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18 November 2009

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The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Sir

Australian Performing Right Association Limited - Revocation and Substitution A91187-A91194

We act for Village Cinemas Australia Pty Limited, the Greater Union Organisation Pty Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Limited, the Hoyts Corporation Pty Limited and the Independent Cinemas Association of Australia (the **Cinema Operators**).

We **enclose** the Cinema Operators' submission in relation to the above referenced applications by Australian Performing Right Association Limited.

Yours faithfully
MINTER ELLISON

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Copy to Mr John Rouw
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SUBMISSION

TO: THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

BY: VILLAGE CINEMAS AUSTRALIA PTY LIMITED

THE GREATER UNION ORGANISATION PTY LIMITED

READING ENTERTAINMENT AUSTRALIA PTY LIMITED

AUSTRALIAN MULTIPLEX CINEMAS PTY LTD

THE HOYTS CORPORATION PTY LIMITED

INDEPENDENT CINEMAS ASSOCIATION OF AUSTRALIA

(The Cinema Operators)

RE: AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED: APPLICATION FOR REVOCATION AND SUBSTITUTION

DATE: 18 November 2009

Introduction

1. This submission is made by Village Cinemas Australia Pty Limited, the Greater Union Organisation Pty Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Ltd, the Hoyts Corporation Pty Limited, and the Independent Cinemas Association of Australia (referred to throughout this submission as the **Cinema Operators**).

2. Village Cinemas Australia Pty Limited, the Greater Union Organisation Pty Limited, Reading Entertainment Australia Pty Limited, Australian Multiplex Cinemas Pty Ltd, and the Hoyts Corporation Pty Limited are major proprietors and operators of cinemas in Australia. The Independent Cinemas Association of Australia is Australia's largest independent cinema association, representing cinemas at over 103 locations with 400 screens, in every State and Territory in Australia.

3. The Australian Performing Right Association Limited (APRA) seeks authorisation of input arrangements, overseas arrangements, output arrangements and distribution arrangements, as described in paragraph 1.2.8 of its Supporting Submission.

4. APRA seeks these authorisations for a period of 6 years.

5. APRA's arrangements essentially involve the following features:[1]

    (a) gathering in by assignment the ownership of the copyright in the public performance right from all authors of musical works and associated literary works and thus aggregating that right across a total portfolio of works (the repertoire);

    (b) APRA takes an assignment of the public performance copyright in all existing and future works thereby effecting a present assignment of the future copyright in the relevant works for the purposes of section 197 of the *Copyright Act 1968* (Cth) (**Copyright Act**);

    (c) APRA enjoys an exclusive licence from affiliated collecting societies throughout the world (except from affiliated collecting societies in the United States of America, in which case the licence is non-exclusive) of works within the portfolio of those societies;

    (d) APRA exploits the repertoire by granting predominately blanket licences to perform all works in the repertoire;

    (e) APRA distributes at least 50% of the royalties in relation to a work to the composer and writer.

Overview

6. APRA has contended that changes which have occurred in the market since the grant of the existing authorisations in 2006 have resulted in additional constraints on APRA's exercise of its power.[2]

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[1] The Cinema Operators are not in a position to independently check the details of all of APRA's arrangements as set out in its application and submissions, and the Cinema Operators submissions in respect of those arrangements are based on the details of them provided by APRA in its application and submissions.

[2] APRA Supporting Submission paragraph 11.

7. For the reasons set out in detail below the Cinema Operators submit that the changes to which APRA refers have resulted in no significant additional constraint on the exercise of its market power.

8. Through the combined operation of its input and output arrangements (including its overseas arrangements), APRA, as a monopoly of music copyright owners who pool their works, continues to be able to exercise a significant (albeit not perhaps entirely unconstrained) degree of market power.[3]

9. APRA's input and output arrangements (including its overseas arrangements) have the following effect, so far as they relate to the screening of films by Cinema Operators:

   (a) the input arrangements arm APRA with the public performance right in the musical works and associated literary works incorporated within a film;

   (b) Cinema Operators must negotiate with APRA as a monopolist to acquire a licence or permission to screen a film incorporating those works;[4]

   (c) APRA enjoys significant market power over Cinema Operators as the exhibition of films would be entirely foreclosed unless a licence is negotiated with APRA;

   (d) APRA seeks to exercise its licensing power, enabled by its input and overseas arrangements with parties who would otherwise be in competition, by participating in the total gross box office revenue of Cinema Operators through a blanket licence of the entire repertoire upon Cinema Operators for a defined percentage of the total gross box office receipts (all the Cinema Operators current licences are such blanket licences);

   (e) there is no realistic opportunity for Cinema Operators to negotiate downstream public performance rights in the relevant works at source as the totality of APRA's arrangements forecloses, in real terms, that opportunity;

   (f) APRA's blanket licences with the Cinema Operators represent in practical terms an effective barrier to the Cinema Operators' obtaining rights at source including for US films since APRA's blanket licences provide no discount to licence fees to account for directly sourced rights.

