Submission by
Free TV Australia Limited

Australian Law Reform Commission

Copyright and the Digital Economy
Issues Paper

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EXECUTIVE SUMMARY

- Free TV welcomes the Copyright Review by the Australian Law Reform Commission (ALRC). Like many other content businesses, commercial free to air broadcasters are facing significant challenges in the face of rapid technological change.
- Free TV members underpin much of the Australian creative sector through investment in content production and distribution. Broadcasters are also prominent users of copyright material.
- Free TV members support a technology neutral regulatory framework which provides robust copyright protection and enforcement alongside fair and practical exceptions for legitimate use.
- Of particular concern to Free TV members are the retransmission rules. Broadcasters currently have no control over how, or on what terms, their services are retransmitted on competing platforms.
- The retransmission exception was never intended to permit the wholesale unauthorised exploitation of free-to-air (FTA) broadcasts by commercial competitors on competing platforms that is occurring today. It was originally introduced to enable the use of FTA signals by self-help providers in areas suffering poor or no terrestrial television reception.
- The increasing availability and penetration of superfast broadband and the resulting proliferation of new online entertainment platforms highlights the need for urgent review of the retransmission scheme.
- A US style "must carry/retransmission consent" regime must 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 would ensure that broadcasters are fairly compensated, while viewers can continue to access FTA services.
- Free TV does not support the application of s 111 to third party commercial copying on behalf of individuals. The policy objective of s 111 was to legalise common domestic practices by individuals. The use of FTA signals by other businesses for commercial gain is outside the scope of this objective.
- Free TV members do not support the introduction of any new exceptions to allow freer use of broadcast material on the internet, especially on social media. Online piracy is a major problem for broadcasters, particularly due to the difficulty of enforcing copyright against online infringements.
- Free TV members propose the introduction of a limited statutory exception for the use of orphan works. To ensure a fair balance is achieved for owners and users, the exception will be subject to a diligent search, attribution where the owner is known and enable the owner to veto further use of the work.
- The introduction of a general fair use exception should be considered carefully, particularly in light of rapid technological change. The current fair dealing provisions work well and provide certainty and consistency for both users and creators.
- Free TV requests that the complexity of music licensing be considered by the ALRC as part of its objective to simplify copyright law in the digital economy.

1 Introduction

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide nine channels of content across a broad range of genres, as well as rich online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, FTA services are watched by more than 14 million Australians.

Commercial free-to-air broadcasters play a significant role in the Australian creative industries. In 2011-2012, Free TV members invested $1.35 billion in Australian content. Free TV members are also regular users of copyright material and frequently rely on copyright exceptions for program creation and general broadcasting activities, including news and current affairs production.

Free TV welcomes the review of copyright exceptions by the ALRC and the opportunity to respond to the Issues Paper. Commercial free-to-air broadcasters support a regulatory framework which provides robust copyright protection and enforcement alongside fair and practical exceptions for use.

The ALRC Copyright Review is timely. Broadcasters are facing significant challenges in the emerging digital economy as technological developments and shifts in viewer behaviour are driving unprecedented change. Without strong and flexible copyright protections, commercial FTA broadcasters cannot prevent the unauthorised use of their material. These protections are essential if broadcasters are to continue to operate as viable commercial businesses in the new digital economy.

As a general principle, copyright reform must aim to create a regulatory framework that is technology-neutral and consistent. The statutory licences, exceptions and retransmission rules (where applicable) should not discriminate or differ based on platform or delivery mechanism.

2 Retransmission of free to air broadcasts

Summary

- *Section 212 of the Broadcasting Services Act 1992* (BSA) *allows competing platforms to retransmit free to air broadcasts without consent or payment to broadcasters.*
- *As a result, Free TV members cannot exercise the exclusive rights in their broadcasts and exploit their services in the new digital environment. This is causing unreasonable prejudice to free-to-air broadcasters who have invested significant labour, expertise and cost in compiling their signals.*
- *This anomaly in the legislative framework has been the subject of substantial and ongoing review since 1994. Legislative amendments to remedy this anomaly lapsed only due to an election.*
- *The roll out of the National Broadband Network and the likely proliferation of new entertainment platforms highlight the need for urgent action.*
- *A must carry/retransmission consent regime must be introduced as soon as possible to address the situation.*
- *The public policy and cultural benefits of ensuring access to Australian television content in a fragmented market provide a strong additional basis for prioritising retransmission reform.*

Exclusive Rights of a Broadcaster

Since the Rome Convention of 1961, a broadcast has been widely recognised as a subject matter protected by copyright. In Australia, television broadcasts were first protected as a specific subject matter in the *Copyright Act 1968* (the Act). The Act provides that the maker of a broadcast has the exclusive right to authorise the re-broadcast and communication of that broadcast to the public[1].

