

## **“Oz rock ensures radio is back in black”**

### **A submission to the Attorney General’s review of the 1% cap on license fees paid to copyright owners for playing sound recordings on the radio, by Alex Malik <sup>1</sup>**

The radio industry owes a great deal to the Australian recording industry. Where would contemporary hit radio be without the recording artists colloquially known as Jet, Kylie, Missy, Delta & the Finger? Where would the classic hits radio format be without Farnsie & Barnsie? And yet, for the last 36 years not only have these and other Australian and international artists attracted new fans to the radio, but they have also financially supported the radio industry – an industry partially owned and managed from overseas. The reason for this support is because of an anomaly in the Copyright Act – an anomaly created in 1968, which was before the internet, before the digital age, and even before colour television arrived in Australia.

Under the Copyright Act copyright protection is afforded to sound recordings and musical works. There are no caps placed on copyright license fees paid by radio stations to the owners of musical works. License fees are determined by bona fide negotiations and the terms of a series of license agreements. Yet, s.152(8) of the *Copyright Act 1968*, places a 1% cap on copyright licence fees payable by radio broadcasters for the playing of sound recordings.

As a result of these rate caps, for the past 36 years the Australian radio industry has had an almost free ride at the expense of recording artists, including Australian artists, and the recording companies that discover, record, produce, finance and market these artists. The radio industry receives legislative discounts on copyright that no other industry receives.

While over 250 commercial radio stations earned hundreds of millions of dollars of revenue last year, they only paid sound recording copyright holders a minuscule \$2.65 million. They paid approximately eight times this amount to the owners of musical works. While these two sets of fees are not directly comparable because owners of sound recordings are not entitled to be paid for the use of US sound recordings, this license differential is still an anomaly which cannot currently be justified. Common sense suggests that the use of sound recordings on radio should be worth at least as much if not more than the use of the musical works embodied within the sound recordings. As Jim White, the former General Manager of the PPCA was fond of saying, “you can’t play a piece of sheet music on the radio.”

The Federal Government has indicated that it is going to review this license fee cap. As a result of this review, the Federal Government should not only amend the Copyright Act and remove this statutory cap, which is no more than a legal anomaly, but they should backdate the abolition of this statutory cap to 1969 – when it first instituted.

## **1968**

It is unclear whether or not the 1% cap was justified in 1968. The Copyright Act was passed in 1968, but these provisions took effect in 1969. In any event, this statutory cap is certainly not justified in 2005. In 1968 colour television was years away, commercial FM stereo radio was 12 years away and the internet had not been conceived. In Australia, Menzies was in power, JOK and The Easybeats dominated the local music charts and “rock ‘n’ roll” was a mere 12 year old adolescent. While music was important to radio, it certainly did not dominate the airwaves to the same extent as it currently dominates the airwaves.

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In 1968 the Government introduced the Copyright Act, which at s.152(8) stated that “the (Copyright) Tribunal must not make an order that would require a broadcaster ... to pay, in respect of the broadcasting of published sound recordings ... an amount exceeding 1% of ... the gross earnings of the broadcaster during the (12 months) ... that ended on the (previous) June 30.” In other words the Tribunal is prohibited from making 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 effect, regardless of the reasonable rate or the Tribunal’s perception of the market rate, the Tribunal cannot order a rate of more than 1%. However, under a collective licensing system currently in place, broadcasters only pay an average fee of 0.4% of gross income, which is far less than the 1% ceiling.

For whatever reason, the Government of the day believed the radio industry needed financial protection in the form of a statutory cap. Perhaps the Government was worried about the Cold War and Vietnam and wanted to ensure a supportive medium with respect to their policies. Perhaps broadcasters made significant donations to political parties. In 1968, the Australian economy was a relatively closed economy. The Australian currency was some 15 years away from being floated. Perhaps, like the wheat, wool, manufacturing and mining industries, the Government simply viewed the broadcasting industry as an essential industry requiring government protection at the time. Perhaps the radio industry was in its infancy in the 1960s and the stakeholders of that industry managed to convince the Federal Government at the time that they required an environment of financial certainty in order to ensure their continued viability.

