

COMMONWEALTH OF AUSTRALIA

COPYRIGHT ACT 1968



IN THE COPYRIGHT TRIBUNAL

FILE NO. CT2 OF 1993

Reference by: **Australasian Performing Right Association Limited under section 154 of the Copyright Act 1968**

AMENDED REFERENCE

1. Australasian Performing Right Association Limited, ACN 000 016 099 (APRA) is a company duly incorporated and limited by guarantee.
2. APRA owns or represents the owner of the copyright, in respect of its application to the act of broadcasting of musical and literary works, in practically all musical and literary works broadcast throughout Australia. Members of APRA constitute about 30,000 Australian composers, authors and publishers of music. Works written by members of APRA and by members of affiliated societies in countries throughout the world comprise "the Repertoire".
3. APRA proposes to bring into operation a new licence scheme to license the broadcasting of musical and literary works by commercial radio stations under the *Broadcasting Services Act 1992* (proposed licence scheme).
4. The proposed licence scheme relates to licences in respect of the literary and musical works comprised in the Repertoire.
5. A copy of the proposed licence scheme is annexed to this reference and marked "A".
6. APRA hereby requests the Tribunal to make such order confirming or varying the proposed licence scheme as the Tribunal considers reasonable in the circumstances.

Filed on behalf of the Applicant
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-2-

Applicant: Australasian Performing Right Association Limited
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Applicant's address for service:

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DATED: 17 May 2001

Katherine Amy Haddock

Solicitor for the Applicant
KATHERINE AMY HADDOCK

A

COMMERCIAL TELEVISION LICENCE SCHEME

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED

**BANKI HADDOCK FIORA
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COMMERCIAL TELEVISION LICENCE SCHEME

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

1.1.1 Where commencing with a capital letter:

ABA means the Australian Broadcasting Authority;

Act means the *Copyright Act 1968*;

Advertisement means any audio-visual production which is an announcement designed to attract the attention of the public or any part of it to a product, service, person, organisation or line of conduct including community service announcements and infomercials;

Agreed Rate means the interest rate for overdrafts of \$100,000 or more charged by the National Australia Bank plus 2 percentage points, calculated on daily rests from the due date to the date of payment;

AMCOS means the Australasian Mechanical Copyright Owners' Society Limited;

APRA means Australasian Performing Right Association Limited;

APRA Works means any and all musical works (including such words as are normally associated with them) in relation to which the right of Broadcasting or Communication is from time to time during the term of this Agreement vested in APRA;

Broadcast has the same meaning as contained in the Act;

Commercial Television Station means a station that operates under a commercial television broadcasting licence under the *Broadcasting Services Act 1992*;

Communicate has the same meaning as contained in the Act;

Copyright Owner of a work means a party in whom the right of reproduction in a material form is vested for Australia;

Dramatico-musical Work means an opera, operetta, musical play, revue or pantomime, insofar as it consists of words and music written expressly for it;

Excerpt means any two single APRA Works written expressly for a particular Dramatico-musical Work;

FACTS means the Federation of Australian Commercial Television Stations Limited;

Gross Advertising Revenue means, in relation to a period, the gross revenue of the Licensee or any Related Bodies Corporate receivable directly or indirectly during that period in respect of the Communication of Advertisements and other matter provided that:

- (a) where, in connection with a transaction, any consideration is payable or given otherwise than in cash, the monetary value of that consideration must be included;
- (b) any and all amounts payable, paid allowed or credited by the Licensee directly or indirectly to advertising agents on account of commission must be included;

COMMERCIAL TELEVISION LICENCE SCHEME

- (c) if and when any advertiser's payment due to the Licensee is written off by the Licensee as a bad debt the Licensee shall be entitled to exclude the amount of the debt; and
- (d) where the Licensee receives income from the sale of programs such income shall not form part of the Gross Advertising Revenue;

Licence Year means a period of 12 months commencing on 1 July and ending on 30 June during the term of this agreement, provided that where this agreement does not commence on 1 July, the first Licence Year is the period from the date of this agreement to the next 30 June;

Logging Information means the information referred to in clause 6.1;

Month means a calendar month;

Record and Sound Recording have the same meanings as in the Act; and

Related Body Corporate has the same meaning as in the *Corporations Law*.

- 1.1.2 Where a word or phrase is given a defined meaning another part of speech or grammatical form in respect of that word or phrase has a corresponding meaning.

1.2 Presumptions of interpretation

- 1.2.1 Unless the context otherwise requires a word which denotes the singular denotes the plural and vice versa.

