

ARIA / PPCA COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL (“Bill”) SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE FOR LEGAL AND CONSTITUTIONAL AFFAIRS

Overview

This Bill is about revising copyrights to be relevant in the communications age.

The “Communication right” provided in the Bill, is good and revises the existing broadcast, cable diffusion right.

In the case of sound recordings it was not even envisaged in 1968 that cable diffusion would be possible and thus no right was included. Nowadays, any form of diffusion is possible, hence the need for the communication right.

The new rights are desperately needed for sound recordings, being the most easily stolen item in the digital age. Equally, the record industry is keen to develop systems for direct to home sale of recordings to consumers, ie: the online world is another retail channel which should expand the market and provide more, for less cost to consumers, from the record labels.

Arguments that the on-line world is different and things that should be free is a nonsense. Recordings, films, books are products (property) – and must be sold by the producer/publisher to obtain returns on investments and to fund recurrent future investment.

The fact the copyright products can be “zapped” around the world for free, because of the non-physical nature, only adds to the argument for strong communication rights, anti-circumvention and piracy controls.

The Bill has improved since the first draft, but still remains inadequate in a number of key areas including:

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- Items 4, 5 and 8 - Require redrafting to **anti-circumvention and effective technological protection provisions** to render them commercially effective and in compliance with the WPPT.
 - Item 9 - Requires redrafting of electronic **rights management information** sections to render them commercially effective and in compliance with the WPPT.
 - Items 87, 94 and 95 – Temporary copying ISP liability. These are still way too wide and will allow too much infringing and unauthorised use. It also probably means that effective injunctive remedies against ISPs are not attainable. These sections are thus outside the scope of the WPPT and contrary to commercial common sense.
 - Item 98 and 100 – Enforcement Provisions against circumvention and electronic rights management information Infringements. These require major redrafting to realise effective remedies, otherwise repeated infringements will occur without any remedies being available.
 - Item 200 – Retransmission of Free-to-Air Broadcast. Unintended inclusion of all types of broadcast rather than just free to air television broadcast. Also, an overly rigid definition of collecting societies that fails to recognise already existing and commercially efficient music collective licensing agreements.
 - Item 201 - The unintended derogation of our industry's rights which is non-compliant with WPPT and moreover against commercial common sense.
 - Schedule 2 – The **Transitional Provisions**. Unintended drafting that wipes out the communication right in probably the majority of copyright items in existence.
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DEFINITIONS

Item 1

Broadcast

Okay.

Item 6

Communicate

ARIA welcomes this concept. For the avoidance of doubt (and to save a court case), however, ARIA submits that a further definition should be inserted that “communication, when used in this Act, will have the corresponding meaning to “communicate”.”

We query whether “online” (which is supposed to indicate non-physical dealings), is needed in the definition given the words that follow it, i.e. “whether over a path, or a combination or paths, provided by a material substance or otherwise”.

Items 4, 5 & 8

Circumvention of technological protection

These definitions need to be read with items 98-100. ARIA submits that these definitions leave copyright owners severely exposed to piracy and are woefully inadequate.

Item 4 circumvention device:

The term “limited commercially significant” is unclear and vague. The USA’s provision section specifies “**primarily designed or produced to circumvent technological protection...**”. Inanimate objects, such as devices or services, do not have “purposes”. It is far from clear, therefore, how a court will determine what the purpose of a device or service is. These convoluted and uncertain provisions are in stark contrast to the simple, clear and effective provisions prohibiting broadcast decoding devices (see item 104). There is no reason in principle or in fairness for this different treatment. Therefore, ARIA submits that a circumvention device or service should be defined as:

“a device [service] (including a computer programme or a component of a device) that is adapted or designed to enable a person to circumvent, or facilitate the circumvention of, an effective technological protection measure.”

Item 8: The definition of **effective technological protection measure** has been extended to include not only a “device or product” but also “a component incorporated into a process”. ARIA supports this change, however, ARIA submits that this must still be extended further to include **components** of a device or product and **processes and treatments**.

Device or product conveys the notion of a complete physical product, whereas technological measures may simply be a particular component or involve the use of computer software or similar electronic treatment (eg. a “watermark”). In this connection, ARIA notes that computer software is usually regarded as a service and not goods for the purposes of, for example, the Trade Practices legislation. In addition, a component incorporated into a product may not be incorporated into a process.

ARIA also submits that the words **“in the ordinary course of its operation”** could undermine the whole provision. As the Bill does not prohibit use of circumvention devices (see items 98 and 100), users will easily and routinely be able to obtain circumvention devices (e.g. by downloading or buying, them over the Internet). In these circumstances, situations will easily develop where the device cannot be said, ordinarily, to limit access since the technological measures will not be operative in potentially widespread cases.