### **36 years Later**

In 2005 Australia has one of the most efficient economies in the world. Indeed, Australia has one of the most efficient music markets in the world as a result of the Federal Government’s decision to remove the restrictions on parallel imports, and the ACCC’s enforcement of this policy. Australian industries compete internationally without the benefit of tariffs, subsidies, quotas or other artificial forms of trade protection. When the multilateral trade system let Australia down and failed to effectively encourage an international environment based on free trade, Australia took a bilateral approach to trade negotiation. As a result Australia has negotiated free trade agreements with New Zealand, the US, Singapore and Thailand, and more agreements expected in the future. Australian culture has also been exported to the rest of the world. Despite this free trade environment and the increased acceptance of globalisation Australian broadcasters remain protected by the 1% cap. Internationally, rates for sound recording broadcast licences are well in excess of 1%, and in some cases can be up to 5%. For example, in the UK rates can be between 2% and 5%, depending upon the level of the broadcaster’s gross revenue and the amount of airtime devoted to music.

Is there any economic, legal or social justification for the maintenance of this 1% cap? No. The commercial broadcasting industry has undergone many changes since 1968 and none of these changes suggest that the radio industry needs to be subsidised by Australian and international recording artists, and their record labels. The radio industry may have been in its infancy in 1968 – however in 2005 it is a mature, profitable and self sufficient industry.

### **Effects of these statutory caps**

The effect of s.152(8) of the Copyright Act is that the broadcaster license fees for the use of sound recordings are effectively capped. There are no price cappings for any copyright of copyright-related item other than those in s.152 of the Copyright Act. Moreover, no license fee caps have ever been in place with respect to the broadcast licence for musical works. These

cappings create market distortions and as takes place with any form of protectionism, result in a misallocation of scarce resources.

While broadcasters are free to negotiate fees outside of the statutory caps, why would broadcasters agree to pay more than they are legally bound to pay, irrespective of the true "value" of sound recordings and other market indicators? As a result, broadcasters have not only paid license fees well below the true market value of sound recordings, but in many instances they have refused to conduct bona fide negotiations with copyright owners. While we will never know the true market value of sound recordings since 1968, copyright owners can justifiably claim to have lost millions of dollars as a result of forgone license fees. These forgone license fees would have not only impacted on major record companies, but would have also had a significant impact on the Australian independent music sector who are heavily reliant on license fees collected from a variety of sources.

The current agreement between the PPCA and industry ceased in 2003, and since then it has been extended several times seemingly without any meaningful negotiations being conducted between radio stations and copyright holders. While there is no way to be certain of what discussions have taken place "behind closed doors", this is not a surprising result. Why would the radio industry conduct meaningful negotiations over the license fee payable to copyright holders when every day that the existing regime is maintained, thousands of dollars are added to the "bottom line" of all commercial radio stations in Australia?

Of course the Australian recording industry can also be at least partially blamed for this apparent stalemate. The recording industry could have demanded a higher rate – irrespective of the operation of s.152(8) of the Copyright Act. The Australian recording industry could have threatened to withhold sound recordings from radio stations that refused to pay a reasonable market rate for sound recordings. They could have imposed conditions on the usage of sound recordings – such as a limited number of plays in a given time period. The Australian recording industry could have also brought an action before the Copyright Tribunal, as the Tribunal has not made a determination on the appropriate rate since September 1980, in what became the Triple M case (*WEA Records v Stereo FM* (1983) 48 ALR 91). The Australian recording industry could have called on the Tribunal to make a finding as to the rate, and then capped it. For example they could have called on the Tribunal to make a finding such as "the royalty payable the broadcast of sound recordings should be 1.8%, but as a result of s.152(8) of the Copyright Act, we can make no greater finding of 1%".

Had the record industry sought a determination by the Tribunal it could have also claimed that the Tribunal and subsequent court decision in the Triple M case was incorrect. The record industry could have argued that the Tribunal should have determined the correct rate based on market conditions, international license rates and other factors, and then it should have capped the rate at 1%. Instead, the Tribunal incorrectly commenced its analysis at a maximum rate of 1% and then discounted this figure for the use of non-protected sound recordings, and other factors – eventually arriving at a rate of 0.45%.

