



**Submission to the Australian Law Reform Commission Issues Paper:
Copyright and the Digital Economy**

30 November 2012

1. Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Australian Law Reform Commission's Copyright and the Digital Economy Issues Paper.

2. About ASTRA

ASTRA is the peak industry body for subscription television (STV) in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major STV operators, as well as channels that provide programming to these platforms. A list of ASTRA members is attached to this submission.

Overview of the STV Sector

The STV sector gives Australians access to quality, live, original and award-winning international and Australian programming across many genres, including movies, news, children's, documentary/current events, light entertainment, lifestyle and drama, live local and international sport, music, ethnic language, local weather and pay per view events.

With over 200 channels (including HD and Plus2) from over 30 different media companies broadcast on the Foxtel platform and channel packages offered through Telstra T-Box and Xbox360, the breadth, range and diversity of STV programming remains unsurpassed in the Australian broadcasting environment. Received by 34% of Australians through their homes and over a million more through hotels, clubs and other entertainment and business venues, STV provides 24 hour news, sport and entertainment.

3. Copyright and the Digital Economy

The creative industries are an increasingly important driver of investment and economic growth in Australia. The Federal Government's Strategy for Creative Industries, published in August 2011, noted that, in 2008-09, the creative industries:

- contributed \$31.1 billion to the Australian economy, with an average growth rate of 3.9 per cent in real terms, faster than the broader economy (over the ten years to 2008-09);
- employed 438,000 people, or 4.8 per cent of total employment (based on the 2006 Census); and
- made a larger contribution to GDP than a number of traditional industry groups, such as agriculture, forestry and fishing.¹

In 2011-12, the STV sector alone directly employed 6461 people and invested \$667 million into Australian content production. The overall economic contribution of STV to the Australian economy in 2011-12 was estimated by Deloitte Access Economics at \$1.4 billion, and at least \$7 billion since its inception in 1995.²

¹ Australian Government, *Creative Industries, a Strategy for 21st Century Australia*, August 2011, p.5.

² "Subscription TV industry investment in Australian content production increases by 13%" ASTRA Media Release, 31 October 2012 at:

http://www.astra.org.au/ArticleDocuments/116/ASTRA_AustralianContentSurvey_Announcement_31Oct12.pdf.aspx

The STV sector, like other sectors involved in the production and distribution of content, relies on a strong legislative framework to protect the substantial investments made in creative content, and to provide certainty for content producers that they can receive a fair return on this investment. Copyright law must reflect an appropriate balance between the ability for consumers to use copyright material and the right of the copyright owner to manage exploitation of the content that the owner has invested economic and other resources to create.

The impact of convergence and the digital economy has the potential to create synergies across once separate industries to drive innovation in the communications environment, however this potential cannot be realised if content producers and distributors are not able to effectively monetise the content they produce or acquire. The ability for content producers and distributors to extract fair monetary returns for their investment in developing or acquiring content is essential for the ongoing sustainability of media and communications enterprises and for the continued investment in Australian content production.

Technological advances in the digital era have enabled significant increases in copyright infringement, posing a significant threat to the viability of content production and distribution. Any dilution of the copyright owner's capacity to exploit rights will reduce the incentive to invest in creative content, reducing the potential for increased Australian content production into the future. Producers will only invest the many millions of dollars required to produce high quality content such as *Tim Winton's cloudstreet* if they can be assured that a regime is in place that allows them sufficient control over the use of that content for a fair and appropriate return on that investment.

ASTRA submits that the Issues Paper lacks sufficient acknowledgement of the significant investments behind the creation and acquisition of Australian and international content, and that appropriate remuneration for the use of that content is essential for Australian producers and content distributors to continue making such investments. The Issues Paper appears to have an underlying theme that there may have been a shift in community attitudes regarding how copyright material should be accessed and used, and the extent to which content owners should be remunerated for such use. The paper does not adequately explore whether there should be greater community recognition of the need for commercially sustainable business models to ensure continued creation of Australian content.

