19. Broadcasting

Contents

Summary

19.1 In addition to the retransmission scheme discussed in Chapter 18, a number of other exceptions in the *Copyright Act* refer to the concept of a 'broadcast' and 'broadcasting'. These exceptions are referred to in this chapter as the 'broadcast exceptions'.

19.2 The broadcast exceptions include those operating to provide exceptions for persons engaged in making broadcasts (such as free-to-air broadcasters); and others operating to provide exceptions for persons receiving, communicating or making copies of broadcasts (such as educational institutions).

19.3 In a changing media environment, distinctions currently made in copyright law between broadcast and other platforms for communication to the public require justification. Innovation in the digital economy is more likely to be promoted by copyright provisions that are technologically neutral.

19.4 The ALRC has closely considered whether the *Copyright Act* should be amended to ensure that broadcast exceptions also apply to the transmission of television or radio programs using the internet. However, given the many different exceptions and important differences between broadcast and other forms of communication, recommending any blanket reform is not an option.

19.5 In some cases, moreover, technological neutrality may best be achieved by removing exceptions that apply only to broadcast. That is, some broadcast exceptions may be able to be repealed on the basis that the relevant uses are likely to be covered by the recommended new fair use or fair dealing exceptions, or are amenable to voluntary licensing.

19.6 The extension of some statutory licensing schemes to the transmission of linear programmed television or radio content using the internet should also be considered, to ensure the licences continue to serve their purpose in an era of media convergence.

19.7 The ALRC recommends that, in developing media and communications policy, and in responding to media convergence, the Australian Government give further consideration to these issues.

The definition of 'broadcast'

19.8 The *Copyright Act* defines the term 'broadcast' to mean 'a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act*'.[1]

19.9 The *Broadcasting Services Act 1992* (Cth) defines a 'broadcasting service' to mean 'a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means'. A broadcasting service does not include:

> (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
>
> (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
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> (c) a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.[2]

19.10 A ministerial determination, made in 2000 under the *Broadcasting Services Act*, excludes a 'service that makes available television and radio programs using the internet' from the definition of a broadcasting service.[3]

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1 *Copyright Act 1968* (Cth) s 10.

2 *Broadcasting Services Act 1992* (Cth) s 6.

3 *Commonwealth of Australia Gazette—Determination under Paragraph (c) of the Definition of 'Broadcasting Service'*, (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.

19.11 The primary reasons for the ministerial determination were to ensure that developing internet audio and video streaming services were not regulated as broadcasting services under the *Broadcasting Services Act*; and to clarify the regulatory position of 'datacasting' over broadcasting services bands.[4]

19.12 However, it also has a significant effect on the scope of the broadcast exceptions under the *Copyright Act*, as discussed below. Among other things, it means that while free-to-air and subscription cable and satellite television transmissions are covered, transmissions of television programs 'using the internet' are not.[5]

Broadcast exceptions and the *Rome Convention*

19.13 As discussed in Chapter 15, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (*Rome Convention*) established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.[6] These rights can be protected by copyright law, as in Australia, or by other measures. Broadcasting and rebroadcasting are defined under the *Rome Convention* as 'the transmission by wireless means for public reception of sounds or of images and sounds'.[7]

19.14 The *Rome Convention* permits exceptions, including: private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.[8]

19.15 In addition, signatories may provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides 'in connection with the protection of copyright in literary and artistic works'.[9]

Use of 'broadcast' in copyright exceptions

19.16 A number of exceptions in the *Copyright Act* use the terms 'broadcast', 'broadcasting' or 'broadcaster'. These exceptions include those concerning time shifting and retransmission of free-to-air broadcasts, which are discussed separately elsewhere in this Report.[10] Other exceptions that refer to the concept of a broadcast

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4 See *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11, [52]–[46].

5 While some forms of internet protocol television (IPTV) and internet radio are treated as broadcasting services under the *Broadcasting Services Act*, others are not—for example, where television-like content is delivered over an unmanaged network, such as broadband internet ('over the top'). This is discussed in more detail in Ch 18.

6 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).

7 Ibid, art 3(f).

8 Ibid, art 15.

9 Ibid, art 15(2).

10 See Chs 9, 15.

include those providing for unremunerated exceptions[11] and for remunerated use, subject to statutory licensing.[12]

19.17 Distinctions currently made in copyright law between broadcast and other platforms may be increasingly difficult to justify in a changing media environment. In particular, television and radio content is increasingly made available on the internet.[13]

19.18 A 2012 Australian Communications and Media Authority (ACMA) report highlighted growth in the availability of commercially-developed video content over the internet.[14] This includes: catch-up television offered by free-to-air broadcasters on an 'over the top' basis,[15] enabling viewers to access recently aired shows via the internet; high-end internet protocol television (IPTV) services providing users with access to video content on a subscription or fee-per-view basis provided by internet service providers; and 'over the top' content services offered direct from the content provider to the consumer.[16]

19.19 The ways in which consumers can access video content, including IPTV services, are expanding and the rollout of the National Broadband Network is likely to provide significant additional stimulus to the supply and take up of online content.[17]

19.20 More generally, the ACMA has identified that the historical distinctions between radio communications, telecommunications, broadcasting and the internet are breaking down:

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11 Unremunerated broadcast exceptions are provided by: *Copyright Act 1968* (Cth) ss 45, 47(1), 70(1), 107(1), 65, 67, 199, 200(2). In addition: s 28(6) provides an unremunerated exception for the communication of television and sound broadcasts, in class, in the course of educational instruction. Because the performance and communication of works or other subject-matter contained in the broadcast is covered by s 28(1), (4) and there is no copyright in an internet transmission itself, internet transmission is effectively covered. Similarly, s 135ZT provides an unremunerated exception and, because the copying and communication of 'eligible items' contained in the broadcast is covered by s 135ZT, internet transmission is effectively covered. Sections 47AA and 110C provide unremunerated exceptions for the reproduction of broadcasts for the purpose of simulcasting them in digital form. These provisions relate specifically to the switchover from analog to digital broadcasting in Australia. Section 105 provides a free-use exception for the broadcasting of certain sound recordings that originate overseas. The purpose of the exception is to prevent performing and broadcasting rights being extended to some foreign-origin sound recordings that were first published in Australia. These broadcast exceptions are not discussed further in this chapter.

12 Remunerated broadcast exceptions are provided by: Ibid ss 47(3), 70(3), 107(3), 47A, 109; pt VA.

13 ACMA advised that an online research survey, conducted in 2011, showed that almost four in 10 respondents watched television or video content both offline and online (38%); less than a third watched this material solely offline (31%); and some were solely online viewers (12%): ACMA, *Submission 214*.

14 Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012). The ACMA noted that 'the supply of IPTV services has continued to expand over the 2011–12 period, encouraged by increased competition between ISPs and higher available bandwidth': 2.

15 'Over the top' refers to communications over existing infrastructure that does not require business or technology affiliations with the host internet service provider or network operator: see Ch 18.

16 Australian Communications and Media Authority, *Online Video Content Services in Australia: Latest Developments in the Supply and Use of Professionally Produced Online Video Services*, Communications report 2011–12 series: Report 1 (2012), 1–2.

17 Ibid, 2.

> digitisation of content, as well as standards and technologies for the carriage and display of digital content, are blurring the traditional distinctions between broadcasting and other media across all elements of the supply chain, for content generation, aggregation, distribution and audiences.[18]

The link with communications regulation

19.21 Extending the scope of the broadcast exceptions to take account of new technologies is not a new phenomenon. Prior to the *Copyright Amendment (Digital Agenda) Act 2000* (Cth), 'broadcast' was defined as to 'transmit by wireless telegraphy to the public'. The digital agenda legislation substituted an extended technology-neutral definition, mainly to cover cable transmissions.

