

BPM Ltd

Background Providers of Music Association Ltd ACN: 631 831 831

Adjudication Branch: Attention Mr Gavin Jones

Australian Competition & Consumer Commission (ACCC)

By email: adjudication@acc.gov.au

Submission in response APRA's response to interested parties' submissions.

This submission is in response to APRA's published responses to submissions made to the ACCC by interested parties with respect to APRA's Application for re-authorisation (the Application).

The Background Providers of Music Association Pty Ltd (BPM) ACN 631 831 831 welcomes the opportunity to provide input into this process and has no objection to this submission being published on the ACCC website.

1. Summary Position

On the invitation of the ACCC, APRA has provided responses to interested party submissions in relation to the Application. In its correspondence with the ACCC, APRA has made several responses directed at the BPM's submission to the ACCC. In this paper, the BPM counter a number of these positions put forward by APRA.

As a broad overview, APRA asserts several key themes in its response that the BPM refutes:

- **The Background Music Sector's (BMS) business is being disrupted by the "competitive threat from digital music services" and is seeking "regulated preservation of the BMS business model"**
- **The BMS hasn't adapted to digital transformation**
- **Using personal digital music services is acceptable and even preferable to the use of background music services**

2. BPM Response to Issues

APRA: The Background Music Sector's (BMS) business is being disrupted by the "competitive threat from digital music services" and is seeking "regulated preservation of the BMS business model"

BPM: The "competitive threat" to the BMS is the APRA Copying Licence – not consumer digital music services.

Consumer music services do not compete with commercial music services

The BMS do not compete with consumer digital music services. The reality, which is well known to every BMS and each consumer digital music provider, is that we target very different customers, with very different needs and we operate at vastly different price points under completely separate licenses.

The concept of a central licensing body creating a license that incentivises businesses to use a consumer service in a public place is akin to your local movie theatre being offered a low-cost license to use Netflix for their movies. Preposterous in the movie realm, yet a reality in the Australian music industry.

The BMS welcomes and thrives on competition from other commercial digital music services. What we object to is any license that places the licensor in competition with the licensees and the erosion of a fair and equitable marketplace.

Rights owners haven't agreed to commercial use of their works on consumer services

None of the rights owners have given permission for the consumer digital music services to be used for commercial contexts. Any blanket license provided by APRA or OneMusic ignores this fact.

The BMS are not seeking regulatory protection for their business model, we are seeking a regulated licensing framework for the use of music in public places

APRA claim in Response 43 that the BMS seek regulatory protection for their business model:

Response 43: *The proposal of a regulated preservation of the BMS business model goes far beyond any other protection afforded to music industry stakeholders, in a way that would protect them from having to compete with other providers of music services.*

The BPM are not seeking for APRA to preserve the business model of its members. We are simply asking APRA to adhere to their role as the custodian of copyrights by not actively creating loophole licenses that bring unintended unregulated competitors into a sector where the only beneficiary is APRA and OneMusic.

The BMS rely on APRA (as an authorised monopoly) to create and preserve a regulated licensing framework for the use of copyrighted music in public places. Regulated licenses by their very definition assert an onus on each licensee to comply to licensing terms and conditions that ensure that each musical work represented in their service is appropriately licensed and each play reported so that the licensor preserves the copyright in the works and compensates the owner each time. In our industry the BMS rely on APRA as the regulator for the benefit of all stakeholders in the chain. Our concern is that APRA focus purely on the end user (i.e. the business customer) and the creator, but place little emphasis on the service provider, when we are the key link between the use in a venue and the ensuing payment to the copyright owner. Without the BMS, it is not possible to work out with any accuracy, what content was used and hence it is not possible to pay the right owner. When viewed through this lens, it is difficult to see how APRA's authorisation could possibly pass the public benefit test given the only real benefit is for APRA and not for the industry more broadly.

As part of the re-authorisation process, the BPM are seeking assurances that APRA will continue to uphold the regulated licensing framework that we see as their core responsibility. Our role is to then use this to perpetuate our business model(s).

The Copying License is now being treated by APRA as a blanket mechanical license

The Copying License was created in a different era. It was designed to give business owners a way to legitimately copy CDs and thereafter digital song purchases (from the likes of iTunes) in business contexts. It created a legitimate mechanism for the use of small numbers of purchased tracks to be performed in a business. In contrast, the BMS was regulated and hence required licenses for every track we used that required us to provide reporting data to the rights holders. But overall the impact to the BMS of the Copying License was minimal, because the use case was controlled.

