

The Senate

Environment and Communications
References Committee

Effectiveness of current regulatory arrangements
in dealing with radio simulcasts

July 2013

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Recommendations

Recommendation 1

2.84 The committee recommends that the Minister for Broadband, Communications and the Digital Economy seek to resolve the ambiguity in the existing determination, either through a new determination, having regard to any other potential consequences of such action, or by negotiating a satisfactory agreement between the two key stakeholders pending a comprehensive response at the earliest opportunity to the findings of the Convergence review, ALRC review and other outstanding issues regarding the interaction of broadcasting and copyright law.

Recommendation 2

2.85 The committee recommends that the Minister for Broadband, Communications and the Digital Economy and the Attorney-General fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews, and by many stakeholders, following receipt of the ALRC review later this year.

Abbreviations and acronyms

AAM	Association of Artist Managers
ABC	Australian Broadcasting Corporation
ABS	Australian Bureau of Statistics
ACC	Australian Copyright Council
ACMA	Australian Communications and Media Authority
AIR	Australian Independent Record Labels Association
ALRC	Australian Law Reform Commission
ARIA	Australian Recording Industry Association
CAG	Copyright Advisory Group
CRA	Commercial Radio Australia
Cth	Commonwealth
ICT	Information and communication technology
IFPI	International Federation of the Phonographic Industry
PPCA	Phonographic Performance Company of Australia
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
SBS	Special Broadcasting Service
Sony	Sony Music Entertainment Australia
UMA	Universal Music Australia
WIPO	World Intellectual Property Organisation

Chapter 1

Introduction

Conduct of the inquiry

1.1 On 21 March 2013, the Senate referred the following matter to the Environment and Communications References Committee (the committee) for inquiry and report by 1 June 2013:

The effectiveness of current regulatory arrangements (under the *Broadcasting Services Act 1992* and the *Copyright Act 1968*) in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the Internet ('simulcast'), including:

- (a) the impact of current regulation on stakeholders, including broadcasters, copyright holders, including both publishing and performance rights holders, and the audience; and
- (b) any related matter.¹

1.2 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations inviting submissions by 26 April 2013. The committee also advertised the inquiry in *The Australian* on 27 March 2013.

1.3 The committee received 16 submissions (see Appendix 1 for a list of submissions). Based on the quality of evidence in written submissions, the committee resolved to prepare its report without holding a public hearing. The committee also asked specific questions of the Department of Broadband, Communications and the Digital Economy (DBCDE), the Attorney-General's Department (AGD) and other key stakeholders to address concerns and queries.

1.4 The committee would like to thank all the organisations that contributed to the inquiry.

The digital world

1.5 Information and communication technology (ICT) plays an important role in changing the way in which people live, work and do business.² ICT products include computer hardware and software, telecommunications equipment and infrastructure, and computer and telecommunication services. These products are the core drivers of the digital world.

1.6 The development and use of ICT since the turn of the century has increased significantly. Since 2000 the percentage of Australian households with access to a computer increased from 53 per cent to 83 per cent in 2010.³ At the end of June 2011

1 *Journals of the Senate*, No. 143—21 March 2013, pp 3869–3870.

2 Australian Bureau of Statistics (ABS), *2012 Year Book Australia*, ABS Catalogue No. 1301.0, 2012, Canberra, p. 689.

3 ABS, *2012 Year Book Australia*, ABS Catalogue No. 1301.0, 2012, Canberra, p. 691.

there were 10.9 million internet subscribers in Australia (excluding internet connections through mobile handsets), with household subscriptions accounting for 80 per cent of this total.⁴ The remaining 20 per cent of connections were business and government subscribers.⁵

1.7 There has also been a significant rise in the variety and number of devices that have access to the internet, including mobile phones and tablets. At the end of June 2011 there were 9.7 million mobile handset subscribers in Australia able to access the internet via mobile phone.⁶ Remarkably this represented an increase of 18 per cent from six months earlier in December 2010.⁷

1.8 The development and proliferation of ICT has meant that more and more people are able to access information and content online. Innovative services not previously imagined have emerged, such as YouTube and Spotify, and traditional broadcasting services are available in new ways, such as radio and television delivered over the internet.⁸ The Australian Communications and Media Authority (ACMA) has identified that the historical distinctions between radio communications, telecommunication, broadcasting and the internet are breaking down:

...digitalisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences.⁹

Regulatory framework

1.9 The Commonwealth government's 2012 Convergence Review recognised that despite the advancements in technology and the accessibility of content online, 'Australia's policy and regulatory framework for content services is still focused on the traditional structures of the 1990s—broadcasting and telecommunications'.¹⁰ The Convergence Review stated:

4 ABS, *2012 Year Book Australia*, ABS Catalogue No. 1301.0, 2012, Canberra, p. 692.

5 ABS, *2012 Year Book Australia*, ABS Catalogue No. 1301.0, 2012, Canberra, p. 692.

6 ABS, *2012 Year Book Australia*, ABS Catalogue No. 1301.0, 2012, Canberra, p. 694.

7 ABS, *2012 Year Book Australia*, ABS Catalogue No. 1301.0, 2012, Canberra, p. 694.

8 Youtube is a video-sharing website where users can upload, share and view content. Spotify is a commercial music streaming service where, for a subscription fee, a user can listen to an unlimited amount of music streamed over the internet.

9 Australian Communications and Media Authority (ACMA), *Digital Australians—Expectations about media content in a converging media environment*, October 2011, p. 7, available at: http://www.acma.gov.au/webwr/assets/main/lib410130/digital_australians-complete.pdf (accessed 16 May 2013).

10 Australian Government, *Convergence Review: Final Report*, March 2012, p. vii, available at: http://www.dbcde.gov.au/data/assets/pdf_file/0007/147733/Convergence_Review_Final_Report.pdf (accessed 24 May 2013).

The distinction between these categories [broadcasting and telecommunications] has become increasingly blurred and these regulatory frameworks have outlived their original purpose. These frameworks now run the risk of inhibiting the evolution of communications and media services.¹¹

1.10 The Convergence Review concluded that 'a new policy and regulatory framework is needed to support these outcomes'.¹²

1.11 One such area of regulation overtaken by technological developments is in relation to copyright. As advances in technology and evolving business models are providing new ways of accessing and distributing content, implications arise for content rights holders and for users. The Australian Law Reform Commission (ALRC) has remarked upon the influence of technology on copyright law:

Technology has brought new means of copying; digitisation reduces the costs of copying and raises the costs of enforcement. In addition, changes or developments in the attitude of consumers and users of copyright material has led to reduced recognition that copyright is a form of property, that is owned by a creator (or more usually, the assignee of a creator) and that moral rights and issues of attribution and integrity of works may be significantly compromised in a 'freed up' copyright environment.¹³

1.12 Of particular concern to the committee's inquiry is the effectiveness of current broadcasting and copyright legislation to deal with the transmission of radio broadcasts via traditional broadcasting bands (i.e. the radiofrequency spectrum) whilst simultaneously being broadcast over the internet (simulcasting).

Copyright

1.13 Copyright law has historically been included among laws which granted property rights for mental labour.¹⁴ In this tradition copyright law has been regarded primarily as conferring economic rights, focusing on the protection of commercial activities designed to exploit material for profit.¹⁵

1.14 The rights of individuals to protect their moral and material interests are recognised in the United Nations' *Universal Declaration of Human Rights*.¹⁶ In Australia, property rights in the creative effort of mental labour are protected by the *Copyright Act 1968* (Cth).

1.15 The prime purpose of the Copyright Act is to:

11 Australian Government, *Convergence Review: Final Report*, March 2012, p. vii.

12 Australian Government, *Convergence Review: Final Report*, March 2012, p. vii.

13 Australian Law Reform Commission (ALRC), *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 12, available: <http://www.alrc.gov.au/publications/copyright-ip42> (accessed 10 May 2013).

