screenrights

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Convergence Review Secretariat
Department of Broadband, Communications and the Digital Economy
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By email: convergence@dbcde.gov.au
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Dear Sir/Madam

DISCUSSION PAPER: MEDIA DIVERSITY, COMPETITION AND MARKET STRUCTURE

Screenrights is a non-profit copyright society representing rightsholders in film, television and radio. Screenrights has over 3,300 members in 59 countries.

Screenrights administers a range of collective licences relating to use of audiovisual material, including educational use of broadcasts, government copying of broadcasts and retransmission of free to air broadcasts.

Screenrights previously made two submissions to this inquiry in response to the Framing Paper and the Emerging Issues Paper.

This submission responds specifically to the Discussion Paper on *Media diversity, competition and market structure*. In particular, at page 29, the Discussion Paper discusses the operation of the retransmission regime and asks questions regarding diversity and competition relating to retransmission and must carry.

1. EXECUTIVE SUMMARY

- The existing retransmission regime enacted in the Broadcasting Services Act and the Copyright Act should not be amended to including any "must carry" requirement.
- The Committee should recommend that Government initiate steps to allow retransmissions to occur over the Internet subject to technological limitations on geographic access.
- Any consideration of the definition of "broadcasting services" in the Broadcasting Services Act should be cognisant of the shared application of that definition throughout the Copyright Act.

2. BACKGROUND TO RETRANSMISSION

In our earlier response to the Emerging Issues Paper, Screenrights' submission included a short explanation of the retransmission regime. For convenience, I have reproduced that description below.

What is retransmission?

Retransmission is the practice of media providers to include free to air broadcasts within their service. For example, Foxtel includes the free to air channels with its package of subscription channels. This means that a consumer is able to watch the free to air channels through the Foxtel set top box, using the Foxtel remote control, and with the guaranteed signal quality of the Foxtel service. For consumers, this is clearly more convenient than having to switch to an alternative free to air signal tuner with its separate remote control and uncertain signal quality.

From a commercial perspective, for a new entrant into the television market in Australia, access to the free to air broadcast channels is very important. Free to air television represents the overwhelming bulk of television consumption in Australia, and even in subscription television households, the free to air channels are by far the most watched.

From a public policy perspective, the most important aspect of retransmission is that it fosters competition in the broadcast television market. By allowing access to the free to air channels, a significant potential barrier to entry is removed.

Regulatory structure

There are two elements to the regulation of retransmission in Australian law. Firstly, section 212 of the Broadcasting Services Act 1992 (BSA) provides a defence for persons that retransmit free to air broadcasts (subject to the retransmission being within the licence area of the broadcasts, in the case of commercial channels). The BSA also provides that the defence does not apply to the rights of underlying copyright owners, ie the owners of the film, script, musical works, sound recordings and artistic works incorporated in the retransmitted broadcasts.

Secondly, Part VC of the Copyright Act 1968 (CA) provides a parallel statutory licence covering these retransmitted underlying works. Part VC, which was enacted in 2000 with bipartisan support, is a defence from copyright infringement for retransmitters, provided that the retransmission is simultaneous with and unaltered from the original broadcast, and provided that a fair fee ("equitable remuneration") is paid to the relevant copyright owners.

Between the BSA and the CA, an open and technologically neutral access regime is created for the retransmission of free to air broadcasts.

Screenrights' role

Part VC of the CA provides that the payments to copyright owners are made to a copyright society declared by the Commonwealth Attorney-General to act on behalf of the owners. Since the provisions were introduced Screenrights has been that declared society.

Screenrights' role is to negotiate equitable remuneration with retransmitters; to collect the fees; and to distribute the fees to the relevant copyright owners after deduction of its operating costs.

As the declared society, Screenrights has a unique perspective on the operation of retransmission in Australia. From our perspective, we submit that the scheme has very successfully met the policy objective of promoting competition in the broadcast market. In particular, the technological neutrality of the regulations has encouraged new and diverse services that were probably not considered at the time the scheme was created.

Under the licence, retransmission is now included in a wide range of services including satellite and cable residential subscription television, mobile television, fibre to the premises services, hospital communication systems, and internet protocol television (IPTV).

In 2010/11, more than 2.25 million households received retransmission.

