Real Music • Real Artists • Real Impact

THE AUSTRALIAN LAW REFORM COMMISSION ISSUES PAPER:

COPYRIGHT IN THE DIGITAL ECONOMY

PPCA SUBMISSION IN RESPONSE

Phonographic Performance Company of Australia

30 NOVEMBER 2012

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Executive Summary

In PPCA's experience, the legislative regime of the *Copyright Act* 1968 (Cth) ("the Act") is operating well in the light of present and developing technology and the various interests that it is designed to accommodate. In general, PPCA does not believe that the Act itself presents impediments to its successful operation in the future. In particular, PPCA believes that its role in the statutory licensing schemes within which it operates, namely public performance and broadcasting, is being fulfilled.

Since the inception of the Act and PPCA's incorporation in 1969, our public performance licence numbers have increased to over 55,000. All these licences operate on a standard basis and do not require individual negotiation of terms or rates. Our administrative operations have also adapted to utilise technology to improve the public performance licensing process, whereby licences are obtained, amended and maintained as well as communications with licensees and licensors generally.

Our broadcast licence schemes are used by the majority of Australian television and radio broadcasters. Our 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).

The moves which PPCA has made in the last four decades to expand its repertoire and the rights it may license have facilitated and increased access to commercial recordings for tens of thousands of Australian businesses and to Australians in general.

Every year, millions of dollars are paid by PPCA to the creators of sound recordings and in particular, to Australian recordings artists, thus encouraging and facilitating further creativity and investment in talent. PPCA will continue to strive to increase its licensor base and licensing opportunities as well as maximise its use of the available technology to improve its business relationships, as the digital age progresses and technology advances.

The main area in which PPCA submits that the individuals and bodies that it represents are at a disadvantage especially is in respect of the income which they may receive arising from the broadcast, public performance and presently the simulcast of radio programmes. PPCA does not believe that this accords with "…the government's objective of ensuring that copyright law provides incentives for investment in innovation and content…"[1]. PPCA believes 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 document "…affects the ability of creators to earn a living, including through access to new revenue streams…"[2].

[1] Copyright and the Digital Economy Issues Paper, August 2012, paragraph 3
[2] Copyright and the Digital Economy Issues Paper, August 2012, question 1(a)

Introduction

PPCA: Its Rights and Operation

1. PPCA is a national non-governmental, non-profit making organisation which was established in 1969. 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 Societies[3].

2. PPCA has a number of functions. Pertinently, these are:-

(a) to issue licences that permit third parties to play protected sound recordings and/or music videos[4] in public[5]; and
(b) to issue licences that permit third parties to communicate sound recordings and/or music videos to the public[6].

3. The licences granted by PPCA are blanket in nature: in other words a single licence from PPCA covers the repertoire of many thousands of record labels. This allows for simplicity and certainty for those that wish to utilise recorded music or music videos in these manners.

4. In relation to public performance, PPCA currently licenses over 55,000 businesses and individuals to play protected sound recordings and/or music videos in public on a non-exclusive basis. The types of organisations which typically enter into public performance licences are commercial enterprises such as bars, hotels, nightclubs, event venues or organisers, retail stores, shopping and sports centres. PPCA grants these licences on standard terms and conditions and the licence fees which are charged are also standard. PPCA licence fees are currently contained in 36 separate tariffs, which are tailored to take into account a variety of venues and the nature of the public performance being licensed[7]. PPCA annually renews and publishes its public performance licence fee information on its website and provides the same, as appropriate, to its licensees, potential licensees and to relevant industry associations. PPCA's standard terms and conditions for its public performance licences are available on PPCA's website[8].

5. 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;

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[3] http://www.ppca.com.au/IgnitionSuite/uploads/docs/Code%20of%20Conduct%202011%20Final[1].pdf
[4] By "music video" we mean a cinematograph film that embodies a sound recording or a soundtrack.
[5] See s 85(1)(b) of the *Copyright Act* 1968.
[6] See s 85(1)(c) of the *Copyright Act* 1968.
[7] See PPCA's website at http://www.ppca.com.au/music-users-/tariffs/
[8] http://www.ppca.com.au/IgnitionSuite/uploads/docs/PPCA_LICENCING_25-10-11-V5.pdf

(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.

6. For its communication licences, 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 entered 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.

7. PPCA is entitled to grant public performance and communication licences in relation to sound recordings as a result of standard form licences granted to PPCA by record companies and labels. These licences, which are referred to in more detail below, allow PPCA to carry out public performance and specified communication licensing functions in respect of the sound recordings in which the signing record company or label owns or controls copyright in Australia.

8. PPCA maintains and regularly updates schedules of the record companies and labels with which it has contractual arrangements allowing it to license the public performance of protected sound recordings to third parties. The listed record companies are generally known as "PPCA Licensors". The current schedules of PPCA Licensors are extensive, ranging from the local affiliates of global record companies to local independent record labels of all sizes and to individual recording artists who have retained copyright in their repertoire.

9. At the time of writing, 1173 record companies, whose repertoires encompass 14,911 record labels, license public performance and communication rights to PPCA. Lists of these record companies and labels are published on PPCA's website[9].

10. PPCA is not able to provide a list of all of the millions of sound recordings that fall within its repertoire. This would be a virtually impossible task, given the multitude of sound recordings which are presently in existence and which attract copyright, the large number of new copyright protected recordings that are released worldwide every day, the periodic loss of protection for older sound recordings and the system of international law which governs whether an individual recording is protected by copyright or not for some uses. As a Copyright Collecting Society, PPCA understands the perceived complexities of its repertoire and it is for this reason that it compiles the lists of record companies and labels referred to above, with a view to assisting third parties in understanding the extent of its repertoire. PPCA is not aware that other collecting societies seek to define the extent of their repertoire in this manner, even in circumstances where it is unlikely that such a society can represent 100% of the interests of 100% of rights holders in any creative sector. Further, given the size of its overall repertoire, PPCA does not believe that any licence negotiation has been hindered because it is not able to define all of the individual works within it. This is particularly the case in relation to internet communication of sound recordings (other than simulcasts, which are referred to elsewhere in this document), for which purpose all sound recordings are copyright protected.

[9] http://www.ppca.com.au/IgnitionSuite/uploads/docs/mohschedule1.pdf
[9] http://www.ppca.com.au/IgnitionSuite/uploads/docs/mohschedule2.pdf

11. The standard form licences through which PPCA Licensors grant rights to PPCA are known as "input agreements". The PPCA input agreement which is in operation at the time of making these submissions is available on PPCA's website[10]. In signing an input agreement, a record company grants PPCA the right to licence public performance rights as well specified communication rights, on a non-exclusive basis. Regardless of the nature or size of the PPCA Licensor, the terms of the input agreement are the same (although licensors have some flexibility in respect of the range of rights granted to PPCA).

12. The non-exclusive nature of the licence taken by PPCA means that it is open to third party sound recording users to contract direct with PPCA Licensors (i.e. a record company or label that controls copyright in a sound recordings) at any time in respect of public performance, broadcast or other modes of communication. For this reason, despite the extensive range of its repertoire, PPCA should not be considered as having a monopoly power in respect of rights in sound recordings.

