



screenrights

The Audio-Visual Copyright Society

DIGITAL AGENDA BILL – RETRANSMISSION SUBMISSION

1 Background to This Submission

On 28 February 2000, the Attorney-General's Department requested that Screenrights furnish the Department with a further retransmission submission. It was requested that the submission should outline how Screenrights envisages the proposed retransmission reform applying with respect to web retransmissions. It was indicated that the submission was urgently required by the Department.

Screenrights offers this submission in addressing that request. Screenrights takes the term "web retransmission" to denote the general, open and simultaneous communication of a broadcast to a global public through the medium of the internet. While a variety of different modes of web retransmission may be contemplated (including encrypted, password protected delivery to specified individuals) Screenrights assumes this to be the general conception of "web retransmission" which is both most likely to occur and with which the Government is most concerned.

Given the limited time in which this submission was prepared, there has not been a full opportunity to consult with all stakeholders. Therefore, this submission should be read in some respects more as a discussion paper, especially in so far as it addresses hypothetical scenarios. Screenrights hopes to highlight particular problems which may arise under the present drafting proposals and to re-offer a drafting suggestion.

Screenrights' general view is that the current drafting of Part 14B of the *Broadcasting Services Amendment Bill (No.1) 1999* ("Re-transmission of programs") and Part VC of the *Copyright Amendment (Digital Agenda) Bill 1999* ("Retransmission of free-to-air broadcasts") do permit certain web retransmissions in limited circumstances, and that this possibility is extremely problematic.

2 Non-prescriptive Forms of Drafting

Part 14B and Part VC are drafted to capture activities beyond the known case of retransmission by subscription television. Presumably for technological-neutrality reasons, Part 14B couches in broad terms entities which may be excluded from the broadcasting regulatory regime and Part VC couches in equally broad terms entities which may be afforded the benefit of the retransmission statutory copyright licence.

2.1 Scope of Part 14B

In Part 14B the term "service that does no more than re-transmit"¹ is used, where "service" per se is not defined elsewhere in the *Broadcasting Services Act 1992*. Thus, under Part 2 of the *Broadcasting Services Act 1992* ("Categories of Broadcasting Services") extensive categories of various "broadcasting services" are set out. "Broadcasting services" are distinguished on the basis of ownership (commercial/national), business model (advertising revenues/subscription revenues), and technology (radio/television). However, a "service" per se is a concept which appears to transcend these various divisions. A "service" may or may not fall within any one of these categories. Given the range of alternative choices open to the draftsman, this must be taken to be a deliberately choice to permit breadth in the range of entities eligible to avail themselves of Part 14B.

For example, Part 14B does not use the expression "a broadcasting service that does no more than re-transmit".² This is notwithstanding that both the *Explanatory Memorandum* to the *Broadcasting Services Act 1992* and a subsequent Australian Broadcasting Authority report in 1996 placed a quite an expansive gloss on the breadth of the expression "broadcasting service" in the context of on-line delivery.

The *Explanatory Memorandum* to the *Broadcasting Services Act 1992* describes the definition of "broadcasting service" as "fundamental to the Act as it establishes the types of services which are to be regulated under the Act".³ The definition excludes "a service that makes programs available on demand on a point-to-point basis". A "point-to-point" service is explained in the *Explanatory Memorandum* to not include where "the program being received by the person is the same as that being received by any other person receiving the service at the same time".⁴ This is expanded upon by the 1996 ABA Report "Investigation Into The Content Of On-Line Services" which states:

On-line services offered on a real time basis are likely to fall within the definition of broadcasting services within the Act where they provide what could be described as television or radio programs. The phrases 'television programs' and 'radio programs', and the words 'television' and 'radio', are not defined in the Act. The word 'program', in relation to a broadcasting service, is widely defined in section 6 of the Act as:

- (a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
- (b) advertising or sponsorship matter, whether or not of a commercial kind.

¹ See for example proposed section 205N(1) of the *Broadcasting Services Amendment Bill (No.1) 1999*.

² *Broadcasting Services Act 1992*, section 6.

³ Page 14.

⁴ Page 15.

The ABA is of the view that what constitutes a television or radio program is a content issue. The ABA is also of the view that where on-line services deliver television or radio programs in real time, these may fall within the regime applicable to broadcasting services.⁵

Therefore, use of the expression "a broadcasting service that does no more than re-transmit" may have been quite an appropriate one in this context, being both broad while tying the entity to the regulatory purview of the *Broadcasting Services Act 1992*. However, this option was not chosen by Part 14B's draftsman.

