

# Cross-border television broadcasts

Ian McGill and Ian Carroll discuss issues relating to the regulation of satellite broadcasts.

*This is an edited extract of a chapter on the negotiation of television broadcasting rights from "Legal and Commercial Aspects of Sport". Even though it deals more particularly with broadcasting of sporting events, the problems identified apply equally to other forms of television programming.*

## Asia Pacific Satellite Systems

The growth in the number of delivery options for television has made national borders increasingly irrelevant to the sale of television rights in Europe.

In the Asia Pacific region there has been substantial growth in the capacity to deliver a television signal by satellite direct to the home. There are a total of 38 communications satellites in orbital slots over the Asia Pacific, the majority of which carry television broadcasting signals. The most powerful with the largest footprints are listed in the Table (see page 7). The demand for capacity to deliver television signals by satellite has been the stimulus for development of the satellite market.

Australia's geographic location has successfully but artificially isolated it from these developments. However, the Table demonstrates there will soon be a dramatic increase in the number of satellite transponders whose footprint covers at least some part of Australia. This capacity will be in addition to the Optus B series satellites which are capable of covering both Australia and New Zealand. Their combined transponder capacity is 32.

For example, the Asiasat 2 system will be able to carry the Star Television network to most of the populated areas of Australia. It could be received in Sydney with a 1.1m dish. The beam of the PAS-2 satellite "hotspots" Australia. It can carry traffic direct from the USA to Australia. The footprint of Apstar 2 is also planned to reach Australia. However, a recent launch mishap means this is unlikely to occur this year.

Direct broadcast by satellite ("DBS") has the capacity to sidestep regulation by the government of the state receiving the broadcast. A viewer need only install a parabolic antenna or satellite dish to receive the signal. Regulation has traditionally controlled the scope and content of broadcasting from a foreign satellite by imposing conditions on the earth stations retransmitting the signal which are usually located within the domestic jurisdiction.

Satellites capable of DBS are by their nature very powerful. They create large footprints which may, deliberately or unintentionally, create transnational overspill. In either case, a nation state within the footprint may object to the overspill but may be powerless to control it.

## International Regulation

Attempts on an international level to control DBS into foreign countries have seen a number of international organisations consider the issue, including the Commission of European Communities and the General Agreement on Tariffs and Trade.

The Radio Regulations under the International Telecommunications Convention provide only the most limited form of protection for states unwillingly receiving direct broadcasts. Regulation 2674 provides:

*In devising the characteristics of a space station in the broadcasting-satellite service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries.*

Different interpretations have been placed on this Regulation. Nations such as the United States argue it is subject to such a large number of technical constraints that it should realistically be viewed as only a planning goal. The opposing view argues the Regulation requires the state responsible for the broadcast to obtain the prior consent of the state receiving the broadcast.

These opposite views have been debated at length in the United Nations. In December 1982 the General Assembly adopted the controversial Resolution 37/92. Paragraph 13 of the Resolution reads "a state which intends to establish or authorise the establishment of an international direct television broadcasting satellite service shall without delay notify the proposed receiving state or states of such intention and shall promptly enter into consultation with any of those states which so requests". Paragraph 14 provides that an international direct television broadcasting satellite service shall only be established in accordance with Paragraph 13 and in conformity with the relevant instruments of the International Telecommunication Union.

The United States, Great Britain, Belgium, Italy, Japan and the Federal Republic of Germany have consistently argued that the principle of prior consent is unacceptable, and were strongly opposed to Resolution 37/92, even though it did not clearly articulate a prior consent requirement. They argue that the principle of free-flow of information, which applies to radio broadcasting in general, also applies to direct satellite broadcasting.

However the opposing view is that direct broadcasting, at least in instances such as TV Marti where it is deliberate, constitutes an infringement of state sovereignty.

## Australian Regulation of Foreign Satellites - Broadcasting Services Act

It may be (as argued by Armstrong at the Australia and New Zealand Sport Law Association, 3rd Annual Conference, 1993) that a DBS service not originating in Australia can be delivered to Australia without the need for an Australian licence. This depends on whether the Federal Government has power to control what is broadcast to Australia by intentional satellite and the non-existence of any laws against selling satellite decoders or dishes in Australia.

Some commentators argue that it would be difficult for Australia to object to satellite television signals originating from South-East Asia given that ATI, the ABC's satellite service, is broadcast to nations in the South-East Asian region via Indonesia's Palapa satellite but without the permission of the government(s) involved.