These exclusive rights acknowledge the creative and economic value of broadcasts. They recognise the endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment. However, despite this protection, broadcasters are currently unable to control the distribution of their broadcasts by competing commercial content distribution platforms.

As noted in the Issues Paper, s 212 of the BSA creates an exception to the right to authorise the re-broadcast or communication of a broadcast by others. This section was introduced specifically to allow retransmission by self-help providers in areas where viewers were unable to receive terrestrial reception or suffered poor reception.

It was never intended to allow new service retransmit FTA signals without authorisation.

It has been used however by subscription TV platforms to provide FTA channels as part of a subscription package without having to negotiate a commercial fee with FTA broadcasters. Subscription TV providers are continuing to benefit commercially from this anomaly in the existing retransmission regime.

[1] S 87 of the *Copyright Act 1968*

54% of all primetime viewing (6pm till midnight) on subscription television is of FTA services[2].

Subscription television was launched in October 1996 with 20 channels, 5 of which were the terrestrial free-to-air broadcasting channels[3].

It has been a profitable business since 2006.

In 2011-12 it earned $2.2 billion in revenue and reported earnings before interest, tax, depreciation and amortisation (before the one off costs of acquiring AUSTAR) of $598 million. It pays no fees to broadcasters which are themselves forced to pay substantial fees to Foxtel for carriage of their services on the satellite[4].

Foxtel CEO Richard Freudenstein has predicted strong growth for Foxtel in the future, telling analysts just last month that the subscription TV operator will increase its penetration to over 50%[5].

History of the retransmission exception

The retransmission exception at section 212 of the BSA has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law[6].

The Copyright Convergence Group in its 1994 report *Highways to Change: Copyright in the New Communications Environment* found that the retransmission of FTA signals for commercial purposes should be subject to the ordinary principles of copyright law.

It recommended that retransmission without authorisation should only be permitted where it was required to address inadequate signal quality[7].

Retransmission was again considered in 1997 as part of the Government's Digital Agenda Review. This Review lay the foundation for the introduction of the Part VC statutory licence[8] and a technology neutral communication right in place of a technology specific broadcasting right[9]. However, the scope and application of s 212 was carved out of the Review due to concurrent Government consultations on the issue from a broadcasting policy perspective[10].

Following these consultations, the *Broadcasting Services Amendment Bill 1998* ('the Bill') was introduced into Parliament. The Bill proposed a new retransmission scheme that would require third party platforms to obtain the consent of a FTA broadcaster for the retransmission of their signals. Genuine self-help groups were not required to obtain this consent and were also exempt from making payments to the rights holders of underlying material. The Bill went to Senate Committee which recommended that the Bill be passed

[2] July 2011 – June 2012, OzTAM, National Pay TV Database – total number of people, based on share of viewing, consolidated data
[3] Wikipedia: http://en.wikipedia.org/wiki/Foxtel
[4] *Australian Financial Review*, August 2012: http://afr.com/p/business/companies/foxtel_picture_belies_torpid_subscriber_zE0hsxgTcc0e4bzYbWva6K
[5] Richard Freudenstein, *Sydney Morning Herald*, July 2012: http://www.smh.com.au/business/media-and-marketing/foxtel-boss-confident-of-achieving-50-slice-of-local-tv-market-20120717-228fi.html
[6] 1996 Federal Government Election Policy, *Arts Online*, Broadcasting Services Amendment Bill 1998 Explanatory Memorandum , Communications Law Bulletin *Retransmission Rights: The Free to Air Broadcasters View*, Volume 17, No 3, 1998
[7] Copyright Convergence Group, *'Highways to Change – Copyright in the New Communications Environment'*, August 1994, 47–48 and 57-58
[8] For the remuneration of underlying copyright owners for the retransmission of free to air broadcasts
[9] Copyright Amendment (Digital Agenda) Bill 1999
[10] Copyright Reform and the Digital Agenda Review Discussion Paper, paragraph 4.45 – 4.46.

without amendment[11]. However, due to the federal election in 1998, the Bill lapsed and FTA broadcasters are still waiting for a practical solution to this issue.

