… Moreover, iiNet's customers could not possibly infer from iiNet's inactivity … that iiNet was in a position to grant those customers rights to make the appellants' films available online…[35]

had engaged in a "common design" with its customers to make copies which, in Optus' case, were not protected from liability by the "time-shifting" exception.[43]

The second example is the introduction and subsequent withdrawal from market of a "global mode" internet service provided by a New Zealand internet service provider, Fyx, which had been promoted as a "legal" solution to circumvent the common use of "geo-blocking" on overseas video streaming websites.[44] If such a service were to be offered in Australia, it would be difficult to argue that the internet service provider was not authorising its customers' conduct, in the sense of "sanctioning, approving or countenancing" that conduct or, after the iiNet Case, "granting or purporting to grant" the right to watch those streams.[45] It appears that, under Australian law, watching overseas video streams by circumventing "geo-blocking" would be a primary infringement of copyright in that content.[46]

Despite iiNet's victory, the risk of secondary liability for copyright infringement, including authorisation liability, will remain front of mind for internet service providers and other internet intermediaries.

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43 *NRL v Optus* [2012] FCAFC 59, [76]-[78], [89], [92].

44 *iTnews*, "Kiwi ISP claims legal clarity on geoblock-busting service", 11 May 2012, at URL: http://www.itnews.com.au/News/300334,kiwi-isp-claims-legal-clarity-on-geoblock-busting-service.aspx and "Kiwi ISP withdraws internet geoblock Fyx", 11 May 2012, at URL: http://www.itnews.com.au/News/300423,kiwi-isp-withdraws-internet-geoblock-fyx.aspx (last accessed 15 May 2012).

45 See also Karl Schaffarczyk and Bruce Arnold, "FYX ISP will unlock 'geoblocked' sites but will it breach copyright?", 11 May 2012, *The Conversation*, at URL: http://theconversation.edu.au/fyx-isp-will-unlock-geoblocked-sites-but-will-it-breach-copyright-6927 (last accessed 15 May 2012).

46 One of the exclusive rights comprised in the copyright in cinematograph films is to communicate the film to the public: s 86(c), *Copyright Act*. A communication other than a broadcast is taken to have been made by the person responsible for determining its content (s 22(6)), which in this case is arguably the user circumventing the "geo-blocking". The user is part of the copyright owner's "public": *Telstra Corporation Limited v Australasian Performing Right Association Limited* (1997) 191 CLR 140, 157 (Dawson and Gaudron JJ). There does not appear to be an applicable parallel importing exception in the *Copyright Act* for such conduct.

Excerpt From 'Networking: Commercial Television in Australia' by Nick Herd, Published by Currency House

Nick Herd has produced a history of commercial television that traces the political and economic development of this important cultural institution from its genesis to the present day. Set out below is an extract from this recently published work. The full work can be purchased from Currency House at http://www.currencyhouse.org.au/node/222

The time is 1957. Television had commenced the previous year and now both the government and media players were considering how it could be extended beyond Sydney and Melbourne. By mid 1957 the Australian Broadcasting Control Board was advising the Postmaster General Charles Davidson (Deputy Leader of the Country party)that television was ready to go to other capital cities:

> While this was occurring, the firms already in the market were attempting to form a coalition that would allow them to extend their control when the time was ripe. On 23 April 1957, a meeting took place at the offices of the *Sydney Morning Herald*.[1] Precisely who called this meeting is not certain, but Rupert Henderson, general manager of John Fairfax and chair of ATN, was probably the host. Present were Frank Packer (chair TCN), Sir John Williams (CEO Herald and Weekly Times), D.S. Sherman (general manager, Queensland Press), Sir Arthur Warner (Electronic Industries, chair GTV) Clive Ogilvy (chair Macquarie Broadcasting) and Sir Lionel Hooke (managing director, AWA). These people represented the existing Sydney and Melbourne licensees or, like Ogilvy and Hooke, were shareholders in ATN. Not invited to this meeting was Rupert Murdoch, whose company News Ltd controlled one of the Adelaide newspapers that might be in the bidding for a television licence.
>
> The purpose of the meeting was to discuss how the various parties represented might establish commercial television in Brisbane. There were then two groups interested, one associated with motion picture and other interests and one with the AWA and HWT subsidiaries. For these men it was of only minor concern that the Government had yet to announce a starting date for Brisbane. Their own stations were still sustaining losses and it was by no means clear when they might turn a profit. Probably for this reason the meeting recognised that the cost of starting two services in Brisbane 'would exceed the revenue capacity of the market for some time'. But they also knew they were *obviously beginning on a network operation which would extend throughout Australia as other stations were opened up in cities other than Sydney and Melbourne.*[2]

