MinterEllison

LAWYERS

5 October 2004

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BY EMAIL
Attention Ms Susan Sullivan
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The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Susan

Application for Authorisation Nos A90918 - A90925 lodged by Australasian Performing Right Association Limited

We refer to our meeting with the ACCC on 1 September 2004, and our subsequent discussions regarding the three issues in relation to which the ACCC has sought further input from Minter Ellison.

The three issues are:

(a) the position regarding the licensing of public performance rights in music and lyrics in cinemas in the United States of America;

(b) the limitations and shortcomings, in practice, of the opt-out and licence back arrangements under the APRA Articles of Association (paragraphs 17(b)-(e) and 17(g)-(h)); and

(c) the structure and operation of an alternative licensing arrangement to a blanket licence (such as a transactional licence).

In response we **attach** a detailed memorandum which deals with these issues. In summary, we would like to make the following points:

1. The Cinema Operators contend that the APRA Articles of Association should be amended so as to provide for increased flexibility in order to promote use of the opt-out and licence back arrangements by APRA members. The Cinema Operators contend that APRA's input arrangements under its Articles of Association could be made more flexible without compromising APRA's position as a viable collecting society.

2. With respect to the opt-out measures, the current measures could be made less restrictive by allowing a member to require APRA to reassign specific categories of rights in relation to a certain work or works, rather than *all* of the member's works within a specific category of rights. With respect to the licence back measures, the current measures could be made less restrictive by imposing fewer or less onerous conditions in existing Article 17(h) of the APRA Articles of Association. With respect to both the opt-out and licence back measures, the time periods imposed on members to notify APRA of their intention to utilise these measures should be made shorter or non-existent (that is, so that a member could utilise these measures at any time).

3. Once such amendments are made, it will be easier for rights owners (that is composers/lyricists or their publishing company) to deal directly with end users of music in licensing the public performance rights in one or several of their works. In the context of licensing public performance rights for music embedded in films, direct licences could be secured between rights owners and cinemas, or between rights owners and film producers. This will be an effective alternative for members where collective management is not appropriate for their needs. This question of providing greater flexibility has been the subject of significant discussion in the United States. **Attached** to this letter is a copy of an article which addresses quite directly the desirability of greater flexibility in the arrangements as contended for by the Cinema Operators in their submission to the ACCC.[1]

4. Alternatively, music users could continue to deal with APRA provided that APRA offered them a form of licence other than a blanket licence (for example, a transactional licence) where this was appropriate to the use of music made by a particular user. We submit that transactional licences are appropriate for cinemas which publicly perform musical works through the screening of films.

If we can provide further information we would be happy to do so.

Yours faithfully
MINTER ELLISON

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[1] *Collecting Society Practices Retard Development of On-Line Music Market* by Thomas C Vinje, Dieter H Paemen, Jenny K M Romelsjo; a paper delivered to the *Copyright In the Music Industry: Digital Dilemmas* Symposium, Amsterdam, 5 July 2003. Although this paper addresses the constraining practices of collecting societies in relation to on-line music, the underlying principles and criticism of the practices of the collecting societies apply with equal force to public performance of musical works in film through exhibition.

MEMORANDUM

CONCERNING:

- **Licensing of public performance rights in music and lyrics in cinemas in the United States of America**
- **The opt-out/non exclusive licence back arrangements under the APRA Articles (paragraph 17(b)-(e) and 17(g)-(h))**
- **Possible alternatives to the current APRA blanket licence scheme for cinemas**

Public performance rights: United States

1. Public performance rights in music and lyrics in cinemas in the United States are not the subject of separate licence fees and licence arrangements between cinema owners and Performance Rights Organisations (**PROs**). The arrangement in the United States can be categorised as a 'through to viewer' licence arrangement. Effectively, cinema owners do not pay any licence fees to the PROs for the right to publicly perform (by reason of the screening of a film) musical works and associated literary works incorporated in or used in the film. Instead, public performance rights are secured by producers of films at the same time as synchronisation rights are obtained.

2. Typically, the film producer secures both a synchronisation licence and a performance licence, on a per-film basis, directly from the copyright owner or their agent *at the time the producer secures the rights to 'use' the specific music he or she would like to include in the film.* This arrangement is unique to the United States, and is also unique to the cinema industry.

