15. Retransmission of Free-to-air Broadcasts

Contents

Summary

15.1 Subscription television companies and other media content providers may wish to retransmit free-to-air television and radio broadcasts to their own customers—that is, to provide the content contained in broadcasts by other means, such as cable or satellite transmission, in a simultaneous and unaltered manner.

15.2 The *Copyright Act 1968* (Cth) and the *Broadcasting Services Act 1992* (Cth) effectively operate to provide, in relation to the retransmission of free-to-air broadcasts:

- a free-use exception in relation to broadcast copyright;
- a free-use exception in relation to copyright in the underlying works or other subject matter (underlying rights), applying to retransmission by self-help providers; and

- a remunerated exception in relation to underlying rights, which does not apply to retransmission that 'takes place over the internet'.

15.3 This chapter examines these exceptions (the retransmission scheme) and whether they are adequate and appropriate in the digital environment. This raises complex questions at the intersection of copyright and communications and media policy. The options for reform are largely dependent on assumptions about matters not within the ALRC's remit, including:

- the exclusive rights covered by broadcast copyright, or other protection of broadcast signals;
- the extent to which retransmission of free-to-air television and radio broadcasts still needs to be facilitated in a converging media environment; and
- the extent to which it remains important to maintain geographical limits on the communication of free-to-air broadcasts.

15.4 For this reason, the chapter presents alternative sets of proposals. The first option would involve the repeal of both the free-use exception applying to broadcast copyright and the remunerated exception in relation to underlying rights (Option 1). This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

15.5 The second option would be to replace the free-use exception for broadcast copyright with a remunerated exception, similar to that which would continue to apply to the underlying rights (Option 2). This would continue the existing retransmission scheme while providing some recognition for broadcast copyright.

15.6 If Option 2 is chosen, or the existing retransmission scheme is retained, the ALRC proposes that retransmission 'over the internet' should no longer be excluded from the scheme, which should apply to retransmission by any technique, subject to geographical limits on reception. However, if the internet exclusion is to remain, its scope and application should be clarified.

15.7 Finally, the chapter examines 'must carry' obligations and concludes that the ALRC should make no proposal on whether free-to-air broadcasters should have the option of requiring that free-to-air broadcasts be retransmitted on subscription cable or other platforms.

The current retransmission scheme

15.8 A retransmission is defined in the *Copyright Act* as a retransmission of a broadcast, where the content of the broadcast is unaltered and either simultaneous with the original transmission or delayed until no later than the equivalent local time.[1] Retransmission without the permission of the original broadcaster does not infringe

1 *Copyright Act 1968* (Cth) s 10.

copyright in broadcasts, by virtue of provisions contained in the *Broadcasting Services Act*.

15.9 The *Broadcasting Services Act* states that no 'action, suit or proceeding lies against a person' in respect of the retransmission by the person of certain television and radio programs.[2] The retransmission must, however, be within the licence area of the broadcaster or, if outside the licence area, with the permission of the Australian Communications and Media Authority (ACMA).[3]

15.10 In this way, the *Broadcasting Services Act* provides immunity against any action for infringement of copyright that might otherwise be able to be brought by the original broadcaster for retransmission of a free-to-air broadcast.

15.11 The immunity does not extend to copyright subsisting in a work, sound recording or cinematograph film included in a free-to-air broadcast (the 'underlying rights') unless the retransmission is provided by a 'self-help provider'.[4]

15.12 A self-help provider is defined to cover entities that provide transmission 'for the sole or principal purpose of obtaining or improving reception' in particular places.[5] Briefly, self-help providers include non-profit bodies, local government bodies or mining companies, which provide retransmission to improve reception in communities; or other persons providing retransmission by in-building cabling of apartment buildings and hotels.

15.13 For retransmitters, other than self-help providers, the *Copyright Act* provides a statutory licensing scheme for the underlying works. That is, the Act provides that the copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by retransmission of the broadcast, if equitable remuneration is paid.[6] Retransmission of a free-to-air broadcast that 'takes place over the internet' is excluded from this remunerated exception by virtue of s 135ZZJA of the *Copyright Act*.

15.14 Essentially, the current retransmission scheme allows the retransmission of free-to-air broadcasts, without the permission or remuneration of the broadcaster, and for equitable remuneration to be paid to the underlying rights holders.[7]

History of the retransmission scheme

15.15 The *Broadcasting Services Act*, as originally enacted, contained special provisions for retransmission of programs, which provided an immunity against

2 *Broadcasting Services Act 1992* (Cth) s 212.
3 Ibid s 212(1)(b)—except in the case of programs transmitted by a national broadcasting service or program material supplied by National Indigenous TV Limited: s 212(1)(a), (c).
4 Ibid s 212(2A).
5 Ibid s 212A.
6 *Copyright Act 1968* (Cth) s 135ZZK.
7 Ibid pt VC.

actions, suits or proceedings in respect of such retransmission, for persons other than broadcasting licensees.[8]

15.16 In 1999, amendments to the *Broadcasting Services Act*[9] changed the operation of the immunity so that it no longer applied to underlying rights, except where retransmission was provided by a 'self-help provider'.[10] This meant that anybody retransmitting programs, other than a self-help provider, would infringe these rights unless retransmission was with the permission and remuneration of the underlying copyright holders.

15.17 The amending Bill in its original form would also have required retransmitters to seek the permission of the owners of copyright in broadcasts before retransmitting.[11] In 1998, the Australian Government announced that 'new rules' would be introduced to 'correct an anomaly … which allowed pay TV operators to retransmit free-to-air television or radio signals without seeking the consent of the originating broadcaster'.[12] However, in the face of opposition to this requirement from the non-Government parties in the Parliament, the Government introduced an amendment that had the effect of overriding the requirement 'while the Government resolves the outstanding issues through further consultation with industry'.[13]

15.18 The *Berne Convention* specifically allows signatories to implement a statutory licence applying to rebroadcast and retransmission of copyright works.[14] The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) introduced the pt VC statutory licensing scheme applying to underlying works.[15] The stated reason for implementing the licensing scheme was that 'it would be impractical for retransmitters to negotiate with individual copyright owners in underlying copyright material to enable the retransmission of free-to-air broadcasts'.[16]

15.19 These provisions were inserted at the same time as the introduction of a new technology-neutral right of communication to the public.[17] This replaced and extended

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8 *Broadcasting Services Act 1992* (Cth) s 212(2) as enacted.

9 *Broadcasting Services Amendment Act (No.1) 1999* (Cth).

10 *Broadcasting Services Act 1992* (Cth) s 212(2A).

11 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).

12 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.350], quoting a joint media release of then Minister for Communications, the Information Economy and the Arts (the Hon Senator Richard Alston) and then Attorney-General (the Hon Daryl Williams AM QC MP), dated 10 March 1998.

13 Ibid, [9.530], citing Attorney-General's Department, *AGD e-News on Copyright*, No 11 (1999). See, also, the history of the retransmission exception set out in Free TV Australia, *Submission 270*: the retransmission exception 'has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law'.

14 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 11(bis)(2). Also *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002) art 8.

15 *Copyright Amendment (Digital Agenda) Act 2000* (Cth); *Copyright Act 1968* (Cth) pt VC.

16 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), 6.

17 *Copyright Act 1968* (Cth) s 87.

an existing re-broadcasting right, which only applied to 'wireless' broadcasts and not, for example, to cable or online communication.[18]

Scope of broadcast copyright

15.20 The grant of a separate copyright in broadcasts did not occur until the passage of the *Copyright Act* in 1968, and followed Australia's accession to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (*Rome Convention*).[19] The *Rome Convention* established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.

