



**PPCA SUBMISSION IN RESPONSE TO THE
AUSTRALIAN LAW REFORM COMMISSION
DISCUSSION PAPER 79: COPYRIGHT AND THE
DIGITAL ECONOMY**

31 July 2013

Executive Summary

1. Phonographic Performance Company of Australia Limited (**PPCA**) welcomes the opportunity to respond to the proposals and questions set out in the ALRC's Discussion Paper 79, *Copyright and the Digital Economy* (the **Discussion Paper**) in respect of the *Copyright Act 1968* (the **Act**).
2. Following the recommendations of the Senate Environment and Communications References Committee (**Simulcast Committee**) in its report on the *Effectiveness of current regulatory arrangements in dealing with radio simulcasts (Simulcast Report)*¹, PPCA understands that the ALRC review will also consider the issues raised in the Simulcast Report in the ALRC's Final Report. Accordingly, PPCA will specifically address internet simulcasting in the context of the ALRC's proposals and questions relating to broadcasting and copyright.

Caps on fees payable by radio broadcasters for the broadcast of sound recordings must be repealed

3. PPCA welcomes the ALRC's acknowledgement in Question 16-2 that the repeal of the s 152 caps on the remuneration that may be ordered by the Copyright Tribunal for the radio broadcasting of published sound recordings needs to be considered in the context of this Inquiry and urges the ALRC to recommend that these caps be repealed.
4. Also, the Simulcast Committee stated in the Simulcast Report that it could understand why previous reviews of the Act have recommended the abolition of statutory caps.² The caps are arbitrary, inequitable, antiquated and confer an unfair advantage on traditional radio broadcasters over services which are delivered using the internet.
5. The section 109 statutory licence for the broadcast of sound recordings should be repealed in conjunction with the repeal of the s 152 caps.

Internet simulcasting must be treated as a communication to the public other than a broadcast in keeping with existing copyright principles and commercial practice

6. Australian copyright law must treat internet simulcasting as a communication to the public other than a broadcast that must be licensed and remunerated separately from the original broadcast, to ensure consistency with established principles and law both locally and internationally. The ALRC must resist attempts by the Australian radio industry to change copyright law to achieve a narrow commercial outcome which will distort the balance of copyright law.
7. The ALRC should consider the decoupling of Australian broadcasting and copyright laws to ensure that broadcasting law is not used by radio broadcasters to distort the operation of copyright law and upset established copyright principles and commercial practices. This could be achieved by adopting a stand alone definition of broadcasting in the Act which is not linked to the definition of broadcasting service in the *Broadcasting Services Act 1992*.

¹ Released 12 July 2013.

² Simulcast Report at page 27.

Voluntary licensing arrangements make it unnecessary to extend the existing broadcast exceptions to the delivery of television and radio programs using the internet

8. PPCA is concerned that the ALRC has not taken into account the significant evidence-based submissions made by ARIA and PPCA as to the efficacy of voluntary licensing practices which make the extension of statutory licences and exceptions to new technology and content delivery mechanisms using the internet unnecessary. PPCA has licensed a range of new internet services as well as offering internet rights to traditional broadcasters.
9. PPCA notes that Proposal 16-1(e), which expressly proposes the extension of the statutory licence relating to the broadcast of sound recordings under s 109, is at odds with Question 16-3 which asks whether the s 109 statutory licence should be repealed and licences for the broadcast of sound recordings be negotiated voluntarily.
10. The ALRC's recommendation in Proposal 6-1 of the Discussion Paper for the repeal of a range of statutory licences and their replacement with voluntary licensing is inconsistent with its proposal for the extension of the broadcasting statutory licences and exceptions to internet transmissions in section 16-1.

Section 199(2) of the Act must be repealed because it amounts to an inequitable treatment of performers and copyright owners in sound recordings

11. PPCA is concerned that the Discussion Paper has not acknowledged PPCA's detailed submission in response to the Issues Paper in respect of the repeal of section 199(2) as it applies to sound recordings³, which was made directly in response to Question 49 of the Issues Paper which asked whether any specific exceptions should be removed from the Act.
12. PPCA sets out below additional arguments in relation to repealing section 199(2) and refers to changes to UK copyright law which repealed an inequitable free use exception relating to the reception and public performance of sound recordings embodied in broadcasts. This could be used as a model for adoption in Australia to remedy this inequity.
13. Also, it would be inequitable to extend this free use exception to radio programs delivered using the internet.

³ PPCA's submission to the Issues Paper at page 35.

1. Introduction

14. PPCA provided the ALRC with a detailed overview of its functions and operations in PPCA's submission to the ALRC's Issues Paper which it will not repeat again in full.
15. In short, PPCA represents the interests of Australian recording artists as well as record companies and labels (that is trading entities that make, license or distribute sound recordings and which either own or exclusively control copyright in those sound recordings in Australia). PPCA is a Collection Society and adheres to the Code of Conduct for Copyright Collecting Societies⁴.
16. As noted in our earlier submission, Australian recording artists are entitled to register with PPCA to receive direct payments when their recordings receive an allocation of income in the annual PPCA distribution, which currently allows for 50% of earnings on each Australian track to be shared by the featured Australian artists performing on that track.⁵ Accordingly, any provisions of the Act which unfairly restrict the amount of income which may be earned from the public performance, communication or broadcast of sound recordings directly impact on performing artists and their livelihoods.
17. PPCA raises this point again to highlight the way in which fair and reasonable compensation payable by users of copyright directly flows through to artists as this does not appear to have been acknowledged in the Discussion Paper which instead cites submissions which caution against conflating the position of original content creators with that of copyright owners.⁶
18. Australian performers and copyright owners are equally affected by the provisions and proposals discussed in this submission. This is also important to note in the context of the continued efforts of radio broadcasters to incorrectly characterise the debate around the repeal of the one per cent cap and ABC cap as a matter concerning multi-national record companies rather than an issue where the repeal of these inequitable caps would directly benefit Australian performing artists.
19. PPCA's submissions in response to the Discussion Paper will focus on the areas directly relating to the licensing activities which it performs on behalf of Australian recording artists and owners of copyright in sound recordings, namely:
 - (a) to issue licences that permit third parties to play protected sound recordings and/or music videos⁷ in public⁸; and
 - (b) to issue licences that permit third parties to communicate sound recordings and/or music videos to the public⁹.

⁴ [http://www.pcca.com.au/ignitionSuite/uploads/docs/Code%20of%20Conduct%202011%20Final\[1\].pdf](http://www.pcca.com.au/ignitionSuite/uploads/docs/Code%20of%20Conduct%202011%20Final[1].pdf)

⁵ PPCA's submission to the Issues Paper at page 7.

⁶ ALRC Discussion Paper at [2.15].

⁷ By "music video" we mean a cinematograph film that embodies a sound recording or a soundtrack.

⁸ See s 85(1)(b) of the Act.

⁹ See s 85(1)(c) of the Act.

20. Accordingly, the proposals and questions of most importance to PPCA and its members relate to the provisions of the Act relating to the broadcasting, communication and public performance of sound recordings and music videos.
21. PPCA submits that the individuals and bodies that it represents are at a disadvantage under the current Act in respect of the income which they may receive arising from the broadcast, public performance and potentially in relation to the simulcast by radio broadcasters of radio programs containing sound recordings. These issues are addressed below in response to the ALRC's proposals, particularly in respect of:
- (a) the caps imposed under section 152 of the Act on the fees payable by radio broadcasters in respect of sound recordings which are not imposed in relation to the broadcast of musical works;
 - (b) the inequitable free use exception under section 199(2) of the Act relating to the reception of broadcasts containing sound recordings which again is not imposed on songwriters or the owners of copyright in musical works;
 - (c) the attempts by the radio industry in the Simulcast Inquiry to require the Government to deem internet simulcasting to come within the definition of broadcast for copyright purposes, the result of which would:
 - (i) deprive Australian recording artists and sound recording owners of the ability to freely negotiate with radio broadcasters in respect of internet simulcasting in the absence of inequitable caps; and
 - (ii) put Australia at odds with accepted practice in other jurisdictions and in breach of our international treaty obligations in relation to the proper characterisation of internet simulcasting as a communication to the public other than broadcasting, or in any event as a right to be licensed and remunerated separately from the original broadcast.
22. PPCA does not believe that these provisions of the Act or potential changes to the characterisation of internet simulcasting accord with "...the government's objective of ensuring that copyright law provides incentives for investment in innovation and content..."¹⁰ Nor do they accord with the following principles set out in the ALRC's Terms of Reference and the Discussion Paper:
- (a) Maintaining incentives for creation and dissemination of works and other subject matter (which includes sound recordings), in line with this objective of copyright law;¹¹
 - (b) Providing rules consistent with Australia's international obligations (which includes the separate treatment of broadcasts on the one hand and internet communications such as internet simulcasts on the other hand);¹²

¹⁰ Copyright and the Digital Economy Issues Paper, August 2012 at [3].

