11 September 2007

Mr Scott Gregson
General Manager
Adjudication Branch
ACCC
GPO Box 3131
Canberra, ACT 2601

BY EMAIL and POST

Dear Mr Gregson

APPLICATION BY PPCA FOR AUTHORISATION

Please see enclosed submission.

Yours sincerely

Stephen Peach
CEO

ACN 000 680 704 ABN 43 000 680 704
LEVEL 4, 19 HARRIS ST, PYRMONT NSW 2009
PO BOX 020, QUEEN VICTORIA BUILDING NSW 1230
T. 02 8569 1100 F. 02 8569 1183
ppca.mail@ppca.com.au www.ppca.com.au

PPCA

Submission in Response to the ACCC's Letter of 29 August 2007

11 September 2007

Introduction

1. PPCA acknowledges that the ACCC has taken account of the issues previously raised by PPCA as evidenced by the material modifications suggested by it in its letter of 29 August. However, the alternative conditions now suggested continue to be unworkable, would not provide any meaningful benefits to potential licensees and would impose significant and unreasonable burdens on PPCA and its stakeholders.

2. There are three elements to the ACCC's current proposal:

   - a condition requiring publication of a list of unpaid recordings (the implication being that all or most of the recordings listed are unprotected recordings);
   - a possible condition restricting PPCA's right to enforce copyright in relation to recordings in the list of unpaid recordings (thereby implicitly circumventing the problem of determining whether or not a recording is unprotected by imposing a rule that all items of unpaid recordings are to be treated as unprotected recordings); and
   - a condition requiring publication of a list of paid recordings (the implication being that all or most of the recordings listed are protected recordings).

   As explained in this submission, compliance with the conditions proposed would expose PPCA to an unacceptable risk of breaching sections 52 and 53 of the Trade Practices Act.

3. This submission also sets out why, in addition to the unacceptable risk of breaching sections 52 and 53 of the Trade Practices Act, PPCA considers each of the suggested conditions to be unreasonable and unnecessary to satisfy the statutory tests for an authorisation.

4. The submission should be considered together with PPCA's earlier submissions. Attachment 1 sets out our comments on recent further submissions made by other parties to the Commission.

5. The following material facts need to be taken fully into account:

   - Unlike the position of a party with monopoly power, PPCA cannot refuse to grant a public performance or broadcast licence. There are statutory public performance and broadcasting licences under the Copyright Act (ss 108 and 109). Neither PPCA nor a copyright owner can withhold a licence.
   - If an undertaking is given by a user under section 108 or section 109 of the Copyright Act, no amount needs to be paid by that user unless and until the Copyright Tribunal determines a rate. Unless and until there is a Tribunal determination, PPCA has no capacity to enforce or collect revenues except by agreement with a licensee.
   - Licensees are free to negotiate a licence directly with copyright owners. Large users do not necessarily have to deal with PPCA (for example, many broadcasters prefer to license directly; see Draft Determination at paragraph 6.40). However, in many cases it will be faster and more cost-effective to obtain a PPCA licence, which partly explains why PPCA licences came into existence.

- Determining whether or not a sound recording is protected under Australian copyright law depends on a complex statutory test the application of which requires information that is often not apparent or available. Nor is the information contained in any database maintained by PPCA, other collecting societies, record companies or anyone else.
- PPCA does not have and does not prepare a list of protected or unprotected recordings. Each year PPCA distributes fees on the basis of information received by it about recordings played or broadcast during the previous financial year and then pays fees in relation to recordings that, on the limited information available to PPCA, PPCA conservatively believes to be protected recordings.
- There is no database anywhere in the world of all the recordings commercially released, let alone a database of those that are protected or unprotected under Australian copyright law (as that is a matter that has to be determined in accordance with Australian copyright law, which is unique in a number of key respects).
- The cost of trying to create such databases would be prohibitive and the databases would be far from complete.

The conditions suggested are unnecessary to satisfy the statutory tests for an authorisation

6. The suggested conditions assume that, unless they are imposed, the level of public benefit resulting from the Collective Licensing Arrangements will not be sufficient to outweigh the level of public detriment. PPCA does not understand or accept that assumption.

