

2 August 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Email: copyright@alrc.gov.au

Dear Ms Wynn

COPYRIGHT AND THE DIGITAL ECONOMY DISCUSSION PAPER

Please find attached the submission on behalf of Fetch TV Pty Ltd in respect of the ALRC Discussion Paper Copyright and the Digital Economy.

I note that the Commission very kindly granted Fetch TV an extension of time for the delivery of the submission given my work commitments overseas.

Please do not hesitate to contact me should you wish to discuss any matter further.

Yours sincerely



SCOTT LORSON
Chief Executive Office
FETCH TV



Fetch TV Pty Ltd
Level 5, 61 Lavender Street Milsons Point NSW 2061 Australia **ABN:** 136 130 669 50C
Phone: +61 (0)2 8014 5180 **Fax:** +61 (0)2 9929 7339 **Web:** fetchtv.com.au

1. Introduction

1.1 FetchTV Pty Limited (**FetchTV**) welcomes the opportunity to provide this written submission in response to the Copyright and the Digital Economy Discussion paper (**Discussion Paper**).

1.2 This submission addresses the proposals and questions contained in Chapter 15 of the Discussion Paper.

2. FetchTV's service

2.1 FetchTV is a relatively new entrant to the Australian media landscape, having commenced operations in July 2010.

2.2 FetchTV supplies subscription television services, for which it has subscription television licences under the *Broadcasting Services Act (BSA)*, to Internet Service Providers (**ISPs**), including iiNet, Optus, Internode, Adam and TransACT, who then supply the FetchTV services to the ISP's subscribers.

2.3 The FetchTV service is comprised of:

- (a) audio visual services in the form of both subscription linear channels and on demand content;
- (b) access to free to air television broadcasts available at the subscriber's home;
- (c) the ability to record television programs; and
- (d) access to internet based contents, such as the ABC iView and YouTube through TV applications.

2.4 To receive the FetchTV service, subscribers connect a Set Top Box (**STB**) to a broadband service which enables access to an electronic program guide, linear and on demand audio visual services, internet based applications and recording facilities. Free to Air (**FTA**) broadcasts are accessed through three receivers contained in the STB.

2.5 The FetchTV service is often referred to as an IPTV service. While that is correct, the term "IPTV" covers a broad range of delivery services which differ significantly in substance.

2.6 From a technical perspective, the majority of subscribers to the FetchTV service receive their service through a private, closed network of the kind described by David Brennan in the article noted in Footnote 119 of the Discussion Paper. A small number of subscribers receive

the FetchTV service via an Over the Top (OTT) service in the second manner referred to in paragraph 15.140 of the Discussion Paper.

- 2.7 Additionally, subscribers to the FetchTV service can use their FetchTV STB to watch and record FTA television programs. At present, this is accomplished via the FTA tuners contained in the FetchTV STB receiving FTA signals, as would a normal television set, and the subscribers selecting and recording programs onto a hard drive contained in the FetchTV STB. That is, FetchTV does not currently retransmit FTA across its network.

3. Proposal 15-1 - Retention of the retransmission Scheme

- 3.1 FetchTV submits that Option 2 is the preferable option.
- 3.2 The ability of new market entrants to rely on the retransmission scheme is very important. The ability to retransmit FTA broadcasts assists new players to offer a more complete range of services, augmented by FTA broadcasts. FetchTV acknowledges that this consideration gives rise to international copyright, competition and broadcasting issues. Nonetheless, an important consideration in copyright is the extent of the monopoly granted to copyright owners.
- 3.3 FetchTV does not consider that this constitutes a fear of "free" riding by retransmitters. Given that the extent of additional viewing of a retransmitted service is captured by the ratings agency appointed by the FTA broadcasters at the subscriber end, that additional viewing is converted by those FTA broadcasters into advertising revenue. With respect to the underlying rights holders, the existing Part VC scheme appropriately compensates those rights holders.
- 3.4 While Fetch TV acknowledges that its service is made more attractive through the availability of FTA broadcasts, this availability already exists in that the inclusion of FTA receivers in the FetchTV STB allows subscribers access to FTA broadcasts without reliance on Part VC of the *Copyright Act*.
- 3.5 FetchTV opposes Option 1. A relatively small player like FetchTV is highly unlikely to be able to negotiate the range of licenses required to retransmit a FTA broadcast. Further, given the increasingly concentrated nature of the Australian media landscape, the protection of self-interests may make the acquisition of necessary licences impossible.
- 3.6 Should Option 2 be followed, FetchTV's primary position is that the Part VC scheme appropriately compensates relevant owners.

