

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600
By email
March 11 2005

RE: REVIEW OF 1% CAP ON LICENCE FEES PAID TO COPYRIGHT OWNERS
FOR PLAYING OF SOUND RECORDINGS ON RADIO

Dear Ms Daniels

The Music Council of Australia is grateful for the opportunity to make a submission to the Attorney-General's Department concerning this matter.

The Music Council is a national peak organisation with a Council of 50, broadly representative of the diverse and complex music sector. The membership includes, *inter alia*, composers, performers, and people from both the recording and radio broadcasting industries, although by design the PPCA, ARIA and CRA are not officially represented.

It is concerned with fostering the most supportive environment possible for the creation of music and its delivery to its audience. The Music Council's position is consistent with a statement by the President of the International Music Managers' Forum, Peter Jenner, to the European Commission in the context of the proposed merger between BMG and Sony Entertainment:

'We start from the position that the market for music is there to help the interaction between the creator on the one side and the public on the other. The structures that lie between are a reflection of the history of the development of the technologies of music distribution and the market response to those technologies. In themselves these structures have no inherent worth or value, the question is whether these structures fulfil a function that helps or hinders the cultural and economic interaction between the creator and the public.'

Without its creators, there is no music. And the creators – the composers and performers – are for the most part individuals negotiating as unequal partners with corporations for the delivery of their music to the audience. On both counts the Music Council must have a special concern for the creators.

At the same time, the Council must also have a concern for the financial viability of the delivery systems – in this instance, the recording and broadcasting industries, since without them the public benefit from the endeavours of the creators is greatly impaired.

Further, the Council's primary interest is with *Australian* creators and delivery systems.

The Music Council's position on the 1% cap

The Music Council supports the removal of the cap on royalties paid by the radio broadcast industry to record companies and recording artists in return for the right to broadcast the music recordings in which they hold copyright.

It does so for two main reasons:

- 1) to afford commercial equity and justice to the copyright owners

- 2) to provide funds to the record industry and to recording artists which can be re-invested in the production of recordings of Australian musical works and performers.

The PPCA's case

We acknowledge and do not repeat the arguments advanced by the recording industry, as captured in the A-G issues paper.

We would like to offer two additional observations.

- *Some extraordinary constraints on the copyright owners.* Under Section 109 of the Copyright Act, broadcasters have the right to broadcast sound recordings without the consent of the copyright owners, provided that a royalty fee is paid. But this fee is constrained under the same Act by the 1% cap. So the copyright owners have neither the right to negotiate a fee that is mutually satisfactory to the parties, nor the right to withhold consent to use of the copyright material if a satisfactory fee is not paid. This surely is an extraordinary distortion of the customary conditions of trade!

- *Subsidy of one industry by another.* If there were no cap, the market would determine a higher rate. This is indicated by all the evidence of relativities here and internationally, and by the fact that PPCA supports and CRA opposes its removal. The effect of the cap, therefore, is an involuntary subsidy by the copyright owners to the broadcast industry.

It is interesting that past governments have seen their way clear to mandate this 'subsidy'. Could they have even contemplated requiring, for instance, that the providers of equipment to the broadcast industry should charge only, say, 20% of its market value, or that the owners of buildings occupied by the broadcast industry should settle for rent at 10% of the going rate? Would the broadcast industry, pleading (undefined) 'special circumstances', even contemplate the possibility of asking for such concessions?

Intellectual property is no longer some sort of fey decoration to the physical labours, the ploughed earth of a pioneer society. Intellectual property is the core, the driver of 21C economies. It has a value determinable by market forces just as is the value of iron ore or automobile parts. One way of viewing the current music broadcast royalty regime is that the broadcasting industry pays royalties on a small portion of the protected music it uses and thanks to the cap, receives the rest free of charge. Can it be a prerogative of government to dictate that one sector of industry should simply hand over its IP to another sector, setting aside normal commercial considerations?

Commentary on arguments advanced by the CRA as summarised in the A-G discussion paper

The sense of the CRA argument is summarised in the statement in italics commencing each dot point.