However, since 1980 neither the record companies nor the commercial broadcasters have made any application under s 152 for the Copyright Tribunal to determine the royalties with respect to broadcasting sound recordings. Obviously commercial broadcasters were satisfied with the 1980 determination and are happy for it to stand.

Why has there been no application for a Tribunal determination by the record companies or the PPCA? Surely in the view of the recording industry, any result would have been improvement on the Tribunal's finding in 1980. Perhaps the absence of an application is due to a lack of leadership and resources at the PPCA. Perhaps the PPCA lobbyists wrongly believed that the 1% cap would have been removed long before now. Maybe they advised the PPCA to wait before calling for a Tribunal determination until after the rate cap is

removed. If that was their advice, expecting a change in the legislation after 36 years is very presumptuous!

Perhaps the PPCA feared that 25 years after the Triple M determination, the Tribunal would reaffirm the methodology used in the Triple M case in determining the current rate. In essence, they may have been afraid of losing the case. Perhaps record companies are too heavily reliant on radio stations playing their "promo" and they simply didn't have the "stomach" for a fight with commercial radio. Memories still loom large of the 1970 dispute between the recording and radio industries. In the current situation, if the radio industry refused to pay the recording industry a higher royalty would the recording industry withhold their music or otherwise prevent their music being played by radio stations? In the age of the internet and CD burning, could the recording industry withhold their music from radio stations? In the era of a strong and proactive ACCC would the recording industry risk instituting a collective boycott against the radio industry? These questions may remain unanswered, depending on the decision by the Federal Government on the 1% cap.

### **Who listens to the radio these days? Seemingly everybody ...**

According to the peak industry body, the Federation of Australian Radio Broadcasters ("FARB") and their successor Commercial Radio Australia:

- There are over 37 million radios in Australia.
- Time spent listening to radio is higher now than it was in 1956 when radio was the only broadcast medium (TV in Australia was introduced to coincide with the Melbourne Olympics).
- Australians spent more time listening to commercial radio over the summer according to the just released first survey for 2001. Australians spent an hour and a half longer listening to commercial radio than they did the previous summer. The AC Nielsen Radio Survey also showed almost 8.3 million Australians listened to commercial radio over this summer, an increase of 4% over the previous year. Survey 1, which covered the period January 14 to February 10 2001, shows that 78% of Australians, aged 10 years and over, spent 19 hours and 29 minutes per week, listening to commercial radio. "This is a massive amount of time given the choice of media and entertainment available to them especially during their holiday period," according to FARB.
- Teenage commercial radio listening showed the most dramatic rise, up two hours and 49 minutes. Commercial radio reached 84% of Australia's 10-17 population, or 1.291 million teenagers. Similar rises were seen in the 18-24 age group, which spent an extra two hours and 47 minutes more with commercial radio than they spent the previous summer.
- Research shows there are now 12 million cars in Australia, and 98 per cent of them have a radio. In car radio reaches seven in ten Australians during each week. A recent AC Nielsen survey, conducted for FARB, found that the average car trip takes around 30 minutes, and nine in ten car travellers say that they listen to radio for at least some of the journey. And they listen with interest - only 4 per cent of car travellers listening to radio say that they pay no attention.

### **Radio industry's financial success**

Radio's success with listeners has been converted into financial success for broadcasters:

- In Australia, commercial radio market revenues have been estimated to be about \$750 million annually, of which 65% to 70% goes to the metropolitan markets, with the remainder going to regional markets. 45% of revenue comes from national advertisers and advertising agencies, with the remainder from direct advertisers.

Radio station owners and operators in Australia have made substantial amounts of money in recent years. Here are some examples of broadcasters that have done well:

