Chapter 2

Discussion of key issues

2.1 The committee received 16 submissions to the inquiry, mostly from the music recording industry, copyright groups and the commercial radio sector.

2.2 The Phonographic Performance Company of Australia (PPCA) and its supporters in the music industry informed the committee that copyright holders should be entitled to receive fair compensation for the exploitation of their work.[1] The organisations however requested that the committee not recommend any isolated changes to the current broadcasting and copyright regulations. They argued that no changes to policy should be considered until the Australian Law Reform Commission (ALRC) completes its inquiry into copyright, and the impact of the Federal Court's determination of the matter between the PPCA and Commercial Radio Australia (CRA) has been assessed.[2]

2.3 Conversely the commercial and community radio sector urged the committee to recommend that a new ministerial determination be issued that clarifies that a radio or television simulcast is considered to be a "broadcasting service" under the Broadcasting Services Act.[3] The sector argued that the public benefit in maintaining the current interpretation of a simulcast outweighs any benefits that may arise from considering a simulcast to be a separate broadcast.[4]

Threats to the music industry

2.4 The music industry raised concerns that the profitability of many artists and businesses are under threat from deficiencies in copyright law.[5] Research prepared for the Australia Council was cited to show that the average earnings of artists are low and considerably less than other occupations requiring similar periods of professional training.[6] The industry argued that it operates in a high-risk environment, with artists

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1 Phonographic Performance Company of Australia (PPCA), *Submission 8*, p. 43. See also Association of Artist Managers (AAM), *Submission 4*, p. 1; Universal Music Australia (UMA), *Submission 5*, p. 2; Australian Independent Record Labels Association (AIR), *Submission 6*, p. 1; Sony Music Entertainment Australia, *Submission 10*, p. 2; Australian Recording Industry Association (ARIA), *Submission 11*, p. 1.

2 PPCA, *Submission 8*, p. 43.

3 Australian Broadcasting Corporation (ABC), Commercial Radio Australia (CRA), Community Broadcasting Association of Australia (CBAA) and Special Broadcasting Service (SBS), *Submission 12*, p. 15.

4 ABC, CRA, CBAA and SBS, *Submission 12*, p. 14.

5 AAM, *Submission 4*, p. 1; UMA, *Submission 5*, p. 2; AIR, *Submission 6*, p. 1.

6 AAM, *Submission 4*, p. 2. See also David Throsby and Virginia Hollister, *Don't give up your day job: An economic study of professional artists in Australia*, Australia Council, 2003, available at: http://www.australiacouncil.gov.au/__data/assets/pdf_file/0007/32497/entire_document.pdf (accessed 20 May 2013).

and businesses investing both time and financial resources into the creation of sound recordings.[7]

2.5 According to the Association of Artist Managers (AAM), if artists are to continue to create and produce the quality content modern digital services rely upon, 'they need the protection of a robust copyright law to provide certainty, protection and a basis for investment in these inherently high-risk endeavours'.[8] The Australian Independent Record Labels Association (AIR) similarly contended that for many small Australian businesses and artists to remain viable, strengthened copyright laws are needed:

> Their ability [small businesses and artists] to build livelihoods, sustainable business models, and continue the cycle of investment and creative output, is based on the protections afforded to rights holders through Australia's copyright framework.[9]

2.6 In addition to the threat that poor copyright regulation may have on small and independent recording artists, large record companies expressed their concern for the music industry in light of technological developments.[10] The digitisation of music and the unauthorised downloading and streaming of recorded music have presented challenges to the industry. According to Universal Music Australia (UMA):

> The significant decline in the overall size of the recorded music industry started when digitisation of music content began to take off in the early 2000s. The prevalence of illegitimate music download and streaming platforms in the digital space has led to a rapid decline in willingness to pay for recorded music. UMA's view is that appropriate regulatory models that support innovation and growth are critical in the digital age.[11]

2.7 UMA informed the committee that over the past ten years the total revenues from legitimate recorded music sales have declined severely, both globally and in Australia.[12] The company claimed that in real terms, revenue has more than halved over the same period.[13]

2.8 The music industry therefore concurred with the PPCA in arguing that Australian copyright regulation needs to ensure that 'those who create and invest in the creation of sound recordings can be remunerated fairly for the use of their creative works'.[14]

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7 AIR, *Submission 6*, p. 2.

8 AAM, *Submission 4*, p. 2.

9 AIR, *Submission 6*, p. 1.

10 UMA, *Submission 5*, p. 2; Sony Music Entertainment Australia, *Submission 10*, p. 2.

11 UMA, *Submission 5*, p. 2.

12 UMA, *Submission 5*, p. 2.

13 UMA, *Submission 5*, p. 2.

14 PPCA, *Submission 8*, p. 1.

Simulcasting

Arguments put forward by the music industry

2.9 The PPCA is a non-profit copyright collecting society that represents the interests of Australian artists, record companies and labels.[15] The PPCA is provided with a mandate by the artists and labels that it represents to manage their specified copyright works. This arrangement provides copyright owners with the ability to receive payments for the use of their copyright works on a collective basis thereby minimising administration and enforcement costs for the copyright owner. It also enables broadcasters to enter into blanket licences which provide access to a wide range of recordings without the need to negotiate separate licences with each copyright holder.[16]

2.10 The PPCA made a submission on behalf of its members which include 1200 record companies and copyright holders, 15 000 record labels and 2500 artists.[17] The AAM, UMA, AIR, Sony Music Entertainment Australia (Sony) and the Australian Recording Industry Association (ARIA) made submissions supporting the PPCA.

