



24 December 2015

Intellectual Property Arrangements Inquiry
Productivity Commission
GPO Box 1428
CANBERRA CITY 2601

By Email: intellectual.property@pc.gov.au

Dear Commissioners,

Submission to the Productivity Commission in response to the Inquiry into Intellectual Property Arrangements

Phonographic Performance Company of Australia (**PPCA**) would like to thank the Productivity Commission for providing PPCA with the opportunity to make a submission in relation to the *Intellectual Property Arrangements Issues Paper* (the **Issues Paper**).

PPCA is a national non-government, non-profit Australian copyright collecting society which was established in 1969. PPCA operates on non-exclusive basis and grants licences for the broadcast, communication or public playing of recorded music and music videos. PPCA represents the interests of copyright owners, recording artists and record labels. PPCA distributes the licence fees that it collects from the provision of such licences to the record labels and Australian recording artists that are registered with PPCA. PPCA's thousands of registered artists and record labels range from small independent artists and labels to world renowned artists and major label record companies.

PPCA has collaborated with parties across the music industry on these important issues and, in relation to the proposals and various questions contained with the Issues Paper, PPCA endorses the position outlined by Music Rights Australia (**MRA**), the Australian Recording Industry Association (**ARIA**) and the Australian Copyright Council (**ACC**) in their respective submissions. However, PPCA would also like to make some additional comments in relation to the Issues Paper, but notes that it will restrict its input to those issues relating to copyright.

Online Copyright Infringement

PPCA's licensors and registered artists have been profoundly affected by the changes that the internet has produced. Whilst the internet and other digital channels have provided artists and record companies with a platform to disseminate their work and interact directly and more readily with fans – it has also left them exposed to persistent online copyright infringement.

Those who do not support the Government's stated goal of reducing online copyright infringement often claim that such infringement is a response to the powerful multinational corporations who do not make content available at a price and at a time that is convenient to the general public. From PPCA's perspective, this could not be further from the truth. Far from representing large and powerful multinational corporations, PPCA has a diverse licensor base. PPCA represents the interests of over 1,800 copyright owners, over 3,000 registered recording artists and over 30,000 record labels. The majority of PPCA's registered artists and record labels are small businesses or independent artists who rely on an effective copyright law framework in order to make a living. Online copyright infringement has a detrimental effect on the ability of these artists and record labels to sustain a livelihood from their creative endeavours. As evidenced in various research projects undertaken by the Australia Council for the Arts¹, the average income of Australian artists remains low. In fact, since 1986/87, although artists' incomes as a whole have kept pace with inflation (just), they have not shared in the "...rising trend in real (inflation adjusted) incomes that have been experienced across the workforce at large".² Australian culture can only suffer if its creators are increasingly disadvantaged when pursuing their craft.

It has also been argued that lack of availability of content at a reasonable price is the major driver of copyright infringement. That is, if content creators and owners provide consumers with access to content at a reasonable price contemporaneously with the release of the content in other countries, then this will provide consumers with an incentive to access legitimate content rather than content from unlicensed sources. PPCA's licensors have addressed the perceived problems of pricing and access by adapting and reinventing their business models to incorporate these digital delivery platforms. However, as noted in the submission made by ARIA to the Issues Paper, although there are a wide range of licensed music services within Australia, each with price points varying from a monthly subscription to free, this has not in any way minimised the persistence and prevalence of the access to music via unlicensed services.

Clearly access to affordable content is not, in itself, enough to stem the volume of unauthorised access to music which continues to occur today.

The Australian music industry has done much to provide consumers with information on legitimate sources of online music, including the Digital Content Guide³, the Pro-Music website⁴, the *Music Matters* campaign⁵ as well as all of the information provided on the core websites of PPCA⁶, ARIA⁷, MRA⁸ and APRA AMCOS⁹. The industry also lends its support to the Australian Copyright Council, which publishes a wide range of plain English information sheets for the general public.¹⁰ However, it is clear that further programs are needed, and it seems only reasonable that service providers and intermediaries play a role in ensuring the internet works for both consumers and creators.

