



AUSTRALIAN ASSOCIATION OF INDEPENDENT REGIONAL RADIO BROADCASTERS

**Submission regarding the
one per cent cap on licence fees payable
to copyright owners
for the broadcasting of sound recordings**

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Executive Summary

- (i) The 1% cap should be retained. The original reasons for its existence are still valid.
- (ii) Serious undesirable consequences could result from the removal of the cap.
- (iii) Arguments in favor of removing the cap include major errors of fact and assertions which have no foundation.
- (iv) So-called “independent” reports which have advocated removal of the cap are grossly flawed in that their authors accepted without question the unsubstantiated assertions of record companies and received no input from broadcasters on the facts or the issues involved.
- (v) Removal of the cap could adversely affect:
 - Australian performers
 - Australian recordings
 - Community broadcasters
 - Narrowcasters
 - The Australian Broadcasting Corporation
 - The Special Broadcasting Service
 - Commercial broadcasters
- (vi) Flow-on effects could lead to demands for:
 - Removal of Australian content quotas
 - Additional funding for community broadcasters and the ABC

Introduction

1. This submission is made on behalf of the Australian Association of Independent Regional Radio Broadcasters (IRB), an unincorporated association of licensees of 68 commercial radio stations operating in 38 regional markets located in every Australian state, the Australian Capital Territory and the Northern Territory. All IRB members are also members of Commercial Radio Australia (CRA).
2. The distinguishing characteristic of IRB members is that the management in each market served has both the responsibility and the authority to ensure that local needs are served as effectively as possible. Programming decisions are made locally and are not dictated by networking or other considerations. IRB members' capacity to maintain these criteria is inextricably linked to their commercial viability.
3. The regional population served by IRB members exceeds 3.6-million.
4. The author of the submission was the President of the Federation of Australian Radio Broadcasters (FARB) and a member of FARB's Copyright Committee in 1967-68 and was closely involved in negotiations with the government during that time on aspects of the proposed copyright legislation, including S. 152 (8) (the 1 per cent cap).
5. The submission demonstrates that there have been and still are a number of misconceptions concerning the 1 per cent cap and that the reasons for its existence are as valid today as they were in 1968. The submission also outlines some of the undesirable consequences which could flow from a decision to remove the cap.

Background

6. While the discussion paper is correct as far as it goes, it understandably lacks some of the background to the circumstances which led to the creation of S.152(8) and which are still relevant.
7. One such circumstance was a dispute between a number of record companies, led by EMI Australia, and the commercial radio industry in 1956. Demands for payment for the right to broadcast sound recordings were regarded by the broadcasters as unreasonable, having regard to the importance of air play in promoting record sales. The broadcasters imposed a ban on the broadcast of protected recordings (ie, sound recordings in which the broadcast right subsisted)

and broadcast only unprotected recordings from the United States and some other countries, and some Australian recordings the copyright owners of which did not claim royalties.

8. The dispute ended when EMI capitulated, and an agreement was negotiated under which the broadcasters paid no money, but provided 15 minutes of time each week for the promotion of protected recordings.

9. The 1956 dispute established firmly in the minds of commercial radio operators both the importance to the record companies of air-play and the importance to the broadcasters of having an alternative source of recordings in the event either that protected recordings would not be available or that the cost of royalties for broadcasting them would be too great. (These convictions were to be amply confirmed in a second major dispute in 1970, which is mentioned in the discussion paper).

10. While the United States was the most significant source of unprotected recordings, broadcasters in both the US and Australia were acutely aware that this state of affairs might not go on indefinitely. It was well known at the time that there was continued lobbying and agitation by American record companies and performers for changes to the US copyright law which would vest a broadcasting right in sound recordings.

11. As the discussion paper states, the Australian government's initial inclination, when considering the revision of Australia's copyright law, was that there should be no performance right in a sound recording after its publication in Australia. This decision was announced by the Attorney-General at the time, Mr Billy Snedden.

