PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LTD ('PPCA')

ACCC, COPYRIGHT LICENSING FOR COLLECTING SOCIETIES: A GUIDE FOR COPYRIGHT LICENSEES ('DRAFT GUIDE')

SUBMISSION

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Level 4, 19 Harris Street Pyrmont NSW 2009

1. INTRODUCTION

1.1 Phonographic Performance Company of Australia Limited (**PPCA**) is a national, non-government, non-profit organisation representing the interests of record labels and Australian recording artists. PPCA collectively administers public performance, broadcast and some transmission rights on behalf of its members.

1.2 PPCA supports the publication by the ACCC of guidelines in this area. PPCA has also supported the amendments to the Copyright Act in 2006 relating to the role of the ACCC in review proceedings before the Copyright Tribunal.

1.3 PPCA generally agrees with the content of the Draft Guide. In particular:

- As stated at p 33, the ACCC will seek to intervene in Copyright Tribunal proceedings in very limited circumstances. PPCA agrees that the ACCC's primary consideration in determining whether to intervene in private proceedings is whether it would be in the public interest.

- As stated at p 34, the ACCC does not have a role determining the appropriate level of remuneration for the use of copyright material or other licence conditions. It is a matter for negotiation between the parties (including through any ADR processes) or, failing this, for determination by the Tribunal.

- The pricing of licence fees is complex and difficult. Simplistic notions of marginal cost pricing do not apply (pp 35-37).

- If licences are too highly individualised or too complex to administer, this may result in excessive costs to both users of the copyright (e.g. in recording details from which to calculate fees) and to the relevant collecting society (e.g. in enforcing the agreement) (p 37).

1.4 However, PPCA believes that a number of further points should be addressed in the Draft Guide, in the interests of accuracy, clarity and balance. These further points are outlined in: section 2 (Market Power); section 3 (Review of Licence Fees by the Copyright Tribunal); and section 4 (Blanket Licensing).

1.5 PPCA agrees with the comments made in the Submission on the Draft Guide by the Australian Copyright Council. Those comments include a request for clarity on the question of whether the Draft Guide is intended only as an aid to licensees or is intended also to provide “guidelines” to be taken into account by the Copyright Tribunal under section 157A of the Copyright Act.

2. MARKET POWER

2.1 The Draft Guide refers at various points to the market power of collective licensing societies without making several essential qualifications. The Draft Guide also wrongly assumes at several points that collective licensing arrangements are in fact anti-competitive (a relevant example is the statement at p 33 that "The ACCC considers that collecting societies should make input and output arrangements that minimise the anti-competitive effect of their operation").

2.2 As a starting point, greater emphasis should be given in the Draft Guide to the significant differences that exist between the various collective licensing schemes in Australia. The Draft Guide seems to project APRA as a leading example of the market power of collective licensing societies (see p 34 and p 35). As far as PPCA is concerned, it should be noted that, unlike APRA, PPCA does not take any assignments of copyright and its licensing scheme is not exclusive. PPCA's collective licensing arrangements are therefore fundamentally different from those of APRA. That difference should be made explicit in the Guide.

2.3 The Draft Guide refers to the issue of market power without indicating what the position would be in the counterfactual worlds that are critically relevant to: (a) an assessment of competition effects under section 45 of the TPA; and (b) detriments and benefits in the context of an application for an authorisation. PPCA submits that the Draft Guide is misleading because it asserts that market power is a major issue in the context of collecting societies without also explicitly recognising that the comparative position in relevant counterfactual worlds would or could be much worse. Counterfactual analysis was central to the ACCC's Determination in relation to APRA in 2006 but is not mentioned in the Draft Guide. The impression conveyed by pp 31-32 is that PPCA's arrangements would breach Part IV but for the 1985 Authorisations. PPCA's position is that the arrangements have never breached Part IV and that authorisation has been sought out of abundant caution.

2.4 It is stated at p 31 of the Draft Guide that:

> "As collecting societies bring together the rights of copyright owners that might otherwise compete in the supply of such material, their arrangements may also risk breaching the competition provisions of the Trade Practices Act. Given their dominant position in the market regarding the types of rights

they control they may also be at risk of breaching the prohibition on misuse of market power."

This statement is cryptic and gives the misleading impression that the risk of breach of Part IV of the TPA is greater than it really is. The Draft Guide should clarify how exactly an issue of liability under section 45 or section 46 of the TPA could conceivably arise. That explanation should avoid any suggestion that there can somehow be a breach of section 45 or section 46 merely because a collective licensing scheme deals with the rights of competing copyright holders or because the collecting society is "dominant":

- The general prohibition against anti-competitive agreements in section 45 requires a counterfactual analysis of the position with and without the collective licensing arrangements in issue. It may well be that there is a much greater likelihood of a substantial lessening of competition in the counterfactual world without the collective licensing arrangements than in the actual world where the collective licensing arrangements apply. To take the example of PPCA's collective licensing arrangements, in a counterfactual world of exclusively direct licensing, the removal of PPCA as an active competitor would mean a drastic reduction in competition and would lead to market failure.

