Cable Retransmission by Foxtel of Free-To-Air Broadcasts: A Rejoiner and some Policy Reflections

Ian McGill responds to the Mallam/Palm article (CLB Vol 15 No 1) and argues the case on the re-transmission of free-to-air broadcast signals from the perspective of the pay TV operator.

On 26 April 1996 the Full Court of the Federal Court handed down its decision in the appeal from the decision of Davies J in *Amalgamated Television Services v FOXTEL Cable Television Pty Limited* (1995) 132 IPR 323 ("the Retransmission case"), concerning the issue of the retransmission of commercial broadcasting signals by pay television. The Full Court dismissed the appeal by the commercial television broadcasters, upholding the decision of the court at first instance (*Amalgamated Television Services v FOXTEL Cable Television Pty Limited*, unreported, Federal Ct (Full Ct), Lockhart Wilcox & Hill JJ, Sydney, 26 April 1996).

Notwithstanding the decision in the Federal Court, the new Federal government has stated that it will "recognise the retransmission rights of commercial broadcasters" (*Better Broadcasting*, The Coalition's National and Community Broadcasting Policy, January 1996). Presumably this will be accomplished by amendment to the *Copyright Act* 1968 and *Broadcasting Services Act* 1992 retransmission provisions.

Paul Mallam and Christine Palm have given an account of the decision of Davies J in the retransmission case from the perspective of the commercial broadcasters, who brought the application to the Federal Court against cable television broadcaster, FOXTEL Digital Television Pty Limited ("FOXTEL Cable") and its associated company, FOXTEL Management Pty Limited ("Management") (Communications Law Bulletin, vol 15, no. 1 1996).

Having acted for the Respondents in the Retransmission case I will attempt to provide a contrary view.

Commercial broadcasters contend that retransmission is a theft of intellectual property - either that of the free-to-air broadcasters or the holders of underlying rights. Commercial broadcasters also contend that retransmission undermines not only their commercial position but also their position as "creators and surveyors of Australian culture, information and entertainment" (Ibid, p 4).

These contentions are exaggerated. Contrary to the end of network television as we know it, the cable retransmission of free-to-air signals is consistent with the commercial reality that the underlying rights holders and the commercial television licensees have been remunerated at the point of broadcast. The simultaneous retransmission of their respective copyright, with no alteration of content and in the licence area of the free-to-air transmission, is not deserving of further remuneration. To do so would be a classic double dip.

FOXTEL has not structured its service offering to import distant broadcast signals or to alter the content of local broadcast signals that are retransmitted. The retransmission benefits subscribers to the FOXTEL service by improving poor reception of broadcast transmissions in some areas and by saving subscribers from the inconvenience of the installation of an external switch to change between the broadcast and pay channels.

The Australian legal position represents a logical mesh between the *Copyright Act* 1968 and the *Broadcasting Services Act* 1992 retransmission provisions and is broadly consistent with the position in countries such as Canada, the United Kingdom and the United States. In the future I believe the pay television industry will accept a statutory "must carry" obligation coupled with a compulsory licence for relevant copyright material (similar to countries where pay television has a long commercial history). However, I am less certain of that industry's sanguine acceptance of remuneration payable to the commercial television licensees for the fulfilment of that carriage obligation in the areas of the free-to-air transmission.

Structure of FOXTEL Service Offerings

FOXTEL Management Pty Limited ("FOXTEL") is a provider of subscription pay television services. On 23 October 1995 it commenced cable transmission of its services to subscribers in Sydney and Melbourne. The package initially offered to subscribers by FOXTEL consisted of 17 channels delivered to subscribers by another company in the FOXTEL group, FOXTEL Cable, and the retransmitted free-to-air broadcasts of the national and commercial broadcasters within a subscriber's local area delivered by FOXTEL.

The free-to-air stations are available to subscribers who take the basic FOXTEL package and, with the exception of the SBS (which has channel position 25), have channel designations identical to their respective free-to-air designations (that is, for viewers they simply appear on the same channel number).

FOXTEL Cable is the holder of licences under the *Broadcasting Services Act* to provide subscription television broadcasting services to its subscribers. Because of a possible ambiguity in the meaning of section 212 of the *Broadcasting Services Act*, FOXTEL Cable was quarantined from any involvement in the retransmission of the free-to-air channels.

In reaching his decision in the Retransmission case Davies J. did not have to deal expressly with this point.

However, he did express the obiter opinion that Parliament had intended that the reference to licensee in section 212(2) was not to any licensee under the Act (such as FOXTEL Cable) but only the person who is a licensee in respect of the particular broadcast the subject of the retransmission. On this view the quarantining of FOXTEL Cable had been, strictly speaking, unnecessary.

On appeal the Full Court found it was not necessary to consider section 212(2) preferring to leave the question open.

