

**REVIEW OF ONE PER CENT CAP ON LICENCE
FEES PAID TO COPYRIGHT OWNERS FOR
PLAYING SOUND RECORDINGS ON THE RADIO**

Discussion Paper

1 February 2005

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Introduction

1. The purpose of this paper is to seek your views on whether the one per cent cap on copyright licence fees paid by radio broadcasters for playing sound recordings on the radio should be retained. This cap is imposed by s 152(8) of the *Copyright Act 1968* (the Copyright Act).
2. This review was foreshadowed by the Government in its 2004 election policy *Strengthening Australian Arts*.
3. Broadcasters (radio and television) are required to pay licence fees for broadcasting Australian and some foreign published sound recordings. The rates of licence fees have been agreed in negotiations between broadcast industry associations and the licensing organisation representing copyright owners (the Phonographic Performance Company of Australia (PPCA)). If the parties cannot agree on licence fees, the Copyright Act provides for a statutory broadcast licence that permits broadcasters to play sound recordings without prior permission of the copyright owners. Under the broadcast licence, the broadcaster may broadcast a sound recording without infringing copyright but the broadcaster must pay the copyright owner an amount set by an independent body, the Copyright Tribunal.
4. Within the broadcast licence scheme, s 152(8) prohibits the Copyright Tribunal from ordering a *radio* broadcaster to pay a fee that is more than one per cent of the broadcaster's gross annual income ('the one per cent cap'). The one per cent cap does not apply to commercial television broadcasters. Current licence fees for radio broadcasters have not been set by the Copyright Tribunal (although the Tribunal has previously done so – see paragraph 33 below). Copyright owners argue that the existence of the one per cent cap is inefficient and inequitable in limiting the licence fees that owners can negotiate with radio broadcasters, or could obtain from the Copyright Tribunal, to less than the fair market value. In contrast, commercial radio broadcasters submit that the one per cent cap has a legitimate regulatory role in preventing the potential abuse of the monopoly of copyright owners exercised either directly or through the PPCA.
5. The Government seeks your views on whether the one per cent cap should be repealed or amended.
6. This review does not seek to determine what the rate of royalties paid by radio broadcasters should be. If s 152(8) was repealed, radio broadcasters and copyright owners could negotiate their own licence agreements. If the parties could not agree on an appropriate fee, the Copyright Tribunal would be able to determine the fee without considering the one per cent cap. Removal of the one per cent cap could result in broadcasters paying higher licence fees, but the parties or the Tribunal may not necessarily set a higher licence rate than the one per cent cap.

7. This paper discusses the background to the inclusion of the one per cent cap in the Copyright Act and the main arguments advanced for and against its retention.
8. In discussing these issues, this paper examines the statutory licence scheme in the Copyright Act for the broadcast of published sound recordings, including the regulatory process for determining the amount payable by the broadcaster to the copyright owner where the parties cannot agree on a voluntary licensing arrangement.
9. The one per cent cap does not apply to broadcasts by the Australian Broadcasting Corporation (ABC) or the Special Broadcasting Service Corporation (SBS). For ABC broadcasts, s 152(11) of the Copyright Act provides a special fee cap arrangement. The Government does not intend to make any change to fee capping for the ABC. The Copyright Act does not provide fee capping for SBS broadcasts.

Categories of broadcasting services

10. The *Broadcasting Services Act 1992* (BSA) defines broad categories of radio services:
 - *National Broadcasting Services* - Government funded, independently administered free-to-air radio services operated by the ABC and the SBS.
 - *Commercial Broadcasting Services* – free-to-air radio services of general appeal to the public operated for profit and funded predominantly by advertising revenue.
 - *Subscription Broadcasting Services* - radio services of general appeal to the public available only on payment of subscription fees and funded by subscriptions and limited advertising revenue.
 - *Community Broadcasting Services* - non-profit free-to-air services provided for community purposes, funded by Government grants, limited program sponsorship, and listeners' subscriptions or donations.
 - *Narrowcasting Services* – free-to-air or subscription services whose reception is limited by audience appeal, location, time period, or some other reason. Narrowcast services are not individually licensed but operate under a 'class licence'. These services may be operated for a profit.

Separate copyright in sound recordings

11. The one per cent cap applies only to licence fees paid by radio broadcasters to sound recording copyright owners.
12. Sound recordings are protected by copyright under the Copyright Act. This copyright is separate from and additional to any copyright subsisting in material embodied in the recording. Copyright in a sound recording protects the sounds fixed in that recording. It rewards the creative, financial and

organisational resources necessary to make and distribute recordings to the public.