10. The opt-out and licence-back arrangements in APRA's constitution do not provide a mechanism which effects a countervailing balance to the market power and the exercise of aggregated market power by APRA.

11. These mechanisms suffer from limitations which make them ill-adapted for efficient granting of the public performance rights in musical works in films. More fundamentally, members will only have an incentive to utilise opt-out or licence-back provisions when they will be in a more favourable negotiating position than APRA, which will be a rare circumstance given APRA's monopoly position. Further there is no incentive for a prospective user to seek to acquire rights from an APRA member unless there will be a

[3] See the ACCC Determination in respect of APRA Authorisation Applications, dated 8 March 2006, (ACCC 2006 Determination) at paragraph 7.33: 'APRA is able to set performing rights licence terms and conditions without regard to what the economically efficient price for those rights would be and without regard for the type of performing licence which could be most suitable for different classes of users. Although APRA is constrained, to some extent, in its ability to do so by the Copyright Tribunal.'

[4] The only exception to this of which the Cinema Operators are aware is in respect of works sourced from the United States in respect of which APRA holds a non-exclusive licence.

corresponding reduction in the price paid under the APRA blanket licence for works which the user may still require in APRA's repertoire.

12. The Cinema Operators contend that APRA's blanket licensing arrangements represent a key element in APRA's ability to exploit its monopoly position in respect of the Cinema Operators. In particular, those blanket licences represent a very real barrier to the Cinema Operators obtaining licences at source for US films.

13. The Commission, in its 2006 Determination, was encouraged by APRA's statement that it intended to actively explore alternatives to blanket licences with interested user groups.

14. As discussed in more detail at 58-61 below, the Cinema Operators are not aware of APRA having offered or explored the offering of a 'discounted blanket licence' in the sense of a blanket licence assessed on revenue but with provision for a discount on the licence fees where the user has negotiated performing rights for some of the works in APRA's revenue directly, as referred to in the ACCC 2006 Determination.

15. It must be recognised that it is in APRA's commercial interests not to offer such 'discounted blanket licences' on commercially viable terms. The Cinema Operators submit that APRA's preparedness to offer such 'discounted blanket licences' is not demonstrated and remains to be tested.

16. The Cinema Operators remain interested in exploring direct licensing, particularly licensing of Australian performing rights at source for US films either on a 'through to viewer' basis from producers and distributors or from music copyright holders directly. However the ability to access appropriately discounted blanket licences is essential to the commercial viability of such arrangements.

17. The Cinema Operators also note the developments in the Europe to which APRA refers in Appendix 4 of its submissions, relating to directives requiring the removal of certain restrictions in the arrangements of EEA collecting societies in order to promote competition between the societies.

18. Against the above background, the Cinema Operators submit that it is not appropriate to grant the authorisations sought by APRA for the period of six years sought.

19. The Cinema Operators submit that any authorisations granted should be for a period of no longer than 3 years to permit the Commission to review at the end of that period:

    (a) the international environment (including further developments in Europe);

    (b) any developments in direct sourcing of Australian performance rights for music in films particularly US films; and

    (c) the preparedness in practical terms of APRA to offer discounted blanket licences on commercially viable terms.

APRA's input arrangements

20. APRA claims that its natural monopoly was significantly eroded by the introduction of opt-out and licence-back provisions into its constitution in November 2000.[5] APRA contends that any negative impacts that may arise as a result of its monopoly must be significantly reduced by the availability of this mechanism.

[5] APRA Supporting Submission paragraph 7.1.4.

21. APRA also contends that changes to APRA's input arrangements that have occurred since the existing authorisations were granted have resulted in a decrease in any detrimental effects of APRA's natural monopoly.[6]

22. The provisions in APRA's constitution permitting its members to opt-out and license back their works were introduced following the decision of the Competition Tribunal in November 2000, and were in place (with further amendments made prior to the Commission's final determination in 2006) at the time the ACCC granted the existing authorisations in 2006.