An even more specific formulation, such as "a subscription broadcasting service that does no more than re-transmit", was also not chosen. However such a formulation would, in Screenrights view, equate most closely to the policy imperatives upon which the reform is premised. As the Explanatory Memorandum to the *Broadcasting Services Amendment Bill 1998* explains:

Current provisions of the *Broadcasting Services Act* allow pay TV operators to retransmit, for commercial purposes, national broadcasting services, and commercial and community broadcasting services within their licences areas, without the consent or compensation of these free to air broadcasters and without compensation of underlying rights holders. This commercial use of free to air television services without authorisation or compensation is inconsistent with normal commercial practice and unfair to copyright owners.⁶

The provisions of Part 14B contemplate retransmitters other than "pay TV operators" being able to take themselves outside of the *Broadcasting Services Act* regulatory regime. Screenrights believes such an expansive approach to be neither necessary nor prudent.

2.2 Scope of Part VC

Part VC uses the term "retransmitter" to establish the class of users who may avail themselves of the statutory copyright licence. The term "retransmitter" is defined to mean "a person who makes a retransmission of a free-to-air broadcast".⁷ "Retransmission", in turn, is separately defined.⁸ Again, no attempt is made to limit the users of the Part VC statutory licence by category or class - other than the circularity of an approach which defines the class as persons who make retransmissions.

Presumably the reason for using the term "retransmitter" is to strive for technology non-specific drafting. However, a consequence is to expand the breadth of potential users who may avail themselves of the Part VC

⁵ Pages 46-50.

⁶ Page 13.

⁷ Proposed section 135ZZI in the *Copyright Amendment (Digital Agenda) Bill 1999*.

⁸ Proposed definition of "retransmission" in the *Copyright Amendment (Digital Agenda) Bill 1999*.

statutory copyright licence. A person making retransmissions of certain free to air broadcasts over the internet may avail themselves of the licence.

2.3 Scope of the Screenrights/ASTRA Drafting Proposal

It is useful to compare the approaches in both Part 14B and Part VC with that taken by Screenrights and ASTRA in a joint drafting proposal made to the Attorney-General's department on 19 March 1999. In that proposal, both the term "retransmission" and the statutory licence in respect of retransmission, were couched in terms of an activity by a "subscription program provider". "Subscription program provider", defined in terms of a person providing either "subscription broadcasting services" or "subscription narrowcasting services" as those terms are defined under the *Broadcasting Services Act 1992*.⁹ Under the Screenrights/ASTRA proposal, the scope of potential users of the statutory licence was directed to give explicit effect to the underlying policy of Government, creating a remunerated (rather than free) exception for pay television operators to retransmit.

Screenrights can see good reason for a reconsideration of this suggested approach in both Part 14B and particularly in Part VC. In light of the possibility of web retransmission, the Screenrights/ASTRA formulation could be further limited to ensure that retransmission referred to under Part VC relates only to activities within Australia. Thus, the definition there provided of "retransmission" could now read:

retransmission, in relation to a free-to-air broadcast, means a retransmission of the free-to-air broadcast, and any work, sound recording or cinematograph film included in the free-to-air broadcast, by a subscription program provider to its subscribers situated within Australia, where:

- (a) the content of the free-to-air broadcast is unaltered (even if the technique used to achieve retransmission is different to the technique used to achieve the free-to-air broadcast); and
- (b) either:
 - (i) in any case—the retransmission is simultaneous with the free-to-air broadcast; or
 - (ii) if the retransmission is in an area that has, wholly or partly, different local time to the area where the free-to-air broadcast was made—the retransmission is delayed until no later than the equivalent local time.

(Under the Screenrights/ASTRA drafting the following definition of "subscriber" is provided:

subscriber means a member of the public who, on payment of a fee to a subscription program provider, has made available to him or her programming which includes a retransmission the subject of a remuneration notice.)

⁹ Appendix B, "Part VC - Retransmission of Free-to-Air Broadcasts by Subscription Program Providers".

Screenrights submits that such an approach overcomes many of the problems inherent in the breadth of the current drafting and the potential inclusion of certain web retransmissions within the proposed retransmission regimes. This will be seen in the context of Section 4 below.

