

**PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LTD  
SUBMISSION TO  
INTELLECTUAL PROPERTY & COMPETITION REVIEW COMMITTEE**

We refer to the Issues Paper September 1999 and we are pleased to make this submission for the committee's consideration in formulating its report.

**PART I – MAJOR COMPETITION ISSUE**

Attached is a report prepared by The Allen Consulting Group which deals analyses the distortions caused by long standing price cappings in section 152 of the Copyright Act 1968 ("the Act"). Whilst the consultant report is a complete document and summarises the issue expertly in Chapter 1 we will briefly summarise the issue as follows:

**THREE PRICE CAPPINGS**

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.

The ceilings are contained in sections 152(8) and 152(11) of the Act. Section 152 is generally concerned with applications to the Copyright Tribunal for the determination of amounts payable for broadcasting published sound recordings. Para-phrased sub-section (8) provides that:

*"The Tribunal shall not make an order that would require a broadcaster to pay, in respect of the broadcasting of published sound recordings an amount exceeding 1% annual gross earnings of the broadcaster."* In other words, ie: regardless of the reasonable rate the Tribunal cannot order more than 1%.

The ceiling on licence fees payable by the ABC is contained with section 152(11) which provides that the licence fee cannot exceed a cent per head of population in Australia.

The effect of s152(8) and (11) is that the broadcasters refuse to negotiate reasonable fees and will not do so until the ceilings are removed.

**MARKET DISTORTIONS**

The cappings create **distortions** regarding what is played and the amount of new Australian material that can be produced. The cappings, of course, also have cost recording artists and record labels millions of dollars in foregone fees over the last 30 years.

## **THE PRICE CAPPINGS ARE A SUBSIDY**

It is simply inappropriate for any subsidy that radio broadcasters might receive to be provided by sound recording creators. Subsidies are provided by government from the entire tax base.

## **NO OTHER PRICE CAPPINGS**

There are no price cappings for any copyright item other than those in s152. Moreover, no such ceiling has ever been in place in respect of the broadcast licence for musical works (ie the fee payable to the songwriters/music publishers via APRA) and licence fees for the exercise of that right are currently an average of 2% with “music” stations paying 2.66% to APRA.

Further, the Coalition in 1996 abandoned price cappings generally except in regard to community service obligations such as stamps and some telephone services.

## **BROADCAST FEES OVERSEAS**

The cappings result in fees that are significantly below comparable market rates for such licences and are inconsistent with competition policy and good broadcasting policy.

Market rates for sound recording broadcast licences overseas, exceed one per cent. By way of international example, the broadcast licence rates in the United Kingdom set by their Tribunal in 1995 are between 2% and 5% depending upon the level of the broadcaster's gross revenue and music airtime.

As you will see this issue goes to the heart of competition policy and market efficiencies and we believe there is no justification whatsoever for maintaining these price cappings.

## **Part 2**

### **Term of protection (page 13)**

*PPCA submits that the term of copyright protection for all subject matters should be extended in line with overseas developments. In the case of sound recordings, this would mean the lesser period of:*

- (a) 95 calendar years from the date of publication; or*
- (b) 120 calendar years from the date of making.*

The *Copyright Act* (1968) (Cth) currently protects published ‘works’ (including musical, literary, dramatic and artistic works) for 50 years after the expiration of the calendar year in which the author of the work died.<sup>1</sup> On the other hand, a sound recording only remains in copyright for a period of 50 years after the expiration of the calendar year in which the recording is first published.<sup>2</sup> As a result a sound recording is likely to fall into the public

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<sup>1</sup> s.33(2) *Copyright Act* (1968) (Cth). If the work is unpublished, protected lasts until the expiry of the 50th calendar year after publication.

<sup>2</sup> s.93 *Copyright Act* (1968) (Cth)

domain several decades before the copyright in the musical, literary or dramatic works embodied in the recording expires. PPCA considers this discriminatory treatment of sound recordings in the *Copyright Act* to be without foundation and recommends that sound recordings be afforded a duration of copyright protection equivalent to that of musical works.

PPCA submits that the massive changes in commercial practice, technological development and international legal developments require urgent attention to this issue.

Today a sound recording of a musical work is as enduring and as commercially important as the musical work it embodies. This contrasts with the situation in past decades, when a given piece of music was likely to have been performed by a variety of artists and made available to the public by a number of means including;

- live performances of the music (by various artists);
- broadcast of a live performance of the music (by various artists);
- publication and sale of sheet music; and
- broadcast and sale of sound recordings (but of lower quality than today's digital versions of old 78's recordings).