- 1.2.2 Unless the context otherwise requires a reference to:

- (a) any legislation includes a reference to any regulation or instrument made under it and where amended, re-enacted or replaced means that amended, re-enacted or replacement legislation; and
- (b) a thing or amount is a reference to the whole and each part of it.

1.3 Successors and assigns

A person includes the trustee, executor, administrator, successor in title and assign of that person. This clause must not be construed as permitting a party to assign any right under this agreement.

2. LICENCE

2.1 Grant of licence

Subject to the terms contained in this agreement APRA grants to the Licensee a licence to Communicate by means of television Broadcast within Australia any and all APRA Works.

COMMERCIAL TELEVISION LICENCE SCHEME

2.2 Limitations on licence

2.2.1 This licence is strictly limited to the acts expressly licensed and does not extend to or include any other incidental or implied rights or powers. Without limiting the generality of the foregoing, no licence or authority is granted with respect to:

- (a) the Communication of any Sound Recordings;
- (b) the making of an adaptation of any musical, literary or dramatic work; or
- (c) the giving of a public performance by means of the reception of a Broadcast.

2.2.2 This Licence does not extend to or authorise:

- (a) the Communication in their entirety in any manner whatever of Dramatico-musical Works except where contained in a cinematograph film;
- (b) subject to clause 2.2.3, the Communication of excerpts from any Dramatico-musical Works if APRA has notified the Licensee in writing that such excerpts are prohibited from Communication;
- (c) the Communication of oratorios or major choral works (that is choral works exceeding 20 minutes' duration) in their entirety or excerpts therefrom if the duration of any such excerpts exceeds 20 minutes except where contained in a cinematograph film;
- (d) the Communication of the whole or any part of music written for a ballet if accompanied by a visual representation of the ballet except where contained in a cinematograph film;
- (e) the Communication of any musical work in association with words other than those (if any) with which the work has been:
 - (i) published; or
 - (ii) issued in the form of Records for sale to the public,unless authorised in writing by the Copyright Owner of the work or by APRA;
- (f) the Communication of any musical work by any means other than as a Commercial Television Station, including subscription television broadcasting, internet broadcasting, datacasting, pay per view television, or interactive television services; or
- (g) the Communication of any musical work by means of Digital Broadcasting other than by way of simulcast.

2.2.3 Excerpts of Dramatico-musical Works other than those prohibited under clause 2.2.2(b) may be Communicated by the Licensee if the Licensee does not Communicate without written permission from the Copyright Owner more than two Excerpts from such Dramatico-musical Work in any period of 3 consecutive hours of Communication.

2.2.4 Where a Copyright Owner has entered into a licence agreement with the Licensee in relation to a particular use of an APRA Work and has complied with APRA's Constitution

COMMERCIAL TELEVISION LICENCE SCHEME

in relation to that agreement, this licence does not extend to the use of the APRA Work by the Licensee under that agreement.

3. TERM

This agreement commences on 1 July 2001 and, subject to earlier termination in accordance with clause 10, continues until terminated by either party on at least 3 months' notice terminating 30 June in the year of the notice.

4. PAYMENTS

4.1 Election

4.1.1 The Licensee must on the date of this agreement (in relation to the first Licence Year) and thereafter by 31 March in each Licence Year, notify APRA whether it wishes to pay licence fees for the next Licence Year based on the method of calculation set out in Part 1 or Part 2 of Schedule A.

4.1.2 In the absence of the Licensee's notification to APRA under clause 4.1.1, the Licensee must pay in accordance with the method of calculation for the previous Licence Year.

4.2 Licence fees

The Licensee must pay to APRA the fees set out in the Schedule in the manner and at the times prescribed in Schedule A, in accordance with the notification provided to APRA under clause 4.1.

4.3 Further payments

4.3.1 The Licensee must pay all stamp duties assessed on or in relation to this agreement.

4.3.2 The Licensee must pay the goods and services tax (GST) which may be payable in respect of the licence granted under this agreement.

5. INFORMATION ABOUT REPERTOIRE

APRA must give the Licensee, on request, all such information as APRA can reasonably give respecting works claimed or represented as being APRA Works provided that such requests are made in respect of specified, named works or works of specified, named writers.

6. OBLIGATIONS OF THE LICENSEE

6.1 Logging information

The Licensee must, within 14 days after the end of each Month, provide APRA with a return containing the details specified in Schedule B, in such form as set out in Schedule B or as APRA may specify, in respect of all musical works Communicated by the Licensee during that Month.

