

SUBMISSION

BY

MEDIA ENTERTAINMENT AND ARTS ALLIANCE

TO THE

ATTORNEY GENERAL'S DEPARTMENT

REVIEW OF ONE PER CENT CAP ON LICENCE FEES PAID TO COPYRIGHT
OWNERS FOR PLAYING SOUND RECORDINGS ON THE RADIO

MARCH 2005

The Media Entertainment and Arts Alliance

The Media Entertainment and Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

Executive Summary

The Media Entertainment & Arts Alliance welcomes the opportunity to respond to the Government's discussion paper on the one percent cap on licence fees paid to copyright owners for playing sound recordings on the radio.

The Alliance supports the removal *of* the cap and its replacement with payment *of* equitable remuneration, to be determined by the Copyright Tribunal in the absence *of* agreement between the parties.

The Alliance's support however is subject, to changes to the Copyright Act to better safeguard the interests *of* performers.

In the event that these amendments are not made performers will need to consider other ways in which their rights may be protected including through the establishment *of* a stand alone collecting society.

Current situation

Voluntary payments by PPCA to performers

As noted in the Discussion Paper, PPCA currently makes voluntary payments to certain Australian recording artists. To receive income, an artist must both register with PPCA as an artist, and register each track for which he or she claims payment.

It appears that the artists' entitlement depends entirely on artists being aware that they need to register, and actually registering both themselves and all relevant tracks. Unless both *of* these conditions are met in advance, the performer's entitlement is paid to the record company instead. According to PPCA, the total amount actually paid to artists in December 2004 was "appreciably lower" than the amount allocated (18.5% *of* the total distributable pool) because one or both *of* the conditions had not been met. We understand *of* total collections in the vicinity *of* 6% is paid to Australian artists.

We do not know what steps are taken by PPCA- apart from the information on its website - to ensure that artists entitled to benefit actually register both themselves and the relevant tracks. It is apparent from PPCA' s Distribution Policy (at page 8) that owners *of* copyright in sound recording must provide PPCA with the name *of* each track, and its artist, in which it claims copyright. It is not clear why the artists must also register the tracks if this information has already been supplied by the record company other than that the record companies have an interest in the artists not being registered. We also do not know whether PPCA attempts to contact artists via their record companies to invite them to register as artists.

In addition, the money is not held in trust pending the artist's registration; if the artist has not registered all relevant information by October in a given year, then the distribution in December is paid to the record company instead. (We understand, from page 4 *of* PPCA's distribution policy, that this is PPCA's policy in relation to all distributions.)

In summary, our major concerns with PPCA's artists' distribution scheme are:

- it is a voluntary scheme, which could be withdrawn at any time;
- the artist's entitlement is not held in trust pending the artist's registration; and
- it appears that PPCA needs to do more to ensure that artists have met the distribution requirements (artist and track registration).

Artists' entitlement under recording contracts

Artists may be entitled to PPCA income under their recording contracts. However, this entitlement, if one exists, is usually only payable once recording costs are recouped by the record company from the artist's income, and the majority of contracts are not recouped.

Recent amendments to the performers' rights provisions in the Copyright Act

The recent amendments to the performers' rights provisions provide few practical benefits to performers. There is unlikely to be much benefit at all in relation to existing recordings, as a result of a number of provisions (including that performers have to pay compensation if they claim copyright).

Even for recordings made after 1 January 2005, the potential copyright interest in sound recordings of the performances is unlikely to vest in performers in practice. This is because:

- record companies are requiring an assignment of the performer's interest. Solicitors practising in this area have confirmed this is the universal practice;
- if an artist is an employee, the copyright interest goes to the employer as a result of section 22(3B); and
- if a sound recording is commissioned, copyright vests (under section 97 (3)» in the commissioning party, even though the performer is unlikely to be a party to the commissioning agreement. This effect of commissioning can be altered by contrary agreement, but this does not assist a performer who is not a party to the commissioning agreement.

The amendments are intended to implement the WIPO Performers and Phonograms Treaty but, in our view, do not. This is partly because Article 6 of that treaty requires Australia to grant exclusive rights to performers; the recent amendments, on the other hand, give performers a potential shared interest in limited situations.

Changes sought by the Alliance

Declaration of collecting society

We are aware of Australia's international treaty obligations in relation to a single

payment by broadcasters for the broadcasting of sound recordings. Given that there may be only one collecting society, it is even more important that that society be required to protect the interest of all rights owners, including performers.

In our view, income under section 109 (statutory licence for broadcasting sound recordings) should be payable only to a declared collecting society, following the model for the statutory licences under Parts V A, VB and VC. The conditions for declaration should be similar to those in section 135P (collecting society for Part V A). A declaration requirement would mean oversight of the collecting society by the Attorney-General, and greater transparency in relation to the collecting society's operations.

Assignment of future rights to performers' distribution body

In addition, the Alliance seeks amendments that will enable performers to assign their future copyright rights in relation to public performance and broadcasting of recordings of their performances to a performers' rights distribution body run by performers. The Alliance seeks a situation which would permit performers to follow the APRA model, whereby composers assign future rights to APRA.

The simplest way to achieve this - and our preferred option - would be to grant performers a separate right, and follow the approach of all other countries, except the US, which grant performers' rights.

If the current approach (co-ownership of copyright in sound recording) is to be retained, we seek at least the following changes:

- abolition of the employer's interest in section 22(3B);
- the exclusion from section 97(3) (the commissioning provision) of the performer's copyright interest, or at least the part of the performer's copyright interest covered by statutory licences; and
- amendments to Part IV Subdivision B (performers' rights in pre-2005 recordings) to exclude the part of the performer's copyright interest covered by statutory licences. If there are concerns about the Constitutional implications of this, then the entitlement could relate to the amount paid above the 1 % cap (ie the "new" income not contemplated at the time the recording was made)
- assignability of the rights to equitable remuneration only to the collecting society.