

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 1*, p. 1.

20 ALRC, *Submission 1*, 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 licences (licences negotiated between a copyright holder or its representative, such as a collecting society, and the licensee).

22 ALRC, *Submission 1*, 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.