1 We know of this meeting because its minutes and the subsequent correspondence between members of the group were made available to the ABCB in its public inquiry into the grant of the licence in Brisbane.

2 Australian Broadcasting Control Board, 1958, *Report and recommendations to the PMG pursuant to the Television Act 1953 and the Television regulations for Commercial Television licences for the Brisbane and Adelaide areas, Canberra: Government printer's Office*, p.36

The meeting highlights the extent to which these competitors were prepared to collude to advance their common interest. Packer and Henderson were fierce rivals in the Sydney newspaper market, which had now extended to television. Williams, who had taken over from Keith Murdoch, was running a company with national interests and ambitions for further expansion. Even more significantly, the meeting demonstrates that these powerbrokers, in direct contravention of the Government's intention, had already cemented a joint understanding that their best interests lay in a network operation radiating from Sydney and Melbourne.

the licences should go to those with the strongest ties to the community they were to serve, that networks of ownership were to be discouraged and that the number of licences awarded would be based on the Board's assessment of the financial viability of the market to support the gradual introduction of television

The general expectation at the meeting was that two licences might be offered in Adelaide, but only one licence each to Perth and Hobart. The group canvassed the possibility of forming a joint bid for Adelaide in the event that only a single licence was offered; and agreed that if it turned out there were to be two licences, then each network grouping would have an outlet for their programming. They might also save costs by erecting joint studio and transmission facilities. The joint plan came to nothing. Attempts to agree on how to cooperate failed. ATN and GTV bought into Queensland Television Ltd, a company formed to apply for a licence. The HWT, through its subsidiaries Queensland Newspapers Ltd (*Courier-Mail*) and Advertiser Newspapers Ltd, also formed companies to apply for the licences in Brisbane and Adelaide respectively. Frank Packer had no connections outside Sydney, so he formed a subsidiary company as the vehicle for his tilt at the licences—Australian Consolidated Press, which came to hold both his print and television interests.

On 4 September 1957 Minister Davidson announced that hearings would take place in early 1958 for the award of licences in Brisbane, Adelaide, Hobart and Perth. The question of the number of licences to be awarded was left open. On 17 October Davidson stated:

The Government has made no decision as to the number of licences to be granted in each of the centres concerned, and will not do so until the Board has made its recommendations following the public enquiries.[3]

When applications closed for Adelaide and Brisbane the groups applying were: Adelaide: Australian Consolidated Press, Southern Television (News Ltd), A.G. Healing (a television appliance retailer whose application was subsequently withdrawn) and Television Broadcasters (Advertiser newspapers-HWT); Brisbane: Australian Consolidated Press, Queensland Television (ATN, GTV and Ezra Norton's *Truth* group) and Brisbane TV (Queensland Newspapers-HWT).

In Sydney and Melbourne the ABCB had constructed for themselves a set of criteria for the award of the licences that strongly favoured the existing newspaper, radio and appliance manufacturers. This was not abandoned, but when it came to Brisbane and Adelaide the ABCB followed what it thought was the Government's policy of localism. That is, the licences should go to those with the strongest ties to the community they were to serve, that networks of ownership were to be discouraged and that the number of licences awarded would be based on the Board's assessment of the financial viability of the market to support the gradual introduction of television. This at once set it on a collision course with the media companies, who had already decided that the process was about how they might extend their influence into the new markets.

The ABCB applied the tests of localism and financial viability to the applications received and reported to the Government on 25 July 1958. It concluded that while co-operation between licensees was desirable to help defray the cost of Australian programming, such co-operation did not require one station to exercise control over another's programs. In particular it found that the agreement between GTV, ATN and Queensland Television Ltd contravened this by giving the Sydney and Melbourne stations control over prime time programming in Brisbane.