Consequently, ARIA submits that Item 8 should read:

“effective technological protection measure means a device, product, technology, process, service or any component of any of the foregoing which prevents or inhibits, or is designed to prevent or inhibit, access to, or the exercise of, copyright subsisting in a work or other subject-matter except with the use of an access code or process (including decryption, unscrambling or other transformation of the work) with the authority of the owner or licensee of copyright in a work or other subject matter.”

Item 9

Electronic rights management information – needs amendment to meet Industry Standards

ARIA submits that this definition requires amendment to comply with article 12(2) of the WIPO Copyright Treaty (**“WCT”**) and article 19(2) of the WPPT:

As the Attorney speech says RMI **“typically” includes such information**. But may not. The use of **“and”** instead of **“or”** makes the section too limited.

- the word “or” should replace the word “and” at the end **of Item 9 sub-paragraph (a)(i)**;
- sub-paragraph (a)(i) must be expanded to refer specifically to “the performer, the performance of the performer, the producer of the phonogram, the phonogram”. This is required under article 19(2) of the WPPT.

If the word **“and”** is retained, each limb of the definition will be read conjunctively, so that the protections for RMI will not apply, except in cases where both of the specified categories of information are included. This does not make sense and is overly prescriptive. **Nor is it consistent with the WCT or the WPPT**. ARIA also notes that **both the US law and the EU proposals extend protection to any of the components identified**.

The addition of the items to sub-paragraph (a)(i) is necessary for conformity with article 19(2) of the WPPT. Moreover, this information is often vital for customers, the detection of infringement and the satisfaction of notice requirements and presumptions existing under the Act.

Article 19(2) (Obligations Concerning Rights Management Information) of the WPPT specifies:

“As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.”

Item 14

Reception Equipment – definition.

The drafting in this section is inconsistent with the drafting style in other parts of the Bill.

To be consistent, for the avoidance of confusion and to make the section clearer, the words “(over a path provided whether in whole or in part by a material substance or otherwise)”, should be included as the last words of this definition.

Whilst acknowledging the change from “hear sounds or see visual images” to “hear or see a work or other subject-matter”, for the avoidance of doubt, ARIA submits that the words “**or both**” should be added after the words “hear or see”.

Item 15

We agree.

Item 20

Reasonable portion

ARIA submits that this definition is **not appropriate**.

Firstly, ARIA strongly supports the conclusion reached by the CLRC that extension of the “quantitative test” to other than published literary, dramatic or musical works is both *not feasible* and *inappropriate* for the reasons set out by the CLRC. Indeed, ARIA submits that the quantitative test is wholly inappropriate for **sound recordings** (and this test should continue to be not included). Also, musical works, as very much smaller proportions of these types of copyright subject matter, assume a very much higher degree of importance and value than in the case of plain text. We agree that, if adopted, it does not really fit with computer programmes.

Further, 10% seems very generous especially for sheet music. ARIA notes that Burchett P (in a different context) recognised and gave effect to the principle that photocopying and production of slides of different kinds of material similar to this in the recent Copyright Tribunal decision in *CAL v University of Adelaide*.

Items 23, 24 and 25

ARIA strongly supports these proposals. Item 25 (ie. s21(6)) must remain in the legislation as the section clarifies the fact that when a sound recording is copied into a computer (whereby it becomes coded) and then recopied off onto another medium, the copy of the sound recording is in fact that ie. a 'copy' as s.85 prescribes of a sound recording. The section is also consistent with overseas Treaties.

Item 39

See our comments under Item 87.

Item 41

See comment on item 90.

Items 42

See comment on item 95.

Item 45

In relation to section 43C - see our comments on section 111A, Item 94.

Items 48 to 53

Our views in general are covered by the submission of the Australian Copyright Council.

Items 54, 56, 70 and 75

Liability Provisions – s.54 “acquired” – needs clarification.

Our overall position, in relation to the library sections in the Bill, is that we oppose the extension of the library copying provisions to allow libraries to copy via digitisation and to communicate the work in certain circumstances.

Both of these activities, in Items 54 and 56, should be done under a licence from the copyright holders to the libraries. The business of such publication will move to online publication and these proposed sections conflict with this; in particular it will obviate the libraries' need to obtain a subscription to the work or periodical.

Items 81 and 82 (section: 85 and 86 “Communication Right”)

ARIA strongly supports this proposal. It is essential for the protection of copyright. Recent estimates calculate that more than 200,000 music tracks are already

available on the internet with more than 10 million people worldwide downloading material regularly. These numbers are exploding.

Item 87 (Morehouse Principles)

We query whether this is needed. This section codifies the standard for authorisation liability and appears to lack the factor of actual or constructive knowledge of infringement, which should be relevant to whether the authorising party is indirectly liable.

Item 90

Copying in Libraries

ARIA is very concerned by these provisions.