15.21 These rights can be protected by copyright law, as in Australia, or by other measures. Under the Convention, broadcasting organisations enjoy, among other things, the right to authorise or prohibit the 'rebroadcasting of their broadcasts'.[20] Broadcasting is defined under the *Rome Convention* as 'transmission by wireless means'[21] and re-broadcasting as the 'simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation'.[22] The *Rome Convention* does not require that broadcasters have an exclusive right to retransmission of their signal by cable.

15.22 In Australia, however, the *Copyright Act* provides that copyright in relation to a broadcast includes the right to 're-broadcast it or communicate it to the public otherwise than by broadcasting it'.[23] This applies to both wireless and wired transmissions and, therefore, provides broadcasters with broader rights than required internationally. In this regard, the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) explained that the amendment to broadcast copyright was

> intended to extend the current re-broadcasting right which only applies to wireless telegraphy to include the cable transmission of broadcasts and the making available online of broadcasts. The new right will therefore allow broadcasters to control the retransmission of their broadcasts irrespective of the means of delivery of the service.[24]

Copyright and communications policy

15.23 The ALRC observed, in the Issues Paper, that reviewing the retransmission exceptions raises significant communications and competition policy questions, as well

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18 Ibid s 87(c), as enacted.
19 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).
20 Ibid art 13(a).
21 Ibid art 3(f).
22 Ibid art 3(g).
23 *Copyright Act 1968* (Cth) s 87(c).
24 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [116].

as copyright policy questions, and asked whether this Inquiry was the appropriate forum for considering these.[25]

15.24 Stakeholder opinion was divided on this. Some stakeholders felt that the central importance of communications policy issues in the design of the retransmission regime meant that the incidental copyright issues should be left to other policy-making processes.[26] ASTRA, for example, submitted that the operation of the retransmission regime would be 'best addressed directly by Government in the context of communications and competition policy' and observed that retransmission does not raise the type of 'fair use' concerns that are at the core of the Terms of Reference.[27]

15.25 Other stakeholders considered that, while retransmission has implications for communications and competition policy, there is no reason the ALRC should not consider these issues.[28]

15.26 Free TV Australia (Free TV) stated that retransmission is 'primarily a copyright law issue'.[29] Screenrights distinguished between the issues and submitted that while 'must carry' (discussed below) is a communications issue, the exclusion of broadcast copyright from pt VC of the *Copyright Act* is a copyright issue that should be considered by the ALRC.[30]

15.27 The Terms of Reference specifically request the ALRC take into account the recommendations of the Australian Government's Convergence Review.[31] In particular, the Convergence Review suggested, in light of its recommendation that geographically-based licences no longer be required to provide content services,[32] the retransmission provisions be reviewed as part of the ALRC Inquiry.[33]

15.28 In the light of this, and stakeholder feedback received on the operation of the retransmission exceptions, the ALRC considers that it should make proposals on retransmission issues.

Assumptions and options for reform

15.29 Options for reform are, however, largely dependent on assumptions about matters not within the scope of the ALRC's Inquiry.

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25 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [228], Question 38.

26 NRL, *Submission 257*; Foxtel, *Submission 245*; SBS, *Submission 237*; ASTRA, *Submission 227*; News Limited, *Submission 224*; Australian Film/TV Bodies, *Submission 205*; Australian Industry Group, *Submission 179*.

27 ASTRA, *Submission 227*.

28 Free TV Australia, *Submission 270*; Music Council of Australia, *Submission 269*; ARIA, *Submission 241*; Australian Copyright Council, *Submission 219*; Australian Broadcasting Corporation, *Submission 210*; NSW Young Lawyers, *Submission 195*.

29 Free TV Australia, *Submission 270*.

30 Screenrights, *Submission 215*.

31 Australian Government Convergence Review, *Convergence Review Final Report* (2012).

32 See Ibid, ch 1, rec 2.

33 Ibid, 33.

15.30 First, reform of the retransmission scheme raises threshold questions about what exclusive rights should be covered by broadcast copyright. That is, what copyright or other protection should be extended to broadcasts in the first place?

15.31 As discussed above, in Australia, broadcasters are provided with broader protection than required internationally, as the *Rome Convention* does not require copyright protection, as such, for broadcasts.

15.32 The *Rome Convention* provides permitted exceptions to broadcast protection, which include: private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.[34] Signatories may also provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides 'in connection with the protection of copyright in literary and artistic works'.[35]

15.33 From this perspective, options for reform can be seen as relatively unconstrained, in copyright policy terms, because the *Rome Convention* does not require broadcast copyright, and allows a series of exceptions not found in the *Berne Convention*.[36] Arguably, the nature of broadcast rights can justify anomalous exceptions—that is, exceptions that do not apply to other subject matter.

15.34 On the other hand, having extended copyright to broadcasts, there are arguments that the exclusive rights applying to broadcasts should be similar to those applying to other subject matter. Arguably, the free-use exception for retransmission would not comply with the 'three-step test' under the *Berne Convention* and other international copyright conventions,[37] if this test applied to broadcast, because it removes broadcast copyright protection without permission or remuneration, conflicting with normal exploitation of the work and unreasonably prejudicing the legitimate interests of the broadcaster.

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34 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15. International protection of broadcasting organisations has been discussed at length at the World Intellectual Property Organization, by the Standing Committee on Copyright and Related Rights (SCCR). The issue of providing legal protection for broadcasting organisations against unauthorised use of broadcasts, including by retransmission on the internet has been retained on the Agenda of the SCCR for its regular sessions: World Intellectual Property Organization, *Program Activites*, *Broadcasting Organizations* <www.wipo.int/copyright/en/activities/broadcast.html> at 24 April 2013.

35 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15(2).

36 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

37 Ibid art 9(2), as incorporated in: *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, ATS 38 (entered into force on 1 January 1995), art 13; *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002) art 10; *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002) art 16; *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005) art 17.4.10(a).

15.35 The scope of broadcast copyright has long been tied up with debates regarding communications policy, including:

> the facilitation of the subscription television industry, ensuring access to broadcasts in remote areas, and the introduction of digital and high-definition technologies. The desire to promote these goals of broadcast policy has led to broadcasters being denied certain rights they might, as copyright owners, expect to have.[38]

15.36 Copyright law has longstanding links with communications regulation, which has tended to emphasise the 'special' place of broadcasting in the media landscape. The *Copyright Act* contains, for example, many free-use and remunerated exceptions that take the circumstances of the broadcasting industry into account, including the statutory licensing scheme for radio broadcast of sound recordings and other exceptions discussed in Chapter 16.

15.37 Historically, regulators have pursued a range of public policy goals in relation to broadcasting, such as ensuring universal public access, minimum content standards (including classification and local content rules), diversity of ownership, competition and technological innovation.[39]

15.38 The retransmission scheme, in facilitating access to free-to-air broadcasts across media platforms, was intended to serve at least some of these public policy goals. The extent to which retransmission remains important may, however, be questioned in light of the convergence of media content and communications technologies. For example, if television audiences fragment across a multiplicity of broadcast, cable and online programming, or there is a move away from licensing media content providers, the case for a retransmission scheme that qualifies ordinary copyright principles may be weaker.

15.39 The retransmission scheme can be seen as favouring certain commercial interests in the communications and media markets. At present, subscription television providers do not need to license broadcast copyright when retransmitting free-to-air broadcasts, which advantages them by removing the need to negotiate rights with broadcasters. Similarly, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for the underlying rights.

15.40 Whether the existing retransmission scheme produces good outcomes in terms of communications and competition policy is a matter beyond the scope of the ALRC's Inquiry. Further, many aspects of communications and media regulation are under review, including as a response to the Convergence Review[40] and against the backdrop

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38 K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242, 254.

