



**Australian Government**  
**Attorney-General's Department**

**Civil Law Division**

13/5611

6 June 2013

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

Dear Committee Secretary

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

I refer to the email dated 28 May 2013 from Christopher Lawley seeking the Department's response to a question on notice from the Committee in relation to the potential copyright and other legal implications of the Minister for Broadband, Communications and the Digital Economy issuing a determination (*the proposed 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 Department is not in a position to provide legal advice. However, the Department considers that there are a number of significant copyright implications as well as legal implications for industry participants who incorporate terms from the *Copyright Act 1968* in their contractual relationships.

The main implications relating to the proposed declaration include:

- Overturning settled law that radio broadcasts and internet transmissions of content are fundamentally different. This law is consistent with other jurisdictions and international copyright treaties.
- Conflating broadcasts (ie content broadcast within a limited geographical or licence area) with internet transmissions (ie content transmitted to the world without geographical limitations) in the Copyright Act. The effect on the Copyright Act would be to fundamentally alter the carefully-balanced existing structure of the Act that supports the radio and television broadcasting industries. Another effect of the proposed determination would be to extend all licences, protections and exceptions in the Copyright Act to commercial broadcast activity on the internet.
- Interfering with and disrupting the operation of existing contracts for both radio and television broadcasts. This is a significant issue for sporting bodies and events with commercial arrangements worth hundreds of millions of dollars. Many of these contracts import relevant

parts of the Copyright Act and the Broadcasting Services Act and are based on differential licences between broadcast and internet transmission. Recent significant transactions and litigation involving major sporting codes indicates the value sporting organisations place on segmented licencing arrangements.

- Distorting fundamentally the market for licencing sound recordings on the internet. An effect of the proposed declaration would be that radio broadcasters could avail themselves of the statutory licence in section 109 and the one per cent cap in section 152(8) for transmitting sound recordings on the internet, providing a significant competitive advantage over other services that transmit music on the internet.

The Department notes the CRA, ABC, CRAA and SBS submission considers that without the proposed determination, no copyright protection is available for broadcasts which are simulcast online. The Department acknowledges there may be a risk that material ordinarily unprotected by copyright that makes up a broadcast (for example live content) may not be protected as a broadcast where it is transmitted on the internet rather than broadcast. The Department considers this risk may be mitigated through industry practices. The Department notes that all copyright protection in underlying content (films, sound recordings, musical works, and literary works) would continue to apply irrespective of whether the transmission is described as a broadcast or a communication to the public.

The Department understands that the Department of Broadband, Communications and the Digital Economy has provided information relating to the possible impacts of the proposed determination on the broadcasting services regulation. The Department does not propose to cover these impacts.

In preparing this letter, I have consulted the Department of Broadband, Communications and the Digital Economy.

Yours sincerely

Matt Minogue  
First Assistant Secretary  
Civil Law Division