3 Web Transmissions by Initial Broadcasters

Explicit in Part 14B is that "a service that does no more than re-transmit" must be a third party to the initial broadcaster.¹⁰ It is implicit in the *Copyright Amendment (Digital Agenda) Bill 1999* that a "retransmission" forms an exercise of rights other than the initial communication of the broadcast. For the avoidance of doubt this could be more clearly expressed. The Screenrights/ASTRA drafting proposal of 19 March 1999 suggested the definition of "retransmission" could provide "a retransmission of the free-to-air broadcast ... by a subscription program provider".¹¹

However it appears that under neither regime would a broadcaster's web-transmission of its own signal fall within the concept of a retransmission. If, say, a broadcaster by its web transmission of its own signal transgressed general licence area rules, that would be entirely a matter for broadcasting law and policy outside Part 14B. Similarly, if a broadcaster web transmitted its signal in contravention of a term of a contractual copyright licence, that would be a private dispute for resolution between the relevant parties.

4 Third Party Web Retransmissions of Australian Broadcasts

Screenrights view is that the current drafting of Part 14B and Part VC permits certain web retransmissions, subject to certain requirements being met. As described below, Screenrights opinion is that a web retransmitter which retransmits Australian broadcasts, may fall within the scope of both Part 14B and Part VC. In the context of the operation of a statutory retransmission copyright licence, Screenrights contends that the inclusion of web retransmissions with that licence is highly problematic.

4.1 Application of Part 14B

A web retransmitter which retransmits Australian broadcasts will be, under Part 14B a "service that does no more than re-transmit". Given the definition of a "broadcasting service" contained in the *Broadcasting Services Act 1992* (particularly read in light of the Act's *Explanatory Memorandum* and the 1996 Australian Broadcasting Authority on-line report), it is likely that the provision of web retransmissions is a broadcasting service which would generally be subject to the Act's regulatory regime.

¹⁰ Proposed section 205F in the *Broadcasting Services Amendment Bill (No. 1) 1999*.

¹¹ Appendix B, "Part VC - Retransmission of Free-to-Air Broadcasts by Subscription Program Providers".

Assuming that the web retransmission was of a broadcast made by a “commercial broadcasting service”, a “national broadcasting service” or a “community broadcasting service” (as those terms apply in the *Broadcasting Services Act*), the Act’s regulatory regime would, however, not apply if the various consent and permission requirements set out in Part 14B were met. Where the web retransmitted broadcast is that of a commercial or community broadcasting licensee, broadcaster consent will be required.¹² In these cases, written permission from the Australian Broadcasting Authority will also be required as a web retransmission will not be confined to any particular licence area.¹³ Further, any web-retransmitter would need to comply with the metropolitan/regional overlap rules.¹⁴ While Authority consent would not be required for web retransmissions of broadcasts made by the national broadcasters, the national broadcasters’ consent would be required.¹⁵

As a matter of practice, Screenrights considers that broadcasters (and in particular commercial broadcasters) would not readily give consent to a third party to retransmit the broadcaster’s signal over the internet.¹⁶ Screenrights considers it more likely that a broadcaster might seek to offer its channel (or channels) of programming over the internet itself. This might be done in a way that captures ratings data relating to internet audiences and which enables the sale of further advertising.¹⁷

4.2 Application of Part VC

However, assuming that the various consents, permissions and conditions are all met under Part 14B, a web retransmitter would be able to avail itself of the Part VC licence, in much the same way as a subscription television retransmitter might. While a web retransmitter may rely primarily on advertiser rather than subscriber revenues, this different revenue source does not take the retransmission outside of Part VC nor precludes an assessment of what constitutes equitable remuneration.

Larger concerns are, however, questions relating to the territorial operation of any retransmission licence granted under the Australian *Copyright Act* 1968. Under the *Copyright Act* such a retransmitter may avail itself of the statutory licence. Web retransmission is global retransmission. The effect of the licence is to create an exception to the new “communication to the

¹² Assuming the web retransmitter is not a “self help provider”: proposed section 205J in the *Broadcasting Services Amendment Bill (No.1)* 1999.

¹³ Proposed section 205P(1)(c) in the *Broadcasting Services Amendment Bill (No.1)* 1999.

¹⁴ Proposed Part 14B, Division 4 in the *Broadcasting Services Amendment Bill (No.1)* 1999.

¹⁵ Again, assuming the web retransmitter is not a “self help provider”: proposed section 205J.