2.11 The PPCA, on behalf of its members, argued that amending regulations to consider a radio simulcast as a "broadcasting service" as defined in the Broadcasting Services Act would be to the detriment of copyright holders.[18] The PPCA expressed the view that any legislative change that treated internet simulcasts in the same way that current broadcasts are treated under the Copyright Act would have undesirable outcomes, including:

- stifling innovation and fair competition in the emerging internet streaming market;
- constraining the Copyright Tribunal in its ability to equitably adjudicate licence agreements; and
- creating inconsistent treatment for copyright owners.[19]

Innovation and competition in the internet streaming market

2.12 In the PPCA's opinion, radio broadcasts and their simultaneous streaming online represent two different services and should be recognised as such.[20] Terrestrial radio broadcasts are confined to particular geographic licence areas, whilst their simulcast online is not restricted and can be heard around the world. According to the PPCA, these services represent separate and distinct activities with the online

15 PPCA, *Submission 8*, p. 2.

16 PPCA, *Submission 8*, p. 2.

17 PPCA, *Submission 8*, p. 2.

18 PPCA, *Submission 8*, p. 36.

19 PPCA, *Submission 8*, pp 31–34.

20 PPCA, *Submission 8*, p. 31.

simulcasting of radio simply being 'another way of increasing the revenue base for the shareholders of these broadcasting companies'.[21]

2.13 The PPCA believed that any decision to not recognise a radio broadcaster's online simulcast as a distinct service will provide a significant advantage to terrestrial radio broadcasters at the expense of businesses solely concerned with providing content online.[22] Currently, customised streaming services that provide music over the internet enter into voluntary, commercial licences with the PPCA or other copyright owners to play their material. If radio broadcasts and simulcasts are considered to be the same service, radio broadcasters would not be required to enter into a separate copyright licence agreement for any content they stream online. The PPCA commented that this creates different rules for two competitors operating in the same market:

> Online streaming services such as linear internet radio and customised streaming services operate in the same digital market as radio broadcasters that simulcast their terrestrial broadcasts over the internet. In terms of the delivery of these two services—there is nothing dissimilar.[23]

2.14 Furthermore, the PPCA argued that when negotiating agreements to transmit programs online, the ability of online streaming services to negotiate fees is not constrained by the price caps contained in section 152 of the Copyright Act.[24] The fees payable by holders of a broadcasting licence who provide terrestrial radio broadcasts and simulcasts are currently capped at one per cent of gross earnings (or for the ABC, one half of a cent per Australian). No such cap on fees would apply to businesses that choose to communicate recordings via the internet alone.[25]

2.15 The PPCA expressed concern that the advantage provided to radio broadcasters over customised streaming services would distort the market and inhibit the development of new businesses in the digital economy.[26] The PPCA stated:

> …providing radio broadcasters with an advantage in the internet streaming industry will stifle competition and the development of new online only services. Ultimately, audiences may miss out on innovative new services that cannot fairly compete with commercial radio giants that have the protection of a statutory cap.[27]

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21 PPCA, *Submission 8*, pp 31–33.

22 PPCA, *Submission 8*, p. 31.

23 PPCA, *Submission 8*, p. 31.

24 PPCA, *Submission 8*, p. 31.

25 PPCA, *Submission 8*, p. 31.

26 PPCA, *Submission 8*, p. 31.

27 PPCA, *Submission 8*, p. 32.

Constraining the Copyright Tribunal

2.16 A second undesirable outcome from not recognising radio broadcasts and simulcasts as distinct services, according to the PPCA, is that it will further constrain the Copyright Tribunal.[28]

2.17 At the moment, the legislative cap on fees payable to copyright owners as set out in section 152 of the Copyright Act is only made available to the holders of a broadcasting licence (such as radio broadcasters) and the ABC.[29] The PPCA argued that treating radio broadcasts and simulcasts as the same service would extend the legislative caps beyond the arena of traditional terrestrial broadcasting and into the developing market for online digital services.[30] The PPCA believed this would constrain the Copyright Tribunal by 'limiting its ability to require equitable remuneration for the use of copyright material in the online environment'.[31]

Inconsistent treatment of copyright holders

2.18 The PPCA argued that another undesirable outcome of treating online radio simulcasts as a "broadcasting service" would be the enforcement of inconsistent treatment of classes of copyright holders.[32] The PPCA pointed out that other copyright industries (such as photography, literature and motion picture) are able to negotiate separate copyright licences for different activities.[33] Treating radio broadcasts and their internet simulcast as the one service would prohibit copyright owners from granting or withholding licences for the broadcast of their work on a discretionary basis.[34]

2.19 The PPCA noted that:

> For example, book publishers are able to separately licence the production of paperback and hardback book formats. Similarly, different agents or representatives may be granted rights to exploit content in different defined geographic areas.[35]

Policy recommendations

2.20 Despite the PPCA's concerns for ensuring that radio broadcasts and simulcasts remain separate services, they requested that the committee should not make any recommendations relating to simulcast regulation until the ALRC inquiry is completed in November 2013:

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28 PPCA, *Submission 8*, p. 33.