13. The first owner of the copyright in a sound recording is the ‘maker’ of the recording (s 97(2)). The maker of a sound recording includes the person (often a record company) that made and owned the first record (i.e., the master disc, tape or other device) in which the sounds are embodied. After amendments made to the Copyright Act by the *US Free Trade Agreement Implementation Act 2004* (Cth) the maker of an original sound recording of a performance includes the performer(s).
14. Musical compositions embodied (i.e., recorded) in a sound recording may be protected by separate copyright, the score as a musical work and accompanying lyrics as a literary work. The first owner(s) of the copyright in a composition is usually a composer or a lyricist.
15. The existence of these independent copyrights and copyright owners means that a broadcaster will usually require licences from two sources in order to broadcast a sound recording – one relating to copyright in the sound recording and another relating to copyright in the work(s) recorded.
16. These two licences are administered by different licensing organisations, called collecting societies. The PPCA is the licensing organisation for the broadcast and public performance rights in sound recordings. The broadcasting and public performance rights of composers, lyricists and music publishers are administered by the Australasian Performing Right Association (APRA). There is no similar cap placed on the licence fees paid by broadcasters to APRA.

Nature of copyright in sound recordings

17. Under s 85 of the Copyright Act, the owner of copyright in a sound recording has four basic rights: making a copy of the recording; causing it to be heard in public; communicating it to the public; and entering into a commercial rental agreement with respect to it.
18. The right of communication to the public was adopted in the *Copyright Amendment (Digital Agenda) Act 2000*. It replaced the previous right to control broadcasting. For present purposes, broadcasting is covered by the communication right; all broadcasts are communications to the public. Consequently the owner of copyright in a sound recording has the right under s 85(1)(c) to authorise or prohibit its broadcast.

Nature of copyright in sound recordings

s 85 of the Copyright Act

- (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a sound recording, is the exclusive right to do all or any of the following acts:

- (a) to make a copy of the sound recording;
- (b) to cause the recording to be heard in public;
- (c) to communicate the recording to the public;
- (d) to enter into a commercial rental arrangement in respect of the recording.

History of the broadcast right

19. Copyright in sound recordings was first conferred in the *Copyright Act 1911* (UK) (Copyright Act 1911), which was extended to Australia by the *Copyright Act 1912* (Cth). Before this legislation, there was no copyright of any kind in gramophone records, perforated rolls and similar devices for mechanically reproducing sounds. It was clear that the Copyright Act 1911 gave record manufacturers the right to prevent the reproduction of a record itself. That right was fundamental because the business of record manufacturers was selling copies of their recordings. However, a question remained whether record manufacturers also had the right to authorise or prevent the public performance of the records made by them. Initially record manufacturers did not claim such a right. But in 1933 a performing right was held to exist in England (*Gramophone Co Ltd v Carwardine (Stephen) & Co* [1934] 1 Ch 450). A consequence of this decision was that the owners of copyright in a sound recording might also be able to restrain its performance by broadcasting.
20. Considerable controversy followed about the extent of the rights that should be granted in sound recordings. Broadcasters were opposed to record manufacturers having the right to prevent others from broadcasting their recordings. In the UK, the question was settled when a broadcasting right in sound recordings was expressly adopted in the *Copyright Act 1956* (UK). Some other countries, notably the United States, declined to recognise this right (although the US now recognises a communication right in digital transmissions).
21. In Australia the issue was examined in 1959 by the Copyright Law Review Committee (the Spicer Committee). Submissions by broadcasting interests argued that any existing broadcasting right in sound recordings should be abolished because:
 - the right was not intentionally conferred but was a result of a drafting error in the Copyright Act 1911;
 - the making of records was merely an industrial process similar to printing a book;
 - broadcasting greatly promoted the sales of sound recordings; and
 - 65 per cent of sound recordings released in Australia at the time were manufactured in the United States and it would be anomalous for a manufacturer in that country to enjoy rights in Australia that it did not enjoy in its own country.
22. In support of the right, the record manufacturers pointed to:

- the significant artistic and technical skills as well as financial investment necessary to produce recordings;
 - the much wider use of sound recording in public performances compared to the period when the 1911 Act was drafted;
 - the effect of that widespread dissemination on reducing record sales; and
 - the potential for the value of a sound recording to be impaired by the way it is used by broadcasting stations.¹
23. The arguments by the record manufacturers to the Spicer Committee were successful and the Committee recommended that record manufacturers should be given exclusive rights with respect to the public performance and broadcasting of records, irrespective of where the records originate.
24. At first the Government was inclined to reject the Spicer Committee's recommendation, preferring the position that there should be no performance right at all in a record after it was released in Australia. But the matter was re-considered before legislative action was taken. The Government was persuaded to modify its view by the recent legislative changes in the UK and other countries conferring such a right and the loss of earnings by Australian records in those markets if Australia did not grant a reciprocal right. The Government was also concerned not to deprive record manufacturers of an existing right.