The ABCB report stated:

The grant of a commercial television licence is a privilege of great public importance, especially to the people in the area in which the station is established; and there seems little doubt for its most effective use a commercial television station should, as far as possible, be in the hands or under the control of those people operating through the medium of a representative and independent company.[4]

This, they said, was a view that clearly arose from the legislation itself. The ABCB also noted that:

Many of the submissions and much of the evidence were directed to the interests of the existing stations and to their development; and these considerations so dominated the inquiry as to give rise to basic issues in relation to the future of commercial television services in this country.[5]

This is perhaps not a surprising outcome given the nature of the applicants. It caused the Board to draw their members' concern to the attention of the Government. They wrote, accusingly:

The issue again is whether the expansion of the interests of groups already powerful in the fields of mass communications is to be accepted, or whether, in the public interest, the local ownership of stations and the independence of licensees is the objective to be achieved.[6]

On the issue of the number of stations, the ABCB pointed out that the decision to offer two licences in Sydney and Melbourne did not 'set the pattern for extension of television services to other capital cities'. There were special reasons for

3 Ibid p.23

4 Ibid p. 26

5 Ibid p. 28

6 Ibid p. 28

that decision. And, given the size of the markets in Brisbane and Adelaide (where retail sales were roughly a third of those in Melbourne and Sydney) no more than one station would be viable. This was supported to some extent by the applicants—both Frank Packer and Sir Arthur Warner gave evidence that having two stations would mean each would take five years to reach a profit. The ABCB also insisted:

> *We are not convinced from the experience of Sydney and Melbourne that competition necessarily ensures better programs. We consider that one commercial station with good prospects from the outset is likely to provide a wider coverage of public events than two stations which are making a loss.*[7]

It concluded:

> The grant of two licences in Brisbane and Adelaide at the present time would be inconsistent with the expressed policy of the Government in relation to the gradual development of the television services and the local ownership and control of stations.[8]

> *The ABCB recommended that only one licence be awarded, found that none of the applicants was suitable and asked the Government to call for fresh applications.*

The ABCB's recommendation went to Cabinet in September 1958. In his autobiography James Darling, deputy chair of the ABCB, claims that Cabinet was divided on the recommendation. PMG Davidson supported it, but William McMahon, Minister for Primary Industry, opposed. According to Darling, Menzies broke the deadlock by saying, 'Oh well, better let them have it.' On 11 September Davidson announced to Parliament the ABCB's recommendation of a new round had not been accepted and that he had asked the ABCB to submit a supplementary report selecting two applicants from the existing groups.

Of the members, Darling at least gave consideration to resigning over this issue but appears not to have done so at the urging of Menzies, who held before him the prospect of other appointments.[9] He was subsequently appointed chair of the ABC. Barry Cole comments:

> *It is clear that by not resigning and by not making any suggestions of resigning, the Board not only ensured the continuation of its subservient position in respect to the Government and Parliament, it also lost a great deal of respect in the eyes of the industry.*[10]

On the other hand, media scholar Mark Armstrong is not sure what resignation would have achieved in terms of change to the institution of the ABCB.[11] Certainly it did make very clear that in politically sensitive areas such as licensing, the role of the ABCB was to be purely advisory and could be overruled by the Government.

The full work **'Networking: Commercial television in Australia'** *can be purchased from Currency House at http://www.currencyhouse.org.au/node/222*

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On the issue of the number of stations, the ABCB pointed out that the decision to offer two licences in Sydney and Melbourne did not 'set the pattern for extension of television services to other capital cities'.

7 Ibid p.25

8 Ibid p.30

9 Darling J, 1978, *Richly Rewarding*, Melbourne: Hill of Content, p.218

10 Cole, B., 1970, 'The Australian Broadcasting Control Board, 1948-1966: The history of board appointments', *Public Administration*, 29.3, 268-83, p.83

11 Armstrong M,1980, 'The Broadcasting and Television Act, 1948-1976: A case study of the Australian Broadcasting Control Board', in *Legislation and Society in Australia*, ed. by R. Tomasic (Sydney: NSW Law Foundation & Allen and Unwin), p. 142