7. The Collective Licensing Arrangements will provide very substantial public benefits, as recognised in the Draft Determination at paragraphs 6.110-6.147. To the extent that, on the analysis set out in the Draft Determination, the Collective Licensing Arrangements result in giving PPCA market power, the first four of the conditions set out in paragraph 6.160 would constrain any such market power. It is difficult to understand why a further condition relating to the question of which recordings are protected recordings is necessary to meet the statutory tests for authorisation under section 90(6)-(8). The other conditions set out in paragraph 6.160, including the condition relating to the direct dealing policies of PPCA licensors, would be more than sufficient. It is difficult to understand how the balance between public benefit and public detriment would critically change if the fifth condition (or the alternatives suggested in the Commission's letter of 29 August) were not imposed.

8. Several considerations support the position that the fifth condition in paragraph 6.160 of the Draft Determination or the alternatives now suggested in the Commission's letter of 29 August are unnecessary to satisfy the statutory tests for an authorisation:

    - Users interested in dealing directly with licensors will either want to license all their repertoire or particular recordings which have come to their attention on the radio or other media. Few will have any real need to examine any PPCA list of paid recordings.

    - Very few users are likely to want to play only unprotected recordings. For example, nightclubs that tried to do so would be unlikely to appeal to their customers - most customers want to hear all recent releases, including Australian releases that are protected recordings.

    - Those users who do want to play only unprotected recordings can and should conduct their own research, see paragraph 9 below.

    - The Draft Determination does not give any apparent weight to the public detriment that would result if PPCA were to be removed as a vigorous and effective competitor. Whether or not a vigorous and effective competitor will be removed is a major factor relevant to the application of the section 50 competition test under the ACCC's Merger Guidelines (1999) (see paragraph 5.138 ff) and there no basis for denying that the same

factor is relevant to the assessment of public detriment under the statutory tests for authorisation. No one would seriously contend that the removal of PPCA as a competitor would not be a devastating lessening of competition in all of the markets affected by the Collective Licensing Arrangements. On a proper counterfactual analysis, and consistently with the Merger Guidelines, the removal of PPCA as an active and vigorous competitor would be a major public detriment. This public detriment has not been recognised as such in the Draft Determination. In assessing the overall balance between public benefit and public detriment, the public detriment of removing PPCA as a vigorous and effective competitor is of far greater significance than the very small possible public benefit that could result from the fifth condition in paragraph 6.160 of the Draft Determination or the alternatives now suggested in the Commission's letter of 29 August.

- PPCA does not believe that sufficient weight has been given to the implications of market failure for a significant number of copyright owners. In the counterfactual world of exclusively direct licensing there would be very substantial market failure because only a very small proportion of recordings could ever become the subject of copyright licences. The vast majority of PPCA's licensors are small or micro businesses which would not have the capacity to manage direct licensing arrangements with the overwhelming majority of PPCA's public performance licensee base of over 45,000 licensees. The significant public detriment of market failure is not addressed specifically in the Draft Determination.

- PPCA believes that the submissions of AHA and the very small number of other parties who want a list of unprotected recordings have assumed a prominence during the current process that is totally disproportionate to the weight that they should be given under the statutory tests for authorisation. First, almost all PPCA licensees value the opportunity to obtain a blanket licence because of the obvious advantages that a blanket licence offers including avoidance of the need to make recoding-by-recording assessments of whether or not a particular recording is protected by Australian copyright law. Secondly, the few licensees who seek a list of unprotected recordings are capable of servicing their own special needs by undertaking the necessary research and preparing whatever list of recordings they regards as appropriate for their own purpose. It is not the function of the ACCC to distort the statutory tests for authorisation by accommodating the special pleading of a small interest group who are holding out for a subsidised advisory service.

The proposed condition that PPCA publish a list of unpaid recordings would be unjustified

