



COPYRIGHT AND THE DIGITAL ECONOMY
FOXTEL RESPONSE TO ALRC DISCUSSION PAPER 79
JULY 2013

INTRODUCTION

Foxtel welcomes the opportunity to make a submission to the Australian Law Reform Commission (**ALRC**) in response to its discussion paper number 79, *Copyright and the Digital Economy*, dated May 2013 (**Discussion Paper**).

Foxtel's submission is focused on the issues of most concern to Foxtel in the Discussion Paper. It does not respond to every proposal and question in the Discussion Paper.

Foxtel's submission is structured as follows:

1. Retransmission of free-to-air (**FTA**) broadcasts (Chapter 15 of the Discussion Paper).
2. The case for fair use in Australia (Chapter 4 of the Discussion Paper).
3. Third parties and private and domestic use (Chapters 5 and 9 of the Discussion Paper).
4. Contracting Out (Chapter 17 of the Discussion Paper).

EXECUTIVE SUMMARY

- Australian copyright law sets a fair and finely struck balance between the interests of rights holders and those of end users. To ensure ongoing investment, the existing balance must not be disrupted unless there is clear evidence of the benefits offered by any proposed amendments.
- Foxtel is strongly opposed to the introduction of a broad fair use defence. The introduction of such a broad exception is a radical change to the current law. Any such change can not be made in isolation without properly considering the costs of introducing this type of change and the flow on impact to both industry and consumers as a result of such a significant change.
- Foxtel is also strongly opposed to any changes to the current retransmission arrangements. Retransmission is an extremely limited right and the Copyright Tribunal of Australia has accepted that Foxtel retransmits the FTA services for the convenience of our subscribers.
- Foxtel also submits that circumstances do not exist which justify the imposition of a “must carry” regime in Australia and we take comfort from the ALRC not forming a view on this issue.
- **Retransmission**

Foxtel does not benefit commercially from its retransmission of FTA services—we do not advertise or promote the FTA services, less than 20% of Foxtel's customers receive all retransmitted FTA services, and we do not charge our subscribers a fee to access the retransmitted FTA channels through their Foxtel set top box.

We are very concerned that option 1—repealing current arrangements and allowing retransmission to be determined solely by consent—will be practically unworkable and will have the effect of eliminating retransmission in Australia. This will have a detrimental impact for Foxtel's customers without any corresponding benefits. We also do not accept that option 1 (or

option 2 for that matter) is necessary for the FTA broadcasters to gain control of their signals, as Foxtel is already required to enter into retransmission agreements with the FTA broadcasters in respect of retransmission and the FTA broadcasters exercise significant bargaining power in the negotiation of these agreements.

We believe that option 2—involving the introduction of a statutory licensing scheme for broadcast copyright—is purely about establishing an additional revenue stream for services that are required to be freely and universally available. FTA broadcasters are underlying rights holders in approximately one third of Screenrights distributions and, additionally, the commercial FTA broadcasters are remunerated for Foxtel's retransmission through advertising revenue. The administrative costs of option 2 will be significant and we expect that they will outweigh what we expect to be very modest distributions for broadcast copyright based on Screenrights' current practices.

Both options are unworkable, and we urge the ALRC to reconsider its position.

Fair Use

We remain strongly opposed to the introduction of a broad fair use defence in Australia.

We believe that fair use will introduce significant and unnecessary uncertainty into Australian law. The existing defences are well established and limited to specifically defined purposes. It will take many years to develop new precedents and the scope of fair use in Australia will need to be developed through the Courts, at rights holders' expense. We do not believe that copyright owners should have to incur significant litigation costs to protect their investments and to set the boundaries of new and uncertain law.

We are also very concerned that fair use will limit the scope of Australian copyright protection and allow unlicensed third parties to benefit at the expense of rights holders, at a time when there is clear evidence of unauthorised use of copyright materials by a significant proportion of the Australian population. We also believe that it is critical that the impact of this type of reform on transaction costs, innovation and economic growth must be assessed. Foxtel strongly believes that this type of reform will have a significant impact on creative outputs due to the uncertainties it will create.

In our view, the case for fair use in Australia has simply not been made out:

- Innovation – There is no compelling evidence that fair use assists innovation. Foxtel itself is an example of an Australian business that has successfully innovated within the bounds of the current regime.
- Flexibility – While fair use may offer flexibility, this will come at the expense of certainty and at a significant cost to Australia's creative industry.
- Restoration of balance – We do not accept that Australia's copyright framework needs to be re-balanced. Foxtel and many other Australian companies are increasingly offering their customers access to copyright materials on flexible terms and via many means.
- Consumer expectations – Australia's copyright laws must not be amended to normalise infringing conduct.

For these reasons, Foxtel is strongly opposed to the ALRC's recommendations in respect of fair use.

Third Parties and Private and Domestic Use

We do not support the ALRC's proposal to replace the time shifting exception in section 111 of the *Copyright Act 1968 (Act)* with a new and very broad fair dealing exception for private and domestic use.

There is no evidence the current regime is not operating effectively. We are very concerned that any amendment to allow third parties to make the recording on behalf of consumers will allow unlicensed entities to profit at the expense of those who have invested in the creation of Australian content.

Any amendment to the Act to allow copying must only apply where an individual has legally acquired a permanent copy of the copyright material, as any expansion of the copying exceptions poses a real risk of undermining subscription based business models and distribution windows.

Contracting Out

Foxtel also strongly opposes any prohibition on contracting out of fair use.

If fair use is introduced, the ability to contract out of fair use will be critically important as the uncertainty of fair use may be partially offset through the certainty of precise contractual terms.

In the case of consumer contracts, terms excluding fair use would still have to comply with existing consumer protection laws (including prohibitions on unfair contract terms). In the case of business contracts, we firmly believe that negotiated agreements tailored to particular business needs should take precedence over a broad statutory exception to copyright.