14 ALRC, *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 12.

15 ALRC, *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 12.

16 United Nations, *Universal Declaration of Human Rights*, Article 27(2).

...protect creative works so that authors, composers, artists and sculptors may, during the continuance of copyright protection, control the uses to which their works are put and get some return for the exploitation of their works. But it is not only creative works, as that term might commonly be understood, that are protected by copyright law. Any literary, dramatic, musical or artistic work which has some slight degree of originality is protected, no matter how prosaic that work might be.¹⁷

Copyright Act broadcast exceptions

1.16 In addition to conferring property rights in the creative effort, the Copyright Act recognises that it is also necessary to have regard to those who use copyright material:

The broadcasting and television industry, the record industry and much of the entertainment industry depend on being able to use copyright material on reasonable terms.¹⁸

1.17 To this end, section 109 of the Copyright Act provides an exception from copyright laws for the broadcasting of sound recordings (subject to a licencing scheme) to facilitate access by broadcasters to published sound recording repertoire.¹⁹ Copyright in a published sound recording is not infringed by the making of a broadcast (other than a broadcast transmitted for a fee) if remuneration is paid by the broadcaster to the copyright owners in accordance with a statutory licensing scheme.²⁰

1.18 In creating a statutory licensing scheme, either the copyright owner or the holder of a broadcasting licence may apply to the Copyright Tribunal²¹ for an order determining the amount payable in respect of the broadcasting of the recordings.²²

1.19 When making a determination in relation to a statutory licensing scheme, section 152 of the Copyright Act limits the Copyright Tribunal in setting the amount

17 The Hon. Lionel Bowen MP, Attorney-General, 'Second Reading Speech Copyright Bill 1968', *House of Representatives Hansard*, 16 May 1968, p. 1527.

18 The Hon. Lionel Bowen MP, Attorney-General, 'Second Reading Speech Copyright Bill 1968', *House of Representatives Hansard*, 16 May 1968, p. 1527.

19 ALRC, *Submission I*, p. 1.

20 ALRC, *Submission I*, p. 1.

21 The Copyright Tribunal is an independent body established under section 138 of the *Copyright Act 1968*. Generally, the Tribunal has jurisdiction with respect to statutory licences (licences to permit reproduction of certain copyright materials by educational institutions) and voluntary licenses (licences negotiated between a copyright holder or its representative, such as a collecting society, and the licensee).

22 ALRC, *Submission I*, p. 1.

payable by broadcasters to copyright holders by way of a legislative cap.²³ The Copyright Tribunal may not award payment of more than one per cent of the gross earnings of a commercial or community radio broadcaster. This is referred to as the "one per cent cap".²⁴

1.20 The Australian Broadcasting Corporation (ABC) is also entitled to a legislative cap on the amount of fees payable to copyright holders under section 152. The Copyright Tribunal may not award more than one-half of one cent (\$0.005) multiplied by the number of Australians (as determined by the Australian Bureau of Statistics).²⁵

1.21 Section 109 of the Copyright Act is specific in applying only to broadcasts delivered by a "broadcasting service" as defined in the *Broadcasting Services Act 1992* (Cth).

Broadcasting Services Act

1.22 Subsection 6(1) of the Broadcasting Services Act defines "broadcasting service" as a service that delivers television or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre or satellite.²⁶ There are certain exceptions to this definition, including that the minister may determine that a particular service does not fall within this definition.²⁷

1.23 In September 2000, the Minister for Communications, Information, Technology and the Arts, Senator the Hon Richard Alston, made such a ministerial declaration specifying that the following class of service does not fall within the definition of "broadcasting service":

...a service that makes available television programs or radio programs using the internet, other than a service that delivers television programs or radio programs using the broadcasting services bands.²⁸

23 The legislative caps contained in section 152 have twice been the subject of a Commonwealth government review. Both reviews recommended the removal of the legislative caps. See Shane Simpson, *Review of the Australian collecting Societies: A report to the Minister for Communications and the Arts and the Minister for Justice*, July 1995, p. 6, available at: <http://arts.gov.au/sites/default/files/pdfs/the-simpson-report-1995.pdf> (accessed 24 May 2013); and Review of the Intellectual Property Legislation Under the Competition Principles Agreement, *Final Report by the Intellectual Property and Competition Review Committee*, September 2000, p. 115.

24 ALRC, *Submission 1*, p. 2.

25 *Copyright Act 1968*, ss. 152(11).

26 *Broadcasting Services Act 1992*, s. 6(1).

27 *Broadcasting Services Act 1992*, s. 6(1).

28 The Hon. Richard Alston, Minister for Communications, Information, Technology and the Arts, *Determination under paragraph (c) of the definition of "broadcasting service"*, Ministerial Declaration No. 1 of 2000, 12 September 2000, available at: <http://www.comlaw.gov.au/Details/F2004B00501> (accessed 17 May 2013).

1.24 The minister explained that the purpose of the definition is to ensure that a service that 'provides television or radio programs through the internet—other than a service that delivers television programs and radio programs using the broadcasting services bands—does not fall within the definition of 'a broadcasting service'.²⁹

1.25 The ministerial declaration was made in response to amendments to the Broadcasting Services Act that facilitated the introduction of digital television and datacasting services to Australia.³⁰ Legislative changes were required to ensure that datacasting services remained distinct from broadcasting services. The minister stated that in introducing the changes, it was 'never the [g]overnment's intention to consider internet video and audio streaming outside the broadcasting services bands as broadcasting'.³¹

1.26 Complexity arises in the current regulatory arrangements in relation to internet simulcasts when radio stations, which are broadcasting services, commonly stream content simultaneously on the internet that is identical to their terrestrial broadcasts.³²

Federal Court case

1.27 The provision of section 109 of the Copyright Act and the definition of "broadcasting service" as stipulated in the Broadcasting Services Act was recently tested in the Federal Court of Australia.

1.28 On 3 February 2010, the Phonographic Performance Company of Australia (PPCA) commenced proceedings against Commercial Radio Australia (CRA) seeking declarations that the communication of sound recordings over the internet by CRA members was outside the scope of the copyright licence granted under an industry agreement. The argument centred on whether internet simulcasts made by a broadcaster (such as a radio station) were considered a broadcast under subsection 6(1) of the Broadcasting Services Act.

1.29 At first instance, the decision was found in favour of the CRA, with the proceedings dismissed. The PPCA subsequently filed a notice of appeal and the Full Court decision was handed down on 13 February 2013.³³

29 The Hon Richard Alston, Minister for Communications, Information Technology and the Arts, 'Internet video and audio streaming defined', Media release No. 127/2000, 27 September 2000, p. 1.

30 See *Television Broadcasting Services (Digital Conversion) Act 1998* (Cth); and *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* (Cth).

31 The Hon Richard Alston, Minister for Communications, Information Technology and the Arts, 'Video and audio streaming', Media release No. 073/2000, 21 July 2000, p. 1.

32 ALRC, *Submission 1*, p. 2.

33 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013], FCAFC 14, available at: <http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2013/2013fcafc0011> (accessed 16 May 2013).

1.30 The Full Court unanimously upheld the appeal, finding that the broadcast of radio programs using the broadcasting services bands was a broadcasting service that fell within the scope of the copyright licence granted by the PPCA.³⁴ However the simultaneous transmission of the radio program over the internet constituted a separate and distinct service that fell outside the scope of the licence. The Court held that:

...the delivery of the radio program by transmission from a terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet.³⁵

1.31 The Federal Court's decision means that a radio broadcaster's internet simulcasts were not covered by the licensing agreement struck between the PPCA and CRA for the right to broadcast material.