- Austereo, whose primary assets consist of radio stations in all mainland Australian capital cities, and Newcastle and Canberra<sup>2</sup> was floated in 2001. The market capitalisation of Austereo as at February 15, 2005 was \$688.6 million. In the year ended June 2004, Austereo's net profit after tax was \$41.9 million. According to the Chairman and CEO's review in 2004, "The radio industry advertising recovery continued, with a capital city growth of 11.7% for the year. The (Austereo) Group exceeded sales budgets, lifting sales revenue ahead of the previous year to \$240.4 million."
- US based company Clear Channel Communications Inc. (who through Clear Channel International are a part owner of the Australian Radio Network along with APN News & Media)<sup>3</sup> In 2004 the company reported revenues of US \$8.93 billion in 2003, an increase of 6 percent when compared the same period in 2002. Commenting on the results, Lowry Mays, Chairman and CEO said, "We are well-positioned for sustainable long-term growth and look forward to another successful year". The company's results include results from overseas investments including the ARN.
- APN News & Media (the other part owner of the ARN Network) announced a 36% increase in interim profit for the 2004 financial year, to \$94.5 million. Net Profit After Tax was up 34% to \$A57.9 million, and this was achieved on an increase in Group Revenue of 10% to \$A599.2 million.
- UK owned DMG World Media (Daily Mirror Group) owns 75% of DMG Radio Australia (and has an option to purchase the remainder of the company). DMG Radio Australia paid \$481 million on seven metropolitan city licences in the past few years. This included \$80 million for a Brisbane licence, and \$106 million for a second Sydney licence (to join Nova 969).
- Southern Cross Broadcasting reported a sales revenue growth of 16.8% to \$403.6 million and a net profit growth of 35% to \$46.2 million in 2004.
- Rural Press recently reported a 39% increase in interim net profit to \$58.4 million and indicated that they expected a strong second half profit performance in 2004-2005.
- According to Commercial Radio Australia, ratings data shows radio increased listeners in 2004, particularly among the key 25-39 demographic in 2004.
- Data released by PricewaterhouseCoopers showed that metropolitan commercial radio stations attracted \$556.6 million in advertising revenue in 2004, a 14.8% increase over 2003 and the industry's best performance in many years.

#### **Metropolitan radio ad revenue - 12 mths ending Dec 2004**

<i>Market</i>	<i>Revenue (\$mIn)</i>	<i>% change over 2003</i>
Sydney	\$220.0	11.4
Melbourne	\$150.3	18.4
Brisbane	\$81.4	24.2
Adelaide	\$49.8	5.9
Perth	55.1	15.1
<b>Total</b>	<b>\$556.6</b>	<b>14.8</b>

Source: PricewaterhouseCoopers<sup>4</sup>

#### **Reasons for radio's success**

In order to determine why radio has been successful and such a substantial revenue earner, we need to consider who are Australia's most successful radio stations, and what are their keys to success. What are the top radio stations in Australia?

<sup>2</sup> Austereo radio stations: Sydney – 2Day FM, 2MMM FM; Melbourne – Fox FM, 3MMM FM; Brisbane – B105, 4MMM FM; Adelaide – SA FM, 5MMM FM; Perth – Mix 94.5, 92.9. Canberra - FM 104.7, Mix 106.3 Canberra (run as joint venture with ARN), and Newcastle - NX FM and KO FM (run as joint venture with RG Capital).

<sup>3</sup> ARN Network radio stations: Sydney - Mix 106.5, 96.1 and 2WS FM; Melbourne – 101.1 TT FM, 104.3 Gold FM; Brisbane – 4KQ 693 AM, 97.3 FM; Adelaide – Mix 102.3 FM, 5DN 1323 AM; and Canberra - Mix 106.3 (as a joint venture with Austereo).

<sup>4</sup> <http://www.commercialradio.com.au/pdf/Radio%20ad%20revenue%202004.pdf>

According to the recent Neilson Media Research ratings survey <sup>5</sup> the following are the top radio stations in Australia's top markets. Next to the stations are listed their broadcast formats:

- **Sydney**

- (1) 2GB – news/talk
- (2) Nova 969 – music based station - contemporary hit radio (CHR)
- (3) ABC 702 – national broadcaster
- (4) 2UE – news/talk
- (5) Mix 106.5 – music based station - adult contemporary (AC)
- (6) 2MMM – music based station – rock/classic rock
- (7) 2WS – music based station – classic rock
- (8) 2Day FM – music based station - hot adult contemporary (Hot AC)/CHR nights
- (9) 2CH – music based station – Easy Listening
- (10) 2JJJ – music based station - rock/alternative