13. In order to extend the coverage and value of its blanket licence offerings for users, and to facilitate participation in available revenue streams for creators, PPCA actively encourages rights holders to license their repertoire to PPCA, for inclusion in its blanket licences. Furthermore, PPCA continually reviews the extent of the rights granted to it by record companies in respect of the communication of sound recordings and music videos, so that where possible, it is able to grant licences to match the needs of potential communicators of sound recordings or music videos and the evolving communication technology.

14. Upon its inception 43 years ago, PPCA was licensed only in respect of public performance and broadcast of sound recordings. Over this period, the rights have expanded to include broader communication rights, such as music on hold and simulcast as well as rights in music videos as described above. Most recently, in October 2012, PPCA updated its input agreement to include an additional right in relation to "pay per view" content as offered by Pay Television providers.

15. PPCA distributes the fees it collects by way of its licences to copyright owners and to registered Australian recording artists in accordance with the input agreements and its associated Distribution Policy. The current Distribution Policy may be found on PPCA's website[11].

16. PPCA allocates and distributes its entire financial year surplus within six months of the end of a period. For the year ended 30 June 2012, PPCA's income exceeded $36 million dollars, which represented a 10% increase on the previous financial year's figures, and over $29 million of which will be distributed in December 2012 in line with PPCA's Distribution Policy.

17. The Artist Direct Distribution Scheme ('the ADDS") is a longstanding feature of the Distribution Policy, having been introduced in the early 1990s. Under the ADDS, regardless of whether or not the individual has retained copyright in the relevant recordings, featured Australian artists are eligible to register for a direct payment when their recordings receive an allocation in the annual PPCA Distribution.

18. The ADDS is an ex gratia arrangement, and currently allows for 50% of earnings on each Australian track to be shared by the Australian artists featuring on that track. In order to participate, eligible

[10] http://www.ppca.com.au/IgnitionSuite/uploads/docs/sampleinputagreement.pdf

[11] http://www.ppca.com.au/IgnitionSuite/uploads/docs/PPCA%20Distribution%20Policy%20-%201%20July%202011.pdf

artists must register their interest in each track they release. If artists do not register for direct payment on Australian recordings under the ADDS the proportion of funds that would otherwise have been made available to those artists is remitted to the rights holder for that recording. Detailed, track specific statements are provided to both registered artists and PPCA Licensors, so they are aware of any amounts paid directly to individual recording artists.

19. It is not uncommon for recording artists to have relationships with PPCA in both their capacity as a PPCA Licensor (for example, for repertoire in which they hold the relevant rights) and as a registered artist under the ADDS (where, for example, they featured on recordings under a record label contract).

20. In respect of international repertoire, where the ADDS does not apply, 100% of earnings for each track is remitted to the relevant PPCA Licensor. Payments to PPCA Licensors are accompanied by detailed track by track reconciliations, in order to allow PPCA Licensors to deal with such income in accordance with their various recording contracts.

21. In addition to its significant licensing role, PPCA performs an educational function, which it regards as a vital element of its activities. PPCA disseminates an array of information concerning and explaining the application of the copyright legal regime to businesses (in particular, small businesses) and to the community at large. We publish a detailed and informative website, which is referred to on a number of occasions above. Members of our executive team regularly speak at seminars, music industry events and information sessions. We also support publications and sponsor events which are organised within the industries with which we enjoy licensing arrangements. PPCA is also a proud supporter of the "Music Matters" campaign[12].

Link with the Australian Recording Industry Association ("ARIA")

22. PPCA is aware of, and has had access to, the submissions made to the ALRC by ARIA. PPCA also supports those submissions, as detailed elsewhere in this document.

23. PPCA and ARIA are distinct corporate and legal entities, which are separately administered. However, the two companies are linked and their interests align. For example, PPCA and ARIA share the same offices and some senior personnel, in particular, the Chief Executive Officer and General Manager. Both companies aim to protect and promote the Australian recording industry, notably by providing blanket licensing services in relation to sound recordings (and music videos). PPCA's licensing functions are described above. ARIA offers blanket reproduction (copying) licences[13], in particular in relation to sound recordings, on a limited basis.

24. ARIA's licensing structure operates in a similar fashion to the public performance licensing function fulfilled by PPCA. To summarise, record companies grant non-exclusive licences to ARIA permitting ARIA to license reproduction rights to third parties in respect of the sound recordings in which those companies control copyright. ARIA compiles lists of its licensing record companies and their labels, which form the basis of the repertoire in respect of which ARIA may grant a reproduction licence. The purposes in respect of which ARIA is permitted to grant reproduction licences are clearly defined by the record companies, for example "educational purposes".

[12] http://anz.whymusicmatters.org

[13] See *Copyright Act* 1968, s85(1)(a)

25. In the university sector, for example, there is a widespread and broad range of activities involving sound recordings, including reproduction, public performance and communication, PPCA and ARIA negotiate and offer licences together, in conjunction with the Australasian Performing Right Association ("APRA") and Australasian Mechanical Copyright Owners' Society ("AMCOS"), who are able to license rights in relation to the reproduction, public performance and communication of musical works.

26. This licensing partnership has operated for almost a decade. It has proved fruitful and is an excellent example of circumstances where it has been possible, through a single set of negotiations and a single contract, to license multiple rights, in different works, to multiple users. It is also notable that the licence has the capacity to be amended as use and/or delivery models develop and PPCA, together with the other licensing bodies, remains open to discussing with the sector any necessary evolutions of the scope of the licence.

The Submission

27. PPCA is grateful for the opportunity to make submissions to the ALRC in relation to the "…current and further desirable uses of copyright material in the digital economy…"[14]. We believe that as a result of our more than 40 years of experience in the licensing of content to a range of users, individual, corporate, institutional and commercial, on a blanket and widespread basis, we have valuable insights as to how licensing schemes may operate in practice, with little complexity and how they are able to evolve in the light of users' needs and advancing technology.

28. As indicated above, PPCA offers its support to the submissions made separately to the ALRC by ARIA on behalf of its members. In the light of that position, in these submissions we have first concentrated on the particular areas of concern to PPCA that arise out of the Copyright and the Digital Economy Issues Paper and secondly, the questions that it poses, as they affect Australian recording artists, PPCA's Licensors and the nature of the licences which PPCA offers.

[14] Issues Paper "Copyright and the Digital Economy" – paragraph 2

PPCA and the Radio Industry

29. One of the cornerstones of the Act is that creators are entitled to be paid equitable remuneration for their work, particularly in the context of statutory licences. In the case of the broadcast of sound recordings a statutory exception has been made to this principle, which has been widened as a result of recent case law[15], even though the commercial success of many radio stations, particularly FM commercial stations, may be attributed to the exploitation of commercial sound recordings.

30. The first issue which PPCA considers to be relevant in the context of a number of the questions raised by the ALRC is section 152 of the Act, in particular subsections 152(8) and 152(11). These subsections are linked to the statutory licence afforded to commercial and national radio broadcasters pursuant to section 109 of the Act. The effect of these subsections is as follows:-

Section 152(8)

This provides that the Copyright Tribunal may not fix an annual licence fee in excess of 1% of gross revenue of a radio broadcaster who holds a licence allocated under the *Broadcasting Services Act* 1992 ("BSA") for that broadcaster's use of sound recordings. Both commercial and community radio broadcasters would fall within this category.

Section 152(11)

This provides that the Copyright Tribunal may not fix an annual licence fee in excess of 0.5 cents per person of Australia's population for radio broadcasts made by the Australian Broadcasting Corporation ('ABC").