1.32 The CRA has made an application seeking leave to appeal to the High Court.³⁶ No appeal has yet been made.

Australian Law Reform Commission review

1.33 On 29 July 2012 the Australian Law Reform Commission (ALRC) was tasked with undertaking an inquiry into copyright and the digital economy.³⁷ The inquiry follows on from the Commonwealth government's 2012 Convergence Review into media and communications regulation. task

1.34 The ALRC has been charged with investigating the objective of copyright law in providing an incentive to create and disseminate original copyright materials, the general interest of Australians to access, use and interact with content and Australia's international obligations regarding copyright law.³⁸

1.35 The ALRC is also specifically examining the issue of whether the Copyright Act can be amended to make statutory licensing schemes operate more effectively in the digital environment and to better facilitate access to copyright material and to give rights holders fair remuneration.³⁹

1.36 An issues paper for the inquiry was released in August 2012. On 5 June 2013, a discussion paper containing proposals for reform of copyright law was released.⁴⁰ The discussion paper considered the issue of simulcasting and stated that:

34 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013], FCAFC 14.

35 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013], FCAFC 14.

36 ABC, CRA, CBAA and SBS, *Supplementary Submission 12*, p. 3.

37 ALRC, *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 3.

38 ALRC, *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 3.

39 ALRC, *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 9.

40 ALRC, *Copyright and the Digital Economy: Issues Paper 42*, August 2012, p. 12, available: <http://www.alrc.gov.au/publications/copyright-ip42> (accessed 10 May 2013).

In the context of media convergence, the continuing distinction between broadcasts and other electronic communications to the public in relation to copyright exceptions seems difficult to justify. There may be no reason, in copyright policy terms, why radio broadcasters should have access to a statutory licensing scheme under s 109 [of the Copyright Act], while internet radio services are required to negotiate licences with collecting societies to transmit sound recordings.⁴¹

1.37 The ALRC proposed in its discussion paper that the statutory licensing scheme under section 109 of the Copyright Act should be amended to apply to the transmission of television or radio programs using the internet.⁴² This would mean all broadcasts, irrespective of whether they are simulcast or a standalone broadcast on a single platform, would be captured by the licensing scheme.

1.38 Final recommendations of the ALRC's inquiry will be released on 30 November 2013.

41 ALRC, *Copyright and the Digital Economy: Discussion Paper 79*, June 2013, p. 341, available at: http://www.alrc.gov.au/sites/default/files/pdfs/publications/dp79_whole_pdf.pdf (accessed 11 July 2013).

42 ALRC, *Copyright and the Digital Economy: Discussion Paper 79*, June 2013, p. 341 and see also proposal 16-1 at p. 347.

Chapter 2

Discussion of key issues

2.1 The committee received 16 submissions to the inquiry, mostly from the music recording industry, copyright groups and the commercial radio sector.

2.2 The Phonographic Performance Company of Australia (PPCA) and its supporters in the music industry informed the committee that copyright holders should be entitled to receive fair compensation for the exploitation of their work.¹ The organisations however requested that the committee not recommend any isolated changes to the current broadcasting and copyright regulations. They argued that no changes to policy should be considered until the Australian Law Reform Commission (ALRC) completes its inquiry into copyright, and the impact of the Federal Court's determination of the matter between the PPCA and Commercial Radio Australia (CRA) has been assessed.²

2.3 Conversely the commercial and community radio sector urged the committee to recommend that a new ministerial determination be issued that clarifies that a radio or television simulcast is considered to be a "broadcasting service" under the Broadcasting Services Act.³ The sector argued that the public benefit in maintaining the current interpretation of a simulcast outweighs any benefits that may arise from considering a simulcast to be a separate broadcast.⁴

Threats to the music industry

2.4 The music industry raised concerns that the profitability of many artists and businesses are under threat from deficiencies in copyright law.⁵ Research prepared for the Australia Council was cited to show that the average earnings of artists are low and considerably less than other occupations requiring similar periods of professional training.⁶ The industry argued that it operates in a high-risk environment, with artists

1 Phonographic Performance Company of Australia (PPCA), *Submission 8*, p. 43. See also Association of Artist Managers (AAM), *Submission 4*, p. 1; Universal Music Australia (UMA), *Submission 5*, p. 2; Australian Independent Record Labels Association (AIR), *Submission 6*, p. 1; Sony Music Entertainment Australia, *Submission 10*, p. 2; Australian Recording Industry Association (ARIA), *Submission 11*, p. 1.

2 PPCA, *Submission 8*, p. 43.

3 Australian Broadcasting Corporation (ABC), Commercial Radio Australia (CRA), Community Broadcasting Association of Australia (CBAA) and Special Broadcasting Service (SBS), *Submission 12*, p. 15.

4 ABC, CRA, CBAA and SBS, *Submission 12*, p. 14.

5 AAM, *Submission 4*, p. 1; UMA, *Submission 5*, p. 2; AIR, *Submission 6*, p. 1.

6 AAM, *Submission 4*, p. 2. See also David Throsby and Virginia Hollister, *Don't give up your day job: An economic study of professional artists in Australia*, Australia Council, 2003, available at: http://www.australiacouncil.gov.au/_data/assets/pdf_file/0007/32497/entire_document.pdf (accessed 20 May 2013).

and businesses investing both time and financial resources into the creation of sound recordings.⁷

2.5 According to the Association of Artist Managers (AAM), if artists are to continue to create and produce the quality content modern digital services rely upon, 'they need the protection of a robust copyright law to provide certainty, protection and a basis for investment in these inherently high-risk endeavours'.⁸ The Australian Independent Record Labels Association (AIR) similarly contended that for many small Australian businesses and artists to remain viable, strengthened copyright laws are needed:

Their ability [small businesses and artists] to build livelihoods, sustainable business models, and continue the cycle of investment and creative output, is based on the protections afforded to rights holders through Australia's copyright framework.⁹

2.6 In addition to the threat that poor copyright regulation may have on small and independent recording artists, large record companies expressed their concern for the music industry in light of technological developments.¹⁰ The digitisation of music and the unauthorised downloading and streaming of recorded music have presented challenges to the industry. According to Universal Music Australia (UMA):

The significant decline in the overall size of the recorded music industry started when digitisation of music content began to take off in the early 2000s. The prevalence of illegitimate music download and streaming platforms in the digital space has led to a rapid decline in willingness to pay for recorded music. UMA's view is that appropriate regulatory models that support innovation and growth are critical in the digital age.¹¹

2.7 UMA informed the committee that over the past ten years the total revenues from legitimate recorded music sales have declined severely, both globally and in Australia.¹² The company claimed that in real terms, revenue has more than halved over the same period.¹³

2.8 The music industry therefore concurred with the PPCA in arguing that Australian copyright regulation needs to ensure that 'those who create and invest in the creation of sound recordings can be remunerated fairly for the use of their creative works'.¹⁴

7 AIR, *Submission 6*, p. 2.

8 AAM, *Submission 4*, p. 2.

9 AIR, *Submission 6*, p. 1.

10 UMA, *Submission 5*, p. 2; Sony Music Entertainment Australia, *Submission 10*, p. 2.

11 UMA, *Submission 5*, p. 2.

12 UMA, *Submission 5*, p. 2.

13 UMA, *Submission 5*, p. 2.

14 PPCA, *Submission 8*, p. 1.

Simulcasting

Arguments put forward by the music industry

2.9 The PPCA is a non-profit copyright collecting society that represents the interests of Australian artists, record companies and labels.¹⁵ The PPCA is provided with a mandate by the artists and labels that it represents to manage their specified copyright works. This arrangement provides copyright owners with the ability to receive payments for the use of their copyright works on a collective basis thereby minimising administration and enforcement costs for the copyright owner. It also enables broadcasters to enter into blanket licences which provide access to a wide range of recordings without the need to negotiate separate licences with each copyright holder.¹⁶

2.10 The PPCA made a submission on behalf of its members which include 1200 record companies and copyright holders, 15 000 record labels and 2500 artists.¹⁷ The AAM, UMA, AIR, Sony Music Entertainment Australia (Sony) and the Australian Recording Industry Association (ARIA) made submissions supporting the PPCA.