4. Comments on specific issues

ASTRA's specific comments focus on proposals to amend the existing scheme for the retransmission of free-to-air (FTA) television services by STV services, with further general comments on other issues raised by the Issues Paper. While all ASTRA members strongly support a robust copyright regime that appropriately balances the rights of copyright owners with the ability of consumers to access and use copyright content, there are differences of approach amongst our membership as to the most appropriate and effective policy settings going forward. As such we would refer you to submissions by individual ASTRA members for their detailed responses to the Issues Paper.

4.1 Retransmission of free-to-air services by subscription television

Retransmission consent or 'must carry' regimes operate to varying degrees in a number of European jurisdictions and the United States. Australian commercial television broadcasters have, in recent years, argued for a similar regime to be adopted here. ASTRA submits that a significantly different broadcasting environment exists in Australia compared to the United States and Europe. The particular public policy concerns that drove the introduction of 'must carry' regimes in these countries have never existed in Australia, and there is increasing

debate, particularly in the United States, as to whether circumstances persist to justify a 'must carry' regime at all.

For many households in the United States and Europe, cable or other non-terrestrial broadcast transmission platforms are the primary or only means by which households can reliably receive terrestrial television services. The primary public policy objective of 'must-carry' regimes in these countries is to ensure consumers are able to access FTA television services, and to ensure the viability of FTA commercial television broadcasters through being able to reach all consumers in their advertising market. In the United States in particular, remuneration for the retransmission of local television stations by STV has traditionally been directly linked to maintaining local program production (including local news programming) by those commercial television stations.

'Must-carry' in the United States

Cable television began in the United States in the late 1940s as community-based services for the retransmission of free-to-air television in areas that could not receive adequate reception of those services from household antennas. Subscription services were later added to the retransmitted FTA services delivered by cable. By 1992, when Congress enacted the first must-carry legislation in the United States, a significant majority of US homes received free-to-air television by means other than "over the air" broadcasts, a trend which has continued to this day.³

The public policy rationale for must-carry rules in the US remains much the same today as they were when those rules were first introduced:⁴

- to ensure all viewers can receive FTA television – there were concerns that, without 'must carry' provisions, cable networks may decide not to carry local television stations;
- to ensure the minority of viewers who still rely on terrestrial transmissions (including low-income and/or rural households) can continue to receive television services; and
- to ensure the viability of local FTA television stations, including local affiliates of the major US networks and those stations operating independently – of particular concern was that loss of advertising revenue for local television stations would threaten local content production.⁵

The link in the US between the underlying public policy rationale of protecting local content production and the operation of the retransmission regime has become increasingly tenuous. The major US networks now routinely demand ever increasing 'programming fees' from their affiliate stations, to be drawn from retransmission fees, while at the same time those local stations increasingly scale back local television production. The intention of the US 'must carry' regime was never for retransmission consent fees to be a revenue stream for national television networks – a point even supported by the National Association of Broadcasters (the US industry association for FTA broadcasters) during debate in 1991 on the introduction

³ In 2009, the OECD reported that 84% of the US population received television by cable or satellite means (OECD, Communications Outlook 2011). Recent media reports put STV penetration in the US at 90% (see "News bid to make TV really pay", *Australian Financial Review*, 21 June 2012).

⁴ See R. Frieden, "Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States" Working Paper Series, University of Pennsylvania, April 2005; J.H. Snider, "Multicast Must-Carry for Broadcasters" Spectrum Series Issues Brief 13, New America Foundation Spectrum Policy Program, Dec 2003.

⁵ See Screenrights submission to the Convergence Review, 28 October 2011, p.4.

of the regime.⁶ However the major US networks are increasingly viewing retransmission fees as no more than a lucrative supplementary revenue generator – one ultimately extracted from cable television subscribers.

