

# 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 to the Australasian Performing Right Association Limited (APRA)  
Application for Revocation of Existing Authorisation A91367-A91375 and Substitution of a New  
Authorisation (the APRA Application).**

This submission is in response to the APRA 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. Our submission follows:

## **1. BPM background**

BPM is a newly formed association of background music providers, currently comprised of the following companies and seeking broader membership:

- Australian Radio Network Pty Ltd ACN 065 986 987
- Marketing Melodies Pty Ltd ACN 058 174 628
- Mood Media Australia Pty Ltd ACN 058 714 177
- Mustard Music Pty Ltd ACN 161 731 675
- Nightlife Music Pty Ltd ACN 052 079 277
- Qsic Pty Ltd ACN 155 394 719
- Satellite Music Australia Pty Ltd (t/a Stingray Business) ACN 072 378 986
- Soundproof Australia Pty Ltd ACN 408 767 669

The members of BPM are business competitors, providing curated music content to bars, hotels, clubs, gyms, bowling alleys, restaurants, retail outlets and other venues, and paying licence fees to rights owners.

The key objects of the association are:

1. To represent the interests of its members and the background music provider sector (the Sector) to:
  - a. all levels of government;
  - b. the business community and relevant industry bodies;
  - c. the music community; and
  - d. relevant industry bodies.
2. To educate business, government, the music industry and the broader community on the role of the Sector and background music services to communities and culture.
3. To grow the collective economic and cultural value of the Sector.
4. To protect its members against unreasonable and excessive regulation, schemes, laws and conditions.
5. To provide a forum for its members to meet, discuss, determine and implement better outcomes and practices for the Sector.

The members of BPM also have a shared interest, being the advancement of the background music industry, and the long term success of the Australian recording industry, including maximising returns to recording artists and songwriters.

## **2 BPM's position**

BPM's position is that:

- (a) It opposes APRA's Re-Authorisation;
- (b) It contends that the APRA has a contractual relationship with the Australasian Mechanical Copyright Owners Society (AMCOS), through OneMusic Australia and elsewhere, and that they should cease their anti-competitive behaviour with respect to granting of public performance licenses where consumer digital services are in use;
- (c) Recent negotiations between APRA and the members of BPM have demonstrated APRA's ability to exert influence over the background music sector to the possible detriment of member companies, by APRA seeking that they turn over confidential information under their proposed contractual terms;
- (d) Through OneMusic Australia, APRA has a relationship with both AMCOS and the Phonographic Performance Company of Australia (PPCA) that further increases their power in the market that impacts both the background music sector and its clients; and
- (e) A reduction in the ability of BPM members to operate under fair trading conditions in the market has a flow on effect to the Australian music industry by reducing the ability of rights owners to be fairly and accurately compensated for the use of their content for the purposes of public performance.

## **3 Consumer service use in public performance sector**

### **What is the Public Performance Sector?**

Generally speaking, the Public Performance sector is not well understood by the general public and the broader music industry yet is one of the key ways in which the majority of the population is exposed to music on a day-to-day basis. The Public Performance sector is made up of Live Music and Recorded Music. Whilst Live Music is also under threat, the majority of music heard in Public Performance comes from Recorded Music and this is the focus of this submission.

Music in Public Performance is the music you hear when you:

- go to your local pub,
- shop for groceries,
- eat at a café/restaurant,
- workout at the gym,
- buy new clothes,
- stay in a hotel, or
- go to an amusement centre.

In hospitality alone, there are more than 85,000<sup>1</sup> places to meet for a drink or eat out and most would be playing some form of music. Similarly, there are almost 4,500<sup>2</sup> fitness businesses in Australia where music plays a key role. Or put simply, this sector reaches practically every single Australian every week on a multitude of occasions.