¹¹ Terms of Reference, principle 1; see also ALRC Discussion Paper at [2.9].

¹² Terms of Reference, principle 4; see also ALRC Discussion Paper at [2.44].

(c) Acknowledging and respecting authorship and creation (which includes the creation and investment in the creation of sound recordings).¹³

23. PPCA and its members believe that there is a direct link between income received through creativity and subsequent investment in creativity. PPCA would also argue that, quite clearly, the restrictions on income imposed on Australian artists and record companies as described in this submission "...affects the ability of creators to earn a living, including through access to new revenue streams..."¹⁴
24. In this submission, PPCA has only specifically addressed the areas of the Discussion Paper that are most relevant to our organisation. PPCA supports the submission made by the Australian Recording Industry Association (**ARIA**) in relation to the matters we have not specifically addressed, in particular, ARIA's submissions relating to fair use.

2. Retransmission of Free-to-air Broadcasts

25. PPCA will comment only on the issue of the Part VC statutory licence and its possible extension to the internet retransmission of broadcasts. PPCA opposes the extension of the Part VC statutory licence to internet retransmission on the basis that it has the potential to undermine and prejudice the commercial interests of content owners (eg. film, sports and music right holders) who separately grant rights for internet transmission of their content (including delivery to internet enabled mobile devices).
26. PPCA has many rights which it may license to third parties in respect of the communication of broadcast material, including sound recordings transmitted over the internet. Such licences are utilised by, in particular, the television industry and PPCA does not want this voluntary licensing system to be undermined.
27. Likewise, the Australian Football League states that:

*[A]llowing retransmission on the internet would undermine the significant and valuable right to exclusive communication via the internet that AFL and other rights holders grant to third parties. To suggest that unauthorized third parties can retransmit on or via the internet and pay nothing or a statutory licence fee would undermine the exclusive granting of rights and inevitably result in a significant financial detriment of copyright owners such as the AFL.*¹⁵

¹³ ALRC Discussion Paper at [2.4].

¹⁴ Copyright and the Digital Economy Issues Paper, August 2012, question 1(a).

¹⁵ AFL submission to the Issues Paper at [3.5]

3. Broadcasting

The definition of 'broadcast'

28. In making recommendations, PPCA submits that the ALRC must make clear and distinguish between the concept of broadcast as a subject matter of copyright and broadcast as a right exercisable in relation to copyright subject matter.
29. The concept of 'broadcast' (as a sub-set of the broader concept of 'communication to the public') should remain a narrower concept than 'communication to the public' due to the role it plays in copyright law in:
- protecting the transmissions of particular content service providers as broadcasts; and
 - applying to certain free use exceptions and statutory licences under the Act.
30. PPCA opposes amending the definition of broadcast to include communications over the internet (including internet simulcasts) as this would have negative effects on:
- the protection of certain classes of sound recordings (including US recordings) which are not protected in Australia for broadcasting, but are protected in respect of communication to the public; and
 - if the section 152 radio caps are not repealed, extend the application of these inequitable caps to internet delivered radio services.

We refer to our submissions in Annexure A which set out our position in detail in relation to internet simulcasting as it relates to this issue.

31. PPCA supports removing the link between copyright law and broadcasting law as set out in Annexure A and the adoption of a stand alone definition of broadcasting which is consistent with Australia's international copyright law obligations and commercial practice. Again, we refer to our submissions in Annexure A on this issue.

Proposal 16.1(b) – Extension of sections 47, 70 and 107

32. PPCA will only comment on s107 because it relates to sound recording copyright.
33. PPCA believes that it is unnecessary to extend the existing s 107 broadcast exception relating to sound recordings to apply to television or radio programs using the internet because the types of uses covered by s 107 are already granted in voluntary licence agreements between individual rights holders (copyright owners such as record companies) or PPCA on the one hand and copyright users (television or radio service providers) in relation to services delivered over the internet on the other hand.
34. As explained in our earlier submission,¹⁶ PPCA's broadcast licence schemes are used by the majority of Australian television and radio broadcasters. PPCA's communication licence schemes are continually expanding and evolving to cater for the advances in technology that provide for communication of audio and audio visual content through various devices (for example, mobile phones, tablets, and computers in addition to traditional radio and television sets) and in a variety of ways, for example simulcasts (i.e. the internet streaming of content simultaneous with a traditional radio or television program) and webcasts (internet streaming alone).
35. In relation to the communication of sound recordings, PPCA presently grants licences to organisations and individuals in the following broad categories:
- (a) National public television broadcasters;
 - (b) Commercial "free to air" television broadcasters;
 - (c) Pay television broadcasters;
 - (d) National public radio stations;
 - (e) Commercial radio stations;
 - (f) Community radio stations;
 - (g) Users of telephone music on hold;
 - (h) Providers of internet steaming services, both non-interactive and semi-interactive;
 - (i) Providers of audio visual content (i.e. television programs) via the internet and mobile telephone networks.¹⁷
36. For licences which grant the right to communicate or broadcast sound recordings, in many instances PPCA negotiates with and subsequently maintains a business relationship with industry associations representing the various sectors. Such agreements ensure simplicity in terms of negotiation and the subsequent operation of the licences between the parties as well as uniformity. For example, in relation to free to air television, PPCA communicates and has an industry agreement with their peak body, Free TV Australia Limited.¹⁸

¹⁶ PPCA's submission to the Issues Paper at page 4.

¹⁷ PPCA's submission to the Issues Paper at [5].

¹⁸ PPCA's submission to the Issues Paper at [6].

37. Of relevance to the s 107 exception, 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 ephemeral copying rights for sound recordings in respect of services which are delivered or made available using the internet.
38. PPCA's extensive internet licensing offerings are set out on our website.¹⁹ These include:
- Non-interactive streaming music services;
 - Interactive streaming music services; and
 - Use of sound recordings as background music on websites.
39. For example, PPCA has directly licensed a number of internet radio services in Australia, including Last.fm, the customised radio service component of the Songl music service and iHeartRadio Australia (which is a service operated by the Australian Radio Network).²⁰
40. In relation to internet television services, PPCA has licensed Fetch TV and other internet TV services in Australia. These licences were negotiated and finalised without the need for statutory exceptions.
41. In addition to PPCA's licensing activities, sound recording rights holders (such as record companies) enter into direct agreements with music services such as Spotify, Rdio, MOG and JB Hi-Fi NOW which grant these services all rights required to operate their services including the right to copy and communicate sound recordings. The different types of licensed services and business models were set out in detail in the submissions made by ARIA in its submission to the Issues Paper.²¹
42. Accordingly, statutory exceptions have no role to play in respect of the services outlined above as there is already in place a vast range of licensed options that enable consumers to enjoy recorded music in a multitude of ways, including free and paid services.
43. Also, for the reasons set out in Annexure A – Internet Simulcasting, PPCA submits that internet simulcasting should not be treated as a broadcast for the purpose of copyright law.

Proposal 16.1(c) - Extension of section 47A

44. PPCA's licensing offering to community radio broadcasters (which would include print disability radio services), whether internet delivered or otherwise, include incidental copying rights which obviates the need for an extension of section 47A.

¹⁹ See <http://www.pcca.com.au/music-users-/webcastlicensing/>

²⁰ See <http://www.arn.com.au/brands/iheart-radio/>

²¹ ARIA's submission to the Issues Paper at page 12.