1. RETRANSMISSION OF FREE-TO-AIR BROADCASTS (CHAPTER 15)

Retransmission

Foxtel agrees with the ALRC that consideration of retransmission arrangements ‘...raises complex questions at the intersection of copyright and communications and media policy’.¹ As such, we urge the ALRC not to make copyright-focussed recommendations in isolation from these other policy considerations, and indeed the commercial context in which FTA channels are currently retransmitted on Foxtel.

We have set out below our comments in respect of the ALRC’s two options for reform. First though, we wish to make a number of comments about the need for a ‘must carry’ regime in Australia, as we understand that Free TV Australia, the industry group for the commercial FTA broadcasters, is continuing to call for the introduction of a must carry regime.

‘Must carry’ regime not required

Foxtel welcomes the ALRC’s conclusion that it should not make any proposal on whether a US-style ‘must carry’ regime—under which FTA broadcasters would be able to *require* that FTA broadcasts be retransmitted on other platforms—should be introduced.

While the ALRC has made this determination on the basis that must carry regimes are a matter of communications and media policy, and ‘*are not issues that can, or should, be driven by the ALRC in the context of reform of copyright laws*’,² Foxtel reiterates its view that such a regime is unnecessary in Australia, even if considered from another policy perspective.

As previously noted, must carry regimes are aimed at ensuring that consumers are able to access FTA television services, and that FTA broadcasters and advertisers are able to reach their target viewers. A must carry regime is unnecessary in Australia because both of these conditions already exist—local and national FTA services enjoy near universal access via terrestrial broadcasts and the Government funded Viewer Access Satellite Television Service.³

The circumstances that led to the introduction of a must carry regime in the US are very different to those of Australia in 2013. At the time that the US *Cable Television Consumer Protection and Competition Act of 1992* was enacted, over 60% of the US households received FTA television by means other than over the air broadcasts. The public policy rationale for must carry rules in the US remains much the same as today as they were when those laws were introduced. The policy rationale is, in summary, as follows:

- The cable industry had become vertically integrated and cable operators and cable programmers often had common ownership. This meant that cable operators had the incentive and ability to favour their affiliated programmers, which would have made it more difficult for non-cable affiliated programmers to secure carriage on cable systems. The US Federal Government wanted to ensure the provision of a fair, efficient and equitable distribution of broadcast television services through the “must carry” regime.

¹ Discussion Paper, para 15.3, page 300.

² Discussion Paper, para 15.156, page 327.

³ Furthermore, we concur with the more specific reasons submitted by Screenrights, and cited in the Discussion Paper on pages 336 and 327, that a must carry regime is not necessary in Australia, including because it would not be viable commercially to retransmit via satellite local signals to numerous small licence areas.

- Broadcast television was regarded as an important source of local news and public affairs programming and critical to an informed electorate. A must carry regime would ensure the continued distribution of those services.
- Broadcast television was and is supported by advertising revenue and cable television systems and broadcast television systems compete for television advertising revenues. As a result there was an economic incentive for cable systems to terminate retransmission arrangements and refuse to carry the services. This would mean that the economic viability of the local broadcast television services and their ability to originate quality local programming would be seriously jeopardised.
- Congress also had concerns that most subscribers to cable television systems did not maintain antennas to receive broadcast television services or have input selector switches to convert from cable to antenna reception systems, which would mean they would not otherwise be able to receive the broadcast television services if they ceased to be carried by the cable systems.
- Congress also noted that broadcast programming continued to be the most popular programming on cable systems and that cable systems obtained a commercial benefit from local broadcast signals via carriage of those services and also placement of cable programming adjacent to the off-air signals. This meant that television broadcasters were effectively subsidising the development of the cable systems and accordingly the Government needed to address an imbalance between the two industries.

We also note that this same rationale of ‘universal accessibility’ is a critical element in the European Commission Universal Service Directive. This Directive states that Member States may impose must carry obligations on electronic communications networks ‘*where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts*’. In summary, we submit that the commercial and regulatory environments of the Australian media industry are significantly different to those in other jurisdictions and that it is inappropriate and erroneous to draw comparisons to justify an overhaul of retransmission rules.

We set out below Foxtel’s views on the ALRC’s consideration of current arrangements, namely the free-use exception in relation to broadcast copyright and the remunerated exception in relation to underlying rights, and possible reform. First, however, it is important to consider current arrangements in their commercial context.

The commercial context of retransmission in Australia

Retransmission of FTA channels by Foxtel via cable or satellite must be simultaneous⁴ and unaltered with the terrestrial transmission and must only be made available in the same licence areas in which they are available off-air. Foxtel cannot make available out-of-area signals or delay the signals to in effect create different services to what are otherwise available to subscribers via their aerial.

Neither does Foxtel promote FTA channels as a reason to subscribe to satellite or cable services. Instead, we rely on our compelling offer of STV programming and functionality: a broad choice of STV programming genres and niche channels; a large suite of high definition

⁴ Or delayed until no later than the equivalent local time.

(HD) channels; and, technical innovations such as our iQ and MyStar personal video recorders (PVRs) and complementary smartphone and tablet apps.

The FTA channels appear in the Foxtel electronic program guide (EPG) only for the convenience of subscribers. Subscribers who have access to retransmitted terrestrial channels through their Foxtel set top box are merely accessing a FTA channel using the Foxtel remote control that they would otherwise be able to access via a terrestrial signal delivered to the same television, at the same time.

As the ALRC notes in the Discussion Paper, following a lengthy investigation into these matters the Copyright Tribunal has concluded that the benefits of retransmission to STV consumers are best described under the heading of 'convenience', being '*...the advantage to consumers of only having to use one remote control to access subscription and free-to-air channels*'.⁵ Foxtel strongly agrees with this conclusion of the Copyright Tribunal.

By contrast, there is significant benefit to FTA broadcasters where Foxtel retransmits their channels, as advertisers on FTA channels still reach their intended audience and these viewers are included in the 'ratings' data used by FTA networks to set advertising rates.

