7 December 2015

Intellectual Property Arrangements Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

By email: intellectual.property@pc.gov.au

Dear Sir/Madam

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Productivity Commission's Issues Paper addressing intellectual property (IP) arrangements.

ASTRA is the peak industry body for subscription media in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television (STV) and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major STV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

ASTRA's members make use of intellectual property arrangements to enable the delivery to consumers of a diverse range of news, information, sport and entertainment programs which convey significant social benefits to a broad cross-section of the Australian community. In 2015, one third of Australians subscribe, along with millions more who watch subscription content in public venues. Every week more than 1000 hours of first-run locally produced content is broadcast, as well as the best international content.

Balanced copyright protections also enable the subscription television industry to make substantial economic contributions. In 2014/15 ASTRA members invested more than $796 million in local content production, added $2.083 billion to the economy, and created jobs for 8370 Australians.

Since the last Government review of copyright (the Australian Law Reform Commission's (ALRC) inquiry into digital copyright), the pace of change in the Australian media industry has intensified. New technologies and consumer offerings are driving generational changes in how we consume media, and business models are under pressure to keep up. The arrival of exciting new media choices has helped create a fiercely competitive and globalised market in which Australian businesses must adapt and innovate – all to the benefit of the consumer.

Subscription television is poised to continue to make great contributions in the new media landscape, growing the economy, creating even more jobs and delivering high-value services to consumers. However, in order to fully achieve our potential and ensure global competitiveness, content creation businesses must be motivated and enabled to innovate, and a key part of that is getting the IP regulatory settings right.

IP arrangements which enable content producers and distributors to extract fair monetary returns for their investment in developing or acquiring content will mean Australian media businesses can take full advantage of opportunities to succeed – to create, to innovate and to be more productive.

The importance of copyright to Australian cultural output

The subscription TV sector, like other sectors involved in the production and distribution of content, relies on a strong legislative framework to protect the substantial investments made in creative content, and to provide certainty for content producers that they can receive a fair return on this investment. Copyright law must reflect an appropriate balance between the ability for consumers to use copyright material and the right of the copyright owner to manage exploitation of the content that the owner has invested economic and other resources to create.

The impact of convergence and the digital economy has the potential to create synergies across once separate industries to drive innovation in the communications environment, however this potential cannot be realised if content producers and distributors are not able to effectively monetise the content they produce or acquire. The ability for content producers and distributors to extract fair monetary returns for their investment in developing or acquiring content is essential for the ongoing sustainability of media and communications enterprises and for the continued investment in Australian content production.

The Productivity Commission should recognise the significant investments behind the creation and acquisition of Australian and international content, and that appropriate remuneration for the use of that content is essential for Australian producers and content distributors to continue making such investments.

ASTRA refers to the separate submission made by member Foxtel which provides data demonstrating the importance of the creative industries to the economy and society.

Competitive impact of exclusive copyright

We note the Issues Paper suggests that the exclusive nature of IP rights can create the risk of parties exercising market power or engaging in other anti-competitive behaviour. ASTRA believes the law as it currently stands provides the appropriate balance between creating the conditions necessary for investment in content creation on the one hand, and on the other, ensuring anti-competitive conduct can be addressed in a proportionate way.

ASTRA submits that there is currently no problem with exclusive rights contracts in Australia because, other than for sport (where the anti-siphoning regime substantially

restricts fair competition), content acquisition is highly competitive, and is likely only to become more competitive in the future.

Competition for rights has increased as:

- the free-to-air commercial television broadcasters have launched digital multi-channels, which means they require far more content than ever before; and
- numerous new media players and platforms have entered the market including:
    - Subscription video on demand services (eg. Presto, Netflix, Stan);
    - IPTV providers (e.g. Fetch TV);
    - mobile providers and a growing range of mobile devices (e.g. smartphones, tablets etc.);
    - local and international online download stores offering content to buy and rent (e.g. iTunes and Google Play); and
    - manufacturers of internet-enabled televisions and gaming consoles.

