# ASTRA's Views on Retransmission

**This is an edited excerpt from the recent submission of ASTRA to the Senate Environment, Recreation, Communications and the Arts Legislation Committee by Tom Mockridge, former Chairman of ASTRA and CEO of Foxtel.**

The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) TV and radio platforms, narrowcasters and program providers came together to underpin and propel the new era in competition and consumer choice that these new services have brought to broadcasting, communications and entertainment in this country.

Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced by the *Broadcasting Services Act* 1992 (Cth) ("BSA"). These new services added to the mix of existing categories of service, being the national broadcasting services; commercial broadcasting services (commercial TV and radio); and community broadcasting services. Subscription (multichannel) television, the most prominent of the subscription services, was first launched (satellite/MDS) in January 1995 with cable services launched in September and October 1995.

By the end of 1995 there were 85,000 homes with 300,000 potential viewers by the end of 1996 - 400,000 homes with approximately one and half million people. By the start of this year about 750,000 homes were subscribing to pay TV - about two and half million potential viewers - a penetration rate of about 13 percent of Australian homes.

This follows a 30 year moratorium before pay TV was allowed to compete with the commercial free-to-air terrestrial services. Once allowed in the original operators were required to use digital satellite and restricted to only eight channels. There was an immediate requirement for new Australian drama expenditure. Advertising was banned until 1 July 1997 and there is still a limit on that advertising revenue. One of the major subscriber drivers, sport, was nobbled by the anti-siphoning list. Now as well as a protected market (with the decision having been made of no fourth commercial network until the year 2006), the commercial networks control the gateway to digital terrestrial broadcasting.

However in three years, subscription television has made a substantial impact on the way we experience entertainment and information in the home in Australia. ASTRA members have made an enormous investment in relation to licence fees and capital costs to establish subscription television, on-line and telephony businesses in metropolitan, regional and remote markets and subscription television has created an enormous number of jobs, investment, infrastructure and content.

Our membership includes the major subscription television operators as well as more than twenty stand-alone channels that provide programming to these platforms. Other members include narrowcast television and radio operators such as racing TV and radio and information radio, and communications companies such as AAPT, Optus Communications and Telstra.

Clearly we remain a long way short of the penetration rate in the world's most mature pay TV market in the US where up to 70 per cent of homes are connected to cable or satellite pay TV, but it is impressive nonetheless in spite of the risks and costs involved with a rapidly changing regulatory environment which continues to put restrictions in the way of the pay TV industry.

## THE RETRANSMISSION BILL

These provisions are intended to amend the retransmission provisions of the BSA to specifically address the retransmission of commercial and national television broadcasts by subscription television operators.

Retransmission of free-to-air signals by subscription television operators is permitted under the current law. For example FOXTEL and Optus Vision retransmit (via cable) the national (ABC and SBS) and commercial television services simultaneously and unaltered under the current provisions of section 212 of the BSA relating to television broadcasting services within licence areas. These channels are free additions to the suite of subscription channels and provided as a service to subscribers.

The validity of the current law was tested in the courts when commercial television challenged the cable operators' right to retransmit under section 212. The 1996 decision of the Full Court of the Federal Court in Amalgamated Television Services Pty Ltd and others v Foxtel Digital Cable Television Pty Ltd and another confirmed that simultaneous and unaltered cable retransmission of terrestrial television services is permitted within licence/coverage areas under the BSA and the *Copyright Act*.

The proposed legislation before the Senate makes 'illegal' what subscription television operators have been doing legally for the past three years as confirmed by the courts. Changing legislation now unfairly disadvantages existing customers.

There are about 500,000 cable subscription television subscribers. The retransmission of free-to-air services arises at no cost to either broadcasters or underlying rights holders; retransmission increases the reach of broadcasters and therefore potential advertising revenue; and more importantly greatly benefits consumers not only in the convenience with which they can switch from subscription channels to free-to-air and vice versa but also in the improved signal quality of free-to-air reception and the fact they can remove unsightly aerials if they so choose.

In retransmitting free-to-air signals, cable operators have already addressed the initial concerns of free-to-air operators by providing each in its usual channel position. The ABC is carried on channel 2, the Seven network occupies channel 7, the Nine network occupies channel 9, the Ten network is on channel 10 and SBS on channel 28.

In lobbying for these changes to the current retransmission rules, commercial television broadcasters have argued that they have a property right in their broadcast signal which they should have control over with respect to retranmission except in 'genuine self-help' cases.