19.22 This extension occurred in the context of the enactment of a new right of communication to the public, replacing and extending the existing broadcasting and cable diffusion rights.[19] A definition of 'broadcast' was retained, however, because the Government 'decided to retain most of the existing statutory licences and exceptions in the Act in relation to broadcasting and not extend these licences to apply in relation to communication'.[20]

19.23 The distinction between broadcasts and other electronic communication to the public in the *Copyright Act* comes about indirectly, by virtue of the ministerial determination made under the *Broadcasting Services Act*. The determination has implications for the coverage of licence fee requirements, local content requirements, programming standards and advertising restrictions. Arguably, the implications for copyright law were very much a secondary consideration.

19.24 The Government decision not to extend the scope of exceptions was consistent with earlier conclusions of the CLRC. In 1999, the CLRC considered how the Government's proposed digital agenda reforms should address whether exceptions should extend beyond communications to the public delivered by a broadcasting service.[21]

19.25 The CLRC recommended specifically that the ephemeral copying provisions[22] should not be further extended (beyond cable transmission). In reaching this conclusion, the CLRC noted that these exceptions operate for the benefit of those broadcasters 'who have paid for the right to broadcast the copyright materials used in their broadcast programs'.[23] As the makers of other transmissions to the public were 'not technically broadcasters', the CLRC stated that 'there is presently no obligation

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18 Australian Communications and Media Authority, *Digital Australians—Expectations about Media Content in a Converging Media Environment* (2011), 7.

19 *Copyright Act 1968* (Cth) s 31(1)(a)(iv), (b)(iii) inserted by the *Copyright Amendment (Digital Agenda) Act 2000* (Cth).

20 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), Notes on clauses, [7].

21 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.103]–[7.105].

22 *Copyright Act 1968* (Cth) ss 47, 70, 107.

23 Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.105].

for them to obtain a licence for the transmission of the copyright materials they use'. Accordingly, the CLRC considered that extending the ephemeral copying provisions to the makers of such transmissions was not justified.[24]

19.26 Since the digital agenda reforms in 2000, however, internet transmission is clearly an exclusive right covered by copyright. A continuing link between the scope of some copyright exceptions and the regulatory definition of a broadcasting service under the *Broadcasting Services Act* may be unnecessary. While a broadcasting service may have additional obligations to comply with copyright law—for example, under broadcasting licence conditions—other content providers still need to obtain permission to communicate the copyright material of others over the internet.[25]

19.27 The reasons for excluding internet transmission from the definition of broadcasting services included that the business models for internet content providers might be significantly different from those of traditional broadcasters, and that broadcast licensing would lead to a competitive disadvantage for Australian content providers and impede the growth of alternatives to traditional broadcasting.[26]

19.28 While the exclusion of internet content services from *Broadcasting Services Act* regulation may promote competition and innovation in broadcasting, it may have an unintended and opposite effect in the copyright context—by privileging traditional broadcast over internet transmission.

19.29 Some stakeholders questioned the need for the continuing link between the scope of copyright exceptions and the *Broadcasting Services Act*.[27] The Internet Industry Association, for example, submitted that 'the regulation of broadcast services should be separate and unrelated to whether or not copyright subsists in a transmission'.[28]

19.30 The PPCA suggested that the ALRC should consider the 'decoupling of Australian broadcasting and copyright laws' by recommending a stand-alone definition of broadcasting in the *Copyright Act*.[29] Screenrights also considered that copyright policy should not be left subject to communications policy. Instead 'the definition of broadcasting service should be imported into the *Copyright Act* in essentially its

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24 Ibid, [7.105]. Similarly, in relation to s 199, the CLRC contrasted broadcasters licensed under the *Broadcasting Services Act* and other content providers, stating that the latter are 'presently not required to obtain a licence from copyright owners' and therefore the scope of s 199 should 'continue to be confined to licensed broadcasts': Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 2: Categorisation of Subject Matter and Exclusive Rights, and Other Issues* (1999), [7.72].

25 While internet-only media are not regulated as broadcasting services, they are subject to content regulation under *Broadcasting Services Act 1992* (Cth) schs 5, 7.

26 See D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.6–26.7; Department of Communications, Information Technology and the Arts, *Report to Parliament: Review of Audio and Video Streaming over the Internet* (2000).

27 eBay, *Submission 751*; Internet Industry Association, *Submission 744*; PPCA, *Submission 666*.

28 Internet Industry Association, *Submission 744*.

29 PPCA, *Submission 666*.

current form (including the effect of the Ministerial declaration) so as to minimize disruption of existing rights and exceptions'.[30]

Transmission using the internet

19.31 In the Discussion Paper, the ALRC proposed that a range of broadcast exceptions should also apply to the transmission of television or radio programs using the internet. The ALRC also asked how such amendments should be framed. [31]

19.32 A number of stakeholders agreed, in principle, that the scope of some broadcast exceptions should extend to transmission on the internet, as well as to broadcasts as currently defined.[32]

19.33 The Internet Industry Association observed that the current situation is anomalous because the streaming of 'live or pre-programmed' material over the internet is effectively the same as broadcasting.[33] Ericsson Australia noted that

> consumers are often not aware (nor do they care) if content they watch is broadcast, multicast to a selected group, or unicast to an individual. Further, with the recent introduction of Hybrid Broadcast Broadband TV (HBBTV) into Europe and planned introduction into the Australian market, any distinctions between delivery platforms will be increasingly obscure to the end consumer.[34]

19.34 Ericsson suggested that exceptions should extend to any delivery platform and 'be framed without technology specificity, in order to future-proof and support on-going technological innovation'.

19.35 The ABC submitted that exceptions should be reframed to extend to transmissions using the internet, including on demand programs, but only where content is made available by a broadcaster.[35] CRA stated that it was seeking a new ministerial determination to ensure that internet simulcasts (by broadcasting services) are treated as broadcasts. This position, CRA said, would 'properly reflect the current use of technology by media consumers and the trend towards platform neutrality'.[36]

19.36 In contrast, the PPCA stated that voluntary licensing arrangements make it unnecessary to extend the existing broadcast exceptions to the delivery of television and radio programs using the internet. The PPCA has licensed 'a range of new internet services as well as offering internet rights to traditional broadcasters'.[37] Similarly, the ACC referred to voluntary licensing frameworks already in place and supporting the

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30 Screenrights, *Submission 646*.
31 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1; Question 16–1.
32 Commercial Radio Australia, *Submission 864*; ABC, *Submission 775*; Internet Industry Association, *Submission 744*; Ericsson, *Submission 597*.
33 Internet Industry Association, *Submission 744*.
34 Ericsson, *Submission 597*.
35 ABC, *Submission 775*.
36 Commercial Radio Australia, *Submission 864*.
37 PPCA, *Submission 666*.

'large number of internet radio and television services already operating in the Australian market'.[38]

19.37 Other stakeholders also opposed any extension of the broadcast exceptions.[39] Nightlife, a provider of music to commercial venues, expressed concern that extending the broadcast exceptions would 'further reduce the ability of creators to leverage an income, while commercial companies turnover billions of dollars on the use of their works'.[40]

19.38 COMPPS expressed concern that including internet transmissions would extend the broadcast exceptions from 'applying only to a limited and identifiable category of persons to potentially anyone in the world', with significant communications law and policy consequences. If the exceptions were extended, however, COMPPS and other sporting bodies considered they should apply only to 'internet transmission by licensed broadcasters of a linear feed of the programming broadcast by that broadcaster'.[41]

19.39 The following section examines particular categories of broadcast exceptions and considers the possible extension of these exceptions to internet transmissions or other forms of communication to the public.

Exceptions for broadcasters

19.40 Sections 45, 47, 70, 107, 47A, 65, 67 and 109 of the *Copyright Act* operate to provide exceptions for persons engaged in making broadcasts. In effect, the definitions of 'broadcast' and 'broadcasting' in these sections serve to limit the availability of these exceptions to broadcasting services as defined by the *Broadcasting Services Act*. They provide broadcasting services with advantages as compared with other content providers who provide content over the internet or by other means (such as over telecommunications networks). The provisions may also operate as a barrier to broadcasters using the alternative platforms for communicating their own content.