Put another way, in the new digital world where consumers no longer find music in a physical store, (e.g. HMV) the Public Performance sector, together with radio and live performance is the new shop

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<sup>1</sup> Eating Out in Australia 2017

<sup>2</sup> IBISWorld Gym and Fitness Centres Australia Market Research report 2018

front for music discovery. The background music sector has considerable influence on consumer purchases and tastes through Streaming Services, which the broader industry relies on for future growth. i.e. our sector plays a key role in the music cycle that significantly impacts overall consumer music revenues.

And beyond the traditional uses of music, the background music sector also opens up new environments with both commercial and social benefits to Government, Health and Community sectors via the provision of music in:

- Hospitals,
- Schools,
- Youth services,
- Community centres, and
- Aged care.

### How is Recorded Music Played in Public Performance?

Broadly speaking, the Public Performance sector sources music in one of two ways (excluding radio/broadcast):

#### 1. Background Music Providers

These are companies governed by specific commercial music licences that exist to maximise the value from music in public places. They invest heavily in bespoke technology that links venues/brands to consumers through music. And they work hard to feature Australian content for Australian businesses and to provide play data for correct royalty distributions back to the Australian artists.

The licences required by background music providers are as follows:

- (a) For the musical work – APRA/AMCOS (for public performance/communication, and reproduction, respectively) and
- (b) For the sound recording – PCCA/ARIA (for public performance/communication, and reproduction, respectively), or directly with the relevant record company.

#### 2. Personal Services

These are streaming or other digital services where a product targeted at personal use is wrongly used in a business context. Examples of these services include Amazon Music, Apple Music, SoundCloud, Spotify, YouTube, Deezer and iHeartMedia.

These services are not designed for Public Performance nor are they marketed to business owners as viable options. This is clear from the terms of usage attached to these services. For example, Spotify grants users a “revocable license to make **personal, non-commercial**, entertainment use of the Content”. Users agree to use “Content for your own **personal, non-commercial**, entertainment use”<sup>3</sup> Similarly, YouTube content “is provided to you AS IS. You may access Content for your information and **personal use** solely as intended through the provided functionality of the Service and as permitted under these Terms of Service” (emphasis added).<sup>4</sup> Importantly there are no technological barriers to their usage and hence they have penetrated the background market based largely on their price point.

A recent study has been published by Nielsen Music<sup>5</sup> in conjunction with global streaming service Soundtrack Your Brand. The study was based on interviewing a representative sample of 5,000 small business owners across seven markets: the US, UK, Sweden, Spain, Italy, Germany, and France. The key findings of the report were that:

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<sup>3</sup> See <https://www.spotify.com/us/legal/end-user-agreement/>

<sup>4</sup> See <https://www.youtube.com/static?template=terms&gl=AU>

<sup>5</sup> <https://www.soundtrackyourbrand.com/content/research/nielsen>

- 88% of small businesses play music daily 4-5 days per week;
- 86% of small businesses are willing to pay for the music they use but are paying for the wrong services, with 17% paying for a licensed background music service and 83% illicitly using a personal music service; and
- between 58% and 75% of small businesses interviewed incorrectly believe a personal music account gives them the right to use it for background music at their place of business.

The report goes on to estimate that 21.3 million businesses use consumer services instead of a licensed background music provider.

It is important to note that these personal services do not curate music for brands/venues as the services are not designed to be used there. The music that is played is typically selected by the business owner or by an employee, which generally leads to irrelevant, inappropriate, and non-Australian music being played in their business. There is also *no* relationship between the personal service provider and the Collecting Society, which means the personal service provider is unable to report to the Collecting Society which tracks received airplay, which makes it impossible for the Collecting Society to distribute the Public Performance revenue to the relevant artists benefitting from the airplay.

As discussed above, these Personal Services are all licensed as consumer services with very different terms of use and fees to a commercial licence. Therefore, Personal Service providers make no attempt to promote or develop their product to be appropriate for use in a business; it is simply not their market. However, despite the intentions of these companies, the allure of a wide selection of music, at a low consumer price, with no rights holder actively policing its use in a business context, has simply proven too attractive to many business owners. As a result, personal services are now a massive, unlicensed competitor to the background music sector.

