Standing Committee in Environment and Communications
Inquiry into the effectiveness of regulatory arrangements to deal with the simultaneous transmission of radio programs
Answer to Questions on Notice
Department of Broadband, Communications and the Digital Economy

Information sought

On 2 July 2013, the Committee asked:

1. What would be the potential broadcasting and other legal implications 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*?

2. Could the DBCDE provide comment on the broadcasting and legal implications 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?

3. How does the regulation of broadcasts and simulcasts in Australia compare with comparable international jurisdictions?

4. Can the Department comment on the implications of the Minister not issuing a new determination raised in CRA's submission under section 2.1(e)?

5. What is the Department's understanding of the intent of the existing regulations and how they have been understood to apply until recent court rulings?

On 8 July 2013, the Committee asked the Department to respond to some additional information it had received from Commercial Radio Australia, (CRA), the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) and the Community Broadcasting Association of Australia (CBAA) (collectively referred herein as the 'radio industry') and published on its website. That information included a Senior Counsel opinion obtained by CRA.

General comments

Answers to the specific questions asked by the Committee are provided below. However, the Department would preface these answers with some general comments. In particular, the Department is concerned that the apparent simplicity of the proposed amendments offered by the radio industry masks the more complex policy question of whether fundamental realignment of the nature and value of copyright in internet simulcasts is appropriate, and if so, whether making changes to broadcasting law is the best way to achieve this.

The radio industry is seeking an outcome whereby the Minister for Broadband, Communications and the Digital Economy (the Minister) makes a determination under subsection 6(1) of the *Broadcasting Services Act 1992* (BSA) that would, in effect, ensure that internet simulcasts of programs broadcast by commercial and community radio

broadcasters (specifically the holders of broadcasting services bands licences for radio) were considered to be a 'broadcasting service'. The proposed determination would also ensure that internet simulcasts of television or radio programs provided by the ABC or the SBS would also be considered to be a 'broadcasting service'. However, the determination as proposed by the radio industry would not include within the definition of a 'broadcasting service' the internet simulcast of programs broadcast by a commercial television broadcasting licensee.

The Department notes that this proposal would, in essence, seek to modify a broadcasting regulation to address a copyright issue. Specifically, the proposal would amend broadcasting legislation, via legislative instrument, to address a dispute over copyright royalties between the CRA and the Phonographic Performance Company of Australia (PPCA). This approach risks unintended consequences in terms of the scope and interpretation of broadcasting legislation to address what is essentially a commercial dispute, which may be better addressed through commercial negotiations between the parties. The Department is not aware whether any such negotiations have commenced.

The Department has attempted to identify and articulate the likely implications for broadcasting law arising from such a proposal in this response to questions received from the Committee Secretariat on 2 July 2013, and in the response dated 5 June 2013 to an earlier question asked by the Committee.

However, the Department is not able to provide definitive advice on all potential implications of such a proposal given the complexities involved in redefining a 'broadcasting service', the likely application of this new definition to other areas of Commonwealth law (including copyright) and the potential impact of this new definition for commercial contracts governing broadcast or other communication rights. Moreover, in the Department's view, a strong policy argument has not been advanced to justify making a regulatory distinction between internet simulcasts of broadcasting programs depending on whether those programs are provided by radio licensees, national broadcasters, or television licensees.

The responses and information provided herein should not be considered legal advice, and in no way guide, constrain or fetter the autonomy of the independent regulator, the Australian Communications and Media Authority (ACMA), in its oversight and enforcement of broadcast law.

The Department has also reviewed the additional information received from the Committee Secretariat on 8 July 2013 and in light of our responses to all the questions asked by the Committee, we wish to confirm that we have no further comments.

Answers

1. The Department has been asked to provide an assessment of a proposal contained in a joint submission to the Committee Inquiry of 10 May 2013 by CRA, ABC, SBS and the CBAA (page 15, paragraph 12 of that submission refers). As noted above, the proposal would, in effect, ensure that internet simulcasts of broadcast programs provided by commercial or community radio broadcasters, and internet simulcasts of television or radio programs provided by the ABC or SBS, were considered to be a 'broadcasting service'.

While the wording of the proposed determination would capture within the definition of a 'broadcasting service' radio programs provided by radio licensees, the Department notes that

the proposal would also capture both radio and television programs provided by either the ABC or SBS within this definition.