3. "MUST CARRY" AND RETRANSMISSION ARRANGEMENTS

The Committee's discussion paper, "Media diversity, competition and market structure" includes a section on retransmission.[1] The paper refers to concerns raised by FreeTV regarding retransmission. In its supplementary submission to the Committee in response to the Framing Paper, FreeTV submitted that: [2]

> *A technology-neutral must-carry/retransmission consent regime should be implemented in Australia, so that it applies regardless of the technical means chosen for the delivery of television and television-like services in the future.*

"Must carry" is a legislative requirement that in prescribed circumstances television suppliers must include all the relevant free to air signals, or alternatively negotiate with the free to air broadcasters if they wish to include a subset of such signals. In support of their submission, FreeTV noted that must carry regimes exist in various forms in the USA and Europe.

Screenrights agrees that the retransmission regime must be technologically neutral, but respectfully disagrees with the proposal that a must carry regime be introduced to achieve the policy goals of the converegence review.

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1 *Convergence Review Discussion Paper: "Media diversity, competition and market structure"*, p 29.

2 *Supplementary Submission – Framing Paper,* FreeTV, 30 June 2011, p 2.

4. MUST CARRY IN OTHER JURISDICTIONS

Screenrights disagrees that the international experience is directly analagous to Australia. It is not the case that there is a universal must carry right outside Australia. On the contrary, where must carry regimes are enacted they are done for particular domestic circumstances and in the most limited way possible in order to meet the domestic policy objective.

For example, in the USA, the must carry regime applies to the retransmission of free to air broadcasts by cable operators. The particular circumstance that gives rise to this policy is the desire to protect local broadcasts from distant signal retransmission. It is commonplace for a cable operator to include the US free to air broadcasters by retransmitting the New York signal of the channels. With the availability of this distant signal retransmission, there is limited need for the cable operator to include the local affiliate of the networks as this is essentially duplication of the programming. Must carry was introduced in the USA in order to protect the local affiliate broadcasters who would lose their advertising revenue if the distant signal retransmission was allowed to replace the local affiliates on the cable platform.

This domestic policy objective in the USA is different to the situation in Australia because the Australian retransmission regime effectively limits retransmission to local signals only for commercial channels. Without the retransmission of distant commercial broadcast signals Australia lacks the conditions which justified in the USA the institution of a local signal must carry policy.

The other example cited by FreeTV is Europe where again must carry laws exist in some territories. Screenrights submits that this is another example of a domestic policy position which is not directly analgous to Australia. In particular, the policy driver for European must carry regimes is to protect local language channels from being overwhelmed by distant signals which are being retransmitted.

Notably, European lawmakers have been careful to minimise the impact and potential misuse of must carry laws through article 31(1) of the Universal Service Directive. Recently, the Belgian must carry laws were overturned by the European Court of Justice (ECJ) on the basis that they offended that article by lacking clearly defined public interest objectives, being disproportionate and lacking transparent criteria for their setting.[3] Under European law blanket must carry laws are not allowed.

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[3] *Case C 134/10, European Commission v Kingdom of Belgium*, 3 March 2011. The Belgian laws mandated that a distributor which is authorised to operate a television distribution network in the bilingual region of Brussels-Capital is required to transmit, simultaneously and in their entirety, the television programmes of all public broadcasters and eight French-language or Flemish-language commercial broadcasters.

5. RETRANSMISSION AND DIVERSITY AND COMPETITION

Screenrights submits that the reason policy makers have been careful to minimise the application of must carry regimes is that they could be viewed as being anti-competitive. A must carry regime places an additional obligation upon other service providers. This amounts to a regulatory barrier to entry for potential market entrants.

Furthermore, Screenrights submits that a "technology-neutral must-carry/retransmission consent regime" would be unworkable in practice in Australia.

For it to be universally applied, it would also have to include existing satellite based television service providers such as Foxtel and Austar. However, it is not commercially viable to retransmit local signals via satellite due to the large number of small licence areas. If a must carry regime were to require satellite broadcasters to retransmit these many local channels, then the cost of the carriage would be prohibitive. Alternatively, if must carry was applied selectively to avoid this problem, eg by excluding existing television service providers, then this would create a clearly unfair and anti-competitive outcome by requiring retransmission by some service providers but not others.

Finally, Screenrights submits that the history of retransmission in Australia demonstrates that must carry is unecessary here. It is Screenrights' experience that television service providers have chosen to retransmit the free to air broadcasts to the widest extent practicable under the current voluntary retransmission regime. The examples where retransmission does not take place occur are because the transmission costs are too high, such as retransmission of commercial channels by satellite in small licence areas.

Today in Australia as a general rule, wherever retransmission can occur, it does occur. Consequently there is the array of retransmitted services outlined earlier, such as fibre to the premises in greenfield sites, hospital services, IPTV, mobileTV and so on.

Screenrights submits that a must carry/consent regime for retransmission would be potentially anti-competitive and unfair and should not be introduced in Australia.