¹ See for example Throsby & Zednik 'Do you really expect to get paid? An economic study of professional artists in Australia) available at

http://www.australiacouncil.gov.au/resources/reports_and_publications/subjects/artists/artist_careers/do_you_really_expect_to_get_paid

² *ibid* at page 12

³ See <http://digitalcontentguide.com.au/>

⁴ See <http://www.pro-music.org/>

⁵ See <http://anz.whymusicmatters.org/>

⁶ See <http://www.pcca.com.au/>

⁷ See <http://www.aria.com.au/>

⁸ See <http://www.musicrights.com.au/>

⁹ See <http://www.apraamcos.com.au/>

¹⁰ See <http://www.copyright.org.au/find-an-answer/browse-by-a-z/>

It is PPCA's view that, consistent with normal business practice, rights holders should be able to determine when, where, how and on what terms their content should be made available. The concept of promotional copies is not new to the music industry, and artists and labels may, from time to time, elect to make material available on a free of charge basis. Once again, like any other business, decisions on how and when to market their product should remain in the rights holders' hands.

The goal of a flexible yet strong copyright framework is bigger than just media and entertainment content. It will also provide a means through which the Government's goal for an innovative, globally competitive Australia that is open for business can be achieved.

Currently, the widespread nature of online copyright infringement means that Australian businesses that wish to participate on a level playing field in the digital economy are disadvantaged, as their businesses must compete with online services that operate without appropriate licences, and do not pay for the creative content upon which their businesses are based. Consequently these unlicensed services are not only depriving rights holders and artists of a fair return for their creative endeavours, but also impeding innovation within Australia by increasing the risks associated with investment in legitimate new business models.

It was for this reason that PPCA welcomed the reform which saw the introduction of s115(A) to the *Copyright Act (1968)* (the **Copyright Act**) in mid 2015, which it anticipates will help to reduce the occurrence of online copyright infringement.

Anti-competitive provisions of the Copyright Act

As outlined in the submission made by ARIA, there are restrictions in Australia's Intellectual Property laws that have a severe impact on competition and the operation of a free market. In particular, the Copyright Act includes statutory pricing caps which limit the amount of fees payable by radio broadcasters to sound recording copyright owners. The statutory pricing caps in the Copyright Act are only imposed on sound recording copyright owners and do not apply to any other copyright owners or creators.

These arbitrary and archaic statutory pricing caps were introduced nearly 50 years ago to protect the then emerging radio industry, and fail to acknowledge and fairly reward artists and labels for their creative efforts and contribution to the profitability of the radio industry. As noted in PPCA's comprehensive submissions to the ALRC review¹¹, these statutory pricing caps have been considered as a part of a number of previous reviews. The statutory pricing caps were considered in 1995 as a part of the Federal Government commissioned "Review of Australian Collecting Societies" (known as the **Simpson Report**¹²). The Simpson Report concluded that that the fees paid by broadcasters under section 152 of the Copyright Act were artificially low and that "*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-parties negotiation with access to the Copyright Tribunal to determine matters that cannot be resolved in that*

¹¹ See http://www.alrc.gov.au/sites/default/files/subs/240_org_ppca.pdf and http://www.alrc.gov.au/sites/default/files/subs/666_org_phonographic_performance_company_of_australia_limited_ppcafina.pdf

¹² See: <http://arts.gov.au/sites/default/files/pdfs/the-simpson-report-1995.pdf>

way. It is recommended that the ceiling on the broadcast fee payable pursuant to section 152 be removed forthwith”¹³

The caps were also considered by the Ergas Committee in 2000, which stated, in respect of the section 152(8) cap:

*“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 cap.”*¹⁴

More recently, in the context of a rate setting hearing¹⁵ before the Copyright Tribunal, the Tribunal noted that ‘...the notion that the rates negotiated in the PPCA-CRA Broadcast Agreement represent freely determined market rates, unaffected by any constraint associated with the 1% cap, is beyond the bounds of possibility.’¹⁶ and further, ‘...confirms that the broadcasting rate of 0.4% is far below what would be a market rate for that activity by reason of the 1% cap.’¹⁷

Appendix A sets out further detail of PPCA’s position on the section 152 licence fee caps.

It is clear that the statutory pricing caps are redundant regulation that stifles competition and innovation and creates market distortions. The pricing caps provide pricing protection for radio broadcasters while disadvantaging new services entering the market that use new technologies (which are not subject to the statutory pricing caps and pay a fair market rate). The continuance of these statutory pricing caps may have the effect of impeding the development of innovative radio and music services. This would have the unwanted effect of disadvantaging Australian consumers and businesses.

Similarly, it is PPCA’s position that the exception contained in section 199 (2) of the Copyright Act is no longer necessary, and should be removed. The section 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 copyright, if any, in that recording....”