39 Ibid, 244.

40 The Convergence Review Committee was established to examine the operation of communications and media regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. The Review covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radiocommunications spectrum: see Australian Government Convergence Review, *Convergence Review Final Report* (2012).

of the rollout of the National Broadband Network (NBN). In this context, the ALRC presents two options for reform. These options are based on two different sets of assumptions about the desirable scope of broadcast protection and the importance of retransmission.

Option 1: Repeal of the retransmission scheme

15.41 Option 1 assumes that the retransmission of free-to-air television and radio broadcasts no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs should be left to be determined by market mechanisms. In terms of the framing principles, this option would assume that the interest in promoting fair access to and wide dissemination of content (Principle 3) is no longer best served by the retransmission scheme.[41]

15.42 There are some indications suggesting that the retransmission scheme is no longer necessary. The scheme was originally intended to provide for the distribution of free-to-air broadcasts to areas which did not receive adequate reception. The regime facilitated self-help arrangements to enable individuals and communities to access free-to-air broadcasting services where the location or other reception difficulties meant that signal quality was not adequate or the signal was not available.[42]

15.43 With the introduction of subscription television into Australia in 1995, subscription television operators also began retransmitting the national and commercial television services as 'free additions' to their channels, without the permission or remuneration of either broadcasters or underlying rights holders.[43] While underlying rights holders are now remunerated under a statutory licensing scheme, the agreement or remuneration of the broadcaster is still not required, despite the extension of broadcast copyright in 2000.

15.44 To the extent that the purpose is to facilitate community access to free-to-air broadcasts, the retransmission scheme may no longer play a significant role apart from retransmission performed by organisations defined, since 1999, as self-help providers under the *Broadcasting Services Act*. Self-help providers do not have to remunerate either the free-to-air broadcaster or the underlying rights holders. The ALRC does not propose any change to the operation of free-use exceptions applying to retransmission by self-help providers. These exceptions appear to retain relevance[44] and there has been no indication that they require review.

15.45 In addition, since 2010, re-broadcast by 'satellite BSA licensees'[45] has been authorised, subject to a separate statutory licensing scheme under the *Copyright Act*.[46]

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41 See Ch 2.
42 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).
43 Ibid.
44 The ACMA, in 2011–12, issued 417 broadcasting retransmission licences to regional councils and other self-help providers, mainly for television broadcasts: Australian Communications and Media Authority, *Annual Report 2011–12* (2012).
45 A 'satellite BSA licensee' means the licensee of a commercial television broadcasting licence allocated under *Broadcasting Services Act 1992* (Cth) s 38C: *Copyright Act 1968* (Cth) s 10.
46 *Copyright Act 1968* (Cth) pt VD.

Under this scheme, the Australian Government-funded Viewer Access Satellite Television service provides free-to-air digital television channels to viewers with inadequate terrestrial reception.

15.46 A possible second purpose for the retransmission scheme may have been to assist in the early development of subscription television and to ensure competition in content provision across media platforms. If so, this rationale may no longer be relevant, given the market penetration of established subscription television services.

15.47 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. Subscription 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.[47]

Repeal of the free-use exception for broadcast copyright

15.48 The ALRC asked, in the Issues Paper, whether the retransmission of free-to-air broadcasts should continue to be allowed without the permission or remuneration of the broadcaster.[48]

15.49 Free-to-air broadcasters submitted that retransmission should be allowed to continue only with broadcasters' permission. Reform to implement this position was seen as justified for a number of reasons.

15.50 First, stakeholders asserted that the rationale for the retransmission free-use exception for broadcast copyright no longer exists, except in the case of self-help providers.[49] Free TV, for example, submitted that s 212 of the *Broadcasting Services Act* was introduced specifically to allow retransmission by self-help providers and was never intended to allow new services to retransmit free-to-air broadcasts without authorisation.[50] Commercial Radio Australia (CRA) stated that, while a provision allowing retransmission to remote communities that would not otherwise receive the broadcast may be justified, in the digital era, a 'blanket right for third parties to retransmit broadcasts' is not.[51]

15.51 Secondly, stakeholders questioned the justification for recognising underlying rights but, effectively, not copyright in the broadcast itself.[52] CRA, for example, submitted that both the broadcast and the underlying works or other subject matter are creative products and there is no 'reasonable basis for the current distinction between

47 Free TV Australia, *Submission 270*.
48 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 35.
49 Free TV Australia, *Submission 270*; Commercial Radio Australia, *Submission 132*; TVB (Australia) Pty Ltd, *Submission 124*.
50 Free TV Australia, *Submission 270*.
51 Commercial Radio Australia, *Submission 132*.
52 Free TV Australia, *Submission 270*; Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*; Commercial Radio Australia, *Submission 132*.

the protection of the underlying content and the broadcast'.[53] Free TV stated that broadcast copyright acknowledges the 'creative and economic value of broadcasts' and the 'endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment'. It also said that the retransmission free-use exception conflicts with the 'three-step test' under the *Berne Convention*.[54]

15.52 More generally, broadcasters had concerns about being unable to control the distribution of their broadcasts by competing platforms.[55] The Special Broadcasting Service (SBS), for example, referred to the need to 'strengthen protections against uses of SBS's broadcast signal by third parties which may affect the integrity of its presentation to viewers'.[56]

15.53 Allowing retransmission to be determined by consent would provide for the value to broadcasters and subscription television services of free-to-air broadcasts to be established through normal commercial negotiations between the two parties. This would give free-to-air broadcasters control over the commercial use of their signal, while allowing subscription television services the choice of which broadcasts they wish to retransmit, subject to the permission of the broadcaster.

15.54 At the same time, it would provide for the remuneration of free-to-air broadcasters where subscription television services were willing to pay for retransmission, while allowing them to decline to carry free-to-air broadcasts where the price is considered to be too high. In some cases, 'it is possible that carriage of the signals themselves could become the established market price for retransmission'—that is, no remuneration would need to be paid in either direction.[57]

Repeal of the remunerated exception

15.55 If the free-use exception for broadcast copyright were repealed, so that the permission of the broadcaster is required for retransmission, this has implications for the operation of the remunerated exception—the statutory licensing scheme in pt VC of the *Copyright Act*.

15.56 If the free-use exception for broadcast copyright were repealed, this statutory licensing scheme would only come into effect if a market-based agreement were to be reached between a free-to-air broadcaster and a retransmitter. That is, if there is no agreement, there can be no retransmission and the need to remunerate underlying rights holders will not arise.

15.57 Further, if the free-use exception were repealed, while underlying rights holders would not directly determine whether retransmission is allowed, in practice, they may be able to prevent it, despite the existence of the pt VC licence. An underlying rights holder may condition licensing of their content for free-to-air broadcast on the basis

53 Commercial Radio Australia, *Submission 132*.
54 Free TV Australia, *Submission 270*.
55 Ibid.
56 SBS, *Submission 237*.
57 See Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth), 13.

that retransmission will not occur, or that retransmission only occur on, for example, linear subscription television but not other technologies, such as 3G or 4G mobile networks.

15.58 Significant content owners, such as major professional sports bodies, could impose such conditions in negotiations around the sale of exclusive broadcasting rights. Therefore, although retaining the pt VC statutory licence would mean that the retransmitter would not have to negotiate with all the underlying rights holders over retransmission, the broadcaster may have to negotiate in order for retransmission to be able to occur.

