Submission by Free TV Australia

Australian Law Reform Commission

Copyright and the Digital Economy - Discussion Paper

16 September 2013

EXECUTIVE SUMMARY

Retransmission

- Free TV welcomes the recognition in the ALRC Discussion paper that the treatment of broadcast signals in being subject to a "free use" framework is anomalous compared to other copyright works. We also welcome the suggestion that broadcasters should have the ability to consent to retransmission of their services. However each of the options proposed by the ALRC in relation to retransmission has significant flaws:
    - Option 1 means that any retransmission would be entirely subject to market mechanisms, both for the use of the broadcast signal and the underlying rights contained within it. While it takes into account the right of free-to-air broadcasters to control their broadcast signal, it assumes that this must be accompanied by the repeal of the remunerated exception for underlying rights. In Free TV's view this would make a consent scheme unworkable due to the large number of underlying copyright owners to be consulted in relation to any retransmission. The current operation of Part VC for underlying rights works well.
    - Free TV does not agree that a broadcaster would not have an incentive to undertake retransmission negotiations. Experience to date indicates overwhelmingly the opposite. As an advertiser supported medium, it is in the interests of commercial broadcasters to make their services available as widely as possible.
    - The ALRC acknowledges that the issue of retransmission raises complex considerations of copyright and broader media policy. These considerations should be the subject of a further review that operates across these wider policy areas. Such a review should take as its starting point the acknowledgement that broadcasters should be accorded retransmission consent. The broader considerations for the review should include the effectiveness of any retransmission consent scheme that does not include a must carry given the monopoly position of Foxtel in the Pay TV market in Australia and the very significant public interest in ensuring that free-to-air television is widely available.
    - Option 2 fails to take into account the right of free-to-air broadcasters to control their broadcast signal, while introducing a new and expanded statutory licensing scheme (notwithstanding the numerous disadvantages arising from such schemes as identified by the ALRC in Chapter 6 of the discussion paper).
    - Free TV opposes any right to retransmit broadcast television without the consent of the broadcaster.
- Free TV supports a third option that includes the introduction of a US style "must carry/retransmission consent" regime. Such a regime would replace the existing retransmission provisions in the Broadcasting Services Act 1992 (BSA) and the Copyright Act 1968 (Act) and incorporate the following components:
    - Retransmission of free-to-air television broadcasts would be permitted only within the licence area of the free-to-air broadcaster, and only:

  - with the consent of, and in accordance with commercial terms agreed with, the broadcaster; or
  - in accordance with a "must-carry" obligation (as discussed below).

- Providers delivering linear programmed content by cable, satellite, internet, IPTV or mobile platforms would be subject to the must carry/re-transmission regime, subject to a reasonable threshold test to be developed.
- The must-carry obligation would arise if a free-to-air television broadcaster elected that a subscription broadcaster (or other provider that met the threshold) offering services within the licence area of the free-to-air broadcaster must deliver each of its free-to-air stations to the subscribers or customers of the service.
  - Each free-to-air television broadcaster would be able to re-exercise that election every three years;
  - If a free-to-air television broadcaster elected not to take the “must carry” option, any third party wishing to retransmit the broadcaster’s free-to-air television channels would need to obtain consent. A free-to-air broadcaster could only consent to retransmission within its own licence area(s);
  - Part VC of the Act would be amended to apply to any retransmission. Specifically, the copyright in underlying works included in free-to-air television broadcasts would not be infringed by retransmission, subject to compliance with the notice and remuneration provisions of Part VC; and
  - The existing provisions in ss.212 and 212A of the BSA relating to retransmission by self-help providers would be retained in their current form.
- Must carry regimes are in place in many OECD jurisdictions. While they vary in scope and terms, they have a common underlying policy rationale. This is to protect the ubiquitous availability of free-to-air services which are recognised as serving the public interest.
- In Australia this long-standing policy rationale is recognised in the BSA (see for example paragraph 3(1)(a)). Section 212 of the BSA was originally intended to further this public interest (as expressed in the Explanatory Memorandum to the *Broadcasting Services Bill 1992*), but the legislative draftsman failed to reflect that intention. It is now appropriate to correct this anomaly, by limiting the operation of section 212 to self-help providers, while creating a parallel mechanism of a “consent/must carry” regime, to properly recognise the rights of broadcasters as copyright owners, as well as to promote the ubiquity of free-to-air services. While the Discussion Paper does not adequately address these related matters, the relevant copyright issues cannot be addressed in isolation from the broadcasting policy issues.
- An optional “must carry/retransmission consent regime supported by an underlying remunerated exception for underlying rights holders represents a conventional and tested approach to managing the copyright interests of broadcasters and underlying rights holders, while achieving the social and cultural benefits of widespread access to free-to-air TV.
- As is currently the case, retransmission consent and “must carry” obligations would be delineated by the licence area framework set out in the BSA. Accordingly, any retransmission arrangements agreed between free-to-air

broadcasters and re-transmitters would acknowledge and be confined to the specific licence area in accordance with the free-to-air broadcaster's BSA licence(s). This would include retransmissions by way of broadcast, or other means (including internet delivery). In this way, retransmissions by any means would not depart from, or disrupt the, strict licence area requirements set out in the BSA.

- In a similar way, Part VC of the Act should only be available to online retransmission services that observe the licence area obligations set out in the BSA.
- Free TV acknowledges that internet retransmissions would require sufficient technological restriction, including geoblocking, in order to observe licence area restrictions. However, the concept of area based licensing is fundamental to the operation of the BSA and to Free TV's members, and its removal would create serious disruption to the industry. As a result, Free TV supports the "must carry/retransmission consent" regime only on the basis that licence area integrity is maintained in accordance with the BSA.

