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30th August 2007

The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
Dickson ACT 2602

Dear Sir/Madam

PPCA Application for Authorisation – Supplementary submission

Free TV welcomes the Draft Determination issued by the Commission on 18 July 2007 and thanks the Commission for the opportunity to attend the Pre-Decision Conference held on 14 August.

Free TV makes the following comments in relation to matters raised in PPCA's further submission dated 13 August and in oral submissions at the Pre-decision Conference.

As stated at the conference, Free TV welcomes the finding in the Draft Determination that authorisation should be granted for a 5 year period, subject to certain conditions. We believe that the conditions proposed by the Commission are necessary to provide transparency for licensees and to ensure that PPCA's collective power is appropriately constrained.

PPCA's further submission and oral submissions made at the conference were largely concerned with the proposed condition relating to publication by the PPCA of a current list of protected sound recordings. While, it is common ground that PPCA does not have rights in respect of all sound recordings the extent of its repertoire has been the subject of considerable debate over a long period of time.

In the recent decision of the Copyright Tribunal in the Nightclubs case the Tribunal noted that PPCA had rights in between 70% and 80% of sound recordings used in nightclubs. The Tribunal choose to adopt a 20% discount for this factor. However that decision is no authority for the extent of the PPCA repertoire generally and industry sources have speculated that PPCA may have rights in a much lower proportion of sound recordings released across the world.

At the conference, PPCA emphasised the difficulties and expense that would be involved in identifying its repertoire with any precision. Free TV accepts that it would be difficult, if not impossible, to create a database of all sound recordings released throughout the world which are protected sound recordings.

However, Free TV submits that because absolute certainty cannot be achieved, should not preclude efforts being made to provide as much information as reasonably possible on the extent of sound recordings which are protected in Australia.

At the conference, Mr Peach suggested that PPCA could produce and release in December each year a list of the 500 most played sound recordings. Free TV believes that this is a useful proposal, but that such a list could be supplemented with other data.

Ms Small advised that PPCA holds data on protected sound recordings for distribution purposes since 1996. She noted that this would need to be revised since the change in the schedule of countries contained at Schedule 3 of the *Copyright (International Protection) Regulations* in 2001. The countries added to Schedule 3 at that time were Canada, Mexico, Netherlands, Slovakia and Venezuela. It is likely that only the recordings of major impact would be those made in Canada or which engaged Canadians in the making and that amending the PPCA records to reflect this would not be overly burdensome.

It was also noted by PPCA that while the distribution database is the result of the best endeavours of PPCA to correctly reflect these recordings that are protected, the list would not be exhaustive or definitive. Free TV accepts this. Despite this we believe that this list of protected recordings should be made public.

The amendments to the Copyright Act which introduced protection for recordings where the makers were citizens, nationals or residents of a scheduled country may introduce further complexities but presumably PPCA has to deal with these complexities when determining distributions and has developed methodologies to take them into account in the light of its obligation to its members to make distributions on an equitable basis.

Free TV submits that if its members or indeed anyone else, wishes to rely upon the lists provided by PPCA that is a matter for that organisation. If it is later found that a use of a recording was found to infringe after the infringing party had relied upon such list any claim could be satisfied on a one-off basis. It would seem to be an unusual result if PPCA can demand payment in respect of sound recordings which are not recognised by it for the purposes of distribution.

We acknowledge that the PPCA distribution list will not contain current recordings but it will provide some guidance to the identity of protected recordings and the extent of the PPCA repertoire, which in itself will be useful when negotiating licence fees for blanket licences.

Finally Free TV wishes to acknowledge that PPCA has agreed that it will not seek to collectively licence music videos and that the present arrangements will continue where each member negotiates with the record companies individually.

Please contact Pam Longstaff, Director Legal & Broadcasting Policy, if you wish to discuss any of the issues raised in this letter.

Yours sincerely



Julie Flynn
Chief Executive Officer