International Standards - Three Step Test

In Free TV's view the current retransmission exception conflicts with the 'three-step test'. This is because it does not comply with the thresholds proposed by the test. These thresholds were introduced to assist legislators and policy makers to determine whether existing or proposed exceptions struck an appropriate balance between the rights of owners and users.

The 'three-step test' is enshrined in international conventions to which Australia is a party[12]. It requires any copyright exception or limitation to be restricted to:

- certain special cases;
- which do not conflict with a normal exploitation of the work; and
- do not unreasonably prejudice the legitimate interests of the rights holder.

It is demonstrable that the current exception breaches these requirements. The inclusion of free-to-air channels in competitors' services has become a 'normal exploitation' of FTA signals in Australia.

TV content can be delivered to the home through a variety of services, including subscription platforms such as Foxtel, FetchTV and Telstra's T-Box. These services include FTA channels in their product to enhance the appeal of their product. In many cases, the availability of free-to-air services in a subscription product is a key component of marketing campaigns for such services[13].

It cannot be argued that the exception meets the "certain special cases" requirement or that it does not "unreasonably prejudice the legitimate interests of the rights holder".

As broadcasters are currently unable to exercise their economic rights in relation to their broadcasts, they have no leverage upon which to negotiate commercial terms for retransmission and derive fair revenue. This is causing unreasonable prejudice to free-to-air broadcasters who have invested significant labour, expertise and cost in compiling their signals.

This contrasts with the position of underlying rights holders who retain the right to be fairly compensated when broadcasts are retransmitted. The Part VC licence facilitates payment to rights owners in the content of a broadcast, even in cases where underlying rights have already been cleared by the free-to-air broadcaster.

The current exception also takes away a broadcaster's ability to determine on which platform a broadcast channel will be carried. Free TV broadcasters have invested over $2bn in the digital terrestrial platform. Allowing third parties free reign to make FTA broadcast channels available on competing platforms without broadcaster consent is prejudicing the legitimate interests of broadcasters to exploit those channels, including on the terrestrial platform.

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[11] Senate Environment, Recreation, Communications and the Arts Legislation Committee Report: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ecita_ctte/completed_inquiries/1996-99/broad/report/contents.htm

[12] Article 13 of the TRIPS Agreement, Article 9(2) of the Berne Convention Article 10 of the WCT, Article 16 of the WPPT and Article 17.4.10(a) of the AUSFTA

[13] Telstra's T-Box: http://www.telstra.com.au/tv/tbox/tv/index.htm; Fetch TV: http://www.fetchtv.com.au/TV#!/tv-channels/cctv-news

Importance of retransmission in the emerging digital economy

Retransmission is an acute problem for free to air broadcasters in the emerging digital economy, particularly as broadband service speed and penetration increases.

The Federal Government is facilitating these services through its $36 billion investment in the National Broadband Network (NBN)[14]. In June 2009 the Minister for Broadband, Communications and the Digital Economy, Stephen Conroy stated publicly that the NBN will deliver "hundreds and hundreds and hundreds" of channels of new IPTV content[15].

There is no doubt that the NBN is a game changer for all involved in the creation and distribution of content. In order to ensure that all Australians continue to have access to free-to-air television services whether provided terrestrially or over the NBN, any reform to the retransmission provisions should include a must carry provision.

A technology neutral must carry/retransmission consent regime similar to that existing in the US should be introduced in Australia. Such a regime would ensure that all Australians continue to access FTA signals regardless of platform and allow broadcasters to settle fair terms for the carriage of their signals.

In doing so, the regime would remove the current disadvantage to broadcasters, respond to technological change and provide an adaptive and efficient framework for rights holders and content services in the transition to the digital economy.

This in turn will encourage innovation and fair competition in an NBN enabled economy as required by Principles 2 and 8 of the Review.

The solution: a "Must Carry" Regime

A US style must carry/retransmission consent regime allows broadcasters to either negotiate for the provision of their broadcast signal ('retransmission consent') or elect to participate in a 'must carry' regime, regardless of the technical means chosen for delivery.

The US rules recognise the value to cable and satellite service offerings of over-the-air network stations and provide a framework for commercial negotiations for a fair return.