31. PPCA's stance is that the continued operation of these subsections arbitrarily disadvantages the sound recording industry (for example, licence fees payable in respect of musical works are not limited in this fashion) while subsidising and protecting broadcasters of radio programmes, in particular, the commercial radio industry. Further, the caps disadvantage new entrants to the market in Australia, for the reasons set out elsewhere in this document and place Australia out of step internationally.

32. A related issue, which is also of concern to PPCA, is the Act's definition of "broadcast", as set out in section 10(1). As a result of different interpretations of "broadcast", PPCA (and consequently the Australian recording artists and copyright holders it represents) currently receives no licence fees specifically designated to "simulcasts" communicated by, in particular, the commercial radio sector. A simulcast is also defined in section 10(1) of the Act, as "simultaneously broadcasting a broadcasting service in both analogue and digital form…" and it is now commonplace for broadcasters of many types to "simulcast" their programmes via the internet.

[15] Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited [2012] FCA 93

33. The issue of whether the transmission of radio programmes to the public via the internet, when occurring simultaneously with the transmission of those same programmes via the radiofrequency spectrum (known in the BSA as the broadcasting services bands[16]) constitutes a "broadcast" within the definition set out in the Act, is presently being considered by the Full Federal Court. We refer to this further below.

34. Further, and also related because it involves an analysis of the meaning of "broadcast" for the purpose of the Act, is a consideration of section 199(2) of the Act. This provides that:

"…*a person who, by the reception of a television broadcast or a sound broadcast, causes a sound recording to be heard in public, does not, by doing so, infringe the copyright, if any, in that recording…."*

35. Accordingly, PPCA (and consequently the Australian recording artists and copyright holders it represents) is deprived of a stream of income arising from the public performance of radio and television broadcasts (and, as it stands, the public performance of simulcasts of radio programmes communicated by the ABC or radio stations which are licensed under the BSA). This exception does not apply in relation to the musical work.

PPCA's Licences with the Radio Sector

36. As indicated in paragraph 5 above, PPCA offers licences to commercial, community and national radio broadcasters.

37. Since the early 1980s, PPCA has licensed the commercial radio sector through various sequential and long term agreements. PPCA presently contracts with Commercial Radio Australia ("CRA", formerly the Federation of Australia Radio Broadcasters), the association for the sector, by virtue of an "industry" agreement which took effect from 1 July 1999. (The term of this agreement expired on 30 June 2003, but has been and continues to be extended on an interim basis.)

38. The industry agreement between PPCA and CRA creates a licensing structure under which PPCA enters into a standard form licence agreement with each broadcaster member of CRA. The agreement currently on foot permits a broadcaster to "broadcast" sound recordings, making reference to the definition of broadcast contained within the Act. CRA collects licence fees from its members and remits the fees to PPCA.

39. Under the current industry agreement terms, the annual aggregate licence fee paid by CRA members is an amount equivalent to approximately 0.4% of their combined gross annual revenue. This means that commercial radio across Australia pays approximately $4 million each year (of its annual revenues which exceed $1 billion) to PPCA for its use of sound recordings on 273 commercial radio stations. The agreements between PPCA and CRA since 1969 have never provided for payment of licence fees of 1% of combined gross annual revenue of CRA's members. The rate payable since the inception of the licensing agreements between PPCA and CRA has increased from less than 0.2% to the present rate, as a direct result of the cap imposed pursuant to section 152(8) of the Act.

[16] *Broadcasting Services Act* 1992 s6(1)

40. The rates which have been (and are) payable by commercial radio broadcasters arise from the industry negotiations conducted between PPCA and CRA. The resulting agreements reflect the need to accommodate the varying degrees of music use across the commercial sector, ranging from "talk" stations where fewer sound recordings are played (and which accordingly pay minimal sound recording licence fees) to stations that rely heavily on commercial music (which thus pay higher licence fees). Pursuant to the industry agreement, CRA determines the individual station fees payable. PPCA is not aware of the actual level of fee paid by CRA's individual members, although it is aware that members pay differing percentages of their revenues, which appear to relate to the level of recorded music use. In other words, 0.4% is not applied to all members on a blanket basis.

41. The current arrangement between PPCA and CRA does not relate to any "podcasts" made by the latter's membership and transmitted via the internet. PPCA has certain rights in this regard through its input agreements. However, PPCA has not been formally approached by the CRA for additional licences.

42. A similar industry agreement is in place in relation to the broadcast of protected sound recordings by community radio broadcasters. PPCA has an agreement in place with the Community Broadcasting Association of Australia ("CBAA"), which sets out the terms upon which its members are licensed by PPCA. Again, the rates payable are much less than 1% of gross revenue. PPCA has separate licences in place for those community radio broadcasters who are not members of CBAA. Similarly, the rates payable are less than 1% of gross revenue.

43. Since 1993, the ABC has paid the amount of 0.5 cents per head of population, that is, the maximum payable pursuant to the Act. The present agreement between PPCA and ABC, which licenses the national broadcaster in respect of a range communication rights (and is not limited to radio) expired on 30 June 2009, but is also continuing on an interim basis. PPCA presently receives around $104,000 per year from ABC radio to distribute to its registered artists and PPCA Licensors, despite the extensive use of sound recordings by the network. Periodically PPCA and the ABC consider the terms of ongoing licensing arrangements in respect of the ABC's television broadcast and digital activities. However, the fees in relation to radio broadcast activity are unable to form part of the negotiation process as a result of section 152(11).

Caps on licence fees paid by radio broadcasters

44. Since the introduction of the Act, over 43 years ago on 1 May 1969, the caps summarised in paragraph 30 above have been in place. As mentioned above, section 109 of the Act enables radio broadcasters to exercise a statutory licence to broadcast protected sound recordings. Provided that such a broadcaster has paid (or gives an undertaking to pay) a licence fee in an amount (if any) determined by the Copyright Tribunal, a copyright holder is unable to take infringement action. The Act further provides that the Copyright Tribunal may fix the amount payable by a broadcaster to copyright owners in the aggregate, but caps that liability in two ways:

(a) for a radio broadcasters licensed under the BSA, to 1% of that broadcaster's gross annual revenue; and

(b) for the ABC, to 0.5 cents per head of the Australian population.

45. The caps were prescribed in the Act in order to take into account "special circumstances" that

existed at the time (but which were not articulated by the government), i.e. in the late 1960s. Initially, it was intended that the Act would provide for "equitable remuneration" to owners of copyright in sound recordings in exchange for the broadcasting right. However, this was revised in a later version of the proposed Act, which contained a right to equitable remuneration but subject to the caps of 1% and 0.5 cents per head of population. The Attorney-General stated in a second reading speech[17]:

"These limits have been set to allay fears expressed by both the commercial broadcasting stations and the Australian Broadcasting Commission that the payment of royalties for the broadcasting of records could impose a substantial financial burden on them. The limits have been fixed in the light of the special circumstances now existing[18] in Australia in relation to the broadcasting of records and are not intended to imply that any particular royalty or rate of royalty is appropriate for the broadcasting of musical copyright works."

46. Thus, the caps were introduced in 1969 to allay fears concerning the level of royalties that could be payable in respect of radio broadcasts. An examination of those "fears" is expressed in correspondence from the Federation of Australian Commercial Broadcasters ("FACB") to the Attorney-General. In a letter of 22 September 1967, FACB referred to is own submissions on the 1967 Bill and expressed its fear that the future financial effects of the performance copyright provided for in that Bill included the prospect that the record manufacturers would seek and obtain royalties as high as 7.5% of advertising revenue from a station.[19]

47. Initially, it was also proposed that the Act would provide for the review of the caps by the Copyright Tribunal, after a period of five years. This was deleted in the Committee stage, on the basis that the caps were legislated and should therefore only be altered by later legislation.