- Misuse of market power under section 46 requires much more than "dominance" or a substantial degree of market power. It is also necessary to establish a taking advantage of market power and a prescribed purpose (eg to prevent a competitor from competing). Realistic examples would indicate that these elements are not easily established and that liability would be exceptional.

3. REVIEW OF LICENCE FEES BY THE COPYRIGHT TRIBUNAL

3.1 The Draft Guide sets out broad principles ('ACCC Pricing Principles') that the ACCC considers to be relevant to the pricing of copyright material.

3.2 PPCA agrees that the ACCC Pricing Principles are relevant to the Copyright Tribunal's application of the statutory tests governing licence fees. However, broad principles of this kind can give only limited practical guidance.

- There are no worked examples in the Draft Guide to show what, if any, difference the application of the ACCC Pricing Principles might conceivably make as compared with the application of the pricing approaches adopted by the Copyright Tribunal to date.

- It is unclear from the Draft Guide to what exact extent the ACCC believes that the pricing approaches adopted by the Copyright Tribunal to date are inconsistent with the ACCC Pricing Principles. To the extent that there is thought to be any inconsistency, it is unclear whether the inconsistency is believed to be resolvable by relatively minor changes to the approaches adopted by the Copyright Tribunal or is an area of significant incompatibility. In the APRA Determination (2006) at para 6.155, the ACCC stated that the tests applied by the Copyright Tribunal departed from the economic pricing principles relevant to an assessment of market power and competition effects. The Draft Guide should state explicitly whether the approach taken by the ACCC in the APRA Determination still applies under the Guide.

- The Draft Guide recognises the difficulty of calculating "the appropriate reward for the risks associated with production of copyright material" and of measuring and valuing "the time costs incurred by the creator of the material". However, no headway is made in identifying how those difficulties can be overcome in practice (contrast the level of detail at pp 24-30 about the approaches adopted by the Tribunal). Arguably the Copyright Act tests and their interpretation by the Copyright Tribunal enable proxies for economic pricing principles to be used because reliance solely or substantially on economic pricing principles is too difficult in practice. If so, the Draft Guide should recognise the practical limitations of purely economic pricing principles in this context and identify where and when proxies for those principles should be used. Attention is drawn to the following discussion in the APRA Determination (2006) at para 6.155:

> … establishing efficient prices for performing rights, irrespective of the user and the context in which the licence is required, is problematic. There is only very limited information regarding what efficient prices for performing rights might be which the Copyright Tribunal is able to draw on in setting licence terms and conditions. In this respect, the Copyright Tribunal is forced to rely on the best available market information, being the 'going rate' for like

> performing rights. However, as noted, given APRA's monopoly in the market for performing rights, the going rate is no indication of what the efficient price for performing rights would be.

It is not clear from the Draft Guide what, if any, alternative approach should be adopted by the Copyright Tribunal where "[t]here is only very limited information regarding what efficient prices for performing rights might be."

4. BLANKET LICENSING

4.1 PPCA agrees with the general statement at p 33 of the Draft Guide that:

> "Flexibility in licensing and allowing users to acquire licences with adjustments to the normal rate charged is only appropriate when the additional costs associated with administration, enforcement and calculation of charges do not outweigh the benefit."

However, this statement may induce false hope in some potential licensees because it does not discuss the practical difficulties that typically stand in the way of making substantial modifications to blanket licensing schemes. PPCA is conscious of the need for flexibility where feasible and does adjust rates in the circumstances set out on its website. Nonetheless, to introduce tailored licences for select repertoire would be a radical and extremely costly change that would undermine the rationale for PPCA's existence. PPCA submits that the statement at p 33 be qualified by saying that the additional costs should not be underestimated by licensees and that the scope for exceptions to blanket licences is likely to be very limited. Alternatively or additionally, the Draft Guide should give concrete examples of what it regards as more flexible arrangements that might conceivably confer benefits outweighing their costs.

4.2 The Draft Guide should also state explicitly that blanket licences are a different product from direct licences. The efficiency advantages that blanket licences offer to licensees and licensors flow from their simple, comprehensive nature, as explained by the US Supreme Court in *Broadcast Music, Inc v CBS*, 441 US 1 (1979), the leading US antitrust decision on collective licensing schemes:

> … ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright

owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, and it was in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against infringement.

When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use

> licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable package, and even small performing-rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. [at 20-22; footnotes omitted]

4.3 The discussion of blanket licensing in the Draft Guide should set out the implications of the distinction between exclusive and non-exclusive licensing arrangements. The case for introducing more flexible licences is stronger in the context of exclusive licensing arrangements where direct licensing is foreclosed. By contrast, non-exclusive licensing arrangements like those of PPCA leave licensees free to negotiate licences directly if they do not want a blanket licence.