15.59 In practice, it is questionable whether a broadcaster would have any incentive to undertake those negotiations—particularly in relation to any retransmitter other than established subscription television, such as Foxtel. Further, free-to-air broadcasters might decide to permit retransmission of only some of their channels and, for example, exclude sports channels from retransmission. The situation could also become more complex over time—a broadcaster might agree to retransmission at one point in time, and be placed in difficult position later when subsequent underlying rights holders refuse to licence retransmission.

15.60 Rather than facilitating retransmission, retaining pt VC may simply make negotiating retransmission more complicated. These problems mean that, in the ALRC's view, if the free-use exception is repealed, the remunerated exception for underlying rights should also be repealed, and retransmission left to be determined entirely by market mechanisms.

Option 2: Retention of the retransmission scheme

15.61 Option 2 assumes 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.

15.62 This means that a mechanism to ensure broadcasters are obliged to allow retransmission is still required; along with a statutory licensing scheme for the underlying rights, on the basis that it would be impracticable for retransmitters to negotiate the retransmission of free-to-air broadcasts.

A remunerated exception for broadcast copyright

15.63 The ALRC asked, in the Issues Paper, whether the retransmission of free-to-air broadcasts should continue to be allowed without the permission or remuneration of the broadcaster.[58]

58 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 35.

15.64 Perhaps unsurprisingly, subscription television interests considered that the existing retransmission exception should continue to operate,[59] while free-to-air broadcasters generally submitted that the permission of the broadcaster should be required.[60]

15.65 A central argument for retaining the current arrangements is that they benefit consumers through competition in the market, by ensuring that free-to-air broadcasts are available across platforms, so consumers may access these services terrestrially, or via cable or satellite.[61] ASTRA and Foxtel submitted that the existing retransmission regime works well for the benefit of consumers, has ensured access to free-to-air broadcast through commercial negotiation and that there is no justification for legislative reform.[62]

15.66 Screenrights stated that, from a commercial perspective, 'access to the free to air broadcast channels is very important for a new entrant into the television market in Australia'.[63] In its view, retransmission has fostered competition in the broadcast market and has 'encouraged new and diverse services, that probably were not considered at the time the scheme was created'.[64]

15.67 While requiring the permission of broadcasters for retransmission would provide broadcasters with an opportunity to negotiate remuneration directly, stakeholders considered that broadcasters already receive remuneration in other ways. That is, commercial broadcasters are ultimately remunerated for retransmission through higher ratings, which have a role in determining advertising revenue. In addition, broadcasters are often the underlying rights holders and receive remuneration under pt VC.[65]

15.68 ASTRA submitted that no evidence has been provided to show any loss of advertising revenue or potential audience reach as a result of retransmission of commercial television services on subscription platforms. Rather, commercial broadcasters were seen as effectively seeking an additional revenue stream from subscription television consumers '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'.[66]

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59 ASTRA, *Submission 227*; Foxtel, *Submission 245*. News Ltd endorsed Foxtel's submission in relation to retransmission: News Limited, *Submission 224*.

60 Free TV Australia, *Submission 270*; Commercial Radio Australia, *Submission 132*.

61 ASTRA, *Submission 227*; Screenrights, *Submission 215*.

62 Foxtel, *Submission 245*; ASTRA, *Submission 227*.

63 Screenrights, *Submission 215*. A number of other stakeholders expressly supported Screenrights' submission in relation to retransmission: Copyright Agency/Viscopy, *Submission 249*; APRA/AMCOS, *Submission 247*; ARIA, *Submission 241*; Australian Directors Guild, *Submission 226*; Australian Copyright Council, *Submission 219*; Arts Law Centre of Australia, *Submission 171*.

64 Screenrights stated that these services include 'satellite and cable residential subscription television, mobile television, fibre to the premises services, hospital communication systems and IPTV' and that, in 2010–2011 more than 2.25 million households received retransmission: Screenrights, *Submission 215*.

65 Foxtel, *Submission 245*. ASTRA stated that free-to-air broadcasters currently receive a 'substantial proportion of the remuneration payments made under Part VC': ASTRA, *Submission 227*.

66 ASTRA, *Submission 227*.

15.69 Foxtel highlighted that retransmission is 'an extremely limited right', which only enables it to retransmit free-to-air broadcasts simultaneously with the terrestrial broadcast, in the licence area and in an unaltered fashion. Foxtel retransmits free-to-air broadcasts only for the convenience of its subscribers being able to access those channels through the one service.[67]

15.70 As discussed above, in the ALRC's view, a scheme that allowed broadcasters to control whether or not broadcasts are retransmitted would be problematic for the operation of any statutory licensing scheme for the underlying rights. For this reason, if Option 2 is preferred, the ALRC proposes that broadcast copyright should also be subject to a statutory licence. This would ensure that retransmission can continue to operate, and provide some recognition for broadcast copyright.

15.71 A model for the new scheme is provided by pt VD of the *Copyright Act*. Part VD was introduced in 2010 as part of the changeover from analogue to digital television broadcasts.[68] A new service was implemented to transmit television by satellite to remote reception areas. As the new satellite service would mainly re-broadcast, pt VD provided a statutory licence to allow this without infringing copyright.

15.72 Unlike the pt VC licence, the pt VD licence extends to the copyright in the broadcast itself. For the satellite BSA licensee to be able to rely on the statutory licence of that copyright there must be an agreement, Copyright Tribunal order or undertaking covering payment to the broadcast copyright owner.[69] A similar scheme could apply to broadcast copyright in relation to retransmission.

15.73 Screenrights stated that the exclusion of broadcast copyright from pt VC is anomalous and, if pt VC were amended to include broadcasts within a statutory licence, it could 'foresee no difficulties with administering this'.[70]

15.74 From the perspective of broadcasters, however, control of the broadcast rather than remuneration for retransmission may be the primary issue. Broadcasters would like to have the ability to refuse permission for retransmission in certain situations and the flexibility to negotiate remuneration, if appropriate.[71]

15.75 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. At present, free-to-air broadcasters may, for example, pay for the costs of satellite transponder space in order to facilitate retransmission by subscription television services.

15.76 CRA stated that, in many cases, radio broadcasters would be willing to 'authorise retransmission free of charge, so the imposition of a statutory licensing

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67 Foxtel, *Submission 245*.
68 *Broadcasting Legislation Amendment (Digital Television) Act 2010* (Cth).
69 *Copyright Act 1968* (Cth) s 135ZZZI. See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.225].
70 Screenrights, *Submission 215*.
71 Commercial Radio Australia, *Submission 132*.

scheme may not be appropriate'. However, there are also 'situations where compensation would be appropriate, for example, if a third party were making a significant amount of revenue from the retransmission, or if the service competed directly with one offered by the broadcaster'.[72]

15.77 CRA also submitted that the industry should have the right to refuse permission for the retransmission of a broadcast, for a range of reasons—for example, where the broadcast licence area is 'so well serviced by traditional analogue and digital radio, and station simulcasts, that further fragmentation of the listenership through retransmission is unnecessary, and certainly outside the spirit of the original legislative drafters' intention'.[73]

15.78 The ALRC understands that, even under the current retransmission regime, free-to-air broadcasters already enter retransmission agreements with Foxtel. These agreements cover matters such as paying for satellite capacity, a channel's position on the electronic program guide, and the quality and reliability of reception. The small number of free-to-air broadcasters means that whether, and on what terms, retransmission takes place can generally be left to negotiation in the marketplace.

Remuneration for underlying rights

15.79 The *Copyright Act* provides that the copyright in underlying works and other subject matter is not infringed by retransmission, if remuneration is paid under the pt VC statutory licensing scheme. Screenrights collects the licence fees, identifies the programs that are retransmitted and pays royalties to the rights holders. Royalties are generated when free-to-air broadcasts are simultaneously retransmitted by another service.