23. The changes made since then are relatively minor and in the Cinema Operator's submission do not in any significant way diminish the anti-competitive effect of APRA's input arrangements. The changes to APRA's constitution made in November 2008 referenced in APRA's submission are said to have 'simplified the existing opt out and licence back categories, including by reflecting more modern language and usage practices and shortening notice periods'[7] and to 'introduce a new category of licence back to address the concerns of a small number of members who wish to license their work, for non-commercial purposes on-line'.[8]

24. These changes do not affect key elements of the opt-out and licence-back provisions which inhibit their effective use.

25. The opt-out arrangements require the member to opt-out in respect of all the member's works in entire specified categories of performing rights. This provides a significant disincentive to any member wishing to take an assignment back of rights in particular works which it wishes to assign or otherwise deal with, for example to a film producer for 'through to viewer' licences (see 39 below in relation to 'through to viewer licences').

26. The licence-back provisions require the member to provide APRA with a notice specifying *inter alia* details regarding the date or dates of performance as are reasonably necessary to identify the performances to which the sub-licence relates and such details regarding the geographic location and venue of the performance as are reasonably necessary to identify whether the sub-licence extends to a particular area and venue. This mechanism is not adapted to an efficient granting of the public performance rights in musical works in films, most particularly to the producer of a film incorporating 'through to viewer' licences.

27. It is submitted that APRA's opt-out and license back provisions do not in fact provide any significant constraint on its ability to exercise monopoly power. The provisions do not *realistically* facilitate the direct negotiation of performing rights between music composers and users.

28. Fundamentally, APRA's opt-out and licence-back provisions do not in fact provide any significant constraint on its ability to exercise monopoly power for two reasons.

29. Firstly, APRA is a monopoly of composers who pool their works and generally provide blanket licences. Members will only have an incentive to utilise opt-out or licence-back provisions if they judge that as a result they will be in a more favourable negotiating position than that provided through APRA. This is likely to be relatively rare, given APRA's monopoly position.

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[6] APRA Supporting Submission paragraph 1.2.4(b).
[7] APRA Supporting Submission paragraph 7.2.1.
[8] APRA Supporting Submission paragraph 4.1.4.

30. Secondly there is no incentive for a prospective user to seek to acquire rights from an APRA member unless there will be a corresponding reduction in the price paid under the APRA blanket licence for works which the user may still require in APRA's repertoire. APRA's blanket licences for cinemas currently provide for a price structure based on a percentage of box-office, with no allowance for any reduction in fees to take account of directly acquired rights. In these circumstances there is simply no incentive for the Cinema Operators to acquire rights directly.

31. As a consequence of APRA's input, output and overseas arrangements (including the blanket licences) there is in practical terms little or no incentive for either music composers or users to deal directly.

32. APRA itself concedes that there have been 'relatively low numbers of licence backs and opt outs'[9]. APRA claims that the 'relatively low numbers of licence back and opt-outs shows that

    (a) members generally approve of its input, output and distribution arrangements;

    (b) the current input, output and distribution arrangements must be seen as operating efficiently as few owners have used the facility and, to the best of APRA's knowledge relatively few users have investigated it either on their own account or in conjunction with owners; and

    (c) the APRA system in fact remains the most efficient means of dealing with the rights'.

33. It is submitted that the relatively low number of licences back and opt outs is actually attributable to the disincentives discussed above, resulting from the effect of APRA's restrictive input, output and overseas arrangements.

Output arrangements - blanket licensing

34. APRA states that 'APRA's licences are almost always granted on a blanket basis'.[10]

35. APRA's justification for blanket licences is that the majority of users cannot accurately inform APRA in advance of what works would be performed on a given occasion.[11]

36. APRA asserts that a cinema that performs music is usually unaware of what musical works will be performed before (and sometimes even after) they are performed.[12] It refers to an Attachment 12 to its submission which is not available on the public register and which the Cinema Operators have not had the opportunity to see**.**

37. Presently, because of the structure of APRA's blanket licences for cinemas (which provide for no adjustment to the price to take account of any directly sourced rights) there is no imperative for Cinema Operators to have in place procedures to inform them of the musical works incorporated in the films they exhibit. If there were an incentive and requirement to do so because of modified licence arrangements which provided for a reduction in price to account for direct dealing, there would be no real difficulty in Cinema Operators obtaining the requisite information from producers and distributors.