The broadcast licence (ss 109 and 152)

25. A completely revised copyright law for Australia was introduced in the Copyright Bill 1967. This Bill balanced the conflicting interests of record manufacturers and broadcasters in a way different to that recommended by the Spicer Committee. While the Bill included a broadcasting right for sound recordings, it also introduced a statutory broadcast licence which would ensure broadcasters could continue to use protected sound recordings, but subject to an obligation to pay a royalty for that use.
26. The broadcast licence is established under ss 109 and 152 of the Copyright Act. Section 152 permits either a broadcaster or the owner of the copyright in a sound recording to apply to the Copyright Tribunal for an order determining the amount the broadcaster must pay to the owner for broadcasting the latter's sound recordings in a specified period. Section 109 provides that a broadcaster may broadcast a published sound recording if it pays the sound recording copyright owner the amount determined by the Copyright Tribunal. Where there is no applicable Tribunal order, the broadcaster may still broadcast a sound recording so long as the broadcaster gives the copyright owner an undertaking to pay such amounts that may be ordered by the Tribunal under s 152. Importantly, s 109(2) also provides that the broadcast licence does not apply where a broadcaster and copyright owner have agreed to voluntary licensing arrangements.

¹ Commonwealth, Parliamentary Debates, 18 May 1968, H of R, p 2333

27. The Copyright Tribunal is an administrative body that was introduced in the Copyright Act 1968 with jurisdiction to arbitrate disputes concerning certain copyright licences. Its purpose was to counter-balance the monopoly-like power of collecting societies to set fees and other licence conditions for users of music.

Inclusion of a broadcast licence cap (s 152(8))

28. Despite the safeguards introduced in the 1967 Bill, commercial broadcasters and the Australian Broadcasting Commission (ABC) continued to have concerns that the payment of royalties ‘could impose a substantial burden on them’.² To allay these fears, while the Copyright Bill was still before Parliament during 1968, the then Attorney-General introduced government amendments to provide additional protection in the form of upper maximum limits on the amounts that the Copyright Tribunal could award. In moving these amendments, he said that ‘the limits have been fixed in the light of the special circumstances now existing in Australia in relation to the broadcasting of records ...’³ For a radio station, the Tribunal was prohibited from ordering a broadcaster to pay an amount exceeding one per cent of the gross annual earnings of the broadcaster (s 152(8)). Special provision was also made for the annual royalty payable by the ABC, as no more than 0.5 cent per head of population (s 152(11)).
29. The broadcast licence cap applies only to the broadcast right in sound recordings. There is no similar limit placed on the Copyright Tribunal in determining the licence rates that broadcasters must pay to APRA for broadcasting works embodied in a sound recording – only that the amount be ‘equitable remuneration’ to the copyright owner.
30. The continuing sensitivity of broadcast royalties for sound recordings in 1968 may be partly explained by the licensing arrangements at that time. Although record makers had an accepted right to control the broadcasting of Australian and some foreign records under the Copyright Act 1911, commercial broadcasters did not actually pay royalties. Following the *Gramophone v Carwardine* decision in 1933, the record manufacturers and broadcasters reached an agreement under which the commercial stations paid no royalty but gave free time to publicising the records of the manufacturers. Broadcasters disputed the existence of copyright in sound recording first released in the United States. The ABC was prohibited by legislation from joining this agreement and paying royalties.⁴

s 152(8) of the Copyright Act – the one per cent cap

- (8) The Tribunal must not make an order that would require a broadcaster who is:

² Commonwealth, Parliamentary Debates, 16 May 1968, H of R, p 1535

³ Ibid

⁴ Commonwealth, Parliamentary Debates, 18 May 1968, H of R, p 2333

- (a) the holder of a licence allocated by the Australian Broadcasting Authority under the *Broadcasting Services Act 1992* that authorises the holder to broadcast radio programs; or
(b) a person authorised by a class licence determined by that Authority under that Act to broadcast radio programs;

to pay, in respect of the broadcasting of published sound recordings during the period covered by the order, an amount exceeding 1% of the amount determined by the Tribunal to be the gross earnings of the broadcaster during the period equal to the period covered by the order that ended on the last 30 June that occurred before the period covered by the order.