Currently, the existing provision is quite limited, applying only to photocopying of works. These proposals go much, much further, however, and authorise the making of any sort of copy of any sort of copyright on any sort of machine, including a computer.

Thus, libraries could be exonerated for illegal videotapes, cassettes or CD Rom recordings made on their equipment. This is extremely far-reaching especially considering unauthorised, near CD quality, recorded music is being made available on the internet in exponentially increasing amounts. These deceptively simple proposals, therefore, alter the balance against copyright owners drastically.

Accordingly, ARIA submits these proposals go far beyond anything contemplated by the WCT or WPPT which permit the extension of existing exceptions into the digital environment only insofar as they are appropriate.

The destruction of the copyright owner's protection becomes even more apparent when these provisions are read in conjunction with items 91 and 92. The library may communicate the copyright material to another library with impunity. The receiving library will have absolutely no incentive to monitor the use made of its equipment as any attempt at monitoring could undermine its reliance on the notice. If the appropriate notice is displayed near the receiving equipment, or any other networked equipment operated by the library any user may copy or communicate it with impunity as it will be virtually impossible to trace the transmission or the user.

The use of "merely because" here and elsewhere, should not preclude liability where notice or direct knowledge is in place and should not at any time stop any injunctive relief from applying.

Items 91 and 92

We do not agree with "communication" being added. For reasons discussed more fully in relation to item 90, these exemptions go much further than WPPT 16(2) provides. They leave copyright owners totally exposed.

Item 94

Temporary Copying

The exception in respect of temporary copying is too wide.

We acknowledge and agree with the amendments made:

- the provision no longer covers published editions of a work; and
- the provision no longer applies to the making of a temporary copy if the making of the communication is an infringement of copyright.

However section 111A remains unacceptable in its present wording for the following reasons:

- it would extend to all forms of temporary reproductions and caching, not just transient copies;
- any temporary copy which is part of a technical process, whether indispensable or not for the internal workings of equipment, would be covered; and
- it is out of step with the USA and EU position.

It is, therefore, necessary to redraft this provision and to limit the temporary copying exception to reproductions that:

- are transient; and
- are internal to equipment and technologically indispensable to enabling the use of the work or other material for which the equipment was designed.
- Such reproductions must not survive the lawful use of the work and should have no independent existence. The exception should only apply to the reproduction right and not to all other rights provided for under the chapter.

The provision could be reworded as follows:

“The right of reproduction subsisting under this Part is not infringed where a transient copy of an audio-visual Item is made as an indispensable step in a technological process in the making of a lawful communication.”

The Department has indicated to ARIA that this section was also intended to catch caching. We disagree strongly that any or all caching should be allowed without the above conditions applying. Caching is not an indispensable or technically necessary process. Also, browsing will be part of what is offered by each book/magazine publisher, record company, film producer to attract and service their customers. The copyright owners will decide what browsing can be done as part of their marketing and competition policies.

Further, with the proliferation of unauthorised music sites worldwide, this proposed exemption will merely allow ISPs to warehouse recordings without regard to the legitimacy of the product and facilitate the access to sites using unauthorised recordings. To this end, at the very least, the carve out should not apply to sound recordings and (music videos) films, due to the heavy piracy problems.

Items 94 and 95 – Create a Major Enforcement Issue Problem

As was suggested in our ED submission, this section, read with Item 95 section 112E, probably means that injunctions cannot be obtained against an ISP if it is relaying a site which contains infringing recordings. Thus, copyright holders in Australia will be powerless to stop infringements in such cases.

This needs to be fixed at least by making it clear that sections 111A and 112E do not in any way prevent injunctive relief and (where the ISP **knows** the communication or copies were infringing) do not prevent other remedies from applying under sections 115, 116 and 132. This would be in line with the USA and EU position which ISPs and telcos have agreed with.

Item 95

These sections must be narrowed.

First, it should be made clear that this does not prevent injunctive relief (and other remedies in certain circumstances) from applying to a carrier or a carriage service provider. This is a major issue which has been further elaborated by us in Item 94 under “Major enforcement issue problems”.

The section also greatly exceeds any permissible scope of the exception recognised in the Agreed Statement to the WPPT (and WCT). At the most, this provision should apply only to the right of communication, and **not** to “any infringement” (which excludes the reproduction only right).

Also, in light of Item 87, it is questionable whether a section like this is needed.

Items 97 and 106 to 199

These provisions apply only to “works” and “published editions”.

Item 98 (116A(7) Permitted Purpose)

We object. This appears to allow libraries to circumvent a record company’s encoded on-line delivery system without ever becoming a subscriber to the services or paying at first instance for the product. Libraries must obtain a legal and paid for copy or access first. Then in limited circumstances where such a copy is damaged and not readily available in the market place, libraries should only then be permitted by this statute to make a replacement copy.

The exemption should only allow government agencies to do this under certain situations.