48. Since the inception of the Act, two independent inquiries have taken place in which the caps in section 152 have been considered.

49. In 1995, the federal government commissioned the "Review of Australian Collecting Societies", conducted by Shane Simpson ("Simpson Report"). The Simpson Report, published in July 1995[20], observed that the fees paid by broadcasters under "section 152" were "artificially low" and concluded:-

[17] Second Reading Speech by Mr. Bowen, House of Representatives Hansard, 16 May 1968.
[18] Our emphasis.
[19] Letter from E Lloyd Sommerlad, Federal Director, Federation of Australian Commercial Broadcasters (FACB) to the Hon. N H Bowen, Attorney-General, 22 September 1967.
[20] Review of Australian Copyright Collecting Societies

"…broadcasters are in no need of the protection offered by the present cap. They are sufficiently well represented to be able to negotiate market rates without the protective arm of the government interfering in that process. Experience has shown that the best way of setting rates is by inter-partes negotiation with access to the Copyright Tribunal to determine matters that cannot be resolved that way. It is recommended that the ceiling on the broadcast fee payable pursuant to section 152 be removed forthwith."[21]

50. No action was taken by the government in response to the Simpson Report.

51. In 1999, the federal government again reviewed copyright legislation, through the Intellectual Property Review Committee (the "Ergas Committee"). PPCA (together with ARIA) commissioned the Allen Consulting Group to conduct an economic analysis of, in particular, the 1% cap as well as the cap in relation to the ABC[22]. The Ergas Committee issued its report in September 2000[23] ("the Ergas Report").

52. In relation to section 152(8) of the Act, the Ergas Committee accepted the view put forward by PPCA, that the retention of the 1% cap represented an unjustified subsidy for commercial radio. It also accepted that the 1% cap had been included in the Act in order to "ease the burden" on the radio industry[24] but was no longer warranted in the light of the substantial change in the economic situation of the radio industry and expressed the view that no public policy purpose was served by the cap, which could distort competition, resource use, and income distribution.

53. Accordingly, the Ergas Committee recommended:-

"To achieve competitive neutrality and remove unnecessary impediments to the functioning of markets on a commercial basis, the Committee recommends that s.152(8) of [the Act] be amended to remove the broadcast fee price cap."[25]

54. The Ergas Report did not recommend changing the cap set out in section 152(11) of the Act[26]. It did not accept that limiting the fees payable by the ABC in respect of the radio broadcast of protected sound recordings would distort competition or competitive neutrality[27].

[21] Section 13.1.5
[22] The Regulation of Copyright Fees for Broadcasters' Use of Sound Recordings
[23] Review of Intellectual Property Legislation Under the Competition Principles Agreement, Final Report by the Intellectual Property and Competition Review Committee, September 2000
[24] Page 115 of the Ergas Report
[25] Page 14 and 116 of the Ergas Report
[26] Page 14 and 116 of the Ergas Report
[27] Page 116 of the Ergas Report

55. Unfortunately, the government did not accept the Ergas Committee's recommendation in relation to section 152(8) of the Act. Acknowledging that the fees payable were the subject of contractual arrangements, its view was, in summary, that the ceiling provided certainty for radio broadcasters, particularly for rural and regional commercial radio broadcasters. They also took the view that it would limit community broadcasters and SBS applying for additional government funding. For these reasons, the government did not propose to take action "at this stage"[28].

56. Several years have elapsed since the publication of the Ergas Report and the government's response to the same. PPCA remains of the firm view that the caps contained within section 152 of the Act are unjustifiable. This is particularly the case in the light of the digital environment and advances in technology that mean that the internet is now a standard and additional means of communication for the vast majority of radio broadcasters and that the landscape for the communication of sound recordings is vastly different to that which existed in 1968.

57. There are a number of reasons for PPCA's position:-

(a) The caps are distortionary

The effect of the cap is that the sound recording industry and Australian recording artists are providing an annual subsidy particularly to the commercial and ABC radio sector. Additional distortions occur within the commercial radio sector itself. A station which relies heavily on sound recordings is being subsidised in relation to one of its key input costs. This subsidy is not enjoyed to the same extent by a "talk" radio station, which plays much less music and where a key financial investment is on air talent. Since publication of the Ergas Report and as the law presently stands, a new distortion has arisen between operators who simulcast their programmes and those who do not.

If a simulcast of radio programmes via the internet falls within the "broadcast" within the definition set out in the Act, sections 152(8) and 152(11) would also apply in relation to certain simulcasts. In other words, the fees payable to PPCA by those entities which offer two services, namely simulcasts and traditional radio broadcasts, would be capped at 1% of revenue or 0.5 cents per person. However, no such cap would apply to the fees payable by an entity that chooses to communicate radio programmes (and sound recordings) via the internet alone.

(b) The caps are anachronistic

There are now no "special circumstances" for, in particular, the commercial radio sector which justify the continuation of the caps. The commercial radio sector, particularly the segment thereof which drives its business through the use of sound recordings is expanding (for example by the exploitation of its programming via the internet, in which it claims to have invested heavily) and is in a healthy, profitable financial position. The latter is supported by information made available by the industry itself as well as by the Australian Communications and Media Authority.

(c) The caps reduce economic efficiency and lack equity

[28] Government Response to Intellectual Property and Competition Review Recommendations Information Package

These were the findings of the Allen Consulting Group in its analysis referred to in paragraph 51 above. The key economic impacts of section 152 of the Act identified were:-

- there was no market failure to which the caps were addressed;
- the caps 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, e.g. talk;
- reduction of revenue for copyright owners and Australian recording artists;
- creation of less Australian recordings as a result of artificially diminished returns to Australian recording artists in respect of radio broadcasts and the consequential loss of incentive;
- potentially decreased quality in music because of the artificial depression of returns to producers of sound recordings;
- the subsidy provided by the Australian recording industry to the radio sector through the caps was not imposed on any other provider of inputs used by commercial radio.

(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 such licence schemes. (We refer to the Tribunal further below.) A fair market rate could be less than the limitations imposed by sections 152(8) and 152(11). Alternatively, a fair market rate could exceed these limitations in which event, creators of sound recordings and Australian recording artists are subsidising the commercial radio sector and the ABC.

(e) The caps are inflexible and arbitrary

PPCA contends that no characteristic of the broadcast right in a sound recording especially recommends the figure of 1% of revenue or 0.5 cents per person as being equitable remuneration for the use of that right. The arbitrariness of the 1% cap is illustrated by the fact that it applies both with respect to broadcasters which provide mainly news or talk as well as those commercial broadcasters whose business models predominantly involve broadcasting music.

The arbitrariness of the 0.5 cent cap is further illustrated by the fact that there is no provision for indexation to take account of inflation, so its value has substantially diminished over time and further, that since the imposition of the cap, ABC radio has vastly increased in terms of the content offered. For example, the introduction of the ABC's Triple J network, which relies heavily on music, resulted in absolutely no increase in licence fees to sound recording copyright holders. Even if we were to assume that the rate of 0.5 cents per head of population was appropriate in 1968 (which PPCA would contest), indexation alone would have raised that amount to $0.05 per person by the present time[29]. That is a tenfold increase, excluding any consideration of increased usage arising from the additional services offered.