...

(19) For the purposes of this section, the gross earnings of a broadcaster in respect of a period are the gross earnings of the broadcaster during that period in respect of the broadcasting by the broadcaster of advertisements or other matter, including the gross earnings of the broadcaster during that period in respect of the provision by the broadcaster of, or otherwise in respect of, matter broadcast by the broadcaster.

31. The Copyright Act 1968 commenced on 1 May 1969. Shortly before that date, the PPCA was established by the major record companies as their collecting agent and to issue licences for the broadcast and public performance of their sound recordings.
32. A request made by PPCA to the commercial radio stations for royalty payments initiated an open dispute. The broadcasters refused to pay royalties or give an undertaking to pay royalties under the s 109 broadcasting licence. From May to November 1970 commercial radio stations imposed a ban on playing 'protected' sound recordings, i.e., recordings which attracted broadcast licence fees (see para 60 below). During the ban stations played only records without a broadcasting right, particularly United States records, and local records whose manufacturers did not insist on royalties. The ban ended when PPCA agreed to licence the commercial broadcasters in return for advertising credits (three 30-second announcements per week on each station in prime time).

The WEA case

33. In September 1980 the major record companies made applications to the Copyright Tribunal for orders determining the amounts payable by several FM broadcasting stations under s 152 of the Copyright Act. The commencement of commercial FM radio broadcasts created new pressures on voluntary licence arrangements as the record companies considered that commercial FM radio stations were making far greater use of recorded music than the AM stations. In the negotiations, PPCA offered to licence FM broadcasting for an annual fee of one per cent of a station's gross earnings while FM broadcasters insisted on the same free airplay terms provided for in the license agreement with the AM stations. PPCA believed free airplay would not provide adequate compensation for the higher use.

34. During the Copyright Tribunal hearing, the parties requested the Tribunal to determine only the application with respect to station 2MMM.
35. Under s 152(7), the Copyright Tribunal in making an order is required to take into account all relevant factors. There is no requirement in s 152(7) that an amount payable by a broadcaster must be equitable (as specified in other statutory licence schemes). Nevertheless, the Tribunal held that the amount it determined ‘should represent equitable or fair and reasonable remuneration to the copyright owner for the broadcaster’s use of protected recordings’. In the absence of a normal rate of profit or a going rate of royalty, the Tribunal approached the task of determining equitable remuneration as establishing a notional bargain:

The task of the Tribunal is to determine what 2MMM would have paid had it negotiated a licence in 1980, instead of merely giving an undertaking to pay the amount determined by the Tribunal. ... [T]he relevant amount would represent what could have reasonably been charged for a licence in the actual circumstances prevailing, the only assumption being that the parties were willing to negotiate and conclude a bargain.

36. After a lengthy hearing the Copyright Tribunal fixed the amount payable by 2MMM as 0.45 per cent of that station’s gross earnings (*WEA Records v Stereo FM* (1983) 48 ALR 91). A relevant factor for the Tribunal in determining the contribution made by protected recordings to the earning capacity of 2MMM was the proportion of broadcasting time as a whole occupied by the playing of protected recordings less advertisements. This was 48 per cent in 1981 and 50 per cent in 1982. The Tribunal also took into account and balanced a number of competing factors such as the benefits accruing to record companies through the increased sales of recordings as a result of their exposure through airplay weighed against the then popularity of home taping from the radio.
37. The one per cent cap was a consideration in the WEA case. It may be argued that the one per cent cap was a real constraint on the record companies’ case in that it set a maximum amount that they might claim from a radio broadcaster in any circumstances. On the other hand, it is not certain that the Tribunal would have determined that 2MMM should pay a rate any higher than 0.45 per cent if the one per cent cap had not existed.
38. Neither the record companies nor the commercial broadcasters have made any further application under s 152 for the Copyright Tribunal to determine the royalties with respect to broadcasting sound recordings.

Broadcast royalties - commercial broadcasters

39. Following the WEA decision, PPCA and the national industry body representing commercial radio broadcasters (then called the Federation of

Australian Radio Broadcasters (FARB)) negotiated a voluntary licence agreement. It provided for the broadcasters to pay an overall royalty of less than 0.2 per cent of gross revenue of commercial radio stations. This agreement covered both AM and FM stations.

