Australian Government

Australian Law Reform Commission

Professor Rosalind Croucher
President

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

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Inquiry into the effectiveness of current regulatory arrangements in dealing with radio simulcasts

I refer to your letter inviting a submission from the ALRC on the Senate Environment and Communications References Committee inquiry into the effectiveness of current regulatory arrangements in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the internet ('simulcast').

The ALRC is currently conducting an inquiry on copyright and the digital economy (the Copyright Inquiry). A Discussion Paper containing proposals for reform of copyright law is due to be released on 31 May 2013. A number of matters to be raised in the Discussion Paper may have a bearing on the Senate's simulcast inquiry. This submission briefly canvasses some of these matters and the possible approach of the ALRC.

It is important to emphasise, however, that any ALRC proposals in areas of concern to the Senate Committee will not be formulated until the release of the Discussion Paper. Further, final recommendations of the Copyright Inquiry will only be made, following further consultation with stakeholders, in the Final Report due for release on 30 November 2013.

Copyright Act broadcast exceptions

The Discussion Paper will examine the operation of exceptions in the *Copyright Act 1968* (Cth) that refer to the concept of a 'broadcast' and 'broadcasting'. There are many of these exceptions, which are referred to by the ALRC as the 'broadcast exceptions'.

Some of the broadcast exceptions operate to provide exceptions for 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 1992* (Cth).

The ALRC is asking whether, in a context of media convergence, and given the general desirability of a technology-neutral approach to copyright law reform, the concept of a 'broadcast' should generally extend to similar content made available using the internet.

In this regard, the *Copyright Act* might be amended to ensure that some of the broadcast exceptions also apply to certain transmissions of television programs or radio programs using the internet and to remove any unnecessary link between the scope of copyright exceptions and regulation under the *Broadcasting Services Act.*

The statutory licensing scheme for broadcast of sound recordings

Section 109 provides an exception, subject to a statutory licensing scheme, for the broadcasting of sound recordings, to facilitate access by broadcasters to published sound recording repertoire. It provides that 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 maker of the broadcast to the copyright owners in accordance with the scheme.

The owner of the copyright in a published sound recording or a broadcaster may apply to the Copyright Tribunal for an order determining the amount payable by the broadcaster to the copyright owner in respect of the broadcasting of the recordings.

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

Broadcast radio stations are able to use the s 109 statutory licensing scheme to obtain the rights to broadcast music and other sound recordings, but internet radio services are not—at least where they are not broadcasting services for the purposes of the *Broadcasting Services Act*. Rather, internet radio services must negotiate rights to transmit sound recordings outside the scheme.

A complexity arises in relation to internet simulcasts, where radio stations, which are broadcasting services, commonly stream content simultaneously on the internet that is identical to their terrestrial broadcasts. In *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* (*PPCA v CRA*) the Full Court of the Federal Court held that, in doing so, a radio station was acting outside the terms of its statutory licence, as internet streaming is not a 'broadcast'.

While the case concerned the interpretation of a licensing agreement to broadcast sound recordings, it was agreed between the parties that the term 'broadcast' in the agreement was to be understood as having the meaning specified in the *Copyright Act*. 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'.

Broadcast radio stations, like internet radio services, will now have to negotiate separate agreements with the relevant collecting society (the PPCA) to stream the same content for which they have already obtained a statutory licence to broadcast. The implications of this case have to be considered in the context of the s 152 'one per cent cap' (see below), which makes access to statutory licensing under s 109 more desirable for radio stations.

In the context of the Copyright Inquiry, the ALRC is considering whether the *Copyright Act* should be amended to ensure that the s 109 licensing scheme also applies to the transmission of television or radio programs using the internet, and if so, how this might be done. More fundamentally, the ALRC is examining whether a number of existing schemes, including s109, should be repealed and replaced with systems of voluntary licensing.

The one per cent cap

A particular issue concerning the operation of the s 109 statutory licensing scheme concerns the 1% cap. Section 152 provides that, in making orders for equitable remuneration the Copyright Tribunal may not award more than 1% of the gross earnings of a commercial or community radio broadcaster. This 'one per cent cap' has been controversial and subject to court challenge.

In 2000, the Intellectual Property and Competition Review Committee (IPCRC), chaired by Mr Henry Ergas, recommended that the cap be abolished 'to achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis'. This recommendation was supported by arguments that the one per cent cap both lacks policy justification and distorts the sound recordings market.

The IPCRC accepted that the cap was originally implemented, in 1969, to ease the burden imposed on the radio broadcasting industry by payments for the broadcasting of sound recordings. It noted that, since then, the economic circumstances of the commercial radio industry had evolved, and concluded that no public policy purpose is served by this preference, which may distort competition, resource use, and income distribution.

In the context of the Copyright Inquiry, the ALRC is considering whether it should add to previous calls, including by the IPCRC, for the one per cent cap to be repealed.

Yours sincerely,

Professor Rosalind Croucher