2.11 The PPCA, on behalf of its members, argued that amending regulations to consider a radio simulcast as a "broadcasting service" as defined in the Broadcasting Services Act would be to the detriment of copyright holders.¹⁸ The PPCA expressed the view that any legislative change that treated internet simulcasts in the same way that current broadcasts are treated under the Copyright Act would have undesirable outcomes, including:

- stifling innovation and fair competition in the emerging internet streaming market;
- constraining the Copyright Tribunal in its ability to equitably adjudicate licence agreements; and
- creating inconsistent treatment for copyright owners.¹⁹

Innovation and competition in the internet streaming market

2.12 In the PPCA's opinion, radio broadcasts and their simultaneous streaming online represent two different services and should be recognised as such.²⁰ Terrestrial radio broadcasts are confined to particular geographic licence areas, whilst their simulcast online is not restricted and can be heard around the world. According to the PPCA, these services represent separate and distinct activities with the online

15 PPCA, *Submission 8*, p. 2.

16 PPCA, *Submission 8*, p. 2.

17 PPCA, *Submission 8*, p. 2.

18 PPCA, *Submission 8*, p. 36.

19 PPCA, *Submission 8*, pp 31–34.

20 PPCA, *Submission 8*, p. 31.

simulcasting of radio simply being 'another way of increasing the revenue base for the shareholders of these broadcasting companies'.²¹

2.13 The PPCA believed that any decision to not recognise a radio broadcaster's online simulcast as a distinct service will provide a significant advantage to terrestrial radio broadcasters at the expense of businesses solely concerned with providing content online.²² Currently, customised streaming services that provide music over the internet enter into voluntary, commercial licences with the PPCA or other copyright owners to play their material. If radio broadcasts and simulcasts are considered to be the same service, radio broadcasters would not be required to enter into a separate copyright licence agreement for any content they stream online. The PPCA commented that this creates different rules for two competitors operating in the same market:

Online streaming services such as linear internet radio and customised streaming services operate in the same digital market as radio broadcasters that simulcast their terrestrial broadcasts over the internet. In terms of the delivery of these two services—there is nothing dissimilar.²³

2.14 Furthermore, the PPCA argued that when negotiating agreements to transmit programs online, the ability of online streaming services to negotiate fees is not constrained by the price caps contained in section 152 of the Copyright Act.²⁴ The fees payable by holders of a broadcasting licence who provide terrestrial radio broadcasts and simulcasts are currently capped at one per cent of gross earnings (or for the ABC, one half of a cent per Australian). No such cap on fees would apply to businesses that choose to communicate recordings via the internet alone.²⁵

2.15 The PPCA expressed concern that the advantage provided to radio broadcasters over customised streaming services would distort the market and inhibit the development of new businesses in the digital economy.²⁶ The PPCA stated:

...providing radio broadcasters with an advantage in the internet streaming industry will stifle competition and the development of new online only services. Ultimately, audiences may miss out on innovative new services that cannot fairly compete with commercial radio giants that have the protection of a statutory cap.²⁷

21 PPCA, *Submission 8*, pp 31–33.

22 PPCA, *Submission 8*, p. 31.

23 PPCA, *Submission 8*, p. 31.

24 PPCA, *Submission 8*, p. 31.

25 PPCA, *Submission 8*, p. 31.

26 PPCA, *Submission 8*, p. 31.

27 PPCA, *Submission 8*, p. 32.

Constraining the Copyright Tribunal

2.16 A second undesirable outcome from not recognising radio broadcasts and simulcasts as distinct services, according to the PPCA, is that it will further constrain the Copyright Tribunal.²⁸

2.17 At the moment, the legislative cap on fees payable to copyright owners as set out in section 152 of the Copyright Act is only made available to the holders of a broadcasting licence (such as radio broadcasters) and the ABC.²⁹ The PPCA argued that treating radio broadcasts and simulcasts as the same service would extend the legislative caps beyond the arena of traditional terrestrial broadcasting and into the developing market for online digital services.³⁰ The PPCA believed this would constrain the Copyright Tribunal by 'limiting its ability to require equitable remuneration for the use of copyright material in the online environment'.³¹

Inconsistent treatment of copyright holders

2.18 The PPCA argued that another undesirable outcome of treating online radio simulcasts as a "broadcasting service" would be the enforcement of inconsistent treatment of classes of copyright holders.³² The PPCA pointed out that other copyright industries (such as photography, literature and motion picture) are able to negotiate separate copyright licences for different activities.³³ Treating radio broadcasts and their internet simulcast as the one service would prohibit copyright owners from granting or withholding licences for the broadcast of their work on a discretionary basis.³⁴

2.19 The PPCA noted that:

For example, book publishers are able to separately licence the production of paperback and hardback book formats. Similarly, different agents or representatives may be granted rights to exploit content in different defined geographic areas.³⁵

Policy recommendations

2.20 Despite the PPCA's concerns for ensuring that radio broadcasts and simulcasts remain separate services, they requested that the committee should not make any recommendations relating to simulcast regulation until the ALRC inquiry is completed in November 2013:

28 PPCA, *Submission 8*, p. 33.

29 *Copyright Act 1968*, s. 152.

30 PPCA, *Submission 8*, p. 33.

31 PPCA, *Submission 8*, p. 33.

32 PPCA, *Submission 8*, p. 34.

33 PPCA, *Submission 8*, p. 34.

34 PPCA, *Submission 8*, p. 34.

35 PPCA, *Submission 8*, p. 33.

In light of the extensive reviews already on foot, in PPCA's view the Committee should not, at this time, recommend any isolated regulatory amendments.³⁶

2.21 This view to continue to recognise radio broadcasts and simulcasts as a separate service was supported by the AAM, UMA, Sony and AIR.³⁷

Arguments put forward by the commercial and community radio sector

2.22 The ABC, CRA, Community Broadcasting Association of Australia (CBAA), and the Special Broadcasting Service (SBS) (the broadcasters) authored a joint submission, highlighting that the issues forming the subject of the inquiry directly affect all of the broadcasters.³⁸

2.23 The broadcasters submitted that radio simulcasting has taken place in Australia since approximately 1999, and that until the recent decision by the Federal Court, it was accepted by many participants in the broadcasting industry that a simulcast of a radio program was a "broadcasting service" within the meaning of that term in the Copyright Act and Broadcasting Services Act.³⁹

2.24 The broadcasters expressed concern that the Federal Court's new interpretation of a "broadcasting service" could have the consequence of removing copyright protection for broadcasts which are simulcast online, making it more difficult for broadcasters to obtain copyright clearances for underlying rights, and effectively double the payment required for the same program to be transmitted at the same time, via two different technology platforms.⁴⁰ The new interpretation may also result in broadcasters ceasing to simulcast, thereby depriving some members of the public access to programs on the devices of their choice as well as creating a regulatory regime that is not technically neutral.⁴¹

Broadcast copyright

2.25 The broadcasters argued that their broadcasts are copyright protected under section 87 of the Copyright Act.⁴² Section 87 provides that copyright in the case of a sound broadcast is the exclusive right of the broadcaster.⁴³ The broadcasters noted that third parties are not able to copy a broadcast without the permission of the

36 PPCA, *Submission 8*, p. 43.

37 AAM, *Submission 4*, p. 3; UMA, *Submission 5*, p. 3; Sony Music Entertainment Australia, *Submission 10*, p. 3; AIR, *Submission 11*, p. 3.

