



Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

26 April 2013

Dear Committee Secretary

Inquiry into the effectiveness of current regulatory arrangements in dealing with the simultaneous transmission of radio programs using the broadcasting services bands and the Internet ('simulcast')

The Australian Copyright Council (ACC) is an independent, not-for-profit organisation, founded in 1968. The ACC has 24 member organisations. These include the peak bodies for Australian creators as well as the major collecting societies, such as the Phonographic Performance Company of Australia (PPCA). This represents over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in Australian creative industries. A full list of our members is at **Appendix 1**.

There are four key points the ACC would like to make in this submission:

1. Copyright law underpins the creative economy.
2. This Inquiry raises difficult and complex policy issues which are being considered in other Government processes;
3. Communication of sound recordings via the Internet has a separate value to the broadcast of sound recordings;
4. These issues cannot be considered without taking into account the cap on broadcast royalties for sound recordings.

We examine these points in further detail below.

1. Copyright Law as Key Infrastructure

In 2012 the ACC commissioned PwC to prepare a report on the Economic Contribution of Australia's Copyright Industries 1996-7 to 2010-11.¹ The Report recognized copyright as a key piece of infrastructure that supports the industries which comprise a modern economy. It found

¹ See <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>

that in 2010—11 copyright industries comprised 6.6% of GDP and employed 8% of the Australian workforce.

The Report also noted the challenges for copyright industries posed by digitization and other factors and stressed the need for an appropriate regulatory model to support copyright businesses' innovation and sustainable growth.

In the ACC's submission, the current regulatory model facilitates appropriate access to copyright material while enabling artists and labels to receive equitable remuneration for use of their copyright material by commercial radio.

2. The Issues

Copyright is not a single right but a bundle of exclusive rights. These rights provide incentives for creators. They are balanced by certain limitations and exceptions, which serve the public interest in access to information.

The convergence of technologies over the last two decades has posed some issues for copyright law. For example, a new broad-based, technologically neutral right of communication to the public was introduced by the *Copyright Amendment (Digital Agenda) Act 2000*.

Simulcasting is a clear example of the convergence of technologies.

The Convergence Review was specifically tasked with looking at the policy and regulatory frameworks in a converged media and communications environment. Furthermore, the copyright issues raised by the Convergence Review are currently receiving consideration as part of the Inquiry by the Australian Law Reform Commission into Copyright and the Digital Economy. The ALRC is due to report to the Government by 30 November 2013.²

These are difficult and complex issues, raising matters of both domestic and international law. In the ACC's respectful submission, the regulatory regime for simulcasting is better dealt with under existing these Government processes.

The ACC is aware that the entitlement of copyright owners to royalties for the communication of sound recordings via the Internet has been the subject of ongoing litigation between Commercial Radio Australia (CRA) and PPCA. We note that CRA has sought special leave to appeal the Full Federal Court's decision of February 2013. In our respectful submission, the particular controversy between the parties is best adjudicated by the High Court of Australia and not by this Committee.

3. The value of communication via the Internet

Questions about the efficiency of the current regulatory arrangements for simulcasting require an examination of broadcasting and communication via the Internet.

² <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy>

In our submission, broadcasting and communication via the Internet are different and should be remunerated separately. Broadcasting is distinct from communication via the Internet in three important ways:

1. Broadcasting is tied to the broadcast signal and is therefore limited to a reasonably confined geographic area.
2. Broadcasting relates to a particular kind of technology, which also limits the potential audience (i.e. those with a radio).
3. Not all sound recordings are covered by the broadcast right (under Australia's international treaty obligations, not all sound recordings are protected).

These limitations do not apply to communications via the Internet. It follows, in our submission, that communications via the Internet are qualitatively and quantitatively different from broadcasting and require separate remuneration.

4. The 1% cap

The efficiency of the current regulatory arrangements for simulcasting cannot be considered without regard to the cap, which currently applies to commercial broadcasts of sound recordings.

Section 152(8)(b) of the *Copyright Act 1968* caps the royalties for broadcasting of sound recordings at 1% of the gross annual earnings of the broadcaster. While price caps are an accepted form of economic regulation, in our submission, the 1% cap is completely arbitrary and does not involve any analysis of economic efficiency. This is to be contrasted with methodologies for price regulation by the Australian Competition and Consumer Commission (ACCC). For example, the methodology that the ACCC applies to price control arrangements for Telstra fixed line voice services.³

In our submission, the cap places an artificial ceiling on the remuneration a copyright owner can receive for the commercial broadcast of sound recordings. The ability of copyright owners in sound recordings to receive equitable remuneration for communications via the Internet needs to be viewed in that context.

3

<http://transition.accc.gov.au/content/item.phtml?itemId=1097956&nodeId=bc65e9f39041af105f3cced7947ee579&fn=Methodology%20for%20administration%20of%20the%20Telstra%20carrier%20charges%20price%20control%20arrangements%20-%2016%20January%202013.pdf>

If simulcasts of sound recordings were subject to the 1% cap, this is likely to have a detrimental effect on the ability of copyright owners in sound recordings to receive equitable remuneration.

We note that the terms of reference for the ALRC's Inquiry into Copyright and the Digital Economy provide an opportunity for further consideration of s 152(8)(b) of the *Copyright Act*. In our submission, it is appropriate for the ALRC to reconsider the 1% cap.

Given the other policy processes currently on foot and the other matters raised in this submission, the ACC does not support the Committee making any recommendations for change to the current regulatory regime for the simulcast of sound recordings.

Please do not hesitate to contact the ACC should we be able to provide further information or assistance to the Committee.

Yours sincerely

Fiona Phillips
Executive Director

Appendix 1: **Australian Copyright Council Affiliates**

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 24 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artist Agency
Ausdance
Australian Commercial & Media Photographers
Australian Directors Guild
Australian Institute of Architects
Australian Institute of Professional Photography
Australian Music Centre
Australasian Music Publishers Association
Australian Publishers Association
APRA / AMCOS
Australian Recording Industry Association
Australian Screen Directors Authorship Collecting Society
The Australian Society of Authors Ltd
Australian Writer's Guild
Christian Copyright Licensing International
Copyright Agency
Media Entertainment & Arts Alliance
Musicians Union of Australia
National Association For Visual Arts Ltd
National Tertiary Education Industry Union
Phonographic Performance Company of Australia
Screen Producers Association of Australia
Screenrights
Viscopy