Standing Committee in Environment and Communications
Inquiry into the effectiveness of regulatory arrangements to deal with the simultaneous transmission of radio programs
Answer to Question on Notice
Department of Broadband, Communications and the Digital Economy

The Committee asked

What would be the potential broadcasting, copyright and other legal implications of the Minister for Broadband, Communications and the Digital Economy issuing 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 *Broadcasting Services Act 1992*?

Answer

There are a number of legislative and other legal issues associated with the proposal that the Minister for Broadband, Communications and the Digital Economy ('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 *Broadcasting Services Act 1992* ('the BSA'). These issues are described below along with relevant background information, with a particular focus on matters relating to broadcasting. It is understood that the Committee has also sought advice from the Attorney-General's Department (which has responsibility for copyright matters) in relation to the potential copyright implications of such a proposal. The Department of Broadband, Communications and the Digital Economy has therefore not provided detailed comment in relation to copyright issues in its response.

Background information

Definition of a 'broadcasting service'

Subsection 6(1) of the *Broadcasting Services Act 1992* (BSA) defines 'broadcasting service' in the following way:

> broadcasting service means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:
>
> (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
> (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
> (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.

For the purposes of paragraph (c) above, in 2000 the then Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, determined 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.

This 'Alston determination' has effect in two parts – it excludes certain services from the definition of a 'broadcasting service' ('a service that makes available television programs or radio programs using the internet'), but then provides an exception to this exclusion for an internet service that delivers television programs or radio programs using the broadcasting services bands. This means that unlike other internet services that deliver television or radio programs, a service that does so using the broadcasting services bands will fall within the BSA's definition of a 'broadcasting service'.

Federal Court decision

On 13 February 2013, the Full Bench of the Federal Court interpreted this determination as excluding internet simulcasting of broadcasts from the BSA's definition of 'broadcasting service' (*Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited [2013] FCAFC 11*). The specific details of this judgment are not discussed in any detail in this response. However, one of the effects of this decision is to make clear that a range of rules applying to broadcasting services transmitted using allocated spectrum do not apply to simulcasts of those services provided over the internet.

Discussion of issues

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. From a procedural perspective, the issue of such a determination would require the Minister to revoke and remake the existing 'Alston determination' (outlined above). Although this does not involve direct legislative change, it does amount to an effective change in the definition of a 'broadcasting service', which itself raises a number of issues. These issues are discussed below.

In providing this analysis, the department notes that the impact of any new determination would depend on the precise drafting of the instrument. The analysis is also based on the understanding that the changes being considered would be those necessary to bring within the definition of a 'broadcasting service' the internet simulcasts of television and radio programs provided by particular broadcasting licensees and the national broadcasters. The analysis below applies equally to internet simulcasts of television or radio programs, with the exception of that relating to the anti-siphoning scheme (this scheme applies only to television broadcasters).

Any proposal to revoke and remake the Alston determination in different terms – for example, to bring internet services more generally (rather than just simulcast services) within the definition of a broadcasting service and therefore the regulatory framework applicable to such services established under the BSA – is likely to have profound impacts for the framework itself, as well as for industry. This response does not canvass, nor provide analysis of, any such alternatives.

Broadcasting issues

Out of area and unlicensed broadcasting

Most significantly, a determination to bring the internet simulcasts of television and radio within the BSA's definition of a 'broadcasting service' is likely to have implications for the BSA's licence area restrictions.

The BSA and the regulatory scheme that it establishes are fundamentally based around the concept of area-based broadcasting services. Broadcasters are licensed to operate in a particular geographic area and those licences confer special rights and obligations which are also area specific.

For example, commercial television and radio broadcasting licensees are subject to a licence condition prohibiting the provision of their services outside of their designated licence areas (clauses 7(2A) and 8(3) of Schedule 2 to the BSA). Community television and radio broadcasters are also required to comply with similar restrictions (clause 9(2A) of Schedule 2 to the BSA).

Unless internet simulcasts of television and radio services were limited to viewers and listeners within the relevant licence areas (i.e. the licence areas in which particular services are authorised to be provided), re-defining a 'broadcasting service' to include online simulcasts is likely to result in broadcasters breaching these licence conditions.

Additionally, making broadcasting services available in areas in which they are not licenced may also result in licensees breaching the prohibition on providing a broadcasting service without a licence, which is an offence subject to civil penalty provisions under Part 10 of the BSA.

Broadcasters may seek to address these issues by employing 'geo-blocking' technology to prevent access to internet simulcasts by users located outside of their licence areas. However, it is not known whether this technology could be used to accurately and consistently 'block' users on a licence area basis. The department also notes that such technology may be costly and difficult to implement, and that it is not employed as part of the existing simulcasts provided by commercial or community radio broadcasters.

While the Australian Communications and Media Authority (ACMA) is able to permit out of area broadcasting, it can only do so if it is satisfied that this occurs in 'exceptional circumstances' (as per paragraphs 7(2A)(c), 8(3)(c) and 9(2A)(c) of Schedule 2 to the BSA), or if the out of area broadcast is required to provide adequate reception for viewers or listeners located within the licence area (as per paragraphs 7(2A)(d) and 8(3)(d) and 9(2A)(d) of Schedule 2 to the BSA). These criteria are unlikely to apply to internet simulcasting.