However, in the past decade, technology has evolved and now the de facto consumer music service is a streaming product that provides access to every song in the world for a minimal monthly fee. Their market dominance highlighted by Apple's recent announcement of the closure of iTunes. The challenge for the BMS is that whilst the consumer market has retired their defunct products, (CDs and digital music stores like iTunes) in the licensing realm APRA (and now OneMusic) have instead

sought to evolve their Copying License for operational simplicity. Morphing a very discrete license for a small number of songs physically purchased into a blanket mechanical license to every song ever recorded.

APRA will assert that this is still a license to a discrete number of tracks (2,000 on any device) but the reality is that a license that previously allowed a small number of purchased songs to be played in your business now sanctions you to use a low cost consumer streaming service with access to every song in the world.

In contrast, the BMS remain regulated (as we should) and hence require a license to every track we utilise and are required to provide detailed reporting data for every song play. Or put simply, one set of operating rules for the BMS and no rules at all for APRA or the licensee under the Copying License.

If the Copying License is a legitimate alternative it should be made available to all

Whilst the BMS have lobbied extensively against the Copying License, it stands to reason that if this license is indeed legitimate and if it is going to be offered to cover any use of music in a public place where no other mechanical license is in place, then it needs to be available for the BMS as well. In fact, if this license delivers the blanket mechanical coverage that it purports to, then there is no need for direct licenses between the BMS and APRA or in turn OneMusic Australia at all and each venue should license all mechanical rights directly.

To date, this license has not been offered to any BPM member and upon request it was rejected with no explanation.

Commercial music services are delivered by technologically innovative digital companies

APRA: The BMS hasn't adapted to digital transformation

BPM: The Background Music Sector are technologically innovative digital companies

APRA's position on this issue misrepresents the role the BMS plays in underpinning their public performance business.

Response 43 states: *Digital music consumer services such as Spotify and Apple Music have been a phenomenal disruptor of the music industry, and it is apparent that businesses that began in the era of physical product, such as many BMS, are also experiencing disruption. Adjusting to digital has proven to be a challenge for many in the music industry, and it is not surprising that this challenge extends to BMS.*

The BPM refutes response 43.

Every single BMS is a digital music service and none have struggled to transition to digital. In fact, the move to digital was achieved by the BMS, which pioneered the very concept of music subscriptions at least 20 years before consumer streaming subscription services were conceived. Further, the BMS leveraged MP3 and digital video long before iTunes or YouTube existed, with most BMS companies moving to digital formats 10 years before the consumer space had arrived at the same destination.

Any assertion that the BMS struggle to adapt to digital is completely incorrect. The unfortunate reality is that the BMS do not get the support technically or via a regulatory licensing framework from APRA to maximise the immense potential of our segment. This is highlighted clearly through their responses which show a lack of understanding of our segment and the positioning of a license

that seeks to financially benefit from the slow dismantlement of our sector in favour of the consumer services, without their consent or support.

APRA are reducing opportunities for the BMS to maintain and grow market share

There is also evidence that many businesses using the services of the BMS have now reverted to using unlicensed consumer digital music services as a direct result of APRA's application of their Copying License.

Response 44 further states: ...The number of premises licensed through APRA 's agency agreements with the BMS (discussed below) as at the first quarter of 2018 is at 99.98% of the number of premises licensed as at the first quarter of 2014. That is, the customer base of BMS does not seem to be declining dramatically.....

This is misleading on several fronts:

1. The key word in this statement is "agency". And it would be true that a very high percentage of licensed premises under the BMS agency agreements would remain static. But, that would infer that the majority of BMS clients are licensed via the agency agreement when in fact there is a very limited scope of collections allowed for the BMS under this agreement and little incentive to use it. i.e. the bulk of the BPMs client base don't fall under the agency agreements.
2. Surely the number of APRA public performance licenses in the same period has grown and as such it would seem logical that the number of BMS clients would be growing, not staying static.
3. Client retention alone is not testament to a healthy marketplace. In the same period the ARPU has dropped significantly as the proliferation of low cost, unlicensed services have forced the BMS to do more for less.

APRA also state:

Response 44 states: It is APRA's experience that the overwhelming majority of businesses now using personal digital music services previously used radio or CDs for their background music.

This statement is incorrect.

There has been an omission of an entire technology platform in response 44. The majority of businesses that are presently using consumer streaming services were previously using other unlicensed services via laptops, MP3 players and other such devices that enable format shifting. Additionally, there were many businesses that were using BMS services that transitioned to using consumer digital music services and other businesses that went from radio to CD to MP3 to BMS companies.

In addition to all of the above, there is a marked change in how the Copying License is being promoted by APRA in the transition to OneMusic Australia that will have major impact on its market penetration.

