangements is currently warranted, whether by way of the ALRC's inquiry or in another forum.

**Question 39.** What implications for copyright law reform arise from recommendations of the Convergence Review?

The Convergence Review recommended greater regulatory intervention in relation to investment in Australian content. Foxtel and our STV partners already produce a significant amount of Australian content and do not consider this expansion is warranted.

However, to the extent that there are regulatory obligations to invest in Australian content these should be matched by protections from the theft of that content and acquired content which is purchased at significant cost. Failure to address this problem will undermine the confidence and ability of Australian content providers to invest, which will ultimately be to the detriment of consumers.

### Statutory licences in the digital environment

**Question 40.** What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?

No comment.

**Question 41.** How can the Copyright Act 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

No comment.

**Question 42.** Should the Copyright Act 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

No comment.

**Question 43.** Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?

No comment.

**Question 44.** Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?

Foxtel does not support the introduction of a free-use exception, for the reasons explained in response to question 52.

### Fair dealing exceptions

**Question 45.** The Copyright Act 1968 (Cth) provides fair dealing exceptions for the purposes of:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news; and
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.

What problems, if any, are there with any of these fair dealing exceptions in the digital environment?

Foxtel is not aware of any problems associated with these fair dealing exceptions.

**Question 46.** How could the fair dealing exceptions be usefully simplified?

Foxtel believes that simplification of the Copyright Act, where possible without upsetting the balance struck under the Act, is in the best interests of industry and consumers.

Accordingly, Foxtel would be supportive of the rationalisation of the various fair dealing defences for different categories of works into overarching exceptions based on the established principles, provided the exceptions are carefully drafted so as not to further expand the scope of the exceptions.

**Question 47.** Should the Copyright Act 1968 (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?

Australian copyright law sets a fair and finely struck balance between the rights of rights holders and those of end users.

The current exceptions under the Act are well-established and for socially useful purposes.

There must be a clear and demonstrated need for the introduction of a new exception, and Foxtel does not believe that any new fair dealing defences are currently justified.

#### **Other free-use exceptions**

**Question 48.** What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

No comment.

**Question 49.** Should any specific exceptions be removed from the Copyright Act 1968 (Cth)?

No comment.

**Question 50.** Should any other specific exceptions be introduced to the Copyright Act 1968 (Cth)?

In the absence of clear compelling evidence, Foxtel does not support the encroachment of rights holders' rights through the introduction of any new specific exceptions.

Australian copyright law sets a fair and finely struck balance between the rights of rights holders and those of end users. To protect creative innovation and encourage investment, that balance must be maintained unless there is clear evidence of the benefits offered by any new exception.

**Question 51.** How can the free-use exceptions in the Copyright Act 1968 (Cth) be simplified and better structured?

No comment.

#### **Fair use**

**Question 52.** Should the Copyright Act 1968 (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on 'fairness', 'reasonableness' or something else?

Foxtel does not support the introduction of a broad "fair use" defence.

Australian copyright law sets a fair and finely struck balance between the rights of rights holders and those of end users. There needs to be clear and indisputable evidence to justify upsetting this balance. There is no evidence that a broader "fair use" or "reasonable use" test is needed in order for Australian copyright law to keep pace with technological developments.

The existing defences are well established and supported by legal precedent established over many years. On the contrary, the scope of a broad "fair use" exception would be wide, vague and uncertain. It would require continual testing by way of expensive and time consuming litigation to establish its boundaries.

The UK Hargreaves enquiry considered this issue at length and ultimately recommended that the UK not introduce a fair use exception into UK law. Foxtel submits that this is the correct position.

**Question 53.** Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?

Foxtel does not support the introduction of a broad "fair use" defence.

The existing exceptions are well established and their scope is relatively clear. There is no justification for replacing years of jurisprudence with a new, entirely untested regime.

#### **Contracting out**

**Question 54.** Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Freedom of contract is a fundamental to commercial negotiations. If two parties acting rationally agree that the terms of their bargain should override the parties' rights at law, then the parties should be free to do so.

Negotiated contract terms offer parties greater certainty in their specific circumstances than the relatively broad statutory exception.

To encourage and protect creative investment, it is critical that content owners are free to determine the terms on which their content is distributed.

**Question 55.** Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

Foxtel does not support an amendment to the Act to prevent contracting out of any copyright exceptions, for the reasons explained in response to question 54.

An amendment of this nature may undermine commercial agreements between parties which have been designed to address their specific business needs.