Control rules and media diversity

Issuing a determination that defines internet simulcasts as 'broadcasting services' may also have implications for a number of the control and media diversity provisions in Part 5 of the BSA, including:

- the 75% audience reach rule, which prevents a person from controlling commercial television broadcasting licences with a combined licence area population exceeding 75% of the Australian population (section 53(1));
- limits on control of commercial television and radio licences, which allow a person to control only one commercial television licence in any commercial television licence area and two commercial radio licences in any commercial radio licence area (sections 53(2) and 54);
- corresponding restrictions preventing the effective breach of the rules above through directorships of companies that control broadcasting licences (sections 55 and 56);
- the '4/5 rule', which prohibits transactions resulting in an 'unacceptable media diversity situation' in which fewer than five independent media groups are present in

a metropolitan commercial radio licence area, or fewer than four in a regional commercial radio licence area (section 61AB); and

- the rules prohibiting an 'unacceptable 3-way control situation', which prevent media mergers involving more than two of the three regulated media platforms (television, radio and associated newspapers) in any one commercial radio licence area (section 61AEA).

These control and ownership rules are all broadly designed to limit the number of commercial broadcasting licences and associated newspapers that a person may control in particular licence areas. Assuming that commercial broadcasters do not, or are unable to, effectively geo-block their simulcasts, any content provided online is potentially available (if not necessarily lawfully provided) in any licence area around the country. Therefore, bringing simulcast services within the definition of 'broadcasting' may undermine the relevance of these control and ownership rules where viewers in a given licence area are able to receive all commercial broadcasting services provided by licensees operating across the country.

Operation of the anti-siphoning scheme

Issuing a determination to bring online simulcasts within the BSA's definition of 'broadcasting service' may also have implications for the operation of the anti-siphoning scheme. This scheme protects the availability of sport on free-to-air television by preventing subscription television broadcasters from buying the rights to events on the anti-siphoning list before free-to-air broadcasters have the opportunity to purchase these rights.

As part of this scheme, subscription television broadcasting licensees are subject to a licence condition preventing the acquisition of a right to televise an event on the anti-siphoning list unless a right to televise is held by a national broadcaster, or by commercial television broadcasting licensees who have the right to televise the event to more than 50 per cent of the Australian population (clause 10(1)(e) of Schedule 2 to the BSA). This '50 per cent rule' is aimed at ensuring that the rights to anti-siphoning events are acquired by commercial television broadcasting licensees that have the capacity to 'reach' more than half of the Australian population before rights to these events can be acquired by subscription television broadcasting licensees.

If internet simulcasts were to be defined as broadcasting services, and if this were to provide all broadcasters with a potential nationwide reach, the acquisition of the rights to a listed anti-siphoning event by a commercial television broadcaster would enable that broadcaster to 'broadcast' the listed event to the entirety of the Australian population online, irrespective of whether they could do so using traditional free-to-air broadcasting technology. In turn, the licence condition on subscription television broadcasting licensees would effectively be satisfied and any such licensee would be able to acquire the rights to the listed event, irrespective of whether a commercial television broadcaster had the capacity to broadcast (using traditional broadcasting technology) the event to more than half of the Australian population.

An example may be illustrative. It is possible that one of the predominantly regional commercial television networks, such as WIN Corporation, Prime Media Group or Southern Cross, may acquire the rights to a particular anti-siphoning event. These networks have the following population 'reach' across the licence areas in which they operate: WIN Corporation (38.9 per cent); Prime Media Group (24.4 per cent); and Southern Cross (34.1 per cent).

If internet simulcasts were defined to be broadcasting services, a subscription television broadcasting licensee would be able to acquire rights to an event on the anti-siphoning list

without restriction under the scheme if either WIN, Prime, or Southern Cross acquired the rights to the event in question. The rights to the event would effectively be 'siphoned' to subscription television, while free-to-air coverage of the event would only be able via traditional free-to-air technology to a relatively modest proportion of the Australian population.

Copyright issues

Subsection 10(1) of the *Copyright Act 1964* ('the Copyright Act') defines 'broadcast' to mean "a communication to the public deliver by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*". Various provisions of the Copyright Act utilise this definition of 'broadcast' and as such, a determination that would alter the definition of 'broadcasting service' established through subsection 6(1) of the BSA may have flow-on implications for the operation of copyright law. The Attorney-General's Department would be best placed to provide advice on any such issues and it is noted that the Committee has asked this department to provide advice on copyright issues associated with the proposed determination.

Commercial / contractual issues

Altering the definition of 'broadcasting service' in the BSA may affect the value and operation of existing commercial agreements between broadcasters and content providers.

While the government is not privy to such agreements, it is likely that the contracts between television / radio broadcasters and content providers may incorporate a statutory definition of 'broadcast' and/or 'broadcasting service'. Expanding the definition of 'broadcasting service' to include internet simulcasts may therefore affect the nature of the rights to televise events acquired by broadcasters and other, online media operators.

This situation would be particularly problematic for content providers that sell online rights to provide coverage of events separately from the traditional broadcast rights. These content providers include sporting bodies such as the Australian Football League and National Rugby League, which routinely sell exclusive rights to provide live coverage of their sports over the internet to online providers such as Telstra. Allowing the purchasers of broadcast rights to provide online simulcasts of the same content for no additional cost, as the result of changing the effective definition of 'broadcasting service', has the potential to diminish the value of the separate online rights offered by these content owners.

Other regulatory implications

The transmission of television or radio programs across multiple licence areas, even if not authorised, might also create regulatory difficulties in other areas of law, beyond broadcasting and copyright.

For example, by providing a service across multiple licence areas, broadcasters may risk breaching the consumer law prohibition on advertising a product in circumstances where there is not a reasonable chance that goods will be available for the advertised price (clause 35 of Schedule 2 to the *Competition and Consumer Act 2010*).

Alternatively, these circumstances may make it difficult to enforce certain court orders, such as the Victorian Supreme Court's 2008 order preventing the Nine Network from broadcasting the *Underbelly* program in Victoria on the basis that it might prejudice a criminal trial.

Potentially unintended consequences of changes to the Alston determination outlined above would most likely need to be addressed through substantial changes to the underlying regulatory framework, given the centrality of area-based licensing in the current BSA.