



Submission to the Attorney-General's Department:

**Review of the One Per Cent Cap on Licence Fees Paid to
Copyright Owners for Playing Sound Recordings on the Radio**

1. Executive Summary

- 1.1 The Community Broadcasting Association of Australia ('CBAA') is of the strong view that the unique circumstances of the community broadcasting sector - namely its limited revenue potential, its not-for-profit status and its public benefit in promoting media diversity and Australian arts, music and culture - merit the special protection afforded by the 1% cap on copyright fees for sound recordings.
- 1.2 Moreover, notwithstanding these unique circumstances of the community broadcasting sector, we support the retention of the 1% cap for all broadcasters. The cap protects against the potential for abuse of monopolistic power in the market for copyright in sound recordings. It is a sensible and appropriate means of monopoly regulation which should be retained across the broadcasting industry.

2. About the Community Broadcasting Sector

- 2.1 The CBAA is the national representative organisation for community broadcasters, both fully licensed stations and groups aspiring to hold a permanent licence. We welcome the opportunity to make this submission on behalf of our members to the Attorney-General's *Review of One Per Cent Cap on Licence Fees Paid to Copyright Owners for Playing Sound Recordings on the Radio* ('Discussion Paper').
- 2.2 Community radio stations are licensed under Part 6 of the *Broadcasting Services Act 1992 (Cth)* ('BSA'). The stations are subject to licence conditions pursuant to Part 5 of Schedule 2 to the BSA, including, inter alia:

- 9(2) (c) *the licensee will encourage members of the community that it serves to participate in:*
- (i) *the operations of the licensee in providing the service; and*
 - (ii) *the selection and provision of programs under the licence;*

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(d) the licensee will provide the service for community purposes;

(e) the licensee will not operate the service for profit or as part of a profit-making enterprise.

9(3) *A community broadcasting licensee may broadcast sponsorship announcements. However, they must not run in total for more than:*

(a) if the licensee is a community television broadcasting licensee—7 minutes in any hour of broadcasting; or

(b) in any other case—5 minutes in any hour of broadcasting.

2.3 Community broadcasting occupies a unique position in the Australian media landscape. It brings programming diversity, media access, and the opportunity for training in broadcast skills to all Australians. The sector caters to a diverse range of communities of interest, from core ethnic, indigenous and RPH communities, to youth, religious, senior citizens, arts, fine music, Australian music and other specialist interest cohorts.

2.4 With its recent dramatic growth to nearly 350 fully-licensed services, community broadcasting now serves communities across the length and breadth of Australia from Christmas Island to Bryon Bay and from the Tiwi Islands to Hobart. Over 60% of fully-licensed stations are located in rural, regional and remote areas. More than one-fifth of community radio stations are the only radio service in their area or the only service producing local content. Over eighty per cent of the sector's content is locally produced.

2.5 The community broadcasting sector survives on the unpaid labour of more than 20,500 volunteers annually. Research conducted by Griffith University indicates that people volunteering at community stations work at least two and half times as many hours as volunteers in other areas and contribute more than \$145 million in unpaid work each year.¹

2.6 The community broadcasting sector operates on extremely modest financial resources. During the 2002-2003 financial year, the combined income of all fully licensed community radio stations was \$46,584,808 and total station expenditure was \$45,013,842. The average station income was \$177,805, and the average expenditure was \$171,809 per station.²

2.7 The average station income figure can be quite misleading as the income of stations varies markedly across the sector. During the 2002-2003 financial year, some stations earned as little as \$5,000. The average income of stations in rural and regional areas, which comprise more than 60% of the sector, is also significantly smaller at \$96,536 per annum.³

2.8 Community radio stations earn income through a variety of sources, including sponsorship, donations, listener subscriptions, government grants, fundraising activities and user access fees. The following table provides a breakdown of income earned during the 2002/2003 financial year.⁴

¹ Susan Forde, Michael Meadows and Kerrie Foxwell, *Culture, Commitment, Community: The Australian Community Radio Sector* (Brisbane: Griffith University, 2002) 33.

² Community Broadcasting Database 2004 (<http://www.cbonline.org.au/index.cfm?pageId=37.113.2.0>)

³ Ibid.

⁴ Ibid.