The submission that Foxtel does not place weight on the availability of FTA channels on our platform, but that FTA broadcasters do, is also evidenced by the fact that it is the commercial FTA networks and not Foxtel who fund the satellite capacity required to deliver their channels to Foxtel satellite households. Indeed, FTA retransmission via Foxtel satellite varies by geographic area according to whether or not FTA networks are prepared to fund transmission to that particular area.⁶ FTA networks choose to, but are not '*forced to pay*' fees to Foxtel for carriage of their services on the satellite as suggested by Free TV in its December 2012 submission to the ALRC.⁷

In the Discussion Paper the ALRC suggests that the current retransmission scheme can be seen as favouring certain commercial interests, namely those of STV providers. For example, the paper notes that:

*[s]ubscription television providers benefit commercially because they are able to provide free-to-air channels as part of their subscription packages without having to negotiate a commercial fee, or conditions, with broadcasters.*⁸

and:

*the retransmission scheme may simply provide subscription television platforms with additional content for their offerings at a lower cost than might be the case if a commercial agreement were required.*⁹

⁵ Discussion Paper, para 15.120, page 321.

⁶ For example, while all FTA standard definition channels are retransmitted to Sydney, Melbourne and Brisbane, they are not retransmitted via satellite to the other capitals or regional areas (presumably because they have smaller advertising markets). Also, other than ABC News 24, which is retransmitted via satellite in certain areas, no HD FTA channels are retransmitted via Foxtel satellite.

⁷ Free TV Australia, *Submission by Free TV Australia Limited – Australian Law Reform Commission – Copyright and the Digital Economy Issues Paper*, 10 December 2012, page 4 – available at http://www.freetv.com.au/media/submissions/ALRC_Copyright.pdf.

⁸ Discussion Paper, para 15.47, page 308.

Foxtel strongly disagrees with these comments. Foxtel retransmits the various FTA channels for the convenience of its subscribers but it does not include the FTA channels 'as part of its subscription packages'. Whether a customer receives a retransmitted FTA channel in addition to their subscription package will depend on a number of factors including their geographic location, whether they are a cable or satellite subscriber, and the type of set top box the customer has. Satellite retransmission was not introduced by Foxtel until 2002 for the commercial FTA services, despite the fact that Foxtel had been offering a satellite service since 1999 and Foxtel only retransmits the FTA services by satellite where the relevant FTA broadcaster reimburses Foxtel for the associated satellite transponder costs.

As at November 2011 just 16.2% of Foxtel's customers received all of the FTA channels as retransmitted services. The 83.8% of customers who did not receive all retransmitted FTA channels did not receive any discount on their subscription fees, as their subscription charge is for the subscription channels they receive, not any retransmitted FTA services that they may have the convenience of accessing through their set top box.

The ALRC's options for reform

Proposal 15-1

Option 1: The exception to broadcast copyright provided by the *Broadcasting Services Act 1992* (Cth), and applying to the retransmission of free-to-air broadcasts; and the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*, should be repealed. This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

Option 2: The exception to broadcast copyright provided by the *Broadcasting Services Act*, and applying to the retransmission of free-to-air broadcasts, should be repealed and replaced with a statutory licence.

Foxtel maintains its view that that there is no case for altering current rules governing retransmission of FTA broadcasts — they provide convenience for Foxtel subscribers while delivering value to FTA broadcasters without the costs involved in negotiating and administering new retransmission consent agreements or any other new legislative scheme.

Nonetheless, our comments on these options are provided below.

Option 1 – Let the market decide

The ALRC notes that allowing retransmission to be determined solely by consent would provide for the value of retransmission to be determined by the parties as part of regular commercial negotiations. The ALRC suggests this would allow FTA broadcasters control over their signals and STV providers choice about the signals they retransmit.¹⁰

Foxtel submits that the current arrangements already provide these benefits:

- FTA broadcasters control their signals because they determine what is transmitted and Foxtel must retransmit simultaneously with the original broadcast and is prohibited by law

⁹ Discussion Paper, para 15.47, page 308.

¹⁰ Discussion Paper, paras 15.53–15.54, page 309.

from altering the broadcast.¹¹ Foxtel has arrangements in place with all broadcasters of retransmitted services. These agreements put numerous obligations on Foxtel in respect of retransmission and therefore, from a practical perspective, the FTA broadcasters already exercise control of their signals.

- Foxtel already has a choice as to the signals it retransmits—there is no compulsion under the current regime for Foxtel to retransmit any FTA services (and Foxtel is opposed to the introduction of a must carry regime for the reasons outlined above and in its response to the Issues Paper).

Furthermore, while option 1 may initially seem like a straightforward option, there would be in practice a number of significant practical difficulties with this option.

In particular, if a commercial agreement were to be reached by a FTA broadcaster and a retransmitter, option 1 would put the onus on the FTA broadcaster to clear the underlying rights to permit retransmission. This is likely to be practically impossible. It would take significant time and resources for content to be cleared for this purpose given the volume of content comprised in a FTA channel. If the FTA broadcaster is not able to clear all content for the purposes of retransmission, then this content will need to be 'blacked-out' from the retransmitted feed and operational arrangements will need to be made with the retransmitter to facilitate this.

It is clear from the above that the implementation of option 1 is likely to have the practical effect of eliminating retransmission in Australia, which will be to the detriment of consumers—who would no longer have the convenience of FTA channels being available via the Foxtel EPG and a single remote control.

Option 2 – A remunerated exception for broadcast copyright

Under Option 2, the ALRC proposes retaining Part VC of the Act and also introducing a statutory licensing scheme for broadcast copyright. It proposes that this exception will be a remunerated exception and that equitable remuneration will be payable by retransmitters for use of the FTA broadcaster's copyright in their broadcast signal. The ALRC states that this will provide '*some recognition for broadcast copyright*'.¹²

While Foxtel supports the retention of Part VC of the Act, which is operating effectively, Foxtel strongly opposes the introduction of a statutory licensing scheme for broadcast copyright.