Fair Use

- Free TV does not support a move to amend the Act to remove the existing fair dealing and specific use exceptions in favour of a broad right of "fair use". A broad fair use exception would have uncertain consequences due to the vague guidance provided by the suggested provisions. The uncertainty created by a new broad fair use exception would inevitably lead to increased litigation, cost, unintended consequences and ongoing legislative amendment, which is not in the public interest.
- Any change that might be required to update existing exceptions to accommodate new technologies should be dealt with on a case-by-case basis, so that the scope and consequences are subject to careful consideration.
- The benefits that might be achieved by a move to fair use, including the accommodation of digital technologies, can be achieved with far less disruption and cost to industry by instead retaining the existing fair dealing exceptions and other specific exceptions in the Act and by adopting a more targeted approach to review and revision of those exceptions as required.

  The advent of cloud based services represents a significant development in the delivery and storage of digital content services. However the application of "fair use" to this issue is too uncertain. To facilitate the appropriate use of these services, the ALRC should reconsider its analysis and start its consideration from the high level principle that there should not be any distinction between using a personally owned or leased device in the home and an identical service using cloud storage, where that service otherwise complies with relevant legal obligations (including copyright law).

Other Issues

- Free TV does not support abolition of the statutory licensing schemes for educational and other uses set out in Parts VA and VB of the Act. These regimes provide a convenient and effective method for the licensing of broadcast subject matter in educational institutions and an administratively efficient way of recovering appropriate compensation by Free TV's members. There is no significant benefit in the abolition of the existing structures but the alternative may involve significant costs and/or loss of revenue.

- Broadcast copyright should subsist in transmissions of live events, simultaneous transmissions of broadcasts and broadcasts of programmed material over the internet.
- Free TV does not support the abolition of the compulsory licensing scheme for the broadcast of published sound recordings. Abolition of this scheme would make the use of sound recordings in broadcasts impractical and costly compared to the existing arrangements.
- Free TV supports the ALRC's recommendation in relation to prohibiting contracting out of the fair dealing rights that apply to research or study, criticism and review, parody or satire and reporting of the news. These fair dealing rights have significant public benefits that should not be curtailed by contractual intervention from the copyright owner.

1. Introduction

Free TV welcomes the opportunity to provide the Australian Law Reform Commission (**ALRC**) with the views of its members in relation to the Discussion Paper "Copyright and the Digital Economy" (**Discussion Paper**).

Free TV represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide nine channels of content across a broad range of genres, in addition to a range of online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. In 2011-2012, Free TV members invested $1.35 billion in Australian content. On any given day, free-to-air television is watched by more than 14 million Australians.

Free TV members are major owners, licensors and licensees of copyright material. Our members also frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production. Free TV is therefore able to comment on the Discussion Paper with a strong appreciation of the spectrum of views and positions that are discussed.

Free TV's submission on the Issues Paper published as part of this review, set out the industry position on key issues such as retransmission. This submission deals specifically with the proposals and questions posed by the ALRC in its Discussion Paper. Both of these submissions should be considered in the development of any recommendations by the ALRC. Note, however, that on some issues Free TV's position has been further developed, as reflected in this response.

Free TV members are operating in an increasingly competitive multi-media marketplace. Increasing broadband speeds (both fixed and mobile), together with the development of sophisticated mobile devices, is changing the way that Australians consume television content and is bringing about permanent structural change in the broadcasting sector. In particular, Pay TV in Australia is dominated by the monopoly provider Foxtel. It is vital that any changes to the Act take into account the impact on consumer services and prevents Foxtel from taking unfair advantage of its market position.

In particular, Free TV members are highly sensitive to increases in costs and are not supportive of changes that will disrupt systems and procedures that are operating well, or may create uncertainties.

The challenge for the ALRC is balancing the clear case for reform in some areas (such as retransmission) with the requirement for stability and certainty for stakeholders in areas where the current arrangements are working well.

2. Retransmission

2.1 Existing situation

The existing retransmission exception is causing unreasonable prejudice to free-to-air broadcasters who have invested significant labour, expertise and cost in promoting and compiling their channels.

It also places commercial free-to-air broadcasters at a significant commercial disadvantage as they are inhibited from exploiting the commercial value of their channel in the converged digital environment and exercising their right to determine the means of delivery of their service and associated issues such as quality of services and placement.

The roll out of the NBN, likely proliferation of new entertainment platforms and the increasingly converged media market highlight the need for urgent action. In this environment Free TV members do not think it is reasonable that new content service providers be allowed to rely on the retransmission provisions to re-sell free-to-air signals without any requirement to remunerate or even obtain the consent, of broadcasters.

This contrasts with the position of underlying rights holders who retain the right to be fairly compensated when broadcasts are retransmitted, including where the broadcaster has already paid to clear underlying rights.

Free TV members also note that Chapter 15 of the Discussion Paper contains a number of important views about retransmission and some of those views require correction. At paragraph 15.46 it is posited that a possible second purpose for the retransmission scheme may have been to assist the early development of subscription television. This is not the case. The various policy documents which preceded the enactment of the Broadcasting Services Act contain not a skerrick of information which supports this surmise by the Committee. The true policy position was as stated in the Explanatory Memorandum to section 212:

> *"It is recognised that there are small communities, or pockets within licence areas which, because of distance from main transmitters or for reasons relating to the topography of their areas, are unable to receive adequate broadcast signals. It is intended that arrangements be permitted between such communities and broadcasters for broadcasting services to be re-transmitted, unaltered, to those communities."*

It is important that the Committee correct its mistaken impression that section 212 may have had a competition purpose. It did not. The section should be seen for what it is a statutory anomaly created by defective legislative drafting.

That said, current industry dynamics do raise competition issues which should be taken into account in any comprehensive consideration of this area. In particular, the monopoly position occupied by Foxtel in the Pay TV sector has implications for a re-transmission consent scheme. This is one reason why Free TV suggests that an elective "must carry/consent" regime such as that in operation in the United States should be implemented in Australia.

The retransmission right allows the exploitation of free-to-air television broadcasts by competitors of the relevant broadcaster without the consent of that broadcaster. In the case of existing Pay TV providers, their business has been built around carriage of the commercial free-to-air television services, which account for over 50% of total prime time viewing in Pay TV homes.[1] While a small fee is payable through Screenrights for the separate underlying rights, free to air broadcasters have not received any compensation for the commercial exploitation of their broadcast signal.