9. A condition requiring PPCA to provide a list of unpaid recordings would be unjustified:

- PPCA is extremely concerned about the misleading nature of a list of unpaid recordings. It is, of course, one of PPCA's primary obligations to its licensors to distribute net revenue in respect of those protected recordings the use of which is notified to it. However, as the Commission has accepted, PPCA has limited information about the connecting factors relevant to question of whether or not a recording is a protected recording. Where in doubt, *and only in respect of its distribution analysis,* PPCA makes a conservative decision and does not pay fees on the recordings that are in doubt. It is inevitable that a significant proportion of the unpaid recordings will be protected recordings. Indeed, the uncontroverted evidence in the nightclubs case was that at least 80% of the recordings which were the subject of the detailed analysis were protected. This was in circumstances where PPCA's usual distribution analysis would have resulted in only 50-60% of such recordings being paid. Given PPCA's primary obligation, any list of unpaid recordings would be inherently misleading as, inevitably, some potential licensees will equate unpaid with unprotected. PPCA does not believe that disclaimers would be effective to protect it

against the risk of liability under section 52 and section 53 of the Trade Practices. See eg *Abundant Earth Pty Ltd* (1985) ATPR 40-532; *Malleys Ltd v Whirlpool Australia Pty Ltd* (1984) ATPR 40-455. The ACCC has no power to exempt PPCA from liability under section 52 or section 53 of the Trade Practices Act. In any event, PPCA does not believe that any such exemption would be appropriate.

- In the counterfactual world of exclusively direct licensing, nightclubs and other parties wishing to use only unprotected recordings would need to undertake the necessary research and prepare a list of unprotected recordings for their own purposes. Neither the licensors nor any other party would be offering an advisory service. If the demand for a list of unprotected recordings were genuine, that demand would need to be met by a relevant user engaging advisers to provide the necessary advice. The position is no different in the actual world where there is the opportunity for both direct licensing and PPCA blanket licensing, except for the public benefit that a PPCA blanket licence obviates the need to decide whether or not a recording is protected.

- PPCA's role and services appear to have been misconstrued. Recognising the extraordinary complexity in determining whether or not particular recordings are protected for public performance or broadcast purposes, PPCA offers a blanket licence that avoids the need for users to make that determination. In other words, PPCA does not (nor has it ever purported to) license the use of specific protected recordings.

- If a particular group of users (such as those represented by the AHA or Fitness Australia) genuinely want a list of unprotected recordings, their representative organisations should undertake the necessary research and pay the costs of production of such a list. Those persons should also assume the risk of potential liability for providing incorrect advice. As a matter of economic principle, there is no justification for making such persons free riders who are subsidised at the expense of PPCA stakeholders (licensors and licensees). It is unreasonable to expect PPCA and its stakeholders (including recording artists and the myriad small labels): (a) to subsidise other businesses who want to avoid Australian copyright licences; and/or (b) to be the victims of and scapegoats for the statutory complexity under the Copyright Act.

- The condition proposed is not relevant to the facilitation of direct dealing.

- In many cases PPCA does not have details of the record company for sound recordings that are played or broadcast and in relation to which it does not distribute any fees. Contrast the assumption made in the second the last paragraph of page two of the Commission's letter of 29 August.

10. PPCA is not prepared to make a list of unpaid recordings available given the risk of misleading and deceptive conduct indicated in paragraph 9 above. PPCA is prepared to make the information it has about particular recordings on a case by case basis after it has had the opportunity to review that information. This would be on a commercial fee-paying basis. At this time, PPCA does not have the resources that would be necessary to conduct such a service. PPCA would need to engage additional staff and make administrative and IT changes. Establishing any such service would take more than six months' lead-in time.

The possible condition denying PPCA the right to enforce copyright in relation to recordings published in a list of unpaid recordings would be unjustified

11. PPCA is highly concerned about the suggestion that consideration may be given by the Commission to "limitations on PPCA's enforcement of copyright" in relation to recordings on a list of unpaid recordings:

- This suggested condition confuses distribution decisions by PPCA and its members with the obligation that users of protected sound recordings have under the Copyright Act to procure a licence from the copyright owner (which they can, if they choose, satisfy by obtaining a licence from PPCA). A substantial proportion of the recordings that PPCA does not pay on are likely to be protected.

- It is not the role of the ACCC to remove rights of action or to try to rewrite the Copyright Act. The approach taken by the ACCC here is inconsistent with the limitation recognised in the Draft Determination that the ACCC has no power to legislate a solution in the area of contracting out of the Copyright Act. An attempt to restrict PPCA's and its licensors' rights of enforcement would be an attempt to legislate contrary to the position taken by the Australian Competition Tribunal in *Application by Medicines Australia Inc* [2007] ACompT 4 at [134].

