

**Submission
to the
Attorney General's Department**

by

**The Association of Independent
Record Labels (Australia) Ltd
t/a AIR**

in response to

**Review of One Percent Cap on
Licence Fees Paid to Copyright
Owners For Playing Sound
Recordings on the Radio**



Summary

The Association of Independent Record Labels (Australia) Ltd (AIR) is making this submission to Government on behalf of its members: Australian owned record labels and; Australian artists.

The review relates to the validity of the current statutory price cap on licence fees paid by the commercial radio sector to the copyright owners of the sound recordings.

In its current state, section 152 (8) of the *Copyright Act 1968* determines that an annual licence fee of no higher than 1% of gross revenue is able to be enforced upon broadcasters who utilise protected sound recordings.

Historically in Australia there may have been time when the price cap was justified due to a circumstantial economic environment. However, it is AIR's view that that time has passed and that copyright owners (record labels and Australian recording artists) have provided subsidies (in the provision of their copyright) for commercial radio broadcasters to garner significant profit margins at the cost of other stakeholders.

It is also worth noting that the licence fees collected by the Australasian Performing Right Association (APRA) on behalf of the copyright owners of the musical work or song are not subject to similar statutory price caps. It would be a fair assessment to consider that the owners of the copyright in the recording be afforded the same market treatment with respect to their economic activity that is invested in such copyright.

As such, the precedent that has been set by the Copyright Tribunal with respect to collections made by APRA from the commercial radio broadcasters, represented by Commercial Radio Australia (CRA), provides an adequate and fair model with which to base any future models or industry practice.

AIR does not support the continuation of the statutory price cap and supports the application as presented by the PPCA and the arguments that it has presented with the Attorney General's Department.

Furthermore, AIR also supports the position that the status quo be retained with regard to the community radio sector and that no amendments be made with respect to the national broadcasters: ABC and SBS.



Introduction to AIR

The Association of Independent Record Labels (Australia) Ltd, t/a AIR, is a national industry association, proactively serving and representing the interests and development of Australian owned independent recording labels across Australia and the world.

AIR was established in July 1996 and currently has over 300 members, representing up to 80% of the sector. Its members include the largest independent labels including: Shock Records, Hot Records, MRA, Alberts, MGM, ABC, Mushroom Music, Liberation and Phantom, plus many mid-size and small labels, including self releasing artists, in all genres and from all States. The majority of AIR's members are also registered with the PPCA.

Artists represented by the members of AIR include Savage Garden, The Wiggles, AC/DC, Silverchair, John Butler, Missy Higgins, James Morrison and The Vines.

Specifically, it is in the **copyright of the recording that AIR assists its members to derive income**, therefore the adequate protection and subsequent exploitation of these copyrights is of primary interest.

As per the Objects for which the Company has been established, AIR is charged with the power to promote its members interests (see below):

- To assist in the exploitation of copyrights created and owned by Australian independent record labels
- To promote a commercially viable industry environment which is conducive to growth of the Australian independent sector and to the development of the artists that it represents
- To encourage and facilitate cultural expression through Australian music at local, national and international levels
- To advocate the values and interests of the Company and the Australian independent sector in accordance with these Objects
- To do all things as are necessary, incidental and conducive to the attainment of the above objects and to the development of the Australian music industry at large.



AIR's Position

As a key stakeholder in this review, AIR has been consulted at length by the PPCA with regard to the current status of the Broadcasting Licence Fee and its intention to lobby the government to argue the case for removal of the current legislative cap on licence fees as set out in s152(8) of the *Copyright Act 1968*.

It is AIR's view that the removal of the legislative cap is of paramount importance to the ongoing health and sustainability of the music industry in Australia and in line with this thinking, AIR supports the PPCA submission.

Specifically, AIR supports the assertion by the PPCA that the removal of the cap will have the following key impacts for the Australian music recording industry:

- Higher incomes for Australian recording artists and greater economic incentive for these artists to remain in the industry.
- Increased income for record labels and an increased ability to invest in Australian recording artists.
- Increased export opportunities for the Australian music industry based on this larger investment in local talent.
- Enhanced cultural opportunities for the community would also result from increased investment in local talent.

It is clear from our investigations that Australia is currently out of step with international practice on the collection of broadcast license fees and as such, this low fee is unfair to the copyright holders (labels and artists) and can in fact be considered an inhibiting factor to the ongoing development of Australian music in Australia.

Of particular interest to AIR is the comparison that can be made between the PPCA's counterpart organisation in the United Kingdom, PPL. The broadcast licence fees collected and distributed on behalf of copyright owners in that market is approximately thirty times higher than that in Australia for a market that is approximately three times the size.

Discussions with AIM, AIR's counterpart trade body in the UK, have revealed that their constituents (who parallel AIR's constituency – labels



and artists), derive a significant proportion of their overall income from the receipt of distributed royalties collected by the PPL. This, in turn, significantly impacts on the ability of the industry to reinvest in the development of talent which provides financial sustainability for artists and further fosters the ongoing development of a healthy recording industry.