COMMERCIAL TELEVISION LICENCE SCHEME

6.2 Parody information

The information provided under clause 6.1 must include information, where a parody has been Communicated by the Licensee with the permission of the Copyright Owner, in relation to the work of which the parody was made.

6.3 Warranty

6.3.1 The Licensee acknowledges the fundamental importance of the information supplied under clause 6.1 to the accurate calculation of licence fees. The Licensee warrants the accuracy of the information supplied under clause 6.1 (other than to the extent the Licensee is relying on information supplied by the manufacturer or publisher of a sound recording or musical work).

6.3.2 APRA acknowledges the fundamental importance of the accurate analysis of the information supplied under clause 6.1 to the calculation of licence fees. APRA warrants the accuracy of the analysis of the information supplied by the Licensee under clause 6.1.

7. CONFIDENTIALITY

7.1 Logging Information

7.1.1 The Logging Information shall be used by APRA for the purpose of its royalty allocations, provided that nothing shall prevent APRA from:

- (a) providing it to AMCOS and Screenrights (and such other organisations which the Licensee may from time to time authorise in writing) for the purpose of enabling AMCOS and Screenrights and such other organisations to make royalty distributions to their respective members. Prior to providing such information, APRA will obtain from AMCOS and Screenrights agreement in writing that the information will not be sold, distributed to third parties or used otherwise than as provided in this clause 7.1.1(a) and 7.1.1(d) (reading "AMCOS and Screenrights" for "APRA" in clause (d));
- (b) providing information to any member or affiliate of APRA in the normal course of APRA's business, being information about the Communication usage of that member's work or works;
- (c) using the Information for the purpose of granting awards;
- (d) subject to clauses 7.1.1(b) and (c) above, making available to APRA's members and the public, information derived from the Logging Information concerning the extent of usage of particular works or categories of works, provided that:
 - (i) APRA obtains the prior consent of FACTS, which consent shall not be unreasonably withheld, and
 - (ii) APRA supplies to FACTS, prior to publication of the information, a copy of any such information; and
- (e) analysing the Logging Information for the purpose of the preparation and submission of evidence in the course of Copyright Tribunal and other legal proceedings.

COMMERCIAL TELEVISION LICENCE SCHEME

7.2 Confidential financial information

The Licensee's Gross Advertising Revenue must be kept confidential by APRA and used only for the purpose of determining the licence fee payable by the Licensee under this agreement, provided that nothing shall prevent APRA from analysing the information for the purpose of the preparation and submission of confidential evidence in the course of Copyright Tribunal and other legal proceedings to which the Licensee and/or FACTS are parties.

7.3 General

7.3.1 APRA will make every effort, so far as is reasonably possible, to minimise the number of APRA employees to whom access to the Licensee's Gross Advertising Revenue is given.

7.3.2 The Licensee recognises and acknowledges that the Logging Information supplied by it is used by APRA:

- (a) to calculate licence fees payable by the Licensee to APRA; and
- (b) to distribute such licence fees as royalties.

8. BOOKS OF ACCOUNT AND AUDIT

8.1 Licensee to keep books of account

In order to enable APRA to make the calculation of the licence fees due under this agreement, the Licensee must:

- (a) keep accurate books of account and other records in sufficient detail to ensure that all amounts payable to APRA under this agreement can be properly ascertained; and
- (b) within 90 days after 30 June in each Licence Year and as reasonably requested by APRA, provide audited verification of the Licensee's Gross Advertising Revenue in the previous 12 month period ending 30 June.

8.2 Audit of licensee's records

8.2.1 APRA may on 7 days' notice examine the Licensee's accounting and other records:

- (a) to determine the correctness of any report or payment under this Agreement; or
- (b) in the case of a failure by the Licensee to provide reports in accordance with clause 8.1(b) or (c), to obtain information required to be provided under that clause,

and for this purpose is entitled to access all records of the Licensee or under its control, wherever held.

8.2.2 The Licensee must give APRA all reasonable assistance in its examination of the

COMMERCIAL TELEVISION LICENCE SCHEME

SCHEDULE A

Part 1

In this Part, where commencing with a capital letter,

Fee (exclusive of GST) means 1% x Gross Advertising Revenue for the Licence Year;

Provisional Fee (exclusive of GST) means 1% x Gross Advertising Revenue for the immediately preceding 12 month period ending 30 June.