Item 99

ARIA supports the proposal, but submits that the word “transmission” in section 132(5A) should be “communication”.

Item 98 (s.116) and 100 (s.132)

ARIA submits that these provisions will not provide adequate legal protection to copyright owners and consequently require amendment.

Firstly, the measures do not prohibit the act of circumvention itself.

ARIA understands that the Government has deliberately chosen this course in light of the EU’s preliminary conclusion that remedies against manufacture and commercial dealings will be more effective. ARIA notes, however, that the European Parliament and the European Commission have reconsidered this preliminary conclusion. **The European Commission has accepted the Parliament’s conclusion that acts of circumvention should be explicitly prohibited**, not just acts such as the manufacture, importation and sale of circumvention devices. See *Amended Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society*, EUR-Lex: Community Preparatory Acts: 599PC0250, 28 June 1999 (“**Amended Proposal**”); especially article 6(1). In this connection, ARIA also notes that the USA through the DMCA and after vigorous public debate (in the face of the strongest, most organised users’ lobby), has in fact passed **legislation prohibiting circumvention**.

ARIA submits, therefore, in the strongest terms possible, that the legislation must prohibit circumvention. **If circumvention itself is not prohibited, copyright owners will be greatly exposed, as any individual will simply be able to import for his or her own use the necessary equipment, software and instructions.** The very technological developments of the online environment means that everyone will have ready access to purchase or obtain the necessary items. In many cases, where the circumvention method is software, these means will be available instantaneously via the Internet.

To the very limited extent that circumvention itself may be justified (if at all), ARIA submits that the appropriate course is for specific, tailored exceptions to the prohibition to be developed.

Accordingly, ARIA submits that Item 98 should be amended as follows:

- renumber paragraphs 116A(1)(b) and (c) as, respectively, (c) and (d); and
- insert a new paragraph 116A(1)(b):

“a person without the permission of the owner or licensee of the copyright uses a circumvention device:

 - (i) to access; or

- (ii) to exercise a right comprised in the copyright subsisting in,
the work or other subject matter in which copyright subsists; or”;
- renumber the reference to paragraph (1)(c) in sub-section 116A(6) to (1)(d).

We note with approval the removal of “reckless” and the inclusion of “or ought reasonably to have known” in the civil provisions (Item 98).

The long history of copyright law in Australia has repeatedly demonstrated the inadequacy of prohibitions based on knowledge. (See eg. *RCA Corporation v. Custom Cleared* (1978) 19 ALR 123.) It was in recognition and acknowledgment of that inadequacy that provisions of the Act such as sections 37, 38, 102 and 103 were amended to cover both persons who “know, or ought reasonably to have known”.

S116B(l)(c) – okay.

We submit, however, that paragraph 116C(1)(c) should be amended to insert “, or ought reasonably to have known,” after “knew” and paragraph 116C(1)(d) should be deleted.

We oppose in the strongest terms possible the inclusion of references to section 49, 50 and Part VB in section 116A(7)(b) and 132(5J).

Under sections 49, 50 and Part VB at the moment, the library or someone must have purchased at least one legitimate copy. In the digital environment where materials are made available on-line, however, copyright owners will be able to obtain compensation only by controlling access. Libraries will be able to defeat such controls without any requirement to pay compensation. They will also be able to use circumvention measures to create and communicate multiple, unlicensed copies. This provision, therefore, will leave copyright owners greatly exposed.

This goes far beyond an appropriate extension of existing exceptions into the digital environment and, consequently, is in breach of the article WCT and of the article WPPT.

ARIA notes that this provision has absolutely no counterpart in either the US or EU legislation. In the USA, the DMCA excludes the use of circumvention devices to access copyright materials. The EU’s Amended Proposal expressly preserves technological measures: see e.g. paragraph 2(1) of the substantive amendments proposed by Parliament and accepted by the Commission and article 5(2)(b bis).

The criminal remedies are available only against persons with knowledge or who were “reckless”.

The inclusion of the element of “recklessness” (in section 132(5E)) is insufficient. In fact, it adds nothing. Criminal liability based on knowledge alone (*mens rea*) already encompasses recklessness: eg. *Howard’s Criminal Law*, 5th edition, 5 and 11.

The exceptions to the anti-circumvention provisions in Items 98 (S.116A – civil) and 100 (s.132(5a) – criminal) will make enforcement virtually impossible. All that the importer, distributor (and the like) of the circumvention device (or service) will need

do to be completely exonerated is to get a “declaration” from the customer, that the product will only be used for library, educational or governmental purposes. There is no penalty for a false declaration and in fact since the act of circumvention for other purposes is not illegal, there is absolutely no legal incentive for anyone to live up to the declared purpose.

Further, Section 132 (5k) compounds the problem, since in a criminal case the defendant need not even produce the piece of paper containing the declaration, but merely has to raise the possibility that it might exist.