3.7 However, FetchTV would not oppose the replacement of the current Part VC scheme with a statutory licence scheme which sets reasonable licence fees for both broadcasters and underlying rights holders, taking into account that each are remunerated through other means.

4. Proposal 15-2 - Retention of the Internet exclusion

4.1 FetchTV submits that the internet exclusion should be maintained.

4.2 Delivery via the open, public internet is significantly different to delivery by other forms of transmission and involves significant risks for copyright owners as well as significant challenges for broadcasting policy.

4.3 Transmission over the public internet involves the following risks:

- (a) there is a significantly greater risk of illicit copying and distribution of content delivered over the open internet;
- (b) while geoblocking technologies are available, they are not 100% effective;
- (c) current broadcasting regulation operates on a geographical licence area basis which cannot be implemented when delivered over the public internet; and
- (d) again from a broadcasting regulatory perspective, a number of foundations of broadcasting policy, such as local content and limitations on reach of commercial television broadcasters, would be seriously undermined by permitting unrestricted transmission of FTA broadcasts over the Internet.

5. Proposal 15-3 - Clarification of the Internet exclusion

5.1 FetchTV strongly supports clarification of the internet exclusion. FetchTV agrees with the ALRC that the lack of a definition of "the Internet" introduces uncertainty into the retransmission exception both in the copyright and broadcasting contexts. Although outside the scope of the ALRC's review, this lack of clarity also impacts the BSA.

5.2 The difficulty arises at a conceptual level. The "Internet" is essentially the physical, interlinked network of telecommunications networks. Parts of those telecommunications networks are simultaneously used for a number of purposes, including delivery of information over or via the Internet. However it is important to differentiate between traffic which travels over those physical elements across the network of networks from other communications which may travel over parts of those physical elements (such as a telephone call travelling over copper pair wires into a residential home) which is clearly not travelling over the public Internet.

5.3 As noted above, FetchTV operates a service which is primarily delivered over closed, managed IP-based networks. This kind of service, whilst sharing some characteristics such as the employment of packet based communications protocols, is fundamentally different to services supplied using the public internet (referred to as "Over the Top" or "OTT"). FetchTV submits that the policy bases for excluding retransmission over the public internet remain as valid today as they did when the internet retransmission exception was introduced.

5.4 FetchTV submits that a clarified exclusion should contain the following features:

- (a) it should be certain and not rely on general terms, such as "the Internet" or "IPTV", which are capable of differing and evolving interpretations;
- (b) the exclusion should be technology neutral in terms of delivery method, meaning it should:
 - (i) be neutral as to the delivery technology, i.e. wired, wireless, satellite or fibre;
 - (ii) be neutral as to the method of coding technology, i.e. IP, DVB or radio frequency (RF);
 - (iii) neutral as to the method of packet transmission i.e. unicast, multicast or broadcast;
 - (iv) exclude delivery which cannot be geographically limited;
 - (v) require that appropriate protections from pirating of signals;
 - (vi) require that distribution only be to identifiable recipients

5.5 FetchTV considers that the simplest and most appropriate way of clarifying the exception is to amend s 135ZZJA of the Act so as to reflect the clarification referred to in the Free Trade Agreements entered into with the US subsequent to the US/Australian Free Trade Agreement.

5.6 By way of example, the Free Trade Agreement between the United States and South Korea states:

"... retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory does not constitute retransmission on the Internet."

5.7 As noted by the ALRC, there is a substantial overlap between the operation of the Part VC retransmission scheme and provisions of the regulatory scheme contained in the BSA. This overlap was also referred to by the Senate Committee on Effectiveness of Current Regulatory

Arrangements Dealing with Radio Simulcasts, which noted the interrelationship of these two areas.

- 5.8 While the ALRC's terms of reference do not extend to the broadcasting sphere, FetchTV considers that it is important that both regulatory regimes operate in parallel in respect of the retransmission. FetchTV submits that the ALRC should additionally recommend that to the extent it recommends a clarification to the internet exclusion, that a corresponding change to the BSA should also be made.

6. Further information

- 6.1 FetchTV would be very happy to expand on the material provided in this submission as the ALRC might find useful.

6.2 Contact Details:

Catherine Lee
General Counsel
Fetch TV
catherine@fetchtv.com.au
Level 5, 61 Lavender Street
MILSONS POINT NSW

Forma