38 ABC, CRA, CBAA and SBS, *Submission 12*, p. i.

39 ABC, CRA, CBAA and SBS, *Submission 12*, p. 2.

40 ABC, CRA, CBAA and SBS, *Submission 12*, pp 2–3.

41 ABC, CRA, CBAA and SBS, *Submission 12*, p. 3.

42 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

43 *Copyright Act 1968*, s. 87.

broadcaster, thus protecting broadcasters against third parties who might wish to copy and distribute programs illegally.⁴⁴

2.26 The broadcasters argued that the Federal Court's decision to consider radio broadcasts and simulcasts as separate services ensures that online simulcasts will no longer be protected by copyright as it is not deemed to be a "broadcast".⁴⁵ The broadcasters believed that that this in turn could create the potential for whole programs to be copied and distributed without their permission.⁴⁶

2.27 It was claimed that the most vulnerable programs to be copied without authorisation are those with no underlying copyright, including live sports broadcasts, live classical music concerts and live news and current affairs programs.⁴⁷

2.28 The broadcasters asserted that the Federal Court's new interpretation effectively legalises an act that would previously have been an infringement of copyright. They stated that 'the removal of such significant copyright protection may make it difficult for broadcasters to continue to simulcast their broadcast programs online'.⁴⁸

Underlying rights holders

2.29 The broadcasters contended that if copyright protection is removed from the broadcast itself, underlying rights holders may be reluctant to grant broadcast simulcast rights.⁴⁹ It was argued that currently, content creators (such as musicians, composers, artists and writers) may rely on the broadcasters to take action to prevent copyright infringement of the content contained within the program. The broadcasters are concerned that as a result of the Federal Court's new interpretation, content creators will no longer be able to take such action and this will leave them with the responsibility of enforcing their copyright themselves.⁵⁰ The broadcasters explained that:

In many cases, content creators do not have the resources to pursue legal action and may be unable to enforce their own copyright. If they can no longer rely upon the [b]roadcasters to enforce copyright in the broadcast as a whole, they may prove unwilling to grant the [b]roadcasters the right to simulcast the program.

44 ABC, CRA, CBAA and SBS, *Submission 12*, p. i.

45 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

46 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

47 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

48 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

49 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

50 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

This is likely to affect a wide range of broadcast programs and would be to the detriment of the listening public, who would be deprived of the choice of listening to their program online.⁵¹

Double payments to copyright owners

2.30 Another concern for the broadcasters, should radio broadcasts and simulcasts be considered separate in regulations, is that copyright owners would be enabled to charge broadcasters twice for the simultaneous use of the same copyright material merely because the device on which it is received is different.⁵²

2.31 They asserted that 'no single listener can listen to two devices simultaneously; they are either listening to the radio or listening online through a computing device'.⁵³ The broadcasters noted that approximately 9.5 per cent of a radio broadcaster's audience choose to listen to a broadcast online, a percentage that has been a consistent trend over the past five years.⁵⁴

Different regulatory regimes

2.32 The broadcasters also believed that the Federal Court's new interpretation of a radio simulcast is in conflict with the policy objectives of the Broadcasting Services Act.⁵⁵

2.33 Subsection 4(1) of the Broadcasting Services Act sets out that:

The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.⁵⁶

2.34 The broadcasters claimed that a program exerts the same degree of influence on its listeners, irrespective of its means of delivery. They stated:

A person who listens to a broadcast on a car radio is no more or less affected by the broadcast than a person who listens to that program at exactly the same time through an online simulcast. Accordingly, the program should be regulated in the same way, irrespective of its means of transmission.⁵⁷

2.35 Furthermore, the broadcasters believed that the new interpretation is in contradiction to subsection 4(2) of the Broadcasting Services Act that states that broadcasting services should be regulated in a way that will readily accommodate

51 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

52 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

53 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

54 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

55 ABC, CRA, CBAA and SBS, *Submission 12*, p. 7.

56 *Broadcasting Services Act 1992*, ss. 4(1).

57 ABC, CRA, CBAA and SBS, *Submission 12*, p. 7.

technological change, and that public interest considerations should be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services.⁵⁸ The broadcasters maintained that in accordance with the policy objectives of the Broadcasting Services Act, 'any regulation should encourage the provision of broadcasting services via new technologies, such as online simulcast'.⁵⁹

2.36 The broadcasters warned that failure to correct these policy inconsistencies will require broadcaster who wish to simulcast programs to be subject to two sets of regulation. They stated:

This places a substantial administrative and financial burden on broadcasters, which is unlikely to encourage the provision of broadcasting services via new technologies and does not accord with the policy objectives set out in the [Broadcasting Services Act].⁶⁰

2.37 The broadcasters also believed that the new interpretation is not consistent with the growing recognition amongst media stakeholders that legislation which governs broadcasting and communications should be technologically neutral where possible.⁶¹

2.38 It was also pointed out that the charters of the ABC and SBS have recently been amended to specifically include the provision of digital services.⁶²

Copyright Act

2.39 In respect to the Copyright Act, the broadcasters asserted that it provides the maker of a broadcast with the exclusive right to make a recording of the broadcast and to re-broadcast it or communicate it to the public.⁶³ They contend that no such protection is given in respect of online communications and a broadcaster could not prevent a person from copying or communicating a simulcast program which has been received online.⁶⁴

Policy recommendations

2.40 The broadcasters argued that many participants in the broadcasting industry have traditionally operated on the basis that the online portion of a simulcast is a broadcast.⁶⁵ They argued that maintaining the status quo would be a 'benefit to the

58 *Broadcasting Services Act 1992*, ss. 4(2).

59 ABC, CRA, CBAA and SBS, *Submission 12*, p. 7.

60 ABC, CRA, CBAA and SBS, *Submission 12*, p. 8.

61 ABC, CRA, CBAA and SBS, *Submission 12*, p. 10.

62 ABC, CRA, CBAA and SBS, *Submission 12*, p. 9.

63 ABC, CRA, CBAA and SBS, *Submission 12*, p. 9.

64 ABC, CRA, CBAA and SBS, *Submission 12*, p. 9.

65 ABC, CRA, CBAA and SBS, *Submission 12*, p. 10.

public as audiences will continue to be able to choose to access broadcasts using an online device'.⁶⁶

2.41 The broadcasters urged the committee to recommend immediate action to overcome the 'significant adverse consequences' of the Federal Court's new interpretation.⁶⁷ They requested that the minister make a new determination which has the effect of revoking the September 2000 determination made by the former minister and creating a new definition that ensures that the following services do not fall within the definition of a "broadcasting service":

a service that makes available television or radio programs using the Internet, unless that service is provided simultaneously with a service that provides the same television program or radio program using the broadcasting services bands and both services are provided by:

- (i) the holder of a broadcasting services bands licence for radio;
- (ii) the Australian Broadcasting Corporation, or
- (iii) the Special Broadcasting Service.⁶⁸

2.42 The broadcasters believed that the proposed new determination will reflect the current use of technology by media consumers and the trend towards platform neutrality of regulation. They contended that it is a straightforward solution that requires no amendment to the Copyright Act or the Broadcasting Services Act.⁶⁹

2.43 The broadcasters also expressed a view that the subject matter of the committee's inquiry is distinct from that currently being undertaken by the ALRC and is distinct from the issue currently before the Federal Court. They stated:

This is not an issue that should be delayed pending the outcome of much wider reviews of the regulatory framework governing copyright. Instead, it should be addressed as quickly as possible, so that broadcasters may continue to provide the services that consumers have enjoyed for the past 10 years, namely the ability to access broadcast programs of their choice over the internet in accordance with the objectives of the [Broadcasting Services Act].⁷⁰

International perspective

2.44 The International Federation of the Phonographic Industry (IFPI), an organisation representing the recording industry worldwide, advised the committee how copyright relating to online simulcasts is treated internationally.