(f) The caps are anomalous

[29] Calculated using the RBA inflation calculator found at http://www.rba.gov.au/calculator/annualDecimal.html

PPCA contends 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 (for music or otherwise). PPCA only receives about one tenth of the radio broadcast revenue paid to APRA for use of the musical work, which is not constrained by any cap. Lastly, the treatment of sound recording copyright in other jurisdictions does not include limitations in respect of the licence fees payable for radio broadcasts (or other copyright material). In countries such as the UK, Japan, New Zealand and Canada, a fair market rate is negotiated between the parties or determined by an independent specialist copyright body. Actual rates around the world vary from about 1.5% to 4% of revenue.

(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[30] 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 has discretion as to whether it protects copyright in a sound recording, but it does not specifically give a contracting state the right to limit payment of equitable remuneration for the protected use.

The WIPO Performances and Phonograms Treaty 1996 contains similar provisions. Article 15(1) enshrines the right of producers and performers of sound recordings to "a single equitable remuneration for the direct or indirect use…for broadcasting or any communication to the public…", subject to a contracting state's ability to make reservations in similar terms to those contained in Article 16(1) of the Rome Convention.

58. The ALRC has requested input in respect of the improvement of the statutory licensing systems as well as in respect of any amendment to the systems, so that they may operate better in the digital environment and give rights holders fair remuneration[31]. For the reasons given above, PPCA proposes that the ALRC should recommend the removal of the caps prescribed in section 152 of the Act.

59. PPCA believes that this would lead to the radio broadcasters which presently benefit from section 152 of the Act paying a market rate more reflective of the value of sound recordings in their industries (and in excess of the rates payable under the present agreements). Furthermore, if it were to transpire that the Act's definition of broadcast includes the simultaneous transmission of radio programmes to the public via the internet, removal of the caps should permit negotiation of a new rate that reflects the value of sound recordings to the sector and the increased communication of those sound recordings, instead of artificially devaluing elements of the communication right when sound recordings are communicated at the same time via traditional radio and the internet.

60. If the caps contained in section 152 of the Act were removed, PPCA would seek to agree new licence fees with each element of the radio sector. In the event that such agreements were not reached, an application to the Copyright Tribunal of Australia, the "independent umpire" in place pursuant to the Act specifically to deal with issues of this sort, may be necessary. PPCA believes

[30] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Obligations
[31] Questions 40 and 41, Copyright and the Digital Economy Issues Paper, August 2012

that the Tribunal represents the most appropriate formal mechanism by which the licence fees payable for radio by the entities which obtain their licences under the BSA and the ABC may be adjusted to reflect market rates in the present era (and updated thereafter as necessary).

61. The Tribunal process would allow detailed consideration of fees in the sector, in conjunction with up to date evidence about the relevant industries and technologies used, through which the Tribunal should be able to arrive at licence fee rates for radio broadcasters taking into account not only the value of the sound recordings utilised by them but also their individual characteristics, requirements, markets and uses of repertoire over time.

62. In PPCA's view this represents a vast improvement on current circumstances, where the remuneration to which Australian recording artists and creators of sound recordings are entitled for the radio broadcast of their work is hostage to the market considerations and technology landscape in existence over 40 years ago.

63. PPCA has noted the submission made by CRA to the ALRC regarding accessibility to the Copyright Tribunal and in particular the Tribunal's consideration of the extent of PPCA's repertoire. PPCA accepts the inherent difficulty, for various reasons[32], in defining every track within its repertoire. However, PPCA does not believe that this difficulty is peculiar to it alone. Further, PPCA wishes to point out that it has no record, in corporate memory, of having been approached by CRA or one of its members in relation to the copyright status of a single sound recording.

64. The impacts of the removal of the section 152 caps may be summarised as follows:-

(a) Licence fees in relation to the broadcast of protected sound recordings would be assessed taking into account the concept of "equitable remuneration", in the same way as other fees payable for copyright material and in particular pursuant to statutory licences.

(b) Australian recording artists could enjoy fair remuneration from radio broadcasts and additional income in relation to simulcasts[33]. Higher incomes for such artists provide greater economic incentive to remain in the industry. Creativity is thus encouraged and users will gain access to a wider range of content.

[32] See paragraph 10 above.

[33] As explained elsewhere in this document, artists are not presently entitled to income from the simulcasts of radio programmes communicated by the ABC or stations that are licensed under the BSA.

(c) Record labels could also enjoy fair remuneration from radio broadcasts and a new stream of income from simulcasts[34]. Increased incomes would doubtless lead to an increased ability to invest in Australian recording artists and local artist rosters, further fostering creativity and the diversity of music available.

(d) Based on a larger investment on local talent, the Australian music industry could experience better export opportunities.

(e) Enhanced cultural opportunities for the community should also arise from increased investment in local talent as well as an increased diversity in Australian music available, both to consumers in general and to radio listeners.

65. PPCA also believes that the existence of the price cap may adversely affect people other than those directly involved in the making of a sound recording. The livelihoods of individuals and organisations other than artists and record labels rely on the recording industry, for example music retailers, artist managers and suppliers of goods and services to the industry. The smaller the investment made in the development of Australian artists by record labels, the larger the likelihood of an adverse impact for these individuals and organisations. Further, it is possible that the wider Australian community may be affected by the existence of section 152 of the Act. For example, it may operate as a deterrent to those considering a career as a recording artist, or to investment in those artists, or in record companies and labels.

Definition of "Broadcast"

66. As outlined in paragraph 33 above, PPCA is presently awaiting a decision from the Full Federal Court in relation to the construction of the defined term "broadcast" as contained in section 10(1) of the Act. The proceedings were brought cooperatively between PPCA and CRA at an industry level pursuant to the Court's jurisdiction under section 39B(1A)(c) of the *Judiciary Act* 1903 (Cth)[35]. The application sought declaratory relief only. The heart of the issue is whether the transmission of radio programmes to the public via the internet, when occurring simultaneously with the transmission of those same programmes via a part of the radiofrequency spectrum known in the BSA as the "broadcasting services bands", constitutes a "broadcast" within the definition in the Act.

67. In the light of the pending decision, PPCA does not consider it appropriate to provide detailed submissions to the ALRC on this issue at this stage in relation to potential changes to the licensing regime currently in operation under the Act. However, PPCA does wish to describe the statutory and factual backgrounds which have necessitated the above mentioned proceedings. In doing so, we highlight the difficulties that PPCA (and thus rights holders) experience, as well the discrepancies within the market which exist as a result of the present legal position, particularly in the light of the limitations imposed by section 152 of the Act.

68. The starting point for the legislative matrix is section 10(1) of the Act, which sets out the definition of "broadcast" as follows:

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[34] See previous footnote.

[35] The Federal Court has jurisdiction because the matter arises under a law made by the Commonwealth Parliament: it relates to a contract the subject-matter of which is copyright, being a right or property created under federal law.

"broadcast" means a communication to the public delivered by a broadcasting service within the meaning of the Broadcasting Services Act 1992. For the purposes of the application of this definition to a service provided under a satellite BSA licence, assume that there is no conditional access system that relates to the service.