- **Melbourne**

- (1) 3AW – news/talk
- (2) ABC 774 (3LO) – national broadcaster
- (3) Nova 100 – music based station - CHR
- (4) Gold – music based station – Gold
- (5) Fox FM – music based station - Hot AC/CHR nights
- (6) 3MMM FM – music based station – rock/classic rock
- (7) Mix 101.1 – music based station – AC
- (8) Magic 693 – music based station – Gold
- (9) SEN – news/talk
- (10) 3MP – music based station – Easy Listening

- **Brisbane**

- (1) B105 – music based station – Hot AC/CHR nights
- (2) FM 104 MMM – music based station – rock/classic rock
- (3) 97.3 FM – music based station - AC
- (4) ABC 612 – national broadcaster
- (5) 4BC – news/talk

- **Adelaide**

- (1) Mix 102.3 – music based station - adult contemporary (AC)
- (2) SAFM – music based station – Hot AC/CHR nights
- (3) ABC 891 - national broadcaster
- (4) 5AA - news/talk
- (5) 5MMM FM – music based station – rock/classic rock

- **Perth**

- (1) Mix 94.5 – music based station – AC
- (2) 92.9 – music based station - Gold
- (3) Nova 93.7 – music based station - CHR
- (4) ABC 720 – national broadcaster
- (5) 96FM – music based station – Hot AC

Of the 35 leading radio stations in Australia, 24 are music stations, 6 are news/talk stations, and 5 are ABC stations. This means that 69% of the leading radio stations in Australia rely heavily on music as a source of content.

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<sup>5</sup> [http://www.nielsenmedia.com.au/MRI\\_pages.asp?MRIID=11](http://www.nielsenmedia.com.au/MRI_pages.asp?MRIID=11).

## **Networking**

There are currently 257 commercial radio stations on air in Australia. There has been a large increase in radio station numbers in the past few years, especially in regional areas. This increase in radio station numbers has resulted in a substantial increase in radio networking, which involves the simultaneous rebroadcast of a radio program from one station to a series of other stations which are part of the same "network". Many Australian radio networks rely heavily on music to undertake their networking activities. So for example, if 2SM did not have country music to play at nights in Sydney, not only would 2SM not be able to broadcast, but the dozen or so stations who take the 2SM networked program would also lose their content.

## **Observations**

From this data it is apparent that Australian radio stations are popular and in most cases very profitable. It is also apparent that a large reason for this success is the broadcast of musical repertoire created and owned by Australian and international record companies. While the ABC and some news talk stations have been and continue to be successful in Australia (led by 2UE and 3AW in Sydney and Melbourne, respectively), most of the successful radio stations in Australia have a music based format.

Broadcasters have argued that their services "promote" sound recordings, and as a result payment to the owners of sound recordings by radio stations should be limited. In the 1980 Triple M case broadcasters argued that music should be "free". Some broadcasters have even argued that they should actually be paid by owners of sound recordings for their so-called "advertising". This music promotion argument is the same argument used by owners of illegal MP3 websites to justify their illegal operations. The implausibility of the proposition can be shown by contemplating what would happen to those businesses if the copyright owners decided they didn't want this so-called "advertising" and withdrew their product altogether.

Owners of sound recordings can argue that they are providing radio stations with content, and without this content many stations would have little to broadcast. There is a great deal of evidence in the marketplace to support this view.

The Australian Radio Network website suggests that as far as their radio stations are concerned, it's all about the music. They advise would-be advertisers that "the network has a dual brand strategy with a MIX and Classic Hits stream operating in nearly every capital city in Australia. The Classic Hits brand is targeted toward men and women aged 35 to 54 and features music from the 60's, 70's and 80's - quite simply it's "Good times and great classic hits". ARN's MIX Brand (including Brisbane's 97.3) is a contemporary format aimed at listeners aged 25 to 44 and combines the latest hits from today with songs you can sing along to, in other words, the "Best Mix of the 80's, 90's and now". Between them, the MIX and Classic Hits formats jointly target listeners' aged 25-54 with a focus on music, information and entertainment."

ARN station Mix 106 in Sydney are currently running a television promotional campaign for their radio station featuring sound recordings and highlights from music video clips featuring Christina Aguilera and other recording artists.