In addition, membership fees to AIM are directly proportional to the returns that record labels receive from PPL, thus enabling a strong voice for the independent label sector. AIR has been in discussion with AIM for some time now with regard to adopting this membership fee structure. Therefore, any proposed lifting of the current legislative cap will have an overwhelmingly positive impact on AIR and the constituents it represents.



Response to Commercial Radio Australia's Assertions

The cap balances the monopoly position of PPCA and provides certainty for commercial and community broadcasters.

Given that the PPCA has a non-exclusive arrangement with the copyright owners it collects on behalf of, the CRA is by no means restricted to dealing with the PPCA. It merely chooses to do so as this makes practical administrative sense.

Clearly, the PPCA is not a monopoly whereas APRA, with whom the CRA is obligated to pay its licence fee to, is and the absence of a cap does not inhibit the industry to industry negotiation of what is or isn't a fair market rate. In the event that a fair rate isn't agreed upon, the presence of the Copyright Tribunal adequately provides the balance required as it does with other industry negotiations.

AIR concurs with the PPCA in maintaining the status quo with regard to the cap for the community radio sector

The cap has a regulatory role similar to price caps imposed by regulators in other industries such as gas, electricity 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.

To compare the regulation of sound recordings with utility services is a misleading analogy. Again, this assertion is based on the 'monopoly' concept which does not exist and furthermore, it is in actuality, the presence of the cap that inhibits the determination of a 'reasonable and cost reflective price'.

The cap provides certainty to both parties on the possible limits to the bargaining outcome. Bargaining parameters and outside determination mechanism are similar to the 'negotiate and arbitrate' access regimes under Part IIIA of the Trade Practices Act. This assists makes bargaining fair and efficient.

While there may be some certainty afforded as a result of the cap, it is however far from fair and efficient and is heavily weighted in favour of one party – the commercial broadcasters – and as such adds further weight to the argument that the copyright owners have subsidised significant profits for the commercial broadcasters for the better part of 35 years.



There is no need to remove the cap while the parties have in place a voluntary licence scheme that sets fees across all stations well below the cap.

The existence of the 1% cap predetermines that the payable license fee will always be under the cap. The collective figure is inclusive of metropolitan FM stations that would be paying as close as possible to the 1% based on their high proportion usage of protected sound recordings and down to smaller regional AM stations that are less reliant on the usage of sound recordings and would pay a reduced fee. This will always bring the average percentage to 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.

All reports, both by the CRA and by independent analysts, would argue on the contrary to the above position. In fact, according to financial analysis from the ABA's most recent BFR report (for the financial year 2002/2003), regional broadcasters have recorded exceptional results highlighted by a 20% profit margin. When this figure is compared to the sector wide figure of 14% regional radio is clearly not under threat as purported by this assertion.

Regardless of whether this is any truth to such an assertion (which by all accounts there isn't), it still does not justify the continued subsidy of the broadcasting sector by the Australian music industry.

The cap is a trade-off for the mandatory minimum Australian program content requirements imposed on radio stations to broadcast minimum quotas of Australian sound recordings. These quotas limit the unprotected content commercial radio may choose to broadcast and guarantee revenue for PPCA from commercial radio.

The introduction of a cap and the introduction of the Australian music quotas are incongruous and to suggest that the cap is a trade off or in anyway related is false. The introduction of quotas as per ABA *Codes of Practice 4* has the primary purpose to reflect and develop local character, foster national identity and celebrate diversity through the broadcasting environment. Therefore, this argument is not a valid economic argument but is one that has much broader cultural implications.

Furthermore, this assertion clearly implies that the imposition to play



Australian content has a negative impact on the profitability of commercial radio stations and therefore, the cap is a trade off. Again, the two positions are unrelated.

In September 2001, the Government decided not to repeal the fee cap in light of the Ergas Report. The Government's decision noted that the cap provides a reassurance to rural and regional broadcasters that significant fee increases will not impinge on their viability.

The Ergas Report did however make the following recommendation:

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

Additionally, and more importantly, a number of independent reports have indicated that regional radio stations have, in line with their metropolitan counterparts, reported high levels of growth and profitability – as high as 20% in some instances.



Recommendations

AIR is of the view that the cap is no longer required on the basis that:

- The commercial radio sector is not in need of any protection given its increasingly healthy financial state with the Australian economy. Given that the commercial radio sector depends heavily on the use of sound recordings for its profit margins, it is only fair that an equitable remuneration model is adopted.
- Comparisons with many other similarly developed countries would concur that Australia is significantly under developed.
- The cap perpetuates the subsidisation of one industry (broadcasters) by another (copyright owners).
- It is not an economically efficient model.
- Price caps don't exist in relation to any other industry that exploits copyright as its economic currency.
- The parties should be able to negotiate a fair market rate without any restrictions and call upon the Copyright Tribunal as the independent arbiter – as is the case with other copyright related industries.
- There is overwhelming support for the removal of the cap from significant music industry bodies that is further supported by both the Simpson Report (1995) and the Ergas Report (2001).

I urge the government to seriously consider all of the proposals to remove the current cap on broadcasting licence fees and allow the parties to determine the rate, according to the market.

AIR will continue to liaise with the PPCA on this matter and welcomes any opportunity to further discuss this issue with the government and relevant stakeholders.