12. However, the Parliament was dissolved before this decision could be put into effect. Following the election of a new Parliament Mr Nigel Bowen was appointed Attorney-General. Mr Bowen persuaded his colleagues to reverse the policy of his predecessor.

13. The history of these events is important because they help to show that the right bestowed on the record companies was never intended to create a significant stream of revenue to the record companies from national and commercial broadcasters. The 1956 dispute had clearly demonstrated that, whether the right existed or not, the broadcasters in the circumstances which existed at that time held

a strong advantage while there was an adequate source of unprotected recordings¹. Furthermore, as the discussion paper makes clear, the government's change of heart was dictated to some degree by concerns over loss of earnings by Australian recordings in overseas markets (under the "national treatment" principle).

14. By the same token, the broadcasters were not unduly concerned by the government's decision in the then current circumstances. For all practical purposes they were in much the same position as they had been under the then existing legislation (Copyright Act 1956). On the other hand, they were deeply concerned by the possibility that they could be denied an alternative source of unprotected recordings. If this were to occur, their position would be drastically weakened.

15. There were two sets of circumstances in which this could happen. The first was that recordings first published in the United States (and some other countries) could gain protection by virtue of so-called simultaneous publication.² Second was the possibility that US copyright law could be amended to grant the broadcasting right.

16. In such circumstances the equilibrium established between the broadcasters and the record companies, through dispute followed by mutual agreement and without government intervention, would be irretrievably destroyed.

17. In addition, there was the unknown – the possibility of unforeseen circumstances which could tilt the balance in favour of the record companies.

18. These possibilities formed the basis of FARB's representations to the Attorney-General.

19. In respect of the first, FARB persuaded the Minister that the Australian legislation should adopt the principle of "first making" rather than the more common principle of "first publication" which applied in the United Kingdom and in the copyright legislation of a number of other countries. This ensured that recordings first made in the US could not fall under protection through simultaneous publication.

20. As to the second and third, it is a matter of record that the Minister agreed to the 1% cap.

¹ This strong advantage is not relevant today because of mandatory Australian music quotas and the inability of broadcasters to act collectively.

² UK Copyright, Designs and Patents Act 1988, S. 155

21. The history of these events and of the 1970 dispute which followed the enactment of the Copyright Act 1968 were recounted to FARB's annual convention in 1970 by the then chairman of FARB's Copyright Committee, Mr Allan Faulkner³:

“After many conferences and discussions with the Leader of the Country Party Mr McEwen, Mr Anthony, Mr Sinclair and the Attorney-General, Mr Nigel Bowen, we were able to achieve two major compromises, namely a ceiling which might be extracted and an exclusion of records originally made in a country which does not give this right to record manufacturers. Without these concessions, the radio industry today would have had no alternative but to pay tremendous amounts of money to record manufacturers based no doubt on precedents created in countries where they are collecting such royalties...”

“It might be appropriate to mention at this stage that in a discussion with Mr Bowen, when we promoted the argument that record companies benefited greatly from the exposure of their product on radio and accordingly we should not be obliged to pay a royalty for what amounted to advertising for them, his reply was in terms like this: ‘It seems to me like you have the ball in your own court and I don’t know what you’re worried about’, indicating of course that if we were sincere in this argument then the record companies could not allow a situation in which their records were not played.”

22. It is impossible to escape the implications of Mr Faulkner's report and of the quotation attributed to the Minister. It shows unequivocally that the primary concern was to protect broadcasters from possible future events, including a change in US copyright legislation. Mr Bowen's statement indicated acceptance of the fact that, in the then current circumstances, if air play was of real importance to the record companies, and the broadcasters were prepared to boycott protected recordings, the record companies would fare no better under the new legislation than they had under the old.