29 *Copyright Act 1968*, s. 152.

30 PPCA, *Submission 8*, p. 33.

31 PPCA, *Submission 8*, p. 33.

32 PPCA, *Submission 8*, p. 34.

33 PPCA, *Submission 8*, p. 34.

34 PPCA, *Submission 8*, p. 34.

35 PPCA, *Submission 8*, p. 33.

> In light of the extensive reviews already on foot, in PPCA's view the Committee should not, at this time, recommend any isolated regulatory amendments.[36]

2.21 This view to continue to recognise radio broadcasts and simulcasts as a separate service was supported by the AAM, UMA, Sony and AIR.[37]

Arguments put forward by the commercial and community radio sector

2.22 The ABC, CRA, Community Broadcasting Association of Australia (CBAA), and the Special Broadcasting Service (SBS) (the broadcasters) authored a joint submission, highlighting that the issues forming the subject of the inquiry directly affect all of the broadcasters.[38]

2.23 The broadcasters submitted that radio simulcasting has taken place in Australia since approximately 1999, and that until the recent decision by the Federal Court, it was accepted by many participants in the broadcasting industry that a simulcast of a radio program was a "broadcasting service" within the meaning of that term in the Copyright Act and Broadcasting Services Act.[39]

2.24 The broadcasters expressed concern that the Federal Court's new interpretation of a "broadcasting service" could have the consequence of removing copyright protection for broadcasts which are simulcast online, making it more difficult for broadcasters to obtain copyright clearances for underlying rights, and effectively double the payment required for the same program to be transmitted at the same time, via two different technology platforms.[40] The new interpretation may also result in broadcasters ceasing to simulcast, thereby depriving some members of the public access to programs on the devices of their choice as well as creating a regulatory regime that is not technically neutral.[41]

Broadcast copyright

2.25 The broadcasters argued that their broadcasts are copyright protected under section 87 of the Copyright Act. [42] Section 87 provides that copyright in the case of a sound broadcast is the exclusive right of the broadcaster.[43] The broadcasters noted that third parties are not able to copy a broadcast without the permission of the

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36 PPCA, *Submission 8*, p. 43.

37 AAM, *Submission 4*, p. 3; UMA, *Submission 5*, p. 3; Sony Music Entertainment Australia, *Submission 10*, p. 3; AIR, *Submission 11*, p. 3.

38 ABC, CRA, CBAA and SBS, *Submission 12*, p. i.

39 ABC, CRA, CBAA and SBS, *Submission 12*, p. 2.

40 ABC, CRA, CBAA and SBS, *Submission 12*, pp 2–3.

41 ABC, CRA, CBAA and SBS, *Submission 12*, p. 3.

42 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

43 *Copyright Act 1968*, s. 87.

broadcaster, thus protecting broadcasters against third parties who might wish to copy and distribute programs illegally.[44]

2.26 The broadcasters argued that the Federal Court's decision to consider radio broadcasts and simulcasts as separate services ensures that online simulcasts will no longer be protected by copyright as it is not deemed to be a "broadcast".[45] The broadcasters believed that that this in turn could create the potential for whole programs to be copied and distributed without their permission.[46]

2.27 It was claimed that the most vulnerable programs to be copied without authorisation are those with no underlying copyright, including live sports broadcasts, live classical music concerts and live news and current affairs programs.[47]

2.28 The broadcasters asserted that the Federal Court's new interpretation effectively legalises an act that would previously have been an infringement of copyright. They stated that 'the removal of such significant copyright protection may make it difficult for broadcasters to continue to simulcast their broadcast programs online'.[48]

Underlying rights holders

2.29 The broadcasters contended that if copyright protection is removed from the broadcast itself, underlying rights holders may be reluctant to grant broadcast simulcast rights.[49] It was argued that currently, content creators (such as musicians, composers, artists and writers) may rely on the broadcasters to take action to prevent copyright infringement of the content contained within the program. The broadcasters are concerned that as a result of the Federal Court's new interpretation, content creators will no longer be able to take such action and this will leave them with the responsibility of enforcing their copyright themselves.[50] The broadcasters explained that:

> In many cases, content creators do not have the resources to pursue legal action and may be unable to enforce their own copyright. If they can no longer rely upon the [b]roadcasters to enforce copyright in the broadcast as a whole, they may prove unwilling to grant the [b]roadcasters the right to simulcast the program.

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44 ABC, CRA, CBAA and SBS, *Submission 12*, p. i.