'Must carry' in Europe

Similarly in Europe, there is substantial reliance on non-terrestrial broadcast means to access FTA television.⁷ As a consequence, must-carry regimes of various forms have also been introduced in a number of European jurisdictions in response to the Must Carry provisions of the European Commission Universal Services Directive (the Directive). Article 31 of the Directive (the provision relating to “must carry” obligations) states:

Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public *where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts*. Such obligations shall only be imposed *where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent*. The obligations shall be subject to periodical review. (emphasis added).⁸

The Directive clearly states that Member States may only impose these obligations on networks where end-users use them as the principal means to receive television. Indeed, it is instructive that the provision sits in the EU directive on Universal Service (that is, the directive relating to the minimum services that end users should receive) and not the Audiovisual or Media directives. Moreover, the Directive is clear that such obligations should be imposed only where they are necessary to meet “a clearly defined general interest objective”. The primary purpose of the provision is to ensure that end-users have access to FTA television broadcasts.

Relevance to Australia

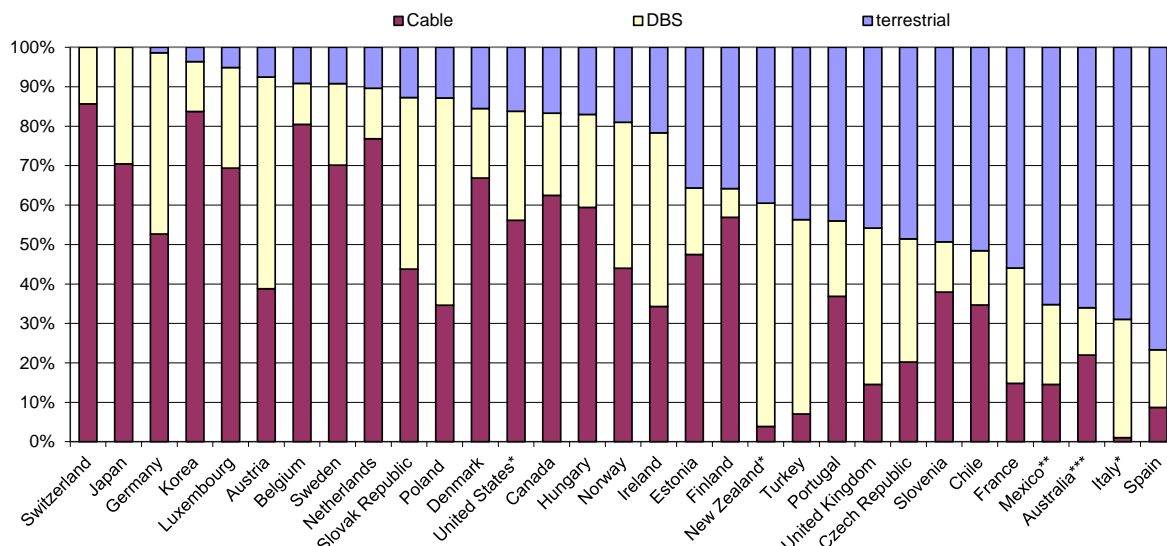
In Australia, the public policy rationale of ensuring universal access to FTA television does not apply. Consumer access to reliable FTA television services in Australia is not contingent on subscribing to a STV platform, unlike many parts of Europe and the United States. Indeed, in regional areas, STV has never retransmitted FTA commercial television services. As the following chart demonstrates, in contrast to most countries in the OECD, Australians mainly receive FTA television services via terrestrial transmission.

⁶ As noted in the testimony of M. Witmer, Executive Vice President & Chief Video and Content Officer, Time Warner Cable during hearings on “The Cable Act at 20” before the US Senate Committee on Commerce, Science and Transportation, July 24, 2012, available at:

http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=df31aa95-2c78-4594-9d47-265ed87594de&Statement_id=956f4171-cae3-4042-8914-e41e7d7715a9&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=7&YearDisplay=2012

⁷ A study of digital television homes in Europe in 2007 found that only 38% of homes received digital television terrestrially, with 42% via satellite, 16% via cable and 4% via IPTV (see W Van den Broeck & J Pierson, *Digital Television in Europe*, ASP/Vupress, 2008, p.2).

