



29 August 2013

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

By email to ec.sen@aph.gov.au

Dear Committee Secretary,

Foxtel submission – Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013

Foxtel is concerned about the introduction of the *Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013* (the **Bill**), referred to the Senate Standing Committees on Environment and Communications on 27 June 2013.

Firstly, in light of the fact that the Australian Law Reform Commission (**ALRC**) is currently conducting an inquiry into the matter of whether the exceptions and statutory licences in the *Copyright Act 1968* (the **Act**) are adequate and appropriate in the digital environment (including whether a fair use defence should be introduced into Australian law), we believe that the timing of the Bill is wholly inappropriate. The ALRC has conducted two consultation processes but has not yet issued a final report.

While acknowledging the ALRC Inquiry, it is suggested in the Bill's second reading speech that '*...testing how fair use might translate to the Australian legal system is worth beginning in parallel to that process*'.¹ Foxtel disagrees and considers it inappropriate that Parliament be asked to consider such substantial reform without the benefit of the findings of the ALRC Inquiry and its publication of the detailed submissions of affected stakeholders. Nonetheless, Foxtel sets out below its views on fair use.

Fair use

If passed, the Bill would introduce to the Act an overarching defence for so-called 'fair use of a copyrighted work', which would include, *but not be limited to* uses for the purposes of criticism, comment, news reporting, teaching, scholarship and research.

Foxtel is strongly opposed to the introduction of a broad fair use defence. As we have submitted to the ALRC's Inquiry, we believe that replacing well-

¹ Copyright Legislation Amendment (Fair Go for Fair Use) Bill 2013, Second Reading Speech, 27 June 2013 – available at http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/81320ab7-05a7-4deb-b6c9-aeba0e6b51bf/0064/hansard_frag.pdf;fileType=application%2Fpdf.

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established defences which are limited to specifically defined purposes with an open-ended fair use defence would introduce significant and unnecessary uncertainty into Australian law. It will take many years to develop new precedents and the scope of fair use in Australia will need to be developed through the Courts, at rights holders' expense.

The fact that it will be rights holders who would be required to fund the setting of parameters around the defence is acknowledged in the Bill's second reading speech where it is suggested that a fair use doctrine:

...allows people developing new technologies or who [are] reproducing and transforming culture to make an assessment of whether their use is fair and if they are challenged they have to defend their use or negotiate terms with the copyright holder.

In 2011–12 the Australian subscription television sector invested \$667 million in Australian content, employing 6,461 people.² We do not believe that copyright owners should have to incur significant litigation costs—costs which will affect their ability to invest in new content—to protect these investments and to set the boundaries of new and uncertain law.

We are also very concerned that fair use will limit the scope of Australian copyright protection, and allow unlicensed third parties to benefit at the expense of rights holders, at a time when there is clear evidence of unauthorised use of copyright materials by a significant proportion of the Australian population.

Foxtel does not agree that changing conditions, such as the rapid technological advances that are taking place in the digital economy, are a proper basis for abandoning well-established Australian jurisprudence in favour of the amorphous concept of fair use.

We would otherwise refer the Committee to pages 11 to 18 of Foxtel's recent submission to the ALRC Inquiry, which is available on the ALRC's website at: http://www.alrc.gov.au/sites/default/files/subs/748_org_foxtel_submission.pdf.

Geoblocking mechanisms

The intention of the Bill appears to be to remove the ability for geoblocking mechanisms to be used to set different conditions for acquisition and use of content in different territories. Foxtel strongly opposes these proposed amendments to the Act.

Geoblocks play a vital role in supporting Australia's creative industries. Our ability to include attractive international content as part of our subscription packages underpins our substantial investment in Australian content. Geoblocking also enables the producers of Australian programs to maintain their value in the international market—for example, by licensing content for use in markets where it will be protected by robust intellectual property laws, so that a fair return on their investment can be obtained.

² Australian Subscription Television and Radio Association, Media Release, *Subscription TV industry investment in Australian content production increases by 13%*, 31 October 2012 – available at http://www.astra.org.au/ArticleDocuments/116/ASTRA_AustralianContentSurvey_Announcement_31Oct12.pdf.aspx?Embed=Y.

An assumption underlying the Bill appears to be that geographic market segmentation is in itself a problem. Foxtel disputes this assumption. Indeed, the Chairman of the ACCC, Rod Sims, has recently noted that it is not against the law for an international producer and owner of a product to set different conditions, including price, in different countries.³

Where, for example, Foxtel acquires internationally produced content and is licensed to be one of, or the exclusive provider of that content in Australia on a particular platform, or in a particular distribution window, this allows Foxtel to package and present that content in a way that is relevant to Australian audiences. It is efficient for the producer as Foxtel is the point of contact for customers in Australia; and, customers have the confidence of having their financial transactions processed in Australia.

Moreover, the Bill fails to recognise that the Australian market is already responding to consumer desire for entertainment content at different prices, available on different devices and available as soon as possible after the international premiere of premium programming.

For example, in addition to our cable and satellite services and packages, Foxtel has recently launched a new internet TV service know as 'Foxtel Play'—with lower price points, no lock-in contracts and simple and fast installation on a range of devices.

Innovation in our service offering has been matched with content innovations such as our 'Express from the US' strategy, a major initiative to deliver television series to Foxtel customers within seven days of the episode screening in the US, and in many cases within hours.

Appropriate copyright protections are central to Foxtel being able to offer excellent programming to our subscribers and, in so doing, support large numbers of Australian jobs and make a valuable contribution to Australia's digital economy. It is Foxtel's strongly held view that our substantial content investments must be appropriately protected by copyright law. It is for this reason that we oppose the weakening of copyright protection through the introduction of a broad and uncertain fair use defence, as well as steps to undermine geographic market segmentation via geoblocking.

Yours sincerely,

Bruce Meagher
Director, Corporate Affairs

³ Australian Broadcasting Corporation, Lateline transcript, *Australians pay too much for technology*, segment broadcast 29 July 2013 – available at <http://www.abc.net.au/lateline/content/2013/s3813758.htm>.