[1] Source: OzTAM, National Pay TV database, based on consolidated data, 1 January 2013 to 30 June 2013. Commercial free-to-air television includes SBS One and SBS 2.

However, financial compensation is not the only, or even the most important issue for broadcasters. The most important issue is that the existing retransmission right denies free to air broadcasters the ability to control and manage their primary commercial asset.

As the Discussion Paper acknowledges, the current retransmission regime is inconsistent with general copyright principles. The existing retransmission regime has enabled Pay TV operators to replace (or supplant) terrestrial broadcast receivers in the home with Pay TV equipment.[2]

Once established, the Pay TV operator can then manipulate and control the channels that are available to viewers. For example, on its satellite service Foxtel currently only retransmits the primary commercial free-to-air channel and one standard definition channel of each broadcaster. Viewers must pay for a premium HD service to access the free-to-air high definition channels (such as 7Mate, One HD, GEM, ABC News 24) on their Foxtel equipment.

The Pay TV provider also determines the location and placement of EPG information of the free-to-air channels as well as the technical quality of the service received by the viewer. This can result in highly discriminatory positioning for free-to-air channels, particularly the secondary channels, which can be 'buried' in the EPG. It could also result in picture quality which is less than competing pay TV channels on the same service.

Accordingly, the retransmission regime allows exploitation of the free-to-air broadcasters' copyright in a manner that can be highly damaging to their strategic interests. The benefit received by Pay TV from the retransmission right cannot be compensated by a statutory scheme that simply places a dollar value on the broadcast copyright. This is because in addition to being a question of copyright ownership, the issues above are also about the integrity of the services provided by packaging the various copyright works and subject matter that make up a broadcast stream, including the skill and expertise in developing that packaged content.

The proliferation of digital platforms, together with increased speeds available over the internet and on wireless services, is facilitating the market entry of new services which retransmit existing free-to-air services. According to recent reports, major international media companies such as Sony Corp., Intel Corp. (INTC), Apple and Google are currently developing pay TV products that would deliver television content programming packages over the Internet.[3]

These developments make reform of the existing retransmission rule an urgent issue. The urgency is amplified by rapid expansion in multi-media content viewing on

[2] Austar MyStar set top boxes contained two tuners and are capable of receiving free-to-air television. However, it has been Foxtel policy over more than a decade to oppose including a free-to-air tuner.

[3] http://www.bloomberg.com/news/2013-09-02/cbs-reaches-accord-to-end-blackout-on-time-warner-cable.html

mobile and tablet devices.[4] Without correction, all these developments will further erode the free-to-air broadcasters' copyright, through the unintended statutory anomaly of section 212.

Universal access to free-to-air television has important social and cultural benefits. In 2011-2012[5], commercial free-to-air broadcasters invested a massive $1.35 billion in Australian content including drama, light entertainment, children's programmes, documentaries, sports, news and current affairs. The Convergence Review described local content as contributing to 'stronger sense of national identity, promotion of social cohesion and cultural diversity', assisting in the creation of a 'healthy progressive society'[6]. Free-to-air broadcast services are the only form of media that regularly engages a significant proportion of the Australia population, creating a "shared experience" that helps to inform and bind our community.

A 2012 report prepared by UK consultants Mediatique for the UK Department for Culture, Media and Sport concluded that payments to public-service broadcasters would lead to incremental expenditure on original UK content.[7] For similar reasons and, having regard to the support for Australian content provided by free-to-air broadcasters, fees paid for authorised retransmission would assist the broadcasters' capacity to continue to invest in Australian television production industry.

2.2 Option 1

Free TV welcomes the recognition contained in Option 1 that broadcasters are currently subject to a "free use" provision in relation to their services and that this does not accord with normal principles of copyright use.

However Free TV does not agree that a market based mechanism for broadcast copyright should be accompanied by a full market based mechanism for underlying rights. In our view such a position is entirely unworkable.

The current Part VC scheme was established in recognition of the fact that it is not practical for retransmitters or broadcasters to negotiate with or facilitate payment to the large number of underlying rights holders involved in a permanent 24 hour broadcast service. By contrast the number of broadcasters with whom a retransmitting party would need to negotiate is limited and easily identified.

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[4] See for example, Nielsen *Multi-Screen Report: Trends in Video Viewership beyond Conventional Television Sets – Q1 2013* 27 June 2013, p 3: http://www.nielsen.com/content/dam/corporate/au/en/reports/2013/multi-screen-report-Q1-2013-final.pdf

[5] Figures compiled by Free TV Australia

[6] Convergence Review Discussion Paper *Australian and Local Content*; pp7, Department of Broadband, Communications and the Digital Economy, 19 September 2011.

[7] This conclusion was qualified by a note on implementation challenges and other possible conclusions which could be drawn from the modelling. Mediatique (2012) Carriage of TV Channels in the UK: policy options and implications Report for the UK Department of Culture, Media and Sport; pp 6

Free TV supports the introduction of a market based retransmission consent for broadcasters supported by the current remunerated exception for underlying rights holders contained in Part VC. The ALRC has expressed concerns that "it is questionable whether a broadcaster would have any incentive to undertake those negotiations". However the behaviour of free to air broadcasters to date indicates quite the opposite. All free-to-air broadcasters have facilitated retransmission of their services on pay TV and other new platforms despite the inequity in having no recognition of the value of the broadcast copyright.

As an advertiser supported medium, it is in the interests of commercial broadcasters to be as widely available on as many platforms as possible. We believe the ALRC's concerns in this area are wholly unfounded. Repeal of the current Part VC scheme would make negotiating retransmission consent for broadcast signals almost entirely unworkable.