- *The cap balances the PPCA's 'monopoly position'.* The CRA characterises the PPCA as implicitly having an advantage because it is in a monopoly position. In fact, legally the CRA can negotiate a royalty rate with any individual broadcaster. It presumably chooses to negotiate with PPCA as a matter of convenience and efficiency. Both parties negotiate as voluntary associations of their members.

If PPCA is not a monopoly, does it nevertheless occupy a dominating position in any negotiations such that its power should be countered by regulation? Two aspects of the situation might be noted.

PPCA could not deliver an ultimatum that until certain conditions are met, it is withholding all music from broadcast: firstly because of the statutory right to broadcast copyright recordings, and secondly because copyright in some recordings has lapsed. On the other hand, the CRA, in theory, could deliver a decision of its members that until certain conditions are met, they will cease all broadcasting of music. So the ultimate sanction is available to one party and not to the other.

The negotiating position of the CRA is further reinforced by these circumstances. CRA represents the broadcasters of the music that produces most of the profit for record companies. A very large percentage of the radio audience listens to the commercial radio stations. Further, given the circumstances and programming policies of the other

broadcasting sectors in Australia, this audience effectively does not have an alternative broadcast source for the music it prefers to listen to.

In summary, if there is an inequality between the negotiating parties at this time, it would seem that the CRA's position is dominant.

- *Without the 1% cap, the regulatory process is weakened.* In fact, the CRA is protected from unbridled exercise of the PPCA's 'monopoly' power by the requirement, with or without the cap, that the parties negotiate a mutually satisfactory rate, and that if no agreement can be reached, the Copyright Tribunal, as an independent arbitrator, will determine a rate. This alone is surely a sufficient guarantee of the CRA members' interest and from this perspective, the cap is redundant. The only potential weak link is partiality or lack of expertise on the part of the Tribunal. Should this be a concern it should be resolved by remediating the Tribunal rather than limiting in advance the royalty rate.

- *Since the present rate was reached by voluntary agreement, there is no problem, no need to remove the cap.* The CRA points out that the industry royalty rate was negotiated 'voluntarily' between the two parties, and at 0.4%, is well below the cap. It implies that since this was a voluntary agreement it must be satisfactory to both sides and there is therefore no need to remove the cap.

If that were the case, PPCA would not be seeking its removal. And in any case, the cap would be redundant.

Clearly, the present rate was negotiated in a context where the top rate that can be set for any *single* broadcaster is 1%, and an industry wide rate on a user-pays basis therefore must be less than 1%. Given this interpretation, the copyright holders had no option but to agree to an industry rate of less than 1%.

Further, the credibility of the CRA argument would be higher were not the 0.4% rate so much lower than the rate it has freely negotiated with APRA for musical works, where there is no statutory cap, and lower also than the rates prevailing in other countries -- ranging from 1.44% to 7% in a table provided by the PPCA. (The PPCA list comprises 10 first world economies including all of Australia's main competitors in the international music market.)

- *According to the discussion paper, CRA claims that the 1% cap was a trade-off for the local content standards.* The implication seems to be that if the cap goes, so too does the obligation to the standards.

MCA has seen no evidence for the CRA claim that the 1% cap was introduced as a trade-off for the local content standards imposed now under self-regulation, but previously by government regulation. Perhaps it has some. If so, it is not substantiated by any statement in the rationale as published in the CRA document on self-regulation of local content standards, *Codes of Practice 4*. As stated there, the purpose of the standards is, in brief, to reflect and develop local character, national identity and diversity through music broadcasting.

Indeed, at the time the cap was imposed, a local content quota had been in existence for a quarter century, but it applied only to Australian compositions and was at the very low level of 5%. A more substantial quota was not introduced until several years after the broadcast royalty for recordings, and the cap, began. It is difficult to envisage that the cap was conceded in 1968 by the record companies as compensation for a minimal local content quota already in place for a quarter century -- nor that the cap was offered by the record companies in 1972 in return for revised local content standards, four years after it was actually imposed. But even were the latter the case, such a concession has long ago been overtaken by other circumstances.

The CRA and its predecessor have fought every step of the way against local content standards. Is the implication here that removal of the cap will see the CRA argue yet again that it should have no obligation to broadcast Australian music?