15.80 Questions may be raised about the retention of the pt VC scheme because, in other contexts, the ALRC has proposed that statutory licensing schemes should be repealed and licences for such uses negotiated voluntarily.[74]

15.81 However, pt VC appears to remain necessary for facilitating retransmission because, even where the broadcast is retransmitted with the consent of the broadcaster, the broadcaster may not have a licence from underlying copyright holders to authorise retransmission.

15.82 Further, because retransmission must be simultaneous with the free-to-air broadcast (the programming of which can change at any moment), it would be impractical for the retransmitter to seek licences to underlying rights, even if problems with the multiplicity of copyright holders could be overcome. Importantly, the retransmitter may have limited, or no prior notice of the broadcast content and would not necessarily be able to identify all the copyright holders.

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72 Ibid.
73 Ibid.
74 See Chs 14 and 15, in relation to the pts VA and VB licensing schemes, as they apply to educational and government uses of copyright material.

15.83 The retention of pt VC would also retain the only statutory source of remuneration for directors because, under s 98 of the *Copyright Act*, directors are entitled to licence fees for retransmission.[75]

15.84 As discussed above, the ALRC presents alternative sets of proposals. Option 1 assumes that the retransmission of free-to-air television and radio broadcasts no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs should be left to be determined by market mechanisms. Reform would involve the repeal of both the free-use exception applying to broadcast copyright and the remunerated exception in relation to copyright in the underlying rights.

15.85 Option 2 assumes a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts, and that it would be impracticable for retransmitters to negotiate the retransmission of free-to-air broadcasts. Reform would involve replacing the free-use exception for broadcast copyright with a remunerated exception, similar to that applying to the underlying rights, which would be retained.

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.

Internet retransmission

15.86 Section 135ZZJA of the *Copyright Act* provides that the pt VC statutory licensing scheme 'does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the internet' (the internet exclusion).

15.87 The following section discusses the internet exclusion and its underlying rationale. In a converging media environment, arguments may be advanced that the internet exclusion from the remunerated retransmission exception should be removed and replaced so that retransmission platforms are treated in a more technology-neutral way.

75 The Australian Directors Guild expressed concern about the limited scope of directors' copyright in films: Australian Directors Guild, *Submission 226*.

15.88 The ALRC proposes that the remunerated exception in relation to underlying rights should be amended by removing the internet exclusion and replacing it with provisions that require that any retransmission be subject to technological measures that limit communication to within Australia.

15.89 The discussion proceeds on the basis that either the existing retransmission scheme is to remain in place, or is to be modified by repealing the free-use exception for broadcast copyright and replacing it with a statutory licence (that is, Option 2 above).

15.90 In contrast, if Option 1 were implemented, the extent to which internet retransmission occurs would be entirely determined by market mechanisms. If a broadcaster wished to enter agreements to permit internet retransmission, the broadcaster would have to acquire the relevant rights from all the underlying right holders. If the underlying rights holders only have rights that are defined territorially, then the broadcaster would not be able to confer rights to broader communication. Any retransmission would have to be confined to territories in relation to which the retransmitter can obtain rights. Geoblocking (discussed below) would be a matter for negotiations between the parties.

History of the internet exclusion

15.91 Professor David Brennan has stated that one government objective of the reforms leading to the retransmission scheme was 'technological neutrality insofar as retransmission was not confined to any particular means'.[76] He stated that, in the face of concerns about the potential harm caused to copyright owners by internet retransmission,[77] the Government retained the technologically-neutral language in pt VC, but introduced the 'over the internet' exclusion in s 135ZZJA.[78]

15.92 These concerns about internet retransmission included fallout from controversy involving a Canadian company, iCraveTV, which had commenced internet retransmission of US television signals, resulting in successful litigation by US film studios and broadcasters to prevent it.[79] This highlighted the possible consequences of extra-territorial internet retransmission.

15.93 Concerns about internet retransmission were also reflected in art 17.4.10(b) of the Australia–US Free Trade Agreement (AUSFTA). This provides that 'neither Party may permit the retransmission of television signals (whether terrestrial, cable, or

76 D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

77 See, eg, Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Copyright Amendment (Digital Agenda) Bill 1999* (1999).

78 See the legislative history summarised in D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

79 See Ibid, 26.8.

satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal'.[80]

15.94 The need for future re-negotiation of this provision was, however, anticipated. By mutual side letters, the Australian and US representatives agreed that if, at any time, 'it is the considered opinion of either party that there has been a significant change in the reliability, robustness, implementability and practical availability of technology to effectively limit the reception of Internet retransmissions to users located in a specific geographical market area', the parties would negotiate in good faith to amend the agreement.[81]

Retransmission and the internet

15.95 The ALRC noted, in the Issues Paper, that the reason for excluding internet retransmission from the scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.[82]

15.96 Given media convergence and other developments such as the NBN, the ALRC asked whether the pt VC scheme should apply in relation to retransmission over the internet and, if so, subject to what conditions.[83]

15.97 Many stakeholders favoured reform in this direction.[84] Media convergence was seen to have rendered the internet exclusion 'increasingly absurd from a consumer's perspective, as television services over the internet are often indistinguishable from those not over the internet'.[85] The Australian Directors Guild observed that with 'the advent of IPTV, Apple TV and the like it is almost impossible to distinguish signals transmitted over the Internet with those using broadcast spectrum'.[86]

15.98 The Australian Competition and Consumer Commission (ACCC) noted that, as technology continues to develop and consumers become increasingly able to view

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80 No such restriction applies to radio, and the US has established a statutory licence for internet retransmission of radio broadcasts: *Copyright Act 1976* (US) 17 USC ss 112, 114. The ability to do so was preserved by *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005) art 17.6.3(c). See also K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242.

81 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005), side letter dated 18 May 2004, [2].

82 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [226]. See, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8, 26.9.

83 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 36.

84 See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; Internet Industry Association, *Submission 253*; SBS, *Submission 237*; Australian Directors Guild, *Submission 226*; Telstra Corporation Limited, *Submission 222*; Australian Copyright Council, *Submission 219*; Australian Broadcasting Corporation, *Submission 210*; NSW Young Lawyers, *Submission 195*; Optus, *Submission 183*; Commercial Radio Australia, *Submission 132*. Some stakeholders stated that they were not opposed in principle to such reform, but considered it a matter of broadcast rather than copyright policy: Foxtel, *Submission 245*; News Limited, *Submission 224*.

85 Screenrights, *Submission 215*.

86 Australian Directors Guild, *Submission 226*.

many 'different forms of broadcast on different platforms', it is likely that the pt VC scheme will become even more restrictive. Therefore, the ACCC submitted, amendments to the retransmission scheme need to be considered.[87]

15.99 CRA stated that the commercial radio industry believes that any retransmission scheme should be extended to include the internet because exclusion 'would lead to the internet being either unregulated, or would make it subject to a different set of regulations', creating another layer of regulation that would further complicate the copyright licensing system.[88]

15.100 Optus stated that the internet exclusion in relation to free-to-air television broadcasts has created 'significant legal uncertainty around transmission technologies such as IPTV and mobile devices using WiFi' and that this has an adverse impact on the provision of content services:

> Without the protection afforded to retransmissions under Part VC, it is not commercially feasible to offer FTA broadcasts over the internet including over WiFi—and because Optus is unable to re-transmit over WiFi, it is not commercially feasible to re-transmit the full suite of FTA channels over Mobile TV.[89]

15.101 Optus supported the extension of the pt VC scheme to apply to 'all rebroadcasting, regardless of the delivery platform or viewing device', and stated that it was fundamental to the success of such a regime that rights holders are prevented from obtaining 'separate royalties for the same content for each delivery method or means of viewing the content'.[90]

15.102 Other stakeholders opposed any extension of pt VC to internet retransmission.[91] One reason was the perceived need to maintain territorial exclusivity in licensing. The Motion Picture Association of America (MPAA) noted that internet retransmission, unlike broadcast and subscription cable television, is 'inherently global in nature':

> The resulting demise of the system of territorial exclusivity would decimate the value of broadcast programming and create chaos in the marketplace.[92]

15.103 Similar concerns about territorial licensing were also expressed by stakeholders who did not necessarily oppose reform of the internet exclusion, and are discussed below in relation to the 'geoblocking' of internet transmissions.