### **How do Businesses pay for music in Public Performance?**

From a licensing perspective, a business using music in a public place is different to a consumer using music. Where an individual has a consumer licence, the licence covers all types of personal usage that are made available under the personal service. i.e. no other licences are required by the end user when the end user is a consumer. However, in a business environment the licence required by a service provider is only half the story. For a business to be compliant from a licensing viewpoint, they must not only obtain the music from a licensed source (i.e. an authorised provider) but must then separately pay Public Performance licence fees directly to APRA/AMCOS and PPCA (as indicated above) for the particular use of music.

The reason that different types of licences are required with different rates being payable is that the value of the music used in a venue changes dependent upon when, where and how the music is used. For example, music supplied for a nightclub or a restaurant is perceived to be of much higher value than music that is used in a retail shop or a hotel lobby. Accordingly, nightclubs and restaurants are charged higher licensing fees by APRA than retail shops or hotels.

So, a compliant business pays the music industry directly via APRA/AMCOS and PPCA licence fees, which are based on their tariffs and indirectly through the fees they pay to their music service provider, who in turn also pays the relevant Collecting Societies.

The aggregate sum paid from the service providers (who are effectively the licensed background music providers) is relatively low in comparison to the Public Performance Tariffs that are collected directly by APRA and PPCA. However, unlike most users of music background music providers are able to identify precisely what music was the subject of public performance at the venues they service. As a result, the data they collect is critical to ensuring the much larger APRA and PPCA collections are distributed correctly.

To further illustrate the point, it is estimated that APRA and PCCA collect approximately \$100m annually from the public performance sector, which is estimated as double the amount payable to the rights holders from broadcast radio. Distributing this money accurately relies on a close relationship between the service provider and the Collecting Societies, which is only possible if the Collecting Societies are directly licensing the source of the music. i.e. accurate distributions rely on the background music providers and falter when personal services are used in their stead.

### **The Problems in Public Performance**

The music ecosystem is extremely fragile, and history has shown on numerous occasions the long-term damage that occurs when rights holders and service providers ignore effective new technologies or otherwise end up being too far out of step. The most recent substantial decrease in music revenues was as a result of unpoliced piracy in the consumer streaming market, where technical innovation outpaced music licensing, and consumer expectations on how music should be delivered outweighed the commercial imperative for music to be the subject of payment.

Currently, the Public Performance sector is in the early stages of a similar digital disruption where again technology is directing business customer expectations at a rate faster than rights holders can anticipate. In this case the impact is the decimation of the legitimate background music industry as personal services licensed under a completely different basis become the unintended competitors at unrealistic price points.

Where most background music providers price their services at between \$50 - \$200 per month, personal services are priced at \$10.99/month. There are even some personal services that are provided on a complementary basis as a loss leader. The Collecting Societies, APRA and PCCA, would assert that in licensing businesses for the public performance of personal services they are in fact curing a market defect, and reacting in the best interests of their members. Whilst this may serve their own interests, it does nothing to support the background music providers nor the longer-term interests of the Australian Music Industry.

In essence, APRA and PCCA, (as the only rights holders that have any direct contact with Australian businesses) are openly licensing personal services in business environments. We believe that no-one is policing what is an inappropriate use of music on a widespread scale in the Australian music industry. The impact on the industry of this is acute and escalating. And, it should be noted that in our members experience, Australian Collecting Societies are the only societies in the world that are taking this position, whereas many other international Collecting Societies from around the world have instead opted for tighter policing and enforcement that aims to prevent personal services from being used by businesses.

Unfortunately, these APRA and PCCA licences are not new concepts as they were originally created to extend the rights on CDs that were purchased for private use but ultimately used in a business context. This was a completely appropriate extension of rights attached to CDs as there was no enduring service provider to license the use that APRA and PCCA could provide. In 2019 CD usage is largely extinct, though the licensing practise has been extended to now include personal services, which is a very different use to the original CD scenario. We believe the appropriate approach where a service provider exists is for each personal service to seek a commercial licence directly, and in the absence of such licence, no alternate licence should be extended on their behalf, especially without the consent or involvement of the personal service.