⁸ Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Art 31.



Source: OECD Communications Outlook 2011.

Notes : (*) Data for 2008 instead of 2009; (**) Data for 2005 instead of 2009; (***) Australia was not included in the original OECD chart. Data for Australia estimated by ASTRA based on STV penetration for cable and satellite services, and households reliant on DTH satellite for FTA television services.

STV in Australia has been built on the back of billions of dollars invested in infrastructure and production to provide exclusive programming and innovative services that consumers want, without a cent of Government funding and without the significant statutory protections and privileges afforded to commercial broadcasters. Consumers do not pay for STV services in Australia to watch FTA television – they pay for program diversity and choice. Research commissioned by ASTRA found that, for the majority of STV users, content diversity and exclusive programming are the primary reasons for subscribing.⁹ The majority of viewing in STV homes is STV programming.¹⁰

The viability of commercial FTA television in Australia is ensured through a legislative framework that provides significant protections and privileges to commercial broadcasters including protection from competition from additional FTA services, guaranteed access to valuable broadcast spectrum (a scarce public resource) and preferential access to premium sports content. Successive Australian Governments have invested many hundreds of millions of dollars since 2001 to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible, including:

- licence fee rebates and direct grants for commercial television broadcasters in regional and remote areas for costs associated with the conversion from analog to digital transmission;¹¹
- grants to commercial broadcasters in smaller regional and remote licence areas to ensure that they can provide the full suite of commercial digital television services;¹²

⁹ ASTRA commissioned survey of STV viewers conducted by MRA Research in January 2011.

¹⁰ Year to date STV share of viewing in STV Homes for 2012 is 56.4%, 2am-2am, with the remainder shared between the five FTA networks, including multi-channels (Source: Source: OzTAM NatSTV as of Week 44 2012).

¹¹ Minister for Communications, Information Technology and the Arts, “Assistance for digital television in regional areas” Media release, 9 May 2000.

¹² Minister for Broadband, Communications and the Digital Economy, “Full digital TV service for regional and remote Australia”, Media Release, 9 November 2010.

- the Household Assistance Scheme which supplies and installs free digital television HD set top boxes (and free antenna and cabling upgrades if required) to people on the maximum rate Age Pension, Disability Support Pension, Carer Payment, Veterans' Service Pension or Veterans' Income Support Supplement;¹³
- the Viewer Access Satellite Television (VAST) service which provides the full suite of commercial and national FTA digital television channels to viewers with inadequate terrestrial reception;¹⁴ and
- the Satellite Subsidy Scheme which provides subsidised installation of satellite reception equipment for reception of the VAST service in households in terrestrial digital transmission black-spots.¹⁵

As the Minister for Broadband, Communications and the Digital Economy stated after the passage of legislation bringing the Viewer Access Satellite Television (VAST) service into being, the introduction of the Government-funded VAST service, combined with further Government funding to upgrade transmission infrastructure in regional and remote areas, means that commercial and national broadcasters "are able to deliver the full suite of FTA digital television services to *every viewer in Australia, wherever they live*".¹⁶

Retransmission of free-to-air services by subscription television has no negative impact on advertising revenue for commercial free-to-air television services

Commercial FTA broadcasters argue that a retransmission right should be introduced for these broadcasters to "exploit the value of their services". ASTRA submits the existing regulatory framework for the retransmission of FTA television under the BSA and the Copyright Act works well for both consumers and all industry stakeholders.

Commercial broadcasting services are services that provide programs that are "made available free to the general public" and that "are usually funded by advertising revenue".¹⁷ The retransmission of FTA services by STV platforms has no negative impact on the advertising revenue of commercial television broadcasters. Audience numbers for FTA programs, upon which commercial FTA broadcaster advertising revenues are based, include FTA viewing in homes of STV subscribers. ASTRA notes that Free TV has never provided any evidence regarding loss of advertising revenue or potential audience reach as a result of retransmission of commercial television services on STV platforms.