3. Historically, the position in the United States was the same as it is now in Australia - the American Society of Composers, Authors and Publishers (**ASCAP**) and Broadcast Music Inc (**BMI**)[1] obtained the exclusive public performance rights from their members and, in turn, granted blanket licences to cinemas for the public performance of music (and associated lyrics) embedded in films. At this time, blanket licence fees were based on theatre capacity. Contractual arrangements with distributors required that films could only be screened in licensed theatres.

4. In 1947, an attempt by ASCAP to raise licence fees to cinemas by as much as 200 to 1500 per cent resulted in a group of cinema owners suing ASCAP for violations of federal antitrust legislation,[2] specifically regarding the requirement that film distributors contract only with cinemas that had ASCAP licences. The Court found that ASCAP had prohibited its members from directly licensing public performance rights to cinemas in competition with each other and with ASCAP itself. The Court also found that because copyright holders could directly negotiate with film producers to license public performance rights at the same time that they negotiated the licensing of synchronisation rights with those producers, there was no efficiency justification for allowing ASCAP to collectively license film producers or cinemas. Accordingly, the

[1] The largest of the three PROs in the United States. The third PRO in the US is the Society of European Stage Authors and Composers (**SESAC**).

[2] *Alden-Rochelle, Inc. v. ASCAP,* 80 F.Supp. 888 (1948), District Court, Leibell J. The cinemas claimed contraventions by ASCAP of the Sherman Act which prohibit contracts, combinations and conspiracies in restraint of trade (section 1), and monopolisation of a market (section 2).

Court issued an injunction prohibiting ASCAP members from licensing the public performance right in a synchronised composition to anyone other than the film producer. The Court also found illegality in ASCAP's licensing arrangements with regard to film producers. This illegality arose from the vertical integration of film producers as beneficiaries of musical performance fees (due to the fact that their subsidiaries (music publishing companies) were members of ASCAP).

5. The outcome of the case was reflected and reinforced in a consent decree between ASCAP and the United States Department Of Justice (**DOJ**). The decree expressly prohibited ASCAP from licensing cinemas for public performances of music in films and specifically required that synchronisation and performance rights be licensed at the same time, directly to film producers and on a per-film basis.[3] In 1966, BMI became bound by a similar consent decree following the settlement of a claim between BMI and the DOJ.

6. The position in the United States has remained unchanged since this time. Typically, a synchronisation licence document will include a provision granting public performance rights for theatrical exhibition of the film in the United States. Appendix A contains two sample contracts which exemplify the gathering in of both synchronisation and public performance rights by the producer at the production stage of a film. According to information on the ASCAP website (www.ascap.org), the majority of synchronisation licence fees charged by music publishers are between $18,000 and $40,000 (USD).

7. The producers of United States films buy the public performance rights for the United States only. Copyright owners assign public performance rights for the rest of the world to the PRO of which they are a member (that is, either ASCAP, BMI or SESAC) at the time they sell the synchronisation licence to the film producer. Therefore, where a United States copyright owner's music is included in a film released outside the United States, the foreign PROs collect licence fees in respect of that work from cinemas in their territory and then remit the copyright owner's share of the licence fees directly to the relevant PRO in the United States. The PRO then pays the royalties to its member as a foreign distribution.

8. APRA accounts to ASCAP (or BMI or SESAC) in the United States under its Distribution Rules and Distribution Practices for royalties paid to APRA by cinema owners for the public performance rights in cinemas in Australia.

9. We understand that ASCAP (and BMI and SESAC) in turn account through their distribution arrangements to the 'rights owners' or copyright owners who have assigned their public performance rights to the relevant PRO. Typically, the rights owners are jointly the composer and the film producer. Consequently, royalties paid by cinema owners in Australia to APRA are ultimately paid, for particular music in films, to the film producer and the composer/lyricist in a proportion, and often 50/50.

10. The Cinema Operators[4] contend that this is effectively double dipping on the part of the film producers who effectively receive licence fees that are either a 'windfall' or reimbursement of synchronisation licence fees already paid by the producer to the holder of the rights in the music/lyrics.

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[3] See section IV(E) of the ASCAP Consent Decree.

[4] In this memorandum, the term 'Cinema Operators' refers to Village Cinemas Australia Pty Limited, The Greater Union Organisation Pty Limited, Birch, Carroll & Coyle Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Ltd, Hoyts Cinemas Limited, Cinema Operators Association of Australia Inc and the Australian Entertainment Industry Association.