However, a retransmission consent for broadcasters supported by a remunerated exception for underlying rights holders goes only part of the way to resolving the issues that arise in relation to retransmission. As the ALRC has clearly identified, the question of how to frame an appropriate retransmission scheme involves complex considerations of broader policy areas including media policy as well as competition considerations.

Free TV members are strongly of the view that a 'must-carry/re-transmission consent' regime should be introduced similar to the one in operation in the US but extended to include carriage of free-to-air services on mobile, satellite and internet platforms. Particular issues arise from the monopoly position of Foxtel in the Australian pay TV market that make the availability of a "must carry" election critical in ensuring the broad availability of the free-to-air services valued by all Australians.

In addition, Free TV is aware that any such 'must-carry/retransmission consent' regime should not be used to circumvent licence area restrictions set out in the BSA. Accordingly, Free TV's proposal is that retransmission consent and 'must carry' obligations must be delineated by the licence area framework. Any retransmission arrangements agreed between free-to-air broadcasters and re-transmitters would need to acknowledge, and be confined to the specific licence area authorised for broadcast by the free-to-air broadcaster's BSA licence(s). This would include retransmissions by way of broadcast, or any other means (including internet delivery). In this way, retransmissions by any means would not depart from, or disrupt the current broadcast regulatory framework.

Part VC of the Act would be amended in order to reflect the "must-carry/retransmission" regime, and would make available the statutory licence to approved retransmissions. In effect, any retransmissions that were subject to a "must carry" obligation or a retransmission consent provided by free-to-air broadcasters would be able to take advantage of the Part VC of the Act in order to facilitate their retransmission without infringement of the underlying content rights. However, Part VC of the Act should only be available to retransmission services that observe the licence area obligations set out in the BSA.

As the Discussion Paper acknowledges, the exploitation of the existing retransmission scheme by Pay TV did not come about by operation of considered government policy. What is clear is that its operation is contrary to the proprietary rights of broadcasters and unfairly beneficial to Pay TV and other retransmitters.

Option 1 as proposed by the ALRC assumes that there is no longer a need for regulatory intervention to support retransmission in the converged media environment, meaning that retransmission would be subject to market mechanisms.

Therefore, Option 1 does not take into account the following issues:

- It does not facilitate access to free-to-air services across the community. As with the existing arrangements, Pay TV and other service providers would be able to decide what media content is made available in the home, and the terms on which it is made available. Where terms of agreement for delivery of free-to-air television services are not reached, audiences face the threat of loss those services (which are the most watched services). Even where terrestrial reception is easily accessible, viewers must then alternate and watch programs across dual platforms, with a wide range of compatibility issues. As noted above, in some cases pay TV installation has even resulted in a disconnection of free-to-air terrestrial receiver equipment. Considering these circumstances, there should be a mechanism that supports and facilitates the stable delivery of free-to-air television by Pay TV and other service providers.
- In the Pay TV sector, free-to-air broadcasters must negotiate with a monopolist. Option 1 does not contemplate a mechanism to address the monopoly market position of Foxtel in any negotiations with commercial free-to-air broadcasters. Free-to-air broadcasters should have a "must carry" alternative in any new retransmission regime, to promote fair competition and balance Foxtel's market power.
- It does not take into account the link between abolition and the part VC statutory licence and the fact that this creates significant difficulties which could make retransmission unworkable.

Overall, while Free TV is generally supportive of Option 1 in so far as it would deliver a retransmission consent to broadcasters, it is of the view that Option 1 does not adequately deliver a workable solution. Firstly a broadcaster consent would be of little utility in the absence of a part VC scheme for underlying rights. Secondly, it does not adequately balance the rights of broadcasters as copyright owners with the public benefits that arise from ubiquitous access to commercial free-to-air television services which requires the addition of a must-carry election for broadcasters.

2.3 Option 2

Free TV does not support Option 2.

Option 2 involves replacing the free use exception in s 212 in the BSA with a remunerated exception for the retransmission of broadcasts by "any technique" (ie statutory licence for broadcasts retransmissions as currently exists in Part VC for underlying rights in retransmissions).

The ALRC states that "Option two assumes there is a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts, either to ensure access to free to air broadcasting or to facilitate market entry by new content service providers" (paragraph 15.61).

Free TV is strongly opposed to Option 2 because:

- the existing retransmission regime was never intended to allow new market entrants to profit from existing broadcast services.
- like Option 1, this option does not guarantee access to free-to-air services across the community. As with the existing arrangements, Pay TV and other providers would be able to decide what channels are made available in the home, the terms on which they are available, and be in a position to restrict the diversity of media available to customer households.

- this option ignores the observations made in the discussion above regarding the right of free-to-air broadcasters and underlying rights holders to control the use of the broadcast signal by further diluting the control of rights holders.

Any statutory scheme that seeks to compensate broadcasters only for the retransmission of their signal may not adequately compensate the broadcaster for the incidental commercial value that access to retransmission rights delivers to a Pay TV provider. This incidental value includes the broadcast stream as a package, including the skill and expertise required to develop it, and the value of the integrity of that stream (including, for example, its placement in a controlled channel menu). In order to operate fairly a statutory licensing scheme must take these factors into account and undertake a process involving consideration of detailed market information, complex economic analysis and contentious issues of judgement. It is far preferable to allow the parties to address these issues by negotiation.

The ALRC made reference to the following factors (amongst others) in support of its proposed repeal of the statutory licencing schemes discussed in Chapter 6 of the Discussion Paper:

- enabling the parties to take advantage of new technologies;
- allowing more efficient remuneration of rights holders;
- removing a derogation of the rights holder's rights;
- the scheme is anti-competitive; and
- the availability of direct licensing.

These are also reasons not to create a new statutory licensing scheme applying to broadcast copyright. To suggest in Chapter 6 of the Discussion Paper that statutory licensing should be abolished and then to suggest an expansion of statutory licensing in Chapter 15 is inconsistent.