Screenrights submits that, as opposed to must carry, the current system of retransmission at the election of a service provider maximises diversity and competition in Australian media while ensuring fairness.

- The current system encourages competition by allowing new market entrants to include the free to air broadcasts where it is commercially viable to do so.
- The current system minimises the barriers to entry, thus maximising diversity from new television service providers offering their content

alongside the retransmitted free to air channels.

- The current system ensures fairness for all parties by requiring that "equitable remuneration" be paid for the retransmission (including to the broadcasters in their capacity of owners of the underlying copyright.)

6. RETRANSMISSION OVER THE INTERNET

As noted above, Screenrights supports the FreeTV submission to the extent that it calls for a "technologically neutral" retransmission regime applying to "television-like services in the future". Given the varied services that currently rely on the regime, it is clear that it already has a very wide operation. However, the regime is neither universal nor technologically neutral.

Section 135ZZJA of the CA provides that the retransmission regime:

> *...does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the Internet.*

In effect, Australian law makes retransmission over the Internet legally impossible. Excluding retransmission over the Internet is a constraint on media diversity and competition which will be increasingly important in a converged media environment.

Indeed, this inconsistency of regulation becomes absurd with convergence. From a consumer's perspective television services over the Internet will increasingly be indistinguishable from those not over the Internet. It is already very difficult to tell the difference in many cases. For example, Screenrights understands that Foxtel is not provided over the Internet to a Foxtel set top box, but is provided over the Internet to the Foxtel Xbox service. But to a consumer, they are more or less the same thing. Similarly, IPTV services such as FetchTV and TelstraTBox: one happens to be over the Internet but the other is not. But to a consumer, they are merely subscription television services like any other.

The effect of the Internet exclusion is potentially to reduce competition in the Australian media market. New market entrants that are over the Internet television-like services looking to compete with incumbents such as Foxtel and Austar are not able to access retransmission. This is a constraint on their ability to compete. In order to include the free to air channels to the best possible extent, they are obliged to include free to air tuners within their set top boxes. This is an additional expense and is in any event less reliable than retransmission.

The Internet exclusion amounts to a regulatory barrier to entry for new market entrants seeking to broadcast television over the Internet.

Furthermore, it is a clearly inconsistent with the principle of regulatory parity ie the notion that like services should operate under like regulations.

The impact of this problem is likely to be increased through widespread availability of very fast broadband as promised by the National Broadband Network. The business case for offering IPTV not over the Internet (eg FetchTV) is that there is a guaranteed level of service by controlling the transmission route. However, this becomes less relevant and perhaps irrelevant with very fast broadband, and the "over the top" approach of linear broadcasting over the Internet (eg TBox) becomes more technically feasible. Services like the NBN will make over the Internet television like services much more feasible but will increase the propblems created by the lack of availability of retransmission.

The policy reason for excluding the Internet from the retransmission regime in 2000 was to avoid the possibility of retransmitted content intended for Australian consumers being sent over the Internet around the world thereby undermining broadcast markets internationally.

The importance attributed to this policy by some parties is demonstrated by its inclusion in the Australia/USA Free Trade Agreement ("the USFTA"). Article 17.3(10)(b) provides:[4]

> *neither Party may permit the retransmission of television signals (whether terrestrial, cable, or 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;*

However, in anticipation that this issue would over time be better addressed by other means, the governments agreed in a side letter to a mechanism to review the Internet exclusion. By mututal letters dated 18 May 2004 between the Australian Trade Minister and US Trade Ambassador, the parties agreed in effect that if either party formed the considered opinion that there was a significant improvement in the *"reliability, robustness, implementability and practical availability…"* of technology to limit the reach of an Internet retransmitted signal, then the parties would negotiate in good faith to amend the agreement.[5]

It is clear that such geoblocking technologies have advanced significantly since 2004, to the extent that television-like services are routinely made over the Internet in reliance on such technologies such as the ABC's iView service. Indeed, entire new businesses have been created on the basis of these technologies including in the United States, for example, Hulu, iTunes, and Netflix.

Screenrights submits that maintaining geographical control of retransmissions is still an important objective of regulation, but that the Internet exception is not the best way to achieve this outcome.

Screenrights submits that the conditions in the side letter between the Australian and US Governments have been met and that the Committee should recommend

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4 Australia-United States Free Trade Agreement, Chapter 17 Intellectual Property Rights. http://www.dfat.gov.au/fta/ausfta/final-text/chapter_17.html Para 10(b).