45 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

46 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

47 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

48 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

49 ABC, CRA, CBAA and SBS, *Submission 12*, p. 5.

50 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

> This is likely to affect a wide range of broadcast programs and would be to the detriment of the listening public, who would be deprived of the choice of listening to their program online.[51]

Double payments to copyright owners

2.30 Another concern for the broadcasters, should radio broadcasts and simulcasts be considered separate in regulations, is that copyright owners would be enabled to charge broadcasters twice for the simultaneous use of the same copyright material merely because the device on which it is received is different.[52]

2.31 They asserted that 'no single listener can listen to two devices simultaneously; they are either listening to the radio or listening online through a computing device'.[53] The broadcasters noted that approximately 9.5 per cent of a radio broadcaster's audience choose to listen to a broadcast online, a percentage that has been a consistent trend over the past five years.[54]

Different regulatory regimes

2.32 The broadcasters also believed that the Federal Court's new interpretation of a radio simulcast is in conflict with the policy objectives of the Broadcasting Services Act.[55]

2.33 Subsection 4(1) of the Broadcasting Services Act sets out that:

> The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services, datacasting services and internet services according to the degree of influence that different types of broadcasting services, datacasting services and internet services are able to exert in shaping community views in Australia.[56]

2.34 The broadcasters claimed that a program exerts the same degree of influence on its listeners, irrespective of its means of delivery. They stated:

> A person who listens to a broadcast on a car radio is no more or less affected by the broadcast than a person who listens to that program at exactly the same time through an online simulcast. Accordingly, the program should be regulated in the same way, irrespective of its means of transmission.[57]

2.35 Furthermore, the broadcasters believed that the new interpretation is in contradiction to subsection 4(2) of the Broadcasting Services Act that states that broadcasting services should be regulated in a way that will readily accommodate

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51 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

52 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

53 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

54 ABC, CRA, CBAA and SBS, *Submission 12*, p. 6.

55 ABC, CRA, CBAA and SBS, *Submission 12*, p. 7.

56 *Broadcasting Services Act 1992*, ss. 4(1).

57 ABC, CRA, CBAA and SBS, *Submission 12*, p. 7.

technological change, and that public interest considerations should be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services.[58] The broadcasters maintained that in accordance with the policy objectives of the Broadcasting Services Act, 'any regulation should encourage the provision of broadcasting services via new technologies, such as online simulcast'.[59]

2.36 The broadcasters warned that failure to correct these policy inconsistencies will require broadcaster who wish to simulcast programs to be subject to two sets of regulation. They stated:

> This places a substantial administrative and financial burden on broadcasters, which is unlikely to encourage the provision of broadcasting services via new technologies and does not accord with the policy objectives set out in the [Broadcasting Services Act].[60]

2.37 The broadcasters also believed that the new interpretation is not consistent with the growing recognition amongst media stakeholders that legislation which governs broadcasting and communications should be technologically neutral where possible.[61]

2.38 It was also pointed out that the charters of the ABC and SBS have recently been amended to specifically include the provision of digital services.[62]

Copyright Act

2.39 In respect to the Copyright Act, the broadcasters asserted that it provides the maker of a broadcast with the exclusive right to make a recording of the broadcast and to re-broadcast it or communicate it to the public.[63] They contend that no such protection is given in respect of online communications and a broadcaster could not prevent a person from copying or communicating a simulcast program which has been received online.[64]

Policy recommendations

2.40 The broadcasters argued that many participants in the broadcasting industry have traditionally operated on the basis that the online portion of a simulcast is a broadcast.[65] They argued that maintaining the status quo would be a 'benefit to the

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58 *Broadcasting Services Act 1992*, ss. 4(2).

59 ABC, CRA, CBAA and SBS, *Submission 12*, p. 7.

60 ABC, CRA, CBAA and SBS, *Submission 12*, p. 8.

61 ABC, CRA, CBAA and SBS, *Submission 12*, p. 10.

62 ABC, CRA, CBAA and SBS, *Submission 12*, p. 9.

63 ABC, CRA, CBAA and SBS, *Submission 12*, p. 9.

64 ABC, CRA, CBAA and SBS, *Submission 12*, p. 9.

65 ABC, CRA, CBAA and SBS, *Submission 12*, p. 10.

public as audiences will continue to be able to choose to access broadcasts using an online device'.[66]

2.41 The broadcasters urged the committee to recommend immediate action to overcome the 'significant adverse consequences' of the Federal Court's new interpretation.[67] They requested that the minister make a new determination which has the effect of revoking the September 2000 determination made by the former minister and creating a new definition that ensures that the following services do not fall within the definition of a "broadcasting service":

> a service that makes available television or radio programs using the Internet, unless that service 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:
>
> (i) the holder of a broadcasting services bands licence for radio;
>
> (ii) the Australian Broadcasting Corporation, or
>
> (iii) the Special Broadcasting Service.[68]

2.42 The broadcasters believed that the proposed new determination will reflect the current use of technology by media consumers and the trend towards platform neutrality of regulation. They contended that it is a straightforward solution that requires no amendment to the Copyright Act or the Broadcasting Services Act.[69]