- Copyright owners would be able to bring proceedings for copyright infringement and hence the suggested condition would hardly protect those who play recordings that are in fact protected recordings. It is difficult to understand the rationale behind the suggested condition or how it is justifiable under the statutory tests for an authorisation.

- Limiting PPCA's rights in the way proposed would compound the misleading nature of publishing a list of unpaid recordings. The effect would be to convey the impression that if PPCA has no enforcement rights then no other party can take action for copyright infringement if any items on the list turn out to be protected recordings. The proposed condition would create an impression that users are free to publicly perform or broadcast recordings included on the unpaid list without liability. As PPCA's licensors would continue to have standing to bring enforcement actions on their own, this impression would be misleading. No disclaimers are likely to be sufficient to remove that misleading impression, in fact or in law.

The proposed condition that PPCA publish a list of paid recordings would be unreasonable

12. PPCA questions whether any genuine need would be served by publishing a list of paid recordings; it is apparent from the submissions made by AHA and other interested parties that they really want a list of unprotected recordings. Nonetheless, and despite its genuine concerns as to the usefulness of any list and the costs to be incurred in producing it, PPCA is not opposed to a condition that it publish a list of paid recordings that is limited to a list of most played items.

13. A condition requiring PPCA to provide list of all sound recordings in relation to which it has distributed fees would be unreasonable:

- A list of over 40,000 recordings, plus the large number of additional recordings that would be added when the list is updated each year, would convey the strong impression that the list is a comprehensive and complete list of protected recordings and not merely a list of paid recordings. The longer the list of items in the list the less the chance that disclaimers would be effective to negate that misleading representation; see, by plain analogy, *Abundant Earth Pty Ltd* (1985) ATPR 40-532;

Malleys Ltd v Whirlpool Australia Pty Ltd (1984) ATPR 40-455. As explained in paragraph 9, PPCA is highly concerned about any condition that would expose PPCA to liability for misleading statements in contravention of sections 52 and 53 of the Trade Practices Act.

- In the counterfactual world of exclusively direct licensing, licensees would not have access to any list of protected or unprotected recordings. Licensors in the counterfactual world would not be able to provide comprehensive reliable lists of recordings protected under Australian copyright law. In many instances licensors do not have, nor are they able to acquire, the connecting factor information that would be required to determine whether recordings are protected or unprotected. The position is no different in the actual world where there is the opportunity for both direct licensing and PPCA blanket licensing, except for the public benefit that a PPCA blanket licence obviates the need to decide whether or not a recording is protected.

- PPCA questions whether any users genuinely want such a list. The list proposed would not include the vast number of overseas recordings that are protected sound recordings under Australian copyright law. The submissions and comments at the pre-decision conference indicate that a list of unprotected recordings is what they are really seeking.

- The objective of transparency does not require publication of the complete list of paid recordings. Users wishing to use the list for the purpose of direct licensing would be most unlikely to want to review over 40,000 entries; they would be interested only in a sub-set of the recordings that have been the most played.

- Any list published by PPCA would be a list of paid recordings, not a list of protected recordings. Disclaimers would apply.

- Users are likely to be interested most in recent releases. PPCA does not obtain any information on recordings used until May of a financial year, with the bulk of the reports not provided to it until after the end of a financial year. It is not possible to provide a list quarterly or even half yearly.

- It would be possible to update a list of paid recordings annually but if the list covered the total paid recordings it would not be practicable to do so by 31 December (as all resources are directed to the distribution process which, for tax reasons, must be completed by 31 December in each year).

- Any list provided by PPCA would need to relate to the current financial year, with annual updates thereafter. Each distribution is treated as a discrete process and PPCA has not kept electronic records of all the data taken into account in previous financial years when working out the recordings that have qualified for the payment of fees. PPCA does not keep working notes about each distribution pool. In addition, there is no "master" or consolidated list of recordings for distribution purposes, as PPCA analyses recordings based on separate "distribution pools". For tax and auditing purposes, PPCA retains hard copies of distribution statements provided to licensees. To compile a retrospective list of paid recordings, PPCA would need to manually enter data and create a paid list for each financial year, based on past statements to licensors. This task would be extremely labour intensive and costly.

Conclusion

14. PPCA is willing to agree to reasonable conditions. However, the conditions suggested in the Commission's letter of 29 August 2007 are unreasonable and unnecessary to satisfy the statutory tests for an authorisation.