Importance of the Retransmission Case

The Retransmission case was significant because it is the first judicial consideration of the retransmission provisions of the *Broadcasting Services Act* 1992 (section 212) and the *Copyright Act* 1968 (section 199). Retransmission has been a feature of broadcasting since the commencement of commercial television in Australia but never before in the context of the competitive threat represented by subscription or pay television. Previously retransmission had been limited to, for example, self help transmitters in areas of bad reception. There is, however, no suggestion in the *Broadcasting Services Act* that retransmission should be so limited.

FOXTEL transmits the free-to-air signals to subscribers unaltered and simultaneously with their free-to-air broadcast from transmission equipment owned by the commercial broadcasters. The actual method of retransmission involves a number of technical steps the purpose of which is to switch the signal from one technology to another, protect it from being pirated by scrambling it, whilst at the same time maintaining the quality of the picture for subscribers. There is no alteration to the content of the matter broadcast.

The ability of a pay television operator such as FOXTEL to retransmit without a licence, without the consent of, and without remuneration to, local free-to-air services is broadly consistent with the copyright and broadcasting position in countries such as Canada, the United Kingdom and the United States. In effect, FOXTEL has accepted a de facto "must carry" obligation for the free-to-air services and in so doing has made available some of the limited channel capacity on the cable system it accesses. In addition, it has made available to the free-to-air broadcasters channel positions consistent with the channel designations of those stations - something that FOXTEL had no legal obligation to do. It has undertaken these obligations in order to minimise inconvenience to its subscribers (who otherwise would have required a switch to be installed to enable switching between free and pay channels) and to ensure that subscribers receive the best quality reception available.

Broadcasting Policy

The *Broadcasting Services Act* commenced operation on 5 October 1992 and the potential of the clear words of the retransmission provision, section 212, to "assist" the subscription television broadcasting industry has been well known. For example, this potential was recognised (and consistently opposed) in numerous submissions by the Federation of Australian Commercial Television Stations ("FACTS") in a number of fora including the ABA inquiry into the proposed exercise of its discretion under section 212(1)(b)(ii) of the *Broadcasting Services Act* and the Copyright Convergence Group inquiry into certain deficiencies of the *Copyright Act*. The FACTS submissions explicitly recognised that legislative amendment was required to section 212 if cable retransmission by competitive new services were to be regulated.

The clear words of section 212 of the *Broadcasting Services Act*, in conjunction with the objects in section 3(a) and (b) and the regulatory policy in section 4(2)(b) support the proposition that Parliament had anticipated new technologies, even for the retransmission of free-to-air broadcasts. The Act has a deregulatory and avowedly technology neutral approach, in recognition of the rapid change in transmission technology, the convergence of broadcasting and telecommunications and the globalisation of communications industries. For these reasons arguments that sought to limit the clear language of section 212 of the *Broadcasting Services Act* by reference to the 1942 Act and its provisions on self-help retransmission were always going to be difficult.

Following the dismissal of the appeal in the Retransmission case, the retransmission in Australia of free-to-air services within the licence area of the licence accordingly requires no additional licence or administrative action from the ABA. This is consistent with the position in the United Kingdom and, other than the absence in Australia of a "must carry" obligation, is consistent with the position in Canada and the United States.

In the United Kingdom prior to 1991 "must carry" legislation required cable operators to carry free-to-air broadcasting services broadcast in the cable operator's area as well as certain DBS satellite services. Since 1991 cable operators are no longer required to carry any services, although as a matter of practice, free-to-air broadcast services are generally carried by cable operators. No licence for carriage is required if the broadcast is intended for reception in the cable operator's area.

In Canada cable operators require a licence from the Canadian Radio and Television and Telecommunications Commission under the Canadian *Broadcasting Act*. Legislation requires cable operators to carry free-to-air broadcasts in accordance with a priority list found in the *Cable Television Regulations*. The Canadian free-to-air broadcasters are not entitled to payment for retransmission of their broadcasts.

In the United States under the provisions of the *Cable Television Consumer Protection and Competition Act* 1992 cable operators are required to carry the signal of local television stations within their local area. Cable operators with 12 or less channels are required to carry at least 3 local commercial stations. Systems with more than 12 channels must carry local television stations up to one third of their channel capacity. The so called "must carry" stations are entitled to certain channel positioning rights and cable operators are not entitled to accept or request compensation from television stations in exchange for carriage under the "must carry " rule.

Cable operators must broadcast signals of the "must carry" stations in their entirety and as part of their basic package.

Local television stations were required to make an election within 1 year of the enactment of the 1992 Act (and

thereafter every 3 years) as to whether they wished to be categorised as a "must carry" station or not. Where a station has chosen not to assert its "must carry" rights, cable operators must obtain the consent of the station to retransmit its signal. The consent process is effectively unregulated. If a station and a cable operator fail to agree on terms for retransmission, the cable operator will not be obliged to carry the signal of the station.