Proposal 16.1(e) – Extension of section 109

45. PPCA submits that the s 109 compulsory licence for the broadcast of sound recordings should not be extended to services using the internet. PPCA also notes its submission below that the s 109 compulsory licence as it currently applies should be repealed given that it is presently tied to the inequitable caps imposed under section 152 of the Act.
46. As previously noted, voluntary licensing is adequate for new digital music services and PPCA has already licensed a number of services in Australia without recourse to a compulsory licensing regime, including Last.fm, the customised radio service component of the Songl service and iHeartRadio Australia which is a service operated by the Australian Radio Network. In relation to internet television services, PPCA has licensed Fetch TV and other internet TV services in Australia.
47. PPCA notes that licensees will still have recourse to the Copyright Tribunal under Subdivision H of the Act even if a compulsory licence is not available in respect the use of sound recordings in internet services.
48. PPCA notes the comments made by Pandora Media²². PPCA submits that Pandora Media is an exception to the orderly and smooth voluntary licensing activities which PPCA has undertaken in respect of new services in Australia over the past five years. PPCA is of the view that this is more a reflection on Pandora’s commercial strategy which has been highlighted of late in other jurisdictions such as the United States where there has been significant public debate in relation to:
- Pandora Media’s lobbying activities to change the compulsory licensing regime which it cited in its submission as the model for Australia; and
 - Whether Pandora Media’s business model supports the payment of fair and reasonable licence fees to artist and rights holders.
49. Commercial Radio Australia claims that “[T]he industry blanket agreement with APRA allows it to communicate music via podcast. However, the industry has not reached an agreement as to a podcast licence with PPCA”.²³ PPCA notes that it has not been approached by Commercial Radio Australia for a podcasting licence in respect of the use of sound recordings.
50. Despite the concerns raised by Commercial Radio Australia in its submission to the Issues Paper, PPCA has been able to voluntarily negotiate a licence with the Australian Radio Network (also a traditional radio broadcaster) in respect of its iHeartRadio internet radio service without recourse to a compulsory licensing regime.
51. As the ALRC correctly notes in the Discussion Paper, 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 109.²⁴ 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

²² Which the ALRC refers to in [16.57] and [16.58] of the Issues Paper.

²³ Commercial Radio Australia’s submission to the Issues Paper at page 3.

²⁴ ALRC Discussion Paper at [16.116].

services are required to license both rights when operating a music service.

52. Accordingly, statutory licences have no role to play in respect of the services outlined above as there is already in place a vast range of licensed options that enable consumers to enjoy recorded music in a multitude of ways.
53. Also, for the reasons set out in Annexure A – Internet Simulcasting, PPCA submits that internet simulcasting should not be treated as a broadcast for the purpose of copyright law or otherwise included in the s 109 statutory licence scheme.

Proposal 16.1(g) – Extension of section 199

54. PPCA strongly opposes the extension of section 199 to the transmission of television or radio programs using the internet and reiterates its position that it should in fact be repealed in respect of the free use exception under section 199(2) which applies to sound recordings but not musical works.
55. PPCA is concerned that its detailed arguments for the repeal of section 199(2) were not noted or considered by the ALRC in the Discussion Paper.
56. This concerns a serious anomaly which creates an unfair and inequitable treatment of one set of copyright interests (recording artists and sound recording owners) as compared with another (being songwriters and music publishers). The ALRC noted in the Discussion Paper that while a supermarket which plays radio broadcasts for the entertainment of its customers “need not license the right to play the sound recording, it must still obtain a licence to use the underlying musical work.”²⁵ There is no discussion as to why this unequal treatment exists despite PPCA’s detailed submissions on this point, notwithstanding that the ALRC must consider exceptions in the context of maintaining incentives for creation of works and other subject matter (which includes sound recordings).²⁶
57. The ALRC’s view in the Discussion Paper that “[t]he policy behind the exception appears to be that it reasonable to allow for the reception of broadcasts in public, as it would be impractical to control this form of communication”²⁷ ignores PPCA’s earlier submission and 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).
58. This limitation on the exclusive right to cause recordings to be heard in public is not required under the Rome Convention or WIPO Performers and Producers of Phonogram Treaty. PPCA submits that it unfairly prejudices the legitimate interests of the owners of copyright in sound recordings in relation to this use.
59. PPCA submits that the regime adopted under UK copyright law for the recognition of the value of sound recordings in broadcasts when publicly performed (as summarised below) is a fair and reasonable basis for addressing the current inequity under Australian copyright law.

²⁵ ALRC Discussion Paper at [16.68]

²⁶ ALRC Discussion Paper at [2.9].

²⁷ ALRC Discussion Paper at [16.72].

UK copyright law now requires sound recordings to be licensed when publicly performed as part of a broadcast

60. PPCA draws the ALRC's attention to amendments made to section 72 of the United Kingdom *Copyright Designs and Patents Act 1998 (CDPA)* which corrected the anomaly between the treatment of sound recordings and musical works in the UK with the result that nearly all commercially released sound recordings embodied in television and radio programs played in commercial premises are now licensed by PPL (the UK collecting society for sound recordings) to businesses in the same way that musical works are licensed.
61. In 2003, and again in 2011, section 72 of the CDPA was amended to exclude the public broadcasting of *certain sound recordings* from the class of permitted activities in respect of copyright.
62. Section 72 of the CDPA, after the 2011 amendment, now reads as follows:

72	Free public showing or playing of broadcast
(1)	The showing or playing in public of a broadcast ... to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe any copyright in – (a) the broadcast; (b) any sound recording (except so far as it is an excepted sound recording) included in it; or (c) any film included in it.
(1A)	For the purposes of this Part an “ excepted sound recording ” is a sound recording— (a) whose author is not the author of the broadcast in which it is included; and (b) which is a recording of music with or without words spoken or sung.
(1B)	Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public— (a) [...] (b) is necessary for the purposes of— (i) repairing equipment for the reception of broadcasts; (ii) demonstrating that a repair to such equipment has been carried out; or (iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.
(2)	The audience shall be treated as having paid for admission to a place— (a) if they have paid for admission to a place of which that place forms part; or (b) if goods or services are supplied at that place (or a place of which it forms part)— (i) at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast..., or (ii) at prices exceeding those usually charged there and which are partly attributable to those facilities.
(3)	The following shall not be regarded as having paid for admission to a place— (a) persons admitted as residents or inmates of the place; (b) persons admitted as members of a club or society where the payment is only for membership of the club or society and the provision of facilities for seeing or hearing broadcasts ... is only incidental to the main purposes of the club or society.
(4)	Where the making of the broadcast was an infringement of the copyright in a sound recording or film, the fact that it was heard or seen in public by the reception of the broadcast shall be taken into account in assessing the damages for that infringement.

63. Under the amendments to the CDPA, the leading UK text on copyright confirms that virtually all commercially released sound recordings are encompassed within the definition of “excepted sound recordings” confirmed in s72(1A)²⁸. The *effect* of this amendment is that a person showing or playing in public a broadcast containing such recordings requires a licence from the owner of the sound recording work²⁹ - i.e. a PPL licence (PPL is PPCA’s counterpart in the UK).
64. It is significant that the UK legislature elected in 2011 to further broaden the category of “excepted sound recordings” so that an even greater range of sound recordings require the necessary licence³⁰.
65. For completeness, we note that the current section 72 does provide a minor exception. The playing in public of a broadcast does *not* infringe copyright in “excepted sound recordings”, where the playing or showing of the broadcast is necessary for the purposes of the repair or demonstration of television or radio equipment (s72(1B)(b)).
66. Accordingly, under the 2003 and 2011 amendments to the CDPA, a person showing or playing in public commercial sound recordings included in a radio or television broadcast must obtain a licence from the owner of the sound recording copyright or its representative.

Reasons against extension of section 199(2) to new forms of television and radio services

67. PPCA strongly opposes the extension of section 199(2) as it would extend this inequitable treatment of sound recordings to new forms of television and radio services, some of which may be tailored specifically to commercial businesses who wish to use recorded music to augment and improve the ambience of their venues, such as nightclubs, pubs, restaurants and cafes.
68. For example, if a Pandora-like internet radio service was subject to the section 199(2) free use 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.
69. As the ALRC correctly notes in the Discussion Paper, “services like Pandora can be personalised to reflect the musical preferences or an individual...and able to act as a substitute for a personal music collection.”³¹ PPCA submits that this would equally apply to the musical preferences of a business or a business’ customers. This is borne out by the fact that Pandora has a separate service offered to businesses in the US market called ‘Pandora for Business’³² which is promoted and marketed with the following wording:

“Create the soundtrack for your business.”

“Music defines your brand and creates the personality of your business.”

²⁸ Copinger & Skone James on Copyright, 16th edition, at [9-220].

²⁹ Copinger & Skone James on Copyright, 15th edition at [9-200] (page 571); 16th edition at [9-220] (page 656-7).

³⁰ In particular, the 2011 amendment removed a carve out for broadcasts shown or played in public which “form part of the activities of an organisation that is not established or conducted for profit”, so that a license now is required in those circumstances (whereas prior to 2011 no such license was required).

³¹ ALRC Discussion Paper at [16.98].

