Fairfax Media Limited
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Gail Hambly
Group General Counsel
& Company Secretary

23 November 2009

Mr John Rouw
The Australian Competition & Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Rouw

Australasian Performing Right Association Ltd – applications for revocation and substitution (A91187 to A91194) – interested party consultation

We refer to the request for submissions in relation to the above applications in your letter dated 20 October 2009 to Mr Brian McCarthy, CEO, Fairfax Media Limited. Fairfax welcomes the opportunity to make a brief submission on the applications.

Summary

In general, our view is that there is currently no realistic alternative to APRA in terms of practicality of music rights acquisition and licensing. However, we submit there are significant shortcomings in APRA's current pricing and administration processes, which Fairfax experienced first hand in its relatively recent renegotiation of the production music licence for our websites.

Accordingly, in our view any substitution of the above authorisations should be both (a) short term and (b) conditional on improvements in pricing clarity and licence administration. We are also aware of shortcomings in APRA's disbursement policies which may prejudice rightsholders.

Fairfax's licence negotiation

Fairfax's experience in dealing with APRA for the renewal of the production music licence for Fairfax websites demonstrates that APRA's monopoly status has lead to a complete lack of transparency in licence pricing.

Fairfax and APRA were parties to a licence, described by APRA as "an experimental licence", which expired on or about July 2007. This licence permitted Fairfax, in consideration of the payment of a fixed fee for the term, to incorporate music from APRA/AMCOS controlled production music libraries into Fairfax online audiovisual content.

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Prior to expiry of the experimental licence, Ian Vaile, Fairfax Digital's Director of Digital Productions, began negotiating with APRA with respect to a successor licence arrangement.

These negotiations continued after the expiry of the experimental licence, under which the parties continued to operate through acknowledgment and conduct. During these negotiations, APRA proposed a new licence fee which represented a very substantial increase from the fee under the prior licence. The basis on which this licence fee was calculated was queried a number of times during the negotiations by Mr Vaile on behalf of Fairfax. On no occasion did APRA address these queries nor provide guidance on the basis of calculation of the fee.

Fairfax made proposals to APRA that there should be an appropriate agreed basis for the calculation of the fee, which would provide transparency in pricing. For example, Fairfax proposed that the fee be calculated with reference to our actual music use, and in connection with revenue associated with that use. Fairfax provided APRA with an indicative audit of music usage for a period to establish the relevant level of music usage and derived revenue. APRA did not address these proposals. APRA appeared to suggest that the reference for the licence fee was the commercial precedent set with other licence holders.

Subsequently, Fairfax proposed that the licence be administered to practically permit Fairfax to source a proportion of its music from non-APRA sources, and that the APRA licence fee be calculated with reference to the proportion of APRA/non-APRA music used. Again, APRA did not engage on this proposal.

Throughout the negotiations, APRA reminded Fairfax that the previous licence had expired and that, absent the continuing negotiations, Fairfax would be in breach of copyright by continuing to use the production music. Ultimately, Fairfax had no choice but to accept a licence with a substantial fixed fee and with no transparency as to its calculation.

Conclusion and recommendations

In Fairfax's view, the course of dealings described above demonstrates APRA's monopoly power in price negotiations, and its inflexibility in systems and processes, including its incapacity to supply meaningful information about the basis of the licence fee calculation, and inability or unwillingness to meet the needs of music users in terms of alternative sources of music and alternative music licensing regimes.

For these reasons we submit any substitution of the above authorisations be conditional on APRA undertaking to clarify pricing, and improve systems to allow this flexibility. Additionally, the term of the new authorisation should be reasonably short, for example three years, to provide a timeframe in which these concerns must be addressed by APRA, and in recognition of the speed of changes in the digital information and entertainment industry, which may give rise to viable alternative means of music licensing or new models of music usage and distribution.

Another concern is that we have no reason to believe that the revenue collected from online music users like Fairfax is accurately accounted for in terms of disbursement to

rightsholders. Fairfax is not provided with any details as to the relevant royalty disbursements, so we cannot be confident that our fees are being directed to the rightsholders of the actual compositions we use. For example, the composer of a piece of music commissioned by Fairfax for use in one of our regular video programs has been unable to obtain proper information about the calculation of royalties due to him, in spite of the fact that Fairfax has provided all necessary music use details to APRA. In the end, APRA made a one-off payment from the "Unlogged Performance Pool," the quantum of which appeared to be arrived at in an entirely arbitrary manner. We question the size of this "unlogged" pool of revenue and whether it is appropriate for APRA to be collecting significant licence fees from music users without proper accounting on the royalty disbursement side.

Yours sincerely

GAIL HAMBLY