Despite concerns being repeatedly expressed, APRA and PCCA claim to be within their current rights to collect for this new use case and are openly pursuing this path even more directly under newly

proposed OneMusic Tariffs<sup>6</sup>, again perpetuating the misperception that personal services are now acceptable for business use, as long as these tariffs are applied.

### **What is the impact of a Public Performance ecosystem dominated by Personal Services?**

As stated previously, personal services are not designed for businesses. So, if they are to become the dominate source of music in public performance then the tailoring of music for particular events/circumstances/situations, (especially the inclusion of Australian music) to businesses will be lost. This will reduce the impact of music in public places as business owners and employees lack the time and expertise to program content that appeals to their customers. As a result, music will be relegated to the background, effectively as white noise to fill a void, or it will simply cease to be present. In the mid to long term we feel this will erode the ability of Collecting Societies to argue in favour of the high value of music and will impact on the well established and high cost tariffs that currently exist in Australia for the use of music. This is because music won't be as important to most businesses and will certainly not be worth paying the value of current tariffs.

For the background music providers, especially the local ones, it will make it very difficult for them to survive. i.e. a personal service relies on millions of customers to become a going concern. Margins attached to each available song are very small. In the meantime, a thriving Australian background music provider can only hope to have 10-20,000 clients. So, if the background music providers are pushed to a price point of \$10.99 per month to match personal services, it won't be possible as a business entity to compete or survive.

Furthermore, with the uncertainty around OneMusic Australia and the perception from many of our customers of public performance that there will be tariff increases, we are seeing many Australian businesses questioning the value of music entirely and considering international music options that avoid our high cost market altogether.

The outlook right now is very uncertain and as music technology businesses we are gravely concerned that without action, the mid-term prognosis is the loss of many local background music providers and the weakening of all of us. We feel this will trigger a chain reaction that impacts on venues first, as they will be unable to source a quality background music provider, because none will exist. This will in turn hurt the local music industry and the ability to foster our Australian culture and identity, because they will lose the ability to truly promote Australian and emerging artists.

Furthermore, it will remove any appetite for innovation, investment or job creation from small and medium sized businesses involved in music technology, as the environment is simply too difficult to conduct operations. Finally, it will eliminate the thriving shop front of public performance that we firmly believe has played and should continue to play such a key role in music discovery and has in part driven the consumer to pay for Personal Services at home.

This is the path we are on, but it is not the only path that we can follow if we collectively acknowledge the existence of the problem and work collaboratively to deliver a balanced outcome

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<sup>6</sup> [OneMusic Australia](#) state consistently on their consultation papers "As it currently stands in Australia, almost all publicly available digital music streaming and download services limit their service to personal and domestic use. Furthermore, while the making of copies of recordings (for example of a CD, a digital download or music service) is permitted under the Copyright Act for domestic listening purposes, this does not extend to public performances (i.e. the type of performance that occurs in a retail business). So, in the absence of appropriate licensing, any public performances and reproductions (including by the operation of the service itself, such as caching or storing for offline use) require licensing. Licences for reproduction have been available from APRA AMCOS and PPCA separately for several years and will continue to be offered by OneMusic Australia. That said, OneMusic Australia reminds businesses that if they are using a digital music service, they should refer to the Terms and Conditions of the service's end user agreement to determine if there are other permissions they may require (including from the service provider itself) that are not under the control of OneMusic Australia."

for all stakeholders. Rights holders need to be correctly and fairly compensated for their works and the Collecting Societies need the ability to collect these revenues on their behalf. But equally we need to ensure the background music providers' interests are recognised and that we are supported as the correct and appropriate method for delivering recorded music in public places. Only then can the fragile music ecosystem we have discussed continue to thrive equally in the consumer and commercial spaces. Ignoring this symbiosis puts at risk the recovery and long-term viability of the Australian music industry.