40. The Government understands that subsequently the commercial broadcasting licence has been re-negotiated through consecutive five year agreements with the most recent agreement, which expired in June 2003, providing for an industry broadcast licence fee of 0.4 per cent of gross industry revenue of member radio stations. That most recent agreement has been extended three times by the parties. The latest extension expires on 30 June 2005.
41. In 2002 the name of the national body representing commercial radio broadcasters was changed to Commercial Radio Australia (CRA). There are 274 commercial radio licences on issue in Australia, of which 272 are operational. The owners of 252 of these licences are members of CRA. The remaining licences are generally held by smaller operators, racing radio services and off-band operators of AM services.
42. It appears that CRA apportions the overall royalty obligation payable by commercial broadcasters among its 252 member stations. Details of the agreement between CRA and its member stations are confidential.
43. PPCA has been notified of the licence fee to be paid to it by each station. The total radio industry licence fee paid to PPCA for 2002 was \$2.65 m.

Broadcast royalties - community broadcasters

44. As holders of licences under the *Broadcasting Services Act 1992*, community broadcasters appear to be covered by the one per cent cap.
45. Community broadcasting services are non-profit free-to-air services provided for community purposes, funded by Government grants, limited program sponsorship, and listeners' subscriptions or donations. There are 348 licensed community radio stations in Australia. Over 60 per cent of community radio stations are located in rural, regional and remote areas.
46. The community broadcasting sector is volunteer driven and focused, having over 20,000 volunteer broadcasters and support staff throughout Australia and is run on a non-profit basis. It provides a valuable training ground for careers in the broadcasting industry, with over 8,000 people being trained in broadcast skills each year.
47. The community radio stations include 15 full-time Radio for the Print Handicapped (RPH) stations and 6 full-time ethnic community radio stations.
48. The Community Broadcasting Association of Australia (CBAA) is the member organisation for the community broadcasting sector. Approximately

88 per cent of licensed community broadcasting stations are members of the CBAA.

49. In 2001 the CBAA negotiated a collective licence fee rate with PPCA of 0.4 per cent of annual turnover for all its member stations. The CBAA pays this directly to PPCA and in turn levies member stations.
50. PPCA is currently working with non-CBAA member community stations individually to negotiate an agreed rate.

The licence fees payable by broadcasters have been set by voluntary agreement between PPCA and broadcast industry associations (CRA and CBAA). Fees have not been determined by the Copyright Tribunal under s 152 of the Copyright Act.

Distribution of PPCA revenue

51. PPCA distributes all licence revenues (less operating expenses) annually to its member record companies and registered recording artists. This allocation is based on airplay logs which it purchases from APRA for a fee. The distributed payments are divided between a local distribution pool (local recordings) and an international distribution pool (international recordings). The Government understands that 35-40 per cent of PPCA's annual licence revenue is attributable to Australian content.
52. The distribution of payments by PPCA for the Australian content is undertaken without reference to, and irrespective of, the contractual arrangements between local record companies and artists. Principal Australian artists on Australian sound recordings are entitled to be paid a share of the income collected by PPCA for the broadcast of those recordings irrespective of the terms of their recording agreements, provided that they register with PPCA to obtain direct payment. Where an eligible artist has registered an entitlement, PPCA divides the distribution that relates to a track between the artist (47.5 per cent), the copyright owner (prior to 1 January 2005, usually the recording company) (50 per cent) and the PPCA Performers Trust Foundation (PPCA Trust) (2.5 per cent). Where an artist is not registered, the full amount for distribution (less the 2.5 per cent allocated to the PPCA Trust) is paid to the copyright owner who is responsible for any further distributions in accordance with contractual obligations. The PPCA Trust is a charitable trust established for the purpose of making grants to performers and the allocation of such grants is overseen by representatives of PPCA, the Media Entertainment and Arts Alliance and the Musicians Union of Australia. The distribution of payments to performers following the legislative changes that came into effect on 1 January 2005 has been determined by PPCA, and continues the scheme outlined above.

53. The above figures may indicate that about 35-40 per cent of any increase in broadcast royalties agreed by the parties, or determined by the Copyright Tribunal, could be distributed to local record companies and performers.

