



PPCA Response to The Broadcasting Service Exclusion Determination Consultation Paper - September 2022

The Phonographic Performance Company of Australia (PPCA) welcomes the opportunity to respond to this consultation.

In summary:

- *The Determination should be remade on the same terms for a minimum of 5 years.*
- *The expiration of the Determination would:*
 - *cause significant financial detriment to the record labels and artists that PPCA represents through the loss of licensing revenue, and this financial loss would be worsened by inequitable provisions in the Copyright Act (such as the 1% cap and compulsory licences for broadcasts of sound recordings); and*
 - *disrupt existing commercial arrangements spanning the creative and sporting sectors, causing uncertainty and financial losses for rights holders.*

Our responses to the specific consultation questions are set out below.

- 1. *Should government make an instrument under subsection 6(2) of the BSA in effectively the same terms as the Broadcasting Services (“Broadcasting Service” Definition—Exclusion) Determination 2019, which excludes services that provide live-streamed content online from being considered a ‘broadcasting service’?***

PPCA strongly supports the remaking of the Determination on the same terms, which excludes services that provide live-streamed content online from being considered a ‘broadcasting service’. PPCA would be very concerned about any proposed reforms which would remove this distinction.

As noted in the Consultation Paper, the precursor to the Determination was the *Determination under paragraph (c) of the Definition of ‘Broadcasting Service’ (No. 1 of 2000)*, made in 2000, known as the ‘Alston Determination’. The Alston Determination was the subject of the Full Federal Court decision in *Phonographic Performance Company of Australia v Commercial Radio Australia Limited* (2013) 209 FCR 331 (special leave refused at [2013] HCATrans 187) - which effectively confirmed the meaning of the Alston Determination by judicial decision. The Full Court, which construed the Alston Determination, found online simulcasting of radio broadcasts to be a separate service from the radio broadcast and therefore excluded from the BSA and, separately remunerable. This is consistent with the legal position in other territories and international copyright treaties.

There is a strong risk that any changes to the drafting of the instrument will have a detrimental impact on sound recording copyright holders, upset existing commercial arrangements across a range of sectors, and bring uncertainty to this facet of broadcasting and copyright regulation.

- 2. *If the instrument is made, in an effort to provide certainty and stability to industry while broader regulatory reforms are developed and progressed, should it be remade for a duration of 3 years, 5 years, or alternative period of time?***

The instrument should be remade for a minimum of 5 years.

A continuation of the Determination provides certainty and stability to both PPCA and its stakeholders for the remuneration that is due to them for the exercise of this separate right, and broadcasters wishing to exercise it. As noted in the response to question 1, the confirmation of this entitlement for sound recording rights holders was a prolonged struggle spanning 5 years of litigation by PPCA. Consequently, PPCA's stakeholders have only received their entitlement to remuneration from radio simulcasts for a relatively short period of time following the conclusion of this litigation.

We understand that the making of this instrument may be an interim measure which forms part of the Government's commitment to progressing transparent and meaningful media reform. We support the Government's reform commitment but note that issues relating to "media convergence" or "platform neutrality" do not necessitate the removal of the fundamental distinction between broadcasts and online communications. The complexity of this issue and the far-reaching ramifications of any potential reforms necessitates a comprehensive review and consultation process.

In order to be properly recompensed for the use of their work, it is critical for sound recording rights owners and recording artists that the distinction between traditional broadcast and the delivery of content online is preserved. Unless and until other amendments appropriately deal with existing legislative caps for the use of sound recordings in radio broadcasts, and compulsory licences for broadcasting, it is imperative that the instrument be maintained.

- 3. *If the instrument is made for a duration of 3 to 5 years, what would be the regulatory and financial impact on your business?***

The instrument itself does not impose any regulatory burdens on PPCA.

Instead, the instrument provides certainty of ongoing remuneration for rights holders and removes the risk of disruption to the current licensing practices that are in place across a range of sectors including music and sports.

- 4. *If the Determination expires on 18 September 2022, with no interim solution in place, how would this impact your business or area of industry? What regulatory and financial costs do you estimate your business would incur in this scenario?***

The expiration of the Determination, with no interim solution, would have a harmful financial impact on PPCA and the record labels and artists that it represents through the loss of licensing revenue, and it would also undermine the existing rights licensing framework. Inequitable provisions in the Copyright Act, such as the 1% cap, would exacerbate the financial losses for PPCA's stakeholders if the Determination expires.

The current simulcast licensing scheme that PPCA has in place with the commercial radio sector is the result of 5 years of litigation. That significant investment from both sectors would be wasted, with adverse consequences for sound recording copyright holders and artists registered with PPCA. The expiration of the instrument would disturb the current licensing frameworks, causing uncertainty and potential litigation. The creative industries and the sporting codes in Australia license their content on the basis that the right to broadcast the content and

the right to communicate the content over the internet are separate rights which may be remunerated separately.

The expiration of the Determination will result in a reduction to the revenue streams and opportunities for our stakeholders to sustain a livelihood. This would be immensely damaging to our stakeholders, particularly at a time when the music industry is trying to rebuild after being devastated during the pandemic. Allowing the Determination to expire would put *additional* financial pressures on the recorded music industry as the online communications would fall within the ambit of the statutory pricing caps prescribed in the Copyright Act.