- FFC rules mandate that locally licensed TV stations must be carried on a cable provider's system. The rule only applies if the TV station wants the cable provider to offer its programming in this way.
- Local broadcasters also have the option to negotiate a fee or other compensation for their programming ('retransmission consent'). The law requires that once every three years, local stations must elect between 'must carry' and 'retransmission consent'.
- Under 'retransmission consent' arrangements, a cable operator is prohibited from carrying the local stations' signals until an agreement is reached.
- The FCC has also applied rules which require local stations to negotiate with cable operators in good faith.

The value to broadcasters of the must carry/retransmission consent regime has been highlighted by the Chairman of News Corp, Rupert Murdoch, who said in 2009 that "Asking cable companies and other distribution partners to pay a small portion of the profits they

[14] NBN Co Limited: http://www.nbnco.com.au/assets/documents/nbn-co-corporate-brochure.pdf
[15] Senator Stephen Conroy, AIIA, June 2009: http://www.arnnet.com.au/article/310712/conroy_nbn_bring_hundreds_tv_channels_australia/

make by reselling broadcast channels, the most watched channels on their systems, will help ensure the health of the over-the-air industry in the America"[16].

Retransmission fees acknowledge the commitment of free-to-air networks to quality content. Free-to-air networks in the US invest the most in broadcast content and rate as the most popular amongst viewers[17].

In the UK, free-to-air broadcasters have recently been making the case for a retransmission right[18]. In 2011 the BBC director of Policy and Strategy, John Tate argued that providing a retransmission right would rebalance the regime and "could be an important way of sustaining investment in UK free-to-air content"[19].

In 2012 ITV Chief Executive Adam Crozier also argued for a retransmission regime[20].

'Must carry' rules do exist in many European jurisdictions, ensuring that broadcast networks cannot be forced to pay for carriage of their services on subscription platforms.

The European Commission, drawing on the conclusions from their Convergence Green Paper (reference), implemented 'must carry' provisions in Article 31 of the Universal Service Directive. Article 31 recognised Member States' ability to impose or maintain reasonable must-carry rules on network providers under their jurisdiction.

A must carry regime has been implemented in a number of European countries (see table at Appendix A). For example, in the Spanish market, both parties must agree on suitable financial compensation.

The successful implementation of must carry regimes in Europe and the U.S. demonstrates:

- the significance of these rights to broadcasters;
- the legitimacy of broadcasters' claims; and
- that such a regime is feasible, practical and effective.

Market developments have made the need for legislative action acute and these pressures will only build as the NBN is rolled out. A must carry/retransmission consent regime provides a reasonable and tested way of protecting broadcasters' legitimate interests in their intellectual property enabling them to realise its full value.

Ensuring a place for Australian content

Addressing the retransmission issue in the fragmenting media environment will also have additional public policy and cultural benefits.

Commercial free-to-air television is the home of Australian content and this is highly valued by Australians who rely on FTA channels as their primary source of entertainment and information. More than 14 million Australians watch free-to-air television on any given day and continue to embrace local content above international content[21].

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[16] Rupert Murdoch, News Corp AGM, http://www.newscorp.com/news/news_432.html
[17] Mark Thompson, MacTaggart Lecture at Edinburgh International Television Festival, http://www.guardian.co.uk/media/2010/aug/27/mark-thompson-mactaggart-full-text
[18] Mediatique Report '*Carriage of TV channels in the UK: Policy Options and Implications*', July 2012: http://dcmscommsreview.readandcomment.com/wp-content/uploads/2012/07/120709-DCMS-Carriage-Consent-Report-FINAL.pdf
[19] Westminster Media Forum, July 2011: http://www.bbc.co.uk/pressoffice/speeches/stories/tate_westminster.shtml
[20] *Broadcast*, 13 March 2012: http://www.broadcastnow.co.uk/news/broadcasters/crozier-sky-retransmission-fees-are-wrong/5039196.article
[21] 45 of the top 50 most watched programmes in 2012 are Australian according to OzTAM and RegionalTAM data

Free TV members are major underwriters of Australian content. In 2011-2012[22], commercial free-to-air broadcasters invested a massive $1.35 billion in Australian content including drama, light entertainment, children's programmes, documentaries, sports, news and current affairs.