2.43 The broadcasters also expressed a view that the subject matter of the committee's inquiry is distinct from that currently being undertaken by the ALRC and is distinct from the issue currently before the Federal Court. They stated:

> This is not an issue that should be delayed pending the outcome of much wider reviews of the regulatory framework governing copyright. Instead, it should be addressed as quickly as possible, so that broadcasters may continue to provide the services that consumers have enjoyed for the past 10 years, namely the ability to access broadcast programs of their choice over the internet in accordance with the objectives of the [Broadcasting Services Act].[70]

International perspective

2.44 The International Federation of the Phonographic Industry (IFPI), an organisation representing the recording industry worldwide, advised the committee how copyright relating to online simulcasts is treated internationally.

2.45 The IFPI indicated that the World Intellectual Property Organisation's (WIPO) *Performances and Phonograms Treaty*, of which Australia is a party, stresses that

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66 ABC, CRA, CBAA and SBS, *Submission 12*, p. 10.

67 ABC, CRA, CBAA and SBS, *Submission 12*, p. 15.

68 ABC, CRA, CBAA and SBS, *Submission 12*, p. 15.

69 ABC, CRA, CBAA and SBS, *Supplementary Submission 12*, p. 1.

70 ABC, CRA, CBAA and SBS, *Supplementary Submission 12*, p. 2.

simulcasting does not constitute "broadcasting", but rather constitutes a form of "communication to the public".[71]

2.46 The IFPI also pointed out that many countries have taken the view of the Federal Court of Australia—that internet simulcasts of radio programs fall outside the definition of "broadcasting". The IFPI stated:

> In many markets, including Austria, Finland, Greece, Hungary, Ireland, Italy, Romania, Spain and Sweden in Europe, as well as Brazil, Canada, Hong Kong, Israel, Japan, Singapore, Taiwan and the US, radio stations pay a separate fee for their simulcasting activities. In other countries a simulcasting licence may be bundled into the traditional broadcasting licence, with one single tariff and no separate simulcasting tariff.[72]

2.47 The IFPI however stressed that the absence of a separate tariff for simulcasting does not mean that simulcast falls within the broadcasting definition and it does not deny copyright holders being paid additional remuneration.[73]

2.48 Conversely, it was argued by the broadcasters (ABC, CRA, CBAA and SBS) that any changes to the interpretation of radio simulcasts would be in contravention of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention).[74] They stated that the Rome Convention provides that broadcasting organisations shall enjoy the right to authorise or prohibit the rebroadcasting or the fixation of their broadcasts and that allowing anything less is contrary to the terms and spirit of the Convention.[75]

2.49 With regard to the regulation of broadcasts and simulcasts in international jurisdictions, DBCDE cautioned that:

> 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.[76]

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71 International Federation of the Phonographic Industry (IFPI), *Submission 7*, p. 1. See also Article 2(f), World Intellectual Property Organisation (WIPO), *Performances and Phonograms Treaty*, 20 December 1996, available at: http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html (accessed 23 May 2013).

72 IFPI, *Submission 7*, p. 3.

73 IFPI, *Submission 7*, p. 3.

74 ABC, CRA, CBAA and SBS, *Submission 12*, p. 12.

75 ABC, CRA, CBAA and SBS, *Submission 12*, p. 13. See also Article 13, WIPO, *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1961, available at: http://www.wipo.int/treaties/en/ip/rome/trtdocs_wo024.html#P119_11307 (accessed 23 May 2013).

76 DBCDE, *Answers to written questions on notice*, 2 July 2013, (received 11 July 2013), p. 4.

Copyright Council perspective

2.50 The Australian Copyright Council (ACC), an independent organisation that represents the peak bodies of Australian creators as well as major collecting societies (including the PPCA), argued that copyright law is a complex policy issue that underpins the creative economy.[77]

2.51 The ACC was of the opinion that broadcasting and communication via the internet are different in three important ways: broadcasting is tied to the broadcast signal and therefore confined to a geographical area; broadcasting relates to a particular kind of technology which limits the potential audience; and not all sound recordings are covered by a broadcast right.[78] The ACC believed that for these reasons, 'broadcasting and communication via the internet are different and should be renumerated separately'.[79]

2.52 The ACC also argued that these are difficult and complex issues, raising matters of both domestic and international law. They therefore suggested that 'in the ACC's respectful submission, the regulatory regime for simulcasting is better dealt with under existing government processes'.[80]

Response from Commonwealth government departments

2.53 In response to the broadcasters' proposal that the minister make a new determination, the Department of Broadband, Communications and the Digital Economy (DBCDE) outlined a number of 'legislative and other legal issues associated with the proposal'[81] and argued that:

> The proposal that the Minister issue 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 BSA would give rise to a number of (potentially unintended) consequences.[82]

2.54 DBCDE was concerned that unintended consequences could impact out of area and unlicensed broadcasting; control rules and media diversity; the anti-siphoning scheme; and copyright and commercial / contractual issues.[83]

2.55 DBCDE highlighted the complexity of broadcasting and copyright law, advising that:

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77 Australian Copyright Council (ACC), *Submission 2*, p. 1.