ASTRA maintains that commercial television broadcasters only have a limited right to broadcast by virtue of licences which have been granted under the BSA.

A subscription television operator, by retransmitting this signal, does not decrease the value of this right. Because the value of the signal is dependent on the number of people who can receive the signal, and because subscription television can only increase the number of people who receive a signal within the licence area, it is more logical that retransmission increases the value of the original broadcast rather than decreases the value.

In addition commercial television broadcasters are compensated through advertising, not by the recipient of the broadcast. If consumers paid for television signal reception directly, then the argument by commercial television that they are unfairly 'uncompensated' might have some validity. Cable retransmission improves the signal quality of reception and in turn increases the value of placed advertisements. There is no need for pay TV operators to compensate commercial television licensees as they are already compensated by advertisers.

The retransmission regime of the United Kingdom as it relates to copyright, reflects the no pay position advocated by Australian cable operators. That is, the copyright in a broadcast or any work included in the broadcast is not infringed by a cable retransmission that takes place in the licence area of the original broadcast.

This Bill contemplates complementary amendments to the *Copyright Act*. The fact that such proposed amendments have not been released with this Bill raises its own problems in terms of how the two Acts will operate together. Once again we are left with an uncertain and incomplete regulatory framework. (This was the case with the digital television conversion legislation which provided a general regulatory framework with much of the essential detail to be determined in subordinate legislation).

It is assumed that changes to the *Copyright Act* will see a new broad-based technology-neutral communication right to the public and pay TV operators will be required to pay a licence fee to underlying rights holders although whether this will be a statutory licence or subject to negotiation is unclear.

The proposed retransmission regime includes both a consent provision which requires subscription television operators to negotiate and reach agreement with all free-to-air broadcasters if they want to retransmit the signal and a limited must carry provision in overlap areas (where metropolitan and regional licence areas overlap, for example the Gold Coast) which imposes a mandatory obligation upon pay TV operators to retransmit the regional commercial television signal if it is retransmitting a metropolitan commercial television signal. However this can only be done with the consent of the regional commercial television licensee.

## SPECIFIC CONCERNS

Under section 205N and 205V of proposed Part 14B of the BSA, a subscription television broadcasting licensee is required to reach agreement with a commercial, community or national broadcasting licensee. This requirement takes effect as soon as the amending Act is proclaimed and does not provide for a transitional period.

Pay TV operators currently providing retransmitted signals to consumers will have to cease retransmission upon the Bill coming into force if they have not entered into agreements with the free-to-air broadcasters at the time.

As long as parties are negotiating in good faith then those negotiations should be able to continue under a transitional regime with no adverse affect to consumers. ASTRA considers an appropriate transitional period to be 12 months.

## AMBIGUITY RE IMPACT OF PROPOSED AMENDMENTS TO THE COPYRIGHT ACT

It is unclear how the proposed amendments to the BSA will operate in relation to the yet to be seen amendments to the *Copyright Act*. While there are assumptions from the second reading speech to this Bill on what the proposed copyright amendments will cover (a new broadly-based technology-neutral communication right and requirement to compensate underlying rights holders), there is no indication of whether, in addition to the compensation to underlying rights holders, pay TV operators will also be required to pay the free-to-air operators any additional fees other than those agreed upon under the retransmission provisions. There is also no indication of how the regime will be administered and by whom.

The second reading speech implies that there will be a statutory licence with respect to underlying rights holders but does not expressly say so. A possible situation is that subscription television operators would be required to pay:

- a statutory licence fee to the underlying rights holders* under the *Copyright Act*;
- a licence fee to the free-to-air operators under the *Copyright Act*; and
- a fee agreed to between parties under the BSA.

(*NB. free-to-air broadcasters will hold underlying rights in some of the material retransmitted, as such, under these proposals, they will receive payment twice for the same material.)

The proposals assume that, in agreeing to allow a pay TV operator to retransmit its broadcast, the free-to-air network is granting a pay TV operator a copyright licence to transmit its service, however the amendments only explicitly deal with being exempt from the regime prescribed by the BSA and does not refer to any possible copyright breaches.

Subscription television operators could find themselves having to seek consent from the underlying rights holders, from two broadcasters (metropolitan and regional) under both the BSA and the Copyright Act and seeking permission from the Australian Broadcasting Authority ("ABA") in terms of retransmissions in declared remote areas or for providing particular programming in regional areas which is substantially the same as programming on a metropolitan commercial television station during particular times of the day.