A "must carry" regime is undoubtedly anathema to the Australian free-to-air licensees: their vision would be more akin to a "may carry" regime, but with provision for copyright remuneration as a precondition to carriage. A United States type of legislative solution may yet result in Australia but in that event the real battle will be joined in necessary amendments to the *Copyright Act* and the structure of the compulsory licence regime.

Copyright Policy

In section 199(4) of the *Copyright Act* provision is made for the retransmission of certain works and films without infringing copyright provided they are part of an authorised television broadcast. That is, there is a defence to an infringement in the Act as it presently stands in section 199(7), the reference to an authorised broadcast is to be read as a reference to a broadcast made by the ABC, the SBS or "the holder of a licence or permit granted under the *Broadcasting Act* 1942".

There was much contention in the Retransmission case and on appeal as to the proper meaning of this expression in section 199(7). Ironically, the free-to-air broadcasters, in arguing that they were not holders of licences under the 1942 Act effectively conceded they had no copyright in their own broadcasts: see section 91 of the *Copyright Act*.

Section 199(7) was interpreted by Davies J. in the Retransmission case by reliance upon section 10 of the *Acts Interpretation Act*. From the perspective of the evident intention of the *Copyright Act* to permit retransmission of certain broadcasts there had been a repeal and re-enactment of the *Broadcasting Act* 1942. Although there are differences in structure and procedure between the 1942 Act and the 1992 Act that replaced it, the principal licences for television were and remained the commercial broadcasting licences. All that Parliament was concerned to ensure from a copyright perspective was that a licence to broadcast existed. If it did, then the retransmission had the benefit of the defence to infringement provided by section 199(4).

As Davies J. noted in the Retransmission case, by making specific provision with respect to copyright to the same effect as the general provisions appearing in section 212(2) of the *Broadcasting Services Act* it could be concluded that the Parliament intended the provisions should apply together.

On appeal the Full court held that Davies J was correct in finding that the defence provided by section 199(4) was available to the Respondents for retransmission of the broadcasts of the commercial free-to-air stations, although the Court followed a different path in reaching this conclusion. Central to the Full Court's reasoning was the fact that section 199(7) refers to a licence or permit *"granted"* under the Act. The Court held that the commercial licences granted under the 1942 Act were kept alive by s.5(1) of the *Transitional Provisions and Consequential Amendments Act* 1992, with such licences continuing in force "as if" they were allocated under the 1992 Act. Accordingly, the Court held that "the reference in s.199(7) to the 1942 Act is descriptive of a licence which was in fact granted under the 1942 Act and which remains in force at the time of the alleged infringement of copyright" (*Amalgamated Television Services v FOXTEL Cable Television Pty Limited*, unreported, Federal Ct, Sydney, 26 April 1996 at page 16) and that each of the licences of the Appellants could be described in this way.

The *Copyright Act* position is substantially mirrored in other jurisdictions. In the UK, the *Copyright, Designs and Patents Act* 1988 provides that where a broadcast made from a place in the UK is received and immediately retransmitted by a cable operator, copyright is not infringed provided that the broadcast is made for reception in the area in which the cable program service is provided and is not a satellite transmission or an encrypted transmission.

In Canada the free-to-air broadcasters are not entitled to any payment for broadcasts retransmitted on cable other than certain limited rights of distant broadcasters (that is outside the licence area). For those latter broadcasters retransmission fees are paid. Broadcasters have no copyright in their signal but distance broadcasters can claim royalties for retransmitted programs they own. Collecting bodies have formed to collect royalties paid by cable operators. In the US, the Copyright Royalty Tribunal, a Federal collecting agency, collects and distributes royalties which must be paid to copyright holders by cable operators. The tribunal sets a yearly rate for royalty payments based on the gross monthly revenues of the cable operator and on the number of distant signals it imports. Significantly, the effective royalty rate for the retransmission of local broadcast signals is nil.

CONCLUSION

Unaltered simultaneous retransmission of free-to-air commercial television poses no policy dilemma at all. Broadcasting policy is properly indifferent to the purpose of a local retransmission provided that the retransmission does not alter the content of the original broadcast. The fact that the retransmitter is now a competitor to the free-to-air networks does not mean that it should be taxed by those networks. From a copyright perspective, it is not equitable that the broadcaster and any underlying rights holder should receive a windfall from a local retransmission. The broadcaster is not losing any of its audience as a result of the retransmission. It has had the opportunity to sell that audience to its advertisers. Underlying rights holders have also been remunerated in context of the original broadcast.

The Federal Government proposes to recognise retransmission rights of commercial broadcasters.

However, in the way the free-to-air television stations ran their case in the Federal Court they were prepared to relinquish copyright in their broadcasts to prevent retransmission by FOXTEL. Perhaps this suggests that the more valuable copyright is program production rather than mere compilation. That is, if royalties are to be paid at all it should be to the underlying rights holders not the transmitters of those rights, and only with respect to retransmission in an area outside the original area of broadcast. This is, after all, consistent with international practice.

Ian G. McGill is a partner of Allen, Allen & Hemsley.