³² See <http://www.dmx.com/pandora/>

70. PPCA licenses in the region of 55,000 businesses and individuals for public performance of sound recordings at the present time and there are a vast number of commercial premises which use sound recordings to enhance their customers' experience in their premises and pay licence fees accordingly.
71. Extending the free use exception in section 199(2) to the reception of new types of internet-delivered services would unfairly deprive performers and rights holders of significant public performance income through PPCA's licensing activities.
72. Also, for the reasons set out in Annexure A – Internet Simulcasting, PPCA submits that internet simulcasting should not be treated as a broadcast for the purpose of copyright law.

Question 16-1 - How should extension of broadcast exceptions be framed?

73. PPCA submits that the extension of the broadcast exceptions to the transmission of television or radio programs using the internet is unnecessary due to the existence of voluntary licensing arrangements which are already in place between PPCA and existing services, or offered by PPCA to new services, which address the use of sound recordings in internet radio and television services which use sound recordings. As highlighted above with reference to actual services which have been licensed on a voluntary basis, such service types include:
 - (a) New forms of delivery of sound recordings, such as webcasting and internet radio;
 - (b) New forms of delivery of television programs, such as IPTV services.
74. In respect of on-demand music services such as Spotify, Rdio and MOG which allow customers to specifically choose which tracks they wish to listen to, rights are granted to these services directly by the rights holders in sound recordings (such as record companies) rather than PPCA, which is not in a position to grant such rights on behalf of rights holders. As the ALRC correctly notes in the Discussion Paper, "on demand communications are more of a substitute for the purchase of personal copies of content."³³
75. As noted at above, PPCA strongly opposes the extension of section 199 to new services and submits that section 199(2) be replaced with a regime similar to that which exists in the United Kingdom which recognises the rights of performers and rights holders in sound recordings so that sound recordings are given equal treatment with musical works in relation to the reception of broadcasts.
76. Also, for the reasons set out in Annexure A – Internet Simulcasting, PPCA submits that internet simulcasting should not be treated as a broadcast for the purpose of copyright law.

³³ ALRC Discussion Paper at [16.98].

Question 16–2 Should the Copyright Act be amended to repeal the one per cent cap under s 152(8) or the ABC cap under s 152(11), or both?

77. PPCA welcomes the ALRC’s introduction of this important issue into the consideration of copyright law reform and strongly supports the repeal of both the one percent cap and the ABC cap for the detailed reasons set out in PPCA’s earlier submission to the Issues Paper.³⁴
78. PPCA notes that the Discussion Paper sets out the history of the section 152 caps, notes the various Government reviews which have recommended the repeal of section 152(8) and summarises PPCA’s submissions in favour of the repeal of both caps.³⁵
79. PPCA’s reasons in support of the repeal of the caps are set out below:
- (a) **The caps distort the market in various ways.** The effect of the caps is that the sound recording industry is subsidising the much wealthier radio industry. There is no reason why a less wealthy industry should subsidise a much wealthier one. On the contrary, there are strong policy reasons why the regime should be made more equitable. Additional distortions occur within the commercial radio sector itself, where some stations focus heavily on sound recordings and others, such as “talk” radio stations, use much less music. The former type of station derives more benefit from section 152 than the latter.
 - (b) **The caps are now out of date.** The “special circumstances” which may have existed for the radio industry in the late 1960s do not exist now. In particular, the commercial radio sector is in a healthy financial position. The number of stations has increased since the imposition of the caps and the nature and extent of their offerings has expanded as well as altered, in particular given the advent of the internet, which has provided a further communication platform.
 - (c) **The caps reduce economic efficiency and lack equity.** In a study previously commissioned by PPCA and conducted by the Allen Consulting Group, it was concluded that the caps did not address a market failure and further, that they actually distorted the volume of music used in radio, by artificially creating non market based incentives for broadcasters in relation to increasing music use at the expense of non-music formats. Other conclusions were that the caps reduced revenue for copyright owners and Australian recording artists as well as adversely affecting the creation of Australian recordings and the quality in music.
 - (d) **The caps are not necessary.** This is especially the case where the Copyright Tribunal of Australia is in place in order to independently assess fees for statutory licence schemes. A fair market rate could be less than the limitations imposed in section 152. Alternatively, a fair market rate could exceed these limitations.
 - (e) **The caps are inflexible and arbitrary.** The levels at which the caps are set do not appear to be linked to an economic assessment of the value of the licence pursuant to section 109 of the Act. The 1% cap applies to both broadcasters which provide mainly news or talk as well as those whose business models predominantly involve broadcasting

³⁴ PPCA’s submission to the Issues Paper, pages 12-19 and pages 32-34.

³⁵ Discussion Paper, [paras 16.102 to 16.113].

music. The arbitrariness of the 0.5 cent cap for the ABC is further illustrated by the fact that there is no provision for indexation to take account of the cost of living, so its value has substantially diminished over time (it is estimated that 0.5 cents in 1968 would have a value of 5 cents in 2012) and further, that since the imposition of the cap, ABC radio has greatly expanded its network.

- (f) ***The caps are anomalous.*** PPCA submits that the caps are not consistent with the economic efficiency objectives underpinning Australia's competition policy. Further, the Act contains no other example of a statutory cap for copyright material in this country. Similarly, on an international level, most other jurisdictions do not include limitations in respect of the licence fees payable for radio broadcasts (or other copyright material). In most other countries, a fair market rate is either negotiated between the parties or determined by an independent specialist copyright body. Actual rates around the world vary from about 1.5% to 4%.
 - (g) ***The caps may not be permissible in the light of Australia's international treaty obligations.*** The effect of Article 12 of the Rome Convention 1961 is that equitable remuneration is to be paid in respect of the broadcast or communication of a sound recording. Article 16.1(a) limits Article 12 by providing that a signatory to the treaty may opt out of Article 12, but it does not specifically give a contracting state the right to limit the amount of payment of equitable remuneration for the protected use. The WIPO Performances and Phonograms Treaty 1996 contains similar provisions.
 - (h) ***Benefits to the sound recording industry and Australian recording artists.*** Removal of the caps would permit the sound recording industry to seek "equitable remuneration" for radio broadcasts, in the same way as other fees payable for copyright material and in particular pursuant to statutory licences. The higher incomes for Australian recording artists and creators of sound recordings that may flow from this should provide them with greater economic incentive to remain in the industry. In turn, creativity is encouraged as is investment in artists, leading to better export opportunities for the Australian music industry and leading to consumers gaining access to a wider range of content.
 - (i) ***Benefits outside the sound recording industry.*** If there is increased investment in local talent as well as an increased diversity in Australian music available, enhanced cultural opportunities for the community should also arise.
 - (j) ***Advantages traditional broadcasters over internet radio services.*** The caps do not apply to stand alone radio services which are delivered over the internet and therefore have an anti-competitive effect by privileging incumbent traditional broadcasters over new entrants. Incumbent broadcasters are attempting to extend this advantage further by lobbying for legislative change which would bring internet simulcasting within the caps.
80. PPCA expects that Commercial Radio Australia and the ABC will make detailed submissions to the Discussion Paper in favour of maintaining the caps and also cite the 2012 decision of the High Court of Australia.³⁶ The High Court found that there was there was no acquisition of property and did not have to decide on the issue on whether it was an acquisition other than on just terms. Accordingly, the High Court did not have to decide on the key issue which is at the heart of this policy debate.

³⁶ *Phonographic Performance Company of Australia Limited v Commonwealth of Australia* [2012] HCA 8 (28 March 2012).

81. PPCA brought the High Court action in the absence of a legislative response to an unjustifiable law which is difficult to change due to the political power of the commercial radio industry, notwithstanding overwhelming support for repeal in the past at a policy level. The ALRC makes reference to the fact that in 2006 the Attorney-General had approved the repeal of the one per cent cap only for it not to be implemented in legislation.³⁷

82. Now that this issue is again the subject of a Government review, PPCA submits that both caps be repealed and supports the ALRC's view that:

*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.*³⁸

83. PPCA also notes that the recent Simulcast Committee stated that it can understand why previous reviews of the Act have recommended the abolition of the statutory caps.³⁹

84. The need for the repeal of the section 152 caps is also linked to the internet simulcast issue and attempts by radio broadcasters to lobby for a change to broadcasting law to deem an internet simulcast to be a broadcasting service under the *Broadcasting Services Act 1992*, with the effect that an internet simulcast would constitute a broadcast under the Act and therefore be subject to the existing section 152 caps in respect of the radio broadcasting of sound recordings.