2.45 The IFPI indicated that the World Intellectual Property Organisation's (WIPO) *Performances and Phonograms Treaty*, of which Australia is a party, stresses that

66 ABC, CRA, CBAA and SBS, *Submission 12*, p. 10.

67 ABC, CRA, CBAA and SBS, *Submission 12*, p. 15.

68 ABC, CRA, CBAA and SBS, *Submission 12*, p. 15.

69 ABC, CRA, CBAA and SBS, *Supplementary Submission 12*, p. 1.

70 ABC, CRA, CBAA and SBS, *Supplementary Submission 12*, p. 2.

simulcasting does not constitute "broadcasting", but rather constitutes a form of "communication to the public".⁷¹

2.46 The IFPI also pointed out that many countries have taken the view of the Federal Court of Australia—that internet simulcasts of radio programs fall outside the definition of "broadcasting". The IFPI stated:

In many markets, including Austria, Finland, Greece, Hungary, Ireland, Italy, Romania, Spain and Sweden in Europe, as well as Brazil, Canada, Hong Kong, Israel, Japan, Singapore, Taiwan and the US, radio stations pay a separate fee for their simulcasting activities. In other countries a simulcasting licence may be bundled into the traditional broadcasting licence, with one single tariff and no separate simulcasting tariff.⁷²

2.47 The IFPI however stressed that the absence of a separate tariff for simulcasting does not mean that simulcast falls within the broadcasting definition and it does not deny copyright holders being paid additional remuneration.⁷³

2.48 Conversely, it was argued by the broadcasters (ABC, CRA, CBAA and SBS) that any changes to the interpretation of radio simulcasts would be in contravention of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention).⁷⁴ They stated that the Rome Convention provides that broadcasting organisations shall enjoy the right to authorise or prohibit the rebroadcasting or the fixation of their broadcasts and that allowing anything less is contrary to the terms and spirit of the Convention.⁷⁵

2.49 With regard to the regulation of broadcasts and simulcasts in international jurisdictions, DBCDE cautioned that:

Direct comparison between the situation in Australia and other jurisdictions is difficult because of the different regulatory regimes and market structures that apply to broadcasters and online services in each country.⁷⁶

71 International Federation of the Phonographic Industry (IFPI), *Submission 7*, p. 1. See also Article 2(f), World Intellectual Property Organisation (WIPO), *Performances and Phonograms Treaty*, 20 December 1996, available at: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (accessed 23 May 2013).

72 IFPI, *Submission 7*, p. 3.

73 IFPI, *Submission 7*, p. 3.

74 ABC, CRA, CBAA and SBS, *Submission 12*, p. 12.

75 ABC, CRA, CBAA and SBS, *Submission 12*, p. 13. See also Article 13, WIPO, *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1961, available at: http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P119_11307 (accessed 23 May 2013).

76 DBCDE, *Answers to written questions on notice*, 2 July 2013, (received 11 July 2013), p. 4.

Copyright Council perspective

2.50 The Australian Copyright Council (ACC), an independent organisation that represents the peak bodies of Australian creators as well as major collecting societies (including the PPCA), argued that copyright law is a complex policy issue that underpins the creative economy.⁷⁷

2.51 The ACC was of the opinion that broadcasting and communication via the internet are different in three important ways: broadcasting is tied to the broadcast signal and therefore confined to a geographical area; broadcasting relates to a particular kind of technology which limits the potential audience; and not all sound recordings are covered by a broadcast right.⁷⁸ The ACC believed that for these reasons, 'broadcasting and communication via the internet are different and should be remunerated separately'.⁷⁹

2.52 The ACC also argued that these are difficult and complex issues, raising matters of both domestic and international law. They therefore suggested that 'in the ACC's respectful submission, the regulatory regime for simulcasting is better dealt with under existing government processes'.⁸⁰

Response from Commonwealth government departments

2.53 In response to the broadcasters' proposal that the minister make a new determination, the Department of Broadband, Communications and the Digital Economy (DBCDE) outlined a number of 'legislative and other legal issues associated with the proposal'⁸¹ and argued that:

The proposal that the Minister issue a determination to the effect of ensuring that television and radio simulcasts are considered to be a 'broadcasting service' under subsection 6(1) of the BSA would give rise to a number of (potentially unintended) consequences.⁸²

2.54 DBCDE was concerned that unintended consequences could impact out of area and unlicensed broadcasting; control rules and media diversity; the anti-siphoning scheme; and copyright and commercial / contractual issues.⁸³

2.55 DBCDE highlighted the complexity of broadcasting and copyright law, advising that:

77 Australian Copyright Council (ACC), *Submission 2*, p. 1.

78 ACC, *Submission 2*, p. 1.

79 ACC, *Submission 2*, p. 1.

80 ACC, *Submission 2*, p. 2.

81 DBCDE, *Answers to written questions on notice*, 28 May 2013 (received 5 June 2013), p. 1.

82 DBCDE, *Answers to written questions on notice*, 28 May 2013 (received 5 June 2013), p. 2; and also DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 2.

83 DBCDE, *Answers to written questions on notice*, 28 May 2013 (received 5 June 2013).

...the apparent simplicity of the proposed amendments offered by the radio industry masks the more complex policy question of whether fundamental realignment of the nature and value of copyright in internet simulcasts is appropriate, and if so, whether making changes to broadcasting law is the best way to achieve this.⁸⁴

2.56 DBCDE continued:

...this proposal would, in essence, seek to modify a broadcasting regulation to address a copyright issue. Specifically, the proposal would amend broadcasting legislation, via legislative instrument, to address a dispute over copyright royalties between the CRA and the Phonographic Performance Company of Australia (PPCA). This approach risks unintended consequences in terms of the scope and interpretation of broadcasting legislation to address what is essentially a commercial dispute, which may be better addressed through commercial negotiations between the parties.⁸⁵

2.57 The Attorney-General's Department (AGD) has responsibility for copyright matters and provided the following analysis of 'issuing a narrow determination to the effect outlined by CRA of ensuring strictly radio simulcasts are considered to be a "broadcasting service"':

The potential copyright implications of a new determination limited only to radio broadcasts remain significant...these implications include:

- Overturning settled law that radio broadcasts and internet transmissions of content are fundamentally different. This law is consistent with other jurisdictions and international copyright treaties.
- Conflating broadcasts (ie content broadcast within a limited geographical or licence area) with internet transmissions (ie content transmitted to the world without geographical limitations) in the Copyright Act. The effect on the Copyright Act would be to fundamentally alter the carefully-balanced existing structure of the Act that supports the radio broadcasting industry.

Another effect of the proposed determination would be to extend all licences, protections and exceptions in the Copyright Act to commercial radio broadcast activity on the internet.

- Fundamentally distorting the market for licencing sound recordings on the internet. An effect of the proposed declaration would be that radio broadcasters could avail themselves of the statutory licence in section 109 and the one per cent cap in section 152(8) for transmitting sound recordings on the internet, providing a significant competitive advantage over other services that transmit music on the internet.⁸⁶

84 DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 1.

85 DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 2.

86 AGD, *Answers to written questions on notice*, 2 July 2013 (received 8 July 2013), pp 1 and 2.

2.58 AGD further advised that '[t]he overriding implication of the Minister not issuing a new determination is that the status quo remains. This would result in commercial and legal stability for industry' and '[t]he Department notes the intent of the existing regulatory structure in the *Copyright Act 1968* is to give effect to international copyright treaties to which Australia is a party'.⁸⁷

Legal advice provided by broadcasters

2.59 The broadcasters sought and supplied to the committee the opinion of Mr John Hennessy SC (the Hennessy opinion) 'in relation to the commentary made by the DBCDE and the Attorney-General's Department on the draft Determination proposed by the radio broadcasters, the ABC and SBS'.⁸⁸

2.60 In their summary of the Hennessy opinion, the broadcasters contended that the issues raised by DBCDE and AGD were 'without foundation, and unlikely to occur'.⁸⁹ The summary further stated that the Hennessy opinion had:

- [drawn] attention to the fact that the Departments had both failed to acknowledge that the draft determination proposed by the Broadcasters did not apply to commercial television broadcasts, rendering baseless many concerns raised, such as anti-siphoning, retransmission and copyright.
- addressed out of area broadcasting, noting that this had been occurring for many years and that, in his considered view, simulcasting would be likely to be found to be permitted under the BSA. Mr Hennessy pointed out that the fact that the ACMA has taken no action in relation to simulcasts over many years supported this view. In addition, he made the obvious point that failure to make the Determination would not prevent simulcasting in any event.
- noted there would be no flow-on implications for the operation of copyright laws.
- advised that no contractual/commercial issues would arise as simulcasts can be, and in fact are already in some instances, precluded as part of the agreement with the content supplier.
- noted there would be no interference with 'settled law' as the recent interpretation given by the Appeals Court of the Federal Court is very new.
- noted that the Attorney-General's Department had agreed that if the draft Determination is not made, copyright protection would be lost for broadcasts which are simulcast online. This is a serious issue.⁹⁰

87 AGD, *Answers to written questions on notice*, 2 July 2013 (received 8 July 2013), p. 2.

88 ABC, CRA, CBAA and SBS, *Additional information—Summary of counsel's opinion*, p. 1.

89 ABC, CRA, CBAA and SBS, *Additional information—Summary of counsel's opinion*, p. 1.

90 ABC, CRA, CBAA and SBS, *Additional information—Summary of counsel's opinion*, p. 1.

2.61 On this last point, AGD responded that this was an 'overstatement' of their position and that it had acknowledged that:

...there may be a risk that material ordinarily unprotected by copyright that makes up a broadcast (for example live content) may not be protected as a broadcast where it is transmitted on the internet rather than broadcast. The Department considers this risk may be mitigated through industry practices. The Department notes that all copyright protection in underlying content (films, sound recordings, musical works, and literary works) would continue to apply irrespective of whether the transmission is described as a broadcast or a communication to the public.⁹¹

2.62 AGD further noted that these 'industry practices' may involve:

...a broadcaster making a recording of the broadcast before or at the moment of simulcast. The simulcast material would then not lose its status as a 'broadcast' as the material being communicated would be protected as a cinematographic film or sound recording of the initial broadcast.⁹²

Legal advice from the Phonographic Performance Company of Australia

2.63 The PPCA subsequently obtained and provided to the committee an opinion from R Cobden SC (the Cobden opinion) 'to provide a response to, and comments on, the written opinion of Mr Hennessy SC' as given to the committee by CRA. Some of the key points made in the Cobden opinion included:

- In seeking to expand the specific exceptions and limitations that apply in the Copyright Act to 'broadcasts' to cover internet streaming activities, the broadcasters advance no real reason why their special historical treatment should be so extended. If they do wish to advance such an argument, the proper forum is the inquiry currently being conducted by the ALRC into 'Copyright in the Digital Economy'.⁹³
- Not only would the proposed determination fail to achieve the so-called 'platform neutrality' that the broadcasters claim it would, it would add a further layer of complication. It would require one to look at who is providing the service and then whether the content of that service also happens to be delivered at the same time via a specific subset of the radiofrequency spectrum (to the exclusion of all other frequencies and broadcasting platforms) in order to determine whether a service is a 'broadcasting service'.⁹⁴
- The inconsistent treatment of internet simulcasts would also have flow-on effects for copyright law in Australia, as the definition of 'broadcasting service' from the Broadcasting Services Act is imported into the definition of 'broadcast' in the Copyright Act. These flow-on effects were recognised by the

91 AGD, *Answers to written questions on notice*, 9 July 2013 (received 11 July 2013), p. 1.

92 AGD, *Answers to written questions on notice*, 9 July 2013 (received 11 July 2013), p. 1.

93 PPCA, *Additional information*, received 11 July, p. 7.

94 PPCA, *Additional information*, received 11 July, p. 9.

various answers to questions on notice given by the DBCDE and AGD. Creating further confusion and inconsistency in the operation of the Copyright Act ought to be avoided, especially in the context of the current ALRC review.⁹⁵

2.64 The Cobden opinion concurred that the AGD's observations with respect to copyright had been 'mischaracterised' in the Hennessy opinion.⁹⁶ Finally, the Cobden opinion agreed with DBCDE's assessment that 'various problematic broadcasting and regulatory implications' arise from the broadcasters' proposed determination'.⁹⁷

Other views

2.65 The Copyright Advisory Group (CAG) to the Standing Council on School Education and Early Childhood made a submission to the inquiry concerning the impact that changes to broadcasting copyright would have on educational institutions.⁹⁸

2.66 CAG observed that Australian schools rely on an exemption under the Copyright Act to be able to view broadcast educational material (such as news programs, documentaries and drama).⁹⁹ Under the exemption, educational institutions are able to copy and communicate broadcasts for educational purposes, without having to seek the permission of the copyright owner, provided they agree to pay remuneration.¹⁰⁰

2.67 Australian schools paid \$17.7 million dollars in 2012–13 for the rights to view educational broadcasts.¹⁰¹ The CAG expressed concern that any changes to the definition of "broadcast service" could have a significant impact on how schools access broadcast material.¹⁰²

One per cent cap

2.68 The music industry, PPCA and the ACC put to the committee that any consideration of changes to simulcast regulation should not occur without an examination of the legislative caps that apply to broadcasting licensees and the Australian Broadcasting Corporation.¹⁰³

95 PPCA, *Additional information*, received 11 July, p. 9.

96 PPCA, *Additional information*, received 11 July, p. 10.

97 PPCA, *Additional information*, received 11 July, p. 11, and see further pp 11- 14.

98 Copyright Advisory Group – Standing Council on School Education and Early Childhood (CAG), *Submission 3*, p. 1.

99 CAG, *Submission 3*, p. 2.

100 *Copyright Act 1968*, part VA.

101 CAG, *Submission 3*, p. 2.

102 CAG, *Submission 3*, p. 4.

103 ACC, *Submission 2*, p. 3; AAM, *Submission 4*, p. 3; UMA, *Submission 5*, p. 2; AIR, *Submission 6*, p. 3; PPCA, *Submission 8*, p. 43; Sony Music Entertainment Australia, *Submission 10*, p. 2; ARIA, *Submission 11*, p. 2.

2.69 The ACC contended that the one per cent legislative cap is 'completely arbitrary and does not involve any analysis of economic efficiency'.¹⁰⁴ Consequently they believed that:

...the cap places an artificial ceiling on the remuneration a copyright owner can receive for the commercial broadcast of sound recordings. The ability of copyright owners in sound recordings to receive equitable remuneration for communications via the Internet needs to be viewed in that context.¹⁰⁵

2.70 The PPCA argued that the legislative caps are distortionary, arbitrary, anachronistic and unnecessary.¹⁰⁶ The PPCA was concerned that the caps ensure that Australian recording artists, in effect, provide an annual subsidy to the commercial radio sector and the ABC.¹⁰⁷ The PPCA stated that:

...there is no characteristic inherent in the broadcast right for sound recordings that supports the figure of 1% of revenue or 0.5 cents per person as constituting equitable remuneration for the use of that right.¹⁰⁸

2.71 The PPCA suggested to the committee that, if it is of a mind to recommend limited reform to the broadcasting and copyright regulation, the only compelling case for change relates to the removal of the artificial caps.¹⁰⁹ The PPCA concluded that:

It is the combination of the compulsory licence in section 109 of the Copyright Act and these outdated caps which have given rise to the current inequalities in relation to broadcaster's use of sound recordings, which are magnified in the evolving digital music economy.¹¹⁰

2.72 The commercial and community broadcasters did not pass comment on the legislative caps.

Committee comment

2.73 Since 2000, not only has there been an increase in the number of Australians with access to a computer and the internet, but there has been a significant rise in the variety and number of devices that can access online content. These new devices, combined with innovation in digital media services, have presented challenges to the regulatory landscape. It is no longer possible to consider communications in terms of the traditional distinctions of broadcasting and telecommunications.