Further down the dial we find Triple M on 104.9 in Sydney. According to the Austereo Chairman and CEO's review in 2004:

"During the year, the Group also focused on the regeneration of the iconic Triple M Network. Triple M is a great radio brand and was destined for a stronger market position. After a major

creative overhaul, Triple M has delivered significant early results, with the promise of even greater future strengths. In Sydney's final audience survey, the station improved over the previous year's survey, jumping from seventh place to fourth (all stations), and was also the second highest rating FM station. In Melbourne, Triple M rose from fifth to second (all stations), and also achieved the number one FM position. This re-growth was achieved through exciting new programs attracting a new and broader audience."

Triple M is an Australian media icon – and icon that was built on rock music and rock music-based personalities. This focus on rock music on the Triple M network continues to this day. A visit to the Triple M website reveals that Triple M are simulcasting their broadcasts. Their playlist features rock acts like Jet, Powderfinger, Avril Lavigne, Missy Higgins, Good Charlotte and Green Day. In a recent on-air advertisement they distinguished themselves from another radio station playing Better Midler's syrupy "From a distance". Triple M are inviting listeners to enter rock music based contests (win a chance to be INXS' lead singer, win concert tickets). Triple M's "photo album" includes rock acts such as Thirsty Merc, Noiseworks, the Finn Brothers and Gavin Degraw.

The Nova radio stations in the capital cities have been very successful – and their ratings success has been based on a focus on new music combined with less advertising. In a 2004 interview Paul Thompson of the DMG Radio said the Sydney and Melbourne Nova stations were profitable. Thompson also said "radio back in 2001 was not a medium that launched new music but recycled music that had been exposed by other media. What the Novas did was to bring new music back to commercial radio and re-establish it as a platform for new music in Australia."

#### **Responses to the user position detailed in par 83 of the issues paper**

##### ***The cap balances the monopoly position of PPCA and provides certainty for commercial and community broadcasters.***

The PPCA is not in a monopoly position – radio stations and any other parties seeking a license for the broadcast/public performance/communication of sound recordings can do so by approaching copyright holders directly. The current situation is one of uncertainty – the PPCA and radio stations are basing their decisions and undertaking their budgetary activities on the basis of an industry based contract that was negotiated several years ago. This contract has been extended several times without any real renegotiation.

##### ***The one per cent cap has a regulatory role similar to that of price caps imposed by regulators in other industries such as electricity, gas and telecommunications – which are used to curb the potential abuse of monopoly power while ensuring the supply of services to consumers at reasonable and cost reflective prices.***

The PPCA is not in a monopoly position, as discussed above. In any event the ACCC is in the best position to curb any potential abuses of power by the PPCA, in the same way as it acted against ARIA when the record companies were accused of trade practices abuses with respect to parallel imports.

##### ***In the bargaining process between PPCA and CRA, the one per cent cap together with the ability of either party to apply to the Copyright Tribunal creates the 'fall back' positions or 'outside options' for the negotiating parties. Both parties know that there are limits on the bargaining outcome. By allowing bargaining within a fixed range of prices with outside determination when bargaining breaks down, the copyright regime is similar to the 'negotiate-and-arbitrate' access regimes implemented under Part IIIA of the Trade Practices Act 1974. In this sense, the one per cent cap can be seen as part of a regulatory framework that makes bargaining fair and efficient.***

In practice negotiations between the recording industry and radio stations did not work in this manner. The license fee cap altered the negotiating positions of the parties and worked to the detriment of the recording industry. The 1% figure cannot be accepted as a “fall back” position when the Copyright Tribunal treated 1% as the starting position in its analysis of the correct rate, and then discounted the figure in response to various factors such as the amount of protected music aired. The Tribunal did not undertake an independent analysis of the party’s positions and then apply a 1% cap as a last resort or “outside option”.

***There is no need to remove the cap while the parties have in place a voluntary licence scheme that sets fees across all stations at 0.4 per cent i.e., well below the cap.***

The 0.4% rate is not a voluntary license rate. It is a rate which was heavily influenced by the existence of the statutory cap. It may even be open to the recording industry to argue that in effect the radio industry coerced it into accepting a very low rate as a result of the existence of the license cap.