85. For the reasons set out in Annexure A – Internet Simulcasting, PPCA submits that internet simulcasting should not be treated as a broadcast for the purpose of copyright law.

Question 16–3 Should the compulsory licensing scheme for the broadcasting of published sound recordings in s 109 of the Copyright Act be repealed and licences negotiated voluntarily?

86. PPCA's position on this issue is inextricably tied to its position on the necessity for the repeal of the one percent cap and the ABC cap as referred to above.

87. The ALRC correctly noted in the Discussion Paper that:

- (a) there is no compulsory licensing scheme for the broadcasting of musical works in Australia and that voluntary licensing arrangements entered into between broadcasters and the APRA appear to operate effectively outside of section 109⁴⁰;
- (b) there is no compulsory licensing regime in place for the broadcasting of sound recordings in New Zealand⁴¹; and
- (c) if the compulsory licensing scheme under section 109 were to be repealed, issues concerning the application of the licensing scheme to internet transmission of television

³⁷ ALRC Discussion Paper at [16.09].

³⁸ ALRC Discussion Paper at [16.112].

³⁹ Simulcast Report at page 27.

⁴⁰ ALRC Discussion Paper at [16.116].

⁴¹ ALRC Discussion Paper at [16.117].

or radio programs, and concerns about remuneration caps, would no longer be relevant.⁴²

88. PPCA notes Commercial Radio Australia's argument in its submission to the Issues Paper that a statutory licence regime should not be introduced to apply to the retransmission of radio broadcasts for reasons including the following:
- (a) it is important that the radio industry is allowed to control whether such retransmissions are made⁴³;
 - (b) retransmission should be allowed to continue only with the permission of broadcasters, who should have the right to charge a reasonable fee if they wish to do so⁴⁴; and
 - (c) there are situations where compensation would be appropriate, for example, if a third party were making a significant amount of revenue from the retransmission.⁴⁵
89. While PPCA understands that there are differences between sound recording copyright and broadcast copyright, PPCA believes that the same arguments made by Commercial Radio Australia for control over its copyright and reasonable compensation for the use of its copyright equally apply to copyright in sound recordings.
90. The current compulsory licensing regime under section 109 and the related caps under section 152 result in an inequitable situation where PPCA is constrained by legislative caps which stop PPCA, on behalf of recording artists and rights holders, from negotiating a reasonable fee with the radio industry in Australia which makes a significant amount of revenue, over \$1 billion per year, from its activities including the broadcast of protected sound recordings.
91. Accordingly, PPCA submits that the compulsory licensing regime under section 109 and the legislative caps under section 152 should be repealed.
92. Also, for the reasons set out in Annexure A – Internet Simulcasting, PPCA submits that internet simulcasting should not be treated as a broadcast for the purpose of copyright law or otherwise included in the s 109 statutory licence scheme.

⁴² ALRC Discussion Paper at [16.117].

⁴³ Commercial Radio Australia's submission in response to the Issues Paper at [30].

⁴⁴ Commercial Radio Australia's submission in response to the Issues Paper at [30].

⁴⁵ Commercial Radio Australia's submission in response to the Issues Paper at [34].

Annexure A – Internet Simulcasting

Background

93. Upon the recommendation of the Senate Environment and Communications References Committee (the **Simulcast Committee**) in its report on the *Effectiveness of current regulatory arrangements in dealing with radio simulcasts (Simulcast Report)*⁴⁶ following its Inquiry (the **Simulcast Inquiry**), PPCA understands that the ALRC review will also consider the issues raised in the Simulcast Report in the ALRC's Final Report.
94. In the Discussion Paper, the ALRC refers to the internet simulcast issue in the context of its proposal that section 109 of the Act, the statutory licence for the broadcasting of sound recordings, be extended to apply to the transmission of television or radio programs using the internet.
95. Following the decision of the Full Federal Court in *Phonographic Performance Company of Australia Limited v Commercial Radio Australia Limited*⁴⁷ (**the Simulcast Decision**) the simulcasting over the internet of a television or radio broadcasting service does not constitute a broadcast and is therefore not subject to the section 109 statutory licence and the licence fee caps imposed by section 152 of the Act.

Summary

96. PPCA submits that the simulcast issue should, from a policy perspective, be considered and addressed separately to the ALRC's review of whether section 109 and other broadcasting exceptions should be expanded in their scope for the following reasons:
- The simulcast issue relates to whether an internet simulcast of a broadcasting service should be treated as a broadcast or a communication to the public other than a broadcast.
 - The ALRC's proposals and questions in sections 16-1 and 16-2 of the Discussion Paper relate to whether the existing s 109 statutory licence and exceptions relating to the broadcast of sound recordings should be extended to internet transmissions (which extend beyond just simulcasts of television and radio programs).
 - The simulcast issue provides strong copyright policy reasons why the broadcasting exceptions and the existing s 109 statutory licensing scheme should not be extended to internet transmissions (either by expanding the definition of 'broadcast' or including internet transmissions in the statutory licence scheme).⁴⁸
 - In keeping with international copyright treaties and accepted treatment of copyright in Australia and other key jurisdictions, broadcasts and internet transmissions of content are fundamentally different and should be treated separately.

⁴⁶ Released 12 July 2013.

⁴⁷ [2013] FCAFC 11.

⁴⁸ Here, we respond directly to paragraph [16.63] of the ALRC's Discussion Paper, which states: "There may be no reason, in copyright policy terms, why radio broadcasters should have access to a statutory licensing scheme under s 109, while internet radio services are required to negotiate licences with collecting societies to transmit sound recordings."

- Media convergence is not sufficient justification for overriding this important distinction. Contrary to the ALRC’s observation that “the continuing distinction between broadcasts and other electronic communications to the public in relation to copyright exceptions seems difficult to justify”,⁴⁹ this distinction is ingrained in Australian and international copyright law. The broadcast right and the communication to the public right are separate exclusive rights, which as a matter of international practice are licensed and remunerated separately.
97. In arguing for a concept of broadcasting which includes internet simulcasting, radio broadcasters are proposing a narrowly focused, bespoke and tailored law solely for internet radio simulcasting which is inconsistent with international copyright law and commercial practice in this broad area of copyright and broadcasting law and regulation, purely to avoid:
- a commercial negotiation with the rights holders of sound recordings which is not subject to the caps under section 152 of the Act; and
 - compensating rights holders for a broader class of sound recordings, being those which are protected under Australian copyright law in respect of communication to the public over the internet (eg. US recordings) but not in respect of broadcasting should the concept of broadcasting be amended to include internet simulcasting.
98. It is contrary to public policy and inconsistent with Australia’s international legal obligations to accede to such narrow commercial interests given the resultant effect this would have on both copyright law and broadcasting law. As discussed in more detail below, such an amendment would put Australia in breach of its obligations under various treaties, including Article 17.6(3) of the Australia-United States Free Trade Agreement (**AUSFTA**) which requires Australia to afford the full exclusive right of communication to the public in respect of US sound recordings transmitted over the internet, including internet simulcasting.
99. PPCA’s position is that an internet simulcast should not be treated as a broadcast under copyright law and should be correctly characterised as a communication to the public other than a broadcast, with the following implications:
- Internet simulcasts are not subject to the compulsory licensing regime under section 109 and the inequtable caps under section 152; and
 - Recordings which would not be protected under Australian law for the limited right of broadcasting (in particular, the substantial catalogue of US sound recordings) would be protected for the broader right of communication, which internet simulcasting is properly treated as under international copyright law, national practice and the relevant copyright treaties.
100. Other parties made detailed submissions to the Simulcast Inquiry outlining the problematic effects which the overturning of the Simulcast Decision would have on broadcasting law and regulation.⁵⁰

⁴⁹ ALRC Discussion Paper at [16.63].

⁵⁰ Including Free TV Australia (Letter dated 12 July 2003), the Attorney-General’s Department (Letters dated 6 June 2013, 5 July 2013 and 9 July 2013) and the Department of Broadband, Communications and the Digital Economy (Letters received 5 June 2013 and 11 July 2013).

Given that the ALRC's remit relates to copyright law, PPCA will not go into detail in this submission in respect of the broadcasting law implications raised by these submissions but they make it clear that deeming internet simulcasts to be broadcasting services for the purpose of the *Broadcasting Services Act 1992 (BSA)* is similarly inconsistent with generally accepted principles and policy objectives under broadcasting law.

