



Australian Government

**Professor Rosalind Croucher
President**

Australian Law Reform Commission

The Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

3 June 2013

**Inquiry into the effectiveness of current regulatory arrangements in dealing with radio simulcasts:
Question on Notice**

On 28 May 2013, the Standing Committee asked the ALRC the following question on notice:

What would be the potential 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?

The ALRC is pleased to provide the following response, based on observations arising from its current inquiry on copyright and the digital economy (the Copyright Inquiry).

The Standing Committee should note that it is not the role of the ALRC to provide legal advice outside the confines of its inquiries, which are subject to Terms of Reference issued by the Attorney-General of Australia.

As discussed in more detail in its April 2013 submission, the ALRC is examining the operation of provisions in the *Copyright Act 1968* (Cth) that refer to the concept of a 'broadcast' and 'broadcasting', terms which are defined by reference to the *Broadcasting Services Act* (the 'broadcast exceptions').

A ministerial determination, made in 2000 under the *Broadcasting Services Act*, excludes a 'service that makes available television and radio programs using the internet' from the definition of a broadcasting service.

In the context of the Copyright Inquiry, the ALRC is examining whether the *Copyright Act* should be amended to ensure that some broadcast exceptions also apply to the transmission of television or radio programs using the internet. That is, in a context of media convergence, and given the general desirability of a technology-neutral approach to copyright law reform, whether the concept of a 'broadcast' for copyright purposes should be extended.

However, the ALRC has not specifically considered the copyright or other legal implications of a ministerial determination being issued, of the nature referred to in the Question on Notice.

The ALRC understands, given the background to the simulcast inquiry, that the intended effect of such a ministerial determination would be to ensure that broadcast radio stations are able to use the statutory licensing scheme under s 109 of the *Copyright Act* to obtain the rights to simulcast music and other sound recordings using the internet and, incidentally, the benefit of the one per cent cap under s 152 of the Act.

The ALRC expresses no opinion on whether this would, in fact, be the effect of such a ministerial determination, or whether this is desirable.

Australian Law Reform Commission
Level 40, MLC Centre
19 Martin Place
Sydney NSW 2000

Postal Address:
GPO Box 3708
Sydney NSW 2001

Tel (02) 8238 6333
Fax (02) 8238 6363

Web www.alrc.gov.au
Email info@alrc.gov.au

The ALRC observes, however, that such a ministerial determination would also have implications for a number of other provisions of the *Copyright Act* including:

- (a) s 45—broadcast of extracts of works;
- (b) ss 47, 70 and 107—reproduction for broadcasting;
- (c) s 47A—sound broadcasting by holders of a print disability radio licence;
- (d) s 67—incidental broadcast of artistic works;
- (e) s 109—broadcasting of sound recordings;
- (f) s 135ZT—broadcasts for persons with an intellectual disability;
- (g) s 199—reception of broadcasts;
- (h) s 200—use of broadcasts for educational purposes; and
- (i) pt VA—copying of broadcasts by educational institutions.

The implications for these exceptions of any ministerial determination under the *Broadcasting Services Act* in relation to television and radio simulcasts would differ.

Some of these exceptions operate to assist persons engaged in making broadcasts—in effect, the definitions of ‘broadcast’ and ‘broadcasting’ in these sections serve to limit the availability of these exceptions to content providers that are broadcasting services for the purposes of the *Broadcasting Services Act*. Some provisions already apply to online communication of free-to-air broadcasts (*Copyright Act* pt VA, by virtue of s 135C(1)).

Other exceptions operate to provide exceptions for persons receiving, communicating or making copies of broadcasts. The references to ‘broadcast’ in these sections serve to limit the application of these sections to broadcasts made by content providers that are broadcasting services for the purposes of the *Broadcasting Services Act*.

If you have any queries, please do not hesitate to contact the Commissioner in charge of the Copyright Inquiry, Professor Jill McKeough

Yours sincerely,