The current Australian regime for broadcasting services under the *Broadcasting Services Act 1992 (Cth.)* ("the BSA") is largely technology neutral. In order to determine whether a particular service is regulated, an analysis of the content of that service rather than the means of its delivery is required.

A "broadcasting service" is defined as one that delivers television programs or radio programs to persons having equipment appropriate for receiving that service (s.6(1)BSA). The means of delivery of that service is irrelevant.

There is potential for some broadcasting services as defined in the BSA to fall outside its regulation. The BSA appears to assume the "round peg" of broadcasting services will fit neatly into the various "round holes" of the six categories prescribed by the Act.

A commercial broadcasting service and a subscription broadcasting service require a specific licence allocated by the Australian Broadcasting Authority (ss14 and 16 BSA, respectively). The provision of one of these services without a licence is an offence (ss131 and 132 BSA) carrying a stiff penalty (see below).

### types of service

**A**s a consequence of the way each of the "round holes" above is drafted, if the peg does not fit then the service is unregulated even if it would otherwise constitute a "broadcasting service". Therefore, it may be possible to attempt to structure the particular service in a manner that places it outside the categories identified above. Alternatively, the service may be established so it fits into the less regulated narrowcasting categories.

A "commercial broadcasting service" is a broadcasting service which:

- (i) provides programs intended to appeal to the general public;
- (ii) provides programs that are freely available to the general public to be received by commonly available equipment;
- (iii) is generally funded by advertising revenue;
- (iv) operates as part of a profit making enterprise; and
- (v) complies with any additional determinations or clarifications made by the Australian Broadcasting Authority.

This definition provides scope for a foreign operator to provide services to Australia by DBS without a licence to operate a commercial broadcasting service. For example, the service may be structured so the transmitting enterprise does not make a profit in Australia. This may be done by sourcing any profits from advertising revenue through a program packager. Of course, in order to receive a DBS transmission, the viewer needs to purchase the necessary equipment. However, the equipment supplier in Australia would not be operating a commercial broadcasting service. Rather, it would merely supply equipment capable of receiving programs supplied by another person. Alternatively, if the service is encrypted (i.e. scrambled) and special decoders are required it may not be "fully available to the general public to be received by commonly available equipment".

A "subscription broadcasting service" is one that:

- (i) provides programs having wide appeal;
- (ii) is made available to the general public but only on payment of a subscription fee; and

- (iii) complies with any additional determinations or clarifications published by the Australian Broadcasting Authority.

A licence for a subscription broadcasting service using a satellite (other than an Optus satellite) may not be allocated by the Australian Broadcasting Authority until 1 July 1997 (s96(3) BSA). The three licences for subscription broadcasting services using an Optus satellite have already been issued. Licence C has been issued to a subsidiary of the ABC. Licences A and B have been issued to new entrants to the television industry). This provision is designed to ensure that, prior to the sunset date, the only licensed subscription broadcasting services in Australia will be transmitted via the Optus satellite system.

As with commercial broadcasting services, there may be scope for a subscription broadcasting service to be provided by a foreign person without the need for an Australian licence. This would depend on an ability to allow subscription fees to be paid in a country other than Australia. Credit cards may well be used for this purpose. However, an Australian entity assisting in the payment of subscription fees due to an overseas entity may be guilty of aiding and abetting a breach of the BSA. This is an offence under the *Commonwealth Crimes Act* (s5(1)).

A similar problem has arisen in Canada where DirecTV (a US satellite service) provides a DBS service into that country. The Canadian Radio-TV Telecommunications Commission has told the operator it must carry a Canadian version of its service on a Canadian satellite in order to offer a legal service in that country. However, DirecTV could still broadcast into Canada without meeting this requirement. Canadian subscribers may find it relatively easy to avoid Canadian regulation by crossing the border and buying the necessary hardware from a US dealer using a falsified US address to subscribe.

There may be some scope for a service to be provided as a "subscription narrowcasting service", avoiding the need for a specific licence. A subscription narrowcasting service is one which is available on payment of a subscription fee and whose reception is limited by being targeted to special interest groups, limited locations, limited periods or programs of limited appeal. Such a service is authorised by a class licence. Therefore if the service falls within the definition, it may be provided without the need for a specific licence under the BSA. The question is, of course, whether the service is sufficiently limited so as to be "targeted".

The fine for providing a commercial broadcasting service or a subscription broadcasting service without a licence

where one is required is \$2million. This is a continuing offence carrying an additional maximum penalty of 10% of the fine for each day the offence continues.