The Consultation Paper notes that the Copyright Act *relies upon the definition of 'broadcasting service' from the BSA to define a 'broadcast', including for (among other matters) the statutory licence framework governing remuneration for the broadcast of sound recordings (including the so-called '1 per cent cap' for radio broadcasters)*¹, but this does not describe the egregious nature of these statutory caps.

For PPCA and its stakeholders, the distinction between the broadcast right and the online communication right is of immense importance, as the broadcast right in sound recordings is compulsorily licensed under s109 of the Copyright Act (the **s109 statutory licence**), and the amounts payable under that licence (administered by PPCA) are capped under s152(8) and s152(11) of the Copyright Act.

The statutory pricing caps have been in place for nearly 55 years and are an international anomaly. The statutory licence and the statutory caps place the Australian recording industry in an unparalleled position of disadvantage compared to other copyright owners. These pricing caps do not apply to any other form of copyright (including musical works). The voluntary licensing arrangements entered into between broadcasters and the Australasian Performing Right Association operate effectively outside of the s109 statutory licence and are not constrained by any pricing caps. PPCA is not able to freely negotiate with radio broadcasters or refer a scheme to the Copyright Tribunal for proper consideration while the inequitable caps persist, making it impossible for existing agreements to be amended to properly reflect the market value of the broadcast right in sound recordings, let alone encompass additional remuneration for internet simulcasts. If the regulatory arrangement is changed so that online communications by broadcasters are treated as broadcasts, then effectively the entire Australian recording industry would be deprived of the important income stream from online radio simulcasting, because this activity would be considered a "broadcast" and subject to the statutory licence and the arbitrary pricing caps.

Several independent reviews² over the past decades have all recommended repeal of the caps, yet the caps still remain in place.

5. What are your views on the alternatives to remaking the Determination?

Any legislative alternatives to remaking the Determination would need to consider the principles of copyright law, and preserve the distinction between the two separate rights in sound recordings, namely the broadcast right, and the "communication to the public" (online transmission) right.

This distinction is enshrined in Australian and international law and practice. It is also a feature of international copyright treaties, with simulcasts treated as communications to the public and not as broadcasts. Comparable countries including the United States, Canada and New Zealand all distinguish between broadcasts and online communications/transmissions, with simulcasts categorised as online communications /transmissions. Our

¹ Consultation Paper at page 12

² *Review of the Australian Copyright Collecting Societies: A report to the Minister for Communications and the Arts and the Minister for Justice, Department of Communications and the Arts, July 1995 (the Simpson Review); Review of intellectual property legislation under the Competition Principles Agreement: Final report to the Minister for Industry, Science and Resources and Attorney-General, IP Australia, September 2000 (the Ergas Review); Australian Law Reform Commission, Copyright and the Digital Economy: Final Report, November 2013 (the ALRC Review); and Inquiry into the Australian Music Industry, House of Representatives Standing Committee on Communications and the Arts, March 2019 (House of Representatives Review).*

understanding is that extending the definition of “broadcast” to include online transmissions by way of simulcasting would be incompatible with WPPT. Furthermore, Australia is required to maintain this distinction under some international treaties, including Article 17.6(3) of the Australia-United States Free Trade Agreement which requires Australia to afford the full exclusive right of communication to the public in respect of US sound recordings transmitted over the internet, including internet simulcasting.

As a part of any alternatives to remaking the Determination, consideration should be given to the repeal of the statutory pricing caps and the s109 statutory licence.

Any reforms that deem online communications as broadcasts would widen this inequity faced by sound recording rights holders by depriving them of remuneration. It will also impact online services that are not broadcasters as these entities need to negotiate market rates for the use of sound recordings within their services. If the pricing caps were extended to simulcast transmissions, which compete directly with on-demand subscription music services (the main driver of the recorded music industry’s recent return to growth), the effect would be a significant market distortion and imbalance in the digital music market.

About PPCA

Established in 1969, PPCA is a national non-government, non-profit Australian copyright collecting society. PPCA operates on a non-exclusive basis and grants licences for the broadcast, communication or public playing of recorded music and music videos. PPCA represents the interests of over 3,500 licensors and 5,000 registered Australian recording artists, and provides an important link between those who control rights in sound recordings, and those who wish to use those recordings in a commercial or public way.

As a non-profit copyright collecting society, each year PPCA distributes its entire surplus (i.e. excess of licence fee revenues over costs) to its Licensors and Featured Australian Artists registered under its Artist Direct Distribution Scheme. Enshrined in PPCA's distribution policy is the allocation of 2.5% of the value of the annual local repertoire pool to charitable, educational and like purposes. As a result, each year PPCA has been able to support a number of industry initiatives, including providing funding for:

- The Australian Copyright Council,
- The Australian Independent Record Labels Association (AIR),
- The PPCA Sound Recording grants, delivered in collaboration with the Australia Council for the Arts,
- The Association of Artist Managers,
- Sounds Australia,
- Support Act, and
- The Best Independent Release category at the annual ARIA Music Awards (the ARIAs).

We acknowledge First Nations people as the Traditional Owners and sovereign custodians of the lands on which we work and live. We recognise their continuing connection to Country and their respective nations across this continent and pay our respects to their Elders past and present. We also celebrate the unique and inspiring creativity and songlines of the world's oldest living culture and give thanks for the immeasurable influence First Nations people continue to have over the music and art we all enjoy.

Contact: Annabelle Herd, CEO, aherd@ppca.com.au, Phonographic Performance Company Australia

PPCA confirms that this submission is not confidential and it can be made public