Competition has significantly increased for both first- and second-run rights, further increasing the substantial bargaining power of content suppliers.

In ASTRA's view, should concerns with exclusive content arise, existing Australian competition laws already provide an effective regulatory framework to deal with such issues.

<u>Retransmission</u>

ASTRA notes that the *Copyright Act 1968* provisions which enable the retransmission of free-to-air television channels on subscription TV platforms are often debated in the context of discussions regarding intellectual property arrangements. We also note the previous consideration of these issues by the ALRC.

It remains ASTRA's view that the retransmission of free-to-air broadcasts is a complex communications policy issue that cannot be addressed within the narrow scope of copyright reform, and ASTRA cautions against this Review making recommendations on the issue.

As ASTRA has consistently noted in other reviews, the existing retransmission scheme works well to the benefit of consumers and has no detrimental impact on the normal commercial operations of free-to-air television broadcasters. As discussed below, ASTRA does not consider that the reforms proposed by the free-to-air industry are justified or warranted.

Retransmission of free-to-air services by subscription television has no negative impact on advertising revenue for commercial free-to-air television services

Commercial free-to-air broadcasters argue that a retransmission right – under which subscription TV platforms would be required to obtain consent, most likely in return for financial or some other consideration, from a free-to-air broadcaster to retransmit

their channels – should be introduced for these broadcasters to "exploit the value of their services". ASTRA submits the existing regulatory framework for the retransmission of free-to-air television under the *Broadcasting Services Act 1992* (BSA) and the Copyright Act works well for both consumers and all industry stakeholders.

Commercial broadcasting services are services that provide programs that are "made available free to the general public" and that "are usually funded by advertising revenue".[1] Commercial free-to-air broadcasters argue that allowing free-to-air services to be made available "on competing platforms without consent is prejudicing the legitimate interests of broadcasters to exploit those channels, including on the terrestrial platform".[2]

However, commercial free-to-air broadcasters have never provided any evidence to suggest that the retransmission of their services by subscription TV leads to a loss of advertising revenue or potential audience reach (that is, the normal means by which commercial free-to-air broadcasters exploit the economic value of their channels):

- the BSA provides that a service provided by a commercial television broadcasting licensee is only permitted to be retransmitted within the licence area of the licensee[3] – commercial television services retransmitted on subscription TV platforms must consist of the same programs with the same advertisements as those services transmitted terrestrially within the relevant licence area, meaning that advertisers reach relevant audiences;
- retransmission has no detrimental impact on the number of households within a licence area that can adequately receive free-to-air signals (and thus be exposed to advertising on a free-to-air channel); and
- audience ratings numbers for free-to-air programs, upon which commercial free-to-air broadcaster advertising revenues are based, include free-to-air viewing in homes of subscription TV subscribers.

Commercial free-to-air broadcasters are effectively seeking an additional revenue stream from subscription TV customers for television services that are required to be both freely available and usually funded by advertising, and where those customers can already receive those services without payment.

Existing retransmission regime works well for the benefit of consumers

The retransmission of free-to-air services on subscription TV gives subscribers the convenience of not needing to move from one platform to another. Consumers who view free-to-air services via their subscription TV provider can also access these services terrestrially (or via Government-funded satellite services[4]) if they choose to do so.

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[1] *Broadcasting Services Act 1992*, s 14.

[2] Free TV submission to ALRC Issues Paper, 10 December 2012, p.5.

[3] Subject to the payment of equitable remuneration to the underlying rights holders: BSA, s 212.

[4] The Australian Government funds a free-to-air satellite service – Viewer Access Satellite Television (VAST). VAST is provided to viewers in remote areas of Australia who do not receive digital television through normal antennae – because, for example, there is local interference, terrain or distance from the transmitter in their area.