#### **4 Market power asserted during negotiations**

There was recently a review of the licensing framework for the background music sector administered by APRA-AMCOS in consultation with the BPM members and the broader background music sector. The process was heavily weighted in favour of APRA/AMCOS with significant pressure applied by APRA/AMCOS to those companies requiring a new agreement. This pressure took the form of requiring members of the background music sector to turn over confidential client information which, in light of the information provided above in relation to personal streaming services, compounds the concerns of members operating in the market.

##### **Duty of confidentiality**

Of course, asking background music providers to provide client lists to APRA/AMCOS is fraught with risk. At a minimum, such an approach presented an enormous conflict of interest to BPM members who were being asked to breach the privacy of their own clients by providing details to APRA of client business activities. Of course, BPM member clients while wishing to be legally compliant, also wished to legally minimise the financial risk to their clients.

Sharing information from the collective client base of the background music sector, which would number in the tens of thousands, would compromise the trust that has been built by members of this sector with the cumulative client base, and adversely impact the ability to secure new sales.

Given the overriding pressure on APRA/AMCOS staff to maximise revenues and engage in lead generation it is not surprising that BPM members would feel that their clients might be unfairly targeted by APRA/AMCOS in terms of the collection of license fees.

Additionally, considering the concerns raised in this submission regarding APRA/AMCOS licensing policy with respect to personal streaming services, there are legitimate concerns that APRA/AMCOS would seek to reap a financial reward by securing direct relationships with businesses who currently have a relationship with a BPM member.

##### **Uneven playing field**

As discussed, BPM members curate content specifically for users. Their products are superior to the products produced by companies outside of the background music sector. Not only are BPM solutions tailor made for clients, but their use results in the distribution of royalties to rights owners based on real, current-time play data.

It is open to businesses to negotiate directly with OneMusic Australia rather than engage with BPM members, however BPM has concerns if this engagement occurs because of an uneven playing field due to OneMusic Australia benefiting from an ACCC authorisation or re- authorisation. If BPM members are no longer engaged by businesses, there will be even fewer opportunities for the use of accurate play data to be utilised in order to support more accurate distributions to music creators. Currently, BPM members have a greater capacity than OneMusic Australia to ensure that Australian music creators are appropriately and fairly rewarded.

BPM members have collectively invested millions of dollars creating solutions to combat the use of un-licensed consumer services and APRA/AMCOS are fully aware of these developments. Despite their awareness of these developments APRA/AMCOS have made a conscious choice to collect revenue wherever possible and often at the expense of Australian artists.

## 5 OneMusic Australia

BPM notes that APRA, AMCOS and the PCCA will be jointly involved in the management of OneMusic Australia. Their relationship has been described in the following manner:

*“PCCA will sub-license on a non-exclusive basis certain rights to APRA AMCOS. APRA AMCOS, with input from PCCA, will then be contracted to manage public performance licensing through OneMusic Australia for both parties”.*

In Australia, APRA and the PCCA have well developed and entrenched public performance schemes in place that are largely well known to end user businesses who are mutual clients of both organisations. Their public relations, information dissemination and court activities have ensured this. BPM clients generally hold one or more licences with each organisation for the use of music in their business. These public performance licensing frameworks are not easily understood and often require some form of expert advice. In an effort to simplify this process, both APRA, AMCOS and PCCA recently agreed to join forces and jointly administer the issuing of public performance licences under the [OneMusic Australia \(OMA\)](#) brand. A similar approach has already been implemented in New Zealand under the [OneMusic New Zealand \(ONZ\)](#) brand and both schemes are administered by APRA. Similarly in the United Kingdom, the respective PROs there (PRS for the works and PPL for the masters) have recently finalised a Joint Venture arrangement called [PPL-PRS – The Music Licence](#). The key difference between the Australian/NZ and the UK examples has been the licence reform that has occurred in the local region as compared to simply the joint administration of existing licences in the UK. Both OneMusic examples have introduced widespread tariff reform of the existing licensing structures with an aim of simplifying the process for end users, which in many instances will be achieved overwhelmingly. There are, however, some key areas where this will result in sharp increases in the level of expenditure end users will be required to allocate for music use in their businesses.