We note that the ALRC has observed that:

*Free-to-air broadcasters would not necessarily ask to be remunerated in order for subscription television companies to retransmit their programs, because retransmission may increase their market penetration.*¹³

We disagree. By seeking the introduction of a remunerated exception, the commercial broadcasters are effectively seeking an additional revenue stream from subscription television

¹¹ Foxtel does not agree with the view of SBS, cited in the Discussion Paper, that there is a need to 'strengthen protections against uses of SBS's broadcast signal by third parties which may affect the integrity of its presentation of viewers'—see Discussion Paper, para 15.52, page 309. We submit that there is no risk to the integrity of the presentation to the FTA broadcast because the broadcast is unaltered.

¹² Discussion Paper, para 15.70, page 312.

¹³ Discussion Paper, para 15.75, page 312.

for television services that are required to be both freely available and usually funded by advertising, and where those customers can already receive those services without payment. The viability of commercial FTA television in Australia is already ensured through a legislative framework that provides significant privileges to commercial broadcasters.

In this respect, and as ASTRA outlined in its submission in response to the Issues Paper, successive Australian Governments have invested many hundreds of millions of dollars since 2001 to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible, including:

- licence fee rebates and direct grants for commercial television broadcasters in regional and remote areas for costs associated with the conversion from analogue to digital transmission;
- grants to commercial broadcasters in smaller regional and remote licence areas to ensure that they can provide the full suite of commercial digital television services;
- the Household Assistance Scheme which supplies and installs free digital television HD set top boxes (and free antenna and cabling upgrades if required) to people on the maximum rate Age Pension, Disability Support Pension, Carer Payment, Veterans' Service Pension or Veterans' Income Support Supplement;
- the VAST service to provide the full suite of commercial and national FTA digital television channels to viewers with inadequate terrestrial reception; and
- the Satellite Subsidy Scheme to provide subsidised installation of satellite reception equipment for reception of the VAST service in households in terrestrial digital transmission black-spots.

We also note that the FTA broadcasters already receive revenue derived via Part VC of the Act as owners of copyright in works included in the FTA services. Based on evidence submitted by Screenrights to the Copyright Tribunal of Australia, Foxtel understands that the FTA broadcasters are an underlying rights holder in approximately one third of television programs.¹⁴

If it were the case that FTA broadcasters did not seek any remuneration for retransmission, then it is unclear to Foxtel what practical benefit a new statutory licensing scheme for broadcast copyright would provide. As noted above, the FTA broadcasters already control the retransmission of their services from a practical perspective. Furthermore, if such a scheme were introduced the cost of its administration would need to be weighed against the likely quantum of payments, were they sought.

We anticipate that any equitable remuneration payable for broadcast copyright would be within and not additional to the existing rates determined by the Copyright Tribunal, as the convenience to Foxtel's customers is the same irrespective of whether equitable remuneration were also payable for the broadcast signal. We also expect that the proportion of equitable remuneration allocated by Screenrights to broadcast copyright would be very small. Pursuant to Screenrights' current distribution policy for government use of television programs (where

¹⁴ At paragraph 51 of an affidavit affirmed on 31 March 2011, James Dickenson, Licensing Executive at Screenrights, stated that *'Screenrights' distributions are not paid to the broadcaster of the program. Rather, the funds are allocated to the owners of the underlying copyright and only in approximately one third of cases is the broadcaster an owner of an underlying copyright (being the copyright in the cinematograph film and the copyright in the literary work which is the scrip). Even then, very often the broadcaster is only a part owner'*.

equitable remuneration is payable for broadcast copyright), just 2% is allocated to the broadcast signal:

Copyright Material	Royalty Allocation
Film	67.1%
Script	21.7%
Commissioned Sound Recordings	0.64%
Commercial Sound Recordings	1.06%
Library Sound Recordings	0.20%
Musical Works	7.3%
Broadcast Signal	2.0%

Source: Screenrights Distribution Policy, as approved by the Board on 3 April 2013.¹⁵

In the 2011–2012 financial year, Screenrights collected \$5.96 million in retransmission royalties.¹⁶ If 2% of this total were to be allocated to broadcast copyright, this equates to an annual distribution of less than \$25,000 per FTA broadcaster or approximately \$7,500 per annum per FTA channel.¹⁷ We believe the administrative costs of implementing and running the scheme are likely to outweigh the costs of these distributions.

In conclusion, Foxtel submits that the introduction of option 2 is not justified. As we have demonstrated, STV retransmission does not conflict with the normal exploitation of works or unreasonably prejudice the interests of rights holders and is therefore compliant with the three-step test. Where retransmission occurs, FTA broadcasters are already remunerated through advertising revenue (and, in many cases, as holder of the underlying copyright in works broadcast). Where retransmission does not currently occur, this is even less likely if an additional and unjustified FTA revenue stream were to be introduced.

The only appropriate solution in all the circumstances is to maintain the existing retransmission scheme.

¹⁵ Screenrights Distribution Policy, as approved by the Board on 3 April 2013 – available at http://www.screenrights.org/sites/default/files/uploads/Dist_Policy_03042013.pdf. See also <http://www.screenrights.org/content-owners/royalty-collection/government-use>.

¹⁶ Screenrights Annual Report Highlights, 2011-2012 – available at http://www.screenrights.org/sites/default/files/publication/file/ARHighlights2011-12_0.pdf

¹⁷ Assumes 5 FTA broadcasters and 16 FTA channels.

2. THE CASE FOR FAIR USE IN AUSTRALIA (CHAPTER 4)

Foxtel is very concerned that the ALRC has proposed the introduction of a broad US-style ‘fair use’ defence.

Foxtel is a copyright owner and makes significant investment in original Australian productions, such as the highly acclaimed *Wentworth*, and the very popular *Australia’s Next Top Model*. Foxtel is also a licensee of third party produced programs, such as *Games of Thrones* and *True Blood*, and has recently entered into significant output agreements with the major Hollywood studios for distribution of their blockbuster content via subscription television.