The retransmission of free-to-air broadcasts on subscription TV has, up to this point, been successfully achieved under the existing regulatory regime for retransmission and through commercial negotiation between subscription TV platform providers and commercial and national television broadcasters.[5] There is no public policy justification for regulatory intervention in a process which works effectively in the interests of the consumer and the underlying rights holders in the programs broadcast by free-to-air services.

Previous ALRC proposals

We note that under the terms of reference for the current review, the Productivity Commission is required to consider the recommendations of the ALRC's Copyright and the Digital Economy report.[6] In its final report, the ALRC concluded that the "Australian Government should consider the repeal of the retransmission scheme for free-to-air broadcasts."[7]

ASTRA believes this recommendation is neither justified or warranted.

As previously submitted by ASTRA, free-to-air broadcast signals are universally and freely available in Australia. Where a service is retransmitted on a subscription TV platform for the convenience of subscribers (as recognised by the Copyright Tribunal), and merely facilitates another way of navigating to free-to-air channels that are otherwise already able to be received, there is no case for imposing new cost and administrative burdens on subscription TV providers by introducing an additional licensing scheme.

Retransmission is an extremely limited right and an insignificant exception to the free-to-air broadcast copyright – as noted, the retransmission must be simultaneous, unaltered and must be made available in the same licence area in which the free-to-air service is available terrestrially. Where retransmission occurs, commercial broadcasters are already remunerated through advertising revenue (and through statutory licence fees where they own the underlying copyright in material broadcast). Where retransmission does not currently occur, it is even less likely if an additional and unjustified free-to-air revenue stream were to be introduced.

Must carry obligations

ASTRA agrees with the conclusion of the ALRC that the issue of a must-carry regime – under which free-to-air broadcasters have the option of requiring that free-to-air broadcasts be carried on cable or another platform – should not be considered in the context of intellectual property, as "the policy rationales for must carry regimes are based primarily on communications policy and are not issues that can, or should, be driven by reform of copyright laws."[8]

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[5] Foxtel is already required to enter into agreements with the FTA broadcasters in respect of retransmission – dealing with matters such as delivery of signals and data for electronic program guides – and the FTA broadcasters exercise significant bargaining power in the negotiation of these agreements.

[6] Terms of Reference 3(i)

[7] ALRC Final Report, p 391

[8] ALRC Final Report, p 403

Given the issue of must carry obligations and retransmission consent may be considered in the broader context of media and communications policy, ASTRA reiterates its position that existing retransmission arrangements are appropriate and that there is no evidence of a need for US-style must carry/retransmission consent scheme in Australia:

- The particular public policy concerns that drove the introduction of 'must carry' regimes in the United States and Europe have never existed in Australia.
- The primary public policy objectives of 'must-carry' regimes in these countries are to ensure consumers are able to access free-to-air television services that may not otherwise be available to them, and to ensure the viability of free-to-air commercial television broadcasters through being able to reach all consumers in their advertising market.
- The must-carry scheme in the US has become a complex and contested mechanism which some argue is being misused by free-to-air broadcasters to secure lucrative additional revenue streams from cable customers.[9]
- In Australia, the public policy rationale of ensuring universal access to free-to-air television does not apply. Consumer access to reliable free-to-air television services in Australia is not contingent on subscribing to a subscription TV platform, unlike many parts of Europe and the United States. Indeed, in regional areas, subscription TV has never retransmitted free-to-air commercial television services.

Thank you for the opportunity to comment on the Productivity Commission's Issues Paper. If you have any queries in relation to the above, please contact Holly Brimble, Policy and Regulatory Manager (holly.brimble@astra.org.au).

Yours sincerely

Andrew Maiden

CEO

[9] Indeed, the US regulator, the Federal Communications Commission, is currently reviewing the rules governing retransmission consent negotiations between subscription television operators and broadcasters – in particular, aspects of the statutory duty to negotiate in good faith. Failures in negotiation in the US have led to channel blackouts and increases in carriage fees, which are said to have been passed on to cable customers. For more information see https://www.fcc.gov/encyclopedia/retransmission-consent.