78 ACC, *Submission 2*, p. 1.

79 ACC, *Submission 2*, p. 1.

80 ACC, *Submission 2*, p. 2.

81 DBCDE, *Answers to written questions on notice*, 28 May 2013 (received 5 June 2013), p. 1.

82 DBCDE, *Answers to written questions on notice*, 28 May 2013 (received 5 June 2013), p. 2; and also DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 2.

83 DBCDE, *Answers to written questions on notice*, 28 May 2013 (received 5 June 2013).

> …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.[84]

2.56 DBCDE continued:

> …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.[85]

2.57 The Attorney-General's Department (AGD) has responsibility for copyright matters and provided the following analysis of 'issuing a narrow determination to the effect outlined by CRA of ensuring strictly radio simulcasts are considered to be a "broadcasting service"':

> The potential copyright implications of a new determination limited only to radio broadcasts remain significant…these implications 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 broadcasting industry.
>
>   Another effect of the proposed determination would be to extend all licences, protections and exceptions in the Copyright Act to commercial radio broadcast activity on the internet.
> - Fundamentally distorting 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.[86]

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84 DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 1.

85 DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 2.

86 AGD, *Answers to written questions on notice*, 2 July 2013 (received 8 July 2013), pp 1 and 2.

2.58 AGD further advised that '[t]he overriding implication of the Minister not issuing a new determination is that the status quo remains. This would result in commercial and legal stability for industry' and '[t]he Department notes the intent of the existing regulatory structure in the *Copyright Act 1968* is to give effect to international copyright treaties to which Australia is a party'.[87]

Legal advice provided by broadcasters

2.59 The broadcasters sought and supplied to the committee the opinion of Mr John Hennessy SC (the Hennessy opinion) 'in relation to the commentary made by the DBCDE and the Attorney-General's Department on the draft Determination proposed by the radio broadcasters, the ABC and SBS'.[88]

2.60 In their summary of the Hennessy opinion, the broadcasters contended that the issues raised by DBCDE and AGD were 'without foundation, and unlikely to occur'.[89] The summary further stated that the Hennessy opinion had:

- [drawn] attention to the fact that the Departments had both failed to acknowledge that the draft determination proposed by the Broadcasters did not apply to commercial television broadcasts, rendering baseless many concerns raised, such as anti-siphoning, retransmission and copyright.
- addressed out of area broadcasting, noting that this had been occurring for many years and that, in his considered view, simulcasting would be likely to be found to be permitted under the BSA. Mr Hennessy pointed out that the fact that the ACMA has taken no action in relation to simulcasts over many years supported this view. In addition, he made the obvious point that failure to make the Determination would not prevent simulcasting in any event.
- noted there would be no flow-on implications for the operation of copyright laws.
- advised that no contractual/commercial issues would arise as simulcasts can be, and in fact are already in some instances, precluded as part of the agreement with the content supplier.
- noted there would be no interference with 'settled law' as the recent interpretation given by the Appeals Court of the Federal Court is very new.
- noted that the Attorney-General's Department had agreed that if the draft Determination is not made, copyright protection would be lost for broadcasts which are simulcast online. This is a serious issue.[90]

87 AGD, *Answers to written questions on notice*, 2 July 2013 (received 8 July 2013), p. 2.

88 ABC, CRA, CBAA and SBS, *Additional information—Summary of counsel's opinion*, p. 1.

89 ABC, CRA, CBAA and SBS, *Additional information—Summary of counsel's opinion*, p. 1.

90 ABC, CRA, CBAA and SBS, *Additional information—Summary of counsel's opinion*, p. 1.

2.61 On this last point, AGD responded that this was an 'overstatement' of their position and that it had acknowledged that:

> …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.[91]

2.62 AGD further noted that these 'industry practices' may involve:

> …a broadcaster making a recording of the broadcast before or at the moment of simulcast. The simulcast material would then not lose its status as a 'broadcast' as the material being communicated would be protected as a cinematographic film or sound recording of the initial broadcast.[92]

Legal advice from the Phonographic Performance Company of Australia

2.63 The PPCA subsequently obtained and provided to the committee an opinion from R Cobden SC (the Cobden opinion) 'to provide a response to, and comments on, the written opinion of Mr Hennessy SC' as given to the committee by CRA. Some of the key points made in the Cobden opinion included:

- In seeking to expand the specific exceptions and limitations that apply in the Copyright Act to 'broadcasts' to cover internet streaming activities, the broadcasters advance no real reason why their special historical treatment should be so extended. If they do wish to advance such an argument, the proper forum is the inquiry currently being conducted by the ALRC into 'Copyright in the Digital Economy'.[93]
- Not only would the proposed determination fail to achieve the so-called 'platform neutrality' that the broadcasters claim it would, it would add a further layer of complication. It would require one to look at who is providing the service and then whether the content of that service also happens to be delivered at the same time via a specific subset of the radiofrequency spectrum (to the exclusion of all other frequencies and broadcasting platforms) in order to determine whether a service is a 'broadcasting service'.[94]
- The inconsistent treatment of internet simulcasts would also have flow-on effects for copyright law in Australia, as the definition of 'broadcasting service' from the Broadcasting Services Act is imported into the definition of 'broadcast' in the Copyright Act. These flow-on effects were recognised by the