The creation and dissemination of local content has significant cultural benefits for Australian society. The Convergence Review described local content as contributing to 'stronger sense of national identity, promotion of social cohesion and cultural diversity' assisting in the creation of a 'healthy progressive society'[23].

This policy objective is reflected in current Australian broadcasting regulation. The Australian Content Standard requires commercial FTA networks to dedicate 55% of programming between 6am and midnight to Australian content and provide prescribed amounts of drama, documentary and children's programs.

Regardless of the platform chosen by households to access audio-visual content, Australians should be able to conveniently and easily access free-to-air channels and local Australian content.

The public policy and cultural benefits of ensuring access to Australian television content in a converged market provide a strong basis for prioritising retransmission reform. This rationale has been used to support must carry rules in alternative jurisdictions.

For example, the protection and proliferation of Canadian programming is the policy justification for the operation of must carry rules in Canada[24]. Canadian rules require cable companies and other distributors of broadcasting services to give priority to the carriage of Canadian television signals and in particular local Canadian stations to "ensure a place for Canadian services".

A technology neutral must carry regime will enable the ongoing wide dissemination of Australian content[25] and ensure Australians continue to enjoy ubiquitous access to quality local content regardless of their chosen delivery platform. On the other hand, without reform, the existing retransmission free-for-all could have an impact on the sustainability of current levels of local content production by free-to-air broadcasters.

3 Communications and Competition Policy

Question 38: Is this inquiry the appropriate forum for considering these questions which raise significant communications and competition policy issues?

While we understand that retransmission has implications for communications and competition policy, retransmission is primarily a copyright law issue. The cable TV experience demonstrates that communications and competition law cannot be relied upon to address the inequity to free-to-air broadcasters arising from the current retransmission rules.

Furthermore, as noted in the Issues Paper, copyright law and media regulation are necessarily interrelated.

[22] Figures compiled by Free TV Australia
[23] Convergence Review Discussion Paper *Australian and Local Content*
[24] Canadian Radio-Television and Telecommunications Commission: http://www.crtc.gc.ca/eng/cancon/c_services.htm
[25] Principle 4 is that reform should promote fair access to and wide dissemination of information and content.

Copyright protection to broadcasts is the primary mechanism through which media businesses can exercise economic rights in their products and compete in the content services market.

Without the requisite copyright protection, broadcasters cannot control and monetise the use of their broadcasts by others, including new and emerging media platforms. This impedes their ability to operate as viable commercial businesses in the digital economy.

Currently, subscription platforms are obtaining a significant commercial benefit from including FTA signals in their products without compensation to broadcasters as copyright owners. This is creating an unfair competitive advantage for subscription platforms and is contrary to the fundamental principles of copyright law. As new media platforms proliferate, there is potential for this loophole to be exploited much more widely. It is therefore critical that the current inequity caused by the retransmission exception is rectified as soon as possible.

The introduction of a must carry/retransmission consent regime will facilitate a seamless transition to a media market powered by super-fast broadband by providing a clear and certain legal framework for the retransmission of FTA broadcasts.

4 Convergence Review Implications

Question 39: What implications for copyright law reform arise from the recommendations of the Convergence Review?

The Convergence Review focused on reviewing communications regulations in light of developments in technology and the convergence of media platforms. It recommended that communications policy take a 'technology neutral approach' to enable its application to new digital media platforms[26].

The current retransmission rules are a textbook example of regulation that has been overtaken by technological and market developments and is now operating in a way that was not intended at its introduction.

A technologically neutral retransmission consent regime should be introduced to enable broadcasters to exploit the value of their signals and compete with emerging businesses in a converged media market.

The Convergence Review also recommended that content businesses be categorised as 'content service enterprises'[27] and that 'no licence be required to provide any content service'[28]. These recommendations, if realised, are likely to have substantial implications for the definition of 'broadcast' in copyright law[29].

The term 'broadcast' is used in a number of provisions in the Act, including several exceptions and statutory licences. Careful consideration must therefore be given to any structural changes and new definitions. Any such change must be subject to extensive consultation before implementation.

[26] Australian Government Convergence Review, *Convergence Review Final Report (2012)*, rec 1
[27] Ibid, rec 3
[28] Ibid, rec 2
[29] Broadcast is defined in the *Copyright Act 1968* as a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*

5 Copying of broadcasts by commercial services

Question 9(a): Should it matter who makes the recording under s 111 if the recording is used only for private or domestic purposes?