Such treatment of a sound recording is inconsistent with that of the musical work which is embodied therein. There is no equivalent of section 199(2) of the Copyright Act in relation to the musical work and accordingly, those who earn their living from the creation of sound recordings are unfairly impacted on this front. PPCA refers to its ALRC Issues Paper submission for further information on this topic.

Copyright Collecting Agencies

The Issues Paper under discussion seeks comment on whether ‘licensing copyright-protected works is too difficult and / or costly?’ and ‘What role can / do copyright collecting agencies play in reducing transaction costs?’

¹³ Section 13.1.5 of the Simpson Report.

¹⁴ [Review of Intellectual Property legislation under Competition Principles Agreement, Final Report by the Intellectual Property and Competition Review Committee, September 2000 at pages 14 and 116](#)

¹⁵ Reference by Phonographic Performance Company of Australia Limited under s 154 of the Copyright Act 1968 (Cth) [2015] ACopyT3 (see: <http://www.austlii.edu.au/au/cases/cth/ACopyT/2015/3.html>)

¹⁶ *Ibid* at [194]

¹⁷ *Ibid*, at [256]

Licensing copyright protected works can be difficult and costly, but also simple and inexpensive. It depends in each case on the intended use of the material and the specific circumstances of that use. PPCA, like other collecting societies, offers a range of standard licensing schemes covering a vast repertoire of recorded music. Users seeking public performance licences, often small businesses, can view the licensing options on the PPCA website, lodge their application electronically, receive their invoice and licence paperwork via email, and pay their account online.

In contrast, an advertising agency wishing to use a well known and popular sound recording in a campaign for a major brand will have to liaise directly with the rights owner, and negotiate the specific terms of that arrangement with them. This is, of course, more complex than taking advantage of one of PPCA's blanket public performance licences, but is nonetheless reasonable in the circumstances, particularly considering the range of alternative recordings available to the advertiser / agency if they are unable to settle mutually convenient terms.

In addition to the public performance licences it offers, PPCA also licences a range of broadcast and online communications, such as catch up television and digital music service providers (eg iTunes Radio). In our view there have been no undue delays or issues. PPCA is in the *business* of licensing sound recording use, and actively seeks opportunities to offer its blanket licences to a range of services. There are differences between issuing a standard licence to a single retail store playing background music, and developing the bespoke arrangements to cover the sound recording use of a large commercial broadcaster, and the market itself naturally adjusts to accommodate the wide variety of transactions that cover the use of creative content.

As a collecting society PPCA offers the advantages of a one stop shop for licensees, delivering a licence that covers the repertoire of our ever growing range of licensors. This means that our clients, under a single arrangement with one supplier, are able to access a vast array of Australian and international content without contacting each of the relevant rights holders. This significantly reduces their reporting, risk and other administrative burdens, and provides the additional benefit of a licence that seamlessly expands to cover newly released repertoire without any action by the licensee.

The PPCA blanket offerings are additional to any arrangements users may prefer to make directly with rights holders. As PPCA acts on a non exclusive basis (ie taking only a licence, rather than an assignment of the relevant rights) users of recordings remain free to negotiate directly with sound recording rights holders. In this instance the existence of a collecting society actually increases market competition, by providing an additional means by which users can (and do) access the repertoire of our licensors, as PPCA effectively competes with them for market share. Those dealing with PPCA are made well aware of this alternative opportunity as PPCA's letterhead has, for many years, included a statement setting out that information.

Activities of the societies are also constrained by the operations of the Copyright Tribunal, which has the power to confirm, vary or amend licensing arrangements. Consequently the Tribunal is able to set the rates for any licensing schemes, and acts as an independent arbiter in circumstances where the user (or class of users) and the society are unable to agree terms.

The societies also subscribe to the Code of Conduct for Copyright Collecting Societies. Established in 2002, and overseen by an independent Code Reviewer, the Code is designed to ensure that the societies conform to published standards of service, transparency and accessibility. The Code Reviewer has, to date, always been a former Federal Court judge, and the position is currently held by the Hon Dr Kevin Lindgren AM QC and was previously held by the Hon James Burchett, QC. Each year the Code Reviewer reviews the compliance of each society with its Code obligations and publishes a report, which is made available on each

society's website. PPCA takes its obligations under the Code very seriously, and ensures that all staff are aware of the Code, and the obligations it imposes on the operations of the organisation. We also make a general observation that Australian Collecting Societies, unlike our counterparts in the UK, have been subject to such annual compliance review since 2002. This contrasts with the UK where, following the Hargreaves review, the first independent assessment was announced and launched in 2014.