Broadcast of extracts of works

> **Example:** A radio interview with an author from the Melbourne Writers Festival is interspersed with a reading of an extract from the writer's book.

19.41 Section 45 of the *Copyright Act* provides an unremunerated exception for the reading or recitation of a literary or dramatic work in public or for a broadcast, of a reasonable length, with sufficient acknowledgement. The original justification for the s 45 exception was that:

> Recitations of reasonable extracts of works in public halls have for many years been regarded as a legitimate exception to copyright protection and it seems to us that the

38 Australian Copyright Council, *Submission 654*.
39 Nightlife, *Submission 657*; COMPPS, *Submission 634*.
40 Nightlife, *Submission 657*.
41 COMPPS, *Submission 634*. Also AFL, *Submission 717*; Cricket Australia, *Submission 700*.

> broadcasting of such recitations is the modern successor to that form of entertainment.[42]

19.42 It is equally possible to see other forms of communication to the public, including on the internet, as the 'modern successor' to recitations in public halls.

19.43 Many uses covered by s 45 would also be covered by the new fair use exception or by the consolidated fair dealing exception under one of the prescribed purposes of quotation, criticism or review, and reporting news—although this would depend on the application of the fairness factors in the particular circumstances. For this reason, the Australian Government should consider repealing s 45, if fair use is introduced.[43]

Reproduction for broadcasting

> **Example:** A television station makes a recording of a variety show it has produced, because a pre-recorded version of the program is to be broadcast.

19.44 Sections 47, 70 and 107 of the *Copyright Act* provide what is referred to in the literature, and in this Report, as the 'ephemeral' copying provisions.[44]

19.45 Section 47(1) provides an unremunerated exception that applies where, in order for a work to be broadcast, a copy of the work needs to be made in the form of a record or film to facilitate the broadcasting. Sections 70(1) and 107(1) provide similar exceptions, in relation to films of artistic works and sound recordings, respectively.

19.46 The exceptions cover copying 'to make the actual broadcast technically easier, or to enable the making of repeat or subsequent broadcasts'[45] and can be seen as promoting efficiency in broadcast programming.[46]

19.47 These exceptions are expressly permitted by the *Rome Convention*, which states that domestic laws and regulations may provide for exceptions as regards 'ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts'.[47]

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42 Copyright Law Review Committee, *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (1959), [111] (Spicer Committee).

43 Some stakeholders suggested that s 45 could be repealed if fair use is implemented. They stated that the 'existing exception allows for the use of an extract of "reasonable length" (another nice example of the unpredictability that attaches to the current provisions) and there is no obvious disadvantage in replacing this highly uncertain standard with a structured test of fairness': R Burrell, M Handler, E Hudson, and K Weatherall, *Submission 716*.

44 See, eg, Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.225]; Australian Copyright Council, *Community Broadcasters and Copyright, Information Sheet G077v06* (2012).

45 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.225].

46 Australian Copyright Council, *Exceptions to Copyright, Information Sheet G121v01* (2012), 7.

47 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 15(1)(c).

> **Example:** A television station makes a recording of a televised play made by an outside producer, in order to broadcast the play at a later time.

19.48 Sections 47(3), 70(3) and 107(3) of the *Copyright Act* provide similar exceptions, subject to a statutory licensing scheme, for the temporary copying of works, films of artistic works and sound recordings by a broadcaster, other than the maker of the work, film or recording, for the purpose of broadcasting.

19.49 The licences do not apply unless all the records embodying the recording or all copies are, within 12 months of the day on which the work, film or sound recording is first used for broadcasting, destroyed or transferred to the National Archives of Australia.[48]

19.50 There may be no policy reason why the ephemeral copying provisions should not apply, for example, to temporary copying to facilitate the streaming of content over the internet, especially by a broadcasting service that also provides content over the internet.

19.51 In the Discussion Paper, the ALRC proposed that ss 47, 70 and 107 be amended to apply to the transmission of television or radio programs using the internet.[49]

19.52 A number of stakeholders representing copyright owners specifically opposed the extension of the ephemeral copying provisions.[50] APRA/AMCOS stated that the ephemeral copying provisions were originally introduced to deal with 'specific issues faced by a nascent broadcasting industry'.

> As it is, AMCOS has licensing arrangements with all free-to-air broadcasters that extend the provisions of the ephemeral licence, due to its narrow application that renders it largely inutile in the current broadcast environment.[51]

19.53 APRA/AMCOS submitted that more appropriate response in the digital environment would be to repeal these provisions altogether. Similarly, the PPCA submitted that uses covered by s 107, in relation to sound recordings, are already granted in voluntary licence agreements, for example, between the PPCA or record companies and copyright users providing television or radio-like services over the internet. In particular, the PPCA

> non-exclusively offers broadcasters and other service providers the rights for incidental copying and other uses of sound recordings which are necessary to provide their services in an online environment, including podcasting, catch-up viewing or listening. Accordingly, voluntary licensing is adequate to deal with new technology and services because PPCA's offering augments and in some cases expands upon the statutory exceptions under s 107 of the Act, including the extension of incidental or

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48 *Copyright Act 1968* (Cth) ss 47(5), 70(5), 107(5).

49 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1.

50 ARIA, *Submission 731*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*.

51 APRA/AMCOS, *Submission 664*.

> ephemeral copying rights for sound recordings in respect of services which are delivered or made available using the internet.[52]

19.54 The ABC observed that, due to technological change, the ephemeral copying provisions provide only part of the rights necessary for the ABC to deliver content. The ABC stated that when content is broadcast relying on statutory licences under ss 47, 70 and 107, it is 'administratively burdensome, complex and costly' then to have to seek further licences when the content moves online—for example, for catch-up television. This, the ABC said, 'renders the statutory licence ineffective in the digital economy'.[53]

19.55 The ABC suggested that these provisions 'need to be rephrased in a technology-neutral way in order to support broadcasters as technologies converge'. Other problems with the statutory licences were said to include the use of the word 'solely' in the phrase 'solely for the purpose of broadcasting' in s 107(1). This limitation does not recognise that 'broadcast material has a longer shelf-life than the broadcast alone—including, online archiving, and then to other distribution'. Further, s 107 may restrict broadcasters to making one copy of a sound recording, rather than allow for copying 'as necessary' for the purpose.[54]

19.56 Pandora, an internet music provider, observed that in order to be able to stream recordings to users over the internet, server copies of all recordings need to be made, but Pandora does not currently qualify for protection under the ss 47 and 70 exceptions because it is not a broadcaster. Pandora submitted that such copying 'does not constitute any form of additional commercial use, but is instead the only way in which the recordings can be accessed and streamed in accordance with the commercially negotiated communication licence'.[55]

19.57 In the ALRC's view, many uses of copyright material covered by the ephemeral copying provisions would be covered by the recommended new fair use exception—in particular, uses within the illustrative purpose of 'incidental or technical use'.[56] For example, where a broadcaster needs to transcode between digital formats to broadcast a television program, this should be expected to be considered a fair use.

19.58 In any case, voluntary licensing solutions seem to be available to cover many uses of copyright material that facilitate broadcasting or the activities of broadcasting organisations.[57] While there may be arguments that some ephemeral uses need to be covered by a specific exception in order to provide certainty to broadcasters,[58] there is

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52 PPCA, *Submission 666*.

53 Australian Broadcasting Corporation, *Submission 210*.

54 This position was said to be 'unworkable in the digital age as multiple copies are necessary due to the pre-production and broadcasting processes being used by the ABC': Ibid.

55 Pandora Media Inc, *Submission 329*.

56 See Ch 11.

57 Although Pandora submitted that, while it had 'successfully secured the necessary reproduction licences through voluntary licence arrangements … no licensee should be in a position where such necessary licences are at the commercial discretion of the collecting society': Pandora Media Inc, *Submission 329*.

