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Retransmission Rights: The Free-to-Air Broadcasters' View

Bridget Godwin reports on the free-to-air broadcasters' views on the Broadcasting Services Amendment Bill 1998.

BACKGROUND

Free to air broadcasters have been calling for the introduction of a retransmission right since the early 1990s. Around this time, it was first realised that with the imminent introduction of pay television in Australia, pay television operators would be able to use the signals of free to air broadcasters as part of their subscription services without permission.

Both major political parties have since recognised the inherent unfairness of this situation and promised to amend section 212 of the *Broadcasting Services Act 1992* (Cth) to give broadcasters the right to control retransmission of their services.

BROADCASTING SERVICES AMENDMENT BILL 1998

On 10 March 1998, the Federal Government announced that free to air broadcasters would be provided with retransmission rights which would enable them to control their own signal. This was the implementation of a promise made in the 1993 election campaign.

Following this announcement, the Broadcasting Services Amendment Bill 1998 ("the Bill") was passed by the House of Representatives and introduced into the Senate on 2 July 1998. The Bill was referred to the Senate Environment, Recreation, Communications and the Arts Legislation Committee for consideration. The Committee received

submissions and held a public hearing in Canberra on 21 August 1998.

The Committee was due to report back to the Senate by 9 September 1998. However, at the time of writing the calling of the Federal election has created a more uncertain environment. The Bill's future depends on whether the incoming government chooses to restore the Bill.

THE PROPOSED SCHEME

The retransmission provisions of the Bill require pay television operators to obtain the permission of the ABC, SBS and commercial broadcasters before being able to retransmit their signals. Commercial broadcasting services may only be retransmitted within their licence areas. Retransmission outside licence area requires the permission of the ABA.

The Government has also announced that it intends to establish a statutory licence scheme requiring pay television operators

to compensate owners of underlying copyright material in the retransmitted broadcast.

The scheme contains special provisions for self-help groups who retransmit services for the purpose of obtaining or improving reception in a community. These groups may retransmit national or commercial broadcasting services without the permission of the broadcaster. Self help groups are also exempt from making payments to the owners of copyright in underlying material.

The Bill allows the ABA to specify that particular areas are "declared remote areas". Retransmission is permitted within these areas without the permission of the broadcaster. However, payment to underlying rights holders would still be required.

In metropolitan/ regional overlap areas for commercial television licensees, the Bill places a mandatory obligation on pay television operators to retransmit all

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television programs of a regional commercial television licensee if that operator is also retransmitting the television programs of a metropolitan commercial television licensee whose licence area includes the overlap area.

This requirement operates if the regional licensee is related to the metropolitan licensee and the regional licensee consents to the retransmission. If no related regional licensee exists in the overlap area, the subscription television licensee must retransmit all consenting regional licensees in the overlap area.

WHY BROADCASTERS NEED A RETRANSMISSION RIGHT

All national and commercial free to air television broadcasters strongly support the proposal to give broadcasters the right to control their signals.

The current situation is based on a long standing and unintended anomaly in broadcasting and copyright legislation, which allows pay television operators to retransmit free to air television services without seeking the consent of the

original broadcaster. This is clearly contrary to copyright and broadcasting principles. It enables pay television operators to appropriate broadcasters' property with impunity.

Commercial broadcasters argue that pay television is a serious competitor to commercial free to air services. Pay television operators are permitted to use the services their competitors as part of a competitive package. As is the case with other owners of proprietary and intellectual property rights, free to air broadcasters argue that their rights should be respected and properly remunerated.

At present, a broadcaster is unable to control the quality or channel number of the retransmitted free to air service. Nor can a broadcaster insist that teletext and closed captioning for the hearing impaired be included as part of the pay television package.

In some regional areas, pay television has chosen to transmit network or capital city services rather than the regional affiliate free to air service intended for the area, placing the affiliate's commercial interests at risk and disturbing the

delicate balance between capital city and regional services established over many years.

Free to air broadcasters are concerned that in many cases, pay television operators routinely remove external free to air aerials, locking subscribers out of free to air access if they end their pay television subscription.

Many new generation services, such as digital terrestrial television and associated data, multiview and multichannel services will be delivered free to air. Removal of aerials, combined with an inability to negotiate acceptable retransmission conditions, threatens the viability of these new services. They are expensive to implement and should not be able to be misappropriated and subverted by direct commercial competitors.

Free to air broadcasters do not want to prevent the retransmission of their signals. It is in their interests to ensure that their services are received by as many viewers as possible at the best possible quantity. These commercial and public interest considerations will ensure that

both sides have an interest in reaching an acceptable agreement.

