



AUSTRALIAN
COMPETITION
& CONSUMER
COMMISSION

Statement of Reasons

In respect of a notification lodged by
Mood Media Australia Pty Ltd and Stingray Group Inc

in respect of
collective negotiation with APRA AMCOS

Date: 4 July 2019

Notification number: CB10000467

Commissioners:
Keogh
Rickard
Court
Ridgeway

Summary

The ACCC does not object to the notification lodged by Mood Media Australia Pty Limited and Stingray Group Inc, to enable Mood Media and Stingray Group and their related bodies corporate to collectively negotiate the terms and conditions of music licence agreements to be entered into between them and APRA AMCOS, including as to licence fees.

This notification is in similar terms to one the ACCC allowed to stand in March 2019. This notification is lodged to expressly cover the related bodies corporate of Mood Media Australia and Stingray Group so that all relevant related entities can participate in the negotiations with APRA AMCOS.

Mood Media and Stingray Group supply background music to a range of businesses including restaurants and retailers. Under copyright law, when businesses play music in public, including as background music, they are required to obtain permission from the music owner. The background music supplier also requires the permission of the music owner to supply music to businesses. APRA AMCOS grants blanket licences to businesses and other users, including background music suppliers, so they are able to play music in public without contacting individual music owners for permission. APRA AMCOS distributes the licence fees collected to its songwriter, composer and music publisher members.

The ACCC has decided to allow the notification to remain in force for a period of 10 years, instead of the default period of three years. The notification came into force on 14 June 2019 and will remain in force until 30 May 2029, unless it is withdrawn or revoked.

The notification

1. On 31 May 2019, Mood Media Australia Pty Limited and its related bodies corporate (together, **Mood Media**), on behalf of itself and Stingray Group Inc, and its related bodies corporate, (together, **Stingray Group**), lodged a collective bargaining notification¹ to enable Mood Media and Stingray Group to collectively negotiate the terms and conditions of music licence agreements to be entered into between each of them and APRA AMCOS, which consists of the Australasian Performing Right Association Limited (**APRA**) and the Australasian Mechanical Copyright Owners Society (**AMCOS**) (the **Notified Conduct**).
2. Mood Media and Stingray Group are background music suppliers, which involves supplying background music that is played in bars, hotels and other venues, retail outlets, gyms, business receptions and customer waiting areas or hold-music on the telephone. Background music is delivered via various platforms including physical delivery (such as CDs), digital downloads and streaming.
3. Mood Media Australia Pty Ltd is an Australian subsidiary of Mood Media Corporation, a global in-store media solutions company operating in over 100 countries.

¹ Businesses can obtain protection from legal action under the *Competition and Consumer Act 2010* (CCA) for collective bargaining including associated collective boycotts by lodging a collective bargaining notification with the ACCC. Protection for collective bargaining (which does not involve a collective boycott) will generally commence 14 days after the collective bargaining notification is lodged.

4. Stingray Group Inc is a global provider of curated direct-to-consumer and business-to-business music, media and technology services. In December 2015, Stingray Group Inc acquired Digital Music Distribution Pty Ltd (DMD), a provider in Australia of digital music services to broadcasters and other media suppliers and brand partners. In July 2017, Stingray Group Inc acquired two Australian providers of in-store media solutions, SBA Music Pty Ltd and Satellite Music Australia Pty Ltd. Since (and as a result of) these acquisitions in Australia, Stingray Group Inc has been able to offer (via its Australian subsidiaries) a portfolio of music products and services (including background music services) across all platforms to Australian businesses and industries operating in the retail, hospitality and fitness sectors.
5. To supply background music, a background music supplier is required to have relevant rights to (permission to use) the musical works that they provide to their customers. Background music suppliers obtain such rights by entering into licence agreements with rights-holders, such as APRA AMCOS.
6. Mood Media and Stingray Group submit that participation in the Notified Conduct is voluntary and that they will each continue to have the option to negotiate individually with APRA AMCOS if they choose to do so. The Notified Conduct does not include a collective boycott.
7. Mood Media and Stingray Group request that the notification continue for 10 years.