58 The United States retains some exceptions similar to the Australian provisions, despite also having a fair use exception: see *Copyright Act 1976* (US) s 112, 'Limitations on exclusive rights: Ephemeral recordings'. See also United States House of Representatives, Committee on the Judiciary, *Copyright Law Revision (House Report No. 94-1476)* (1976), [101]–[102].

little to suggest that the absence of ephemeral copying provisions has been a barrier to the development of internet transmission of content, which operates under voluntary licensing.

19.59 For these reasons, the Australian Government should consider repealing the ephemeral copying provisions in ss 47, 70 and 107 of the *Copyright Act*.

Sound broadcasting by holders of a print disability radio licence

> **Example:** A book is read aloud on a print disability radio station.

19.60 Section 47A of the *Copyright Act* provides exceptions, subject to a statutory licensing scheme, for sound broadcasting by holders of a print disability radio licence.

19.61 These exceptions cover the making of sound broadcasts of a published literary or dramatic work, or of an adaptation of such a work, where this is done by the holder of a print disability radio licence, in force under the *Broadcasting Services Act* or the *Radiocommunications Act 1992* (Cth).[59]

19.62 Print disability radio licences are granted for the purpose of authorising the making of sound broadcasts to persons who, by reason of old age, disability or literacy problems, are unable to handle books or newspapers or to read or comprehend written material.[60] In practice, this requirement is met by the granting of community radio licences with these conditions, and Radio for the Print Handicapped (RPH) broadcasts from stations in most capital cities.[61]

19.63 Vision Australia submitted that the scope of the s 47H remuneration exception means that RPH services are 'currently not able to operate as a reading service in this medium without engaging in time-consuming negotiations with individual publishers to obtain copyright permission'.

> The result is that people who are blind, have low vision, or another print disability are unable to benefit from advances in content distribution such as internet streaming, at a time when internet radio is becoming commonplace for the rest of the community.[62]

19.64 In the ALRC's view, the extension of the s 47A statutory licence to cover the provision of sound recordings of written material using the internet or other means should be considered. The licence may need to be restricted to linear, programmed (that is, 'streamed' but not 'on demand') content to avoid applying to any internet sound recordings.

19.65 Such a reform would necessitate parallel review of the current system for granting print disability radio licences under the *Broadcasting Services Act* and *Radiocommunications Act 1992* (Cth).

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59 *Copyright Act 1968* (Cth) s 47A(11).
60 Ibid.
61 Australian Copyright Council, *Disabilities: Copyright Provisions Information Sheet G060v08* (2012).
62 Vision Australia, *Submission 181*.

Incidental broadcast of artistic works

Example: A television documentary about an art gallery shows paintings and sculptures in the background of a person being interviewed.

19.66 Section 65 of the *Copyright Act* provides an unremunerated exception that covers, among other things, the inclusion of a work in a television broadcast, where the work is 'situated, otherwise than temporarily, in a public place, or in premises open to the public'.

19.67 Section 67 provides an unremunerated exception for the inclusion of an artistic work in a film or television broadcast where its inclusion is only incidental to the principal matters represented in the film or broadcast.

19.68 The policy behind these exceptions appears to be that it is reasonable to allow the inclusion of these works in a broadcast, as it would be impractical to control these forms of copying.

19.69 This rationale seems to apply equally to the inclusion of public works, or the incidental broadcast of works, in internet transmissions or other forms of communication to the public.

19.70 The ALRC would expect that many uses covered by ss 65 and 67 would be covered by the new fair use exception[63]—although this would depend on the application of the fairness factors in the particular circumstances. An industry practice of licensing incidentally captured music for documentary films, for example, may weigh against fair use. The Australian Government should consider repealing ss 65 and 67, if a fair use exception is introduced.[64]

Broadcasting of sound recordings

Example: A radio station broadcasts recordings of popular music.

19.71 Section 109 of the *Copyright Act* provides an exception, subject to a statutory licensing scheme, for the broadcasting of published sound recordings, to facilitate access by free-to-air broadcasters to published sound recording repertoire.

19.72 Section 109 provides that copyright in a published sound recording is not infringed by the making of a broadcast (other than a broadcast transmitted for a fee), if

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63 For example, in the US, fair use was found where a television film crew covering an Italian festival in Manhattan recorded a band playing a portion of a song, which was replayed during a news broadcast. In concluding that this activity was a fair use, the court considered that only a portion of the song was used, it was incidental to the news event, and it did not result in any actual damage to the composer or to the market for the work: *Italian Book Corp v American Broadcasting Co*, 458 F Supp 65 (SDNY, 1978).

64 The National Association of Visual Artists favoured the repeal of ss 65 and 67, but not the introduction of a fair use exception: NAVA, *Submission 655*.

remuneration is paid by the maker of the broadcast to the copyright owners in accordance with the scheme.[65] The PPCA is the organisation that administers the statutory licensing of the broadcast rights in sound recordings. The owner of the copyright in a published sound recording or a broadcaster may apply to the Copyright Tribunal for an order determining the amount payable by the broadcaster to the copyright owner in respect of the broadcasting of the recording.[66]

19.73 While broadcasters have access to sound recordings under the s 109 licence, other licences may still be needed with respect to the public performance and communication of the music and lyrics. APRA is the organisation that administers the voluntary licensing of music and lyrics for broadcast.

19.74 Broadcast radio stations are able to use the s 109 statutory licensing scheme to obtain rights to broadcast music and other sound recordings, but internet radio services cannot—at least where they are not also broadcasting services for the purposes of the *Broadcasting Services Act*. Rather, internet radio services must negotiate rights to transmit sound recordings outside the scheme.

19.75 A further complexity arises in relation to internet simulcasts, where radio stations, which are broadcasting services, commonly stream content simultaneously on the internet that is identical to their terrestrial broadcasts. In *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* (*PPCA v CRA*), the Full Court of the Federal Court held that, in simulcasting, a radio station was acting outside the terms of its licence, as internet streaming is not a 'broadcast'.[67]

19.76 While the case concerned the interpretation of a licensing agreement to broadcast sound recordings, it was agreed between the parties that the term 'broadcast' in the agreement was to be understood as having the meaning specified in the *Copyright Act*. The Court held that 'the delivery of the radio program by transmission from a terrestrial transmitter is a different broadcasting service from the delivery of the same radio program using the internet'.[68]

19.77 Broadcast radio stations, like internet radio services, now have to negotiate separate agreements with the relevant collecting society (the PPCA) to stream the same content for which they have already obtained a statutory licence to broadcast.

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65 The statutory licensing scheme does not apply to a broadcast transmitted for a fee payable to the broadcaster: *Copyright Act 1968* (Cth) s 109(1). Ricketson and Creswell state that it 'was evidently felt that subscription broadcasters did not need the same help in accessing and making use of sound recordings as free-to-air broadcasters': Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.245].

66 For these purposes, a 'broadcaster' is defined as meaning the ABC, the SBS, the holder of a licence or a person making a broadcast under the authority of a class licence under the *Broadcasting Services Act*: *Copyright Act 1968* (Cth) s 152(1).

67 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11. In August 2013, an application for special leave to appeal this decision to the High Court was refused: *Commercial Radio Australia Ltd v Phonographic Performance Company of Australia* [2013] HCATrans 187 (16 August 2013).

68 Ibid, [69].

19.78 The implications of this have to be considered in the context of the s 152 remuneration caps, which make access to statutory licensing under s 109 more desirable for radio stations. The remuneration caps are discussed further below.

19.79 After the decision in *PPCA v CRA*, the Senate Environment and Communications References Committee was asked to examine the effectiveness of current regulatory arrangements in dealing with simulcasts, including the impact of current regulation on broadcasters and copyright holders (the Simulcast Inquiry). In June 2013, the Simulcast Inquiry recommended further Government consideration of this and related issues, following the release of the ALRC's Report.