We note the comments from the Copyright Hub Foundation London in its submission¹⁸ in regard to the complexities of educational licensing prior to the UK Hargreaves inquiry. We agree that, wherever possible, licensing solutions should be simplified and note that for almost twenty years now ARIA, APRA AMCOS and PPCA have worked together to provide joint music licensing solutions to the education sector, in order to streamline administration for both the societies and the educational institutions they service.

Collecting societies also play an important educative role themselves. PPCA, like the other societies, provides significant information materials to Australian businesses on copyright, makes available helpful information on its website, supports the Music Matters¹⁹ campaign (managed by MRA), makes staff available to speak at industry conferences and seminars, and supports the work of the Australian Copyright Council and the Arts Law Centre of Australia. All of these initiatives are designed to increase awareness and understanding of copyright, and reinforce the value of the contribution of our creators.

Conclusion

Australia's copyright regime is sophisticated and supports an enormous array of transactions in the recorded music industry, ranging from micropayments for the single use of a sound recording on an advertising supported free-to-consumer streaming service, through to significant sums for the use of popular well known tracks for global brand marketing.

The music industry has traversed a period of disruption and reinvention, as its delivery channels quickly migrated from almost exclusively physical delivery to today's mix of physical, digital download and online subscription access models. Throughout this period of evolution licensing practices have developed to accommodate new ways of connecting consumers with music, and their expectations about price, availability and access to vast catalogues of repertoire. The current copyright regime has been sufficiently flexible and robust to accommodate these changes.

Australians now have unprecedented access to music, and virtually all of the major music services operate here and court the Australian consumer. In fact the Australian market is very often chosen by global digital services as one of the early markets in which to launch (eg. Australia was the second market after the US to launch iTunes Radio and iHeart Radio). In our view this demonstrates the effective operation of the market.

Given the importance of the copyright industries as contributors to the Australian economy (valued by a recent PwC Report at \$111.4 billion²⁰) we counsel against unnecessary wholesale change that may adversely impact this complex ecosystem.

¹⁸ <http://www.pc.gov.au/inquiries/current/intellectual-property/submissions> Submission #6, at page 3

¹⁹ <http://whymusicmatters.com.au/>

²⁰ http://www.copyright.org.au/acc_prod/ACC/News_items/Copyright_Industries_continue_to_be_a_significant_contributor_to_the_Australian_Economy.aspx

That is not to say that copyright law should remain static. There are a number of areas for improvement which PPCA believes should be initiated, and these are outlined in this submission, and that of ARIA. They include the removal of some outdated exceptions and statutory caps, the extension of authorisation liability, and the review of other exceptions to, where applicable, ensure the drafting is technologically neutral.

However wholesale changes, such as a move to an open ended 'fair use' approach are unnecessary and will only increase uncertainty and risk both for those supplying creative content, and those who wish to use it. It is preferable that any potential changes be judged against robust evidence of specific market failure and (if any) appropriate exceptions be crafted consistent with the three step test. In contrast, to introduce an approach completely foreign to Australia's longstanding copyright culture will exponentially increase risk and uncertainty, and potentially adversely impact investment, which will curtail opportunities for innovation and creation (both for creators, and legitimate users of their content).

Whilst recording artists and record labels have embraced the digital market, and generally seek to license their products wherever possible, it is still only fair that they should have the capacity to determine when, where and how their works are made available. It should not be considered 'fair' for a company to develop a service and build a valuable business that relies on the existence of quality creative content, yet seeks to avoid any form of licence or obligation to the owners of that underlying content. Merely appropriating the work of others for commercial or other gain is not 'innovative', but rather a sophisticated 21st century version of free riding.

Finally, we would like to remind the Commission that Australian creators play an important role in safeguarding and developing our national culture and identity, and taking Australian stories to the world. Thus any consideration of copyright cannot be based solely on economics, but also must address the social and cultural dimensions. These invaluable resources, in the context of that broader purpose, must be considered as part of any wider assessment.

PPCA welcomes the opportunity to discuss this further with the Commission and would be pleased to provide additional information in respect of any of the points raised.

Yours sincerely,

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APPENDIX A

There are a number of reasons for PPCA's position on the statutory licence fee caps contained in section 152 of the Copyright Act:

(a) The caps are distortionary

The effect of the caps is that the Australian recording industry and Australian recording artists are providing an annual subsidy to the highly profitable commercial radio sector and the ABC.