15.104 More generally, stakeholders expressed concern that removing the internet exclusion would undermine their commercial interests. The Australian Football League (AFL) stated that to permit unauthorised third parties 'to retransmit on or via the internet and pay nothing or a statutory licence fee would undermine the exclusive

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87 ACCC, *Submission 165*.
88 Commercial Radio Australia, *Submission 132*.
89 Optus, *Submission 183*.
90 Ibid.
91 COMPPS, *Submission 266*; NRL, *Submission 257*; AFL, *Submission 232*; Cricket Australia, *Submission 228*; Australian Film/TV Bodies, *Submission 205*; Motion Picture Association of America Inc, *Submission 197*.
92 Motion Picture Association of America Inc, *Submission 197*.

granting of rights and inevitably result in a significant financial detriment of copyright owners such as AFL'.[93]

15.105 The National Rugby League (NRL) compared the resulting situation to the problems for copyright owners caused by the Optus TV Now technology. In particular, the NRL submitted that, given the purpose of the retransmission right, there 'seems to be little justification in the scheme permitting the retransmission of copyright content over mobile telephone networks'.[94] The AFL also expressed concern that where content is broadcast on a delay into a particular market internet retransmission using an earlier free-to-air broadcast in another market 'would allow for earlier communication into delayed markets despite, and in breach of, agreements with local broadcasters'.[95]

Geoblocking

15.106 While broadcasts are generally geographically limited in scope, the internet is a global system for the communication of copyright materials. Geoblocking refers to the practice of preventing internet users from viewing websites and downloading applications and media based on location, and is accomplished by excluding targeted internet addresses.[96]

15.107 Some stakeholders considered that the expansion of the pt VC scheme should take place on the basis that retransmissions are available only within Australia.[97] That is, expanding statutory licensing of retransmission to the internet may require technological means to limit communication, such as 'via a closed or managed IPTV environment, or necessitating the use of geoblocking to limit distribution within a licensed geography'.[98]

15.108 Many stakeholders submitted that that internet retransmission should be required to be subject to geoblocking.[99] Telstra observed that it should not be necessary to introduce a 'specific geoblocking condition for internet retransmission' because an organisation would be bound by the requirements of the licence to make 'whatever technical arrangements are necessary to restrict its supply to that licence area'.[100]

15.109 Screenrights identified that one option for maintaining geographical control of retransmission would be to require retransmitters to 'ensure that any retransmission is appropriately geoblocked to the original broadcast territory as a condition of relying on the pt VC licence'. It submitted that geoblocking technologies 'have advanced significantly since 2004, to the extent that television-like services are routinely made

93 AFL, *Submission 232*.
94 NRL, *Submission 257*.
95 AFL, *Submission 232*.
96 Definition of 'geo-blocked' PC Mag, *E-encyclopedia* <www.pcmag.com/encyclopedia> at 25 February 2013.
97 See, eg, ARIA, *Submission 241*; PPCA, *Submission 240*.
98 Ericsson, *Submission 151*.
99 Internet Industry Association, *Submission 253*; ARIA, *Submission 241*; SBS, *Submission 237*; Screenrights, *Submission 215*; Australian Broadcasting Corporation, *Submission 210*.
100 Telstra Corporation Limited, *Submission 222*.

available over the internet in reliance on these technologies including ABC's iView service, Hulu, iTunes and Netflix'.[101]

15.110 The MPAA cautioned that geoblocking may not be the solution to problems resulting from internet retransmission. Although copyright holders who license copyright materials for internet retransmission commonly impose access controls, which may include a geographic component:

> there is a world of difference between requiring geoblocking in the context of comprehensive access control obligations that the licensor can require its contract partner to enforce, and reliance upon geoblocking alone as carried out by a statutory licensee over which the copyright owner has, as a practical matter, far more limited leverage.[102]

Existing licensing practices

15.111 There were also concerns that any expansion of the pt VC scheme should not trespass on existing licensing practices. ARIA, for example, noted that the music industry already licences websites that communicate audiovisual material containing sound recordings over the internet, and 'believes that such voluntary licensing schemes are the optimal and preferred model'.[103]

15.112 Screenrights noted that broadcasting services commonly simulcast their free-to-air channels over the internet and that this is 'currently managed effectively through voluntary licence arrangements, with broadcasters acquiring additional rights from underlying rights holders to enable web transmission of their broadcasts'.[104] Screenrights also expressed concern about internet retransmitters 'cherry picking' broadcasts of certain major events (such as the Olympics) for the statutory licence fee, which could be significantly lower than a commercial fee.[105]

15.113 Screenrights concluded that, while it believed the internet exclusion to be an anomaly, 'including internet retransmissions in Part VC (subject to geoblocking) would only create more problematic issues for rightsholders by seriously undermining their capacity to enter voluntary arrangements for internet retransmission'.106

15.114 The existing retransmission scheme covers only the retransmission of broadcasts in an unaltered and simultaneous manner,[107] which would appear to rule out 'cherry picking' the retransmission of certain events; and does not cover simulcast.

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101 Screenrights, *Submission 215*. However, Screenrights opposed including internet retransmissions in pt VC: Screenrights, *Submission 288*. ARIA also acknowledged that it may 'now be technically possible to restrict access to internet retransmission services to users located within Australia': ARIA, *Submission 241*.

102 Motion Picture Association of America Inc, *Submission 197*.

103 ARIA, *Submission 241*. See also PPCA, *Submission 240*.

104 Screenrights, *Submission 215*.

105 Screenrights, *Submission 288*.

106 Ibid.

107 *Copyright Act 1968* (Cth) s 10, definition of 'retransmission'.

Removing the internet exclusion

15.115 The starting point for reform of the internet exclusion is whether geographically limiting retransmission of broadcasts remains an aim of communications policy and, if so, whether there is a better way to frame the scheme to facilitate that goal. As discussed above, Option 2 assumes that 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.

15.116 Technological change, including that brought about by the NBN, may make forms of internet retransmission of broadcasts more feasible. However, at present, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for underlying rights. If communications policy makers decide that it is important to facilitate the availability of online television, then it would be logical to consider extending the pt VC statutory licence to internet retransmission, so that broadcasters cannot block the provision of new content services.

15.117 Issues then arise about the need to limit retransmission geographically, including because of the territorial nature of underlying rights and to comply with obligations under the AUSFTA, assuming that this is to be renegotiated. These issues would include whether to restrict retransmissions:

- to broadcasting licence areas, as is the case with retransmission and broadcast copyright,[108] or to 'Australia' or some other formulation;
- by geographic location where the retransmission is received, or by where the subscriber is ordinarily resident—that is, should a person who becomes a subscriber to an internet television service be able to receive retransmissions when they are overseas?