Revenue Source	Per Station Average	Total Station Income	Percentage of Total Income
Sponsorship	56,352.49	14,764,352.38	32%
Other Income	41,922.35	10,983,655.70	24%
Donations	15,662.00	4,103,444.00	9%
Subscriptions	14,444.53	3,784,466.86	8%
CBF Grants	13,360.65	3,500,490.30	8%
Fundraising	10,896.06	2,854,767.72	6%
Access Fees	7,877.84	2,063,994.08	4%
Federal Government Grants	5,469.90	1,433,113.80	3%
State Government Grants	4,476.27	1,172,782.74	3%
Production or Studio Fees	2,398.94	628,522.28	1%
Philanthropic Organisation Grants	1,557.69	408,114.78	1%
Training Fees	1,017.23	266,514.26	1%
Local Government Grants	553.58	145,037.96	0%
Total Income	175,989.53	46,109,256.86	100%

Note: 'Other Income' is made up of miscellaneous income for all stations and income received by a proportionally small number of stations from either educational institutions or via the Aboriginal and Torres Strait Islander Commission (ATSIC).

2.9 As canvassed in the Discussion Paper, the CBAA represents its members in negotiations with the PPCA over the royalty rate applicable for the copyright in sound recordings. In 2001, the CBAA negotiated a collective licence fee rate of 0.4% of annual station turnover. The term of the current agreement with the PPCA ends on 30 June 2005, although the agreement automatically extends for periods of one year unless expressly terminated by either party.

3. Retaining the 1% Cap for Community Broadcasters

3.1 There are compelling reasons why the 1% cap must be retained for community broadcasters.

The PPCA has long accepted the need to retain the 1% cap for community broadcasters

3.2 The consistent position of the PPCA has been that the 1% cap must be retained for community broadcasters. The PPCA has recognised that community broadcasters deserve protection from market forces because of its unique not-for-profit status and the immeasurable benefits that community broadcasting delivers to the Australian music industry and Australian community at large.

3.3 We refer to the submission of the PPCA to the Minister for Communications, Information Technology and the Arts, and Attorney General, dated 3 December 2002. At paragraph 3.2 of that paper, the PPCA stated:

PPCA maintains a separate agreement with the Australian community radio sector (based on 0.4% of gross revenues), and is not seeking to change the level of broadcast fees paid by that sector. Indeed, PPCA would be happy to give whatever undertakings are required to confirm that this will remain the case.

3.4 Again, in April 2003, the PPCA lodged a submission to the Minister for Communications, Information Technology and the Arts, and Attorney General, which stated:

PPCA proposes the retention of the 1% cap for broadcasters that hold community broadcasting licences issued by the ABA under the BSA. This is a specific licence category

under s. 15 of the BSA, which covers non-profit broadcasting services that are provided for community purposes.

PPCA accepts the position that community radio stations warrant special protection from market-based licence fees because of the non-commercial role of such stations and the non-profit nature of community radio.

3.5 We trust this remains the position of the PPCA.

Removing the cap would impinge on the community broadcasting sector's viability

3.6 The community broadcasting sector operates on a shoestring budget. During the 2002-2003 financial year, the sector's combined income was \$46,584,808, and its combined expenditure was \$45,013,842, leaving a combined surplus of \$1,570,996. It is critical to note that copyright fees are already a significant area of expenditure for stations, at just over 2.6 percent of total expenditure.

3.7 Lifting the cap on copyright fees for sound recordings would inevitably lead to a significant increase in PPCA fees, which could jeopardise the financial viability of the sector. Any increase in royalty fees would inevitably require the community broadcasting sector to seek greater public funding from government in order to meet the costs.

Community broadcasting does not compete with commercial radio stations in the relevant markets and thus merits protection from market forces

3.8 Copyright owners argue that the existence of the 1% 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.

3.9 However, community broadcasters do not compete in the same market as commercial broadcasters and should not be subject to untrammelled market forces.

3.10 This point was acknowledged by Allen Consulting Group in the report prepared for the PPCA and ARIA, *Competitors or Not? Does the ABC Compete with Other Radio Broadcasters?* (May 2000), which stated:

In Australia the relevant market traditionally adopted for competition analysis of radio (and television) broadcasting has been with respect to advertisers (including television agencies) for whose business radio stations compete (ie not the radio listening audience).⁵ Relying upon advertisers to define a market's boundaries has created a market definition which excludes from the market 100 percent publicly funded broadcasters and community broadcasters (ie those that rely on subscriptions).

3.11 Under the BSA, all community broadcasting licensees are subject to a licence condition that prevents them from broadcasting advertisements (Clause 9(1)(b) of Schedule 2). Community radio licensees may broadcast sponsorship announcements, which are not classified as advertising under the Act. As the Australian Broadcasting Authority's Guidelines for broadcasting sponsorship announcements and other promotional material on community radio and community television (2003) states:

⁵ See *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd and 2Day-FM Limited* (1982) 62 FLR 43.