IMPROVEMENTS TO THE BILL

While supporting the overall thrust of the legislation, free to air broadcasters have suggested a number of modifications to the Bill. The major concerns raised by free to air broadcasters were:

The Bill does not currently contain a definition of 'retransmission'. A definition is needed to clarify that retransmission must be simultaneous, unaltered and of the whole broadcast signal. This is necessary to ensure that practices such as cherry picking or the stripping of advertisements do not occur.

It is expected that in most cases, the ABA will determine existing remote commercial television licence areas to be declared remote areas. Retransmission in remote areas raises a number of issues. The object of the remote area provisions is to ensure that remote area residents receive a full suite of broadcasting services using one set of domestic reception equipment.

In most remote areas, free to air and pay television services are delivered by satellite, usually on competing systems. This requires the consumer to purchase two different types of domestic reception equipment. However, the Federation of Commercial Television Stations (FACTS) argues that the government's proposed scheme may have the unintended consequence of diminishing competition between satellite service providers. Each satellite would be able to transmit any signal they wish without consent, removing the incentive for satellite providers to compete to provide comprehensive packages of services. The scheme may also result in retransmission of signals outside service areas, given the nature of satellite distribution of signals.

The ABC and FACTS are of the view that the consent regime established for non-remote areas should apply equally to remote area broadcasters. In the absence of a consent regime, they have proposed that remote area retransmissions require special provisions to ensure that retransmission occurs at an appropriate

quality and that signals are not able to be intercepted outside licence areas. SBS has also raised a concern that self help providers in remote areas may be disadvantaged, as they are not exempt from payments to underlying copyright owners in the same way as self help providers in other areas. At the very least, SBS was of the view that retransmission in remote areas for commercial purposes should require the consent of the broadcaster.

Concerns have also been raised that retransmission of commercial television services outside licence area is permitted with the consent of the ABA. Commercial television interests argue that these decisions should also require the consent of the broadcaster and that the ABA should be required to take the objects of the Broadcasting Services Act and in particular its planning provisions into account. This would prevent authorisations to retransmit becoming de-facto planning decisions.

Broadcasters have commented on commencement and enforcement provisions of the Bill. The government has expressed an intention that the Bill will not be proclaimed until the enactment of companion copyright legislation establishing a payment scheme for underlying copyright holders. As copyright legislation is unlikely to be a speedy process, this could leave broadcasters waiting a number of years for their retransmission rights to come into force. Broadcasters believe that this would be unfair, and have pressed for the commencement of the Bill within three months of enactment.

A related concern is that the Bill contains no provisions enabling broadcasters to take action in relation to breaches of the retransmission regime. There appears to be no sanction or remedy against pay television operators retransmitting in breach of the legislation. This omission clearly needs to be rectified. Rights are of little value if they cannot be enforced.

PAY TELEVISION CLAIMS

Pay television operators have vigorously opposed the introduction of a retransmission right for free to air

broadcasters. They claim that free to air broadcasters will prevent them from retransmitting, that subscriber rates will increase, that consumers will be inconvenienced, forced to buy external antennas and unable to switch between free to air and pay services. They also argue that the provisions will restrict the development of the pay television industry and that it is therefore anti-competitive.

Free to air broadcasters reject these arguments. To refuse retransmission would be quite contrary to the commercial interests of broadcasters, who are trying to reach the maximum number of viewers at the best possible quality. Subscriber rates are clearly entirely at the discretion of the pay television operators themselves, not determined by free-to-air broadcasters.

At present, the inability of broadcasters to control their signals gives pay television an unfair competitive advantage because of pay television's unfettered ability to trade on the property of others. Commercial and national broadcasters have invested millions of dollars in their services, in an environment which places far more regulatory requirements on them than is the case for pay television. Unlike pay television operators they have invested heavily in the Australian production industry. Commercial broadcasters pay huge licence fees to government which pay televisions are not required to pay.

To argue that giving broadcasters a retransmission right, a simple mechanism to protect the value of the creativity and investment which goes into producing a distinctive broadcasting service, is unfair to pay television is to ignore the reality of an environment which already gives significant concessions to pay television operators. It is also to ignore a principle so basic we teach it to our children - the property of one person should not be taken by another without the owner's permission.

Bridget Godwin is Corporate Counsel with SBS. The use of submissions prepared by FACTS and the ABC in relation to the Bill is gratefully acknowledged.