For much of this century, therefore, consumption of music through sound recordings has not been the primary means by which the public has accessed music. This was particularly the case in the 1940s and 1950s when the principles on which our current copyright law is predicated were being developed.<sup>3</sup>

As the quality and durability of sound recordings has improved, however, this has changed dramatically. This dramatic shift has been accelerated by the development of digital technologies with their promise of perfect, limitless, permanent copies. Improvements in sound recording techniques, the advent of new processes (such as digital mastering and re-mastering) and technologies (such as compact discs) enable old sound recordings to be revitalised and new recordings to be made and played with astonishing fidelity. These advances in quality mean that a sound recording available today may remain a commercially valuable product for many more decades than in the past.

Further, these same technologies in conjunction with explosive improvements in telecommunications technology have greatly increased the role of the sound recording. For example, the internet and subscription broadcasting and the imminent offering of "pay as you listen" music services will continue to greatly enhance the role of the sound recording as the principal means of communicating music to the masses. Nostalgia-based radio stations playing recordings of songs dating back to the 1940s, 1950s, 1960s and 1970s are already enjoying an unprecedented popularity. In addition, multi-channelling now enables consumers to subscribe to up to 100 different music channels, covering all genres and periods of recorded music.

The *Sonny Bono Copyright Term Extension Act* was passed by the United States Congress in 1998. The Act amends Title 17 of the United States Code. Prior to its

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<sup>3</sup> The Copyright Act 1968 basically implemented the Spicer Committee Report of 1959 which in turn was based on the 1951 report of the Gregory Committee in the UK.

enactment the basic term of copyright protection for “works” (which under the United States legislation are defined to include sound recordings) was 50 years after the death of the life of the author. For “works made for hire”<sup>4</sup> the term was 75 years from the year of publication or 100 years from the date of creation, whichever was shorter.

The *Copyright Term Extension Act* extends the term of protection for copyright works as follows:

- For works (other than works made for hire) created on or after 1 January 1978 the copyright subsists for the life of the author plus 70 years.
- For a work made for hire created on or after 1 January 1978 the period of protection is the lesser of 95 years from the year of publication or 120 years from the date of creation.
- For works created between 1923 and 1978 copyright lasts 95 years (provided copyright has been renewed where required).
- The legislation does not afford protection for works which at the time of its enactment were already in the public domain (i.e. registered or published prior to 1923).

In the USA “works” also means sound recordings.

In 1995 the European Union extended the copyright term for its member states from 50 years after the life of the author to life of the author plus 70 years. While this extension does not apply to sound recordings (unlike the US legislation), PPCA submits that this discriminatory treatment is unjustified and should not be mirrored in any Australian legislative amendment.

PPCA considers that the *Copyright Act (1968) (Cth)* must be amended to afford copyright protection on a par with that provided for in the USA and in the European Union. Without this extension, those countries (which constitute significant markets for Australian-created intellectual property) would not have to provide the additional copyright protection which they now afford their nationals. This could result in millions of dollars of lost export revenue. An extension of the term of copyright along lines similar to those in those countries will mean that Australian-created works will generally be protected for the same period as works of EU and US creators. This will help ensure that profits from the sale of Australian works will be returned to Australia.

As noted above, the EU has not extended protection for sound recordings to the same extent as the USA. PPCA submits that the US approach is preferred.

First, most of the members of the EU have traditionally operated within the “droit d’auteur” tradition at odds with our own (and that of the USA and the UK). This has led them to devalue the rights of producers unjustifiably. Thus, many member states of the

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<sup>4</sup> A “work made for hire” is a work that is prepared by an employee within the scope of his or her employment, or a work that is specifically commissioned and falls into one of the following nine categories: (1) contribution to a collective work, (2) part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) an answer material for a test, or (9) an atlas.

EU protected sound recordings only for 20 or 25 years and so an extension to 50 years was in itself a long overdue correction.

In contrast, under our law, the law in the UK and in the USA, sound recordings have always received the same protection as cinematograph films (to which they are most closely analogous).<sup>5</sup> The Spicer Committee recommended 50 years protection for sound recordings in 1959 because that was the term of protection for films. Therefore, PPCA submits that the approach taken in the USA is most consistent with commercial development in the market and principle.