### Australian Regulation of Foreign Satellites - Telecommunications Act

**I**n addition to possible lack of coverage in the broadcasting regime, there may be scope to deliver a DBS service to Australia without offending the laws regulating telecommunications.

Under the *Telecommunications Act*, the Government has declared the general carriers (i.e. Telecom and Optus) as the primary providers of Australia's public telecommunications infrastructure and networks. Together they have the exclusive right to be the primary suppliers of selling satellite services between distinct places in Australia and a place in Australia and a place outside Australia (s.91). However, a person may supply an international satellite service by use of a satellite based facility if the service is supplied to the holder of a prescribed earth station licence and is supplied by means of that earth station (s.103). An "earth station" could simply be a dish in a backyard or on a rooftop (Reg. 3, *Radiocommunications Regulations 199*). Provided the service does not then fall within the definition of a broadcasting service (see above), it may be provided without infringing the broadcasting and telecommunications regime.

However, the *Telecommunications Act* states that the provision of a telecommunications service supplied by the use of a satellite between a place within Australia and a place outside Australia is an international service (s.5). The international service providers class licence permits the supply of an eligible international service subject to compliance with the class licence conditions. Those licence conditions require a service that connects to a public switched telephone network (e.g. a cable service) to enrol with Austel and be subject to Austel control of tariffs etc. Such a service would also have greater difficulty avoiding classification as a commercial or subscription broadcasting service subject to regulation by the BSA.

### Practical Implications

**A**lthough there appears to be a wide scope for a foreign operator to deliver a direct broadcast satellite service to Australia without a licence, the exercise is not without some risk. The fines that may be imposed are

substantial. At the date of publication, no organisation has begun to provide such a service. In the end, whether unlicensed direct broadcast satellite transmissions are made from another country to Australia will depend on the ability of the foreign operator to structure the service (and collect any necessary revenues) without having a presence in Australia that exposes it (or

those assisting it) to the possibility of being in breach of the *BSA* or the *Crimes Act*.

For the organiser of a sporting event, cross border broadcasts can denigrate from the value of exclusive television rights granted in a territory. On the other hand, given the plethora of proposed and existing satellite transponders with Australian coverage, there may be scope to

market an event to foreign satellite operations for delivery to an Australian audience.

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**TABLE**  
**South-East Asian Satellites**

Satellite	Owner	Launch Date	Transponder Capacity	Footprint
PAS-2	Pan-AmSat	July 1994	32	Asia-Pacific from Thailand to the US West Coast and North East and South-East Asia, Russia, China, Australia and New Zealand
PAS-4	Pan-AmSat	Early 1995	32	Primarily serving the Indian Ocean region but including Japan, the republics of the old USSR, South East Asia, China and Australia
Asiasat 1	Asian Satellite Telecommunications Company (Cable and Wireless, CITIC and Hutchison Whampoa)	April 1990	24	Asia and the Middle East
Asiasat 2	As for Asiasat 1	April 1995	33	China, Japan, Indonesia, India, the Middle east, the republics of the old USSR, Hong Kong, Taiwan, Korea and Australia
Apstar 1	APT Satellite Company (shareholders include China Telecommunications and Broadcast Satellite Corp and Hong Kong Chia Tai International Telecommunications Ltd)	September 1994	24	Mainland China, Hong Kong, Indonesia, Japan, Singapore, Vietnam
Apstar 2	As for Apstar 1	Unkonwn	32	As above and extending into Europe, Russia and India and Australia
Palapa B2P	Indonesia state-owned telecommunications company PT Telecommunikasi	March 1987	24	Indonesia, The Philippines, Papua New Guinea, Thailand, Malaysia and Singapore, Cambodia, Vientam
Palapa C	PT Satelindo	June 1995	34	As above and Taiwan, Hong Kong, New Zealand, Eastern Australia, Bangladesh, India, Korea, Japan, Eastern China, Macao
Total number transponders			235	

In addition to the satellites listed in this Table, communications satellites are planned by companies such as Rimsat and Unicom which will have a total capacity of 74 transponders. Other smaller companies such as Columbia and Pacificom have satellites in operation and planned.

Thaicom's two satellites covering South East Asia will have a total of 24 transponders.

Not included in the Table is information on the footprints for the Intelsat satellites over the Asia Pacific (Intelsat V series to Intelsat VII), which also carry television broadcasting signals. These broadcasts make up a small but significant part of their payloads. These satellites are often described as the "workhorses" of the industry due to the variety of transponder configurations available.

Information compiled by *Australian Pay TV News*, Level 20, 133 Castlereagh Street, Sydney and reprinted with permission.