15.118 In relation to broadcast generally, the Convergence Review concluded, with the increasing availability of broadband, content services can be delivered over the internet across Australia and the world, and that it is 'no longer efficient or appropriate for the regulator to plan for the categories of broadcasting service for different areas and issue licences to provide those services'.[109]

15.119 Assuming the way is made open to remove the internet exclusion, determining exactly how reform should be implemented would require further detailed consideration. For example, repeal of s 135ZZJA might be 'subject to ensuring any retransmission is appropriately geoblocked, and subject to the exclusion of retransmissions that can and should fall within voluntary licensing regimes'.[110]

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108 *Broadcasting Services Act 1992* (Cth) s 212(1)(b).
109 Australian Government Convergence Review, *Convergence Review Final Report* (2012), viii.
110 Screenrights, *Submission 215*.

15.120 The removal of the internet exclusion may also mean new Copyright Tribunal cases on appropriate levels of remuneration under pt VC. In relation to remuneration, the Copyright Tribunal has concluded that the benefits to subscription television consumers of the retransmissions, and therefore the value of those retransmissions to subscription television companies, are best described under the heading of 'convenience'—the advantage to consumers of only having to use one remote control to access subscription and free-to-air channels.[111] While assessment of remuneration has been based on the value to retransmitters—which has been equated with the convenience to consumers—with online retransmission there is more potential for mobile access and the value to consumers may be very different.

15.121 The ALRC proposes that retransmission 'over the internet' should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts in pt VC of the *Copyright Act*. Rather, the retransmission scheme should be amended to apply to retransmission by any technique, subject to geographical limits on reception.

15.122 Exactly how these geographical limits should be defined is yet to be determined. At present, the *Copyright Act* does not place geographical limits on the statutory licence for retransmission.[112] At the least, it should be a condition of the statutory licence that retransmission be limited to Australia. Such a provision should, however, not prescribe the technological or other measures by which such limits are effectively imposed.

15.123 Extending the pt VC scheme to retransmission over the internet would involve Australia negotiating amendments to the AUSFTA.[113] However, arguments may be made that excluding the internet from the retransmission scheme is no longer the best means of controlling the reach of retransmission, and that the conditions precedent in this side letter have been met.[114] The ALRC's final Report may suggest that the Australian Government seek to negotiate an amendment to remove art 17.4.10(b) from the AUSFTA.

15.124 More generally, the ALRC is interested in comment on the ramifications of removing the internet exclusion and any consequential amendments to the retransmission scheme that may be necessary. For example, existing provisions require that retransmission in relation to a broadcast means 'the content of the broadcast is unaltered (even if the technique used to achieve retransmission is different to the technique used to achieve the original transmission)'.[115] Where retransmission takes place over the internet there may need to be some room for minor alterations in the content of the broadcast, if only to take account of different formats. For example, if

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111 *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 (1 June 2012), [188].

112 The *Broadcasting Services Act* provides, in relation to the free-use exception, that retransmission must be within the relevant broadcasting licence area: *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

113 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005).

114 Screenrights, *Submission 215*.

115 *Copyright Act 1968* (Cth) s 10, definition of 'retransmission'.

free-to-air broadcasts are viewed through a web browser there may be some unavoidable alteration in content.

15.125 In making its proposal, the ALRC recognises that it can be argued the internet exclusion is primarily a matter of communications and media policy, rather than copyright. The Convergence Review noted that emerging platforms, including internet protocol television (IPTV), are not covered comprehensively by existing content regulation and the availability of internet content on smart televisions means that viewers can move easily between 'regulated broadcast content' and 'unregulated internet content'.[116]

15.126 There are unresolved questions about how IPTV and other television-like online content should be regulated under the *Broadcasting Services Act* or successor legislation for the purposes of, among other things, imposing content standards and obligations with regard to Australian content. The Convergence Review recommended that new content services legislation should replace the *Broadcasting Services Act*; and communications legislation should be reformed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.[117]

15.127 The current retransmission provisions may be seen as favouring some players in the subscription television market, depending on the technological platform used (that is, cable and satellite over internet). Removing these provisions may favour the internet as a content platform and raise general regulatory issues, including the future of broadcast licensing, which cannot and should not be solely resolved the context of reform of copyright laws.

Proposal 15–2 If Option 2 is enacted, or the existing retransmission scheme is retained, retransmission 'over the internet' should no longer be excluded from the statutory licensing scheme applying to the retransmission of free-to-air broadcasts. The internet exclusion contained in s 135ZZJA of the *Copyright Act* should be repealed and the retransmission scheme amended to apply to retransmission by any technique, subject to geographical limits on reception.

Question 15–1 If the internet exclusion contained in s 135ZZJA of the *Copyright Act* is repealed, what consequential amendments to pt VC, or other provisions of the *Copyright Act*, would be required to ensure the proper operation of the retransmission scheme?

Clarifying the internet exclusion

15.128 As discussed above, retransmission of a free-to-air broadcast that 'takes place over the internet' is excluded from the remunerated exception by virtue of

116 Australian Government Convergence Review, *Convergence Review Final Report* (2012), 40.
117 Ibid, 106–107.

s 135ZZJA of the *Copyright Act*. There is currently considerable uncertainty over the meaning of this phrase and, in particular, its application to IPTV.[118]

15.129 While the ALRC considers that the internet exclusion from the remunerated exception for retransmission should be repealed, in view of the need to renegotiate provisions of the AUSFTA and for further Government consideration of the complex issues that such a reform may raise, this is unlikely to happen in the short term. In the meantime, or if the Government determines that the internet exclusion should remain, the scope of the exclusion and its application to IPTV, in particular, should be clarified.

Interpretation of 'over the internet'

15.130 The application of the internet exclusion to IPTV is not entirely clear. In particular, whether retransmission by an IPTV service 'takes place over the internet' may depend on the functional characteristics of the service.[119] For example, it seems to be accepted that some IPTV retransmission may fall within the operation of the pt VC scheme because 'while the retransmission occurs over infrastructure shared by an Internet connection, as a direct feed from [internet service provider] to customer at no point is connection to the Internet by either ISP or customer necessitated'.[120]

15.131 Other IPTV retransmission may not fall within the scheme—for example, where the retransmission is 'over the top' of existing infrastructure and does not require business or technology affiliations with the host internet service provider or network operator.

15.132 'Over the top' television (OTT TV), in this context, means a television-like service where content is delivered over an unmanaged network such as broadband internet, for example, through Telstra T-Box.[121] As a result, some current subscription IPTV services are able to offer access to free-to-air broadcasts only because they include built-in digital TV tuners in their set top boxes.

15.133 Other questions that arise in interpreting the internet exclusion include whether it includes retransmissions that use internet protocol networks only in part. For example, if a retransmission uses the internet to 'transmit' to a transmitter, which then uses radio frequency spectrum to communicate content to mobile devices is this 'over the internet'? Or must the entire retransmission both originate and terminate on the internet?

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118 For the purposes of this discussion, the term IPTV includes TV-like services where content is delivered by internet protocol, whether over the content provider's own network or 'over the top' of existing infrastructure; and only includes streamed and not on demand content.

