

8 July 2013



ABC
Australian
Broadcasting
Corporation

The Committee Secretary
Senate Standing Committee on Environment and
Communications
By email

ABC Ultimo Centre
700 Harris Street
Ultimo NSW 2007
GPO Box 9994
Sydney NSW 2001
Tel. +61 2 8333 1500
abc.net.au

Dear Committee Secretary,

The ABC provides the answers to the questions asked on notice by the Committee on 2 July 2013 as follows:

1. *What would be the potential broadcasting, copyright and other legal implications for the ABC should the Minister for Broadband, Communications and the Digital Economy issue a determination similar to the effect outlined by the CRA in their submission to the inquiry of ensuring strictly radio simulcasts are considered to be a "broadcasting service" under section 6(1) of the Broadcasting Services Act 1992?*

The ABC notes that the proposed determination set out in the separate submission by Commercial Radio Australia (CRA)¹ is identical to the one proposed in the joint submission by the ABC, SBS, CRA and the Community Broadcasting Association of Australia (CBAA).² It is not limited to radio simulcasts. Specifically, the proposed determination would have the effect of ensuring that the definition of a "broadcasting service" under the *Broadcasting Services Act 1992* ("BSA") includes a service that makes available television or radio programs using the Internet if it is "provided simultaneously with a service that provides the same television program or radio program using the broadcasting services bands" and both services are provided by the ABC, SBS or the holder of a broadcasting services bands licence for radio.

As such, the proposed determination would ensure that simulcasts of television programs provided by the ABC and SBS are broadcasting services for the purposes of the BSA.

The proposed determination does not extend to simulcasts of television programs provided by holders of commercial television broadcasting licences. The ABC understands that this reflects the wishes of commercial free-to-air television broadcasters, as communicated on their behalf by Free TV Australia during the preparation of the joint submission.

In respect of the potential broadcasting, copyright and other legal implications for the ABC of the proposed determination, the ABC refers to the advice of the Hon JM Hennessy, SC dated 1 July 2013.

¹ Commercial Radio Australia. *Urgent Supplementary Submission to Environment And Communications Reference Committee re: Enquiry 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')* dated 24 May 2013.

² ABC, CRA, CBAA and SBS. *Submission by Australian Broadcasting Corporation, Commercial Radio Australia, Community Broadcasting Association of Australia and Special Broadcasting Service* dated 10 May 2013.

The ABC considers that the following implications would flow from limiting the scope of the determination to radio:

- (a) The ABC currently simulcasts ABC News24, its digital television news service, online. A narrowing of the scope of the determination to radio would have the effect of guaranteeing broadcast copyright to the ABC's radio simulcasts, whereas its television simulcasts may not have that guarantee. Any live news content simulcast on ABC News24, such as *News Breakfast*, the 7.00pm News, or Q&A, could be freely copied by a commercial service and re-packaged and delivered for a fee and the ABC may not have any copyright grounds upon which to prevent it.
- (b) The broadcast-based exceptions in the *Copyright Act 1968* ("Copyright Act"), such as sections 47, 70, 107(1) and 109 would have to be applied differently for ABC Radio and ABC Television. The ABC notes the ALRC's proposal, in its Copyright and the Digital Economy Discussion Paper,³ that such exceptions be extended to the transmission of television or radio programs using the internet.
- (c) The ABC believes that the statutory licence in Part VA of the Copyright Act would not be affected by the determination proposed by the Broadcasters, nor by a narrower determination, as section 135C already allows broadcast content that is communicated online to be copied by educational institutions.
- (d) While the ABC would prefer to have all of its broadcasting activities within the scope of such a determination, it would find a radio-specific determination to be of some benefit.

2. *What would be the potential broadcasting and legal implications to the ABC of the Minister for Broadband, Communications and the Digital Economy issuing a determination to the effect outlined by CRA of ensuring strictly radio simulcasts are considered to be a "broadcasting service" under section 6(1) of the Broadcasting Services Act 1992 with a condition the broadcasters do not simulcast outside of their designated licence areas? What are the practical implications of imposing such a condition?*

In relation to the question of the limits of the determination to radio simulcast, see the ABC's response to Question 1, above.

The Corporation does not broadcast within designated licence areas and would not be affected by such a condition. The ABC understands that limiting internet streaming, whether simultaneous or otherwise, to geographical areas within Australia is not currently technologically feasible.

3. *What are the implications for the ABC should a new determination not be issued by the Minister?*

As described in the joint submission, if the new determination is not issued, the ABC would expect to be charged twice by copyright owners for the simultaneous delivery of the same content to the same audience on different receiving devices. This could increase the rights costs that the Corporation is required to meet to deliver its services in a manner consistent with the expectations of the Australian public.

In addition, a consequence of the finding of the Full Bench of the Federal Court is that, contrary to industry expectations to date, the copyright protection of "broadcasts" under section 91 of the Copyright Act may not extend to online simulcasts of such programming. In the absence of the proposed determination, this creates the potential for whole programs to be copied and distributed by

³ Australian Law Reform Commission, *Copyright and the Digital Economy Discussion Paper* (2013) [16.42]

third parties without the permission of the broadcaster. It would affect not only the ABC as a broadcaster, but also underlying rightsholders, such as independent musicians, composers, artists and writers who are not resourced to undertake litigation, and may lead to them becoming reluctant to grant broadcast simulcast rights to a broadcaster such as the ABC. Such reluctance would, in turn, potentially reduce the quality of the programming that the ABC would be able to provide to Australian audiences via online platforms.

4. What is the understanding of the ABC of the intent of the existing regulations and how they have been understood to apply until recent court rulings?

In September 2000, when the then Minister, Senator the Hon. Richard Alston, issued the current determination, broadband internet penetration was low and online audio and video services were very much in their infancy. The ABC understands that the intention of the determination was to ensure that the development of internet-based media services in Australia was not constrained by the potentially heavy costs of complying with the various obligations that apply to broadcasters and datacasters. The distinction between on-demand streamed services and simulcasts (i.e. live, simultaneously-streamed services) does not appear to have been considered by the Minister.

The ABC's understanding of the application of the determination stems from its understanding of the intent, i.e. that the determination merely sought to distinguish regulation of the provision of online content from regulation of the provision of broadcast or datacast content.

As described in the joint submission, the ABC began simulcasting radio services in 1999 and was followed by other broadcasters over the next two years. The Corporation regards simulcasting as an alternative means of live delivery of its radio services and ABC News24 television service to audiences for their convenience, and understands that this is the perception of other radio broadcasters.

In the ABC's experience, the possibility of simulcast being treated as distinct from broadcast first arose in 2009 during negotiations with PPCA, when the Corporation was asked to pay for a simulcasting licence as part of a complex bundle of online rights that also included on-demand rights. The ABC elected to accept the proposal on a non-precedential basis in order to secure access to the remainder of the bundled rights. Contrary to the suggestion in PPCA's supplementary submission,⁴ no such distinction exists in the ABC's online licence with APRA/AMCOS.

The ABC hopes that these responses are of use to the Committee in its consideration of the question of simulcasting.

Yours sincerely,

Michael Millett
Director of Corporate Affairs

⁴ Phonographic Performance Company of Australia Ltd, *Supplementary submission to the 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")* dated 31 May 2013.