Section 111 should only apply to copying carried out by an individual for their private and domestic use. It should not apply to third party copying for commercial gain.

As stated by the Full Federal Court in *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd*[30]:

There is nothing in the language, or the provenance, of s 111 to suggest that it was intended to cover commercial copying on behalf of individuals. Moreover, the natural meaning of the section is that the person who makes the copy is the person whose purpose is to use it as prescribed by s 111(1).

The Explanatory Memorandum to the *Copyright Amendment Bill 2006* states that s 111 is intended to legalise common domestic practices that do not unreasonably affect the copyright owner's interests[31].

Third parties exploiting free to air signals without the permission or compensation of broadcasters as copyright owners are undermining the economic interests of broadcasters. Broadcasters as copyright owners are entitled to control the exploitation of their signals and should be appropriately compensated by third parties reaping commercial gain from their broadcast signals.

6 Copying for Private Use

Question 8: Should the four format shifting exceptions be replaced with a single format shifting exception with common restrictions?

Free TV does not support the introduction of a single format shifting exception in place of separate exceptions.

The format shifting exceptions were introduced as a means of recognising legitimate consumer interests without causing substantial financial harm to copyright owners and markets.

Markets for film, music, photographs, books and newspapers are uniquely different and the test of financial harm will differ for each market. Specific exceptions are required to ensure no substantial harm is caused to any particular market and provide greater certainty for consumers and copyright owners.

Question 12: Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted?

Free TV members are concerned at the introduction of any exception intended to facilitate greater use of broadcast material online, presumably allowing use which does not fit within any of the existing exceptions such as fair dealing. Online piracy is a significant concern for creative industries, particularly as owners face great difficulty in enforcing their rights against online pirates.

[30] (2012) 201 FCR 147 at para [89]
[31] Copyright Amendment Bill 2006 Explanatory Memorandum, para 6.2

Social media in particular is an area where copyright material is often shared illegally, with no recourse or compensation to the copyright owners. Like other copyright owners, broadcasters use social media as a strategic platform to distribute or promote television programs and related content. For example, Network Ten premiered *Puberty Blues* on Facebook before it screened on free-to-air television.

Free TV strongly opposes the introduction of an open ended social media exception that allows users to distribute or share content more freely without the permission of the copyright owner. Such an exception would diminish copyright owners' rights to exploit their content on these platforms, and only serve to facilitate or assist online piracy.

Television programs are routinely shared illegally through file sharing sites or 'mashed up' by users for no other value than to ridicule or demean program content. This has a detrimental effect on broadcasters who invest significant resources and funds into program creation and acquisition and are often contractually required to protect the copyright of underlying rights holders in television programs. Free TV opposes any move to legalise infringing activity of this sort.

The existing fair dealing exceptions represent an appropriate balance between the interests of copyright owners and the public and provide sufficient flexibility for users in their social and domestic pursuits online. Any additional exception for the online use of material is likely to encourage the unauthorised distribution of broadcasts and create uncertainty for owners in the short and medium term.

7 Orphan Works

Question 24: Should the Copyright Act 1968 be amended to create a new exception or collective licensing scheme for the use of orphan works? How should such an exception or collective licensing scheme be framed?

Free TV supports the introduction of a statutory exception for the use of orphan works.

Broadcasters are currently unable to use valuable archival material such as audio-visual footage or photographs where the copyright owner cannot be identified or located to seek the necessary permission. The Internet has exacerbated this problem as it is often impossible to locate the copyright owner of material that is made available online. Because the copyright owner cannot be located despite extensive search, the material cannot be used for broadcast.

Free TV supports an exception that would apply to published and unpublished material and enable both commercial and non-commercial use subject to the following conditions:

1. Diligent search being conducted by user;
2. Owner being attributed if this information is known; and
3. Owner being able to veto further use of the work.

An exception framed along these lines would strike a fair and practical balance between the interests of users and owners. It would provide a clear and efficient mechanism for users in managing orphan works, promote recognition of the owner where the owner is known and protect the owner's right to prevent further use of their work.

8 Fair Use

This Issues Paper asks whether the Act should be amended to include a broad, flexible use exception similar to the 'fair use' provision existing in US copyright law. As noted in the Issues Paper, this question has been previously considered by a number of reviews and has canvassed a variety of stakeholder responses.