Background

8. The licences for businesses to use copyright music are usually centrally managed by copyright collecting societies, acting on behalf of their members. Copyright societies grant licences for the use of copyright material, collect royalties from users of copyright material and distribute revenue to owners of copyright.
9. APRA AMCOS provides two types of licences relevant to background music suppliers. APRA grants licences covering the right to *perform* the musical work in public and *communicate* it publicly (for example, for live performance, playing the work on radio or television, causing the work to be heard in public such as at a pub, club or café, and communication via the internet). AMCOS grants licences covering the right to *reproduce* the work in certain formats such as reproduction of songs and compositions on CD, DVD, online, for use as production music and for radio and television programs.
10. Together, APRA and AMCOS control the copyright for such purposes in almost all commercially available musical works by virtue of:
 - their members (Australian composers, songwriters and music publishers) assigning their rights to APRA AMCOS, and
 - their reciprocal arrangements with equivalent overseas collection societies pursuant to which each grants the other the right to license works in their repertoires within their respective jurisdictions.
11. APRA AMCOS generally offers ‘blanket’ licences to users that cover use of their entire repertoires.
12. Since 1997 APRA and AMCOS have been administered in tandem. Together, they now offer background music suppliers a single licence that covers the right to reproduce the work and communicate it publicly, which enables background music suppliers to provide a stream or download of works to their clients. From the perspective of clients of background music suppliers, this is essentially the same

service that they have historically acquired, but delivered digitally by the background music supplier rather than via a CD.

13. A separate collection society, the Phonographic Performance Company of Australia (**PPCA**), grants licences covering the copyright in the recorded version of the musical work, such as the sound recording. Many businesses, including background music suppliers, require licences covering copyright in both the musical work and the sound recording. However, the Notified Conduct is only in relation to negotiations with APRA AMCOS. Mood Media and Stingray Group do not propose to collectively negotiate with the PPCA.
14. The APRA AMCOS arrangements replace direct dealing between individual rights holders and users, and the individual licensing and enforcement of copyright by composers and other rights holders. This means that a background music supplier needs only one performing rights licence from APRA AMCOS to cover any and all music it supplies to its clients and APRA AMCOS need only confirm that the background music supplier has the correct APRA licence to ensure copyright compliance.
15. In the background music context, both the background music supplier and its clients (i.e. the businesses to which the background music supplier is supplying music) require (separate) licences from APRA. In some instances, a background music supplier will have an 'agency' licence with APRA that enables them to collect the APRA public performance fees from its clients on behalf of APRA. Absent such an agreement, these fees are paid directly by the client to APRA in the same manner that a business that plays music but does not use a background music supplier to supply that music would.
16. Mood Media and Stingray Group state that they may include negotiation of such agency licences in their collective negotiations with APRA.

Related notification

17. Mood Media and Stingray Group previously lodged a notification in relation to collectively bargaining with APRA AMCOS on 11 February 2019 (CB10000463). On 28 March 2019, the ACCC issued a decision not objecting to notification CB10000463.
18. Notification CB10000466 is in similar terms to notification CB10000463, except that in the current notification related bodies corporate to Mood Media and Stingray Group are also named as notifying parties.
19. Details about the application for reauthorisation are available from **the ACCC's public register**.

Related application for authorisation

20. APRA's arrangements for the acquisition and licensing of performing rights in its members' musical works have been authorised by the Australian Copyright Tribunal and the ACCC since 1999. Most recently, the ACCC re-authorised these arrangements in 2014 for five years. This authorisation expires on 28 June 2019 and the ACCC is currently assessing APRA's application for re-authorisation of these arrangements. Details about the application for re-authorisation are available from **the ACCC's public register**.

21. In its previous consideration of APRA's applications for authorisation, the ACCC has concluded that the public benefits that result from APRA's arrangements would outweigh the public detriments. In particular, the ACCC found that there are significant public benefits in APRA's arrangements, namely:
 - transaction costs savings for users, particularly resulting from the comprehensive coverage of APRA's blanket licences which provide certainty for users that they are licensed in respect of virtually the entire worldwide repertoire of musical works, and
 - increased efficiency and effectiveness of monitoring and enforcement. APRA's arrangements likely reduce free riding on the creativity of copyright owners and preserve the incentives for the future creation of works.
22. However, the ACCC has also concluded that as a virtual monopoly with exclusive rights to its members' works, APRA has significant market power in relation to its dealings with users. Businesses that want to play music have little choice but to deal with APRA, and have little bargaining power in these negotiations.
23. On 5 June 2019, the ACCC released a draft determination proposing to re-authorise APRA's arrangements, subject to conditions, for five years. The ACCC expects to release a final determination in September 2019.
24. On 27 June 2019, the ACCC suspended the operation of existing authorisation and granted interim authorisation in its place. This enables the current arrangements to continue while the re-authorisation process continues.