23. Initially, the Minister proposed that the cap be prescribed under Regulations, which in ordinary circumstances would be the usual approach if the cap were seen as a flexible provision subject to occasional revision. FARB's representatives opposed this. They argued that the cap was there for the long term, and that it

³ FARB Convention Minutes – 1970 – Appendix 4

should be enshrined in the Act rather than Regulations because of the relative ease with which Regulations could be amended or repealed. The Minister agreed to this course and so S. 152 (8) passed into law.

24. As the discussion paper correctly reports, the equilibrium between the broadcasters and the record companies was again tested in 1970, without recourse by either party to the Copyright Tribunal, and with a broadly similar outcome to that following the 1956 dispute. Mr Faulkner's account of this dispute relates how the record companies gave notice of cancellation of their agreement with the broadcasters and indicated they "would not consider any other substitute for cash, based on a percentage of station revenue".

25. The report states:

"A further meeting with the record companies did not change the situation materially except that (they) indicated that they may be prepared to consider a figure very much lower than the maximum amount provided for in the Act, namely 0.5%. The manufacturers promoted the fact that the ABC was paying about 60% of the maximum provided under the Copyright Act"

26. FARB offered a counter proposal whereby the record companies would receive advertising credits to use as they wished (instead of the old quarter hour weekly program) but this was rejected.

27. While the detail of the dispute is not relevant here the outcome surely is; after a period of a few months during which the broadcasters refrained from broadcasting protected recordings, the record companies reconsidered their position and accepted FARB's counter-offer.

28. It is important to note that up to and including 1970 all negotiations and agreements between the record companies, represented by the Phonographic Performance Company of Australia (PPCA) and the broadcasters (represented by FARB) had occurred on an industry-to-industry basis, and that in both cases the members of the two industry bodies were acting collectively. However, since 1971, and to the extent that the members concerned are in competition with one another, such behaviour has been subject to trade practices legislation. In fact, PPCA has an authorisation under Trade Practices Act 1974 allowing its members to act collectively in the matter of broadcasting royalties. This fact, coupled with

the greatly increased concentration of major global record companies⁴, means that PPCA's monopoly is much stronger today than it was in 1968.

The WEA case

29. In considering the WEA case and its implications, it is important to note that the determination of the Copyright Tribunal applies to only one broadcaster, based on the circumstances of that broadcaster's use of protected recordings at a particular time. Should any of those circumstances change, it would be open to PPCA (or one of its members) or to the broadcaster (2MMM) to attempt to negotiate different terms and, if negotiation failed, to seek a new order from the Tribunal.

30. It is abundantly clear that the amounts likely to be payable by individual broadcasters vary greatly, depending on their styles of programming. For example, news and talk stations would pay very little indeed compared with stations such as 2MMM.

Arguments for repeal of the 1% cap

31. The discussion paper cites three primary sources of arguments for the removal of the 1 per cent cap, namely:

- (i) The arguments attributed to PPCA at paragraph 80 of the discussion paper.
- (ii) The report of the Intellectual Property and Competition Review Committee (IPCRC) in 2000.
- (iii) The report by Mr Shane Simpson (*Review of Australian Collecting Societies*) in 1995.

32. Each of these calls for scrutiny and response.

PPCA's arguments

33. *"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)*

⁴ There are now only four – Sony/BMG, Universal, Warner and EMI.

is much lower than the fees paid in comparable countries, which PPCA claims fall in the range of 1.5 to 4 per cent.”

IRB response:

34. There is no evidence that the cap is responsible for the current licence fee. As the discussion paper rightly states at paragraph 37: “It is not clear 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”.

35. The reference to “comparable countries” is specious. Copyright law in so-called comparable countries such as the United Kingdom adopts the criterion of first publication (not first making, as in Australia) and protects recordings published in other countries through so-called “simultaneous publication”. For practical purposes almost all records most suitable for broadcasting are protected, including those made in the US, under the principle of simultaneous publication.

36. The comparison of the current licence fee with what is paid overseas is therefore ambiguous and misleading. The current licence fee in Australia is a negotiated, all-industry figure which embraces talk stations as well as music stations. It can bear no relationship to what is paid in other countries, which may have a significantly different “mix” of talk and music stations, and do not have alternative sources of unprotected recordings.