In the case of free-to-air broadcasters, the availability of direct licensing is particularly relevant. Statutory licenses are only appropriate where it is difficult to transact with a large number of rights holders. There are only 5 major commercial free-to-air broadcasters in Australia and only 8 in total. The number in each license area is never more than three. This makes direct licensing a convenient and effective solution.

The current retransmission regime severely disadvantages broadcasters and has a detrimental impact on continued investment in original Australian content. Extending the right of retransmission to internet based services would substantially increase this detriment by allowing third parties to continue to build new services around the Free TV channels without having to contribute a cent to their compilation. Option 2 would perpetuate a culture of "free riding" which is unjustifiable in an industry where there is intense competition surrounding content and viewer engagement.

In summary, Option 2 would exacerbate rather than address the serious issues associated with the existing retransmission scheme and would further erode broadcasters' rights.

2.4 Must-carry / retransmission consent regime

As indicated above when addressing Option 1, Free TV supports a US-style 'must carry/retransmission consent' regime that applies to services delivered over cable, satellite, IPTV, the internet, mobile telecommunications networks and other technologies and platforms. Such an approach provides a reasonable and tested way of protecting broadcasters' legitimate interests in their intellectual property.

In order for this approach to work the Act must be amended so that the statutory licensing scheme for underlying rights will operate in cases where there is a negotiated agreement for retransmission, and where retransmission takes place due to exercise of a must carry obligation. The restriction which prevents the statutory licensing scheme for underlying rights from applying in in relation to retransmission on the internet should be removed, but only when a new retransmission scheme is enacted.

Amendments to Part VC of the Act would extend the benefit of the statutory licensing scheme for underlying rights to all retransmission services, including those that occur via the internet. Although Free TV is in favour of facilitating online retransmissions where undertaken in accordance with a "must carry/retransmission consent", Free TV members note that the extension of the statutory licence scheme should not be used to circumvent licence area restrictions in the BSA.

In particular, online retransmission services should not be provided with the benefit of the statutory licence to facilitate their operation in circumstances where retransmissions services occurring by way of "broadcast" are limited by licence area restrictions in their retransmissions. This would create an unintended inequity for retransmissions, with differing regulatory requirements placed on internet retransmissions compared to other retransmissions.

Accordingly, Free TV is in favour of retaining the licence area restrictions set out in the BSA in order to apply a consistent approach to all retransmissions. In doing so, Free TV acknowledges that internet retransmissions would require sufficient technological restriction, including geoblocking, in order to observe licence area restrictions.

Free TV considers retention of the licence area regime set out in the BSA to be a critical component of any introduced "must-carry/retransmission regime". Free TV's members recognise and understand the policy goals underlying the concept of geographically based licence area regulation. The licence area framework delineates well understood market areas, protects and fosters competition, and is an established framework that has been in existence since the industry's inception.

This is particularly important for those Free TV members that operate services in regional and remote areas of Australia, and are reliant on the identification of their licence areas in order to maintain their services, in concert with the corresponding obligation in certain markets to provide material of local significance.

The concept of licence area integrity is both pervasive and fundamental in the BSA, and its removal would create serious disruption to the industry. As a result, Free TV supports the "must carry/retransmission consent" regime only on the basis that licence area integrity in accordance with the BSA is maintained.

Any recommendations by the ALRC must reflect both the proprietary interest of broadcasters in the broadcast signal, and the public benefit of facilitating access to free-to-air television. The recommendation should not leave the public benefit to be determined by the market, nor contemplate a statutory scheme allowing all and sundry access to broadcast channels.

Instead it should grant commercial television broadcasters rights in relation to retransmission which will enable and facilitate wide public access to the free-to-air television services available in their licence area(s).

We note that the ALRC argues that "rationales for must carry regimes are clearly based primarily on communications and media policy and are not issues that can, or should, be driven by the ALRC in the context of the reform of copyright laws" (paragraph 15.156).

Free TV strongly disagrees with the assertion that the ALRC can avoid, and should not consider, communications and media policy in arriving at its recommendations. Retransmission is an issue where communications and media policy intersect at a fundamental level with copyright law. This was acknowledged by both the recommendations of the Convergence Review[8], and by the ALRC in proposing Options 1 and 2.

It is clear from the observations made above that the existing retransmission regime is a significant example of "communications and media policy". In our submission, a great deal of the Act and most of the exceptions represent views on issues of policy, including policy in the area of communications and media. The framework that should guide the ALRC's consideration of communications and media policy is set out in the existing legislative framework, including the objects at section 3 of the BSA.

Furthermore both Options 1 and 2 proposed by the ALRC are proposals which have a significant bearing on communications and media policy. If the ALRC is prepared to entertain Options 1 and 2, it must also give proper consideration to a proposal for a must carry regime.

A “must carry” regime was first put in place by legislation in the United States when, in 1992, the *Cable Television Consumer Protection and Competition Act* was passed. Since 1992, there has been international recognition of the need to protect free-to-air television from impact of Pay TV. Comparable regimes have been introduced in Canada, as well as many countries in Europe and India.

It should be noted that a must carry regime addresses the potential market failure where free-to-air and subscription providers are unable to reach commercial agreement regarding the terms of negotiated retransmission. In that case, a free-to-air broadcaster has a very strong commercial incentive to make a “must carry” election. The economics of free-to-air broadcasting require maximum audience coverage, as a free-to-air broadcaster delivers audiences to advertisers (and in the case of national broadcasters, advances the public interest charters of these broadcasters). This point is important, because it demonstrates that a “must carry” regime furthers the policy objective of ensuring that free-to-air services are ubiquitous.

USA

The United States precedent is particularly relevant because it is the most mature multi-service and multi-platform market. The United States approach therefore provides a strong guide for policy mechanisms which appropriately address these issues in Australia. The key elements of the US regime are:

- a right for each free-to-air television broadcaster to elect that Pay TV cable providers active in its licence area must carry its free-to-air services in that licence area.

[8] Australian Government Convergence Review, *Convergence Review Final Report* (2012), at 33.