5 *Letter to the Hon. Robert B. Zoellick, United States Trade Representative from the Hon. Mark Vaile MP, Minister for Trade, dated 18 May 2004*, para 2.

that the Australian Government seek to negotiate an amendment to remove Article 17.3(10)(b) from the USFTA.

Screenrights submits that, upon future amendment of the USFTA, section 135ZZJA of the Copyright Act should be deleted and that Part VC should be amended to add (as a condition to the licence) that a retransmitter must apply effective access control technological protection measures to ensure the retransmission is appropriately geoblocked.

7. BROADCASTING SERVICES AND THE INTERNET GENERALLY

In Screenrights' view, a similar issue to the question of retransmission over the Internet, applies more generally to the definition of "broadcasting service" under the BSA.

Section 6 of the BSA provides that,

> ***broadcasting service*** *means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:*
>
> *(a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or*
>
> *(b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or*
>
> *(c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.*

On its face, television-like services transmitted over the Internet would seem to fall within the definition and be a broadcasting service. However, in September 2000 the then Minister for Communications determined one class of services not to be a 'broadcasting service', and thereby not subject to the licensing regime. That was 'a service that makes available television and radio programs using the Internet'. [6]

The effect of this declaration is that services such as Telstra TBox not only are not included within the retransmission regime, but they also fall outside the licensing regime in the BSA generally.

At the time of the determination there was an arguable case to exclude the Internet from BSA regulation. However, over time, and with convergence, that case is harder to justify. For the reasons outlined above in regard to regulatory parity for the retransmission regime, Screenrights can see a good argument to

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[6] Alston, Richard. "Determination under paragraph (c) of the definition of 'broadcasting service' (No 1 of 2000)", *Commonwealth of Australia Gazette No GN 38*, 27 September 2000.

amend the definition of broadcasting service so as to regulate like services alike in the BSA.

Screenrights is hardly unique in identifying this problem. The Australian Communications and Media Authority describes the definition of broadcasting service and in particular the exclusion of services over the Internet as a "broken concept", noting the regulatory consequences to be: [7]

> ***Misalignment of policy/misplaced emphasis/blurring of boundaries***
> *Current licensing of service types does not readily align or reflect all the available forms of content distribution. There is a lack of clarity about the treatment of internet-based content delivery and devices.*
>
> ***Gaps in coverage***
> *Newer forms of entertainment, information and advertising are not within scope of current regulation.*

Screenrights does not comment here on how to best address this "broken concept", but would like to draw to the Committee's attention that the application of this definition is not confined to the BSA. The CA includes in section 10 a definition of "broadcast" which is linked to and dependent on the definition on broadcasting service in the BSA. Accordingly, any change to the definition in the BSA will have a consequential change to the definition of broadcast in the CA.

The term "broadcast" is used in many areas in the CA including, for example, in section 87 (which establishes the nature of copyright in television and sound broadcasts), section 111 (which creates a time shifting exception), very widely in Parts VAA, VA, VC (which refers to "free-to-air broadcasts" that are again tied to the definition of "broadcasting service" in the BSA) and VD, and other areas of the CA. Accordingly, an amendment to the definition of broadcasting service in the BSA to repair the broken concept would have widespread effect upon the operation of the CA.

Screenrights does not submit that as a result the definition of broadcasting service should remain unchanged. It seems to Screenrights quite central to a consideration of regulation in a converged environment that this particular broken concept would need to be addressed in some manner.

Screenrights submits that the Committee should give consideration to the the consequences for copyright law which will arise from any amendment to the definition of "broadcasting service" in the Broadcasting Services Act.

[7] Australian Communications and Media Authority. *Broken concepts: The Australian Communications Legislative landscape.* p. 44.

8. CONCLUSION

Screenrights strongly supports the Committee's Review. Convergence is having important impacts upon the various statutory licences administered by Screenrights.

Screenrights' experience of administering the retransmission regime has given us a good view of the practical effect of convergence upon regulation.

On the one hand, the generally open nature of the retransmission scheme has encouraged competition and diversity in the Australian media market. Services relying on retransmission have developed in ways regulators could not have anticipated in 2000 and this has been to the advantage of consumers, service providers and rightsholders alike.

On the other hand, the exclusion from the regime of Internet based retransmissions has outlived its usefulness and should be a replaced with a technology neutral provision to protect the content while allowing the retransmission regime to continue to be relevant in a converged online broadcasting environment. This way competition, diversity and fairness will continue to be optimised by the retransmission regime.

In a wider context, Screenrights sees a similar need to amend the definition of broadcasting service, and looks forward to working with the Committee and Government to consider the implications of any such amendment upon the Copyright Act.

Yours sincerely,

Simon Lake
Chief Executive