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.¹⁸ 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.

In Foxtel’s view, the case for fair use in Australia has not been made out and there is no justification for changing the current regime.

As discussed throughout this section of our submission, Foxtel’s main concerns in respect of the possible fair use defence are that:

- it will introduce significant and unnecessary uncertainty into Australian law;
- the parameters of the defence will need to be tested through the Courts, which will be expensive and will result in the Courts making policy decisions rather than the Parliament;
- the introduction of fair use will weaken copyright protections without any corresponding consideration of how copyright protections must be strengthened to address usage that is clearly unauthorised; and
- it will have negative economic consequences and have a significant impact on creative output due to the associated uncertainties.

We set out below our comments in respect of the arguments in favour of fair use and the arguments against fair use in Australia that the ALRC has identified in its Discussion Paper.

Rebuttal of arguments in favour of fair use in Australia

Fair use provides flexibility to respond to changing conditions

The ALRC believes that ‘*fair use [will] provide flexibility to respond to changing conditions*’.¹⁹

Foxtel does not agree that changing conditions, such as the rapid technological advances that are taking place in the digital economy, are a proper basis for abandoning well-established Australian jurisprudence in favour of a US style fair use exception.

¹⁸ 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.

¹⁹ Discussion Paper, para 4.93, page 79.

While we accept that a fair use defence appears to be more flexible (at least on its face) than limiting fair dealing to one of the established purposes, the nature of the defence means that the supposed flexibility, ‘*dynamism*’, ‘*agility*’ and ‘*malleability*’²⁰ of fair use to respond to changing conditions can actually only be established through testing through the Courts. In Foxtel’s view, this is unacceptable.

The fast pace of change in the digital economy, which only looks set to increase, and the typical period of time the Courts will take to resolve matters of this nature means that Court rulings will constantly struggle to keep up with technological changes. By the time a dispute in respect of a new technology has crystallised, litigation has been instituted, evidence has been prepared and the Courts have heard and determined the matter (and all of this at a very significant cost), it is very likely that the technology in question has already been superseded and the Court’s decision is irrelevant.

Foxtel submits that those arguing for fair use simply want the ability to make use of copyright works without having to incur the costs of clearing that use as is usual commercial practice. Whenever Foxtel wants to offer its services on a new platform, it is required to spend the time and effort in clearing each channel and program for distribution.

Fair use assists innovation

The ALRC has formed the view that fair use will assist innovation and that the enactment of fair use ‘*would foster an entrepreneurial culture which contributes to productivity*’.²¹ Foxtel does not accept the assertion that fair use assists innovation.

As outlined in the Discussion Paper, the technology sector has submitted to the ALRC that a broad exception will assist innovation and facilitate start-ups. However, Foxtel has not seen a compelling piece of evidence that suggests that the absence of a fair use defence is stifling Australian would-be innovators. By contrast, a recent assessment of the economic effects of fair use by Dr George Barker, a Director at ANU’s Centre for Law and Economics, suggests that the scope for fair use to contribute to innovation and economic growth is if anything reduced as the digital economy develops and the costs of transacting on the internet fall.²²

As we submitted in our response to the ALRC’s Issues Paper, companies like Google and Facebook have very successfully established their Australian operations within the bounds of the existing regime.

Foxtel also believes that the ALRC has not given sufficient weight to the conclusions with respect to fair use and innovation that were reached by the UK Hargreaves Review of Intellectual Property (the **Hargreaves Inquiry**). As part of its investigation into whether fair use should be introduced into the UK, members the Hargreaves Inquiry visited Silicon Valley and met with companies such as Google, Facebook, Yahoo and Yelp. Their conclusion was that

²⁰ Discussion Paper, para 4.43, page 67.

²¹ Discussion Paper, para 4.97, page 79.

²² Barker, Dr George R (9 July 2013): *Agreed Use and Fair Use: The Economic Effects of Fair Use and Other Copyright Exceptions* (the **2013 Barker Paper**), page 3 – available at <http://www.serci.org/2013/Barker.pdf>. Dr Barker notes that ‘[t]ransactions costs provide the basic rationale and define the economic scope for fair use exceptions. To the extent transactions costs are falling, the benefits of fair use also fall. The scope for fair use to contribute to innovation and economic growth is thus reduced. This necessitates a reduction in the extent of fair use laws rather than an extension’.

'the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated':²³

Does this mean, as is sometimes implied, that if only the UK could adopt Fair Use, East London would quickly become a rival to Silicon Valley? The answer to this is: certainly not. We were told repeatedly in our American interviews, that the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law.²⁴

There are also many examples of Australian companies that are successfully utilising digital technologies — within the current copyright framework — to offer Australian consumers innovative products and services. Foxtel itself has invested billions of dollars in establishing its innovative consumer services, which provide consumers with many options to access Foxtel and Foxtel programmes including the Foxtel iQ PVR, Australia's largest HD offering, the most comprehensive Olympic Games coverage Australia has ever seen, and the hugely popular Foxtel Go service for mobile and tablet devices.

When Foxtel launched its cable subscription television service in 1995, it offered just 20 linear channels. Today, and following a significant investment in time and resources, Foxtel distributes its services by cable, satellite, mobile networks and via the internet, to a range of devices including set top boxes, mobile phones and tablets, internet connected televisions and games consoles. All of this has been achieved without a fair use exception. Foxtel has sought and acquired the appropriate permissions and licences from its content partners and, where required, the current exceptions have provided sufficient flexibility to allow Foxtel to innovate within the bounds of a more certain legal framework.

Foxtel's track record of innovation has recently been recognised by Senator Kate Lundy. On 8 April 2013, Senator Lundy issued the following media release congratulating Foxtel on its Logie win for its Olympics coverage.²⁵

Minister for Sport and Minister Assisting for Industry and Innovation, Senator Kate Lundy today congratulated Foxtel on winning its first Logie for Most Outstanding Sports Coverage for its broadcast of the London 2012 Olympic Games.