Within the commercial radio sector itself, additional distortions occur between various stations and networks. For example, a station which relies heavily on sound recordings is effectively being subsidised in relation to one of its key input costs. However, this subsidy is not applied to the same extent to 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 – which has also been compounded by changes in the digital landscape. A new distortion now exists between operators who provide online streaming services and those who do not.

A market distortion occurs as the statutory caps are not applicable to the fees payable by businesses that communicate a music radio service (incorporating sound recordings) via the internet alone. These services enter into freely negotiated licences for their services at market rates. However, the licence fees covering radio services offered via traditional broadcast means are capped at 1% of revenue or 0.5 cents per person. This creates a market inequity which could disadvantage new entrants seeking to participate in the developing digital economy, and potentially stifles innovation.

(b) The caps are anachronistic

Since the caps were introduced, the commercial radio sector has flourished into a \$1 billion dollar a year industry.²¹ Any "special circumstances" which may have existed over 40 years ago are no longer applicable, especially in relation to the commercial radio sector. There is nothing that justifies the continuation of the caps. In relative size the Australian recorded music market is less than half of the commercial radio market.²² It appears inconceivable that commercial radio does not have the capacity to negotiate with an industry a fraction of its size. The commercial radio sector is expanding its reach by offering its programming via the internet and is in a healthy, profitable financial position.

(c) The caps reduce economic efficiency and lack equity

The Allen Consulting Group²³ in its 1999 review, noted that the caps reduce economic efficiency and lack equity. The analysis identified that the key economic impacts of section 152 of the Copyright Act were:

²¹ Broadcasting financial results 2012 – 2013 Commercial Radio and aggregated licence data dated October 2014 which is published by the ACMA on its website at: <http://www.acma.gov.au/~media/Finance%20Budgets%20and%20Revenue%20Assurance/Report/pdf/Broadcasting%20Financial%20Results%202012-13%20pdf.pdf>

²² See: <http://www.aria.com.au/pages/documents/2014ARIAYearlyStatistics.pdf>

²³ In 1999, 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.

- 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; and
- 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 unnecessary

There is no justification for the caps - especially due to the existence of the Copyright Tribunal. The Copyright Tribunal has the jurisdiction to independently assess fees for such licence schemes.

The Copyright Tribunal is an independent arbiter and it may determine for example, that a fair market rate is in fact less than the limitations imposed by sections 152(8) and 152(11) of the Copyright Act. Alternatively, the Copyright Tribunal could determine that a fair market rate could exceed these limitations – which means that the creators of sound recordings and Australian recording artists are currently subsidising the commercial radio sector and the ABC.

(e) The caps are inflexible and arbitrary

In PPCA's view, there is no characteristic inherent in the broadcast right for sound recordings that supports the figure of 1% of revenue or 0.5 cents per person as constituting equitable remuneration for the use of that right.

The arbitrariness of the caps is that:

- **in respect of the 0.5 cent cap:** no provisions are made for indexation to take account of inflation, so its value has substantially diminished over time. In addition, since the imposition of this cap, the ABC's radio services has vastly increased in terms of the number of services, the reach of these services and the types of programming that are now offered. To put this in perspective, the introduction of the ABC's Triple J, which relies heavily on music, resulted in no increase in licence fees to sound recording copyright holders. Even if we assume that the rate of 0.5 cents per head of population was appropriate in 1968 (which in our view, it clearly was

not), subject to indexation alone, this amount would have increased at least tenfold²⁴ (excluding any consideration of increased usage arising from the additional services offered); and

- **in respect of the 1% cap:** the fact that it applies equally to broadcasters which provide mainly news or talk as well as those commercial broadcasters whose business models predominantly involve broadcasting music highlights the inequity and arbitrary nature of the cap.

(f) The caps are anomalous

The caps are inconsistent with the economic efficiency objectives that underpin Australia's competition policy. Also, a review of the Copyright Act will show that the Copyright Act contains no other example of a statutory cap for copyright material. For example, no caps are in place for the use of musical works, films, photographs or any other copyright protected materials.

Musical works are not constrained by any statutory caps. PPCA only receives a fraction of the radio broadcast revenue paid to APRA for use of the musical work.

The caps are also out of step with legislation in other countries. Copyright law relating to sound recordings 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

Article 12 of the *Rome Convention 1961*²⁵ sets out 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.

Similarly, Article 15(10) of the *WIPO Performances and Phonograms Treaty 1996* provides 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.

²⁴ Estimated using the RBA inflation calculator found at <http://www.rba.gov.au/calculator/annualDecimal.html>

²⁵ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Obligations