On 5 June 2013, the Department provided a response to a similar question on notice asked by the Committee, although this earlier question sought advice on the implications of including both radio and television simulcasts within the definition of a 'broadcasting service'. As a result of the scope of the original request, advice was provided on matters such as the anti-siphoning scheme which clearly only applies to television broadcasting services. Although the proposal currently being considered is intended to exclude simulcasts by commercial television broadcasting licensees, a number of the issues noted previously remain relevant.

- The online simulcast of radio services by commercial and community radio broadcasting licensees outside of their designated licence areas – which would be considered to be a 'broadcasting service' as a result of the making of the proposed determination – may result in breaches of relevant licence conditions preventing such broadcasts. This may also result in breaches of the relevant licence conditions preventing broadcasting services from being made available in areas where they are not licenced. Absent legislative amendments to remove or dis-apply these licence conditions (discussed in response to question 2), breaches of these conditions would potentially be subject to enforcement action by the ACMA.

- Various provisions of the *Copyright Act 1968* (Copyright Act) use the term 'broadcast' which incorporates the term 'broadcasting service' within the meaning of the BSA. As noted by the Attorney-General's Department in its response to an earlier question on notice from the Committee, dated 6 June 2013, a determination that sought to render online simulcasts of radio or television programs as 'broadcasting services' is likely to conflate broadcasts (in the current case, radio broadcasts) with internet transmissions in the Copyright Act, and extend all broadcasting-related licences, protection and exceptions in the Copyright Act to commercial radio broadcasting activity on the internet. The Attorney-General's Department would be best placed to provide any further advice on copyright issues and the Department understands that the Committee has asked the Attorney-General's Department a number of additional questions in this regard.

- The proposal to alter the definition of 'broadcasting service' may also affect the value and operation of existing agreements between broadcasters and content providers. It is conceivable that contracts between radio broadcasters and content providers, or between the ABC and SBS and content providers in relation to either radio or television programs, may incorporate a statutory definition of 'broadcast' and 'broadcasting service'. Expanding the definition of 'broadcasting service' to include internet simulcasts may therefore affect the nature of the rights to broadcast these events. These are matters for the parties concerned, and presumably these parties may be amenable to contractual amendments to restore the original intention of the agreements, to the extent such an agreed intention ever existed.

2. Commercial radio broadcasting licensees and community radio broadcasting licensees (although not the ABC and SBS) are already subject to a licence condition preventing them from providing their services outside of their designated licence areas (clauses 8(3) and 9(2A) of Schedule 2 to the BSA refer). There are limited circumstances in which the provision of services outside the licence area may be permitted, being where the 'out of area' broadcast:

a. occurs accidentally; or

b. is a necessary result of providing services within the designated licence area; or

c. occurs in exceptional circumstances, as assessed and approved by the ACMA; or

d. enables a person in an adjacent licence area who does not receive adequate reception of services licensed for that adjacent area to receive services, as approved by the ACMA.

Radio broadcasters may seek to comply with their respective licence conditions by employing 'geo-blocking' technology to prevent access to internet simulcasts by users outside of their licence areas. However, it is not known whether this technology could be used to accurately or consistently 'block' users on a licence area basis. The Department also understands that such technology may be costly and difficult to implement, and that it is not employed as part of the existing simulcasts provided by commercial or community radio broadcasters.

The enforcement of applicable licence conditions is ultimately a matter for the ACMA. The Department is not in a position to speculate as to the ACMA's views about the implications of the current Determination made under subsection 6(1) of the BSA, which is generally referred to as the 'Alston Determination'. However, we note that the decision of the Full Bench of the Federal Court of 13 February 2013 (*Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited [2013] FCAFC 11*) indicated that if a commercial radio broadcasting licensee were to provide a radio service by way of the internet, the licensee would be providing that service outside of its licence area and would therefore, subject to any potential exceptions, be in breach of the relevant licence condition (referred above) **if** that service were to be considered a 'broadcasting service'. This would be the case for internet simulcasts of programs broadcast by commercial and community radio broadcasters (specifically the holders of broadcasting services bands licences for radio) if the Determination was made along the lines proposed by the radio industry.