11. The Cinema Operators consider that the United States model has relevance to the Australian position as the majority of films exhibited in Australia are of United States origin - films produced in the United States contribute approximately 85% of box office revenue in Australia.

APRA Articles of Association - Opt-out and Licence Back Provisions

12. The APRA Articles of Association (**APRA Articles**) were amended following the decision of the Australian Competition Tribunal (**ACT**) in June 1999 in *Re Applications by Australasian Performing Right Association*.[5] The background to those amendments and their effect is contained in Appendix B.

13. Essentially there are 'opt-out' provisions and 'licence back' provisions. The Cinema Operators have not entered into any arrangements directly with rights owners in respect of the public performance rights for music and associated lyrics since the amendments were made to the APRA Articles. The Cinema Operators contend that both the opt-out and licence back provisions are limited and inflexible in their operation and effect and do not provide any realistic opportunity for cinema owners to source rights directly from the rights owners (who are APRA members).

14. Though a member of APRA may assign all or any works to APRA, once such an assignment has taken place the member may only require APRA to 'reassign' specific rights in *all* of his or her works (which are currently assigned to APRA). For example, if a member has assigned all of his or her repertoire to APRA and wishes to 'opt-out' under Article 17(b), the member may only request the assignment to him or her of a specified right *in all of his or her works*. An example would be the member may request 'reassignment' of 'the right of performance in public by the exhibition of cinematograph films' *for all of the member's works*. This does not allow a member to withdraw his or her rights for a particular work and particular type of use at any time. It is clear that this is an 'all or nothing' opt-out provision which would have limited appeal to, or use for, any APRA member.

15. Furthermore, to exercise the very limited opportunity to 'opt-out', the member must comply with strict time constraints and notice requirements which can only take effect on 30 June or 31 December of any particular calendar year.

16. The non-exclusive licence back provision is also extremely limited and inflexible, specifically because it requires 'nomination' on the part of the APRA member of the identity of all persons to whom the member intends to grant a sub-licence; more importantly, the APRA member is required to nominate to APRA *the dates upon which the performances are to take place, the geographic location and the venue of the performances* and this must be done at least two months prior to the date of the first performance under the sub-licence (or at least one month prior in the case of a television broadcast). There are also costs and indemnity conditions which would appear onerous to most APRA members.

17. The Cinema Operators contend that, as to the opt-out provisions, APRA members would be disinclined to exercise those provisions because of their 'all or nothing' nature. As to the licence back provisions, the Cinema Operators contend that the requirement to notify 'specifics' in advance (by way of dates, geographic location and venue) are entirely unsuitable and inappropriate in the context of exhibiting films.

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[5] ***Re Applications by Australasian Performing Right Association*** [1999] ACompT 3 (16 June 1999).

18. Cinema owners are provided with a general indication of approximately two to three months in advance, by the distributors, of the proposed date of first exhibition of a film. Confirmation of the date of exhibition might well be given within approximately one month of exhibition. Cinema owners do not know in advance, for any particular film, the date upon which the film will cease to be exhibited.

    Consequently, a rights holder who is in negotiation with a cinema owner for the grant of a licence for the public performance rights in a particular film could not supply to APRA the information required to enliven the licence back provisions.

Alternatives to the current APRA blanket licence scheme

19. In their submission in response to the APRA Application for Authorisation, the Cinema Operators contend that the current blanket licensing arrangements which cover the entire APRA repertoire are neither appropriate nor necessary in the context of films exhibited by cinema owners.

20. The Cinema Operators contend that rather than being restricted to a blanket licence and a licence fee calculated by reference to box office revenue, the following options should be available:

    (a) cinema owners should be able to negotiate a transactional licence directly with rights owners - such a licence could be granted on a per-film or a periodic basis;

    (b) cinema owners should be able to negotiate a transactional licence through APRA - such a licence could be granted on a per-film or a periodic basis;

    (c) film producers should be given the ability to negotiate a non-exclusive licence for public performance rights in Australia directly with the rights owner (that is, 'at source'); this would occur at the same time that the film producer secures a synchronisation licence from the rights owner. Cinema owners would be licensed with all rights necessary to exhibit the film in consideration for the film hire paid to the film's distributor. This would eliminate the need for cinema owners to obtain a licence for the 'down stream' use of the rights.