Consultation

25. The ACCC invited submissions in respect of the notification from a range of interested parties, including background music suppliers, digital music services and Australian collecting societies.
26. The ACCC received one submission, from APRA AMCOS, which takes the same position in respect of this notification as it did with notification CB10000463. That is, APRA AMCOS submits that the notification is misconceived as APRA AMCOS offers licence schemes on identical terms throughout any given industry. If a background music supplier were to negotiate more favourable licence terms than those offered by APRA AMCOS in the first instance, APRA AMCOS submits it would offer those more favourable terms to anyone requiring a licence under that scheme, unless the specific position of the first background music supplier was so different that it would be reasonable to offer other suppliers different terms.
27. APRA AMCOS submits that Mood Media and Stingray Group are not individually in weak bargaining positions *vis a vis* APRA AMCOS, as the availability of the Copyright Tribunal means that APRA AMCOS is not in a position to withhold a licence from any music user who wishes to obtain one on reasonable terms.
28. Notwithstanding these views, APRA AMCOS does not object to Mood Media and Stingray Group, and their related bodies corporate, seeking to negotiate collectively.

ACCC's assessment

29. The ACCC has considered the Notified Conduct in accordance with section 93AC of the *Competition and Consumer Act 2010* Cth (**CCA**).

30. In doing so, the ACCC has taken into account:

- The likely future with and without the Notified Conduct. In particular, the ACCC considers that, absent the Notified Conduct, Mood Media and Stingray Group are each likely to continue to individually negotiate licensing arrangements with APRA AMCOS.
- The relevant areas of competition likely to be affected by the Notified Conduct. The ACCC considers that the primary areas of competition are the acquisition and supply of performing rights, and reproduction rights, in relation to musical works in Australia.

Public benefit

31. The ACCC considers that the Notified Conduct is likely to result in public benefits from improved efficiency through:

- Transaction cost savings (such as negotiation and contracting costs, including the time taken to negotiate) for Mood Media, Stingray Group and APRA AMCOS, relative to Mood Media and Stingray Group conducting negotiations with APRA AMCOS on an individual basis. While the APRA AMCOS licensing arrangements, by providing instantaneous access to their entire repertoires, already generate significant transaction cost savings, further transaction cost savings are likely to be realised by Mood Media and Stingray Group collectively negotiating with APRA AMCOS.
- Better input into contracts, as collective bargaining may improve the ability for Mood Media and Stingray Group to have better input into contracts than they would be able to achieve on their own.

Public detriment

32. The ACCC considers that the Notified Conduct is likely to result in minimal, if any, public detriment from a reduction in competition between Mood Media and Stingray Group in acquiring performing rights in relation to musical works because:

- Mood Media and Stingray Group are two of approximately 147,000 businesses licensed by APRA AMCOS. APRA AMCOS control performing rights and reproduction rights, which are necessary inputs into Mood Media and Stingray Group's businesses. APRA AMCOS will still have significant market power in negotiating with Mood Media and Stingray Group. As such, it is very unlikely that the Notified Conduct will enable Mood Media and Stingray Group to artificially depress licence fees below the competitive level.
- Mood Media and Stingray Group will continue to compete for customers and the Notified Conduct is not likely to diminish this competition.
- Participation in the Notified Conduct is voluntary for Mood Media and Stingray Group and for APRA AMCOS, and Mood Media and Stingray Group will still be free to negotiate individually with APRA AMCOS.

Period for which the Notification will be in force

33. A collective bargaining notification (and therefore the protection it confers) will be in force for a period of three years from the date it is lodged unless the ACCC determines that another period is appropriate or the notification is withdrawn or revoked.

34. In this case Mood Media and Stingray Group have asked that the notification remain in place for 10 years.
35. The ACCC considers that it is appropriate for the notification to remain in force until 30 May 2029, for the following reasons:
 - The likely benefits of the Notified Conduct may be expected to continue for the duration of the Notified Conduct and therefore total benefits are likely to be greater with the extended notification period.
 - The extended notification period is unlikely to change the minimal public detriment which is likely to result from the Notified Conduct.

Decision

36. The ACCC considers that the benefit to the public that is likely to result from the Notified Conduct will outweigh any detriment to the public that is likely to result.
37. Accordingly, the ACCC does not object to the notification at this time. As with any notification, in accordance with s 93AC, the ACCC may act to remove the protection afforded by the notification at a later stage if it is satisfied that the public benefit does not outweigh the public detriment.
38. With respect to the period for which the notification will remain in force, for the reasons set out in paragraph 35, in accordance with s 93AD(5), the ACCC is satisfied that:
 - a three year notification period is not appropriate in all the circumstances, and
 - another period is appropriate in all the circumstances, being the period ending on 30 May 2029.²
39. Accordingly, the protection provided by notification CB10000467 commenced on 14 June 2019 and will continue until 30 May 2029, unless the notification is withdrawn or revoked.
40. This Statement of Reasons serves as the written notice and written statement of reasons for giving that notice required by section 93AD(6) of the CCA.

² As required by s 93AD(5)(b), this period will end no later than 10 years after the day that the notification was lodged.