## MUST CARRY PROVISIONS: NO CONSIDERATION OF CAPACITY TO CARRY

At present it is only viable for pay TV operators to retransmit on cable. However, the must carry element with respect to overlap areas will be a problem in terms of limited technical capacity. Section 205W of the proposed legislation does not take into account any considerations of the technical capacity and capacity limitations of the different

delivery modes of subscription television whether cable, satellite or MDS (wireless cable).

Subscription television systems do not have unlimited channel capacity. There are restraints in terms of technical capacity and the channel needs of the pay TV broadcasters take priority. There are limited MDS channels available (11 through to a maximum of 19 channels); satellite capacity is driven by cost per transponder and is based on a national beam, hence the cost becomes prohibitive in attempting to 'regionalise' the signal; and cable capacity is limited by cost effectiveness.

## MUST CARRY AND STILL MUST PAY

Section 205X of the proposed legislation provides that pay TV operators must comply with the must carry provisions on such terms and conditions as are agreed between the related or unrelated regional commercial television broadcaster (or failing agreement, as arbitrated). This leaves the pay TV operator in a situation where it will presumably have to pay to retransmit a broadcast which it is compelled to carry. No other country in the world has such a draconian impost. For example under the US regime, cable operators do not have to pay the retransmitted free-to-air licensees who elect must carry rather than the consent regime.

ASTRA welcomes the recognition of the difficulties this may pose for pay TV operators with provision of an arbitration mechanism, albeit restricted to this particular circumstance.

## NO ARBITRATION MECHANISM

ASTRA has long maintained that any consent regime should include provision for arbitration for circumstances where a free-to-air broadcaster and a pay TV operator have failed to reach a retransmission consent agreement.

With no arbitration mechanism ASTRA views this proposed legislation as providing commercial broadcasters with unprecedented control over signal transmission. While the Government seems to acknowledge some level of comfort from the free-to-air operators that they will not 'extract exorbitant fees', ASTRA has no such comfort especially given their previous position on this issue and no legal requirement to ensure fair and reasonable negotiation.

As proposed, there are no procedural requirements in negotiating agreements, no time limitations and no dispute resolution procedures. ASTRA seeks provision within the legislation to require the free-to-air operators "to make access to their broadcasts available on reasonable terms and within reasonable time of a request being made".

ASTRA impresses upon the Senate the importance of including a mediation or arbitration mechanism in the legislation, otherwise all negotiating leverage will lie in the hands of the commercial television broadcasters. ASTRA believes the Copyright Tribunal is the most appropriate arbitrator in these circumstances and such arbitration should recognise the inequality of the bargaining positions of the parties.

## COMPLIANCE WITH THE BSA BUT POTENTIAL BREACHES OF COPYRIGHT

Further to the must carry element of the Bill, ASTRA maintains there should also be corresponding provisions in the amended Copyright Act in which pay TV operators obtain a statutory licence to retransmit the copyright material of underlying rights holders. If there is no such provision, an anomalous situation is created under which pay TV operators are compelled to carry the broadcast under the BSA (despite scarce broadband or spectrum capacity) and must pay a fee under the Copyright Act or risk an action for infringement.

Another failure to cross reference with the proposed amendments to the Copyright Act is the fact that the only instance where the Government sees a public interest in retransmission is in declared remote areas. The Bill does not address the copyright implications of pay TV operators retransmitting a free-to-air signal in a remote area. In such circumstances pay TV operators may find themselves complying with the regulatory regime of the BSA but be in breach of the copyright of the underlying rights holders under the Copyright Act.

## IMPACT OF DIGITAL TELEVISION

It seems incongruous to introduce a new retransmission regime specific to analogue transmission when Parliament has just passed the digital television conversion legislation to provide for the introduction of digital terrestrial television by 2001. Especially when that same digital legislation already provides for a review of the retransmission rules to consider what amendments would be needed to take account of retransmission of digital signals (including capacity to retransmit HDTV, enhanced programming and possible multichannels).

This Bill is silent as to the implications of digital television. The digital regime will see commercial (metropolitan and regional) and national television broadcasters required to transmit their services in digital format and during the simulcast period, these services will be transmitted in both analogue and digital format.

This situation is only now being tackled by the Federal Communications Commission (FCC) in the US, which believes that the most difficult carriage issues arise during the transition period when the digital and analogue signals are operating simultaneously. (see attached press clipping at Appendix C).

Given the unknowns, why rush to introduce a regime which has such a limited life?

*Tom Mockridge is the Chief Executive Officer of FOXTEL and was Chairman of ASTRA at the date of this submission.*