It is BPMs view that some of these proposed increases are out of step with global use cases and therefore the public performance environment in the Australian market is not aligned with good commercial use cases where the tariff costs are out of balance with the available revenue to spend on music use. There is only so much money available for end users to spend on music and entertainment and this is currently aligned to the interests of the PROs at the expense of end user businesses and their customers, 3rd party background music providers and the creators of copyright.

BPM commends and supports the ability and right of the PROs to exploit and seek a commensurate return for the use of their members copyrights in public performance environments. They have a mandate and requirement to do so and their existence in the market creates administrative efficiencies across the board. Throughout the tariff reform process though, it could be argued that there should be greater consideration given to the various pressures on businesses in a world that is facing its own unique set of disrupting factors. While the music industry has largely worked its way through a major upheaval through the disruption presented by the evolution of digital industries, these parallels are only just beginning to impact on businesses who also rely on music in public performance spaces.

Consider the impact of Uber Eats to dining; Amazon to retail; AIR BnB to accommodation; Tinder to the night time economy and you don't have to look far to realise that there is an enormous amount of downward pressure being placed on businesses. This means that they are looking both at ways to



entice more people back to a bricks and mortar existence yet balanced with lower margins within which to do so. In these circumstances, music is often one of the first casualties, despite the value we know and believe it adds to any business. The commercial realities are though when businesses are stressed, music, as a budget line item, will be impacted.

BPM contends that APRA/AMCOS via OneMusic Australia has failed to conduct effective consultation with BPM member companies and other stakeholders as part of the tariff development process, despite their claims that they have undertaken widespread industry consultation.<sup>7</sup>

BPM would like to know why all of the key OneMusic Australia stakeholders being APRA, AMCOS and the PPCA aren't required to seek authorisation from the ACCC?

## **6 Flow on effect to the Australian music industry**

Individual BPM members have attempted to explain to APRA that their technology in many regards is superior to APRA technology, and as a result they are in an excellent position to provide music to business users and distribute license proceeds to rights owners in a timely manner, all on APRA's behalf. However, at this time APRA have chosen to ignore the inherent superiority of BPM companies in this regard, to the detriment of Australian venues (users) and artists.

Since the last authorisation, technical solutions in the music industry have been enhanced. APRA suggested these solutions are too impractical. BPM contends that not only are the solutions developed and tested by its members not impractical, but its solutions are superior to those currently offered by APRA and present the best opportunity to provide accurate returns to rights holders.

As a result of the non-exclusive nature of the recording industry, several BPM members and others operating in the background market have developed products that compete directly with the PPCA and provides specific use cases for public performance compliant products that serve as an alternative to certain PPCA tariffs. This creates user choice in a market while maintaining compliancy in public performance and cost-effective public performance product based on discrete content pools of content that provides a more accurate record of titles used to the immediate benefit of the rights owners.

Under APRA's current membership arrangements, APRA members assign their copyrights to APRA un an exclusive input arrangement. Under this arrangement, businesses cannot seek direct licensing arrangements with artists and publishers to exploit their copyrights without the requirement of the owners of the copyrights to enter into APRA's License Back or Opt Out arrangements which are administrative burdensome and ineffective as path to license content.

While the BPM supports the role APRA plays with respect to the provision of blanket arrangements in the Australian landscape there are proven examples in the market that demonstrate the public benefits of non-exclusive licensing that balances the benefits of blanket arrangements versus market choice. Where non-exclusivity is in play end users of copyright gain the benefit of choice, rights owners and specifically the artist creator of musical works have greater autonomy over their copyrights and the broader Australian community can be exposed to more Australian culture.

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<sup>7</sup> See for example <http://www.onemusic.com.au/consultations/>.