

26 May 2000

Ms Kay Collins
Director
Intellectual Property & Competition Review
Committee Secretariat
Attorney-General's Department
Robert Garran Offices
BARTON ACT 2600

Dear Ms Collins

**Phonographic Performance Company of Australia Limited Submission
Intellectual Property & Competition Review
Response to the Interim Report**

The Phonographic Performance Company of Australia Limited (“PPCA”) is pleased to make this submission to the Committee in response to the Committee’s Interim Report dated April 2000 and refers to its response to the Issues Paper released by the Intellectual Property & Competition Review Committee (“Committee”) in September 1999.

PPCA maintains its support for the views outlined in its previous submissions, but does not repeat them here in order to avoid repetition. The comments below are addressed specifically in response to the Committee’s Interim Report.

Broadcast Fee Price Capping

PPCA welcomes the Committee’s recommendation to amend section 152(8) to remove the broadcast fee price cap. It is the view of PPCA, however, that a similar amendment should also be made in relation to the ABC in section 152(11).

PPCA notes that the cap imposed by section 152(11) is merely the counterpart to the cap imposed by section 152(8).

PPCA notes the Committee’s view that:

“the ABC is not a commercial participant in the relevant market for commercial broadcasting activity. As the ACCC and the Courts have found on numerous occasions, this market is one in which commercial broadcasters compete to provide audiences to advertisers. The ABC does not operate in this market; rather, it is budget funded. As a result, the Committee does not believe that

considerations of competitive neutrality require any change in the current arrangements.” p 80, Interim Report.

With respect, however, PPCA submits that the ABC is a participant in the relevant market and that “competition” in terms of this inquiry is broader than merely the meaning given to the matter in a federal court case. The ABC competes with other radio stations for audiences. This is most obviously demonstrated by the inclusion of the ABC in ratings surveys. **To assist the Committee** further in this regard, we have requested the Allen Consulting Group to further examine the basis that the ABC can be viewed to properly fall within a “competition and copyright” review. **See attached report entitled “Competitors or Not? Does the ABC Compete with Other Radio Broadcasters?”**

The Allen Consulting Group’s report clearly demonstrates that using standard trade practices methodologies the ABC can reasonably be said to be competing against other radio broadcasters in both an input market (i.e., competing to obtain material suitable for broadcast) and in an output market (i.e., competing to attract listeners).

However, such an analysis based upon standard trade practices analysis may itself be limiting in the context of a National Competition Policy (NCP) review. The Hilmer Report and the subsequent NCP agreements (one of which set the framework for the current IPCR) sought to expand the reach of competition beyond that embodied in the Trade Practices Act to all sectors of the economy, no matter how competitive distortions were created. Given this expansive approach to competition the default approach in the current review should be for the Copyright Act to treat the ABC on equivalent terms as other broadcasters. Any deviation from this approach should be justified in the 'public interest' terms required under NCP.

In addition, the removal of the fee caps is also consistent with the Committee’s view on Crown copyright ownership, that:

“The Committee can see no reason why the Crown should benefit from preferential treatment ... as compared with other parties. As a result, the Committee is of the view that section 176 of the Copyright Act 1989 should be amended to leave the Crown in the same position as any other ‘normal’ contracting party”: p78, Interim Report.

PPCA submits that neither the Crown or the ABC should benefit from beneficial treatment. It is not appropriate for the ABC to receive a subsidy via the s152 price capping. The ABC is already funded by the budget. Any further subsidies should also be provided by the government (and thus the entire tax base) and not from sound recording creators. There is no justification for treating ABC radio stations different from every other radio station and indeed from licensors or purchasers of every other copyrighted article or any other goods or services.

Collecting Societies

PPCA endorses the Committee’s recognition of the benefits which flow from collecting societies. As the Committee and the Australian Competition Tribunal recognises, attaining those benefits does or may entail some costs. PPCA supports the Australia Competition Tribunal’s conclusion that costs which are necessary to attaining those benefits are acceptable. PPCA also notes that there are powerful constraints controlling those costs.

First, PPCA’s output arrangements are subject to the Copyright Tribunal. As the Committee will be aware, the Copyright Tribunal was established precisely to control the potential for misuse of market power.

Secondly, the rights PPCA administers are licensed to it on a non-exclusive basis. Thus users retain the potential to deal directly with the copyright owner and this does in fact occur.

Thirdly, PPCA's input arrangements in particular are subject to authorisations under the Trade Practices Act and have been since 1985. That is, even with section 51(3) in place, PPCA's input and output arrangements are subject to powerful oversight in the interests of competition.