ARIA submits that Item 100 must be amended to replace “reckless” with “ought reasonably to have known” if the provision is to be effective. Parliament itself has recognised the need for this extension as all the other provisions already prohibited by section 132 impose liability where the infringer knows or ought reasonably to have known that they were engaging in infringing activity.

Item 100

As submitted above, there must also be a **prohibition on use of a circumvention device** (see Items 98 and 100 above).

ARIA agrees that for Item 98 the knowledge requirement should be “knows, or ought reasonably to have known”, consistent with article 12(1) of the WCT and article 19(1) of the WPPT which expressly require this extension in the case of civil remedies.

In addition, without limiting the foregoing, ARIA submits that even in the case of criminal remedies, sub-section 132(5E)(d) must refer to both “knew, or ought reasonably have known”. Otherwise defendants will have a licence to blindly ignore obvious tampering with rights management information.

In addition to circumvention service, **the Act should proscribe the “conduct” by anyone of circumventing a copyright product’s protection measures.**

Also, 5(D) and 5(E) “remove or alter any electronic” should be “remove or alter in part or in full any electronic”.

Also refer to notes under Item 98.

Further, we note that under new 116A, **the sale of a circumvention device** to a library to be used by an officer of the library for activities specified under the library and archive exceptions, will not fall within the operation of the enforcement measure provisions.

The manufacturer or vendor will not suffer any liability provided the devices are sold on the basis that they must only be used in accordance with defences under the Copyright Act.

We disagree with this completely, it will allow such machines/devices into the market place and it lets libraries hijack/infringe copyright rather than subscribing lawfully to services to obtain original copies in the first place.

This condition is not a requirement of the WIPO Treaties (nor in USA law).

Item 200 Part VC (Retransmission of Free-to-Air Broadcasts)

As drafted, section 135ZZK appears to create a statutory license for all retransmissions of free-to-air broadcasts and not just retransmissions by pay TV operators. This is because:

- as defined in Item 15, “retransmission” is simply any retransmission of a broadcast (ie. this could be TV or audio only, or free-to-air, or subscription broadcast); and
- as there is no uncertainty or ambiguity in the plain meaning of the terms used in these provisions, there is no need or mandate for any recourse to the Commentary or any other extrinsic materials.

Therefore, the provisions do not reflect the Government’s announced policy intentions (see paragraph 167 of the ED Commentary). Accordingly, ARIA submits that these provisions require amendment to reflect properly the Government’s intentions.

In relation to the first bullet point above, the relevant “**retransmission**” **should only apply to retransmission of a free-to-air television programme**. At present, it would also refer to retransmission of another pay TV television programme and of any radio or other audio broadcast (eg. Subscription audio broadcast). This is an **unintended consequence** of the drafting and must be tightened accordingly.

Section 135 ZZT

ARIA submits that it is more appropriate for the Copyright Tribunal to have the power to declare one or more collecting societies to administer these rights. The Copyright Tribunal is an independent forum where decisions are made on the basis of evidence and after giving all interested parties a chance to be heard. Therefore, the decision making process is much more transparent and is *seen* to be fair. Parliamentary oversight of the process and the operations of any declared societies can be maintained through the Copyright Regulations (e.g. Reg. 23J) together with a simple amendment of the proposed section 135ZZV.

Section 135ZZT(4) permits declaration of more than 1 society which must be maintained. However, the Definition of a Collecting Society is too narrow. The section ignores the fact that APRA and PPCA already exist to licence broadcasters and will also include to licence broadcast re-transmissions in those agreements.

The interests of the owners of different classes of copyright are not always the same.

The legislation must make it clear that a “class of copyright owner”, therefore, includes at least a class determined on the basis of the copyright subject matter. (Not the format of the copying). ARIA currently has a case proceeding in the Federal Court dealing with such an issue.

The legislation should deal expressly with situations where copyright owners reach agreement about who shall act as their collecting society. ARIA submits, therefore, that a new sub-section should be included which specifies the following principal:

“(2A) Nothing in section 135ZZT(4) or in this Part shall preclude an existing collecting society that has or will licence pay TV (or other retransmitting broadcasters) to broadcast a class of copyright material to also licence retransmission of the same copyright material.

As the Committee would readily appreciate, in the case of music and recordings, APRA and PCCA already have licences in place with the broadcasters and the retransmission licence would be added into existing broadcast licences. The imposition of another collecting society would merely create an inefficiency and diminution of the fee payable through further administrative costs. Further, the sound recording copyright owners desire PCCA to collect these fees in relation to sound recordings. It is much more efficient to allow copyright owners to decide which body should act as their collecting society for themselves. This ensures that their interests are properly represented as the society is subject to their control and allows a measure of competition against which they can measure whether or not they are being well served.