Extending the s 109 licence

19.80 In the Discussion Paper, the ALRC proposed that the compulsory licensing scheme in s 109 of the *Copyright Act* be amended to apply to the transmission of television or radio programs using the internet.[69] The ALRC also asked whether, in the alternative, s 109 should be repealed, leaving licences to be negotiated voluntarily.[70]

19.81 There was little support for the idea of extending the operation of the s 109 licence to internet transmission, except in relation to internet simulcast.

19.82 Pandora, however, submitted that the absence of a statutory licensing scheme covering all forms of 'online radio' may create an 'unnecessary and unjustified barrier to market entry for those creating and launching new innovative online services'. Pandora suggested that either the existing statutory licensing scheme for broadcasters should be extended to include online licences, or a new scheme created for such services.[71]

19.83 The Australian position was compared with that in the United States, where internet radio services operate pursuant to statutory licences under the *Copyright Act 1976* (US). The US statutory licensing scheme covers the performance of sound recordings publicly by means of a 'digital audio transmission', including by subscription services.[72] Pandora submitted that the differences in these legal frameworks with respect to internet radio, works to

> impede the introduction into Australia of new and innovative business models, imposes unnecessary costs and inefficiencies upon those wanting to access or make use of copyright material and places Australia at a competitive disadvantage internationally.[73]

19.84 Pandora supported the proposal to extend s 109, subject to qualifications, including that: a similar statutory licence in relation to musical works be made

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69 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1.

70 Ibid, Question 16–3.

71 Pandora Media Inc, *Submission 104*.

72 *Copyright Act 1976* (US) s 114(d)(1), (2). US law does not, however, recognise a terrestrial broadcast performance right for sound recordings, so has no equivalent to *Copyright Act 1968* (Cth) s 109. That is, in the US, broadcast radio is the only medium that transmits music but does not compensate artists or labels for the performance.

73 Pandora Media Inc, *Submission 104*.

available; 'radio program' be defined broadly;[74] and the existing exclusion in relation to subscription broadcasts should not apply.[75]

19.85 Pandora suggested that a 'workable method' to extend s 109 would be to define its scope by reference to a definition of a 'relevant communication', which would include the existing concept of a broadcast and 'communication of a radio program or TV program otherwise than by way of broadcast'.[76]

19.86 Other stakeholders considered that s 109 should simply be extended[77] to ensure that it covers internet simulcasts.[78] CRA stated that this reform is required to 'correct the inconsistency that copyright owners would 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'.[79]

19.87 This position was opposed by others,[80] including the PPCA, which submitted that internet simulcasting must be treated as a communication to the public other than a broadcast 'in keeping with existing copyright principles and commercial practice'.[81] The ACC stated that, in accordance with international practice, broadcasting and internet simulcasts should be treated separately, because

> to do otherwise would mean overturning settled law, shifting the structure of the *Copyright Act* for the narrow purpose of meeting the commercial objectives of the radio industry and distorting the market for the licensing of sound recordings on the Internet.[82]

19.88 These, and other, stakeholders also opposed any other extension of the s 109 licence, or favoured repeal of the statutory licence entirely.[83] In this context, stakeholders highlighted relevant differences between broadcasting and internet transmission, and the role of voluntary licensing.

19.89 The ACC contested the idea that the same exceptions should apply to internet transmissions as to broadcast, and referred to its submission to the Simulcast Inquiry, in which it stated:

> Broadcasting is distinct from communication via the Internet in three important ways:

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74 Pandora noted that 'radio program' would have to be defined broadly to ensure that its service would be covered—for example, a radio program should be able to be indeterminate in length and personalised; and should not require 'pre-programming' and or a mix of music and other content: Pandora Media Inc, *Submission 329*.

75 Ibid. That is, the reference to 'broadcast transmitted for a fee' in *Copyright Act 1968* (Cth) s 109(1).

76 Pandora Media Inc, *Submission 329*.

77 Through the mechanism of a new ministerial determination under the *Broadcasting Services Act 1992* (Cth) concerning the definition of 'broadcasting service'.

78 Commercial Radio Australia, *Submission 864*; ABC, *Submission 775*.

79 Commercial Radio Australia, *Submission 864*.

80 Association of Artist Managers, *Submission 764*; ARIA, *Submission 731*; PPCA, *Submission 666*; Australian Copyright Council, *Submission 654*.

81 PPCA, *Submission 666*.

82 Australian Copyright Council, *Submission 654*.

83 Music Victoria, *Submission 771*; Association of Artist Managers, *Submission 764*; ARIA, *Submission 731*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*; Nightlife, *Submission 657*; Australian Copyright Council, *Submission 654*.

> 1. Broadcasting is tied to the broadcast signal and is therefore limited to a reasonably confined geographic area.
> 2. Broadcasting relates to a particular kind of technology, which also limits the potential audience (ie, those with a radio).
> 3. Not all sound recordings are covered by the broadcast right (under Australia's international treaty obligations, not all sound recordings are protected).
>
> These limitations do not apply to communications via the Internet. It follows, in our submission, that communications via the Internet are qualitatively and quantitatively different from broadcasting and require separate remuneration.[84]

19.90 The PPCA also emphasised that treating communications over the internet (including internet simulcasts) as broadcasts would have negative effects on the protection of certain classes of sound recordings—notably US sound recordings—and bring Australia in possible breach of provisions of the AUSFTA.[85]

19.91 Further, stakeholders submitted that voluntary licensing arrangements make it unnecessary to extend s 109 to internet radio.[86] The Australian Independent Record Labels Association, for example, observed that

> the wide range of legitimate music services currently available in the Australian market makes it abundantly clear that voluntary licensing practices between rights holders and music services are facilitating the creation and growth of new business models without the need for statutory licences and further copyright exceptions.[87]

19.92 There was support for repeal of the s 109 licence and its replacement with forms of voluntary licensing.[88] Nightlife stated, for example, that repeal would be the 'best pathway for creators to manage their own rights and to allow technology to enable discount blanket licensing and address many needs currently unserviceable under statutory blanket licensing'.[89]

19.93 Support for the repeal of s 109 was influenced by the existence of the remuneration caps, which limit remuneration for the broadcasting of published sound recordings (discussed below). For example, the ACC stated that,

> For as long as the statutory licence under section 109 is subject to the inequitable one percent and ABC caps imposed on the equitable remuneration of performers and copyright holders in sound recordings, this statutory licence does not support nor

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84 Australian Copyright Council, *Submission 654* referring to Australian Copyright Council, *Submission to Senate Environment and Communications References Committee Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts*, 29 April 2013.

85 *Australia-US Free Trade Agreement, 18 May 2004*, [2005], ATS 1 (entered into force on 1 January 2005), art 17.6(3), which requires Australia to afford the full exclusive right of communication to the public in respect of US sound recordings transmitted over the internet.

86 Australian Independent Record Labels Association, *Submission 752*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*.

87 Australian Independent Record Labels Association, *Submission 752*.

88 Music Victoria, *Submission 771*; ARIA, *Submission 731*; PPCA, *Submission 666*; Nightlife, *Submission 657*; Australian Copyright Council, *Submission 654*.

