9 November 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

To the Secretariat,

SUBMISSION FROM MEDIA ARTS LAWYERS -
COPYRIGHT LEGISLATION AMENDMENT (FAIR PAY FOR RADIO PLAY) BILL 2023

Media Arts Lawyers welcomes the opportunity to provide comments on the Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023 (Cth) (the **Bill**).

Media Arts Lawyers is Australia's preeminent music and entertainment law firm. We represent many internationally renowned recording artists and independent record labels.

As a firm, we are in a unique position to provide this submission in support of the Bill as our team has been guiding the careers of recording artists and providing commercial advice to independent record labels for over 25 years.

We advise on all areas of intellectual property, rights management and commercial law, and work to maximise income streams available to our clients for the exploitation of their copyrights. In doing so, it is our hope that our clients may be financially sustained by the music industry to which they contribute their time, efforts and creativity.

Media Arts Lawyers unequivocally supports the Bill to amend the *Copyright Act 1968* (Cth) (the **Act**) for the removal of subsections 152(8) to 152(11). It is our position that these statutory pricing caps create an inequitable market by unfairly restricting the remuneration due to our clients when their sound recordings receive airplay on broadcast radio.

Notwithstanding our support for the removal of both statutory pricing caps applicable to commercial radio and the Australian Broadcast Commission (**ABC**), we note that for the purpose of this submission, our comments focus primarily on subsection 152(8) which prevents commercial radio stations from paying more than one percent of their gross annual revenue in licence fees for the broadcast of sound recordings (the **1% Cap**).

In our view, the Bill must be passed and the 1% Cap removed for the following reasons:

1. OUTDATED AND UNINTENDED

When the Copyright Bill 1967 (Cth) (**1967 Bill**) was first introduced to Parliament, the commercial radio industry (**Radio**) was already paying licence fees to songwriters and publishers for the broadcast of musical compositions, pursuant to a broadcast agreement with the Australasian Performing Right Association (**APRA**). The 1967 Bill proposed that Australia's revitalised copyright law would introduce an exclusive right for the owners of sound recordings to *cause their recordings to be heard in public,* giving rise to the payment of broadcast licence fees to recording artists and record companies (**Record Industry**).

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The 1967 Bill did not propose the inclusion of any statutory pricing caps at the outset. Instead, it was the intention of the government for Radio and the Record Industry to reach agreement on the payment of licence fees for the broadcast of sound recordings either independently, or with the assistance of the Copyright Tribunal. On 18 May 1967 during second reading debates, the then Attorney-General Mr Nigel Bowen told the House of Representatives:

> *[I]f the record is performed in public or broadcast, the copyright owner has the right to be paid a royalty in respect of that use of the record. The royalty is such as is agreed on by the parties or, in default of agreement, as is determined by the Copyright Tribunal.*

In Radio's view, the payment of broadcast licence fees to the Record Industry in addition to what was already being paid to APRA, would create an *extreme financial burden* and an *unbudgeted expense*. Radio lobbied tirelessly against the proposal claiming the 1967 Bill was *grossly unjust*, while the Record Industry pushed for its right to receive fair pay for radio-play.

Under tremendous pressure to appease both Radio and the Record Industry, Mr Bowen included the 1% Cap in the new Copyright Bill 1968 (Cth) (**1968 Bill**), as a last-minute protective measure and an attempt to reach a compromise amidst the controversy.

We note that the 1968 Bill also included a proposed review provision at section 153, which would allow for the pricing caps to be reviewed by the Copyright Tribunal after the Act had been operative for a minimum of 5 years (**Review Provision**). Where a case could be made out to the Attorney-General that there had been a sufficient change in circumstances to warrant a review of the pricing caps, the Copyright Tribunal would then hold an inquiry and report its findings back to the Attorney-General. The pricing caps could then be varied by regulation where the maximum royalty could be increased. On 16 May 1968, in support of this Review Provision, Mr Bowen assured the House of Representatives that the government would:

> *…carefully watch the effect of the Bill on the operations of those who are affected by it, so that if it appears further changes need to be made to the law, those changes can be made.*

The proposed Review Provision demonstrates that Mr Bowen certainly did not intend for the pricing caps to remain in the Act in perpetuity. Rather, the 1% Cap, was envisioned as a temporary measure to alleviate what was described at the time as *an avalanche of complaints and criticism* directed towards the government from Radio and the Record Industry.