***Protection is still needed by broadcasters. The commercial sector has experienced a major decline in profitability. The cap is particularly needed to protect regional broadcasters affected by volatile competition for advertising revenues.***

As discussed above, data released by PricewaterhouseCoopers and reproduced on the Commercial Radio website showed that metropolitan commercial radio stations attracted \$556.6 million in advertising revenue in 2004, a 14.8% increase over 2003 and the industry’s best performance in many years.

***The one per cent cap is a trade-off for the mandatory minimum Australian program content requirements imposed on radio stations under Code 4 of the Commercial Radio Codes of Practice. Code 4 requires all commercial radio stations to broadcast minimum quotas of Australia sound recordings (in some cases up to 25 per cent). These quotas, by limiting the unprotected content commercial radio stations may choose to broadcast, provide guaranteed revenue for PPCA from the commercial radio sector.***

Australian program content requirements are not part of the license conditions for radio stations, and as a result cannot be considered to be genuinely mandatory requirements. In any event, Australian program content requirements are far lower than comparable rates in Canada, France, Germany and many other jurisdictions where license fees paid to copyright holders for their sound recordings are far higher than Australia. Many radio stations base their playlists on the ARIA music charts which currently feature about 30% Australian content. As so-called “mandatory” Australian content requirements are far below 30% in effect they are not having any meaningful influence on radio station playlists. As a result, it is incorrect to consider license fees as a trade off for increased play for Australian recording artists. In any event, any change to license fees would be unlikely to impact on radio play accorded to Australian artists, compared to airplay provided to recording artists from other “protected” countries such as the UK, Germany or Canada. Finally, focusing on PPCA revenue is disingenuous – the PPCA redistributes most of its revenue to copyright holders and recording artists. The PPCA is not seeking guaranteed revenue streams – it simply seeks a reasonable return to copyright holders for the use by radio stations of their sound recordings. John Laws and Alan Jones are paid substantial amounts to provide content to their news/talk radio stations. Recording artists should be afforded the same treatment with respect to content they provide to music based radio stations. Although these sums may be collected by the PPCA instead of John Laws or Alan Jones’ agents, and the sums may be less, this does not change the underlying principal.

***The Government in September 2001 reviewed the one per cent cap and decided in its response to the IPCRC report not to repeal the fee cap 'at this stage'. The Government's decision noted that the cap reassures rural and regional commercial radio broadcasters that significant increases in fees will not impinge on their viability.***

The Government's current consideration of this matter is to be commended.

### **Conclusion**

It is accepted that radio stations are obtaining a significant benefit from the use of recorded music. They are obligated to pay the copyright owners for the use of their recorded music. So, how much money should they actually pay? That is not a question we can answer – it should be a matter purely dependant on negotiations between copyright owners and broadcasters.

The Federal Government should amend s.152(8) of the Copyright Act and remove the 1% of gross earnings cap on orders that may be made by the Copyright Tribunal. If such an action were to be taken it would be in line with the findings of the Intellectual Property and Competition Review Committee (IPCRC), chaired by Mr Henry Ergas, and would be consistent with the Simpson Report and other authorities. The radio industry has opposed these findings, but of course they have a vested interest to do so. Radio stations don't wish to pay additional license fees for their content! The removal of s.152(8) of the Copyright Act should be backdated to 1969, as there was no valid reason for the introduction of the cap in the first instance.

The abolition of these statutory caps would allow the PCCA and broadcasters to negotiate a realistic payment rate based on existing market conditions and the relevant circumstances in each situation. License fees would not necessarily increase, but they may increase. This approach would be consistent with the Federal Government's philosophical approach of allowing market forces to decide the market value and price of commodities. There is no reason why the owners and users of sound recordings should not be allowed to negotiate a valid commercial rate for the use of sound recordings, and enter into a contract reflecting the result of these negotiations. Why should the radio industry be subsidised by owners of sound recordings? The mere prior existence of a cap on copyright licence fees should not alone be a reason for the maintenance of this cap. The world has changed. The mere existence of a statutory anomaly in 1968 should not be enough reason for the continuation of such an anomaly in 2005.