



**Australian Copyright Council response to the
Senate Legal and Constitutional Affairs Legislation Committee Inquiry
on the
Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023
3 November 2023**

The Australian Copyright Council acknowledges the Traditional Owners and Custodians of the lands on which our office is located, the Gadigal people of the Eora nation, and all Traditional Owners of Country throughout Australia. We pay our respects to all Elders past and present, and recognise their continuing great, creative and cultural expressions.

1. The [Australian Copyright Council \(ACC\)](#) is grateful for the Legal and Constitutional Affairs Legislation Committee's (the **Committee**) invitation to [make a submission](#) addressing the [Copyright Legislation Amendment \(Fair Pay for Radio Play\) Bill 2023](#) (the **Bill**).

About the Australian Copyright Council

2. The ACC is an independent, not-for-profit, non-government organisation dedicated to promoting understanding of copyright law and its application. We work to foster collaboration between content creators and consumers, representing the peak bodies for professional artists and content creators working in Australia's creative industries.
3. The ACC is a unique organisation:
 - it is the only dedicated copyright expert organisation in Australia
 - its focus is on copyright as it applies to all art forms
 - it provides advocacy, expert advice and information on copyright issues, and
 - it is a membership-based organisation, representing over a million creators.
4. The ACC has [24 affiliate member organisations](#)¹ representing over a million writers, musicians, visual artists, designers, photographers, directors, performers, choreographers, producers, publishers, record labels and architects working in the Australian creative industries.

¹ See Appendix 1 of this submission.

5. As part of its services, the ACC provides [information, education, training](#) and [free legal advice](#) to those who fall within its guidelines including the staff of libraries, galleries, museums and educational institutions.²

Background and context

6. Copyright refers to the set of exclusive rights that a copyright owner has over specific types of material. In line with Australia's international obligations³ and articulated in the *Copyright Act 1968* (Cth) (**Copyright Act**), copyright protection is free, automatic and does not require registration.
7. There are two broad categories of material which may be protected by copyright:
- 'original works' including literary works (e.g. books and other text-based material), artistic works (e.g. photographs, paintings and illustrations), dramatic and musical works,⁴ and
 - 'subject matter other than works'⁵ including sound recordings, films, broadcasts and published editions.
8. A copyright owner has certain exclusive rights – acts that only the copyright owner can do.⁶ Generally, only the copyright owner may exercise these exclusive rights unless an exception to infringement applies⁷ or the copyright owner has granted permission.⁸
9. For musical works, the copyright owner (generally, the composer/s) has the exclusive right to perform the work in public; and to communicate the work to the public.
10. For sound recordings, the copyright owner (generally, the person making the recording and its performers) has the exclusive right to cause the recording to be heard in public; and to communicate the recording to the public.
11. Copyright protection is limited in duration and is dependent on the type of material. For:
- original works i.e. literary, artistic, dramatic and musical works, copyright generally expires 70 years after the author's death⁹
 - sound recordings published before 1 January 2019, the duration of copyright lasts for 70 years from the year it was first made public
 - sound recordings not made public before 1 January 2019, the general rule is that copyright lasts for 70 years after the calendar year in which the copyright material was made,¹⁰ and
 - sound recordings first published before 1955, copyright has expired.

² See Appendix 2 of this submission.

³ See further paragraph 18 of this submission.

⁴ *Copyright Act 1968* (Cth) (**Copyright Act**), Part III.

⁵ Copyright Act, Part IV.

⁶ Copyright Act section 13(1).

⁷ See Copyright Act Part III, Divisions 3-8; sections 103A-112E and Part IVA.

⁸ Copyright Act section 13(2).

⁹ Copyright Act sections 33, 93, 95, 96.

¹⁰ Copyright Act section 93(3). Note, however, that for sound recordings made public within 50 years of the end of the calendar year in which they were made (and published on or after 1 January 2019) copyright lasts for 70 years after the end of the calendar year in which the recording was first made public.

Amendments proposed by the Bill

12. The Bill proposes that the Copyright Act be amended by removing the provisions (sections 152(8) to 152(11)) that:
- (i) cap/limit radio broadcasters from paying more than 1% of their gross earnings in licence fees for the broadcast of sound recordings, and
 - (ii) cap/limit the licensing fees payable by the Australian Broadcasting Corporation (ABC), for the broadcast of sound recordings, to 0.5 cents per head of the Australian population.
13. As outlined in the [Bill's Explanatory Memorandum](#), there have been a number of enquiries and reviews (over 30 years) 'which have generally found that the caps serve no public policy purpose and distort the market in a way that disadvantages Australian artists and rights holders'; and recommended that the caps be removed.¹¹
14. The ACC has previously made submissions in response to the following enquiries/reviews which have discussed the radio sound recording caps:

July 2013	Effectiveness of current regulatory arrangements in dealing with radio simulcasts	Senate Standing Committee on Environment and Communications
November 2013	Copyright and the Digital Economy	Australian Law Reform Commission ¹²
March 2019	Report on the inquiry into the Australian music industry	House of Representatives Standing Committee on Communications and the Arts ¹³

15. The statutory licensing regimes (for educational institutions, governments) set up by the Copyright Act are predicated on 'equitable remuneration' to copyright owners for the use of their material.¹⁴ Similarly, the payment of fair or equitable remuneration is at the heart of licensing arrangements managed by collecting societies (such as Copyright Agency, APRA AMCOS, and PPCA) on behalf of their creator/copyright owner members.
16. Other than the caps currently in place in relation to broadcast royalties for sound recordings, there are no remuneration caps imposed on copyright material – payment for use is generally a matter of negotiation between copyright owners and users.
17. The Copyright Tribunal has jurisdiction, under the Copyright Act,¹⁵ to consider whether a proposed or existing licensing scheme is reasonable. The Tribunal may make an order, confirming, varying or substituting the scheme for another scheme proposed by one of the parties to the Tribunal proceedings.¹⁶
18. The cap on licensing fees was referred to by the Tribunal in its decision (in the [Simulcast case](#))¹⁷ considering the appropriate rate that commercial radio broadcasters ought to pay for a licence to use sound recordings (of music) in simulcasting activities.