- a right to re-exercise that election every three years; and
- if a free-to-air television broadcaster does not elect that a Pay TV provider carry its services, the parties will be free to negotiate for the Pay TV provider to carry the services on commercial terms.

The fundamental policy objectives behind "must-carry" obligations as implemented in the United States was concisely stated in the US Supreme Court decision, *Turner Broadcasting System, Inc, et al v Federal Communications Commission*[9] as being:

1. to preserve the benefits of free, over the air local broadcast television;
2. to promote the widespread dissemination of information from a multiplicity of sources; and
3. to promote fair competition in the television programming market.[10]

Although Free TV services in Australia are more ubiquitous than the equivalent services in the United States when must carry was introduced, the reasons for introducing must carry in the USA are also applicable in Australia.

Once a pay TV platform is established as the primary source of audio-visual entertainment in the home, the pay TV provider has control of the content that is made available within the home. This is an unhealthy degree of control over access to information, news and entertainment and gives rise to a significant degree of market power that may be adverse to fair competition in the programming market. The anti-siphoning regime in relation to sports rights has been legislated to help address this issue.

The issues of access to information and market power are more relevant in Australia than they have been in the US, because of the monopoly position of Foxtel and vertical integration between Foxtel and the content businesses of News Corporation.

Free TV supports an approach that adopts the key elements of the US scheme, expanded to encompass carriage of free-to-air services on satellite and the internet. This alternative option recognises the proprietary rights of free-to-air television broadcasters while facilitating broad community access to free-to-air stations (thereby fulfilling the public policy rationale for free-to-air television broadcasting).

Europe

The European Union's Universal Service Directive 2002/22/EC sets out Europe's "must carry" framework. Article 31 provides guidance on the obligations, which is supplemented by various Working Documents, such as *'Must-carry' obligations under the 2003 regulatory framework for electronic communications networks and services*.

[9] 520 US 180 (1997).

[10] *et al ibid* . (95 – 992), 5, at 6 – 11.

Must carry provisions have been implemented in domestic law across Europe, including nations such as Belgium, Germany, the Netherlands, Spain, and the United Kingdom[11]. The details of the rules applicable in the domestic legislation of these countries is summarised in Attachment A.

2 Fair Use

The current fair dealing regime should be retained. The fair dealing exceptions set out sections 40, 41, 41A and 42 of the Act (**fair dealing exceptions**) are well established and effective. Members of Free TV rely upon fair dealing for criticism and review, parody and satire and most importantly, reporting of news, on a daily basis in compiling programming.

In the areas where broadcasters rely on the fair dealing provisions there is a strong and well-established understanding between various stakeholders as to the balance that the current system provides between the interests of copyright owners and users.

More particularly, the uncertainty and cost implications associated with replacing the existing law with a broad fair use exception would impose a significant financial and administrative burden on parties, which will require extensive reliance on legal advice and renegotiation of agreements. Further, the proposed formulation of fair use allows very substantial latitude for disagreement regarding the scope of the provision, and therefore its application to particular cases. This may make it difficult for stakeholders to reach an agreement on how the new law should be applied and prevent the development of suggested codes of practice.

It is not clear the extent to which US jurisprudence might be used to assist in interpreting fair use. Many fair use cases in US law judge fairness having regard to the US Constitution. In particular, US courts have regard to the right of free speech and find fair use where the use benefits free speech under the US Constitution[12].

In practice, the change proposed will create uncertainty for stakeholders until the scope of the application for the fairness factors and illustrative purposes are litigated in court in Australia. It will take a number of cases to re-establish a high degree of certainty and it is very likely that it will take a considerable period of time before the uncertainty is resolved. Litigation costs in seeking clarity will be imposed on copyright owners and copyright users seeking to rely on the fair use exemption. In the interim, the lack of certainty will have an impact on the ability of both owners and

[11] *An Inventory of EU 'must-carry' regulations: A report to the European Commission, Information Society Directorate*, February 2001 at:
http://www.pedz.uni-mannheim.de/daten/edz-bo/gdi/01/OVUM-mustcarry.pdf

[12] See for example Nordstorm, Inc v PARAN 1992 US Dist. LEXIS 9162.

users to confidently invest in the production of content and/or the development of new services.

Free TV is not convinced of the argument that fair use assists innovation, as outlined in paragraphs 4.44 – 4.49 of the Discussion Paper. Free TV notes in this regard the joint submission of the Australian Film/TV Bodies in response to the ALRC's Discussion Paper, that 'economic evidence suggests that the introduction of fair use has a harmful impact on content producing industries',[13] and that the economic effects of more flexible copyright exceptions on content industries are at best very difficult to measure.[14]

3.1 Free TV's preferred approach to managing rapidly evolving technologies

Given the rapid technological changes taking place in broadcasting and media generally, we recognise that there is some disconnect between the current copyright law framework and the technological practices essential to broadcast television.

However, Free TV is of the view that the best approach to addressing the issues resulting from rapidly developing technological practices is to add additional prescriptive exceptions on a case-by-case basis as they are required. Free TV is in favour of a well-considered and iterative approach to considering new technological developments. As each technological development will necessarily impact upon rights holders in a different manner, an all-encompassing illustrative purpose provision runs the risk of ultimately being detrimental, weighing too far in favour of end users. The introduction of new exceptions, or any amendments to existing exceptions, should be the subject of a measured process of review and consultation, submission and report. It is not appropriate to deal with these issues as one without thorough and detailed consideration of the possible consequences of any change to the law.

3.2 Alternative approaches

If the ALRC remains committed to an open-ended exception, Free TV is strongly of the view that the fair dealing exceptions and the exceptions at ss 45 and 67 should still be retained. The only way to retain the existing law and prevent any 'backsliding' is to preserve the existing fair dealing provisions in their entirety.

Free TV does not agree with the ALRC that the model as outlined in paragraphs 4.170 – 4.171 of the Discussion Paper. Furthermore, Free TV does not agree that

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[13] Submission 205, *Copyright and the digital economy*, 142; citing George Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, (November 2012), Centre for law and Economics http://ssrn.com/abstract=2180769.