Importantly (and as stated above), this Item **MUST** specify that it relates to retransmission by Pay TV broadcasters of free-to-air TV programmes broadcast only (not any other type of broadcast ie. audio only broadcast).

Item 201 (s.136)

ARIA submits that the addition of the words in section 136(1)(b): “or to broadcast the recording in a broadcast transmitted for a fee payable to the person who made the broadcast” are too wide and inconsistent with the changes introduced in the Copyright Amendment Bill No. 1 1997 and passed in July 1998.

Section 136 determines what licences are, subject to the Copyright Tribunal’s jurisdiction. Any person setting up, say, a multi-channel audio service, therefore, could force record label/artists to licence them. In a short time, however, in the vast majority of cases, sound recordings will be sold by online communication delivery. To allow others to simply access a licence to do this will interfere with the marketing and business of the record labels/artists. The broadcast subscription services that will emerge will be offering multi-channel 24 hour digital music. These services will compete with or displace direct sales (i.e. making available or demand services) by the copyright owners, as it would even allow, for example, a Beatles channel.

No such statutory ‘licence’ applies to films and equally it should not apply to sound recordings. Subscription broadcasters should organise their programmes by acquiring licences in the market place as they have always done for audio-visual programmes. **Indeed, in respect of (music video) films**, each Pay TV operator obtained licences from various copyright owners in separate negotiations/licenses and specifically declined collective licensing.

Accordingly, our position is that no Tribunal access (i.e. statutory licence) should be provided for the broadcast of sound recordings by subscription broadcasters. This should be achieved by expressly limiting the licence to free-to-air broadcasters as, under the new rights, there will be many more types of communication than just free-to-air broadcasts and subscription broadcasts.

In addition, as the Committee will appreciate, the Bill repeals the current definition of “to broadcast”, therefore, it is not appropriate to continue to use that terminology. The provision should presumably refer to, including material in a broadcast.

Our alternate position is that if at the election of individual relevant copyright owners, their sound recordings are to be collectively licensed, then Tribunal jurisdiction under s136 ought to apply. The relevant part of paragraph (b) could read:

“...or in respect of those copyright owners which have consented to collective licensing - to communicate the recording (in association with other matter or otherwise) to the public by a broadcasting service with the meaning of the Broadcasting Services Act 1992 for a fee payable – directly or indirectly – to the person who made the broadcast”.

Or alternatively, it must be ensured that S.136 only relates to sound recordings in films (ie. TV programmes), not audio channels. Indeed, this may be the point that the department/drafters got confused about ie: the addition to section 136 should only cover the instant where sound recording copyright owners (or their collective licensing agency PPCA) licences pay TV operators (or subscription broadcasters) to broadcast sound recordings that are embodied in TV programmes.

The words “in association with other matter or otherwise” are required in order to prevent a subscription broadcaster from “shamming” a s136 license by putting unrelated still or film images with sound recordings and then broadcasting to create a pretense that the broadcast is an audio visual (TV) programme or arguably the same type of thing.

Item 215 to 217

ARIA supports these proposals.

Items 218 to 222

These proposals seem to be OK.

Item 223

ARIA supports this proposal.

Items 224 to 230

ARIA submits that these provisions do not go far enough as they retain, or introduce, references to “broadcast” and “re-broadcast” where those expressions are verbs. As the right to “broadcast” will be replaced by this legislation, ARIA submits that these references should be replaced with “communicate”.

Schedule 2 - Transitional

These as drafted are unacceptable.

Item 3 (Schedule 2) of the Bill states that application of the communication right to existing rights “does not apply” to broadcasting rights or cable transmission rights.

This wording has the effect of denying the benefit of the new communication right to any work or other subject-matter that has been assigned before the commencing day. ARIA submits that this cannot have been the intention of Parliament and is an absurd result which cannot be enacted.

ARIA submits that where a broadcasting right or cable transmission right of a sound recording has been assigned before the commencing day, the assignee should be the owner of the new communication right. This should apply generally, so that the assignee of any work or other subject-matter that has been previously assigned becomes the owner of the new communication right. The exception should be where the contract of assignment or licence provides to the contrary.

Accordingly, ARIA submits that Item 3 be re-written to this effect.

In the alternative, and at the very least, Item 3(2) should be deleted, and in Item 3(1) the words “(other than an assignment of copyright)” should be amended to read “(including an assignment of copyright)”.

S111(3)(d) Copyright Act 1968

As this section now reads, it is inconsistent with the Bill, “broadcasting” in (d) should be replaced with “communicating”.]

Omissions from Digital Agenda Bill (ie: Broadcaster Fees for use of recorded music s152)

- **The Bill fails to deal with** a vital issue concerning broadcasting and communications of sound recordings and competition policy.
- Namely, the Bill does not repeal the **price cappings** – introduced in 1969 – on the fees payable by broadcasters for the use of sound recordings.
- Both commercial broadcasters and the ABC radio stations have benefited from the price cappings on these licence fees.