Senator Lundy said the multichannel broadcast in high definition showed every Gold Medal event in full, resulting in the most extensive Olympics Games coverage in Australian history.

"I was lucky enough to witness the Olympics first-hand in London and had the opportunity to see the amazing work the staff of Foxtel were doing on the ground," Senator Lundy said.

"Foxtel set up all eight of their channels on the ground in London. There was no duplication of resources or equipment, and no splitting of the production team, they all worked together in London.

"By producing their content in London, Foxtel ensured their high quality coverage of the Games was cohesive and timely, making a better viewing experience for Australians.

²³ I Hargreaves (2011), *Digital Opportunity: A Review of Intellectual Property and Growth* (the **2011 Hargreaves Paper**), page 45.

²⁴ The 2011 Hargreaves Paper, page 45,

²⁵ 8 April 2013 Media Release, Senator the Hon Kate Lundy – available at <http://ministers.regional.gov.au/senator-honourable-kate-lundy/media-releases/2013/minister-congratulates-foxtel-their-logie-win>

"Foxtel showed great innovation with their Foxtel London 2012 app for tablets which allowed customers to access all eight channels on their tablet, meaning in many households sports lovers could keep an eye on two of their favourite sports at once."

Senator Lundy congratulated Foxtel for its outstanding coverage. In particular, the Senator commended the work of Director of Sports & Olympic Games, Peter Campbell.

"Foxtel are an extremely innovative company. Fox Sports covers 650 local sporting events each year across their seven channels, providing Australians with access to high quality sport 24 hours a day," Senator Lundy said.

"The coverage of all Australian sport is extremely important and I congratulate Foxtel on the award and well deserved public recognition."

On 30 July 2013, Foxtel also launched its new internet TV service know as 'Foxtel Play'. Foxtel Play is available through Samsung Smart TVs, Xbox 360s and PC and Mac computers and can be accessed on up to three devices.

Based on our proven experience in establishing innovative services, we believe that the most important factor that will determine whether Australian companies will continue to innovate and make such investments is the strength of the Australian copyright protection framework, and not the introduction of a fair use defence. Indeed, this view is supported by Dr Barker's recent conclusion that, rather than expanding exceptions:

...the development of the digital economy requires the opposite response – namely the strengthening of copyright and the limiting of exceptions'.²⁶

In order for Foxtel to grow the contribution we make to the digital economy, both through our investments in Australian content and technology, we must be able to rely on a copyright regime that provides appropriate protections and enables us to receive a fair reward for our investments.

Fair use restores balance to the copyright system

The premise of the argument that fair use restores balance to the copyright system is that the balance of Australia's current copyright framework favours rights holders at the expense of users. This is simply not the case.

The digital economy has advantaged consumers by facilitating easier copying and storing of copyright materials. For rights holders, it has led to the significant threat of online piracy. Access to illegal content via the internet is growing and will only become more prevalent as data speeds increase. In this respect, research commissioned by the Intellectual Property Awareness Foundation in 2012 found that just over one quarter of Australians (27%) were active illegal downloaders (classified by the research as either 'persistent' or 'casual' downloaders).²⁷

²⁶ 2013 Barker Paper, page 3 – Dr Barker notes that '...moves to extend copyright exceptions in response to the development of the digital economy are mistaken in that it will only serve to reduce incentives for the development of new creative works, which in turn is likely to reduce overall social welfare'.

²⁷ 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.

Foxtel is very concerned that the introduction of a fair use defence will swing this balance too far in favour of consumers, particularly (as we discuss below) where the market is already offering innovative services that allow customers generous access to copyright materials. It is crucial that Australian copyright law not condone this behaviour and that a fair balance is struck between the rights of consumers and the interests of rights holders.

Fair use assists with meeting consumer expectations

The ALRC states in the Discussion Paper that '*a number of submissions cited with approval the statement that 'fair use exceptions keep copyright closer to the reasonable expectations of most people and thus help make sense of copyright law' or made similar points*'.²⁸

What this statement fails to take into account is that there is real evidence in Australia that the market can and is providing services that meet customers' expectations. When the market is meeting customer demand there is no basis for legislative intervention.

By way of example, Foxtel is already offering its customers access to copyright materials on flexible terms that we believe exceed, and not just meet, the reasonable expectations of our customers. Through our 'Foxtel Go' service, subscribers to Foxtel's cable and satellite service can currently access 67 linear channels and approximately 1,400 on demand titles each month using compatible tablet and mobile devices—whenever and wherever they want, and at no additional charge.²⁹ This is in addition to access to a sophisticated PVR in the Foxtel iQ and MyStar, through which they can record every episode of their favourite show with the press of a button.

However, as outlined in our submission in response to the ALRC's Issues Paper, Foxtel urges the ALRC not to legitimise social norms which condone use of copyright material to justify unreasonably broad exemptions to copyright. It is critical to the ongoing viability of Australia's creative industries that the law is not amended to normalise behaviour that has the potential to significantly undermine Australia's creative industries.

Arguments against fair use in Australia

Fair use is unnecessary and no case is made out for it

As we submitted in our response to the ALRC's Issue Paper, in light of the critical importance of an effective copyright regime to the ongoing viability of those who invest significantly in Australian content, Foxtel's view is that there needs to be clear and indisputable evidence that demonstrates both the need for, and the benefits of, introducing fair use in Australia before a radical step of this nature is taken.

As we have demonstrated above, clear evidence of the need for and benefits of fair use has simply not been established by those calling for its introduction.

²⁸ Discussion Paper, para 4.52, page 70.

²⁹ Cable and satellite customers can register up to three Foxtel Go devices, which now includes PC and Mac computers and laptops and some Android devices. Go is also available to Foxtel Play internet TV customers. Foxtel Go has been warmly welcomed by our customers and has contributed significantly to customers' overall satisfaction with the Foxtel service.