Free TV members rely on the existing fair dealing provisions on a daily basis and believe they work reasonably well[32]. They also have the advantage of being generally well understood by users and creators which creates certainty and assists in managing compliance costs, particularly in a period of rapid technological change.

The introduction of a general fair use exception would have a significant impact on broadcasters as prominent owners and users of copyright material. Free TV members look forward to engaging with the ALRC in detail on any specific proposal for the introduction of open ended fair use exception.

9 Music Licensing

The inquiry asks for evidence about how copyright law imposes unnecessary costs and inefficiencies on users of copyright material.

Music licensing is a complex area for broadcasters who expend substantial resources and costs in clearing multi-layered music rights.

The complexity of music licensing is compounded by the existence of different music collecting societies that operate independently of each other. Presently, broadcasters are required to licence music rights through four different collecting societies:

1. Australasian Mechanical Copyright Owners Society (AMCOS)
2. Australian Performing Right Association (APRA)
3. Phonographic Performance Company of Australia (PPCA)
4. Australian Recording Industry Association (ARIA)

This process is highly inefficient and results in high compliance costs for broadcasters.

The complexity of music licensing should be considered by the ALRC as part of its objective to simplify copyright law in the digital economy.

In particular, consideration should be given to whether copyright owners including authors, publishers and record companies, should be required to reach agreement on the type and nature of music rights granted to respective collecting societies. This will promote consistency between the varying collecting societies and in turn provide certainty and efficiency for users, such as broadcasters, who seek to licence the same rights in musical works and sound recordings.

[32] There is some uncertainty about the interaction between fair dealing for parody and satire and a creator's moral right not to have their work treated in a derogatory way. Free TV appreciates any clarity that the ALRC can provide on this point.

APPENDIX A

MUST-CARRY

Country	Year of Implementation	Legislation/ Decree	Beneficiaries of the Must Carry Provisions
Austria	1997	The Cable and Satellite Broadcasting Act BGBI.I *Nr. 42/1997*, Article 11	the public service broadcasting company.
Belgium, Flemish Community	1995	Co-ordinated Decrees on Radio and Television, Article 112	specified radio and television programs of the Flemish and French public broadcaster, as well as authorised private and regional broadcasters.
Belgium, French Community	1987 (last modified 1999)	The Media Decree, Article 22	French public broadcasters, authorised local and private broadcasters, television programs relating to international organisations, and other broadcasters as agreed to from time to time.
Belgium, Regional of the Capital Brussels	1995	The Federal Law of 30 March 1995, Articles 13, 16 and 19	television and radio public service broadcasters of the Flemish and French communities, as well as other broadcasters as agreed to from time to time.
Denmark	2000	Danish Broadcasting Act nr 551/2000, Article 4	public service broadcasters, including regional programs
Finland	1998	Act on Television and Radio Operations, Article 42	public Finnish broadcasting companies
France	1986, amended 2000	French Law of 30 September 1986 on Freedom of Communication, Article 34	services broadcast via hertzian means, and possibly also communal authorities and not-for-profit associations
Germany	2001	Inter-State Agreement on Broadcasting Services, sections 51 and 52	public broadcasters and broadcasters who are otherwise appropriately licensed; other broadcasters as determined by location.
Republic of Ireland	1974, amended 1988	Radio and Television Act 1988, section 17; Wireless Telegraphy (Wired Broadcast Relay Licence) Regulations 1974, section 3 and Wireless Telegraphy (Television Programme Retransmission)	national public service broadcasting company and television programs of the independent television station.

		Regulations, 1989, section 3.	
The Netherlands	1987	The Media Act 1987/249, Article 82	the three television channels of the Dutch public service broadcasting companies, two local public service broadcasting companies, and television programs transmitted by the two channels of the Flemish public service broadcasting company.
Portugal	1997	Decree No. 241/91, Article 12	the two television channels of the public service broadcaster, Article 12
Spain	1996	Cable Telecommunications Act, Article 11 and	the two channels of the public service broadcasting service; the television programs transmitted by the three channels of private broadcasting companies; and the local television channels.
Sweden	1996	Radio and Television Act, Chapter 8, Section 1	two television channels of public service broadcasting company and one television channel of the private broadcaster
United Kingdom	1990	Broadcasting Act 1990, Schedule 12, Part III, paragraph 4 and section 78A	The following channels: BBC1, BBC2, ITV, Channel 4 and the Public Teletext Service.