The key feature of a sponsorship announcement is its acknowledgement of financial support given by a sponsor to a community broadcasting licensee or a program broadcast on the service provided under the licence. The announcement may also promote the activities, events, products, services or programs of the sponsor, provided that it contains an acknowledgement of financial support by the sponsor of the licensee or a program.

- 3.12 Under the BSA, community broadcasting stations are limited to five minutes of sponsorship announcements per hour. Sponsors tend to be local businesses, and their financial support must be acknowledged. Sponsorship is a very different form of financial support than advertising. Because community broadcasters do not compete in the market for advertisers with commercial radio broadcasters, arguments about the 'fair market value' for royalty rates are inapplicable. Community broadcasters require special protection from these market forces.

The Simpson Report did not take account of the unique circumstances of community broadcasting stations

- 3.13 The Discussion Paper notes that the Simpson Report (*Review of Australian Collecting Societies*, 1995) recommended the removal of the 1% cap. The Simpson Report argued:

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 government interfering in that process. Experience shows that the best way of setting rates is by inter-party negotiation with access to the Copyright Tribunal to determine matters that cannot be resolved in that way. It is recommended that the ceiling on the broadcast fee payable pursuant to section 152 be removed forthwith.

- 3.14 We strongly disagree with this argument, and submit that community broadcasters are particularly in need of the 1% cap. While the CBAA is able to negotiate with the PPCA on behalf of its members, the parties do not have equal bargaining power due to the monopolistic position the PPCA occupies in the market for copyright in sound recordings. For obvious reasons, we are unable to individually negotiate with ever rights holder and thus are compelled to enter into a licensing agreement with the PPCA on behalf of our members, or else our stations will be liable for copyright infringement. This imbalance of power merits a protective 1% ceiling on the rate that is eventually negotiated, providing parties with a 'fall-back' position.

- 3.15 Moreover, as outlined above, as non-profit stations with limited means of generating revenue, we do not compete in the same market as commercial radio stations and should not be left to the whim of market forces.

The IPCRC report is inapplicable to community broadcasters

- 3.16 According to the Discussion paper, the Intellectual Property and Competition Review Committee (IPCRC) in 2000:

accepted that the one per cent cap had been implemented to ease the licence burden imposed on the radio industry, but considered that, since the time of introduction, the economic circumstances of the commercial radio stations had evolved ...

The IPCRC further considered that the cap was an unnecessary impediment to the markets operating on a commercial basis and could distort competition (eg between commercial radio and diffusion over the internet), resource use, and income distribution.

3.17 Clearly the IPCRC was only referring to the commercial broadcasting sector, and as such its recommendations were not intended to apply to the community broadcasting sector. The IPCRC does not give any specific consideration to community broadcasting in its report.

3.18 Indeed, in its submission to the IPCRC, the PPCA said:

There are three types of cappings (which were introduced in 1969):

- 1. The commercial broadcasters fee is capped at less than 1% of each station's turnover.*
- 2. The ABC radio stations' fee is capped at half of one cent per head of population.*
- 3. No fee applies to broadcast use of US and Canadian recordings. This is a price capping of zero.*

That is, the PPCA's own submission failed to make reference to a cap on community broadcasters' fees, and therefore the subsequent arguments it put forward that the cap created a market distortion can also be implied not to be referring to the community broadcasting sector.

3.19 Moreover, it is important to note that the IPCRC did not support any change to the ABC price capping arrangement, and said 'we do not accept that continuing the current treatment of the ABC would distort competition or competitive neutrality'. Further, the IPCRC stated:

We believe there is a clear public interest in the operation of the ABC, and that this public interest underpins the support successive governments have given to the ABC.

We believe that the situation of the ABC is analogous in this respect to that of community broadcasters. There is a clear public policy rationale in protecting community broadcasters from untrammelled market forces by retaining the 1% cap. The public interest in the operation of community broadcasting has long been recognised by the successive governments.

3.20 We applaud the Government response to the IPCRC Recommendations in rejecting the proposal to remove the 1% cap 'on the basis that copyright legislation continues to be fair and effective in balancing the interests of copyright owners and copyright users and in acknowledging that contractual arrangements are in place'. More specifically, the government defended its decision on the grounds that:

The ceiling limits the requirement for community broadcasters and the SBS to seek additional funding from Government to meet significant increases in these payments.

We submit that the Government was correct to retain the 1% cap on the grounds that it effectively balances the competing interests of the parties, and prevents community broadcasters from having to make recourse to public funds to cover an increase in royalties.

