

Comments on ALRC response to question on notice

1. Background

- 1.1 The Australian Law Reform Commission (**ALRC**) was asked the following question on notice from the Senate Standing Committees on Environment and Communications (**Committee**) in relation to its 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)'* (**Inquiry**):

What would be the potential copyright and other legal implications of the Minister for Broadband, Communications and the Digital Economy issuing 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 Broadcasting Services Act 1992?

- 1.2 In its response dated 3 June 2013, the ALRC advised that it *'had not specifically considered the copyright or other legal implications of a ministerial determination being issued, of the nature referred to in the Question on Notice'*. However the ALRC observed that such Ministerial Determination would have implications for a number of provisions of the *Copyright Act 1968* (Cth) (**Copyright Act**). We address each of these provisions below

2. Comments on the ALRC's response

Overarching comment

- 2.1 In response to the Inquiry a submission was made on behalf of the ABC, CRA, the Community Broadcasting Association of Australia and the SBS (**Broadcasters**). As part of that submission, the Broadcasters urged the Committee to recommend that the Minister make a new Determination under paragraph (c) of the definition of 'broadcasting service' in subsection 6(1) of the *Broadcasting Services Act 1992* (Cth) (**BS Act**) in or to the effect of the following:

- (a) *revoke the determination made by the Minister for Communications, Technology and the Arts made on 12 September 2000, and*
- (b) *determine that the following class of service does not fall within that definition:*

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 the services are provided by:

- (i) the holder of a radio broadcasting services bands licence,*
- (ii) the Australian Broadcasting Corporation, or*
- (iii) the Special Broadcasting Service. (Proposed Determination)*

2.2 At the outset, we note that the Proposed Determination, in so far as it relates to television programs, will only apply to simulcasts made by the ABC and SBS and will not apply to commercial television broadcasting in any way.

2.3 Secondly, we note that the Proposed Determination will only apply to simulcasts. That is, exactly the same content being communicated simultaneously using the broadcasting services bands and the internet. The Copyright Act does in fact refer to '*simulcasting*' (for example in section 47AA) however it is used in a different and defined sense in the Act to accommodate the introduction of digital broadcasting and does not affect the way it was used in the previous Determination or is used in the Proposed Determination.

Section 45 of the Copyright Act

The reading or recitation in public, or the inclusion in a sound broadcast or television broadcast of a reading or recitation, of an extract of reasonable length from a published literary or dramatic work, or from an adaptation of such a work, does not constitute an infringement of the copyright in the work if a sufficient acknowledgement of the work is made.

2.4 While it is true to say that the Proposed Determination would change how this provision currently applies to online simulcasts following the decision of the Full Court of the Federal Court of Australia in *Phonographic Performance Company of Australia v Commercial Radio Australia Limited* [2013] FCAFC 11 (**Decision of the Full Court**), if the Proposed Determination is not made it would mean that the online delivery of a simulcast would not obtain the benefit of this provision while the delivery over the broadcasting services bands of exactly the same content at exactly the same time would. The Proposed Determination would correct this inconsistency.

Sections 47, 70 and 107 of the Copyright Act (as relevant)

47 Reproduction for purpose of broadcasting

(1) Where the broadcasting by a person of a literary, dramatic or musical work, or of an adaptation of such a work, would not (whether by reason of an assignment or licence or of the operation of a provision of this Act) constitute an infringement of the copyright in the work, but the making by the person of a sound recording or a cinematograph film of the work or adaptation would, apart from this subsection, constitute such an infringement, the copyright in the work is not infringed by the making by the person of such a recording or film solely for the purpose of the broadcasting of the work or adaptation.

70 Reproduction for purpose of including work in television broadcast

(1) Where the inclusion of an artistic work in a television broadcast made by a person would not (whether by reason of an assignment or licence or of the operation of a provision of this Act) constitute an infringement of copyright in the work but the making by the person of a cinematograph film of the work would, apart from this subsection, constitute such an infringement, the copyright in the work is not infringed by the making by the person of such a film solely for the purpose of the inclusion of the work in a television broadcast.

107 Making of a copy of the sound recording for purpose of broadcasting

(1) Where the broadcasting by a person of a sound recording would not (whether by reason of an assignment or licence or of the operation of a provision of this Act) constitute an infringement of the copyright in the recording but the making by the person of a copy of the sound recording would, apart from this subsection, constitute such an infringement, the copyright in the recording is not infringed by the making by the person of a copy of the sound recording in association with other matter solely for the purpose of the broadcasting of the recording in association with the other matter.

2.5 The Proposed Determination would change how these provisions currently apply to online simulcasts (following the decision of the Full Court), however if the Proposed Determination is not made the benefit of these sections would not be available for the broadcast component of a simulcast because the copy would not be made '*solely for the purpose of broadcasting*'. Broadcasters may cease to simulcast as a result. The Proposed Determination would rectify this position.

Section 47A of the Copyright Act (as relevant)

- (1) *The making of a sound broadcast of, or of an adaptation of, a published literary or dramatic work does not constitute an infringement of copyright in the work if:*
- (a) *the broadcast is made by a person being the holder of a print disability radio licence and is made under the licence; and*
 - (b) *there is made by or on behalf of the person, as soon as practicable after the making of the broadcast, a record of the making of the broadcast that:*
 - (i) *sets out the time and date of the making of the broadcast;*
 - (ii) *identifies the work; and*
 - (iii) *contains particulars of such other matters in relation to the work or in relation to the broadcast as are prescribed.*

2.6 Print disability radio licences are generally held by community radio stations. If the proposed Determination is not made they would not be able to simulcast published literary or dramatic works, to the detriment of listeners with a print disability.

