

12 July 2013

Committee Secretary,  
Senate Standing Committee on Environment and Communications  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Sir/Madam,

**Re: Inquiry into the effectiveness of regulatory arrangements to deal with the simultaneous transmission of radio programs**

Free TV Australia is the peak industry body representing each of Australia's commercial free-to-air television licensees.

Thank you for providing us with the opportunity to comment on your current inquiry which is examining whether or not the Minister for Broadband, Communications and the Digital Economy should issue a determination similar to the effect outlined by Commercial Radio Australia (CRA) in its submission to the inquiry of ensuring certain online simulcasts are considered to be a 'broadcasting service' under section 6(1) of the *Broadcasting Services Act 1992* (Cth).

At the outset, we note that the proposed determination would not be limited to "strictly radio simulcasts". The proposed determination is supported by the ABC and SBS and would extend to cover the online simulcasts of their television services.

Free TV does not support the determination in the form proposed by CRA ("the Proposed Determination").

More broadly we do not support a wider determination including television at this time. It may be appropriate at some point to recognise internet simulcast of broadcast services as part of a broadcast. However a number of things flow from such a decision and these should be fully considered before making such a decision.

Importantly, we also note that the power of the Minister in section 6 of the *Broadcasting Services Act* is to make a determination that a service or class of services does not fall within the definition of a "broadcasting service". There seems to be considerable doubt that what is currently being sought, namely a positive action to determine that certain services are broadcasting services, is within the scope of the power granted to the Minister under the relevant legislation.

These are complex and complicated issues with implications for many stakeholders that should be considered in the context of legislative change rather than through a Ministerial direction.

This approach would enable the Department of Broadband, Communications and the Digital Economy to conduct a full examination of all the implications and then provide a recommendation to the Minister.

Other jurisdictions such as the United Kingdom have addressed these issues through legislation as the most appropriate way of providing a comprehensive approach backed with legislative certainty. For example section 6(1A) of their *Copyright, Designs and Patents Act 1988* (UK) defines “broadcast” as including some internet simulcast streams.

In our view there are a number of issues that arise from making the Proposed Determination:

- The Proposed Determination would result in differential treatment of broadcast copyright between radio and television. In the form currently drafted it would differentiate between radio broadcasts and television broadcasts by national broadcasters on the one hand and commercial television broadcasts on the other. Incongruously, the ABC and SBS would enjoy television broadcast (or alternatively sound broadcast) copyright in online simulcasts while the commercial free-to-air television licensees would not.
- Platform specific approaches to legislation and regulation are increasingly ineffective in a converged media environment. In this environment it is important to ensure that legislation and or regulation, does not undermine the ability of individual players to compete on an even playing field.
- Making the Proposed Determination would attach the usual broadcast licence conditions to the internet streaming service. These would include licence area limitations. Our understanding of the purpose of the Proposed Determination is to permit ongoing provision of national internet streamed radio services. It seems doubtful that this would in fact be the outcome of making the Proposed Determination. The most likely result of making the Proposed Determination seems to be uncertainty and further litigation.

Extending the Proposed Determination to include commercial television raises a number of complex issues which we believe require further consideration. These include questions relating to the scope of our current broadcasting licences and whether they extend to internet transmissions, the implications for underlying rights in material broadcast by commercial broadcasters, extension of broadcast copyright to internet simulcasts, availability of certain copyright defences and permissions such as sections 47, 107 and 67 of the *Copyright Act 1968* (Cth).

There are also some issues relating to whether future online services may be delivered by some means other than the internet, such as closed user or end-to-end managed networks. These too require consideration to ensure any regulatory provisions are appropriate for a converged media environment.

There are no detriments to Free TV members from not making the Proposed Determination at this time.

The issue that gave rise to this inquiry is still before the courts, with CRA having recently applied for special leave to appeal to the High Court. It is anticipated that the hearing of that application will occur in the latter half of 2013.

We note that the Australian Law Reform Commission inquiry into copyright and the digital economy is also looking at related issues where the BSA and Copyright Act concepts are linked. Its review is relevant to these issues and provides an opportunity to look at the matters from a first principles policy consideration rather than a platform specific approach.

In a rapidly converging media environment it is important that these issues are dealt with comprehensively and we strongly urge you to consider recommending a legislative approach.

Yours sincerely,

Julie Flynn.  
CEO Free TV Australia