37. *“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.”*

IRB response:

38. We reiterate there is no evidence that the existence of the cap is responsible for this situation. What individual stations pay is irrelevant because PPCA and CRA have agreed for many years on an industry rate.

39. *“Commercial radio broadcasters do not need special protection. The Australian commercial sector is generally operating profitably, particularly FM stations.”*

IRB response:

40. These assertions are incorrect. They fail on a number of counts. First, there is no evidence that the broadcasters are receiving special protection. Second, the assertion regarding profitability is a generalisation which does not apply across the commercial radio industry, nor to FM stations. Third, the profitability of commercial radio stations and especially regional radio stations is notoriously volatile and subject to outside influences (such as drought or recession) as the following table shows:

Year	Total no. of regional stations	No. of regional stations in loss	Percentage of stations In loss
1998-99	187	59	32.8
1999-00	201	41	24.5
2000-01	205	52	19.0
2001-02	205	75	30.9
2002-03	210	54	25.7

Source: Australian Broadcasting Authority – Broadcasting Financial Results

41. It is interesting to note by comparison that in 1967-68 only 9 of the then 114 commercial radio stations operated at a loss, representing a mere 7.9%.⁵ This underlines the fact that the industry's concerns at the time were not concerned with the present, but with an unpredictable future. The current situation, where 26.7% of all commercial stations are operating at a loss, provides stronger evidence that the cap needs to remain.

42. Fourth, the cap continues to serve its original and important purposes of providing certainty and of anticipating the possibility that the United States may decide to grant a broadcasting right in sound recordings. Such a possibility cannot be ruled out. Since 1968 a number of other countries have changed their copyright laws to grant a broadcast performance right in sound recordings, and in the United States recording company interests continue to lobby for a similar change. No doubt one of their arguments is the same as that which influenced the Australian government in 1968, that the conferring of such a right would give access to royalties from other countries.

⁵ Australian Broadcasting Control Board – Annual Report 1967-68

43. *“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.”*

IRB response

44. Consistency is a dubious argument for removing the cap, having regard to the special circumstances which gave rise to it and to the fact that sound recordings are subject to a statutory right,⁶ which in itself is inconsistent with other forms of copyright.

45. *“Repeal has been recommended in independent reports to Government.”*

IRB response

46. The independent reports referred to are the *Review of Intellectual Property legislation under the Competition Principles Agreement* (the IPCRC Report) and the *Review of Australian Collecting Societies* (the Simpson Report). Each of these reports is analysed hereunder.

The IPCRC Report

47. In respect of the 1% cap, the value of the IPCRC report is seriously diminished for two important reasons.

48. First, the IPCRC was focussed almost exclusively on competition principles, whereas the issue with which PPCA is concerned is primarily, and understandably, what it perceives as an issue of equitable and fair remuneration. The conflict between these two objectives is glaringly obvious in the IPCRC’s attempt to justify retaining the cap which applies to the Australian Broadcasting Corporation (ABC) while recommending removal of the cap for commercial broadcasters.

49. Secondly, the report is deficient in that the Committee had no relevant input from the broadcasters. For some unaccountable reason, FARB failed to make a

⁶ Described in the Simpson Report as “denying the control which the individual rights owner may otherwise have had” (Chapter 31)

submission to the inquiry,⁷ and failed to respond to the Committee's indication, in its interim report, that it favoured removal of the cap.⁸

50. As a result of this extraordinary lapse on the part of the broadcasters' industry body, the Committee was denied all of the background which is critical to a proper understanding of the issues. It also accepted the findings of a self-serving report, *The Regulation of Copyright Fees for Broadcasters' Use of Sound Recordings* (the Allen Report) which had been commissioned by PPCA and which came to the completely erroneous conclusion that the cap had been introduced on the basis that it was a form of subsidy to broadcasters or to protect broadcasters from an unbudgeted expense.