Section 67 of the Copyright Act

Without prejudice to the last two preceding sections, the copyright in an artistic work is not infringed by the inclusion of the work in a cinematograph film or in a television broadcast if its inclusion in the film or broadcast is only incidental to the principal matters represented in the film or broadcast.

2.7 While it is correct that the Proposed Determination would change how this provision currently applies to simulcasts of television programs by the ABC and SBS only (following the decision of the Full Court), if the Proposed Determination is not made the protection provided to the ABC and SBS in relation to the incidental inclusion of artistic works in a live program communicated over the broadcasting services bands would not apply to the online component of the simulcast of exactly the same program to the detriment of those organisations. The Proposed Determination would correct this inconsistency. It is worth noting, to show the illogical result of this artificial differentiation, that if the simulcast was of a film containing the artistic work, the broadcaster would have the benefit of the section.

Section 109 of the Copyright Act (as relevant)

- (1) *Subject to this section, the copyright in a published sound recording is not infringed by the making of a broadcast (other than a broadcast transmitted for a fee payable to the person who made the broadcast) of that recording if:*
- (a) *where there is no order of the Tribunal in force under section 152 applying to the maker of that broadcast in relation to the time when that broadcast was made—the maker of that broadcast has given an undertaking in writing to the person who is the owner of the copyright in that recording to pay to the owner such amounts (if any) as may be specified in, or determined in accordance with, an order of the Tribunal made under that section in respect of the broadcasting by the maker, during a period within which that broadcast was made, of published sound recordings in which the copyrights are owned by that person and which include that recording; or*
 - (b) *where there is an order of the Tribunal in force under that section applying to the maker of that broadcast in relation to the time when that broadcast was made:*
 - (i) *the copyright in that recording is owned by a person who is specified in the order as one of the persons among whom the amount specified in, or determined in accordance with, the order is to be divided and the maker of the broadcast makes payments to the person in accordance with the order; or*
 - (ii) *the copyright in that recording is owned by a person who is not so specified in the order.*

2.8 The Proposed Determination would change how this provision currently applies to online simulcasts (following the decision of the Full Court), if the Proposed Determination is not made this provision would not be available to the radio broadcasters, the ABC and SBS in relation to the online component of their simulcasts. Copyright owners would therefore be able to charge twice for the simultaneous use of exactly the same copyright material merely because the device on which it is received is different. The Proposed Determination would correct this inconsistency.

Section 135ZT of the Copyright Act (as relevant)

(1) Subject to this section, the copyright in an eligible item or in a television broadcast is not infringed by the making by, or on behalf of, a body administering an institution assisting persons with an intellectual disability of a copy or communication of the whole or a part of the eligible item or broadcast, if the copy or communication is made solely for use in the making by, or on behalf of, that body of a copy or communication of the whole or the part of the eligible item or broadcast, as the case may be, for a person with an intellectual disability.

2.9 The protections given by this section are not affected by the Proposed Determination.

Section 199 of the Copyright Act

- (1) Where the inclusion in a television broadcast or sound broadcast of a reading or recitation of an extract from a published literary or dramatic work, or from an adaptation of such a work, does not constitute an infringement of the copyright in the work, a person who, by the reception of the broadcast, causes the work or adaptation to be performed in public does not, by doing so, infringe the copyright in the work.*
- (2) A person who, by the reception of a television broadcast or sound broadcast, causes a sound recording to be heard in public does not, by doing so, infringe the copyright, if any, in that recording under Part IV.*
- (3) A person who, by the reception of an authorized television broadcast, causes a cinematograph film to be seen or heard in public shall be treated, in any proceedings for infringement of the copyright, if any, in the film under Part IV, as if the person had been the holder of a licence granted by the owner of that copyright to cause the film to be seen or heard in public by the reception of the broadcast.*

2.10 The purpose of this provision is to allow the public performance of works, sound recordings and films. Unless the Proposed Determination is made, the public will not be able to avail themselves of this provision if they choose to receive such transmissions online rather than over a radio or television set (even though the same content is being communicated at the same time over these different devices). The Proposed Determination would correct this inconsistency.

Section 200 of the Copyright Act (as relevant)

- (2) *The making of a record of a sound broadcast, being a broadcast that was intended to be used for educational purposes, does not constitute an infringement of copyright in a work or sound recording included in the broadcast if:*
- (a) *the record is made by, or on behalf of, the person or authority in charge of a place of education that is not conducted for profit; and*
 - (b) *the record is not used except in the course of instruction at that place.*

2.11 The purpose of this provision is to allow recordings of sound broadcasts to be made for educational purposes. Unless the Proposed Determination is made, schools and universities will not be able to avail themselves of this provision if they choose to record a simulcast program online (which may provide them with the ability to make a better recording) rather than recording it from the radio broadcast (even though the same content is being communicated at the same time over these different devices). The Proposed Determination would correct this inconsistency.

Part VA

2.12 As noted by the ALRC, Part VA already applies to the online communication of free-to-air broadcasts by virtue of section 135C(1) of the Copyright Act.

8 July 2013