



Hostages to cable

The Government's cable retransmission decision may represent a significant policy failure argues **Paul Mallam**, a partner at law firm Blake Dawson Waldron.

In 20 years time, if the information age does not live up to our expectations, retransmission of free-to-air will mark one of our more significant policy failures. The issue represents a roadblock in the information highway which will reduce competition and erect barriers to entry by new competitors.

It is worth noting that the Federal Court's Foxtel decision (which is subject to appeal) is couched in apparently very wide terms. It allows any person to retransmit free-to-air television or radio signals with impunity due to the effect of section 212 of the *Broadcasting Services Act*. That is an extraordinary situation, depriving the free-to-air broadcasters of any control over their output.

Cable re-transmission of free-to-air broadcasts is contrary to basic principles of intellectual property, under which an owner of copyright holds and controls all rights in the copyright. Secondly, it is contrary to the legislative intention of section 212 which was intended to allow self-help groups to re-transmit the signals of free-to-air broadcasters in areas of poor reception. Thirdly, it is contrary to the recommendations of the Copyright Convergence Group.

In those circumstances it is reasonable to expect that the Federal Government and proponents of the Foxtel decision bear some onus to justify this gap in copyright protection. However, no policy rationale has emerged from the Government. Foxtel has justified its decision to re-transmit free-to-air broadcasts on the basis that it will provide better reception. But this is tantamount to suggesting that anyone should be entitled to take the output of another

person, if they can lay claim to improving upon it. As a rationale for re-transmitting the free-to-air signals throughout Australia, it is nonsensical. Australia overall has some of the best quality free-to-air television reception in the world - certainly far superior to the US, where rules permitting cable to carry free-to-air signals were originally developed (but are no longer in force).

When considered in economic terms, the cable retransmission is even more curious. In simple terms, free-to-air broadcasters perform two functions: they create or acquire content and they deliver that content to audiences. On the content side, the Trade Practices Commission is considering whether free-to-air television and pay TV compete in the same market, in the context of its consideration of the Foxtel/Australis merger.

If the programs of free-to-air and pay TV compete for audiences, this makes all the more extraordinary the Government's decision not to amend section 212. In effect, it is allowing one competitor to trap the 'content shelves' of another - a neanderthal economic exercise, in this age of competition-induced economic reform.

Even if the programs of pay TV and free-to-air do not compete, competition between them as delivery platforms must also be considered. This, of course, includes the area of actual and potential competition. At present the 'vertical blanking interval' of a free-to-air television signal can be used to carry teletext and other services.

However, with the development of digital technology, free-to-air television will be able to carry an increased range of services. As a deliv-

ery platform, this ability would allow free-to-air to compete with pay TV, in the provision of multiple services.

This potential must be seen against the fact that there are only three basic ways of delivering entertainment and information to the home - physical delivery, for example newspapers and home video rental; cable, which involves enormous infrastructure costs; and over-the-air transmission. Each form of delivery is constrained by the ability to obtain popular or core programming, around which to build other services. Free-to-air television is the only delivery platform apart from pay TV controlled delivery platforms with access to this 'core' popular programming. So where are new sources of competition in the delivery of entertainment and information likely to emerge? The sources of potential competition are extremely limited, with the most likely being free-to-air television. A free-to-air television signal will be capable of being 'enriched' within the foreseeable future, so that it is able to provide an array of services. These could include data, narrowcast and other audiovisual services. But the effect of cable re-transmission is that this is not likely to occur.

In the long term, as cable penetration increases and it becomes the primary delivery platform in Australia, dominated by only two players, the chance of creating opportunities for other entrants will slip away.

Indeed, free-to-air potentially becomes a 'hostage' to cable, dependent on cable as its primary delivery mechanism. No doubt this will suit cable-based pay TV operators, but it is not necessarily in Australia's interests. □