¹⁶ See for example the litigation relating to the Canadian iCraveTV web retransmission service in the USA described in two articles attached to this submission as Appendix A.

¹⁷ Such as through “framing” around the signal or through other means on the broadcaster’s web presence.

public" right. Although after the enactment of the *Copyright Amendment (Digital Agenda) Bill 1999*, "to the public" will mean public "within or outside Australia"¹⁸, it is problematic to consider that Part VC as it is currently drafted could be used as a licence to exercise the world-wide rights in copyright. The Part VC statutory licence (ie "copyright ... is not infringed") can be relied upon only within the jurisdictional ambit of Australian *Copyright Act 1968*. Retransmissions outside this jurisdictional ambit may infringe copyright under the copyright laws of other countries. A web retransmission under the Part VC licence may infringe the broadcast, public performance, communication and other analogous rights in jurisdictions outside Australia where the Part VC licence will not apply.

This suggests that the that possibility of extra-territorial web retransmissions occurring under the retransmission regime should be carefully considered. Acute international embarrassment may arise if web retransmissions emanating from Australia under a statutory licence represent copyright infringements other countries.¹⁹

As a further practical issue, such web retransmissions make an assessment within Australia of equitable remuneration in respect of extra-territorial retransmissions highly problematic.

Screenrights believes that the source of all these difficulties resides in the breadth of the terms "service" and, in particular, "retransmitter". If the exceptions in the regimes are limited to:

- a class of users which equates to subscription broadcasters which are subject to *Broadcasting Services Act* regulation and
 - to retransmissions to their subscribers situated within Australia,
- none of these difficulties could be reasonably expected to arise.

5 Third Party Web Retransmissions in Australia of Foreign Broadcasts

5.1 Application of Part 14B

For the reasons stated above in 2.1 (above) it is likely that the provision of web retransmissions of foreign broadcasts would constitute the provision of a "broadcasting service" under the *Broadcasting Services Act 1992* and be subject to the regulatory regime of the Act. However, unlike Case Two, Part 14B could not be relied upon as the retransmissions would not be the broadcasts of a "broadcasting service" under the *Broadcasting Services Act*. The provision of a broadcast in a country other than Australia can not be said to fall within the *Broadcasting Services Act* concept of a 'broadcasting

¹⁸ Proposed definition of "to the public" in the *Copyright Amendment (Digital Agenda) Bill 1999*.

¹⁹ Consider the controversy surrounding the Canadian iCraveTV service in Appendix A to this submission.

service'.²⁰ The *Broadcasting Services Act* has no extra-territorial effect. It can not be a correct construction to give the *Broadcasting Services Act* an effect which places all foreign broadcasting activities within its regulatory ambit.

Thus, the prospective web retransmitter in this case would be regarded under the *Broadcasting Services Act 1992* as not a retransmitter at all. Rather, it would be in the same position as any other entity wishing to broadcast television or radio programming in Australia.

5.2 Application of Part VC

Similarly, it is highly unlikely that such an entity would be regarded as a "retransmitter" under Part VC. A "retransmission" is defined as a "retransmission of the broadcast". After the enactment of the *Copyright Amendment (Digital Agenda) Bill 1999*, "broadcast", will mean "a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*".²¹ For the same reasons given above at 5.1, this must necessarily exclude foreign broadcasts.

Therefore, the Part VC statutory licence would not be available in this setting - the entity would not be regarded as a retransmitter.

6 **Conclusion**

Screenrights view is that an attempt to achieve technological-neutrality in the drafting of the retransmission regimes may be the cause of their over-broad and problematic scope. It is Screenrights general view that exceptions should be narrowly drafted to address the particular need which has arisen. In this way there is less likelihood of the exception being applied in settings for which it was unintended. Putting aside web retransmission, Part VC may also apply to "music on hold" where a broadcast is the source of the music. This is presumably an unintended consequence. It is the breadth of the current section 212 of the *Broadcasting Services Act 1992* and of section 199(4) of the *Copyright Act 1968* which has created the opportunity for pay television to have exploited these provisions in a manner unintended when the provisions were drafted. Screenrights believes care should be taken now to minimise the chance of these revised exceptions being equally misapplied in the future.

²⁰ See the objects of the *Broadcasting Services Act 1992* in section 3, particularly (a) and (b).

²¹ The proposed amended definition of "broadcast" in the *Copyright Amendment (Digital Agenda) Bill 1999*.