¹¹ Explanatory Memorandum Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023: [ParlInfo - Copyright Legislation Amendment \(Fair Pay for Radio Play\) Bill 2023](#).

¹² For the ACC's submission see [Submissions received by the ALRC](#), submission 654 (**ALRC 2013 submission**) p 23. <<https://www.alrc.gov.au/inquiry/copyright-and-the-digital-economy/submissions-received-by-the-alrc-4/>>

¹³ For ACC's submission, see [Submissions – Parliament of Australia](#) submission 62.

¹⁴ Copyright Act Part IVA Div 4; Part VII Div 2. See also Part VC (Retransmission of free-to-air broadcasts) Div 2.

¹⁵ Copyright Act Part VI.

¹⁶ Copyright Act sections 154 -155.

¹⁷ [Re Phonographic Performance Co of Australia Ltd \(under s 154 of the Copyright Act 1968 \(Cth\)\)](#) [2015] ACopyT 3 (**Simulcast case**).

19. In that case, Jagot J referred to the approaches, summarised in the [Nightclubs case](#)¹⁸, used to determine whether a licensing scheme (and fees payable under it) are reasonable. As noted by the Tribunal, those approaches include:¹⁹
- (i) Market rate: ‘the rate actually being charged for the same licence in the same market in similar circumstances’.
 - (ii) Notional bargain rate: ‘the rate on which the Tribunal considers the parties would agree in a hypothetical negotiation, between a willing but not anxious licensor and a willing but not anxious licensee’.
 - (iii) Comparable bargains: ‘bargains not in the same market but sufficiently similar to such a notional bargain as to provide guidance to the tribunal’.
 - (iv) Judicial estimation: a rate determined by the Tribunal taking account of a range of matters such as ‘previous agreements or negotiations between the parties; comparison with other jurisdictions; comparison with rates set by other licensors, capacity to pay, value of the copyright material, the general public interest and the interests of consumers; and administrative costs of a licensing body’.
20. In the Simulcast case, the Tribunal made the following remarks in considering the fundamental matters the parties would consider in any actual negotiation between them on payment for use of sound recordings (in a simulcast):
- PPCA would not agree to a percentage of revenue rate which was based on the 0.4% rate in the PPCA-CRA Broadcast Agreement. It would not do so because (rightly, in our view) it would judge that rate to be largely the result of the operation of s 152(8) of the Copyright Act and the 1% cap it imposes, rather than a market rate. While CRA would make arguments to the contrary none of them (as we have found below) would be persuasive. PPCA would be in a strong position to maintain that the 0.4% from the PPCA-CRA Broadcast Agreement is an inappropriate starting point because it does not reflect a market rate for that right and, accordingly, cannot be a proper basis for a market rate for the simulcast right.²⁰
21. The caps on licensing fees for the broadcast of sound recordings (imposed by the provisions of the Copyright Act referred to in paragraph 12 above) are anomalous and inconsistent with the notion of fair or equitable remuneration.
22. As outlined in previous submissions²¹, the ACC considers those caps to be arbitrary and inequitable and submits that they should be repealed in line with the proposed amendments of the Bill.

Conclusion

23. Thank you for considering this submission. If the Committee requires further information, please let us know.

Eileen Camilleri
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Australian Copyright Council
3 November 2023

¹⁸ *Re Phonographic Performance Co of Australia Ltd (under s 154 of the Copyright Act 1968 (Cth))* [2007] ACopyT 1 ([Nightclubs case](#)).

¹⁹ *Simulcast case*, [20].

²⁰ *Simulcast case* [48].

²¹ See ALRC 2013 submission p23.

Appendix 1

Australian Copyright Council Affiliates

as at 3 November 2023

The Australian Copyright Council's views on issues of policy and law are independent. However, we seek comment from the organisations affiliated to the ACC when developing policy positions and making submissions to government. As at the date of this response, the Australian Copyright Council affiliates are:

1. [Aboriginal Artists Agency Ltd](#)
2. [APRA|AMCOS](#)
3. [Ausdance National](#)
4. [Australia New Zealand Screen Association](#)
5. [Australasian Music Publishers Association Ltd](#)
6. [Australian Cinematographers Society](#)
7. [Australian Guild of Screen Composers](#)
8. [Australian Institute of Architects](#)
9. [Australian Publishers Association](#)
10. [Australian Recording Industry Association](#)
11. [Australian Screen Directors Authorship Collecting Society Limited](#)
12. [Australian Society of Authors](#)
13. [Australian Writers Guild Authorship Collecting Society \(AWGACS\)](#)
14. [Big Studio Movie Licence](#)
15. [Copyright Agency](#)
16. [Design Institute of Australia](#)
17. [Illustrators Australia](#)
18. [Image Makers Association Australia](#)
19. [Media Entertainment & Arts Alliance](#)
20. [Musicians Union of Australia](#)
21. [National Association for the Visual Arts](#)
22. [Phonographic Performance Company of Australia](#)
23. [Screen Producers Australia](#)
24. [Screenrights](#)

Appendix 2

ACC Guidelines

A core part of the ACC's activities is our free legal advice service. This community legal service is targeted primarily to those working in the creative industries and members of our affiliate organisations. Staff members of the organisations listed below, are also eligible:

- educational institutions
- arts and cultural organisations
- libraries
- museums
- galleries
- archives.