101. It would also have significant flow-on effects on copyright law relating to broadcasts, as the copyright definition of 'broadcast' imports by reference the entire definition of 'broadcasting service' in the BSA. This is consistent with PPCA's view that radio broadcasters are seeking a change to the law which is focused on achieving a narrow commercial outcome under copyright law without regard to its effect on the overall regulatory framework of both copyright and broadcasting law.
102. The next sections of this Annexure will set out how Australian copyright law, international copyright law and relevant international jurisdictions treat broadcasting and internet transmissions separately. In particular, as a matter of both law and practice, a broadcast and an internet simulcast of that broadcast are licensed separately and attract distinct rights of remuneration. Before going into detail, a table setting out a summary of the issues is set out below:

Treatment of internet simulcast	Supporters of positions ⁵¹	Effect on legal principles of copyright	Effect on protection of US recordings for internet transmissions which is an obligation of Australia under the Australia-US Free Trade Agreement	Effect on parity of treatment of traditional broadcasters who simulcast vs stand alone internet radio services
Current position: Internet simulcasting is a separate right to broadcasting under copyright law	Recording industry, Attorney-General's Department, Department of Broadband, Communications and the Digital Economy Commercial television industry (as represented by Free TV Australia), Australian Copyright Council, Pandora, AFL, Coalition of Major Professional and Participating Sports Inc.	Consistent with Australian and international copyright principles and copyright treaties which is that broadcast and internet transmissions are <u>separate</u> rights	US recordings are protected in relation to internet transmissions in accordance with the Australia-US Free Trade Agreement	Traditional broadcasters who simulcast and stand alone internet radio services are treated equally in relation to internet transmission of sound recordings (s 152 caps do not apply) and the requirement to pay for internet transmission of US sound recordings
Radio industry position: Internet simulcasting should be deemed to be a broadcast under copyright law	Commercial Radio Australia, Community Broadcasting Association of Australia, ABC and SBS	Inconsistent with Australian and international copyright principles and copyright treaties	US recordings would not be protected in relation to internet transmissions in breach of the Australia-US Free Trade Agreement	Traditional broadcasters who simulcast & stand alone internet radio services would be treated unequally in relation to internet transmission of sound recordings (s 152 caps only applies to traditional broadcasters) and the requirement to pay for internet transmission of US sound recordings would only apply to stand alone internet radio services.

Australian copyright law treats broadcasting and internet transmissions separately

103. PPCA engaged Richard Cobden SC to provide a memorandum of advice which was submitted to the Simulcast Committee.⁵² The advice sets out in detail the basis on which the law of copyright in Australia has at all relevant times drawn a distinction between broadcasts and internet

⁵¹ As indicated by submissions to the Simulcast Inquiry.

⁵² Received by the Simulcast Committee on 11 July 2013.

transmissions (including simulcasts). This is consistent with the answers to questions on notice provided by the Attorney-General's Department to the Simulcast Committee.⁵³

104. These distinctions have important implications for the protection of sound recordings in Australia. For historical reasons, to reflect the fact that some countries (importantly, the United States) do not give domestic or foreign sound recordings a broadcast right, Australia has correspondingly withheld a broadcast right from sound recordings entirely originating in those countries ("unprotected" as opposed to "protected" sound recordings).⁵⁴ The effect of this historical practice is that Australian radio broadcasters are not required to remunerate copyright owners for broadcasts of US sound recordings, which evidently make up a substantial part of the repertoire of the vast majority of Australian radio broadcasters.
105. The corollary of this substantial benefit is that (following the US and international practice described in more detail below), communications to the public of US and other sound recordings – including all internet transmissions – are protected by Australian copyright law and must be licensed by broadcasters with remuneration payable to rights holders.
106. A definition of broadcast which includes internet simulcasting would result in the simulcast of such sound recordings not enjoying the balance of the communication right and they would not be protected. However, all recordings communicated by the internet alone (i.e. not simultaneously with a traditional radio broadcast) would be protected. This introduces an anomaly between long standing radio industry participants and new entrant service providers such as Last.fm and Pandora Media.
107. The distinction described above results from the *Copyright (International Protection) Regulations 1969* (the **Regulations**), which provides a general reciprocal protection to foreign works and subject matter, including sound recordings (regulation 4). This reciprocal protection is subject to the rest of the regulations, notably regulations 6 and 7, which limits the reciprocal protection for sound recordings for countries not specified in Schedule 3 of the Regulations (Schedule 3 lists countries which recognise public performance and broadcasting rights, and does not include the US). It follows that the copyright in US sound recordings in Australia does not include the exclusive right to broadcast the recording (regulation 7) or the exclusive right to cause the recording to be heard in public (regulation 6). The separate right to communicate the sound recording to the public under section 85(1)(c) of the Act (which includes internet streaming) continues to apply to US sound recordings by virtue of the general reciprocal protection provided by regulation 4.
108. If the BSA is amended to provide that an internet simulcast is deemed to be a broadcasting service, this would expand the definition of "broadcast" in the Act and the above Regulations to include internet streaming. The result will be to remove the current protection for internet simulcasts of US sound recordings under the Act and the Regulations, as this would come within regulation 7 as a "broadcast" and override the general protection provided by regulation 4.
109. This would breach Australia's obligation under Art.17.6(3) AUSFTA to afford the full exclusive right of communication to the public in respect of US sound recordings transmitted over the

⁵³ Letters dated 6 June 2013, 5 July 2013 and 9 July 2013.

⁵⁴ Copyright Act s 105; *Copyright (International Protection) Regulations 1969* (Cth), reg 7. See *Re Phonographic Performance Co of Australia Ltd under Section 154(1) of Copyright Act 1968* (Cth) (2007) 73 IPR 162 at [6]-[8] for a discussion of "protected" and "unprotected" sound recordings.

internet. Article 17.6(3)(a) of the AUSFTA requires Australia to provide performers and producers of phonograms with the full exclusive rights of broadcasting and communication to the public, subject to Article 17.6(3)(b) which allows exceptions and limitations in respect of *wireless (over the air) broadcasting only*:

“...the application of this right to traditional free over-the-air (i.e. non-interactive) broadcasting, and exceptions or limitations to this right for such broadcasting activity, shall be a matter of each Party’s law”. (Art. 17.6(3)(b) AUSFTA).

110. This provision allows both countries to continue practices in relation to traditional broadcasts, including the statutory 1% cap on radio broadcast licence fees in Australia, the non-recognition of terrestrial broadcast rights in the US and accordingly, the non-recognition of terrestrial broadcast rights for US sound recordings in Australia (discussed above). It does not allow Australia to derogate from granting producers of sound recordings the full exclusive right of communication to the public by expanding the definition of “broadcast” or otherwise extending the statutory licensing scheme so that internet simulcasts and other online transmissions are covered by the same licence, as this would leave the communication of US sound recordings over the internet either unremunerated, or insufficiently remunerated as a result of the 1% statutory cap. Non-compliance with the AUSFTA is a significant barrier to any proposed change to copyright law, as the ALRC have recognised in relation to the exclusion of the internet from the retransmission scheme.⁵⁵
111. Any extension of the concept of ‘broadcast’ in Australian copyright law, or the existing s 109 statutory licensing scheme, to internet transmissions would also breach the principle of reciprocity that underlies the Australian regime for the protection of foreign sound recordings. The regime (described above) recognises that US sound recordings should not receive royalties from broadcasts as broadcasts in the US do not generate royalties for US, Australian or other foreign sound recordings. This principle of reciprocity suggests that, since the US does provide for payment of royalties for internet simulcasts (as well as other internet transmissions),⁵⁶ Australia should ensure that US sound recordings receive reciprocal treatment. It would be inequitable for radio broadcasters to continue to benefit from the historical exception from licensing for broadcasts of US sound recordings without accepting the corresponding obligation to pay royalties in respect of digital transmission rights.

International law treats broadcasting and simulcasting separately

112. The distinction drawn in Australian law between broadcasting and internet transmissions (including simulcasting) is based on the key international copyright treaties that set the global framework for copyright law. Australia’s continuing compliance with this framework is of utmost importance to PPCA, not only from the perspective of Australia’s compliance with its international obligations, but also because we license international rights, have an international membership and operate in a global context. The fact that internet transmissions (including simulcasts) necessarily extend beyond Australian territory is another important reason to maintain consistency with this international framework.

⁵⁵ See the ALRC Discussion Paper at [15.129], referring to Art 17.4.10(b) of the AUSFTA, which prevents Australia from permitting internet retransmission of television broadcasts without the permission of relevant rights holders.