Note: A broadcasting service does not include the following:

(a) *a service (including a teletext service) that provides only data or only text (with or without associated images); or*

(b) *a service that makes programmes available on demand on a point to point basis, including a dial up service.*

69. It is apparent from the above that construing "broadcast" in the Act requires consideration of provisions of the BSA, in particular the definition of "broadcasting service" which is defined as follows:

"Broadcasting service" means a service that delivers television programmes or radio programmes 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, but 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 programmes available on demand on a point-to-point basis, including a dial-up service; or*

(c) *a service, or a class of services, that the Minister determines, by notice in the Gazette, not to fall within this definition.*

70. On 12 September 2000, pursuant to (c) above, the Minister for Communications, Information Technology and the Arts made the following determination ("the Ministerial Determination"):

I, RICHARD KENNETH ROBERT ALSTON, Minister for Communications, Information Technology and the Arts, under paragraph (c) of the definition of "broadcasting service" in subsection 6(1) of the [BSA], determine that the following class of services does not fall within that definition:

a service that makes available television programmes or radio programmes using the Internet, other than a service that delivers television programmes or radio programmes using the broadcasting services bands.

71. The keys to the construction of the definition of "broadcast" lie within:-

(a) the construction of the Ministerial Determination as a whole, which excludes certain services from the concept of a "broadcasting service", but incorporates an exception (commencing "other than …") which carves out certain services from those which are excluded; and

(b) the meaning of the word "service" as used in the Ministerial Determination.

72. The starting point for the factual matrix is the licence agreement currently existing between PPCA and CRA in respect of the latter's members. Pertinently, as mentioned above, the scope of the licences granted to CRA members is defined by reference to the definition of "broadcast" in the Act, as amended from time to time.[36]

73. Many of CRA's members transmit radio programmes to the public via the broadcasting services bands and simultaneously transmit the same radio programmes to the public via the internet. There is no dispute that the licences granted by PPCA permit members of CRA to make such transmissions via the broadcasting services bands. A dispute does arise between PPCA and CRA as to whether the licences also cover the internet transmissions and in particular, given the legislative framework outlined above, whether such communications were delivered by a "broadcasting service" within section 6(1) of the BSA.

74. The matter was first heard in the Federal Court, in mid-October 2010 and the decision was delivered on 15 February 2012[37]. The essence of the Court's reasoning was that the word "service" should be taken to refer to the "entire business activity" of the service provider:[38]

> *"The concept of a "service" when used in the definition of "broadcasting service" in the Broadcasting Act encompasses the entire business activity carried on by the service provider. It carries with it the notion of all that is required to produce the end-product – the identity of the service provider and all of the processes, equipment and know-how which is brought to bear in the delivery of the radio programmes made available by that service."*

75. This meant that CRA's members who were transmitting radio programmes via the internet and simultaneously via the broadcasting services bands were providing a single "service". Accordingly, the exclusion in the Ministerial Determination did not apply, because that service was (in part) a "service that delivers … radio programmes using the broadcasting services bands" within the exception to the exclusion. This had the effect that the internet transmissions by CRA's members were delivered by a "broadcasting service" and were "broadcasts".

76. A decision of the "broadcast" issue not only determines the scope of the licences between PPCA and CRA members, but has broader implications, for example in relation to other licences granted by PPCA and for the general application of other aspects of the copyright and broadcasting legislation.

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[36] The term "broadcast" was defined in that agreement by reference to the definition of "broadcast" in the Copyright Act.

[37] Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited [2012] FCA 93

[38] Reasons at [115].

77. Of particular note is the effect of the present decision coupled with the effect of section 152 of the Act. For entities that hold licences under the BSA "to broadcast sound recordings…" (relevantly the commercial and community radio sectors) and which simultaneously transmit their radio programmes to the public via the internet, licence fees are limited to 1% of their gross earnings, pursuant to section 152(8), for broadcast and simulcast combined, because broadcast includes simulcast. For the ABC, the cap of 0.5 cents per capita of the population applies in respect of "sound broadcasts". Section 10(1) of the Act defines "sound broadcasts" as "sounds *broadcast* otherwise than as part of a television broadcast…". If broadcast under section 10 (1) of the Act includes simulcast, the 0.5 cent cap applies to the combined broadcast and simulcast of ABC radio programmes, in cases where these activities are conducted together.

78. The reasons that clarification of this matter is important to PPCA and for communicators of sound recordings are both practical and financial, and may be summarised as follows:-

(a) At present, radio broadcasters, in particular from the commercial radio sector, may contend that their simulcasts fall within the aforementioned definition of broadcast and that accordingly, no additional licence is required or separate fee is payable in relation to this activity.

(b) If (a) is correct, advances in technology and the proliferation of additional services delivering sound recording content do not result in additional streams of income to Australian recording artists, rights holders and/or creators of sound recordings. The caps set out in section 152 of the Act, referred to elsewhere in this document, would apply in relation to the combined activities of those entities which broadcast and simulcast radio programmes, including the ABC, even though the simulcast of sound recordings amounts to the further and substantial use of those sound recordings.

(c) In the commercial (and community) radio sectors, the maximum licence fee payable under the Act, for both the traditional broadcast of radio programmes and the simulcast of those programmes, is 1% of gross income. For the ABC, the maximum licence fee payable under the Act, for both the traditional broadcast of its radio programmes and the simulcast of those programmes is 0.5 cents per person of the Australian population. As stated in paragraph 43 above, this rate has formed part of PPCA's licence with the ABC since 1993, well before the introduction or utilisation of simulcast technology. In any event, given that simulcast was not a method of communication envisaged over 40 years ago by the makers of the Act, section 152 could not have been directed at licence fees payable for the exercise of this right. Accordingly, if a simulcast is a broadcast for certain providers, the value of the licensed communication rights is artificially reduced for those providers.

(d) In contrast to (c) other, non-broadcaster internet communicators of sound recordings (i.e. those that solely stream sound recordings via the internet) are not subject to any such limitation on the royalties that they might be required to pay. The holders of radio broadcasting licences under the BSA and the ABC therefore enjoy an anomalous and privileged position over other users of internet transmissions, ultimately as a result of political lobbying that took place over 40 years ago.

(e) 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).[39]

The present construction means, in effect, that the simulcast of such sound recordings would not enjoy 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 a further anomaly between long standing industry participants and new entrant service providers.

(f) The reduction in streams of revenue or income for the sound recording industry may have the wider impacts described in paragraph 64 above in respect of section 152 of the Act.

Section 199(2) of the Act

79. The ALRC has asked whether any specific exceptions should be removed from the Act[40]. PPCA submits that this would be appropriate in relation to section 199(2) of the Act, which provides that:

> *"…a person who, by the reception of a television broadcast or a sound broadcast, causes a sound recording to be heard in public, does not, by doing so, infringe the copyright, if any, in that recording…"*

80. This exception was introduced in the Act, following the recommendation of the committee appointed in 1958 by the Australian Attorney General to "Consider What Alterations are Desirable in the Copyright Law of the Commonwealth", which published its report in December 1959 ("the Spicer Report")[41]. Essentially, the Spicer Report supported the legislative position enacted in this regard in section 40(1) of the United Kingdom's *Copyright Act* 1956, which provides that:-

> *"where a sound broadcast of television broadcast is made by the Corporation or the Authority, and a person, by the reception of that broadcast, causes a sound recording to be heard in pubic, he does not thereby infringe the copyright (if any) in that recording under section twelve of this Act…"*

81. PPCA's view is that it is no longer appropriate for the exception to form part of the Australian copyright statutory regime, particularly taking into account the issues referred to above, namely the provisions of section 152 of the Act and the current interpretation of the Act's definition of "broadcast". PPCA relies on the following in support of its position:-

(a) The licence fees payable to Australian recording artists and creators of or rights holders in sound recordings in respect of the exploitation of sound recordings is already significantly limited for broadcast as a result of section 152 of the Act. In PPCA's view, it is unjustifiable in those circumstances, to deny those artists and rights holders a further source of income from public performance of radio and television broadcasts. It is notable that in the UK, or in other jurisdictions where exceptions of this nature exist, there is no equivalent to section 152 of the Act.