[14] George Barker, *Estimating the Economic Effects of Fair Use and other Copyright Exceptions: A Critique of Recent Research in Australia, US, Europe and Singapore*, (November 2012), Centre for law and Economics http://ssrn.com/abstract=2180769. The Australian Film/TV Bodies comprise of the Australian Federal Against Copyright Theft (AFACT), the Australian Home Entertainment Distributions Association (AHEDA), the Motion Picture Distributors Association of Australia (MPDAA), the National Association of Cinema Operators (NACO), The Australian Indepe3ndent Distributors Association (AIDA), the Independent Cinemas Association of Australia (ICAA), and the Media Entertainment and Arts Alliance (MEAA).

the existing exceptions should be included as 'illustrative purposes' because it leaves open the risk that the certainty that currently exists in relation to those exceptions is removed.

The fair dealing provisions should not be amended to include additional fairness factors which may make them less certain and open to re-litigation. Free TV agrees with the concerns stated in the joint submission of SBS, Commercial Radio Australia and the ABC in this regard that:

> *"If these well-established and heavily used provisions are included within a 'fair use' provision they will be open to re-litigation. This may unintentionally diminish their utility or add further restrictions on their operation."*

Free TV is concerned that the risks associated with uncertainty will be increased if the entire fair dealing system is replaced by a new model.[15]

3 Non-consumptive Use Exceptions

Chapter 8 of the Discussion Paper sets out various "non-consumptive" techniques which are not currently permitted under the Act. In particular, it outlines the concerns that the current provisions regarding temporary copying, reproductions and proxy web caching (such as ss 43A, 43B, 111A, 11 and 200AA of the Act) do not allow for many commonplace techniques involving non-consumptive copying. The arguments in respect of the one "non-consumptive" illustrative purpose covering individual techniques are as follows:

- Caching and indexing: the ALRC contended that it may be difficult in practice to "draft a specific exception for caching and indexing that would be technology neutral, and that would accommodate the different interests of the parties"[16]. Stakeholders expressed concern that the scope of "temporary reproduction" is currently unclear under the Act and does not reflect the fact that "multiple reproductions and communications may occur"[17] as part of a technological process. There were also views as to the undesirability of having "several overlapping but distinct provisions aimed at the same basis phenomenon and offering only partial and uncertain protection".[18]
- Data and text mining: There was similar concern that data and text mining - defined as "automated analytical techniques"[19] resulting in data "stored in

[15] Submission 295, *Copyright and the digital economy*, 23 May 2013.

[16] 8.73, Copyright and the Digital Economy (ALRC DP 79, 2013).

[17] 8.19, Ibid.

[18] 8.21, Ibid.

[19] 8.41, Ibid.

databases and repositories"[20] – is also not adequately permitted under the current framework. The ALRC submitted that there was insufficient evidence of "market failure to warrant a specific exception to deal with data and text mining"[21]. It is proposed that a series of data and text mining-specific fairness factors will adequately balance a number of competing interests. Various stakeholders also attested to the importance of data and text mining in facilitating research and study.

In our submission the circumstances, uses and possible consequences of each process are unknown and highly complex. We are not persuaded, for example, that copyright owners should not be able prohibit persistent caching of their content or that the owners of a data base should not be able to use copyright to restrict data mining of the information that is held, depending on the circumstances in which such caching or data-mining is taking place.

Consistently with our position in relation to fair use outlined above, Free TV is of the view that sections 43 A, 111A, 43 B, 111B and 200AAA should be retained, so that the exceptions contained within these provisions remain certain. These provisions should not be deleted in favour of a fair use exception. Free TV disagrees with the ALRC's proposal to address these issues within a fair use framework by introducing an illustrative purpose of "non-consumptive use".

If, contrary to Free TV's submission, the ALRC recommends that a fair use style provision should be introduced, then Free TV is of the view that the specific provisions in relation to non-consumptive use (ss 43A, 111A, 43B, 111B and 200AAA) should be retained. Any additional exceptions could be dealt with by way of the recommended fair use provision.

4 Third Parties

The transition of electronic services from the personal computer and at home devices to online services in "the cloud" is a major shift and should be accommodated by the Act. It seems anomalous that activities that would be legal if conducted in the home on storage devices owned by a consumer might not be permissible if the same consumer purchases cloud storage to do exactly the same activity.

However, Free TV does not agree with the ALRC that possible liability for third party use should be determined by the introduction of a fair use right. The uncertainty of applying the four fairness factors and attempting to find a relevant "illustrative purpose" is unacceptable.

[20] 8.42, Ibid.

[21] 8.78, Ibid.

The ALRC should reconsider the implications of cloud based storage and, in particular, whether the following factors should change the copyright obligations of a cloud service provider:

- the method of charging: advertisement supported fee for service, subscription, equipment rental, space rental, communications or data charges.
- the subject of the charge: providing automated services, providing software as service, providing storage, providing rack space, selling or renting equipment;
- the sophistication of the service: the user causes each copy to be made; the users selects copies to be made automatically, the service provider selects the copies to be made based on general instructions from the user, the service decides what copies the user needs/would probably like to make and makes them as a service to the user.

The range of features described above are common across different cloud services.

The ALRC should carefully consider how each of these factors might make a difference to whether or not the service should be regarded as simply a means for a user to enjoy one or more of the exceptions set out in the Act or necessarily involves the services provider in copyright infringement. The ALRC should produce clearly targeted recommendations that clarify the law in this important area.

5 Abolition of Statutory Licence Schemes

Free TV does not support the abolition of statutory licence schemes applicable to educational institutions, government and institutions assisting persons with a print disability that are set out in Parts VA and VB of the Act.

The current regime is an effective way of making broadcast content available to the relevant users and caters to the various interests of stakeholders. The ALRC's proposal may lead to a more complicated approach to the licensing of rights and a more complex relationship with users and collecting societies. This is likely to result in broadcasters having to deal with a greater administrative burden without any increase in relevant licensing revenue.