The BSA provides that a service provided by a commercial television broadcasting licensee is only permitted to be retransmitted within the licence area of the licensee.¹⁸ Commercial television services retransmitted on STV platforms consist of the same programs with the same advertisements as those services transmitted terrestrially within the relevant licence area – meaning that advertisers reach relevant audiences. Commercial broadcasters are effectively seeking an additional revenue stream from STV customers 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.

¹³ For more information, see: <http://www.digitalready.gov.au/Households/government-assistance/household-assistance-scheme.aspx>

¹⁴ For more information, see: <http://www.digitalready.gov.au/Households/what-is-the-switch/VAST-service.aspx>

¹⁵ For more information, see: <http://www.digitalready.gov.au/Households/government-assistance/satellite-subsidy-scheme.aspx>

¹⁶ Minister for Broadband, Communications and the Digital Economy, "Digital switchover legislation passed", Media Release, 25 June 2010.

¹⁷ *Broadcasting Services Act 1992*, s 14.

¹⁸ Subject to the payment of equitable remuneration to the underlying rights holders: BSA, s 212.

Further, as Screenrights noted in a submission to the Convergence Review, the FTA broadcasters are themselves significant owners of underlying rights in the content they broadcast and currently receive a substantial proportion of the remuneration payments made under Part VC of the Copyright Act.¹⁹

By contrast, a must carry scheme would place additional and unnecessary regulatory burdens on STV broadcasters. In particular, the retransmission of regional broadcasting services in a satellite environment would be commercially prohibitive due to the number of local licence area-based regional broadcasting services.

Existing retransmission regime works well for the benefit of consumers

The retransmission of FTA services on STV gives subscribers the convenience of not needing to move from one platform to another. Consumers who view FTA services via their STV provider can access these services terrestrially (or via satellite) if they choose to do so.

The retransmission of FTA broadcasts on STV has, up to this point, been successfully achieved under the existing regulatory regime for retransmission through commercial negotiation between STV platform providers and commercial and national television broadcasters. There is no public policy justification for regulatory intervention in a process which works effectively in the interests of the consumer and the underlying rights holders in the programs broadcast by FTA services.

Inappropriate forum to examine retransmission issues

ASTRA does not believe this Inquiry to be the appropriate forum to discuss the regulatory framework for the retransmission of FTA services. ASTRA agrees with the ALRC that any questions that may arise from the operation of the retransmission regime would be best addressed directly by Government in the context of communications and competition policy. The retransmission of FTA services by STV does not raise the type of 'fair use' concerns that are at the core of the terms of reference for this Inquiry.

ASTRA would, in principle, support a consistent approach to the retransmission of FTA broadcasting services on any platform. However, any clarification of the retransmission regime in relation to retransmission over the internet should not lead to commercial FTA broadcasters receiving remuneration for the provision of services that are required to be provided for free and that STV subscribers would expect to receive without payment.

Further, the extent to which the transmission of television or radio programs via the internet can be, or should be, considered 'broadcasting' is ultimately a question of media and communications policy and is one that, in ASTRA's view, should be determined by the Government of the day and not in the context of this Inquiry.

4.2 Other issues

Guiding principles for reform

ASTRA does not believe that the principles suggested by the ALRC, taken as a whole, give sufficient weight to the importance of a strong copyright regime to provide certainty for investment in creative content. Producing new Australian television content, for example, including new drama and documentaries, requires significant investment of funds and

¹⁹ Screenrights response to the Convergence Review Emerging Issues Paper, 12 August 2011, p.5. Screenrights collected \$5.96 million under the Part VC remuneration scheme in 2011-12 (*Screenrights Annual Report 2011-12*, p.7).

resources, with no guarantee of commercial success. Content producers require the certainty that investing in new content will grant them reasonable and appropriate control over how that content is accessed and used.