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[39] 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.

[40] Question 49, Copyright and the Digital Economy Issue Paper August 2012

[41] It was also a recommendation of the Spicer Report that "copyright should subsist in every sound recording of which the maker was a qualified person…", paragraph 256.

(b) Another stream of income is denied to the sound recording industry if the radio programmes simultaneously transmitted over the broadcasting services bands and the internet by entities that hold licences under the BSA or by the ABC are all classified as "broadcast". In other words, an additional exception now exists in relation to the public performance of the simulcasts communicated by these providers. PPCA does not believe that 43 years ago the government intended to introduce an exception for simulcast, given that the technology to permit such communication did not exist at that time.

(c) Treatment of a sound recording is inconsistent with that of the musical work which is embodied therein. There is no equivalent of either section 152 or section 199(2) of the Act in relation to the musical work and accordingly, those who earn their livings from the creation of sound recordings are arguably unfairly impacted on these two fronts.

(d) The absence of revenue for the sound recording industry experienced as a result of section 199(2) of the Act may have broader effects such as those described in paragraph 64 above in relation to section 152 of the Act.

Conclusion

68. In the light of the above, PPCA submits that there is no doubt that the individuals and bodies that it represents are at a disadvantage in respect of the income which they may receive arising from the broadcast, public performance and presently the simulcast of radio programmes. PPCA does not believe that this accords with "…the government's objective of ensuring that copyright law provides incentives for investment in innovation and content…"[42]. As stated above, PPCA believes 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 document *"…affects the ability of creators to earn a living, including through access to new revenue streams…."*[43]

69. These disadvantages are only expanded by the development of the digital economy and in addition to sound recording rights holders, now also disadvantages those developing services on digital only platforms (as they have to compete with those paying a lower than market rate for their content).

[42] Copyright and the Digital Economy Issues Paper, August 2012, paragraph 3
[43] Copyright and the Digital Economy Issues Paper, August 2012, question 1(a)

PART B: RESPONSES TO QUESTIONS

In its response to the questions posed by the ALRC, PPCA refers to the *Copyright Act* 1968 (Cth) as "the Act". Furthermore, PPCA refers to the *Broadcasting Services Act* 1992 (Cth) as "the BSA".

Where it has provided answers to specific questions, PPCA has reproduced the text of the question. Otherwise PPCA has answered questions in the sections identified by the ALRC on a general basis.

The Inquiry

Question 1:

The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:

(a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;

(b) affects the introduction of new or innovative business models;

(c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or

(d) places Australia at a competitive disadvantage internationally.

Answer:

PPCA supports the submissions made by ARIA, particularly in relation to the its description of the recording industry in 2012 and the expansive and evolutionary nature of the licences that are being granted by the industry to those that wish to use sound recording content in a commercial context. PPCA has the additional comments set out below:

- The Act singles out the makers of sound recordings and negatively affects their ability to make income in two significant respects. First, section 152 limits the licence fees payable in respect of radio broadcasts of sound recordings to 1% of gross revenue (broadcasters who are licensed pursuant to the BSA) and to 0.5 cents per person of the Australian population (for the ABC). The introduction of the section 152 caps was justified in 1968 by the "special circumstances" of the radio industry. Despite recommendations by two subsequent government inquiries that supported the removal of the cap particularly in relation to commercial radio, section 152 remains in operation. Second, section 199(2) of the Act provides a statutory exception in relation to the public performance of broadcasts: such performance does not amount to an infringement of copyright. Accordingly, public performances of broadcasts do not require a licence and those that PPCA represents are not entitled to receive any remuneration in this regard.

- In the light of present case law, certain radio simulcasts (i.e. the internet communication of radio programmes simultaneous with the traditional radio broadcast of those programmes) do not give rise to an additional income stream to those who control copyright in sound recordings. This is because such simulcasts have been held to fall within the definition of broadcast set out in section 10(1) of the Act. Due to the caps imposed by section 152 of the Act regarding radio broadcasts, there is therefore no room for negotiation of additional fees for the simulcasts offered by the entities licensed under the BSA and the ABC, which are currently protected by the caps. This affects the ability of sound recording creators to earn an increased living from the increased exploitation of their rights and arises directly from the advent of simulcast (internet) technology.

- The same case law has a further implication for sound recording creators in the context of section 199(2) of the Act. The public performance of a sound recording in any simulcast that falls within the definition of a broadcast will not amount to an infringement of copyright. This acts as a further limitation to income in respect of the exploitation of sound recordings.

- New entrants to the Australian market that offer internet services alone are disadvantaged as a result of section 152 of the Act and the present status of the law in relation to simulcasts. Given that no other jurisdiction operates caps on licence fees in relation to the broadcast of sound recordings, section 152 may deter the commencement of business operations in Australia because it distorts the market as well as competition.

- PPCA also refers the ALRC to its response to Questions regarding the Act's statutory licensing schemes and exceptions.

Guiding Principles for Reform

Question 2:

What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the *Copyright Act* 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?

Answer:

PPCA supports the submissions made by ARIA in relation to this question and has no further comments to make.

Caching Indexing and Other Internet Functions

Question 3:

What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?

Answer:

Subject to the concerns raised by ARIA in relation to the precise activity that constitutes "caching", which PPCA shares, PPCA does not believe that these functions are limited by the present legislative regime. As stated elsewhere in this document, PPCA is able to license various rights to third parties. When approached for a licence, PPCA makes every effort to understand the business needs of that potential licensee and will, insofar as possible, extend a licence that satisfies those needs with in the ambit of the input agreements. In all other respects, PPCA supports the position of ARIA.

Question 4:

Should the *Copyright Act* 1968 (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?

Answer:

PPCA supports the position of ARIA.

Cloud Computing

In relation to this issue, PPCA supports the position of ARIA. In addition, PPCA would again comment that when approached for licences which relate to the rights in respect of which it may grant licences, PPCA attempts to accommodate the needs of a potential licensee insofar as this is permissible within the limitations of the input agreements.

Copying for Private Use

Question 10:

Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?

Answer:

By virtue of its input agreements, PPCA does enjoy a limited right in respect of the reproduction of sound recordings, insofar as that reproduction is incidental to the major rights granted to PPCA in respect of public performance and communication. For example, businesses that have PPCA public performance licences may also obtain a licence from PPCA to make compilations of sound recordings to be played in public. PPCA added this licence to its suite of licences in response to the introduction of section 109A of the Act. Digital communications of sound recordings by their nature involve reproductions, which PPCA licenses as a matter of course to its licensees in this field. The licences which PPCA has granted in reliance on these rights operate well.

In the light of its limited rights and the detailed submissions made by ARIA in relation to the other questions under this heading, PPCA does not have any further comments to add and supports the position of ARIA in relation to this question and the other questions in this section.