PPCA submits that the proposed amendment would not result in any anti-competitive effect. No one sound recording can achieve market power- accordingly sound recordings are likely to remain competitively priced. Further, the statutory licence scheme under section 55 of the Act preserves the ability of performers to record new versions published musical works. PPCA considers that failure to extend the term of protection for sound recordings is likely to encourage free riding on the significant investments made by record producers given the vast changes in commercial practice and technology.

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#### **Administration of Rights**

We note the comments on the ACT and APRA authorisation.

PPCA is proud of its record in this respect.

PPCA administers the broadcasting and public performance rights in sound recordings. To do this, it has been granted *non-exclusive* licences by the relevant copyright owners. It grants non-exclusive licences of its repertoire to users. This means that anyone wishing to license the use of one of our members' sound recordings has two sources: the owner of the copyright themselves or PPCA.

PPCA has been granted an authorisation for its activities under the Trade Practices Act since 1985.

PPCA has two main issues; both arise out of the limitation of the Copyright Tribunal's jurisdiction to so-called "output" arrangements.

First, there appears to be a major inconsistency between the approach to regulation of collecting societies taken by the Parliament on one hand and, on the other, the ACCC and the Australian Competition Tribunal.

As demonstrated by the Competition Tribunal's recent decision on APRA's applications, the regulators under the Trade Practices Act appear to be pushing collecting societies to positions of non-exclusivity for "input" arrangements. The Competition Tribunal for example has required APRA to develop a licence back of copyright to its assignors.

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<sup>5</sup> The reason for the different means of calculating the term of protection derives from the fact that there is no single author whose "life" can provide the yardstick as is the case for literary and musical works.

Parliament, on the other hand, has unilaterally imposed “declared” societies for the purposes of administering the statutory licences under for example Parts VA and VB of the Copyright Act. This imposition has a number of important consequences. One consequence is obviously an important advantage: users of the copyright material need deal with only one person to secure the right to use the material. They are not confronted by limitations in the repertoire and so can confidently use all material free from the risks of infringement and uncertainty about whether or not the collecting society holds the necessary licence.

Another consequence, however, is a corollary of the foregoing. Copyright owners have no choice about who will act as their collecting society or even if they wish their material to be accessible through a collecting society.<sup>6</sup> Thus, declared societies collect revenues for copyright owners who are not members and the only way the owner can receive the remuneration is to become a member.<sup>7</sup>

PPCA submits that the inconsistent approaches between Parliament and the trade practices regulators is anomalous. The difference in approach leads to considerable confusion and dissatisfaction in the marketplace. PPCA submits therefore that the Copyright Act should be amended to confer on all collecting societies comprehensive jurisdiction to license all copyright material falling within their applicable classes of copyright.

The second issue arises out of the fact that copyright owners whose material is represented by a declared society have no choice but to join the society if they wish to receive payment for activities covered by the declaration.

Generally, the relationship between collecting societies and copyright owners and creators should be left up to those parties to determine. The base requirement should be that the management of rights and the distribution of income will be on the basis that there should not be any discrimination between any of the rights holders, whether they are members or not.

However, in the case of the statutory created collecting society Screenrights an immense deficiency exists. This society accounts to 5 different sectors of copyright owners and its Board is charged with the responsibility of determining the allocations of income to those 5 groups. Once the percentage of total income is agreed to by the Board that allocated percentage is then distributed on the basis of sample logs. The problem is not with the sample logs but with the fact that the decision of the Board as to the allocations is not reviewable.<sup>8</sup>

Given that Screenrights administers the copyright rights of 5 different sectors and that any licensed film or program may involve the licensing of the rights of classes of several copyright owners, there is great potential for disagreement as to the appropriate allocation of royalties between those owners.

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<sup>6</sup> Copyright is after all an exclusive right which confers the right to grant, or withhold, a licence.

<sup>7</sup> See *Nationwide News v. CAL* (1995) 30 IPR 159, 178-82; 34 IPR 53 at 80-2.

<sup>8</sup> The remedies potentially available are either so drastic as to be most unlikely to ever exercised (eg, revocation of the declaration) or ineffective (eg, very limited rights of shareholders against their companies the inadequacy of which is compounded by the member’s inability to cease to be a member)

PPCA submits, therefore, that the Copyright Tribunal should have jurisdiction over the arrangements between collecting societies and their members (input arrangements) where the collecting society accounts to 3 or more different sectors of copyright owners.

In regard to distributions, PPCA's view and practice is that distributions of royalties to members should be based on use of the relevant copyright items during the relevant period. In the context of collective administration this means statistically valid sampling systems must be used.