Comparison with APRA

54. The amount of royalties collected by PPCA is sometimes compared with APRA revenues, although there are differences in the two schemes. Broadcasters are also one of APRA's main user groups. In 2004 APRA collected \$20.4 m from Australian commercial radio broadcasters compared to the approximately \$2.75 m collected by PPCA in 2004.
55. In the view of PPCA, the higher revenues of APRA are due in part to the higher APRA licence rates that have been set by the Copyright Tribunal without the constraint of a statutory cap. The licence scheme determined by the Copyright Tribunal for the broadcast of musical works requires commercial broadcasters to pay APRA according to a sliding scale based on the percentage of airtime occupied by musical works. The scale of monthly fees contains a discounted percentage fee ranging from 0.5 to 3.5 per cent of gross earning for that month, with the highest rate applying where the music percentage is greater than 80 per cent of airtime (*Australasian Performing Right Association v Federation of Australian Radio Broadcasters Ltd* [1999] ACopyT 4 (17 September 1999)).
56. However, there may other considerations that explain the different rates of royalties determined by the Copyright Tribunal. Obvious factors are the changes in economic circumstances and broadcast communications between 1983 and 1999 when the Tribunal decisions were made.
57. There are two further important considerations. The first is that the two rates apply to different copyright subject matter. Secondly, APRA has a right to be paid licence fees with respect to the broadcast of almost all the world's published musical works that remain protected by copyright while PPCA is not entitled to be paid for the broadcast of United States sound recordings (see para 60 below). Sound recordings from the United States make up a significant proportion of the music played on Australian radio.

Comparison with other countries

58. PPCA argues that the broadcast licence fees currently paid by commercial radio broadcasters in Australia are significantly lower than the market rate in comparable countries. PPCA links this outcome to the absence of a comparable fee cap in those countries.
59. However, even in respect of these examples, the special circumstances that apply in individual countries that would affect the licence fees paid. These would require careful and detailed examination.

Protection of foreign sound recordings

60. Broadcasters do not pay licence fees to PPCA for the broadcast of foreign sound recordings originating from countries that do not recognise a broadcasting right for sound recordings in their domestic law.
61. Australian copyright law recognises public performance and broadcasting rights in foreign sound recordings according to the principle of reciprocity. As a consequence, Australia does not protect a broadcast right in sound recordings originating from countries where Australian records do not have a broadcast right.
62. Under s 89 copyright subsists in a sound recording that is made by an Australian citizen, an Australian resident or an Australian corporation, or which is made in Australia or which has been first published in Australia. This protection is extended by reg 4(1) of the *Copyright (International Protection) Regulations 1969* to sound recordings made by nationals, residents or corporations of, or made or first published in, countries that are parties to the Berne Convention, the Universal Copyright Convention, the Rome Convention or the WIPO Performances and Phonograms Treaty or members of the World Trade Organisation. The protection of foreign sound recordings is limited by regs 6 and 7. In general, the overall effect is that where a recording is published in Australia, or a period of seven weeks has elapsed from the date of first publication elsewhere, the protection conferred by reg 4(1) does not include the exclusive right to broadcast the recording (or cause it to be heard in public) unless:
 - a. the maker of the recording was, at the time when the recording was made, a citizen, or national of, or resident or body corporate incorporated in, a country specified in Schedule 3; or
 - b. the recording was made in a Schedule 3 country.
63. The countries listed in Schedule 3 are those that provide for public performance and broadcasting rights in copyright for sound recordings. The most important effect of the above provisions is in relation to recordings from the United States which does not protect secondary uses of sound recordings, except for certain communications by means of on-demand services and digital radio transmission. As a result there is no broadcasting right in Australia for United States sound recordings. Such recordings do enjoy a temporary Australian broadcasting right until publication in Australia or seven weeks after first publication elsewhere. Thereafter, sound recordings from the United States may be broadcast in Australia without infringing copyright.
64. This may affect the level of royalties paid by broadcasters to PPCA. Some estimates are that United States sound recordings make up about 50 per cent of the music played on Australian radio.