On the basis that the current regime is effective, Free TV believes that there is little justification for repealing the compulsory licence scheme.

6 Contracting out

Free TV supports the ALRC recommendation that the Act be amended to include a provision expressly prohibiting contracting out of the statutory exceptions associated with:

- library and archives;
- research or study;
- criticism and review;
- parody or satire;

- reporting of the news; and
- quotation.

These exceptions serve an important social purpose in promoting freedom of expression and information. Contractual relationships should not be able to interfere with rights that are essential in order to better protect the public interest.

We note that other jurisdictions have displayed considerable support in limiting parties' ability to contract out of fair dealing exceptions. In the United Kingdom, the *Digital Opportunity: Review of Intellectual Property and Growth* (May 2011) (**Hargreaves Review**) argued in favour of copyright exceptions being "protected from contractual override". The Hargreaves Review outlined the significant risks associated with contracting out, to the extent it grants rights holders the ability to "rewrite the limits the law has set on the extent of the right conferred by copyright"[22]. One of the key arguments centred around the legal uncertainty created by contracting out. It states the following[23]:

> *"Where an institution has different contracts with a number of providers, many of the contracts overriding exceptions in different areas, it becomes very difficult to give clear guidance to users on what they are permitted."*

This legal uncertainty is further reinforced by the issue of "contractual override"[24]:

> *"Even if unused, the possibility of contractual override is harmful because it replaces clarity ("I have the right to make a private copy") with uncertainty ("I must check my licence to confirm that I have the right to make a private copy"). The Government should change the law to make it clear no exception to copyright can be overridden by contract."*

In echoing these sentiments, Free TV believes that any ability to contract out of fair dealing exceptions, specifically criticism and review or parody, risks undermining the "central objective of copyright".[25] We agree with various submissions that any attempt to restrict these exceptions would unduly fetter the "free flow of information and freedom of expression".[26]

7 Conclusion

Free-to-air television broadcasters are operating in a heavily regulated and increasingly competitive environment. Television is no longer the only screen

[22] 5.40, I Hargreaves, *Digital Opportunity: A Review of Intellectual Property and Growth* (2011).

[23] Ibid.

[24] Ibid.

[25] Ibid.

[26] 17.50, Copyright and the Digital Economy (ALRC DP 79, 2013).

providing entertainment in the home, and the television itself is now shared with Pay TV, IPTV and on-demand services. To compete effectively in this context, free-to-air broadcasters need regulatory and legal certainty.

Free TV agrees that there is no proper basis for continuing the existing retransmission regime but rejects the options suggested by the ALRC. The two options proposed are inadequate to achieve the dual objectives of reinstating the rights of copyright owners and ensuring free-to-air TV is widely available. Option 1 provides no mechanism for achieving the public policy objectives associated with free-to-air television. Option 2 would be an unwarranted further derogation of the rights of Free TV members.

Neither option would ensure diversity of providers of news and information and/or achieve wide range community access to free-to-air services.

Australia should follow international developments and adopt a "must carry" regime along the lines of the system that has been operating for more than 20 years in the United States. The necessary elements of the scheme are:

- a right for each free-to-air television broadcaster to elect that pay TV providers (including satellite and internet based services) active in its licence area must carry its free-to-air stations in that licence area;
- a right to re-exercise that election every three years; and
- if a free-to-air television broadcaster does not elect that a pay TV provider carry its channels, the parties will be free to negotiate for the pay TV provider to carry the channels on commercial terms.

Free TV has considered in detail the arguments and proposals made in the Discussion Paper for replacing existing fair dealing rights with a right of fair use. The arguments made in favour of the change can be summarised as falling within 3 headings: allowing flexibility, facilitating innovation and meeting user expectations. Free TV is not persuaded that there are significant benefits associated with moving to a fair use regime that would justify the disruption, uncertainty and additional costs that would be caused by such a change. Amending the Act to take account of technological change should take place through a careful consultation process relating to each relevant exception resulting in precise adjustments.

Free TV believes that the benefits of adopting fair use do not outweigh the detriments of moving from familiar and well understood fair dealing principles. Free TV does not believe that the arguments made in the Discussion Paper are sufficient to justify the abolition of the existing statutory licensing schemes set out in Parts VA and VB of the Act and wishes to maintain the compulsory licensing scheme for the broadcast of sound recordings.

Free TV commends the ALRC for its consideration of the complex issues raised in the Discussion Paper and thorough review of the arguments on both sides. Free TV offers the comments and observations expressed in this submission to aid the ALRC in the preparation of its Final Report.

Attachment A

Examples of "must carry" rules

Country	Year of Implementation	Legislation/ Decree	Beneficiaries of the Must Carry Provisions
Belgium, French Community	1987 (last modified 1999)	The Media Decree, Article 22	French public broadcasters, authorised local and private broadcasters, television programs relating to international organisations, and other broadcasters as agreed to from time to time.
The Netherlands	1987	The Media Act 1987/249, Article 82	The three television channels of the Dutch public service broadcasting companies, two local public service broadcasting companies, and television programs transmitted by the two channels of the Flemish public service broadcasting company.
Spain	1996	Cable Telecommunications Act, Article 11	Television programmes transmitted by three private broadcasting channels
Belgium, Regional of the Capital Brussels	1995	The Federal Law of 30 March 1995, Articles 13, 16 and 19	Television and radio public service broadcasters of the Flemish and French communities, as well as other broadcasters as agreed to from time to time.
Germany	2010	Interstate Treaty on Broadcasting and Telemedia, Section III	Commercial broadcasters who are appropriately licensed
United Kingdom	1990	Broadcasting Act 1990, Schedule 12, Part III, paragraph 4 and section 78A	The following channels: BBC1, BBC2, ITV, Channel 4 and the Public Teletext Service.
United States of America	1992	Cable Television Consumer Protection and Competition Act 1992, Section 614	Local commercial broadcasters