1. For each Licence Year, the Licensee must pay to APRA the Fee.
2. The Fee must be paid as follows:
 - (a) on or before 31 December and 30 June in each Licence Year the Licensee must pay 50% of the Provisional Fee;
 - (b) in the first Licence Year, within 90 days after 30 June or on the first day of the Licence Year whichever is later, the Licensee must deliver to APRA a statement, certified by the Licensee's auditors, of the Licensee's Gross Advertising Revenue for the immediately preceding 12 month period ending 30 June;
 - (c) in the second and subsequent Licence Years, within 90 days after the end of the immediately preceding Licence Year, the Licensee must deliver to APRA a statement, certified by the Licensee's auditors, of the Licensee's Gross Advertising Revenue for that Licence Year;
 - (d) in any Licence Year, if the Provisional Fee paid is less than the Fee, the Licensee must pay APRA the difference between the Fee and the Provisional Fee that was paid, within 30 days after the date of APRA's invoice for such amount; and
 - (e) in any Licence Year, if the Provisional Fee exceeds the Fee, APRA must, at its option, either credit the Licensee or refund to the Licensee the difference between the Fee and the Provisional Fee that was paid.
3. APRA must issue the Licensee with a tax invoice for each payment due under paragraph 2.
4. The Licensee must pay each tax invoice referred to in paragraph 3:
 - (a) in respect of Provisional Fees:
 - (i) within 14 days after the date of the invoice; or
 - (ii) the due date,whichever is the later; and
 - (b) in respect of any adjustment under paragraph 2(d), within 14 days after the date of the invoice.

Part 2

In this Part, where commencing with a capital letter:

COMMERCIAL TELEVISION LICENCE SCHEME

Music Use Percentage means the aggregate percentage of airtime occupied by the Communication of APRA Works calculated in accordance with paragraph 2;

Music Use Band means the band set out in the following table into which the Licensee's Music Use Percentage falls;

Music Use Percentage	Percentage of Gross Advertising Revenue (exclusive of GST)
60%+	1.4%
50-59.99%	1.25%
35-49.99%	1%
25-34.99%	0.75%
<24.99%	0.6%

and

Fee (exclusive of GST) means the amount calculated in accordance with the following formula:

$$F = P \times LGAR$$

Where P means the percentage of Licensee's Gross Advertising Revenue which corresponds to the Music Use Band for the Licence Year in the table above, and LGAR means the Licensee's Gross Advertising Revenue for the Licence Year.

Provisional Fee (exclusive of GST) means the amount calculated by multiplying the Licensee's Music Use Percentage for the immediately preceding 12 month period ending 30 June by the Licensee's Gross Advertising Revenue for the same 12 month period.

1. The Licensee must pay to APRA the Fee.
2. The Music Use Percentage will be calculated by adding the total duration of all APRA Works Communicated by the Licensee under this agreement during the Licence Year and calculating the percentage of airtime occupied by such APRA Works for the period.
3. The Fee must be paid as follows:
 - (a) APRA will calculate the Music Use Percentage for the 12 month period ended 30 June immediately preceding the Licence Year in question, and will notify the Licensee of the results of that calculation within 90 days after the end of that 12 month period. In the First Licence Year, for the purposes of calculating the Provisional Fee, the Music Use Percentage will be deemed to be in the 35 - 44.99% Music Use Band;
 - (b) on or before 31 December and 30 June in each year, the Licensee must pay 50% of the Provisional Fee;
 - (c) within 90 days after the end of each 12 month period ending 30 June during the term of this agreement, the Licensee must deliver to APRA a statement, certified by the Licensee's auditors, of the Licensee's Gross Advertising Revenue for that 12 month period;
 - (d) in any Licence Year, if the Provisional Fee paid is less than the Fee, the Licensee must pay APRA the difference between the Fee and the Provisional Fee that was paid, within 30 days of the date of APRA's invoice for such amount; and

COMMERCIAL TELEVISION LICENCE SCHEME

- (c) in any Licence Year, if the Provisional Fee exceeds the Fee, APRA must, at its option, either credit the Licensee or refund to the Licensee the difference between the Fee and the Provisional Fee that was paid.
- 4. APRA must issue the Licensee with a tax invoice for each payment due under paragraph 3.
- 5. The Licensee must pay each tax invoice referred to in paragraph 4:
 - (a) in relation to Provisional Fees:
 - (i) within 14 days after the date of the invoice; or
 - (ii) by the due date,whichever is the later; and
 - (b) in respect of any adjustment under 3(d), within 14 days after the date of the invoice.

PLUS
Approx A < B.
EDL specs.
① Logging
② Worksheets