89 Nightlife, *Submission 657*.

> properly incentivise the creation of sound recordings and accordingly should be repealed.[90]

19.94 However, some stakeholders expressly supported repeal of s 109, even if the remuneration caps were abolished.[91] The PPCA observed that

> there is no compulsory licensing scheme for the broadcasting of musical works in Australia and the voluntary licensing arrangements entered into between broadcasters and APRA appear to operate effectively outside of section 109. Nor does a compulsory licence exist in New Zealand in respect of the broadcast of sound recordings. Similarly, PPCA is able to effectively license internet services in Australia such as those referred to above without a compulsory licence regime in place. It would be inconsistent as a matter of public policy to treat the sound recordings and musical works differently because services are required to license both rights when operating a music service.[92]

19.95 In contrast, the ABC submitted that s 109 should not be repealed, because it is 'in the public interest for broadcasters to be able to have access to the full available repertoire of sound recordings so that they can be made available to the public'. Further, it suggested that the introduction of a voluntary licence scheme could result in 'censorship' and in 'increased administration costs for broadcasters and delays in obtaining permission'.[93]

19.96 In Pandora's view, direct licensing is not a practical alternative, because of the breadth of licensing required, the costs involved in negotiating separate licensing agreements, limitations on the rights granted to the PPCA by record companies and unsatisfactory dispute resolution procedures.[94]

19.97 Pandora opposed voluntary licensing, including in relation to musical works, on the basis that rights owners may refuse to licence content, creating significant problems for Pandora's business model.[95] Pandora submitted that the ALRC should 'guard against that possibility by recommending a provision in relation to musical works that mirrors s 109'.

The remuneration caps

19.98 Related issues are raised by the remuneration caps under s 152 of the *Copyright Act*, which provides caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings.

19.99 Section 152(8) provides that, in making orders for equitable remuneration, the Copyright Tribunal may not award more than one per cent of the gross earnings of a

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90 Australian Copyright Council, *Submission 654*.
91 ARIA, *Submission 731*; PPCA, *Submission 666*.
92 PPCA, *Submission 666*.
93 ABC, *Submission 775*.
94 Pandora Media Inc, *Submission 104*.
95 Pandora referred to recent experience in the US where over the past 12–18 months, various rights owners have withdrawn 'digital' rights from the US equivalent of APRA: Pandora Media Inc, *Submission 329*.

commercial or community radio broadcaster (the 'one per cent cap').[96] The one per cent cap has been controversial and subject to court challenge.[97]

19.100 The ABC is subject to a different cap under s 152(11), which provides that remuneration is limited to the sum of 0.5 cents per head of the Australian population (the 'ABC cap').

19.101 In 2000, the Ergas Committee recommended that the one per cent cap be abolished 'to achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis'.[98] This recommendation was supported by arguments that the one per cent cap lacks policy justification and distorts the sound recordings market.[99] A previous review reached similar conclusions.[100]

19.102 The Ergas Committee accepted that the one per cent cap was originally implemented in 1969 to ease the burden imposed on the radio broadcasting industry by payments for the broadcasting of sound recordings. The Ergas Committee noted that, since then, the economic circumstances of the commercial radio industry had evolved. It concluded that no public policy purpose is served by the cap, which may 'distort competition (for example, between commercial radio and diffusion over "Internet radios" of sound recordings), resource use, and income distribution'.[101] However, the retention of the ABC cap was recommended, on the basis that the ABC is not a commercial competitor in the relevant markets, and there is a clear public interest in its operation as a national broadcaster.[102]

19.103 In 2001, the Government rejected the Ergas Committee's recommendation to repeal the one per cent cap.[103] Then, in 2006, the then Attorney-General, the Hon Philip Ruddock MP, indicated that repeal of the one per cent cap had been approved, as part of 2006 amending legislation, but this did not eventuate.[104]

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96 *Copyright Act 1968* (Cth) s 152(8).

97 See, eg, Australian Government Attorney-General's Department, *Review of the One per cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio*, Discussion Paper (2005); *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61.

98 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 14, 114–116.

99 Ibid, 14, 114–116.

100 S Simpson, *Review of Australian Copyright Collecting Societies—A Report to a Working Group of the Australian Cultural Development Office and the Attorney-General's Department* (1995), 119. See also Australian Government Attorney-General's Department, *Review of the One per cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio*, Discussion Paper (2005).

101 Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (2000), 115.

102 Ibid, 116.

103 Ricketson and Creswell state that it can be assumed that the one per cent cap issue: 'became a bargaining chip in the extensive review and negotiations that the government was undertaking at the time with regard to a whole range of policy issues concerning the regulation of the broadcasting industry, including cross-media ownership, digital broadcasting and the like': Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.258].

104 Ricketson and Creswell state: 'One is left with the impression that effective lobbying by the radio broadcasters may have weakened the government's resolve to go through with its announced decision': Ibid, [12.258].

19.104 The PPCA submitted to the ALRC Inquiry that both caps should be repealed, because the caps:

- distort the market in various ways—including by subsidising the radio industry;
- are out of date—given that the financial and other circumstances of the radio industry are very different from the late 1960s;
- reduce economic efficiency and lack equity—including by creating non market-based incentives for broadcasters in relation to increasing music use at the expense of non-music formats;
- are not necessary—given that the Copyright Tribunal independently assesses fees for statutory licence schemes;
- are inflexible and arbitrary—as the levels at which the caps are set are not linked to an economic assessment of the value of the licence;
- are anomalous—because the *Copyright Act* contains no other statutory caps, other jurisdictions do not cap licence fees, and the cap is inconsistent with Australian competition policy;
- may not comply with Australia's international treaty obligations—in particular, the requirement under the *Rome Convention* for equitable remuneration to be paid.[105]

19.105 The PPCA argued that removing the caps would bring benefits to the sound recording industry and Australian recording artists, through increased income and, in turn, provide a greater economic incentive for creativity and investment and enhance cultural opportunities.[106]

19.106 The PPCA was supported in its position by a number of other stakeholders.[107] The ACC, for example, submitted that both caps should be repealed as they are 'inequitable, completely arbitrary and do not involve any analysis of economic efficiency' and 'constitute an unfair subsidisation of the radio industry by performers and sound recording copyright owners'.[108]

19.107 Pandora also submitted that the caps provide the 'commercial radio sector with a significant competitive advantage over online radio services' and should be repealed. However, if the caps are not repealed, Pandora suggested that 'market parity

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105 PPCA, *Submission 240*. Referring to *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 12.

106 PPCA, *Submission 240*.

107 Music Victoria, *Submission 771*; Association of Artist Managers, *Submission 764*; Australian Independent Record Labels Association, *Submission 752*; ARIA, *Submission 731*; Arts Law Centre of Australia, *Submission 706*; PPCA, *Submission 666*; Nightlife, *Submission 657*; Australian Copyright Council, *Submission 654*; Pandora Media Inc, *Submission 329*.

108 Australian Copyright Council, *Submission 654*.

demands that online businesses providing the same or similar services should also receive the benefit of those caps'.[109]

19.108 The ABC submitted that the ABC cap should remain, on the basis that the cap 'represents a financial indicia set by Government', the constitutional basis of which has recently been upheld unanimously by the High Court of Australia.[110]

The future of s 109

19.109 Reform to broaden the communication technologies covered by the broadcast exceptions may be justified in order to encourage innovation and competition, and respond to technological change. The availability of the s 109 licensing scheme for radio broadcasters provides them with a competitive advantage over internet radio services.

19.110 In the context of media convergence, the continuing distinction between broadcasts and other electronic communications to the public in relation to copyright exceptions seems difficult to justify. There may be no reason, in copyright policy terms, why radio broadcasters should have access to a licensing scheme under s 109, while internet radio services do not. Australia appears to have a comprehensive and flexible system for the voluntary licensing of music, which can easily be adapted to the needs of broadcasters.

19.111 As discussed above, broadcasters usually require licences from two sources to broadcast a sound recording: one relating to copyright in the sound recording (available under s 109), and another relating to copyright in the musical work recorded. Voluntary licensing appears to operate effectively in respect of the latter.[111]

19.112 For these reasons, the Australian Government should consider repealing the s 109 licensing scheme for the broadcasting of sound recordings, leaving licences to be negotiated voluntarily. If this approach were taken, issues concerning the application of the licensing scheme to internet transmission of television or radio programs, and concerns about remuneration caps, would no longer be relevant.