Consequently, PPCA broadly supports the CLRC's draft recommendations that:

- (a) the Copyright Tribunal should have jurisdiction over all license schemes (whether voluntary or statutory); and
- (b) the Copyright Tribunal should not generally have jurisdiction over input arrangements.

PPCA's support for recommendation (b) above is qualified, however, in one important respect. On page 71 of the Interim Report, the Committee refers to a number of mechanisms available to members of a declared collecting society for review of that declared collecting society. These mechanisms are not effective and may be inappropriate. For example, revocation of a society's declared status is extremely drastic and so likely to be exercised only in the most extreme circumstances.

This is particularly a problem where the declared society represents several (three or more) different classes of copyright owner. In such a case, the various classes of copyright owner are in competition with each other for the distribution of revenues. The apportionment of such distributions is highly sensitive and can be decided detrimentally to a smaller class where one or more other classes of copyright owner control the society's operations. There are no avenues for recourse against such decisions. As noted above, the existing mechanisms are suitable for drastic situations only. Detriment can result, or be seen to result, even in the absence of overt discrimination. Because the society is declared, withdrawal from the society is not an option either. Therefore, PPCA submits that there is a compelling need for an appeal mechanism. PPCA further submits that, in view of its experience in this area, the Copyright Tribunal is the most suitable body to resolve disputes of this nature.

In this connection, PPCA is not sure what is the intended scope of the belief attributed to FACTS on pages 72-3 of the Interim Report that all collecting societies should be subject to statutory supervision. As discussed above, this is already the case. In particular, PPCA (although not a creature of statute) is subject to statutory supervision by the Copyright Tribunal and under the Trade Practices Act by the ACCC, the Australian Competition Tribunal. PPCA believes, therefore, that the current statutory supervision is appropriate and should be continued. Apart from the extension of the Copyright Tribunal's jurisdiction over the input arrangements of declared societies representing more than two classes of copyright owner, however, PPCA does not support further extension of statutory oversight.

PPCA does support the declaration of more than one collecting society for the same class of copyright owner as proposed on page 74 of the Interim Report. Most recently ARIA tried to ensure this principle was applied in relation to section 183B of the government copying scheme. Screenrights however sought to ensure that only one society would be in place. At first instance, the Federal Court has found in favour of the Screenrights approach (see *Audio-visual Copyright Society Limited –v- Australian Record Industry Association Limited* judgment enclosed). The record industry, through ARIA, is appealing that decision to the full Federal Court.

Copyright Term

PPCA notes that the Committee “*is not convinced that there is merit in the proposed extension of term*”: p 77, Interim Report.

At page 76, the Interim Report summarises some of the arguments put to the Committee in favour of an extension of copyright term, but does not appear to fully appreciate their merit. It is of vital importance that we “*maintain parity in an increasingly globalised market*” in order to remain competitive. The need for this cannot be overstated.

The Committee states that:

“there is a well established economic case against perpetual copyright, including the transaction costs it imposes, and sought clarification [from the Australian Copyright Council] of why that case did not hold in respect of the extension proposed”: p 76, Interim Report.

With respect, **the economic position with reference to perpetual copyright is a totally unlike a mere extension in temporary copyright.** The economic case for a fixed term will naturally be different to one that is ever-lasting. Any conclusions (“*As a result, the Committee is not convinced...*”) drawn from the erroneous basis that the economic case for perpetual copyright applies to an extension of term for copyright will therefore also be erroneous.

The basic problem is that the Australian industry is denied the benefits of the longer terms in our main foreign markets because Australian law fails to give co-extensive protection.

It is also necessary to reverse the discriminatory treatment of sound recordings in the Copyright Act by affording them the equivalent treatment to that of musical works. Due to the period of 50 years beginning to run from the death of the author on the one hand, and the publication on the other, a sound recording is likely to fall into the public domain several decades before the copyright in the musical, literary or dramatic works embodied in the recording expires. The Queensland University of Technology’s suggestion that “*these [arguments] are specious; most copyrights with any commercial potential are owned by publishers not individuals*”: p 76, Interim Report is not necessarily true and even so, is an irrelevant statement. Recording artists increasingly retain ownership of the copyright in their recordings. Moreover, regardless of the ownership of the copyright, royalty streams flow to the artists for the duration of the copyright or, in the case of lump sums, based on the copyright term.

PPCA would be pleased to expand on any of the issues discussed above or in PPCA’s submission in response to the Issues Paper or any other issues of interest to the Committee. Please contact Emmanuel Candi if we can be of further assistance.

Yours sincerely

Emmanuel Candi
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