⁵⁶ The US operates a statutory licence scheme for non-interactive internet transmissions of sound recordings (including simulcasting and webcasting) which, in international terms, generates generous royalties.

113. In addition to the AUSFTA, Australia has entered into two multilateral copyright agreements which contain obligations in respect of rights of “broadcast” and “communication to the public” for sound recordings:
- the Rome Convention of 1961 (the **Rome Convention**); and
 - the World Intellectual Property Organisation Performers and Phonograms Treaty of 1996 (the **WPPT**).
114. Like the AUSFTA, both the Rome Convention and the WPPT expressly distinguish the rights of “broadcasting” and “communicating to the public” and limit the concept of broadcasting to wireless (i.e. over the air) transmissions. Because the treaty language is focused on the means of delivery, the fact that the content of a simulcast is identical to that of the original broadcast does not transform the simulcast into a broadcast under international law.

Rome Convention

115. Article 12 of the Rome Convention obliges the Contracting States, including Australia, to grant phonogram producers a right to receive single equitable remuneration for “broadcasting or any communication to the public” of sound recordings.
116. The text distinguishes between the broadcasting right and the communication to the public right. The definition of “broadcast” (Art 3(f)) refers exclusively to wireless transmissions: “broadcasting” means “*the transmission by wireless means for public reception of sounds or images of sounds*”. Although the treaty does not define “communication to the public”, this would appear to include wired communications, such as communications over the internet.
117. Adopting the treaty language, an internet simulcast would not be regarded as a “broadcast”, but rather as a “communication to the public”.

WPPT

118. The WPPT, which was concluded in 1996, sets the international standard with respect to the protection of phonograms on the internet. While Australia did not formally accede to the WPPT until 2007, it is arguable that the repeal of “broadcast” as an exclusive right for sound recordings, its replacement with “communicate to the public” as well as the changes to the definition of “broadcast” in the *Copyright (Digital Agenda) Act 2000* reflect Australia’s interpretation of its obligations under the WPPT. This legislative history suggests a clear move on the part of the Australian government towards adopting internationally recognised concepts in this area of copyright law.
119. Like the Rome Convention, the WPPT also limits “broadcasting” to “transmission by wireless means” (transmission by satellite is expressly included) (Art. 2(f)). It also maintains the distinction in the Rome Convention between “broadcasting” and “communication to the public” in replicating the obligation in Art 12 of that convention (see Art 15 of the WPPT). Art 2(g) sets out a broad definition of “communication to the public”, which encompasses all non-interactive wired transmissions, including internet simulcasts, but clearly excludes broadcasts. It is therefore clear that, under the WPPT, a communication over the internet, in the nature of a simulcast, would not be regarded as a “broadcast” but as a form of “communication to the public”.

Other jurisdictions treat broadcasting and simulcasting separately

120. As a result of this international framework, other jurisdictions generally treat internet simulcasting as a separate right to broadcasting, or at a minimum make clear that these rights are to be subject to separate remuneration. For example:
- US copyright law distinguishes between broadcasting and simulcasting. Phonogram (sound recording) producers receive royalties from certain digital transmissions, including simulcasting and webcasting by broadcasting organisations, but no exclusive rights or rights subject to a statutory licence are granted in relation to terrestrial non-subscription broadcasts.⁵⁷ Notwithstanding the lack of protection for terrestrial non-subscription broadcasts of sound recordings, sound recordings are protected for internet simulcasting of such broadcasts.⁵⁸
 - Canada regards simulcasting and broadcasting as two separate acts of exploitation. Simulcasting is subject to a separate tariff to be approved by the Copyright Board of Canada.
 - In New Zealand, the Copyright Tribunal has recognised that simulcasting is separate from broadcasting, and consequently that internet simulcasts of broadcasts are subject to the payment of separate royalties.⁵⁹
121. The UK (implementing the relevant EU Directive)⁶⁰ recognises a broad “communication to the public right”, being “communication to the public by electronic transmission” which includes “the broadcasting of the work”.⁶¹ The UK definition of “broadcast” expressly excludes internet transmissions, other than internet simulcasts and the live streaming of events.⁶² Unlike Australia, UK radio broadcasters do not get the benefit of a cap on licence fees and rights holders are free to negotiate a fair and reasonable fee for both the broadcasting and simulcasting of sound recordings.
122. While this definition of “broadcast” is broader than the international norm described above, it is clear at both UK and EU level that each transmission of a work which uses a specific technical means (e.g. an internet simulcast of a terrestrial broadcast) constitutes a separate act of communication to the public and must “as a rule” be individually authorised by the copyright owner.⁶³ Further, the effect of this broad definition is quite different in the UK than it would be in Australia were we to adopt the same approach. In the UK, broadcasting is not subject to a general statutory licence; therefore phonogram producers are free to grant licences based on the real value of both broadcasting and simulcasting of their recordings.
123. It would be completely inconsistent with the international law and practice described above to recommend extending the concept of “broadcast” or the s 109 statutory licence scheme to include internet transmissions of sound recordings (including simulcasts) in a way that deprives

⁵⁷ See s 114 US Copyright Act.

⁵⁸ This position was confirmed by the Court of Appeals in *Bonneville International Corp v Peters* 347 F.3d 485 (3rd Cir, 2003).

⁵⁹ *Phonographic Performances (NZ) Ltd v Radioworks Limited* [2010] NZCopyT 1 (19 May 2010).

⁶⁰ Directive 2001/29/EC (the Information Society Directive), Art 3(2)(b).

⁶¹ *Copyright, Designs and Patent Act 1988*, s 20.

⁶² *Copyright, Designs and Patent Act 1988*, s 6.

⁶³ See Art 3(3) Information Society Directive, *Copyright, Designs and Patent Act 1988*, s 6(5A) and the recent decision of the European Court of Justice in a reference from the UK High Court in *ITV Broadcasting Ltd v TVCatchup Ltd* (Case C-607/11, 7 March 2013).

phonogram (sound recording) producers of the right to separately commercialise, and receive an acceptable level of remuneration in respect of, each of these separate rights/acts of exploitation.

124. There are also serious risks in including internet simulcasts in a statutory licence designed for terrestrial broadcasts. While traditional broadcasting is inherently territorial, content delivered over the internet is not restricted by geography and has the potential to reach the entire world. By granting a statutory licence covering internet transmissions, Australia would therefore be purporting to grant broadcasters a licence to transmit sound recordings everywhere on earth. Even if the licence is technically confined to Australia, the existence of the licence would by nature encourage broadcasters to transmit those broadcasting signals on the internet without any territorial limitations, thereby infringing copyright in virtually every other jurisdiction. On the other hand, if simulcasting were left to voluntary licencing, the licensing producers could either secure authorisation to license the simulcasts worldwide, or include a condition in the licences that simulcasts must be limited to recipients in Australia. Voluntary licensing in this context is far more suitable for the digital environment.

Two uses of “broadcast” in copyright law

125. It is important to distinguish between the concept of broadcast as a subject matter of copyright and broadcast as a right exercisable in relation to copyright subject matter. For example, section 87 of the Act sets out the nature of copyright in television and sound broadcasts, while s 109 of the Act establishes a statutory licensing scheme for *acts* of broadcasting in relation to a different copyright subject matter (sound recordings). PPCA notes that the World Intellectual Property Organisation (*WIPO*) is currently reviewing the scope of protection afforded in respect of broadcasts as a subject matter of copyright.⁶⁴
126. It is important that the ALRC’s review in relation to the broadcast exceptions and the correct characterisation of internet simulcasting clearly identifies the distinction referred to above. For example, submissions were made by radio broadcasters to the Simulcast Inquiry that the Simulcast Decision will mean that internet simulcast transmissions are not protected as broadcasts. This is entirely consistent with existing principles of copyright law.

Separate definition of broadcast

127. The ALRC’s submission to the Simulcast Committee stated that the ALRC “ is asking whether, in the context of media convergence, and given the general desirability of a technology-neutral approach to copyright law reform, the concept of a ‘broadcast’ should generally extend to similar content made available using the internet...In this regard, the *Copyright Act* might be amended to ensure that some of the broadcast exceptions also apply to certain transmissions of television programs or radio programs using the internet and to remove any unnecessary link between the scope of copyright exceptions and regulation under the *Broadcasting Services Act 1992*.”⁶⁵
128. PPCA submits that the ALRC consider proposing a definition of broadcast in the Act which:
- is consistent with international copyright law and the position in other jurisdictions and does not include making available or transmitting content using the internet; and

⁶⁴ See <http://www.wipo.int/pressroom/en/briefs/broadcasting.html>

⁶⁵ Letter to Simulcast Committee dated 24 April 2013.