Copying for private use

ASTRA believes the existing exceptions for copying legally acquired copyright material have worked well to provide an appropriate balance between reasonable use by consumers and the right of content owners to receive fair remuneration for the use of copyright content. As the Issues Paper notes, content owners and distributors are developing new business models that give consumers greater flexibility in the acquisition, access and use of copyright material. A converged media and communications environment will only increase competition and drive content producers and distributors to develop more innovative and consumer-responsive means to access and use copyright content, while ensuring a reasonable return for investment in content creation.

The ability of content rights holders to have certainty over how their content is distributed, accessed and used is vital to ensure continued investment in content production. ASTRA would strongly oppose any reforms that permit an entity that is not the rights holder, or an entity not authorised by the rights holder, to build a business model using copyright material based on exceptions specifically created only for private or domestic use. The Optus TV Now case affirmed the legitimate interests of sports bodies and other rights holders in receiving a justifiable return for their property and investments, and the inappropriateness of an entity attempting to exploit exceptions for private and domestic use for commercial gain.

Transformative use

ASTRA submits that an appropriate balance needs to be maintained between unlicensed use of copyright material to create new content, and the legitimate economic interests of copyright owners to have certainty over how their intellectual property is distributed, accessed and used. The existing legislative framework enables owners of creative content to receive fair compensation where that content is used by third parties in forms that could be used for commercial gain. Even where transformative content is user-generated and/or produced “non-professionally” for non-commercial distribution through, for example, social media platforms such as You Tube or facebook, the advertising-based business models of those sites are built on the attractiveness of content posted by users.

The intellectual and economic investment made in the production of copyright content must continue to be recognised and, where that content forms the basis of another work or other subject matter, be appropriately compensated. Existing exceptions, such as for satire or parody, already provide significant scope for legitimate unlicensed use of copyright materials, and ASTRA is not aware of any compelling evidence that a further specific exception for transformative use is necessary.

Recommendations of the Convergence Review

As noted above, the impact of convergence has the potential to create synergies across once separate industries to drive innovation in the communications environment, however this potential cannot be realised if content producers and distributors are not able to effectively monetise the content they produce or acquire. Technological advances in the digital era have enabled significant increases in copyright infringement, posing a significant threat to the viability of content production and distribution.

The Convergence Review made a number of recommendations that would expand Australian content expenditure obligations on STV. The implementation of these

recommendations would require a strong legislative framework to protect the substantial investments that would need to be made, and to provide certainty for content producers that they can receive a fair return on this investment. Copyright law must reflect an appropriate balance between the ability for consumers to use copyright material and the right of the copyright owner to manage exploitation of the content that the owner has invested economic and other resources to create.

Statutory licences in the digital environment

ASTRA submits that the existing statutory licensing schemes work effectively in the interests of consumers and content owners.

Fair dealing exceptions

ASTRA does not see any need for new specific exemptions to be introduced into the Copyright Act. However, any proposals for new exceptions that may arise from this review should include an assessment of the potential economic detriment for content owners. Any proposed new exception should not be contemplated where its introduction impacts on the capacity of content owners to receive a fair and reasonable return for their investment.

Use of different works and subject-matter are not necessarily comparable – consumers access and use music, films, television programs, books and other content in different ways. Exceptions that may be appropriate for one content form, and that do not impact on the ability of the content owner to receive fair remuneration for that content, may not be appropriate for, and may threaten the commercial viability of, other forms of content or content delivered in a particular way. ASTRA urges caution in any proposals that may threaten the commercial basis that underpins the creation and distribution of copyright content.

ATTACHMENT: ASTRA Members

Subscription Television Platforms

Foxtel
Telstra

Program Channel Providers

Aurora
Australian Christian Channel
Australian News Channel
BBC Worldwide Channels Australasia
Discovery Networks
E! Entertainment
ESPN
Eurosport
Expo Networks
FOX Sports
Movie Network
MTV Networks
National Geographic
NBC Universal
Nickelodeon
SBS Subscription TV
Setanta Sports Australia
Sky Racing
Turner International (Australia)
TV1
TVN
TVSN
Walt Disney Company (Australia) Pty Ltd

Communications Companies and Other Associate Members

Ai Media
Ignite Media
Multi Channel Network
BSA