19.113 However, if the s 109 licence is retained, there appears to be a strong case for repeal of the one per cent cap. Further, the ABC cap may not be the most appropriate way to support the funding of the national broadcaster. The problematic nature of the caps was recognised by the Simulcast Inquiry, which stated that it 'can understand why previous reviews have recommended the abolition of such a cap'.[112]

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109 Pandora Media Inc, *Submission 329*.

110 ABC, *Submission 775* referring to *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* (2012) 286 ALR 61. The Arts Law Centre also supported retention of the ABC cap: Arts Law Centre of Australia, *Submission 706*.

111 That is, broadcasting and public performance rights of composers, lyricists and music publishers are administered by APRA, outside s 109.

112 Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013), 27.

Exceptions for persons using broadcasts

19.114 Sections 199, 200 and pt VA of the *Copyright Act* operate to provide exceptions for the benefit of persons receiving, communicating or making a record of a broadcast. The references to 'broadcast' in these sections serve to limit the application of these sections to broadcasts made by content providers that are broadcasting services for the purposes of the *Broadcasting Services Act*.

Reception of broadcasts

> **Example:** A supermarket plays radio broadcasts for the entertainment of its customers.

19.115 Section 199 provides unremunerated exceptions in relation to the reception of broadcasts of works, sound recordings and films. Essentially, the effect of these provisions is that enterprises such as pubs, supermarkets and other shops are permitted to play radio or television broadcasts without infringing copyright.

19.116 Under s 199(1), where an extract from a literary or dramatic work is broadcast, a person who, by receiving the broadcast causes the work to be performed in public, does not infringe copyright in the work.

19.117 Section 199(2) provides that where a person, by receiving a television or sound broadcast, causes a sound recording to be heard in public, there is no infringement of copyright in the sound recording. However, while the supermarket (in the example above) need not license the right to play the sound recording, it must still obtain a licence to use the underlying musical works.

19.118 Section 199(3) provides that where a person, by receiving an authorised television broadcast, causes a film to be seen in public, the person is to be treated as if the holder of a licence granted by the owner of the copyright to show the film.

19.119 The framing of the term 'broadcast' in s 199 is narrower than in the case of some of the other exceptions, being restricted to broadcasts made by the ABC, SBS, holders of broadcasting licences, or persons authorised by class licences, under the *Broadcasting Services Act*.[113]

19.120 The policy behind the exception appears to be that it is reasonable to allow the reception of broadcasts in public, as it would be impractical to control this form of communication. This rationale seems to apply equally to similar content that is transmitted using the internet. Therefore, in the Discussion Paper, the ALRC proposed that s 199 be amended to apply to the transmission of television or radio programs using the internet.[114]

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113 *Copyright Act 1968* (Cth) s 199(7).

114 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1.

19.121 Some stakeholders specifically opposed the extension of the s 199 exceptions on the basis that it would advantage internet radio services.

19.122 Nightlife, for example, stated that extending s 199 would create 'an unfair advantage to radio streaming providers like Pandora' and extending it to 'on demand' services would 'decimate the music industry'.[115] Similarly, the PPCA stated that the extension of s 199 would cause 'inequitable treatment of performers and copyright owners in sound recordings'. For example, if an internet radio service was subject to this unremunerated exception,

> a nightclub, café or restaurant could tailor its service to play a particular style or genre of music in a commercial setting for the entertainment of its customers without the need to obtain a licence or pay for the public performance of sound recordings which in that setting would clearly add considerable value to the business and to the customers' experience.[116]

19.123 Stakeholders considered that s 199 should instead be repealed on the basis that it constitutes an unjustified restriction on the rights of rights holders and is unnecessary due to the availability of voluntary licensing.[117]

19.124 The PPCA submitted that s 199 unfairly prejudices the legitimate interests of the owners of copyright in sound recordings; creates an anomaly between how sound recordings and musical works are treated; and is not required under intellectual property treaties.[118] To retain s 199 would be to ignore the fact that

> there is a commercial licensing regime in place for musical works relating to the public performance of musical works embodied in broadcasts (as administered by APRA) which is denied to sound recordings by the operation of existing section 199(2).[119]

19.125 Enterprises that play radio or television broadcasts for their customers already have to obtain a licence to use the underlying musical works, and there is no indication that voluntary licensing does not operate adequately in this regard.

19.126 The Australian Government should consider repealing the unremunerated s 199 exception, which would require enterprises to obtain licences from the owners of copyright in sound recordings.

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115 Nightlife, *Submission 657*.
116 PPCA, *Submission 666*.
117 Association of Artist Managers, *Submission 764*; ARIA, *Submission 731*; PPCA, *Submission 666*.
118 Specifically, the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964); and *World Intellectual Property Organization Performances and Phonograms Treaty*, opened for signature 20 December 1996, ATS 27 (entered into force on 20 May 2002).
119 PPCA, *Submission 666*.

Use of broadcasts for educational purposes

> **Example:** A high school records a radio broadcast for schools to replay the broadcast in the classroom at a later time.

19.127 Section 200(2) of the *Copyright Act* provides an unremunerated exception in relation to making a recording of a sound broadcast, for educational purposes, being a broadcast intended to be used for educational purposes.

19.128 This exception is expressly permitted by the *Rome Convention*, which states that domestic laws and regulations may provide for exceptions as regards 'use solely for the purposes of teaching or scientific research'.[120]

19.129 The rationale for allowing unremunerated use of educational radio broadcasts, but not in relation to internet radio services, is not clear.

19.130 The ALRC would expect that the use of a recording of a radio broadcast for educational purposes would be covered by the new fair use exception—although this would depend on the application of the fairness factors in the particular circumstances. In Chapter 14, the ALRC proposes that, if fair use is enacted, s 200 should be repealed.

Copying of broadcasts by educational institutions

> **Example:** A university records a television broadcast of a film for use in film studies classes.

19.131 Part VA of the *Copyright Act* provides a statutory licensing scheme applying to the copying and communication of broadcasts by educational institutions and institutions assisting persons with an intellectual disability, as long as this is for one of the authorised statutory purposes.[121]

19.132 The *Copyright Amendment Act 2006* (Cth) extended the pt VA licensing scheme, pursuant to s 135C(1), to apply to 'a communication of the content of a free-to-air broadcast, by the broadcaster making the content available online at or after the time of the broadcast'.

19.133 The Explanatory Memorandum said that this provision responded to 'the increasing trend of broadcasters making the content of their broadcast material available online, either simultaneously or at a later time (eg, through services commonly referred to as webcasting or podcasting)'.[122]

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120 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964), art 15(1)(d).

121 Screenrights is the declared collecting society administering the pt VA statutory licensing scheme.

122 Explanatory Memorandum, Copyright Amendment Bill 2006 (Cth), [8.5].

> This extension caters for the possibility that the owners of copyright in the content of a broadcast, in agreeing to its being made available online as a podcast, may not have agreed to license more than downloading for the private listening/viewing by the downloader; that is they may not have expressly or impliedly licensed the downloader to communicate the content to the public or play/show it in public.[123]

19.134 Given that the underlying copyright owners have authorised downloading for consumption by the downloader, who could be a student watching or listening to the podcast in connection with his or her studies, s 135C 'sensibly allows educational institutions to facilitate that activity'.[124]

19.135 Part VA is often referred to as the 'statutory broadcast licence' and permits educational institutions to copy radio and television programs, including programs from free-to-air broadcasters and satellite and subscription radio and television. Educational institutions can also copy and communicate podcasts and webcasts that originated as free-to-air broadcasts and which are available on the broadcaster's website.[125]

19.136 A number of stakeholders expressly identified the existing definition of broadcast as being problematic in the context of the pt VA scheme.[126] The Society of University Lawyers submitted that pt VA is not adequate or appropriate in the digital environment because it excludes 'internet transmissions or internet-only content uploaded by television or radio broadcasters', despite the fact that such content, and the use of tablets rather than television, are becoming more common.[127]