International conventions relating to sound recordings

65. International treaties play an important role in developing uniform standards of copyright protection. However, agreement on standards with respect to sound recordings has been hindered by continuing divisions between countries as to whether royalties should have to be paid for ‘secondary uses’ of sound recordings, including broadcasting.
66. Australia is currently a party to three multilateral treaties dealing with the protection of sound recordings: the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the ‘Rome Convention’), the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (the ‘Geneva Convention’) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The Geneva Convention and TRIPS Agreement are not relevant to this paper.
67. The Rome Convention was adopted in 1961 and Australia became a signatory in 1992. Under this Convention, the only exclusive right that must be given to record producers is to control the direct or indirect reproduction of their recordings (Art 10). There is no requirement to confer a broadcasting right. The Rome Convention at Art 12 provides for a single equitable remuneration to be paid to the performers and/or producers where a sound recording is used for broadcasting or for any communication to the public. However, a contracting state may enter a partial or total reservation with respect to Art 12 (Art 16). Australia in fact has made a declaration under Art 16 that it will not apply Art 12 in its entirety. This reservation allows Australia to maintain the one per cent cap at s 152(8) – so far as it may provide for less than equitable remuneration for the broadcasting of sound recordings.
68. In bilateral trade agreements with Singapore and the United States, the Australian Government has given commitments to accede to the WIPO Performances and Phonograms Treaty (WPPT). This treaty, which entered into force in 2002, updates protection for record producers in the Rome Convention. The WPPT gives more extensive protection to sound recordings. In particular, Art 14 of the WPPT gives record producers the exclusive right to control making their recordings available online to the public in on-demand services.
69. The WPPT further provides in Art 15(1) that both performers and record producers shall have the right to a single equitable remuneration for the direct or indirect use of recordings published for commercial purposes for broadcasting or for any communication to the public. This right is expanded by Art 15(4) which deems that recordings that have been made available online to the public via on-demand services to have been published for commercial purposes.
70. As with Art 12 of the Rome Convention, it is possible to enter a partial or total reservation to Art 15(1) of the WPPT. An ‘agreed statement’ concerning Art 15 adopted at the Diplomatic Conference in December 1996 indicated that

delegates had been unable to resolve differing proposals in relation to the level of rights that should be enjoyed by record producers and performers in the digital environment and the issue had been left to future resolution. Reflecting the lack of consensus on a minimum level of rights, Art 15 of the WPPT is in much the same form as Art 12 of the Rome Convention. In effect, the right to equitable remuneration conferred by the WPPT remains a matter to be determined in national legislation.

71. Protection of sound recordings is also covered in extensive provisions of the bilateral Australia-United States Free Trade Agreement (AUSFTA). Although the national treatment requirements of the AUSFTA are very comprehensive, Australia is not required, because of the limits of protection under United States law, to extend to United States recordings the benefits of Australian legislation providing for rights for broadcasting of sound recordings.

Previous reviews of the legislative cap

72. In 1995 Mr Shane Simpson was commissioned by the former Government to report on the structure and operation of Australia's collecting societies (*Review of Australian Collecting Societies*). Mr Simpson considered that the broadcast fees collected at that time by PPCA were artificially low and unfair to copyright owners. He noted that the fees were much lower than UK broadcasters paid to PPCA's equivalent (being between 2 and 5 per cent of turnover). Mr Simpson attributed this situation to the one per cent cap. He believed that broadcasters were in no need of the protection offered by the cap and were sufficiently able to negotiate market rates without any need for government intervention in the process. As result, Mr Simpson recommended that the ceiling on broadcast fees in s 152 be removed.
73. The broadcast fee cap was also examined in 2000 by the Intellectual Property and Competition Review Committee (IPCRC), chaired by Mr Henry Ergas, which was established to inquire into the interaction between competition policy and intellectual property law.
74. The IPCRC noted concerns that the one per cent cap created distortions and market inefficiencies. While price caps can advance market efficiencies by correcting market error, the presence of a market failure justifying the existing price cap was challenged. The IPCRC accepted that the one per cent cap had been implemented to ease the licence burden imposed on the radio broadcasting industry, but considered that, since the time of introduction, the economic circumstances of the commercial radio stations had evolved. The IPCRC believed that the cap was no longer warranted.
75. The IPCRC further considered that the cap was an unnecessary impediment to the markets operating on a commercial basis and could distort competition (e.g., between commercial radio and diffusion over the Internet), resource use, and income distribution. The IPCRC recommended that s 152(8) be amended to remove the cap.

76. The Government Response to the IPCRC Report indicated that the Government was not persuaded of the need to disrupt existing licensing arrangements at that time.
77. The IPCRC further recommended that no change be made to the fee cap for the ABC under s 152(11) of the Copyright Act. The Government accepted that no change should be made to s 152(11).