- *'Code 4 requires all commercial radio stations to broadcast minimum quotas of Australian sounds 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.'*

Further to the comment in the previous section, would it be fair to interpret this statement as indicating that were it not for Code 4, the radio industry would broadcast an exclusive diet of tracks originating in the US and unprotected by copyright in broadcast, in order to avoid the 0.4% royalty? That is to say, they would play no Australian music, nor any from Britain nor the rest of the industrialised world?

Will it be a consequence of removal of the cap and an increase in the royalty rate, further increasing the differential between US and other recordings, that broadcasters will broadcast only the Australian content required under the Code 4 local content standards, and US recordings on which no royalty is due? That could be an outcome if royalties were calculated exactly on usage. Even though they are calculated as an industry-wide average, the broadcast sector may believe itself to be in a better position to press for a lower rate if it can cite even higher use of US recordings.

This may be tactically advantageous for the broadcast sector, but it is culturally confining for the Australian public, which should be able to hear music from a diversity of sources world-wide.

- *The broadcasting industry, especially the regional broadcasters, cannot afford to pay more.* This is the implication of the statement in the discussion paper.

There is an in-principle response to this assertion: the financial viability of the broadcasting industry is not the in-principle responsibility of any other industry, including the recording industry. It is not appropriate to expect the recording industry to donate to the broadcasting industry in order to ensure the latter's profitability.

Pragmatically, the recording industry has a concern for the viability of the broadcasting industry, and the reverse is also true. To this end, all relevant pricing and supply factors become part of the mosaic of commercial negotiations.

Moving from principle to factuality: according to ABA figures, the broadcasting sector is in rude good health: as a whole, it showed a 14% operating profit margin for 2002-03, and the FM sector, which is the most dependent upon music content, achieved an average 18% operating profit margin. Regional radio managed a 20% margin, and the music-driven regional FM stations racked up the highest average of all, at 26%! The argument has no credibility and the special circumstances of 1968, whatever they were, surely could no longer apply.

The commercial radio sector's revenues in 2003 were \$773 million. Its total music royalty payment was less than \$2.7 million, or 0.34 of one per cent.

The music-dependent FM sector alone achieved revenue of \$545,000,000. FM's royalty payment to PPCA for music broadcast rights was \$2,450,000.

\$2.45 million paid for the content that attracts \$545 million in revenue. The figures speak for themselves.

We note that the FM royalty payment represents 0.45 of one per cent of revenue, for the group of stations that depend above all on music as program content. This does seem to beg the question as to what program content would motivate a rate close to the 1% cap.

A potential benefit to Australian music and culture

A PPCA argument, not shown in the discussion paper, notes that removal of the cap and negotiation of a higher royalty rate could result in a significant flow of funds to record companies and recording artists. This, it says, would enable record companies and the artists themselves to make significantly larger investments into issuing recordings by Australian artists. That possibly will then flow through to greater international penetration by Australian artists and an increase in export income.

To put this another way, a fair payment by the broadcasting industry could have a significant benefit for a sector of the arts, without government intervention either by regulation (constrained under the US FTA) or subsidy. The PPCA is suggesting that to achieve this outcome, the government has simply to *remove* a clause from the current legislation.

PPCA does not present reinvestment as an undertaking but as a probability. There is another possibility, and that is that the companies would simply use the funds to increase profits and dividends, as is their right.

But the prospect that increased revenue from broadcast royalties could be invested in increased production of Australian titles is most welcome. Since the industry has held this out as a potential benefit of removing the cap, perhaps it would be willing to make a commitment to reinvestment of at least a substantial portion of the funds.

As PPCA notes, removal of the cap will result also in increased royalty payments to artists under the PPCA's ex gratia Direct Artist Investment Scheme. Possible consequences are that artists then have a better financial basis for remaining in the industry (without subsidy) and may themselves invest in new recordings.

Conclusion

The Music Council of Australia clearly finds the case for removal of the cap convincing and the arguments against it largely without substance.

The Music Council welcomes the PPCA's observation that removal of the cap might lead to greater investment in the production of recordings of Australian music and possibly, as a consequence, to increased Australian music exports and would be interested to know of any undertakings to increase the probability that this occurs.

Thank you once again for the opportunity to advance this submission.

Yours sincerely

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Executive Director