representing the recording industry worldwide

IFPI Submission
Inquiry regarding the effectiveness of current regulatory arrangements in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the Internet ("simulcast")

SUMMARY

IFPI (the International Federation of the Phonographic Industry) represents the recording industry worldwide, with a membership comprising some 1400 record companies in 66 countries and affiliated industry associations in 55 countries.

The Australian Recording Industry Association (ARIA) is IFPI's affiliate in Australia; the Phonographic Performance Company of Australia (PPCA) is a collecting society that licenses the rights, or collects equitable remuneration, for certain uses of sound recordings on behalf of record companies, including members of IFPI, in Australia.

This submission supplements that of ARIA and PPCA in order to provide more information on the international context with respect to the interpretation of "simulcasting" and "broadcasting" and international licensing practices for simulcasting.

This submission will clarify that simulcasting does not constitute broadcasting, but is recognised both nationally and internationally as a new and distinct act of exploitation, and therefore in many territories subject to separate tariffs and remuneration. Licensing and collection practices differ from country to country, however. Even in countries where there is no separate tariff for simulcasting, this act of exploitation is nevertheless best regarded as distinct and separate from broadcasting, and as giving rise to an obligation to pay additional remuneration.

BROADCASTING AND SIMULCASTING UNDER INTERNATIONAL COPYRIGHT TREATIES

Australia, like 90 other countries around the world, has adhered to the WIPO Performances and Phonograms Treaty (WPPT). One of the two WIPO "Internet Treaties" concluded in 1996, the WPPT sets the international standard with respect to protection of phonograms on the Internet. Article 15 of the WPPT requires Contracting Parties to provide performers and producers of phonograms with equitable remuneration for the "direct and indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public". The Treaty treats "broadcasting" and "communication to the public" as two different (albeit related) activities, and it is clear that simulcasting does not constitute "broadcasting", but rather constitutes a form of communication to the public.

The WPPT defines in Article 2(f) "broadcasting" as "the transmission *by wireless means* for public reception of sounds or of images and sounds or of the representations thereof; such transmission by

satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent". The definition in Article 2(g) of the WPPT of "communication to the public" is defined in such a way that it (1) clearly includes simulcasting and (2) clearly excludes broadcasting: "'communication to the public' of a performance or a phonogram means the *transmission to the public by any medium*, *otherwise than by broadcasting,* of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, 'communication to the public' includes making the sounds or representations of sounds fixed in a phonogram audible to the public". (Emphasis added.)

From these definitions it follows that a simulcast - i.e. an Internet transmission, typically in whole or in part by wire, of a broadcast - is not a broadcast, but constitutes a communication to the public. While broadcasting necessarily is by wireless means (transmissions by cable do not fall within the definition), communication to the public has no such limitation and typically takes place over wired networks, although it can also take place at least in part by wireless means. The fact that the content of a simulcast is identical to that of the original broadcast does not transform the simulcast into a broadcast; the focus is on the means of delivery and not on the content.

SIMULCASTING DEFINITION IN DIFFERENT COUNTRIES

In many countries courts have taken the view of the Federal Court of Australia in its decision of 13 February 2013 that internet simulcasts of radio programs fall outside the definition of "broadcasting" - and therefore are subject to separate rights clearance and would not be covered by existing broadcasting licences granted to Australian commercial radio stations, notwithstanding the arguments of the CRA, Commercial Radio Australia Limited.

In Europe, the Court of Justice of the European Union (CJEU) in its decision in the *ITV Broadcasting Ltd v TVCatchup Ltd case* (C-607/11) held that "*each transmission or retransmission of a work which uses a specific technical means must, as a rule, be individually authorised by the author of the work in question*" (see paragraph 24). The CJEU furthermore confirmed that "*it is apparent from Article 3(3) of that directive [EU Copyright directive (2001/29/EC)] that authorising the inclusion of protected works in a communication to the public does not exhaust the right to authorise or prohibit other communications of those works to the public*" (see paragraph 23).

It is clear from the Court's reasoning that also the simultaneous and unaltered transmission by the broadcaster of its over-the-air broadcast signals using a different technology, such as the Internet, would constitute a new separate act of communication to the public. In other words, it follows that simulcasting must be considered as a different act of exploitation than broadcasting (as it is based on a different technology) and, as such, subject to a specific authorisation by the rightholder. It is also worth noting that the CJEU in other cases addressing similar questions has held that the fact that the new exploitation act reaches "new audiences" is a factor that renders an act a new and separate act of communication to the public (see for instance Case C-431/09 "Airfield", paragraphs 71 – 84, and case C-306/05 "SGAE").

In the US, simulcasting is also seen as a separate right and a separate act of exploitation. In fact, under US law the broadcasting of phonograms is lawful without any requirement of permission or remuneration, but simulcasts of the very same broadcasts are subject to a statutory license (or, if they do not fall within the terms of the statutory license, they are subject to the exclusive rights of the rightholder). See *Bonneville International Corp. v. Peters,* 347 F.3d 485 (3d Cir. 2003). In *Bonneville,* the Court of Appeals held that notwithstanding the statutory exemption that they enjoyed for their broadcasts of sound recordings, broadcasters' Internet simulcasts are not

"broadcast transmissions" subject to the exemption but are subject to the statutory license for "eligible non-subscription transmissions."

Also in Canada, simulcasting and broadcasting are regarded as two separate acts of exploitation. Simulcasting is subject to a separate tariff to be approved by the Copyright Board of Canada. The Canadian simulcasting rates are structured as a percentage of gross revenues earned by the service operator, with a minimum annual fee per channel.

In New Zealand, the local phonogram producers' collecting society offers broadcasters an *additional* license for internet simulcast of their broadcasts. As recently as in 2010, the local Copyright Tribunal recognised in *Phonographic Performances (NZ) Ltd v RadioWorks Ltd & The Radio Network of New Zealand Ltd* the separate nature of simulcasting – and the consequent obligation for the operators of this service to pay additional royalties. In paragraph 378, the Copyright Tribunal held that *"some form of royalty is payable"* when radio broadcasters *"play the sound recordings independently in this medium* [the Internet]*"*. It is worth noting that this view is in line with the CJEU case law described above.

LICENSING PRACTICES IN DIFFERENT COUNTRIES

In IFPI's experience, licences for the use of sound recordings are typically construed in a way distinguishing between separate exploitation acts, including different exploitation acts for broadcasting and simulcasting. These uses are as a result often subject to separate rates. According to IFPI's information, collecting societies that report simulcasting income separately typically receive additional remuneration for this use, most commonly in the form of a "per-track-per-stream" payment, or alternatively in the form of a lump sum. However, some collecting societies may still apply a tariff based on the percentage of revenue, or an additional percentage on top of traditional broadcasting rates.

From the above it becomes clear that simulcasting should be regarded as a separate act of exploitation, attracting separate remuneration in addition to the remuneration applying to broadcasting. However, collection practices differ. In many markets, including Austria, Finland, Greece, Hungary, Ireland, Italy, Romania, Spain and Sweden in Europe, as well as Brazil, Canada, Hong Kong, Israel, Japan, Singapore, Taiwan and the US, radio stations pay a separate fee for their simulcasting activities. In other countries a simulcasting licence may be bundled into the traditional broadcasting licence, with one single tariff and no separate simulcasting tariff. However, it is important to stress that the absence of a separate tariff for simulcasting does not mean that the respective act of exploitation falls within the broadcasting definition - and it does not mean that it does not attract additional remuneration.

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