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[9] APRA Supporting Submission paragraph 7.6.1.
[10] APRA Supporting Submission paragraph 5.1.1.
[11] APRA Supporting Submission paragraph 5.3.7.
[12] APRA Supporting Submission paragraph 5.3.7.

38. There is no impediment to Cinema Operators being able to know in advance the works to be performed by way of exhibition of a film. An exhibitor of a film at a cinema publicly performs the same body of musical work and associated literary work every time the film is screened. The musical works embodied in a film are fixed at the time that the film is created. The works in the film are determined by the producer and embodied in the film (print) as delivered by the distributor.

39. That blanket licence fee arrangements are not necessary to support the efficient collection of licence fees for performance of works in the course of exhibition of films is demonstrated by the successful operation in the United States of a regime in which film producers license the synchronisation right to a musical work together with a 'through to the viewer' licence for performances in cinemas in the United States.[13] This arrangement is practical, convenient and economically efficient. The owners of the copyrights are readily identifiable prior to performance, and the works which will be performed when a film is shown are known in advance. Importantly, such an arrangement preserves and promotes competition between composers, whereas a blanket licence fee arrangement is not subject to any constraint arising from competition between collecting society members.

40. The situation in the United States demonstrates that collective monopolistic arrangements are not necessary for copyright owners in musical works to obtain fees for performance of their works in the course of exhibition of films.

41. The Cinema Operators submit that APRA's input, output and overseas arrangements effectively preclude the emergence of such a regime and market in Australia. In particular APRA's blanket licensing regime for Cinema Operators constitutes a very significant barrier to any transition to direct licensing.

42. Furthermore, the ability of Cinema Operators to obtain Australian performance rights in US films (which constitute around 85% of the Australian box office) is in practical terms foreclosed by APRA's input, output and overseas arrangements. In particular APRA's blanket licence fee arrangements for Cinema Operators provide no incentive for Cinema Operators to seek to obtain Australian performing rights through their 'upstream' production and distribution channels, or from copyright holders directly, since these licences do not provide for any reduction in licence fees to take account of directly acquired rights.

The Copyright Tribunal

43. APRA claims that the Copyright Tribunal provides an important constraint on APRA's ability to exercise its monopoly position.[14]

44. The jurisdiction of the Copyright Tribunal does not extend to the direct consideration of the anti-competitive effect of the totality of APRA's arrangements including its input and overseas arrangements. However those matters, critical to the monopoly power of APRA, will necessarily provide the context in which the Copyright Tribunal is called upon to consider any referred APRA licence scheme.

45. Further, as noted in the Commissions' 2006 Determination:

[13] This regime developed in the United States against the background of anti-trust rulings which had the effect of precluding United States collecting societies from collecting public performance royalties from cinemas.
[14] APRA Supporting Submission paragraph 8.1.1.

> *'There is only very limited information regarding what efficient prices for performing rights might be which the Copyright Tribunal is able to draw on in setting licence terms and conditions. In this respect the Copyright Tribunal is forced to rely on the best available market information, being the 'going rate' for performing rights. However … given APRA's monopoly in the market for performing rights, the going rate is no indication of what the efficient price for performing rights would be*'.[15]

46. Proceedings before the Copyright Tribunal are often of considerable duration and complexity. In considering possible recourse to the Copyright Tribunal licensees must consider the total costs involved, including legal and associated costs, management time and resources and the commercial costs associated with continuing uncertainty of the outcome and the resulting fee levels. For Cinema Operators this occurs in a context where the exhibition of films would be entirely foreclosed unless a licence is negotiated with APRA.

47. Prospective licensees will only consider recourse to the Tribunal where the total costs of such recourse are judged to be worth bearing in light of the price which can be negotiated with APRA. In other words, APRA's monopoly power can still be exercised to produce outcomes above the competitive price level.

48. APRA's submission itself refers to protracted negotiations and references to the Copyright Tribunal in relation to mobile ringtone and digital download licences.[16] This provides little comfort that APRA is not exercising its market power in the context of these negotiations.

49. APRA points out that that since 2006 the Copyright Tribunal can order the parties to engage in mediation, but notes that this has not yet occurred in any proceedings before the Tribunal.[17] It is submitted that in the light of the incentives noted above, the ability to order mediation is unlikely to have any impact on the duration and complexity of proceedings before the Tribunal.