Fair use would create uncertainty and expense

Foxtel remains concerned that the scope of a broad fair use exception would be wide, vague and uncertain, while at the same time it would significantly erode the scope of copyright protection which is so critical in protecting investment in Australia's cultural industries. The uncertainty of introducing fair use is accepted by many supporters of its introduction.³⁰

The existing Australian defences are well established and supported by legal precedent established over many years. Dr Barker has previously noted 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.³¹ Broadening the exceptions beyond uses for purposes which deliver specific public benefits would imply imposing costs in areas without commensurate public benefits.³²

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 to the digital economy.³³ 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, Singaporean copyright industries had an average growth rate of 14.16%; however, this slowed to 6.68% for the period after the amendments were introduced.³⁴

Fair use originated in a different legal environment

The Hargreaves Inquiry ultimately reached the 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 European context*'.³⁵ We submit that these conclusions are equally applicable in the Australian context.

The Australian fair dealing defences are supported by many years of Australian precedent and jurisprudence and, in Foxtel's opinion, are well understood. On the contrary, it is unclear how US case law would be utilised in establishing the boundaries of an Australian fair use exception. It is simply not possible to import an entire body of US law into Australia because of the real differences that exist between each country's laws, including (most importantly) the absence of a provision equivalent to the US First Amendment in Australian law—which arises in many fair use determinations.

This would mean that the Australian version of fair use would require expensive and time-consuming litigation through the Courts to establish its parameters. It will take many years of

³⁰ See Burrell & others, *Submission 278*, at page 7; '...any reform will lead to a measure of uncertainty in the short to medium term...'

³¹ 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 **2012 Barker Paper**), page 10 – available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2180769.

³² 2012 Barker Paper, page 10.

³³ 2012 Barker Paper, page 26.

³⁴ R Ghafele and B. Gilbert (2012): *The Economic Value of Fair Use Counterfactual Impact Analysis In Singapore* (**Ghafele and Gilbert**), Oxfirst at page 6 – available at: http://works.bepress.com/rova_ghafele/12.

³⁵ Ghafele and Gilbert, page 52.

uncertainty for the scope of the defence to take shape through the Courts, and even then will continue to be of uncertain application in the face of new technologies and services.

Fair use may not comply with the three-step test

The 'three-step test' ensures that exceptions to copyright may only be legally implemented where they do not conflict with the normal exploitation of the copyright materials and do not unreasonably prejudice the legitimate interests of rights holders.

We note that the ALRC has identified in its Discussion Paper that there is significant uncertainty and differing opinions between legal experts as to this matter. Given the significant issues we have identified in respect of the need for and benefits of fair use, even if these matters had been established we would query the basis of introducing a fair use defence in the face of this legal uncertainty.

The ALRC's proposal in relation to fair use

Proposal 4–1 The *Copyright Act 1968* (Cth) should provide a broad, flexible exception for fair use.

Proposal 4–2 The new fair use exception should contain:

- (a) an express statement that a fair use of copyright material does not infringe copyright;
- (b) a non-exhaustive list of the factors to be considered in determining whether the use is a fair use ('the fairness factors'); and
- (c) a non-exhaustive list of illustrative uses or purposes that may qualify as fair uses ('the illustrative purposes').

For the reasons outlined above, Foxtel is strongly opposed to Proposal 4-1 and Proposal 4-2.

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 in Australia.³⁶

Australian copyright law sets a fair and finely struck balance between the interests of rights holders and those of end users. To protect creative innovation and encourage investment, the existing balance must not be disrupted unless there is clear evidence of the benefits offered by any new exception.

³⁶ As Dr Barker notes '...economic theory suggests that any weakening in the enforcement of copyright, through introduction of ill defined exceptions would have significant *negative* economic costs, and little or no benefit' – 2013 Barker Paper, page 44.

3. THIRD PARTIES AND PRIVATE AND DOMESTIC USE (CHAPTERS 5 AND 9)

As the issues and proposals raised in chapter 5 (Third Parties) and chapter 9 (Private and Domestic Use) of the Discussion Paper are closely related, Foxtel is responding to them together in this section of our submission.

Third parties

The ALRC has proposed that third party use of copyright materials should be determined by whether such use constitutes fair use.

For the reasons explained in section 2 above, Foxtel is very concerned about the introduction of a fair use defence in Australia. In the context of third party use, we submit that the introduction of a fair use defence and the inevitable uncertainty it will introduce will facilitate unlicensed third parties profiting at the expense of rights holders. We firmly believe that the introduction of fair use poses a real risk of undermining the ability for content owners and distributors to monetise their content and extract fair value from distribution windows.

In this respect, although the ALRC states that a commercial purpose will tend not to favour a finding of fair use it has admitted that '*the finding of a commercial purpose in a particular use [is] by no means determinative*'.³⁷ This is of serious concern to Foxtel, as it is entirely unsatisfactory that Australia's copyright framework would allow third parties to share in the rewards that rightly belong to those who invest in content and its creation.

We are also very concerned by the ALRC's comments that:

*some copying by third parties is unlikely to harm the rights holders' market, and may help develop new markets for rights holders to exploit. Prohibiting such unlicensed copying through overly confined exceptions, even if technology neutral, may inhibit the development of the digital economy.*³⁸

In our view, more freely permitting copying by third parties is likely to harm rights holders' markets. As Foxtel's subscription service allows our customers to access content for a limited period of time, unlicensed copying by third parties will undermine our business model and will also hurt those from whom we acquire content. Distributors who make their content available on a temporary basis and to a limited audience must have the ability to determine how their content is accessed, used and stored. We also refer to our comments in section 2 above about the innovative services that Foxtel is offering as real evidence that the current exceptions have not inhibited the development of the digital economy.

Private and domestic use

If fair use is not enacted, the ALRC has proposed that the Act should provide for a new fair dealing exception for private and domestic use.

³⁷ Discussion Paper, para 5.42, page 107.

³⁸ Discussion Paper, para 5.49, page 107.