21. Options (a) and (c) could be achieved through amending the APRA Articles of Association to provide for a simplified, more flexible and more user-friendly form of opt-out and licence back provisions. Option (b) could be achieved by changing APRA's tariff structure for cinemas. This memorandum sets out some precise principles as to how such alternative licence schemes may be structured and how they would operate in practice.

22. The types of licence mentioned in paragraph 2 are inherently more suitable to the music usage made by cinemas which publicly perform music when screening films. As the Cinema Operators point out in their submission to the ACCC, the musical and associated literary works publicly performed by cinema owners in exhibiting films are identified works and constitute a very small proportion of APRA's repertoire. Cinema owners require a licence to cover specific, identifiable pieces of music within the film shown - there is no need for a blanket licence covering the entire APRA repertoire. For example, a large-scale cinema owner exhibits approximately 200 different titles a year with an average of 20 musical works per film[6] - this would require access to only 5,000

[6] Information provided by Cinema Operators.

of APRA's works, as opposed to the library of around three million works to which access is provided under a blanket licence.

23. These alternative licensing options would not necessarily have to replace APRA's blanket licence regime - they could operate in addition to the blanket licence regime, to provide a music user (or in the case of film, a film producer) with incentive to try to license some of its music directly even if it had to license other music under a blanket licence.

24. In addition to amendments required to the APRA Articles of Association in order to provide greater flexibility of input arrangements (so as to offer alternative forms of output arrangements), APRA should be required to maintain a publicly available (preferably, online) list of its repertoire and the status of the works within the repertoire. This would enable a music user to easily identify whether a work is part of APRA's repertoire, and whether it is solely controlled by APRA or whether the music user has the option of negotiating directly with the rights owner because he or she has taken advantage of the opt-out or licence back mechanisms.

25. The Cinema Operators acknowledge that direct licensing would only be feasible where the value of the royalty to be paid to the rights owner was more than nominal - that is, so that the transaction cost for collecting the royalty would not outweigh the benefits in collecting it.[7] The Cinema Operators submit that a significant number of APRA members, in particular the publisher members, are capable of effectively absorbing such administrative costs due to their size and profitability.

26. The Cinema Operators acknowledge that they would still require a blanket licence for their use of music in the foyer areas, toilets, staffrooms, etc, within the cinema complex. Such a licence could be granted on a similar basis to the licences granted to businesses which publicly perform music on their premises, and the licence fee could be based on factors such as the size (in square metres) or capacity of the premises.

27. The pricing of a transactional licence should generally take into account the following factors:

    (a) musical works used in a film are determined at the time of production of the film and are therefore defined, finite and readily identifiable;

    (b) musical works used in a film are not subject to substitution or random episodic selection from the entire APRA repertoire from time to time as a film is screened;

    (c) a cinema owner has no choice in either the decisions on music inclusion/exclusion or specific selection and duration thereof;

    (d) the musical works used in a film are extremely small in number in comparison to the size of the overall APRA repertoire;

    (e) the benefits to copyright owners of other royalty flows from ancillary sales following the promotion of music within movies; and

    (f) any additional administrative work which may be involved.

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[7] Intellectual Property and Competition Review Committee (Ergas Committee) Final Report, at 121.

28. In the event that a cinema owner elected to secure a blanket licence (consistent with the existing scheme) rather than a transactional licence, the principles outlined in paragraphs 22 and 27 (except 27(e)) would apply equally to that licence.

29. Licence fees could be based on the following factors:

    (a) how the musical work is used (for example, whether it is sung by a character in the film, background instrumental, vocal performance of a recording from a jukebox, etc, and whether there is a single use of the musical work or multiple uses in various scenes);

    (b) the duration of the musical work as used in the film (this could easily be determined from film cue sheets);

    (c) the term of the licence; and

    (d) the territory covered by the licence.

30. Fees could be structured on categories based on whether the music contained within a film is either important or incidental to the primary visual experience of the film - this will depend on the nature and genre of the film. For example, a Category A licence would apply to films in which music was an important and central component (for example, films of musicals), while a Category B licence would apply to all other films. The number of categories would necessarily have to be limited.

31. The licence would cover a certain period (for example, one year) and would require a cinema owner to estimate the number of films in each category (that is, 'central' or 'incidental') to be screened in the relevant period, and the cinema owner would pay an annual licence fee, which could be adjusted at the end of the relevant period to take into account any usage which differed from the estimate. The cinema owner's estimate would be based on the historic exhibition data for that particular cinema owner.

MINTER ELLISON
5 October 2004