50. APRA also states that the Commission's ability to appear as a party in the Copyright Tribunal is 'a powerful constraint on APRA's conduct'.[18] While the ability of the Commission to appear is welcome, it is submitted that it does not alter the restricted jurisdictional basis of the Copyright Tribunal, APRA's ability to enter negotiations from a monopoly position or the incentives discussed at 47 above. Also the Commission may face the same lack of information as to efficient prices as noted above.

Code of Conduct for Australian Collecting Societies

51. APRA claims that the 'the Code is an effective mechanism that ensures that APRA does not abuse its monopoly powers…' [19]

52. The Code of Conduct was in place at the time of the last authorisations. In the Cinema Operators' submission nothing has changed which would lead the Commission to alter its view expressed in its 2006 determination at that time:

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[15] ACCC 2006 Determination paragraph 6.155
[16] See APRA Supporting Submission, paragraphs 11.1.5 and 11.1.16.
[17] APRA Supporting Submission paragraph 8.2.1.
[18] APRA Supporting Submission paragraph 8.1.4.
[19] APRA Supporting Submission paragraph 10.1.12.

'… having a process for the handling of complaints against APRA does not, in itself, serve to reduce its capacity to impose licence terms and conditions on users which reflect its position as a monopoly provider of performance rights licences in Australia'.[20]

Dispute resolution - expert determination

53. APRA states that since 2000 only three matters involving licensees have been referred to expert determination. In two of these cases the matter was not resolved satisfactorily.[21]

54. APRA states that it 'believes that the utilisation of the expert determination procedure demonstrates that APRA is effective at resolving disputes, and that its licensees are relatively satisfied with the arrangements for licences granted'.[22]

55. The Cinema Operators submit that the available evidence does not support this conclusion. The process has been utilised only a very small number of times and in the majority of such cases did not result in successful resolution.

56. Further it is submitted that the availability of expert determination does not provide any significant restraint on APRA's monopoly power. There is no requirement on an expert to consider matters which are directed to whether the licence fee and other terms sought are competitive or efficient. If the expert did turn to consider such matters he or she would be faced with even greater difficulties relating to lack of information as to competitive pricing than those noted above in respect of the Copyright Tribunal.

57. The effect of the amendments suggested by APRA in Appendix 5 of its submissions is not simply to remove the requirement that APRA pay for the costs of the independent expert where the estimated annual licence fee is under $50,000, but also to remove the right of the licensee to require referral to expert determination. The Cinema Operators submit that that right of the licensee should be retained, but with provision for sharing of the cost of expert determination where the estimated annual licence fee is $50,000 or more.

Grant of discounted blanket licences

58. In paragraph 11.2 of its submissions entitled 'Discounted blanket licences' APRA refers to mobile ringtone and digital download licences. However, as APRA indicates, fees under these licences are *not* assessed on a blanket basis at a percentage of revenue, but instead assessed on a work-by-work basis. APRA states that the nature of these digital services is analogous in structure with traditional record sales and that the nature of the tariff is 'transactional, as it is and always has been for CD sales'.[23]

59. This type of licence is not a 'discounted blanket licence' in the sense of a blanket licence with provision for a discount on the licence fees where the user has negotiated performing rights for some of the works in APRA's revenue directly, as referred to in the Commission's 2006 Determination.[24]

60. At paragraph 7.25 of its 2006 Determination the Commission stated 'The ACCC is encouraged by APRA's stated preparedness, in response to the draft determination, to

[20] ACCC 2006 Determination, paragraph 6.181.
[21] APRA Supporting Submission paragraphs 10.2.4, 10.2.5, 10.2.6, and 10.2.7.
[22] APRA Supporting Submission paragraph 10.2.9.
[23] APRA Supporting Submission 11.2.3.
[24] ACCC 2006 Determination, paragraph 7.56.

actively explore alternatives to blanket licences with interested music users'.[25] This statement immediately followed the discussion at paragraph 7.24 concerning the desirability of providing users with the ability to obtain adjustments to licence fees to account for performing rights which had been negotiated directly, and were directed to the possibility of such arrangements being negotiated.

61. The Cinema Operators are not aware of APRA having offered any 'discounted blanket licences' in the sense described above or having undertaken any active exploration with users in respect of such licences. APRA has not undertaken any such active exploration with the Cinema Operators.

[25] ACCC Determination 8 March 2006, paragraph 7.25.