The ALRC has also proposed that the private copying exceptions for format shifting and time shifting should be repealed, on the basis that *'they are too prescriptive and inflexible to keep up with an evolving digital environment.'*³⁹

We disagree. As we submitted in response to the Issues Paper, Foxtel does not believe there is a need for amendments to the current time shifting and format shifting exceptions. The ALRC has identified some limited issues in respect of the current exceptions, but we do not believe that these warrant the breadth of the proposed private and domestic use exception.

The format shifting and time shifting exceptions were only introduced into the Act in 2007 and were introduced following extensive public consultation. 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 (as evidenced by the Full Federal Court's decision in the Optus TV Now case) is the right one.

We are very concerned that a new exception for a purpose of private and domestic use will be significantly broader than the current time shifting and format shifting exceptions and will be out of step with overseas developments.

For example, as part of the implementation of the Hargreaves Inquiry the UK Intellectual Property Office is currently consulting on a proposed new private copying exception. The private copying exception is described as a *'narrow private copying exception which will allow an individual to copy content they own, and which they acquired lawfully, to another medium or device for their own personal use'*.⁴⁰ Importantly, the conditions of the proposed exception include that:

- the copier must be an individual, not a body corporate;
- the individual must have lawfully acquired, on a permanent basis, the copy from which further copies are made; and
- the further copy must be made for the individual's private use, for non-commercial ends.

We agree with each of the above conditions and submit that it is imperative that any exception for private and domestic use in Australia include such conditions.

In our view, replacing the current limited exceptions with a broader and uncertain concept of private and domestic use and which does not limit the scope of the exception to materials acquired lawfully on a permanent basis will undermine new and innovative services that the market is already offering.

For example, Foxtel currently offers its customers access to a large library of catch-up content at no additional subscription charge. Foxtel refreshes this content regularly and the period of time such content is available to stream or download varies, although is rarely longer than 28 days. It is unclear how a new exception for private and domestic use would operate in the

³⁹ Discussion Paper, para 9.6, page 174.

⁴⁰ Intellectual Property Office, *Private Copying*, page 1 – available at <http://www.ipo.gov.uk/techreview-private-copying.pdf>.

context of such services. We are very concerned that any loosening of the existing provisions will undermine our ability to market and benefit from these types of services.

The ALRC also notes in its Discussion Paper that:

*...in Australia, many private uses of copyright material are commonly thought by members of the public to be fair. This is one factor that suggests some private uses of copyright material should not infringe copyright.*⁴¹

We agree with the ALRC that social norms should not dictate the law, but are concerned that the ALRC remains of the view that the law should at least account for social norms.⁴² While we understand the ALRC's desire to ensure that Australian copyright law keeps pace with legitimate consumer practices, we urge the ALRC not to allow illegal consumer practices, no matter how widespread, to dictate proper policy.

In summary, we urge the ALRC to have regard to the real impact that a broadening of the current time and format shifting exceptions will have on subscription based services (whether by way of the introduction of fair use or otherwise) before making any recommendations in this regard.

⁴¹ Discussion Paper, para 9.20, page 176.

⁴² Discussion Paper, para 9.32, page 178.

4. CONTRACTING OUT (CHAPTER 17)

Foxtel is very concerned that the ALRC has proposed that the Act:

*should be amended to provide that contractual terms excluding or limiting...the proposed fair use exception – in relation to fair uses for purposes of research or study; criticism or review; parody or satire; reporting news and quotation – are unenforceable.*⁴³

As the ALRC identifies in the Discussion Paper, '[t]he economic value of freedom of contract is an important factor'⁴⁴ when considering this issue. As we outlined in our submission in response to the Issues Paper, 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. Freedom of contract is fundamental to commercial negotiations and we believe 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.

Having the freedom to tailor precise terms becomes even more important in light of the real and significant uncertainty that fair use would introduce into Australian law. This uncertainty may be partially offset through contractual terms, however a prohibition on excluding the operation of the fair use defence will only result in additional and unnecessary uncertainty.

We do not agree with the ALRC that fair use, were it to be enacted, would be prejudiced by terms which excluded its operation.⁴⁵ On the contrary, we firmly believe that negotiated agreements, tailored to our particular business' needs and complexities, offer Foxtel and our counterparties greater certainty than a broad statutory exception.

We also submit that any perceived unfairness can be addressed through existing consumer protection regimes such as the unfair contracts provisions of the Australian Consumer Law. This is recognised in the Discussion Paper where it refers to David Lindsay's conclusions in relation to limitations on contracting out of copyright protection:

The view that such restrictions are needed 'overestimates the ability of the law to establish optimal rules for the protection of copyright material, at the expense of the considerable advantages to be derived from private market-based arrangements' and the extent to which copyright owners, operating in a competitive market, are capable of unilaterally imposing terms. He considered that:

*Insofar as private agreements may result in less than optimal outcomes, they should be dealt with under established principles of contract law, competition law or consumer protection law.*⁴⁶

In these circumstances, we do not support an amendment to the Act which would result in untested and potentially very broad exceptions taking precedence over business-specific commercial agreements.

⁴³ Discussion Paper, para 17.3, page 353.

⁴⁴ Discussion Paper, para 17.92, page 370.

⁴⁵ Discussion Paper, para 17.4, page 353.

⁴⁶ Discussion Paper, para 17.105, page 372.

We also note the ALRC's comments that *'if limitations on contracting out are implemented, consistent amendments to TPM [technological protection measures] provisions may be justified. That is, there may be little point in restricting contracting out of exceptions, if TPMs can be used unilaterally by copyright owners to achieve the same effect'*.⁴⁷

We urge the ALRC to use caution when making any recommendations in respect of technological protection measures. Technological protection measures are a critically important tool in the digital economy in protecting rights holders against online piracy. As such, we strongly urge the ALRC not to make any recommendations which may dilute their effectiveness.

⁴⁷ Discussion Paper, para 17.131, page 377.