15. PPCA is willing to continue to co-operate with the Commission in an endeavour to arrive at an approach that is workable and consistent with the statutory framework for an authorisation.

Attachment 1

Comments on recent submissions by other parties

1. Fitness Australia submission 4 September 2007

Fitness Australia criticises PPCA's proposal that it provide a list of the 500 most-played recordings in respect of which fees have been distributed to PPCA licensors. However, Fitness Australia does not suggest a workable alternative. Moreover, Fitness Australia's comments do not appear to be based on any apparent analysis of the statutory tests for authorisation.

The condition proposed in the Commission's letter of 29 August 2007 is not that PPCA be required to publish "an updated list of protected music."

It is not feasible for PPCA to publish a quarterly or half-yearly list of paid recordings.

2. FreeTV submission of 30th August 2007

PPCA notes that FreeTV agrees with PPCA's proposal that it provide a list of the 500 most-played recordings in respect of which fees have been distributed to PPCA licensors, subject to the provision of some additional information.

PPCA has never claimed that it has rights to any percentage of sound recordings released across the world. PPCA pays fees only on recordings conservatively believed to be recordings protected under Australian copyright law. It does not license unprotected recordings and has no business interest in them. If FreeTV genuinely wishes to explore what unprotected recordings are available across the world, then it can undertake and pay for the necessary research, possibly in a joint venture with AHA and others who may be interested in such a venture.

PPCA is opposed to the suggestion that a list of paid recordings since 1996 be provided for the reasons outlined in our submission.

FreeTV states that "a list of protected recordings" should be made public. That is not what the ACCC has proposed.

FreeTV states that PPCA has to deal with the complexities of the law governing protected recordings when determining distributions. PPCA has repeatedly made the point that it does not attempt to make a definitive analysis of the connecting factors relevant to determining whether or not a sound recording is protected. An assessment made for distribution purposes is not an assessment made for the purpose of deciding whether or not copyright will be infringed unless a licence is obtained. Any list published by PPCA would be a list only of paid recordings and the list would be accompanied by disclaimers including a disclaimer that the list is not a list of protected recordings.

FreeTV asserts that it would be an unusual result "if PPCA can demand payment in respect of sound recordings which are not recognised by it for the purposes of distribution." This assertion is unpersuasive. The fact that PPCA has not paid fees for a recording has nothing to do with the obligation under the Copyright Act for the use of a protected recording to be licensed. It would be not only unusual but also perverse for FreeTV or anyone else to expect to have a free ride merely because PPCA takes a conservative approach in its distribution analysis and does not distribute fees in relation to a sound recording if there is any doubt about whether it is protected.

PPCA has never "agreed that it will not seek to collectively license music videos". The Collective Licensing Arrangements relate to music videos. Free TV does not appear to have read the Application or the Draft Determination. Free TV's members continue to have the right to enter into direct negotiations and licences with copyright owners should they choose to do so. PPCA has never proposed an exclusive arrangement.

3. Carlo Colossimo's submission of 5 September 2007

The points raised in this submission are covered by PPCA's submissions including the comments made on further submission by other parties.

4. Attorney-General's Department submission of 6 September 2007

PPCA notes that the AGD has "no information on how difficult it is in practice to determine whether a particular foreign-origin recording has the requisite connection with a country listed in Sch 3 of the Copyright (International Protection) Regulations, ie, is a 'protected' recording."

The statement that PPCA "would not have the standing to take infringement action against alleged unlicensed use of any of those recordings" is correct as PPCA has no standing on its own account. PPCA's interest in proceedings arises as a result of the terms of its Input Agreements.

5. Explorer Line Cruises and WA Nightclub Association Inc submissions dated 7 September 2007

The submissions made by Explorer Line Cruises and WA Nightclub Association Inc are attempts to circumvent the Copyright Tribunal process. PPCA notes that the Commission has previously said that it is not the role of the Commission to revisit decisions of the Copyright Tribunal. PPCA agrees that the authorisation process is not the appropriate forum to debate matters determined by the Copyright Tribunal.

In the event that the Commission has any concerns or comments about issues raised by Explorer Line Cruises and WA Nightclub Association Inc, PPCA would appreciate notification by the Commission so that PPCA has an opportunity to respond to any specific points.