It would be inequitable to provide special protection to the ABC but none for community broadcasting

3.21 The annual royalty for the ABC is no more than 0.5 per cent per head of population (s 152(11) *Copyright Act 1968* (Cth)). The effect of this price cap is significantly different to the cap for other broadcasters and is acknowledged to be lower than the general cap on broadcast fees.

3.22 It would be illogical and inequitable to expose community broadcasters to full market rates whilst preserving special protection for the ABC. In the 2002-2003 financial year, the ABC received consolidated revenue from its ordinary activities of \$966,551,000 (Source: ABC Annual Report), more than twenty times the combined revenue of the community broadcasting sector. There is no logic to protecting the ABC but not the community broadcasting sector when the ABC's resources are so much greater.

The cap is a trade-off for community broadcasting's unique role in supporting and developing new Australian music

3.23 Under the Community Broadcasting Code of Practice, 25% of all music programmed on community radio stations must be Australian. This is the strongest commitment to Australian music given by any broadcasting sector. The Community Broadcasting Database revealed that, in practice, the sector exceeds this quota by programming 32% Australian music.

3.24 In this respect, the 1% cap represents a fair 'trade-off' in recognition of the significant benefits that flow to the Australian music through the community radio sector's public performance of sound recordings.

International comparisons reveal that the royalty rate paid by community broadcasters is traditionally low

3.25 The Discussion paper rightly points out that international comparisons of the rates paid for copyright in sound recordings are somewhat fatuous because of the unique circumstances of each country.

3.26 We submit broadly that the contention that the standard rates overseas vary from 2% to 5% is inaccurate in respect of community broadcasters.

3.27 For example, in the United Kingdom, which operates on a tiered fee-structure with commercial radio stations pay different rates based upon their level of income. Stations which earn less than £26,000 per annum £520.00, which represents as little as 0.02% of income.⁶ The Community Media Association is currently negotiating their own collective licence agreement with the PPL, and it is highly unlikely that the negotiated rate would be more than that which applies to the commercial radio sector. Given that the annual turnover of most community radio stations in the United Kingdom could be presumed to be less than £26,000, it can be assumed that the amount paid by community broadcasters will be relatively low.

3.28 Further, in Canada, the amount that community radio stations are required to pay for the use of recorded music (including the copyright in sound recordings, performer's performances and communication signals) is subject to the *Copyright Act*, which gives them a

⁶ <http://www.ppluk.com/>

preferential rate of \$100 per year in perpetuity.⁷ Canada has rightly recognised that community broadcasters serve a public benefit which justifies statutory restrictions on the royalties for which they are liable.

All broadcasters require protection from the monopoly in the market for copyright in sound recordings

3.29 Notwithstanding that we consider the community broadcasting sector to have a special claim to the protection of the 1% cap, we believe that there are strong arguments in principle why the 1% cap should be retained for all broadcasters.

3.30 As outlined above, the PPCA has an effective monopoly in the market for the copyright in sound recordings. This creates an imbalance in the power afforded to all broadcasters in their bargaining with the PPCA over an appropriate royalty rate. Only the 'fall back' position of the 1% cap creates an appropriate limit on the royalty rate the PPCA is able to demand of broadcasters.

3.31 Indeed, the ameliorating effect of the price cap was acknowledged by the Trade Practices Commission when granting PPCA an authorisation in 1985.⁸ Price capping is widely recognised as an appropriate and sensible means of regulating monopoly power and should be retained across the broadcasting industry.

4. Conclusion

4.1 The 1% cap provides for equity, certainty and legitimate protection for broadcasters negotiating the appropriate licence fee for copyright in sound recordings.

4.2 Community broadcasters have a special claim for protection because:

- (i) they are non-profit organisations which operate for community purposes;
- (ii) they support Australian music, arts and culture;
- (iii) any significant increase in the royalty rate payable would have a detrimental impact on the ongoing financial viability of the sector;
- (iv) the sector offers analogous public benefits to that of the ABC, which is also afforded protection through a price cap;
- (v) international comparisons reveal the rate paid by community broadcasters to be low; and
- (vi) community broadcasters do not compete in the same markets as commercial broadcasters and as such should not be exposed to full market rates.

4.3 Moreover, in principle we support the retention of the 1% cap for all broadcasters because it offers fair and legitimate regulation of the monopoly in the market for copyright in sound recordings.

⁷ http://strategis.ic.gc.ca/sc_mrksv/cipo/cp/cp_circ_9-e.html

⁸ *EMI Records (Australia) Ltd et al* (1985) ATPR (Com) 50-096, paragraph 83.