51. While the Committee cannot be condemned for accepting information which was unchallenged by the broadcasters at that time, such information is now under serious challenge. A critique of the Allen report by Charles River Associates (Asia Pacific) Pty Ltd, commissioned by CRA, asserts that market distortions and inefficiencies attributed to the price cap in the Allen Report are "all without any sound economic function"⁹. We understand CRA is including a copy of this critique with its submission.

52. The stated objective of the IPCRC recommendation to remove the 1% cap was "to achieve competitive neutrality and to remove impediments to the functioning of markets on a commercial basis".

53. What is extraordinary about this statement is not only that it is based on a questionable assumption (it assumes the Copyright Tribunal would have set a higher rate in the WEA case but for the cap) but that it fails to recognise that, with or without the cap, the market in this case is not competitively neutral, being grossly distorted because of far more serious impediments which are attributable to legislative and regulatory intervention.

54. The most notable of these are:

- (i) the statutory right in the Copyright Act to permit the broadcasting of recordings (subject to giving an undertaking),
- (ii) compulsory quotas for the broadcasting of Australian recordings,

⁷ IPCRC Report – September 2000. Appendix 4 (a)

⁸ Ibid – Appendix 4(b). FARB did make a submission in response to the Interim Report (Submission No. 24), but the submission made no reference to the 1% cap.

⁹ "The Economics of Collecting Societies and Regulation of Copyright Fees: A critique of the Allen Report. November 2003. Quote from Executive Summary (p. 1)

- (iii) the authorisation under the Trade Practices Act which allows PPCA's members to act collectively, and
- (iv) a massive difference between the caps which apply to commercial broadcasters and to the ABC.

55. The IPCRC recommendation not to remove the cap which applies to the ABC is based on "considerations of competitive neutrality", not on whether it is fair to the owners of copyright in sound recordings. This highlights the real shortcoming of the IPCRC report for the purposes of the debate on the 1 per cent cap. The IPCRC is narrowly focussed on competition principles, whereas the government's review is about practical considerations and equity.

The Simpson report

56. The Simpson report shares some of the more egregious features of the IPCRC report. It is clear from a reading of it that there was no serious investigation of the origins or the effects of the 1% cap. The report merely repeats the mantra of the PPCA. Also, as in the case of the IPCRC report, it is clear that FARB's contribution was minimal or non-existent on the 1% cap issue. The report shows that FARB made no written submission, but there was a "telephone conversation."¹⁰

57. As a side issue, it is interesting to note that Simpson, who had a different brief from that provided to the IPCRC, recommended also that the cap on the ABC should be repealed.

58. From the above it is apparent that, partly due to FARB's manifest failures to address the issue on three important occasions, PPCA's much reiterated and questionable claims about the reasons for and the effects of the cap were uncritically accepted by the two inquiries which purported to examine it.

Consequences of repeal of the 1% cap

59. It is self-evident that any action which is likely to add to the costs of business will provoke reactions calculated to avoid or minimise those additional costs. The commercial broadcasting industry in general, and IRB members in particular, are no different from other businesses in that regard.

¹⁰ Chapter 33.

60. Removal of the 1% cap is likely to lead to an increase in broadcasters' costs and it can be reasonably inferred that the intensity of their reaction will be dictated by the amount of the increase.

61. Having said that, it is appropriate to examine the current environment in which PPCA and commercial broadcasters operate, arrangements which are in place, and other important factors. They include:

62. *The broadcasters do not differentiate between protected and unprotected recordings, because there is no incentive to do so.*

63. The first and most obvious response to any unacceptable increase in royalties would be to reduce the use of protected recordings to the maximum extent possible. In highly competitive metropolitan radio markets some individual broadcasters, notably contemporary music stations, might find it difficult to impose a total ban on protected recordings, but significant reductions would still be achievable. In the majority of regional radio markets stations would find it much easier to impose total bans.

