

21 November 2023

Committee Secretary
Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary

Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023

1. The Intellectual Property Committee of the Business Law Section of the Law Council of Australia (the **IPC**) welcomes the opportunity to make a submission in response to the Committee's inquiry regarding the *Copyright Legislation Amendment (Fair Pay for Radio Play) Bill 2023* (the **Bill**) and supports the passage of the Bill.
2. The IPC is comprised of barristers, solicitors and academics with significant expertise and experience in intellectual property law matters, including with particular relevance to the subject of this inquiry—copyright.
3. As the Committee will be aware, copyright law is an important means by which Australia's cultural and artistic communities (including authors, performers and producers) can seek payment for the fruits of their efforts. Copyright law does this by providing creators and rights holders with a bundle of exclusive rights including the right to communicate their works to the public which, in turn, includes the exclusive right to broadcast the copyright-protected material. Without the protection of copyright, unauthorised third parties could free-ride on the creative efforts without incurring the expense, trouble or risks of investing in creation. Such free-riding has the potential to significantly undermine the incentives for Australian authors, performers and producers to create uniquely Australian content.
4. Section 152(2) of the *Copyright Act 1968*, however, qualifies the exclusive right to broadcast the recorded music by imposing a statutory right or licence in favour of broadcasters to broadcast published sound recordings.

5. Section 152(6) then provides for the Copyright Tribunal, an independent, expert and specialist arbiter established under the Act, to fix the amount payable by the broadcaster to the copyright owner for the broadcast of the material.¹
6. Sections 152(8) to 152(11) of the Act, however, further restrict the amount payable to the copyright owner by imposing an artificial ceiling on the rate that the Copyright Tribunal may fix:
 - a) In the case of radio broadcasters licensed under the *Broadcasting Services Act 1992*, the total amount payable by the broadcaster must not exceed 1% of the broadcaster's *gross earnings* per year; and
 - b) in the case of the ABC, the amount equal to 0.5 cents times the estimated population of Australia.
7. The Bill proposes the repeal of sections 152(8) to 152(11).
8. The IPC supports the repeal of those provisions. They are an artificial constraint on the amount of equitable remuneration payable for the use of valuable material. Sections 152(8) and (11) are anachronisms.
9. The broadcasting of recorded music by the broadcasters plainly has value to the broadcasters otherwise they would not broadcast the material. In some cases, such as a radio station whose repertoire is essentially playing Top 40 hits or 'golden oldies', the recorded music is central to the existence and purpose of the station. In other cases, the playing of recorded music provides light relief or ambience to the programming. In yet other cases, the use of recorded music adds life, mood and vividness to the programming.
10. In principle, the broadcaster should pay the copyright owner the value of the copyright as an input, just as the broadcaster must pay the supplier of electricity the market rate for the electricity it uses and so on.
11. The limitation on the rights of the copyright owners imposed by sections 152(2) and (6), however, is justified by the efficiencies gained from collective administration of the multitudes of copyrights that would be involved and as a counter-balance to any monopolistic tendencies that may arise.

¹ Historically, the owners of sound recordings have typically been the record companies. However, since the 2004 reforms introducing section 100AA to section 100AH, the performers on the recording are also co-owners.

12. Ordinarily, in fixing the rate payable to a copyright owner under the statutory licences created by the Act, the Copyright Tribunal seeks to strike a rate that reflects a fair return to the copyright owner based on the value of the use to the user while protecting the user from exploitation arising from unequal bargaining power. For example, the Copyright Tribunal has sought to determine the share of the value to the user of the copyright which reflects use on reasonable terms and at a reasonable price.
13. In such situations, the Australian Competition and Consumer Commission (the **ACCC**) has recommended that the ideal equitable remuneration would be determined using a combination of “benchmarking” and “construction”.²
14. “Benchmarking” involves using appropriate rates grounded as far as possible in *competitive* market rates. “Construction” involves constructing a hypothetical bargain between a willing, but not anxious, licensor and a willing, but not anxious, licensee by applying an economic model to construct an appropriate licence fee. Preferably, both methods should be used as a cross-check.
15. While the Copyright Tribunal has found it difficult to apply either approach, the key point is that they both aim to ensure that the copyright owner receives fair value for the use of their copyright material while at the same time protecting the user from unfair exploitation.
16. The ceiling on the rates that is fixed by sections 158(8) to 158(11) violates this objective by imposing an artificial constraint on the rates that can be fixed. The Copyright Tribunal should not be artificially constrained from determining what the true value of the use of the recorded music is to the broadcaster, and a fair apportionment of that value between the copyright owner and the broadcaster.
17. The IPC notes that, internationally, the WIPO Performances and Phonograms Treaty 1996 (**WPPT**) administered by the World Intellectual Property Organisation, a United Nations body based in Geneva, Switzerland, provides in article 15:
 - 1) Performers and producers of phonograms³ shall enjoy **the right to a single equitable remuneration** for the direct or indirect use of phonograms published for commercial purposes **for broadcasting** or for any communication to the public. [*emphasis added*]

² ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration, April 2019, p. 4 available at <<https://www.accc.gov.au/system/files/ACCC%20Copyright%20Guidelines.pdf>>.

³ In the Copyright Act 1968, ‘phonograms’ are referred to as ‘sound recordings’.

18. Australia has been party to the WPPT since 2007 and, accordingly, is bound by it.
19. When acceding to the WPPT, however, Australia made a reservation that it would not apply article 15.⁴ This was presumably because the ceiling on the equitable remuneration imposed by sections 152(8) to 152(11) would not qualify as a permissible exception in accordance with WPPT article 16. Article 16 generally requires that limitations of, or exceptions to, the rights established in the WPPT must not conflict with a normal exploitation of the copyright and also must not unreasonably prejudice the legitimate interests of the right holder.
20. For these reasons, the IPC supports the repeal of sections 152(8) to 152(11) proposed in the Bill.
21. The IPC would be pleased to discuss any aspect of this submission.
22. Please contact the chair of the IPC, Angus Lang, at lang@tenthfloor.org if you would like to do so.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P. Argy', with a long, sweeping flourish extending to the right.

Philip Argy
Chairman
Business Law Section

⁴ WPPT Notification No. 67, 26 April 2007.