91 AGD, *Answers to written questions on notice*, 9 July 2013 (received 11 July 2013), p. 1.

92 AGD, *Answers to written questions on notice*, 9 July 2013 (received 11 July 2013), p. 1.

93 PPCA, *Additional information*, received 11 July, p. 7.

94 PPCA, *Additional information*, received 11 July, p. 9.

various answers to questions on notice given by the DBCDE and AGD. Creating further confusion and inconsistency in the operation of the Copyright Act ought to be avoided, especially in the context of the current ALRC review.[95]

2.64 The Cobden opinion concurred that the AGD's observations with respect to copyright had been 'mischaracterised' in the Hennessy opinion.[96] Finally, the Cobden opinion agreed with DBCDE's assessment that 'various problematic broadcasting and regulatory implications' arise from the broadcasters' proposed determination'.[97]

Other views

2.65 The Copyright Advisory Group (CAG) to the Standing Council on School Education and Early Childhood made a submission to the inquiry concerning the impact that changes to broadcasting copyright would have on educational institutions.[98]

2.66 CAG observed that Australian schools rely on an exemption under the Copyright Act to be able to view broadcast educational material (such as news programs, documentaries and drama).[99] Under the exemption, educational institutions are able to copy and communicate broadcasts for educational purposes, without having to seek the permission of the copyright owner, provided they agree to pay remuneration.[100]

2.67 Australian schools paid $17.7 million dollars in 2012–13 for the rights to view educational broadcasts.[101] The CAG expressed concern that any changes to the definition of "broadcast service" could have a significant impact on how schools access broadcast material.[102]

One per cent cap

2.68 The music industry, PPCA and the ACC put to the committee that any consideration of changes to simulcast regulation should not occur without an examination of the legislative caps that apply to broadcasting licensees and the Australian Broadcasting Corporation.[103]

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95 PPCA, *Additional information*, received 11 July, p. 9.

96 PPCA, *Additional information*, received 11 July, p. 10.

97 PPCA, *Additional information*, received 11 July, p. 11, and see further pp 11- 14.

98 Copyright Advisory Group – Standing Council on School Education and Early Childhood (CAG), *Submission 3*, p. 1.

99 CAG, *Submission 3*, p. 2.

100 *Copyright Act 1968*, part VA.

101 CAG, *Submission 3*, p. 2.

102 CAG, *Submission 3*, p. 4.

103 ACC, *Submission 2*, p. 3; AAM, *Submission 4*, p. 3; UMA, *Submission 5*, p. 2; AIR, *Submission 6*, p. 3; PPCA, *Submission 8*, p. 43; Sony Music Entertainment Australia, *Submission 10*, p. 2; ARIA, *Submission 11*, p. 2.

2.69 The ACC contended that the one per cent legislative cap is 'completely arbitrary and does not involve any analysis of economic efficiency'.[104] Consequently they believed that:

> …the cap places an artificial ceiling on the remuneration a copyright owner can receive for the commercial broadcast of sound recordings. The ability of copyright owners in sound recordings to receive equitable remuneration for communications via the Internet needs to be viewed in that context.[105]

2.70 The PPCA argued that the legislative caps are distortionary, arbitrary, anachronistic and unnecessary.[106] The PPCA was concerned that the caps ensure that Australian recording artists, in effect, provide an annual subsidy to the commercial radio sector and the ABC.[107] The PPCA stated that:

> …there is no characteristic inherent in the broadcast right for sound recordings that supports the figure of 1% of revenue or 0.5 cents per person as constituting equitable remuneration for the use of that right.[108]

2.71 The PPCA suggested to the committee that, if it is of a mind to recommend limited reform to the broadcasting and copyright regulation, the only compelling case for change relates to the removal of the artificial caps.[109] The PPCA concluded that:

> It is the combination of the compulsory licence in section 109 of the Copyright Act and these outdated caps which have given rise to the current inequalities in relation to broadcaster's' use of sound recordings, which are magnified in the evolving digital music economy.[110]

2.72 The commercial and community broadcasters did not pass comment on the legislative caps.

Committee comment

2.73 Since 2000, not only has there been an increase in the number of Australians with access to a computer and the internet, but there has been a significant rise in the variety and number of devices that can access online content. These new devices, combined with innovation in digital media services, have presented challenges to the regulatory landscape. It is no longer possible to consider communications in terms of the traditional distinctions of broadcasting and telecommunications.

2.74 For over thirteen years, technological developments have made the simulcasting of radio programs online possible, with a core group of listeners choosing to access radio programs in this manner. The Commonwealth government

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104 ACC, *Submission 2*, p. 3.