Summary

This Bill fails to deal with the unsustainable and inequitable provisions in the Copyright Act that **artificially cap** the fees payable by broadcasters/transmitters for the use of sound recorded music. This is caused by section 152 (8) & (11) which provides that each commercial broadcaster cannot be ordered by the independent Copyright Tribunal to pay more than one percent of their turnover for their use of recorded music. This has required the record industry and its artists to subsidize commercial radio. In the transmission online age, it is simply not a commercially sustainable proposition for record companies/artists to have this uncommercial limitation imposed on the use of their products.

The ABC is similarly subsidized via a capping that it pays no more than half a cent per head of population. Since 1969, when this was included in the Copyright Act, the half cent has not even been CPI adjusted. Moreover, the ABC’s radio network has

expanded greatly as has its use of recordings via the ABC FM and Triple J networks in particular.

These cappings are repugnant to the government's competition policy. The cappings create distortions in the marketplace as well as distortions in terms of cultural policy as they can influence what is played. If there is a case for commercial radio broadcasters to be subsidised then this is an issue for the government's application of taxpayer funds. It is not an issue for a supply industry, (ie: the recorded music industry) to subsidise another private industry, ie: radio broadcasters. Further still, unless the price cappings are removed, new entrants into the broadcast market will commence business on the basis of these price cappings and distortions.

The amendment needed to lift the 1% and half cent ceilings is a very simple one which should be done in the Digital Agenda Bill this year.

Phonographic Performance Company of Australia
and the Australian Record Industry Association

27 September 1999

Three Price Cappings

There are three types of cappings (which were introduced in 1969):

1. The commercial broadcasters fee is capped at less than 1% of each station's turnover.
2. The ABC radio stations' fee is capped at half of one cent per head of population.
3. No fee applies to broadcast use of US and Canadian recordings. This is a price capping of zero.

The ceilings are contained in sections 152(8) and 152(11) of the Act. Section 152 is generally concerned with applications to the Copyright Tribunal for the determination of amounts payable for broadcasting published sound recordings. Para-phrased sub-section (8) provides that:

"The Tribunal shall not make an order that would require a broadcaster to pay, in respect of the broadcasting of published sound recordings an amount exceeding 1% annual gross earnings of the broadcaster." In other words, ie: regardless of the reasonable rate the Tribunal cannot order more than 1%.

The ceiling on licence fees payable by the ABC is contained with section 152(11) which provides that the licence fee cannot exceed ½ a cent per head of population in Australia.

The effect of s152(8) and (11) is that the broadcasters refuse to negotiate reasonable fees and will not do so until the ceilings are removed.

1. Market Distortions

The cappings create **distortions** regarding what is played and the amount of new Australian material that can be produced. The cappings, of course, also have cost recording artists and record labels millions of dollars in foregone fees over the last 30 years.

(a) THE PRICE CAPPINGS ARE A SUBSIDY

It is simply inappropriate for any subsidy that radio broadcasters might receive to be provided by sound recording creators. Subsidies are provided by government from the entire tax base.

2. No Other Price Cappings

There are no price cappings for any copyright item other than those in s152. Moreover, no such ceiling has ever been in place in respect of the broadcast licence for musical works (ie the fee payable to the songwriters/music publishers via APRA) and licence fees for the exercise of that right are currently an average of 2% with "music" stations paying 2.66% to APRA.

Further, the Coalition in 1996 abandoned price cappings generally except in regard to community service obligations such as stamps and some telephone services.

2.1 Broadcast Fees Overseas

The cappings result in fees that are significantly below comparable market rates for such licences and are inconsistent with competition policy and good broadcasting policy.

Market rates for sound recording broadcast licences overseas, exceed one per cent. By way of international example, the broadcast licence rates in the United Kingdom set by their Tribunal in 1995 are between 2% and 5% depending upon the level of the broadcaster's gross revenue and music airtime.

(i) COMMERCIAL BROADCASTERS: NO IMPACT UNTIL 2003

The removal of Section 152(8) from the Act will have no immediate impact on commercial broadcasters. The sound recording industry, through Phonographic Performance Company of Australia Limited ("PPCA") has reached an industry agreement with the Federation of Australia Radio Broadcasters ("FARB") which represents commercial radio broadcasters in Australia.

Under the terms of that agreement, the 'capped' licence fees for FARB's members have been agreed upon until 30 June 2003. As such, there will be no immediate impact on the commercial broadcasting industry from the introduction of the ability to charge market rates until after 2003.

(ii) NEW BROADCAST SERVICES

The removal is crucial also in terms of licensing new licencees and new transmission services that are emerging with the technological Super-highway. Clearly, unless proper market rates can be put in place with these new entrants, the inequities and distortions caused by the ceilings are further aggravated and entrenched.