- is not tied to broadcasting regulation so that it avoids any unintended effects on copyright law which arise from specific broadcasting regulation. Broadcasting law and copyright law have different objectives. This is of particular importance in the context of the simulcast issue where broadcasting law, in particular the definition of broadcasting service, is being used as a proxy by radio broadcasters to achieve a result in copyright law which is contrary to copyright law principles and practice.⁶⁶
129. The basic scope of the existing definition of broadcast in the BSA could be codified in the Act, while removing the express reference to the BSA licensing scheme. In particular, a new copyright definition of “broadcast” should:
- ensure that there is an express distinction between ‘broadcasting’ (terrestrial broadcasting) and other forms of communication to the public, including transmissions made over the Internet (such as simulcasts). The new definition could draw on the Rome Convention and WPPT definitions of broadcasting, i.e. “the transmission by wireless means for public reception of sounds or images and sounds” (Art 3(f) Rome Convention; Art 2 WPPT);⁶⁷
 - ensure that, whether as a result of this definition or by virtue of a separate express provision, broadcasts and internet transmissions (including internet simulcasts) are regarded as separate and distinct acts of exploitation that must be licensed and remunerated separately;
 - describe specific categories of provider currently covered by the BSA, e.g. television stations and radio stations, rather than relying on whether or not broadcast licences have been granted. This would mirror the way that certain categories of content providers are currently excluded from the definition. The concept of “free to air” broadcasts could be retained where relevant, as in in the AUSFTA (Art. 17.6 (3)(b));
 - ensure that the definition does not catch those entities that are ‘too small to be regulated’ and so currently fall outside the BSA regime; and
 - expressly exclude ‘on demand’ services, which are the subject of a separate exclusive right under the WPPT (see Art 14, which creates an additional exclusive right in respect of ‘on demand’ communications to the public).⁶⁸
130. This way, any changes to broadcasting law and the expansion of the scope of broadcasting services would not impact on and have unintended consequences on copyright law and Australia’s compliance with its obligations under international copyright treaties. This would include any changes to broadcasting law which may arise from the Convergence Review. As the ALRC has recognised, these changes could be very significant, particularly as one of the

⁶⁶ This is supported by the Department Broadband, Communications and the Digital Economy in its answer to Questions on Notice to the Simulcast Committee that the radio industry’s proposal would “seek to modify a broadcasting regulation to address a copyright issue. Specifically, the proposal would amend broadcasting legislation...to address a dispute over copyright royalties.”

⁶⁷ Note that the WPPT also expressly provides the transmission by satellite is “broadcasting”, as is transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organisation or with its consent.

⁶⁸ See, e.g. *Copyright, Designs and Patent Act 1988*, s 6.

recommendations is to remove the requirement for broadcasters to obtain geographically-based licences in order to provide content services.⁶⁹

131. Any proposals made by the ALRC in respect of the extension of copyright exceptions to internet communications must be specifically referable to communications to the public other than broadcasts. Any proposal which seeks to expand the definition of broadcast to include internet communications would, as described above, be inconsistent with international copyright law and practice. Media convergence does not provide sufficient justification for overriding this established framework.
132. PPCA requests that this submission on internet simulcasting should be considered in conjunction with PPCA's submissions on the repeal of the section 152 caps.

Upsets existing commercial practices

133. PPCA supports the submissions of number of other rights holders such as the Australian Football League who have also raised concerns that the merging of fundamentally different concepts of broadcasts and internet transmissions is not consistent with commercial practice and has the potential to impact on existing and future commercial agreements.⁷⁰
134. PPCA notes that the Australasian Performing Right Association Limited (**APRA**) appears to distinguish between the grant of broadcasting and simulcasting rights in respect of musical works in its commercial arrangements with radio broadcasters. For example, APRA's website provides that narrowcast radio services who wish to simulcast their terrestrial radio broadcast online must take out a separate agreement to their existing APRA and AMCOS Broadcast agreements.⁷¹ On this basis, PPCA surmises that APRA's arrangements with the commercial radio broadcasting services distinguish between broadcasting and simulcasting as separate rights.
135. The radio broadcasters also claim that the requirement to recognise the broadcasting and simulcasting as separate rights is an attempt to charge broadcasters twice for the simultaneous use of the same copyright material.⁷² As explained in detail in our submissions to the Simulcast Inquiry and above:
 - Internet simulcasting is a separate right under copyright law;
 - Internet simulcasting extends beyond the licence area of a broadcaster's terrestrial service and is therefore outside of the grant of rights made by PPCA to radio broadcasters for the territory of Australia;
 - A wider class of sound recordings (including US recordings) are protected in respect of internet communication rather than just broadcasting;
 - It appears to be existing commercial practice in respect of the licensing of musical works by APRA under voluntary licences that broadcast and simulcasting are treated as separate rights. This shows that the radio industry is willing to negotiate and pay reasonable licence fees to rights holders such as songwriters and music publishers

⁶⁹ See ALRC Discussion Paper at e.g. [15.126] and [16.30].

⁷⁰ Australian Football League, Letter to Simulcast Inquiry dated 12 July 2013.

⁷¹ See <http://www.apraamcos.com.au/MusicConsumers/OnlineMobile/Webcasters.aspx>

⁷² Submission to Simulcast Inquiry dated 10 May 2013 at [5.1].

(though APRA) when they are not protected by artificial caps which are not available to any other users of sound recordings, such as the television industry and stand alone internet radio services;

- Despite PPCA's willingness to discuss licence fees for simulcasting with the radio broadcasters, the radio broadcasters have not engaged in any discussions with PPCA regarding the quantum of fees payable. Instead, the radio industry is focused on changing the law to avoid a commercial negotiation which they have not historically been required to do due to the section 152 caps.
136. The fact that commercial television broadcasters as represented by FreeTV Australia⁷³ do not support the position of commercial radio broadcasters highlights how narrow and inconsistent their position is with respect to copyright and broadcasting law and again shows that it is an attempt to obtain a commercial advantage in respect of the use of sound recordings without regard to broader policy considerations.
137. The radio broadcasters claim that the lack of broadcast copyright protection given to internet simulcasts could undermine protection of radio broadcasts and may result in underlying rights holders – such as independent musicians, composers, artists and writers – being reluctant to grant internet broadcast simulcast rights.⁷⁴ This claim is completely without foundation given the existing commercial practices where songwriters, performers and rights holders in songs and sound recordings actively license internet radio services in full knowledge that there is no protection in the actual communication or transmission of the song or sound recording by the relevant streaming service. The inherent cynicism in this argument by the radio industry is made even more galling by the fact that the reason behind the radio broadcasters' wish to make simulcasting come under the definition of broadcasting is to deny performers and rights holders the ability to properly negotiate fair and reasonable fees for the use of their sound recordings.
138. Finally, it is also necessary to point out that the Simulcast Committee appears to have simply accepted without question CRA's characterisation of the position before the Full Court's decision, namely that it was "established practice for simulcasts to be permitted under a single licence agreement with rights holders for the better part of a decade"⁷⁵ and that the Full Court's ruling essentially overturned the status quo.
139. On the contrary, prior to the proceedings and the Simulcast Decision, both PPCA and CRA had agreed there was real legal uncertainty about the issue in question namely, whether internet simulcasts by the commercial radio broadcasters were broadcasts and therefore licensed under the existing broadcast licence agreement.
140. It was for precisely that reason that the parties agreed to cooperatively conduct the proceedings on an agreed set of facts to seek a final determination of that issue by the Court. It is only because CRA is now disappointed by the Simulcast Decision and seeks to cavil with the ruling of the Full Court, that it has sought to re-characterise the Simulcast Decision before the Simulcast Committee as overturning the status quo. No such status quo existed. So much is clear from the

⁷³ Free TV Australia (Letter dated 12 July 2003).

⁷⁴ Submission to Simulcast Inquiry dated 10 May 2013 at [4.7].

⁷⁵ See for example, Simulcast Report at [2.81].

description of the nature of the dispute between the parties in the judgment at first instance⁷⁶ and in the Simulcast Decision,⁷⁷ and the manner in which the parties approached the cooperative conduct of the case to resolve that dispute.

⁷⁶ *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* (2012) 94 IPR 585 at [19] to [31].

⁷⁷ *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* (2013) 209 FCR 331 at [6]-[8], [19]-[23].