105 ACC, *Submission 2*, p. 3.

106 PPCA, *Submission 8*, pp 14–16.

107 PPCA, *Submission 8*, p. 14.

108 PPCA, *Submission 8*, p. 16.

109 PPCA, *Submission 8*, p. 43.

110 PPCA, *Submission 8*, p. 43.

clearly sought to address these issues, to some extent, in 2000. The result was a determination that appears to have been accepted by both broadcasters and rights holders as facilitating simulcasts under broadcasting agreements until legal action was commenced in 2010.

2.75 The 2000 determination established an 'exemption' from the definition of a "broadcasting service". Section 109 of the Copyright Act then provides an exception from copyright laws for certain broadcasting services. Creating an 'exception' to the 'exemption' has been found to be ambiguous, as evidenced by the commencement of legal proceedings in this matter and the different verdicts in the original judgement on this matter and the judgement of the appellate court.

2.76 While responsibility ultimately rests with the ministers responsible for creating the ambiguity and, subsequently, failing to address it, the committee is particularly concerned at the respective attitudes shown by DBCDE and AGD that this is a 'commercial dispute, which may be better addressed through commercial negotiations between the two parties'[111] or that doing nothing 'would result in commercial and legal stability for the industry'.[112] It is correct that this is a commercial dispute, but it is a dispute with the interpretation of an ambiguous legislative instrument at its heart, which rather than providing stability has seen the practice of a decade overturned by a recent court judgement.

2.77 The committee believes it is unsatisfactory that the policy issue of whether radio simulcasts are a "broadcasting service" under the Broadcasting Services Act has—via recent legal proceedings—become a matter for the Federal Court to resolve. The Commonwealth government should have been proactive in ensuring that stakeholders in the music industry and radio broadcasting sector have certainty on this matter.

2.78 With regard to this inquiry, the committee contended with arguments and counter-arguments from the proponents in the ongoing legal dispute about the definition of a "broadcasting service", including legal advice rebutting information provided by Commonwealth government departments and legal advice refuting alternative legal advice. While it is the role of Senate committees to "shine light in dark corners" and provide a forum where ideas can be contested and analysed, it is not the role of Senate committees to act as quasi-courts or mediators. In this regard, this inquiry raises the question of the appropriateness of referring such disputes to a parliamentary committee, albeit in the guise of addressing a broader policy issue.

2.79 That said, the committee is sympathetic to both the argument of the radio industry that the ambiguities surrounding the disputed determination should be settled by government policy rather than having established practice not simply overturned by legal proceedings, and the arguments of rights holders that related matters are being considered in a far more comprehensive way through the ALRC review, as flow-on to the equally comprehensive Convergence Review.

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111 DBCDE, *Answers to written questions on notice*, 2 July 2013 (received 11 July 2013), p. 2.

112 AGD, *Answers to written questions on notice*, 2 July 2013 (received 8 July 2013), p. 2.

2.80 The committee is mindful of differing arguments from stakeholders on both sides of this dispute and the relevant government departments about potential unintended consequences stemming from either doing nothing or stemming from making a new determination, but it is not entirely convinced by some of these arguments and suspects they may be overstated. In any event, it is a matter for the agencies of government to work through such consequences to find satisfactory policy outcomes, not use them as excuses for inaction.

2.81 Ultimately, it is the committee's view that if it has been established practice for simulcasts to be permitted under a single licence agreement with rights holders for the better part of a decade then it is unsatisfactory for this to be abruptly overturned by a court ruling. It is, however, equally the committee's view that with the advance of new technologies and increasing convergence of content across different platforms that much of the regulation in the broadcasting and copyright space is failing to keep pace with changes in technology and that it would be preferable not to be dealing with individual areas of regulation for different mediums of transmission in a piecemeal way.

2.82 The committee also notes the arguments about the application of the one per cent cap, which limits the amount paid to rights holders, and the PPCA's valid argument that simulcasting increases the potential audience for radio broadcasters far beyond their terrestrial broadcasting reach. While for the commercial and community broadcasters, the percentage-based nature of the cap means that the actual payments made to rights holders would increase as any increase in advertising revenue associated with increased audience occurred, the committee can understand why previous reviews have recommended the abolition of such a cap. The committee believes the findings of the ALRC review should be considered by government as quickly as possible.

2.83 The committee urges the government to address both the short- and long-term issues that exist within the existing regulatory framework.

Recommendation 1

2.84 The committee recommends that the Minister for Broadband, Communications and the Digital Economy seek to resolve the ambiguity in the existing determination, either through a new determination, having regard to any other potential consequences of such action, or by negotiating a satisfactory agreement between the two key stakeholders pending a comprehensive response at the earliest opportunity to the findings of the Convergence review, ALRC review and other outstanding issues regarding the interaction of broadcasting and copyright law.

Recommendation 2

2.85 The committee recommends that the Minister for Broadband, Communications and the Digital Economy and the Attorney-General fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews, and by many stakeholders, following receipt of the ALRC review later this year.

Senator Simon Birmingham
Chair