(iii) ABC

The ABC should pay market rates like any other broadcaster subject to the Copyright Tribunal's final arbitration.

The basis for calculating the ceiling, as it applies to the ABC, introduces two further inequities which are not present in relation to section 152(8).

The figure of half a cent per head of population has not been indexed and has remained unchanged since the introduction of the Act in 1969. There has been substantial inflation in Australia during that 25 year period. Indeed, adjusted for inflation, half a cent in 1969 is now 4 cents.

Since 1969, the ABC has established ABC-FM and Triple J, both substantial users of recorded music. Accordingly, the fee in real terms, has decreased substantially given the substantial music broadcasting undertaken by the ABC through the addition of these two stations combined with the decrease in the ½ cent fee caused by inflation.

As with the commercial broadcasters, PPCA is about to enter into an agreement with the ABC in relation to the broadcast of sound recordings. That agreement would be for three years. Again, should the ABC and PPCA be unable to come to an agreement, and the ½ cent capping was removed, the Copyright Tribunal will be the final arbiters of the rate, not the Government.

The ABC's reliance on the ½ ceiling may also offend the governments competitive neutrality policy.

3. Broadcasters' Position

The broadcasters have "opposed the removal" of the cappings "on the basis that they were concerned that PPCA would make excessive demands for royalties if the ceilings were removed". (**Source: para 4.30 Copyright Reform and the Digital Agenda Discussion Paper, July 1997**)

This response is, of course a complete nonsense. The fees (royalties) are subject to jurisdiction of the Copyright Tribunal and if broadcasters do not agree with a PPCA rate the Tribunal is there to adjudicate. Further still, it is highly likely that once the ceilings are removed both radio and PPCA will apply to the Tribunal to set the first uncapped rate to ensure that all aspects of each sides views are taken into account. The radio industry has much experience in, and is vigorous in its approach to, Tribunal fee applications.

(a) COPYRIGHT TRIBUNAL DETERMINES THE FEE

The appropriate uncapped fee will be the fee the Copyright Tribunal judges to be a fair market rate for each relevant type of broadcaster. The Tribunal will take all relevant matters into consideration. The radio industry, via FARB, are expert and very experienced in Tribunal cases.

The Copyright Tribunal has a long standing and expert role in resolving copyright licences and fees. The Copyright Tribunal has the power to set rates and terms in relation to 9 other matters, ranging from fees payable by educational institutions for copying TV programmes and films to incorporating songs in records. In all of these matters there are no cappings or ceilings, except for the section 152 fees payable by radio stations for using sound recordings. This again highlights the absurdity and

inequity of the cappings in sections 152(8) and (11) and the need for their immediate removal.

3.2 Minor Amendment Required

Very minor legislative changes are required to repeal the cappings. Indeed, the repeal of Section 152(8) and (11) is achievable as a one sentence amendment to the Digital Agenda Copyright Amendments. It would read as follows:

Section 152:

- (i) Repeal sub-sections (8), (9), (10) and (11)(b)(i) of Section 152.”

Note: Sub-sections (9) and (10) are consequential to (8) and (11)

Repeal of these sub-sections, would leave the Copyright Tribunal’s jurisdiction in place but remove the ceiling on the Tribunal’s ability to order what the broadcast rates will be.

This suggested repeal fixes the 1% price capping and the ½% (ABC capping). It does not deal with the zero price capping on American and Canadian repertoire.

REQUEST

We request the removal of the 1% and ½ cent price cappings in the **Digital Agenda Reform Bill**.

ATTACHMENT A

Submitted by:

PPCA

PPCA is a non-profit organisation established to collectively license, enforce and administer public performance and broadcast rights in sound recordings and to distribute the revenues raised from these licences to artists and copyright owners.

PPCA was established in 1969 after those rights were first introduced in the Australian Copyright Act 1968. The rights vest in the sound recording copyright owner/controller. PPCA also licenses the broadcast and public exhibition rights in music video clips.

PPCA provides the commercial link between sound recording and music video copyright owners and tens of thousands of users, distributing revenues to featured recording artists and member labels in a quick cost-effective manner.

Revenues are also distributed through the PPCA Trust.

And

ARIA

ARIA has over 80 members ranging from small “boutique” labels typically run by 1-5 people, to medium size companies and very large companies employing thousands of people.

In broad terms ARIA performs four main functions:

- First, ARIA acts as an advocate for the industry, domestically and internationally.
- Secondly, it acts as an anti-piracy unit enforcing the copyrights of its members, often in conjunction with the police.
- Thirdly, it is a focus for industry opinion and compiler of industry information and views.
- Fourthly, it provides in certain cases, a “blanket” licensing function on behalf of its members for various copyright users.