Previously the Copy Tariff, as asserted by APRA, was largely confined to small business owners (albeit lots of them) as larger business owners understood that this was a partial license only and would not take the risk of using an unlicensed service. However, based on the prominence and

confidence with which the OneMusic tariffs promote the legitimacy and availability of this license, the BPM are already fielding far more enquires from large groups and franchisors all confused and seriously considering this as an option, based on the position asserted by OneMusic. Hence, it is naïve and a selective choice of data from APRA to represent that the Copying Tariff as purely for those migrating from Radio and CD and that there will be no impact to the BMS. They and we know that this license, offers a compelling commercial option that competes with the BMS.

But as a starting point the BPM would like to know how many Copying Licenses were provided in the 2014 vs. 2018 to see if this “static” growth is true in all scenarios or if this license is in fact the early warnings of competition stifling the growth of the BMS.

APRA: Using personal digital services is acceptable and even preferable to the use of background music services

BPM: Personal digital services are not an acceptable replacement for background music services

APRA repeatedly condones the use of consumer services in commercial settings as evidenced in both responses 41 and 45 outlined below:

Response 41 states: *“Many of the BMS have expressed concerns regarding the fact that APRA licenses businesses that use services such as Spotify to perform music in public at their premises. APRA understands that services such as Spotify make it easier for (particularly small) businesses to use relatively sophisticated playlists of music. The BMS generally see the digital music services as providing a significant and unwelcome degree of competition for the BMS businesses”.*

Response 45 states: *“For relatively small businesses that wish to use music to enhance the experience of their customers, the technological ease with which the personal digital music services can be used, and the availability of curated playlists on those services, means that many small businesses have opted to use such services”.*

APRA are a performing rights society. Their role is to create regulatory licensing frameworks that are in the best interests of the public. They are not qualified or authorized to decide what is the best fit for music use in a business, they are simply there to ensure copyright is upheld. Any further use of their power to license what they perceive as a better experience for the business is an overreach on their mandate. If consumer services want to be used in a business context, there is a clear and established licensing framework to achieve this and if they opt not to, then it is up to APRA and the rights holders to ensure the use is at best prohibited, at least discouraged, but never endorsed for their own financial gain.

Despite the fact that consumer streaming End User License Agreements (EULA) clearly state they are for personal use only, APRA disregards this by creating a license that is contrary to the EULA and also creates market confusion by pushing the onus to the end user as per the statement below:

Response 42 states: *“The BMS' concern is expressed to be because Spotify and other digital music services include as a term of service that the music is provided for personal use only. If a Spotify customer uses the service to perform music in public, and if that use is contrary to the Spotify terms of service, APRA regards that as a contractual matter between Spotify and its customer”.*

Surely as a monopoly of publishing works in Australia some onus falls on APRA to work with Spotify and their peers to eliminate the unintended use rather than design a work around that hides behind a contract to push the responsibility away from themselves?

The reality is that we as an industry have a duty to uphold copyright in all segments, working collegially to maximise the success of our industry. It is clear that the BMS and the consumer services want to follow this path, but we need the support from APRA to work on real solutions rather than pushing the problem to the technology providers.

3. Conclusion

The BMS is an undervalued and misunderstood segment, but we are an essential link in the broader music ecosystem that connects millions of Australians to music every single day. For the consumer segment and in turn the rights holders and APRA to thrive, we need a strong BMS.

It is ironic that APRA rejects any support for the preservation of the BMS business model, given the very purpose of this entire process is to preserve theirs as a publishing monopoly in Australia. Compounded further when we look back at the support they demanded from government and the ACCC to protect them from a “safe harbor” from tech giants like YouTube, when now they are creating something very similar against us small tech companies via the Copying License. Made worse still when any offer of the same licensing terms to the BMS is rejected with no explanation.

The BPM is proof that a sector can come together to collaborate on issues that bind us whilst still operating in a competitive landscape. The partnerships between many of the background companies and the consumer services further demonstrates a respect and fundamental acknowledgement of the importance and intrinsic differences between our segments that we can mutually exploit through partnerships.

Our challenge, as it has been for a very long time, is to work collaboratively with APRA and the entire rights community to maximise the potential for music in Australia.

APRA's response to our submission demonstrates a complete disconnect and lack of understanding of the BMS, the challenges we face and the support that we need from them to thrive. The Copying Tariff is short sighted. It is motivated purely for financial gain and only serves to drive a further wedge between all digital (consumer and commercial) music providers and rights holders and it is the wrong solution to an acknowledged piracy problem. But, if it is here to stay, then it needs to be available to all.