When the second reading debates for the 1968 Bill continued on into the late hours of 4 June 1968, Mr Bowen, in contradiction with his previous statements, unceremoniously announced that the Review Provision would be removed completely. He told the House of Representatives:

> *For a number of reasons it has now been decided that it is inappropriate to carry out this function by way of inquiry to the Tribunal and that it is a matter that would not arise for a very considerable period and would be better left for the Parliament to determine, if the ceiling we are speaking of were to be varied.*

It remains unclear what those reasons for scrapping the Review Provision were, although it would appear Mr Bowen succumbed to further pressure from Radio, leaving the Record Industry to lobby for legislative reform to vary the 1% Cap that:

a) was never originally intended to be part of Australia's copyright law as evidenced by the 1967 Bill;

b) imposes an unfair restriction on the payment of broadcast licence fees, a matter initially proposed to be agreed between the parties independently, or with the assistance of the Copyright Tribunal;

c) was included as a compromise by a government under pressure to *allay the fears* of Radio at that time;

d) was initially accompanied by a Review Provision that would allow for an increase to that 1% maximum by regulation, after 5 years had passed since the passing of the Act; and

e) was intended to be carefully monitored by the government so that those affected by the 1% Cap could propose a change to the law, and to see those changes made.

The 1% Cap was included haphazardly into the Act by a government who capitulated to commercial pressures 55 years ago. The fears professed by Radio in 1967, are now in 2023, unwarranted and outdated. Radio has had over half a century to acclimatize to its obligation to pay fair broadcast fees at a market-determined rate to the Record Industry and is no longer in need of statutory protection. Instead, Radio has fought for this outdated 1% Cap to remain in place for decades longer than ever intended, to the detriment of the Record Industry who is being restricted from negotiating fair market rates for the use of its copyright.

2. ANTICOMPETITIVE

We note that the 1% Cap only applies to licence fees for the broadcast of sound recordings on commercial radio. Comparatively, there is no such statutory pricing cap mandated for the broadcast licence fees paid by Radio to APRA for the use of musical compositions. We note that APRA currently receives broadcast licence fees at the rate of up to 3.76% of gross annual revenue under its agreement with Radio. This sees songwriters and their music publishers remunerated for the use of their copyrights at market-determined rates, while our recording artists and their record labels languish under a government mandated ceiling.

The separate copyrights that subsist in the musical composition and the sound recording are equally recognised and protected under Australia copyright law. As such, the rights holders of each should be afforded the opportunity to be equally remunerated in a free and competitive market.

The Phonographic Performance Company of Australia (**PPCA**) who represent the Record Industry are being unfairly restricted by the 1% Cap and should be free to negotiate with Radio independently without restriction in the interests of its members. We note that currently, PPCA receives just 0.04% of gross annual revenue in licence fees under its agreement with Radio because the 1% Cap was deemed as a starting point by the Copyright Tribunal in negotiations that proceeded downwards. Arguably, a rate of 0.04% is a meagre amount for Australia's billion-dollar commercial radio industry to be paying the rights holders of sound recordings, particularly when the very core of its business relies so heavily on recorded music.

It is our hope that this Bill and the removal of the 1% Cap will open the door to a re-negotiation between PPCA and Radio for fair market rates to be paid to appropriately reflect the value of the copyrights being licensed.

3. UNFAIR

Australia is the only territory where there is a government mandated pricing cap in its copyright law. The 1% Cap represents an anomaly in the international market.

Comparatively, overseas collection societies receive between 1.5% and 5% of annual gross revenue in license fees from radio for the broadcast of sound recordings. The Bill should be passed to remove this irregularity from the Act.

Conclusion

Media Arts Lawyers are in full support of any copyright reform which will assist in compensating our clients' creative efforts with a meaningful and sustainable income.

Australian copyright law has long recognised the importance of incentivising its creators by implementing a balanced framework of protection against infringement, public access to creative works and fair remuneration to rights holders. These caps are contrary to that balance and act as a disincentive for the creation of new work.

We strongly encourage the government to pass the Bill to remove the pricing caps which continue to adversely affect the licence fees our creators receive when their sounds recordings receive airplay.

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Thank you for the opportunity to provide our submission for the committee's review. Should you have any queries or wish to discuss further, please contact .

Yours faithfully,

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Media Arts Lawyers

* This submission refers to sources cited in the following paper:

Whitehead, Mary "Time to Face the Music: Lifting the Australian Commercial Radio Royalty Cap" (2021) 31 *Australian Intellectual Property Journal* 216.