3. Direct comparison between the situation in Australia and other jurisdictions is difficult because of the different regulatory regimes and market structures that apply to broadcasters and online services in each country. The Department has limited information to hand on the operation of royalty arrangements for broadcasters. However, in general terms, the Department understands that online content providers are not regulated as broadcasting services in the United Kingdom or in the United States.[1] The following comments relate to radio broadcasts and simulcasts and do not countenance the regulatory arrangements applicable to television or television-like services.

As far as commercial copyright arrangements are concerned, the Department understands that in the United Kingdom, internet simulcasting of a radio broadcast is expressly provided for in the various copyright licences.[2] The Department also understands that in the United States, the negotiated copyright arrangements expressly cover internet simulcasting of radio broadcasts.[3] Broadcasters in the United States must also pay publishing royalties for their

[1] Source: ACMA paper *International approaches to audiovisual content regulation*, http://www.acma.gov.au/theACMA/international-regulatory-research

[2] Sources: http://www.ppluk.com/I-Play-Music/Radio-Broadcasting/Radio-types/Online-radio-and-services/ and http://www.prsformusic.com/users/broadcastandonline/Radio/commercialradio/Pages/default.aspx

[3] Source: Radioinfo, "US radio stations reach agreement on internet radio royalty rates", http://www.radioinfo.com.au/news/8161

internet simulcasts to the relevant collection agencies.[4] Some of the broadcasting licences cover internet simulcasting, but such terms are at the discretion of the collection agency.[5]

Detailed questions on these matters could be addressed to the Attorney-General's Department.

4. Should the proposed Determination not be made, the BSA would continue to regulate 'broadcasting services' within the meaning of the current Determination (and, where applicable, as adjudicated by the courts). Similarly, the Copyright Act would continue to govern copyright and associated royalties payable for the use of sound recordings (and other 'works' potential subject to copyright) in 'broadcasts' and internet transmissions.

In relation to the BSA, services that do not fall within the definition of a 'broadcasting service' would not be subject to broadcasting regulation, including compliance with licence conditions. However, content services (including streaming services and on-demand services) are subject to regulation under Schedules 5 and 7 to the BSA, particularly in relation to provision of offensive, harmful or illegal content. Internet streaming services with an Australian connection would need to comply with these Schedules.

5. The Alston Determination, made by the then Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston in September 2000, determined that the following 'class of service' does not fall within the definition of 'broadcasting service':

> a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands.[6]

This Determination was made, in part, in response to internet service providers' concerns about the possibility of emerging streaming services on the internet being regulated as 'broadcasting services'. The Explanatory Statement indicates that the intention of the Determination is to remove potential legal uncertainty as to whether a streaming service that makes content available over the internet falls within the definition of a 'broadcasting service'.

> The purpose of the accompanying determination under paragraph (c) of the definition of "broadcasting service" in subsection 6(1) of the Act is to make it clear that audio and video streaming over the Internet are not broadcasting services.[7]

Provided the service in question does not use the broadcasting services bands to deliver television or radio programs, such a service is not a broadcasting service, regardless of whether delivery was solely achieved using the Internet.

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[4] Source: Media Law Monitor – The Basics of Music Licensing in Digital Media, http://www.medialawmonitor.com/2011/06/the-basics-of-music-licensing-in-digital-media-2011-update/

[5] See, for example: http://www.broadcastlawblog.com/2012/01/articles/broadcast-performance-royalty/details-of-the-ascap-settlement-with-the-radio-industry-what-will-your-station-pay/

[6] http://www.comlaw.gov.au/Details/F2004B00501/Explanatory%20Statement/Text

[7] ibid

> "The determination [excludes from the definition of a 'broadcasting service'] a service that uses the Internet, even if part of the means of delivery of the service is technology which may not clearly be part of the Internet, so long as the service does not deliver programs using the broadcasting services bands."[8]

Consistent with the intentions noted above, the Department understands that since the making of the Determination, services that use the internet as a means of delivery for television and radio programs, or any other audio or visual content for that matter, have not been regulated as broadcasting services under the BSA.

The Department does not have specific knowledge as to how a 'broadcasting service' has been dealt with through commercial agreements, such as those between CRA and the PPCA, or other broadcasters and copyright owners.

[8] ibid.