119 See, eg, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.1.

120 Ibid, 26.9.

121 Adapting language used by Broadcast Australia: Broadcast Australia, *Submission 133*.

15.134 In the Issues Paper, the ALRC asked whether the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to IPTV needs to be clarified, and if so, how.[122]

15.135 A number of stakeholders agreed that some clarification is desirable.[123] Screenrights observed that, for example:

> Foxtel is not provided over the internet to a Foxtel set top box but it is provided over the internet to the Foxtel X–box service. But to a consumer, they are more or less the same. Similarly, IPTV services such as Fetch TV and Telstra T–Box are also impossible to distinguish but one happens to be over the internet, while the other is not.[124]

15.136 The ABC observed that the term IPTV has 'no commonly accepted definition in the industry' and the current legal position of some operators under the retransmission scheme 'is not clear as it might be argued that they are not able to access pt VC legally because they are retransmitting via the internet'.[125]

Amending the internet exclusion

15.137 If the internet exclusion is to remain, its scope should be clarified. At present, the internet exclusion may give some providers of IPTV services a competitive advantage over others, in being able to rely on the pt VC scheme to carry free-to-air broadcasts, despite services being identical to the end consumer.[126]

15.138 While there are differing interpretations, it seems widely accepted that some forms of IPTV are not considered to take place 'over the internet', for the purposes of the internet exclusion. On the other hand, it seems that OTT TV is considered excluded. While the ALRC understands that OTT TV retransmission of high rating free-to-air broadcasts is unlikely to be offered because it would be likely to overload most internet delivery networks, it is possible that small audience free-to-air channels might be retransmitted in such a way.

15.139 In copyright law terms, the current interpretation may lead to arbitrary distinctions between retransmission platforms that are not based on the underlying purpose of the exclusion.

15.140 For example, the ACMA distinguishes, for communications policy purposes, between IPTV 'delivered over managed IP-based networks' and 'over-the-top' content, which is delivered 'direct to the consumer without the internet service provider being involved in the control or distribution of the content'.[127] The extent of an ISP's

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122 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), Question 37.

123 APRA/AMCOS, *Submission 247*; Screenrights, *Submission 215*; Australian Broadcasting Corporation, *Submission 210*; Optus, *Submission 183*.

124 Screenrights, *Submission 215*.

125 Australian Broadcasting Corporation, *Submission 210*.

126 Screenrights, *Submission 288*.

127 Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012), 6.

involvement does not, however, seem relevant in copyright policy terms, even if it is relevant for the purposes of regulation under the *Broadcasting Services Act*.

15.141 The development of the NBN makes it important to clarify the position. The intention is that the NBN will enable content providers to retransmit using internet protocol multicasting, in reliance on the pt VC licence.[128] The NBN Co's Multicast feature is being marketed as 'particularly suitable' for IPTV service delivery.[129] There may be difficulties, and cost implications, in enforcing restrictions on the retransmission of free-to-air broadcasts using the NBN.

15.142 The rationale for excluding retransmission 'over the internet' from the retransmission scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.

15.143 The ALRC's proposal to remove the internet exclusion, subject to geographical limits on retransmission, would mean that it would not be necessary to deal with the problem of applying the terms of the exclusion to various forms of internet retransmission, including IPTV, and all the possible technological configurations.

15.144 However, if the internet exclusion is to remain, it should be redrafted to reflect its purpose of ensuring that internet retransmission does not lead to retransmission that is geographically unlimited. That is, it should be redrafted to reflect the fact that internet protocol technology can be 'employed in closed, secure distribution systems that offer complete protection against copying and redistribution of programming over the Internet, and that respect the principle of territorial exclusivity'.[130]

15.145 The ALRC is interested in comment on how this might be done. For example, should the exclusion be expressed so as to allow retransmission using internet protocol to identifiable subscribers within Australia and subject to access control technological protection measures?

Proposal 15–3 If it is retained, the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* should be clarified.

Question 15–2 How should the scope and application of the internet exclusion contained in s 135ZZJA of the *Copyright Act* be clarified and, in particular, its application to internet protocol television?

128 Screenrights, *Submission 215*.

129 NBN Co, *Multicast—Broadcasting the Future* <www.nbnco.com.au/getting-connected/service-providers/multicast.html> at 2 March 2013. NBN multicasts 'will be accessible from the same physical port on the NBN Co network termination equipment as the accompanying broadband internet connection': Broadcast Australia, *Submission 133*.

130 Motion Picture Association of America Inc, *Submission 197*.

Must carry obligations

15.146 The ALRC, in the Issues Paper, noted that calls to strengthen broadcasters' rights in relation to retransmission have included suggestions that a US-style 'must carry' regime should be implemented.[131] Under such a regime, free-to-air broadcasters have the option of either requiring that free-to-air broadcasts be carried on cable or another platform, or requiring that the free-to-air broadcaster is remunerated where the other platform chooses to retransmit the signal.[132]

15.147 Many jurisdictions have must carry regimes. These were designed primarily to ensure that locally-licensed television stations must be carried on cable providers' systems, mainly to protect local broadcasters from distant competitors and, in Europe, to protect local language channels. For example, in the absence of must carry obligations cable providers might only carry major capital city channels.

15.148 In Australia, the apparent purpose of a must carry regime would be to provide a framework for commercial negotiations between free-to-air broadcasters and subscription television companies about payments for broadcasts retransmitted by the latter. A must carry regime would also ensure that, in future, free-to-air broadcasters are not forced to pay for carriage on subscription platforms—particularly if IPTV becomes a primary platform with the advent of the NBN.

15.149 A number of stakeholders addressed the issue of must carry regimes in submissions to this Inquiry. Free TV was emphatically in favour of the introduction of such a regime—a view that was opposed by other stakeholders.[133]

15.150 Free TV submitted that a US-style 'must carry/retransmission consent' regime should be introduced in Australia to ensure certainty of carriage and provide broadcasters with the ability to withhold consent and negotiate fees and terms of retransmission. This, it was said, would ensure that broadcasters are fairly compensated, while viewers can continue to access free-to-air services. The rollout of the NBN and the 'likely proliferation of new entertainment platforms' were said to highlight the need for urgent action.[134]

15.151 In contrast, Screenrights submitted that a must carry regime is not necessary in Australia and that such a regime would be both 'unworkable and anti-competitive' and contrary to the interest of underlying copyright owners.[135]

15.152 Screenrights considered that the context of retransmission in Australia is significantly different from that in overseas jurisdictions that have must carry regimes. First, the Australian retransmission rules effectively limit retransmission of commercial channels to local signals only—removing concerns about retransmission of distant

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131 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [221]–[222].
132 Australian Government Convergence Review, *Convergence Review Final Report* (2012), 33.
133 SPAA, *Submission 281*; Foxtel, *Submission 245*; ASTRA, *Submission 227*; Australian Directors Guild, *Submission 226*; News Limited, *Submission 224*; Screenrights, *Submission 215*.
134 Free TV Australia, *Submission 270*.
135 Screenrights, *Submission 215*.

signals.[136] Secondly, for a must carry regime to be applied in Australia, it would have to include existing satellite based television service providers such as Foxtel and Austar. Screenrights submitted that it would not be 'commercially viable to retransmit local signals via satellite due to the large number of small licence areas'.[137]

15.153 Foxtel also contrasted the US position with that in Australia, suggesting that it would be inappropriate to implement must carry in Australia. It stated that, while the key objective in the US was to ensure that consumers could continue to receive signals in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials, in Australia, almost 99% of the population has access to free-to-air television and cable and satellite penetration is significantly lower.[138]

15.154 ASTRA highlighted the fact that 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'.[139]

15.155 Free-to-air broadcasters not only want the free-use exception removed but also favour the imposition of must carry obligations on subscription television services. The ALRC has concluded, however, that it should make no proposal on whether reform of the retransmission exception applying to broadcast copyright should involve the imposition of must carry obligations on subscription television service providers.

15.156 Essentially, must carry provisions would operate to impose obligations to communicate copyright materials (broadcasts), at the behest of the copyright holder. This issue does not directly concern the operation of copyright exceptions, which are the subject of the Terms of Reference. Further, the policy 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 reform of copyright laws.

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136 That is, retransmission generally must be within the licence area of the transmitter: *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

137 Screenrights, *Submission 215*.

138 Foxtel, *Submission 245*.

139 ASTRA, *Submission 227*.