2.74 For over thirteen years, technological developments have made the simulcasting of radio programs online possible, with a core group of listeners choosing to access radio programs in this manner. The Commonwealth government

104 ACC, *Submission 2*, p. 3.

105 ACC, *Submission 2*, p. 3.

106 PPCA, *Submission 8*, pp 14–16.

107 PPCA, *Submission 8*, p. 14.

108 PPCA, *Submission 8*, p. 16.

109 PPCA, *Submission 8*, p. 43.

110 PPCA, *Submission 8*, p. 43.

clearly sought to address these issues, to some extent, in 2000. The result was a determination that appears to have been accepted by both broadcasters and rights holders as facilitating simulcasts under broadcasting agreements until legal action was commenced in 2010.

2.75 The 2000 determination established an 'exemption' from the definition of a "broadcasting service". Section 109 of the Copyright Act then provides an exception from copyright laws for certain broadcasting services. Creating an 'exception' to the 'exemption' has been found to be ambiguous, as evidenced by the commencement of legal proceedings in this matter and the different verdicts in the original judgement on this matter and the judgement of the appellate court.

2.76 While responsibility ultimately rests with the ministers responsible for creating the ambiguity and, subsequently, failing to address it, the committee is particularly concerned at the respective attitudes shown by DBCDE and AGD that this is a 'commercial dispute, which may be better addressed through commercial negotiations between the two parties'¹¹¹ or that doing nothing 'would result in commercial and legal stability for the industry'.¹¹² It is correct that this is a commercial dispute, but it is a dispute with the interpretation of an ambiguous legislative instrument at its heart, which rather than providing stability has seen the practice of a decade overturned by a recent court judgement.

2.77 The committee believes it is unsatisfactory that the policy issue of whether radio simulcasts are a "broadcasting service" under the Broadcasting Services Act has—via recent legal proceedings—become a matter for the Federal Court to resolve. The Commonwealth government should have been proactive in ensuring that stakeholders in the music industry and radio broadcasting sector have certainty on this matter.

2.78 With regard to this inquiry, the committee contended with arguments and counter-arguments from the proponents in the ongoing legal dispute about the definition of a "broadcasting service", including legal advice rebutting information provided by Commonwealth government departments and legal advice refuting alternative legal advice. While it is the role of Senate committees to "shine light in dark corners" and provide a forum where ideas can be contested and analysed, it is not the role of Senate committees to act as quasi-courts or mediators. In this regard, this inquiry raises the question of the appropriateness of referring such disputes to a parliamentary committee, albeit in the guise of addressing a broader policy issue.

2.79 That said, the committee is sympathetic to both the argument of the radio industry that the ambiguities surrounding the disputed determination should be settled by government policy rather than having established practice not simply overturned by legal proceedings, and the arguments of rights holders that related matters are being considered in a far more comprehensive way through the ALRC review, as flow-on to the equally comprehensive Convergence Review.

111 DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 2.

112 AGD, *Answers to written questions on notice*, 2 July 2013 (received 8 July 2013), p. 2.

2.80 The committee is mindful of differing arguments from stakeholders on both sides of this dispute and the relevant government departments about potential unintended consequences stemming from either doing nothing or stemming from making a new determination, but it is not entirely convinced by some of these arguments and suspects they may be overstated. In any event, it is a matter for the agencies of government to work through such consequences to find satisfactory policy outcomes, not use them as excuses for inaction.

2.81 Ultimately, it is the committee's view that if it has been established practice for simulcasts to be permitted under a single licence agreement with rights holders for the better part of a decade then it is unsatisfactory for this to be abruptly overturned by a court ruling. It is, however, equally the committee's view that with the advance of new technologies and increasing convergence of content across different platforms that much of the regulation in the broadcasting and copyright space is failing to keep pace with changes in technology and that it would be preferable not to be dealing with individual areas of regulation for different mediums of transmission in a piecemeal way.

2.82 The committee also notes the arguments about the application of the one per cent cap, which limits the amount paid to rights holders, and the PPCA's valid argument that simulcasting increases the potential audience for radio broadcasters far beyond their terrestrial broadcasting reach. While for the commercial and community broadcasters, the percentage-based nature of the cap means that the actual payments made to rights holders would increase as any increase in advertising revenue associated with increased audience occurred, the committee can understand why previous reviews have recommended the abolition of such a cap. The committee believes the findings of the ALRC review should be considered by government as quickly as possible.

2.83 The committee urges the government to address both the short- and long-term issues that exist within the existing regulatory framework.

Recommendation 1

2.84 The committee recommends that the Minister for Broadband, Communications and the Digital Economy seek to resolve the ambiguity in the existing determination, either through a new determination, having regard to any other potential consequences of such action, or by negotiating a satisfactory agreement between the two key stakeholders pending a comprehensive response at the earliest opportunity to the findings of the Convergence review, ALRC review and other outstanding issues regarding the interaction of broadcasting and copyright law.

Recommendation 2

2.85 The committee recommends that the Minister for Broadband, Communications and the Digital Economy and the Attorney-General fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews, and by many stakeholders, following receipt of the ALRC review later this year.

Senator Simon Birmingham
Chair

Appendix 1

Submissions, Answers to questions on notice and additional information

Submissions

- 1 Australian Law Reform Commission
- 2 Australian Copyright Council
- 3 Copyright Advisory Group - Schools, Standing Council on School Education and Early Childhood
- 4 Association of Artist Managers
- 5 Universal Music Australia Pty Limited
- 6 Australian Independent Record Labels Association
- 7 International Federation of the Phonographic Industry
- 8 Phonographic Performance Company of Australia
- 9 Artist Directors and Patrons of PPCA
- 10 Sony Music Entertainment Australia
- 11 Australian Recording Industry Association
- 12 Australian Broadcasting Corporation, Commercial Radio Australia, the Community Broadcasting Association of Australia and the Special Broadcasting Service
- 13 8SAT Flow FM
- 14 Commercial Radio Australia Ltd
- 15 Pandora
- 16 Australian Football League

Answers to questions taken on notice

- 1 Australian Law Reform Commission – Answer to question on notice, received 30 May 2013
- 2 Department of Broadband, Communications and the Digital Economy – Answers to a written question on notice, received 5 June 2013
- 3 Attorney-General's Department – Answer to a written question on notice, received 6 June 2013
- 4 Attorney-General's Department – Answer to written questions on notice, received 8 July 2013
- 5 Australian Broadcasting Corporation – Answers to written questions on notice, received 8 July 2013
- 6 Special Broadcasting Service – Answers to written questions on notice, received 8 July 2013
- 7 Attorney-General's Department - Answer to supplementary written question on notice, received 11 July 2013
- 8 Department of Broadband, Communications and the Digital Economy - Answers to further written questions on notice, received 11 July 2013
- 9 The Coalition of Major Professional & Participation Sports – Answers to written questions taken on notice, received 12 July 2013
- 10 Free TV Australia – Answers to written questions taken on notice, received 12 July 2013

Additional information

1 Counsel's opinion, received 2 July 2013, from the Australian Broadcasting Corporation, Commercial Radio Australia, the Community Broadcasting Association of Australia and the Special Broadcasting Service.

2 Counsel's opinion (summary) received 2 July 2013, from the Australian Broadcasting Corporation, Commercial Radio Australia, the Community Broadcasting Association of Australia and the Special Broadcasting Service.

3 Additional information, received 11 July 2013, from the Phonographic Performance Company of Australia.

4 Additional information, received 10 July 2013, from Australian Broadcasting Corporation, Commercial Radio Australia, the Community Broadcasting Association of Australia and the Special Broadcasting Service, in response to Attorney-General's Department

5 Additional information, received 10 July 2013, from Australian Broadcasting Corporation, Commercial Radio Australia, the Community Broadcasting Association of Australia and the Special Broadcasting Service, in response to Department of Broadband, Communications and the Digital Economy