Issue: *Should the one per cent cap be repealed?*

Record industry (copyright owner) position

78. The PPCA is the collecting society that licenses the broadcasting right in sound recordings on behalf of copyright owners.
79. The PPCA has made representations to Government over a number of years proposing that the legislative cap should be removed, so as to enable the Copyright Tribunal to make an unfettered market determination of the fee broadcasters should pay.
80. PPCA's case for removing the one per cent cap is that:
 - The cap is causing significant economic loss for the copyright owners of sound recordings. The current licence fee negotiated under the cap (0.4 per cent) is much lower than the fees paid in comparable countries, which PPCA claims fall in the range of 1.5 to 4 per cent.
 - Because of the existence of the cap, radio stations are only paying between close to 0 per cent (talk stations) to near one per cent of revenues (music stations) which averages out at 0.4 per cent of revenues. As such, for as long as the one per cent cap remains in place, an industry rate significantly above 0.4 per cent is unlikely to be achieved.
 - Commercial radio broadcasters do not need special protection. The Australian commercial sector is generally operating profitably, particularly FM stations.
 - Removing the cap would bring the treatment of licence fees in line with all other copyrights that fall within the jurisdiction of the Copyright Tribunal and would also be consistent with international practice.
 - Repeal has been recommended in independent reports to Government.

Commercial broadcaster (user) position

81. The CRA is the national industry body representing commercial radio broadcasters.
82. The CRA has made representations to Government that the legislative cap at s 152(8) should be retained.
83. CRA's case for retaining the one per cent cap is that:

- The cap balances the monopoly position of PPCA and provides certainty for commercial and community broadcasters.
- The one per cent cap has a regulatory role similar to that of price caps imposed by regulators in other industries such as electricity, gas and telecommunications – which are used to curb the potential abuse of monopoly power while ensuring the supply of services to consumers at reasonable and cost reflective prices.
- In the bargaining process between PPCA and CRA, the one per cent cap together with the ability of either party to apply to the Copyright Tribunal creates the ‘fall back’ positions or ‘outside options’ for the negotiating parties. Both parties know that there are limits on the bargaining outcome. By allowing bargaining within a fixed range of prices with outside determination when bargaining breaks down, the copyright regime is similar to the ‘negotiate-and-arbitrate’ access regimes implemented under Part IIIA of the *Trade Practices Act 1974*. In this sense, the one per cent cap can be seen as part of a regulatory framework that makes bargaining fair and efficient.
- There is no need to remove the cap while the parties have in place a voluntary licence scheme that sets fees across all stations at 0.4 per cent i.e., well below the cap.
- Protection is still needed by broadcasters. The commercial sector has experienced a major decline in profitability. The cap is particularly needed to protect regional broadcasters affected by volatile competition for advertising revenues.
- The one per cent cap is a trade-off for the mandatory minimum Australian program content requirements imposed on radio stations under Code 4 of the *Commercial Radio Codes of Practice*. Code 4 requires all commercial radio stations to broadcast minimum quotas of Australia sound recordings (in some cases up to 25 per cent). These quotas, by limiting the unprotected content commercial radio stations may choose to broadcast, provide guaranteed revenue for PPCA from the commercial radio sector.
- The Government in September 2001 reviewed the one per cent cap and decided in its response to the IPCRC report not to repeal the fee cap ‘at this stage’. The Government’s decision noted that the cap reassures rural and regional commercial radio broadcasters that significant increases in fees will not impinge on their viability.

Your views are sought on the following issue:

Should the one per cent cap at s 152(8) of the Copyright Act be repealed or amended?

Any of the following issues could also be addressed

1. The economic and other circumstances of the commercial radio industry and any factors the Government should consider in deciding whether to retain the current protection for the radio industry (or any part of the industry, such as commercial broadcasters, community broadcasters or narrowcasters).
2. The effects of the one per cent cap (and its removal) for:
 - (a) copyright owners;
 - (b) broadcasters;
 - (c) Australian performers;
 - (d) radio listeners; and
 - (e) the general community.
3. The implications of the one per cent cap for competition, resource use and income distribution.
4. How the removal of the one per cent cap would affect different sectors of the radio broadcasting industry.
5. The role of the Copyright Tribunal and how it should decide a fair rate under s 152 if the cap were removed.
6. The implications of the one per cent cap for Australia's obligations under international copyright treaties, including accession to the WPPT.
7. How the removal of the one per cent cap could be implemented.

Submissions

Submissions are invited from interested parties on the matters covered in this paper. Submissions are also invited to address any other relevant issues not specifically addressed in the paper.

Submissions should be made by **18 March 2005** and should be addressed to:

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

It would be appreciated if submissions could be provided electronically. Submissions should be emailed to michelle.tippett@ag.gov.au. Questions concerning this review may be directed to Norman Bowman by email at norman.bowman@ag.gov.au or by telephone 02 6250 6324, or facsimile 02 6250 5929.

Submissions may be made public on the Attorney-General's website unless otherwise specified. Persons providing a submission should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.