64. *The broadcasters do not discriminate against Australian recordings or Australian performers.*

65. In fact, they exceed the quota requirements of their Code of Practice for the Broadcast of Australian Music. Although these quota requirements range from 5% to 25% (depending on the type of music involved) the discussion paper states that the Government understands 35-40 per cent of PPCA's annual licence revenue is attributable to Australian content. This estimate is supported by reports provided by CRA to the Australian Music Performance Committee (AMPCOM) under the commercial broadcasters' Code of Practice for Australian Music.

66. One of the most regrettable consequences of Government action to "move the goalposts", possibly leading to an unacceptable increase in royalties, would be erosion of the goodwill which is characteristic of the current relationships between broadcasters, record companies and performers. Unacceptable increases in costs as a result of the removal of the cap would destroy the present climate in which broadcasters cheerfully exceed the Australian content quota. They would not only ensure that they did not exceed the quota while it continued to exist, but they would also campaign as strongly as possible for its removal altogether, on the grounds that it would be immoral, hypocritical and inconsistent with competition principles to impose a quota on broadcasters and at the same time insist that they must pay fees for complying with it.

67. *The broadcasters do not require to be informed by the record companies whether particular recordings are or are not protected.*

68. In committing themselves to minimising their use of protected recordings, however, it would be important to establish beyond doubt the copyright status of individual recordings. Broadcasters would argue that it should be obligatory for the record companies to disclose this information.

69. *The broadcasters accept the differentiation between the cap applying to them and the cap applying to the ABC.*

70. In the current circumstances and as the Act stands commercial broadcasters have been prepared to ignore the fact that the ABC is liable only for a maximum of about \$100,000 in fees compared with approximately \$7.2-million for the commercial radio sector.

71. However they would react very strongly to having to face unacceptable increases in royalties while the ABC cap was retained.

72. In recommending that the ABC cap be retained (in contrast to the Simpson Report) the IPCRC took a narrow view based on “considerations of competitive neutrality”. It did not address the fact that the ABC competes with commercial radio stations for audience and that this impacts on the commercial stations’ financial results.

73. If commercial stations are obliged to reduce their usage of protected recordings because of the cost of doing so, it would be manifestly unjust to treat the ABC differently so that it is freed from such constraints and given a special programming advantage.

77. *The fees payable by individual broadcasters and the royalties delivered to PPCA for distribution to its members are achieved through voluntary arrangements.*

78. PPCA is spared the necessity of reaching agreement with individual broadcasters or of seeking determinations against them in the Copyright Tribunal. As part of this process CRA voluntarily acts as a de facto collecting society for PPCA. These arrangements alone represent considerable savings to PPCA.

79. Such arrangements are tenable only because individual broadcasters have found them to be acceptable in the current circumstances. The consequence of unacceptable cost increases would almost certainly lead to large numbers of stations opting out of the system, reducing their use of protected recordings to a minimum, calculating what they should expect to pay in the light of the latest Copyright Tribunal determination and making an offer to PPCA in those terms.

Other factors

80. It should not be assumed that commercial broadcasters' only response to an unacceptable increase in licence fees would be confined to the above. If the necessity to cut costs is great enough, they will also look to other areas of their operations.

81. Another serious consequence of any increase in the rates payable by commercial radio broadcasters to the record companies would be that the increase would inevitably flow on to community broadcasters and narrowcasters. It is no coincidence that the rate negotiated between PPCA and the Community Broadcasting Association of Australia (CBAA) is virtually identical to that negotiated between PPCA and CRA – 0.4%.¹¹

82. Removal of the cap followed by an unsustainable increase in fees payable would almost certainly lead to representations from the community broadcasting sector for increased government assistance, and seriously imperil the continued operations of many narrowcasters.

83. A final irony would be that of the additional royalties which might become payable by national, commercial and community broadcasters if the 1 per cent cap were removed, the overwhelmingly major proportion would be sent overseas.



¹¹ Discussion Paper, para. 49