19.137 CAG Schools stated that, while pt VA applies to broadcasts and to some free-to-air broadcasts made available online, under the current *Copyright Act* definition of broadcast 'many types of content such as communications delivered via internet protocol television (IPTV), the majority of online content such as "made for internet" content, YouTube videos etc are currently excluded from the Part VA licence'.[128]

19.138 Screenrights stated that the exclusion of transmissions over the internet from the definition of broadcast creates 'an unnecessarily complicated distinction for educators'.[129] Screenrights explained:

> Depending on the transmission mechanism, the program may or may not be part of a broadcast, and therefore amenable to copying under Part VA. This is illustrated for example by IPTV services offered by FetchTV: if you receive FetchTV through iiNet or Internode it is a broadcast, whereas if you receive FetchTV through Optus it is not a broadcast, and a copy would not be protected by the statutory licence.[130]

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123 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.210].
124 Ibid, [12.210].
125 Copyright Advisory Group—Schools, *Submission 231*.
126 Ibid; Screenrights, *Submission 215*; Arts Law Centre of Australia, *Submission 171*; R Wright, *Submission 167*; Society of University Lawyers, *Submission 158*.
127 Society of University Lawyers, *Submission 158*.
128 Copyright Advisory Group—Schools, *Submission 231*.
129 Screenrights, *Submission 215*.
130 Screenrights, *Submission 646*.

19.139 Screenrights observed that voluntary licensing is unable to fill this gap, because it is not possible to offer a comprehensive voluntary licence for educational institutions to copy broadcasts. It recommended that the definition of broadcast in pt VA be amended to 'deem linear television and radio services to be broadcasts' for the purposes of pt VA.[131]

19.140 In contrast, Universities Australia opposed any expansion of pt VA for two reasons:

> Firstly, expanding the Part VA licence to include freely available internet content may result in Australian universities paying for content that no one ever expected to be paid for and that can currently be used in reliance on s 200AB. Secondly, even if the intention were to confine an expanded Part VA to 'the online equivalent of television or radio programs', we are concerned that the practical effect would be for Part VA to potentially apply to a much broader range of content than the ALRC appears to anticipate, as the line between 'TV like' and 'other' kinds of video content increasingly blurs.[132]

19.141 In the ALRC's view, the extension of the pt VA statutory licence to cover some other forms of communication to the public, including using the internet, should be considered. There may be good reasons to extend the licence, for example, to television or radio-like content that is provided using the internet by a provider that is not a broadcasting service. Again, the licence may need to be restricted to linear, programmed content to avoid applying to all internet content.

Further review of broadcast exceptions

19.142 As discussed in Chapter 18, copyright law has longstanding links with communications regulation, which has tended to emphasise the special place of broadcasting in the media landscape. To some extent, the scope of some exceptions may reflect the special characteristics of broadcasts, particularly free-to-air broadcasts, in terms of their ubiquity and market or cultural penetration.

19.143 Where broadcasters are given special treatment in copyright policy terms, this is sometimes seen as commensurate with obligations under the *Broadcasting Services Act* that do not apply to other content providers.[133] In considering the future of exceptions for broadcasters, the issues include whether a justification remains for an exception; or media content providers other than licensed broadcasters should have a 'level copyright playing field'.

19.144 The scope of exceptions for persons using broadcasts means they are sometimes required to draw distinctions between broadcasts and other audiovisual content, including internet content—or infringe copyright laws by inadvertently treating broadcast and other content in the same manner. Justifications for the

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131 Ibid.

132 Universities Australia, *Submission 754*. Also ADA and ALCC, *Submission 586*.

133 For example, through obligations under the *Broadcasting Services Act* and commercial radio codes of practice, commercial radio broadcasters must adhere to minimum Australian music quotas; provide a minimum daily amount of local content; and provide a minimum daily amount of local news: see CRA 864.

continuing existence of exceptions for persons using broadcasts are most likely to centre on assumptions that broadcast retains a 'special' place in the media landscape.

19.145 In the Discussion Paper, the ALRC suggested that some broadcast exceptions should be amended to apply to the transmission of television or radio programs using the internet and asked how this might be done—for example, whether some exceptions should: be extended only to the 'internet equivalent of television and radio programs'; continue to exclude 'on demand' programs; or extend only to content made available by free-to-air broadcasters using the internet.[134]

19.146 One risk of such approaches is that links with technologies or regulatory concepts specific to 'technologies and regulatory concepts of today' may become quickly outdated and regulatory distinctions that 'depend on concepts based on television and broadcasting are extremely problematic in an age of convergence'.[135]

19.147 The ACMA stated, for example, that: defining the 'internet equivalent' of radio and television programs is likely to become 'increasingly problematic' as business models continue to evolve; changing business models and consumer behaviour will challenge the distinction between live programs and on demand services; and restricting exceptions to free-to-air broadcasters could effectively exclude market entrants from the same 'opportunities and protections'.[136]

19.148 Further, unexpected consequences may arise from reform. For example, in the context of educational statutory licensing, extending the pt VA licence to additional categories of internet transmission would have the effect of removing many educational uses of online content from an unremunerated to a remunerated exception.[137]

19.149 The broadcast exceptions nevertheless require comprehensive reform in the light of media convergence and changes in the way that media content is consumed by the Australian public. The need for review has been thrown into sharp relief by the decision in *PPCA v CRA*,[138] which confirmed that a broadcast, for the purposes of the *Copyright Act*, does not include an internet simulcast of a broadcast.

19.150 Stakeholders agreed on the need for further review.[139] The ADA and the ALCC supported review of the 'full range of issues across copyright and communications policy'.[140] The ACMA stated that reform should be part of 'an overall

134 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 16–1; Question 16–1.
135 ADA and ALCC, *Submission 586*.
136 ACMA, *Submission 613*.
137 ADA and ALCC, *Submission 586*. That is, some uses covered by s 200AB may then be covered by pt VA.
138 *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited* [2013] FCAFC 11.
139 For example, COMPPS, *Submission 634*; ACMA, *Submission 613*; Google, *Submission 600*; ADA and ALCC, *Submission 586*.
140 ADA and ALCC, *Submission 586*.

coherent approach to content regulation, to minimise the potential for proposals to have unintended consequences or introduce potential market distortions'.[141]

19.151 In this context, stakeholders referred to the deliberations of the Simulcast Inquiry, which in its report emphasised that reform at the intersection of copyright and broadcasting should not be dealt with in a piecemeal way.[142]

19.152 The Simulcast Inquiry recommended that, following receipt of this ALRC Report, 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'.[143]

19.153 In this context, the ALRC suggests that some of the broadcast exceptions should be repealed on the basis that relevant uses are likely to be covered by the fair use or new fair dealing exception, or are amenable to voluntary licensing. In these cases, removing exceptions may:

- better acknowledge creators' rights and maintain incentives by removing unnecessary exceptions and facilitating voluntary licensing;[144] and
- advance technological neutrality and innovation by removing exceptions that apply only to broadcast but not other forms of communication to the public.[145]

19.154 Despite the complexities, the extension of some statutory licensing schemes to the transmission of linear television or radio programs using the internet should be considered, in order to ensure these licences continue to serve their purpose in an era of media convergence.

Recommendation 19–1 In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the following exceptions in the *Copyright Act* should be repealed:

(a) s 45—broadcast of extracts of works;

(b) ss 47, 70 and 107—reproduction for broadcasting;

(c) s 109—broadcasting of sound recordings;

(d) ss 65 and 67—incidental broadcast of artistic works; and

(e) s 199—reception of broadcasts.

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141 ACMA, *Submission 613*.
142 Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013), 27.
143 Ibid, Rec 2.
144 See Ch 2, framing principles 1, 2
145 See Ch 2, framing principle 4.

Recommendation 19–2 The Australian Government should also consider whether the following exceptions should be amended to extend to the transmission of linear television or radio programs using the internet or other forms of communication to the public:

(a) s 47A—sound broadcasting by holders of a print disability radio licence; and

(b) pt VA—copying of broadcasts by educational institutions.