Online Use for Social, Private or Domestic Purposes

In this context, PPCA supports the comments and position stated by ARIA.

Transformative Use

Question 14:

How are copyright materials being used in transformative and collaborative ways—for example, in 'sampling', 'remixes' and 'mashups'. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?

Answer:

In the light of its limited rights in this area, PPCA does not have detailed submissions in relation to this question, although PPCA does note that the term "mash-up" is used in respect of a broad range of compilation activities. In considering the questions in this section, this breadth of activity should be taken into account bearing in mind the numerous rights and interests which may be at stake. Otherwise, PPCA supports the position stated by ARIA.

Questions 15 to 18:

Answer:

PPCA supports the position stated by ARIA in respect of questions 15 to 18 inclusive.

Libraries, Archives and Digitalisation

Question 21:

Should the *Copyright Act* 1968 (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?

Answer:

At the present time, PPCA has no licences on foot with libraries or cultural institutions in relation to these activities, although it would be open to consideration of any issues with which it may assist these bodies within the ambit of its input agreements.

PPCA re-iterates the comments made by ARIA in relation to this question and the other questions in this section.

Orphan Works

PPCA supports the comments made by ARIA, in particular in relation to Question 24.

Data and Text Mining

PPCA has no comments to make in relation to this section.

Educational Institutions

Question 31:

Should the exceptions in the *Copyright Act* 1968 (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?

Answer:

As stated elsewhere in this document, PPCA is part of a wider music industry licensing scheme which covers the activities of the Australian university sector. This is an initiative which includes ARIA, AMCOS and APRA, namely the other bodies that are able to grant and administer licences for reproduction (ARIA and AMCOS), public performance and communication (APRA). The result is that universities enjoy a licence scheme that covers these activities for both sound recordings and musical works. The universities licence scheme has been in operation for almost a decade; PPCA believes that it serves the sector well in terms of the extent of the rights granted and the relative ease of administration, resulting

from the cooperation of the four music industry bodies and confining the arrangement to a single contract negotiated between the parties.

PPCA therefore supports the position as stated by ARIA in its submissions on this topic.

Crown Use of Copyright Material

At present, PPCA has no licences in place with government at state or federal level.

PPCA does not support any proposal involving the extension of the Crown use provisions to local governments. PPCA has a range of simple schemes available for use by individual councils, and would be happy to tailor a scheme to suit the particular requirements of the sector. In PPCA's view the broad and varied use of music by the very many local councils across the breadth of Australia cannot be considered as for the purposes of the State.

PPCA endorses the submission of ARIA and has no further issues that it wishes to raise in relation to this subject.

Retransmission of Free to Air Broadcasts

Question 36:

Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?

Answer:

PPCA has many rights which it may licence to third parties in respect of communication of broadcast material, including sound recordings via the internet. Such licences are utilised by, in particular, the television industry. PPCA's position is that such voluntary licensing schemes of this nature are effective and operate simply.

PPCA submits that any consideration of extending the scope of the statutory licence scheme must be against solid evidence that any such retransmissions would be available only within Australia. PPCA further submits that any proposed amendments should not undermine the voluntary licensing schemes already available, or those likely to be developed by relevant rights holders or their representatives.

Question 37:

Does the statutory licensing scheme for the retransmission of free-to-air broadcasts apply to internet protocol television (IPTV) need to be clarified, and if so, how?

Answer:

PPCA submits that the issue should be clarified, however urges caution in respect of extending the scope of the statutory scheme beyond the original intention.

Statutory Licences in the Digital Environment

Question 41:

How can the *Copyright Act* 1968 (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?

Answer:

PPCA is dealing with Questions 40 and 41 together. As described elsewhere in this document, PPCA operates within the statutory licence to broadcast prescribed under section 109 of the Act. Under section 152 of the Act, the licence fees which PPCA may charge in respect of the broadcast of radio programs by entities that obtain licences pursuant to the BSA (for example commercial and community radio broadcasters) and by the ABC in reliance upon the licence imparted by section 109 are capped at 1% (BSA licensed providers) and 0.5 cents per head of the Australian population (ABC radio).

PPCA requests that the ALRC consider the removal of the licence fee constraints imposed by the government 43 years ago, under section 152 of the Act. The reasons for PPCA's position are as follows:-

- The caps distort the market in various ways. The effect of the cap is that the sound recording industry is subsidising the radio industry. 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. Currently, a further distortion is experienced between radio broadcasters who simulcast their programmes online and those who do not. Section 152 will apply to the combination of internet simulcast and traditional broadcast of radio programmes for the former but will not apply to sound recording content that is delivered by the internet alone.

- 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.

- 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.

- 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.

- 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 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.

- The caps are anomalous. PPCA would contend 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, other jurisdictions do not include limitations in respect of the licence fees payable for radio broadcasts (or other copyright material). In 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%.

- 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 has discretion as to whether it protects copyright in a sound recording, but it does not specifically give a contracting state the right to limit payment of equitable remuneration for the protected use. The WIPO Performances and Phonograms Treaty 1996 contains similar provisions.

- 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.

- 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.

Question 42:

Should the *Copyright Act* 1968 (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?

Answer:

PPCA repeats ARIA's submission that there is no role for a statutory licence to improve access to commercially available sound recordings, because Australian consumers already have access to a huge range of recorded music through a plethora of licensed providers. PPCA refers to and supports ARIA's submissions on this point.

In relation to Questions 43 and 44, PPCA endorses ARIA's position.

Fair Dealing Exceptions, Free Use Exceptions, Fair Use and Contracting Out

In relation to these topics, PPCA endorses ARIA's position. However, PPCA has some additional issues to raise in relation to Questions 48 and 49, which relate to exceptions pursuant to the Act.

Question 48:

What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

Answer:

PPCA believes that as a result of a decision recently made in the Federal Court regarding the definition of "broadcast" in the Act (which is currently under review), the interests and rights of those that it represents have been further adversely affected by the exception contained in section 199(2) of the same. Otherwise, it is PPCA's experience that the digital environment has not affected the operation of the exceptions in the Act.

Question 49:

Should any specific exceptions be removed from the *Copyright Act* 1968 (Cth)?

Answer:

PPCA submits that section 199(2) of the Act should be removed. The effect of this section is that the public performance of sound recordings embodied in television and radio broadcasts is not an infringement of copyright in those sound recordings. The reasons for this may be summarised as set out below:-

- particular to recording artists and creators of sound recordings. This in unjustifiable in circumstances where licence fees payable to these artists and rights holders in respect of the exploitation of sound recordings is already significantly limited for radio broadcasts as a result of the caps on licence fees imposed under section 152 of the Act.

- Another stream of income is denied if the radio programmes simultaneously transmitted over the broadcasting services bands and the internet by entities that hold licences under the BSA or by the ABC are all classified as broadcasts. If this is correct, public performance of the sound recordings contained within those simulcasts will not require a licence. Again this is not supportable, particularly when simulcast technology did not exist 43 years ago when the caps in section 152 of the Act were introduced.

- Treatment of a sound recording is inconsistent with that of the musical work which is embodied therein. There is no equivalent of either section 152 or section 199(2) of the Act in relation to the musical work.

- The absence of revenue for the sound recording industry experienced as a result of section 199(2) of the Act may have broader economical and other impacts, such as those described in response to Question 41 above.