

Association of Liquor Licensees Melbourne
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Mr. Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
Level 35, The Tower
360 Elizabeth Street
Melbourne, Victoria 3000

Dear Sir,

Australasian Performing Rights Association Ltd – application for revocation and substitution A91187 to A91194 and A91211 – draft determination.

We refer to the above mentioned matter.

Background

This submission is prepared on behalf of the Association of Liquor Licensees Melbourne (ALLM) - being an industry collective that represents the interests of Melbourne's bar and nightclub proprietors: www.allm.org

With respect to the public performance of copyrighted music, APRA defines specific venues as 'nightclubs' and then applies a subsequent and unique licensing fee structure to venues falling within this definition; payment of a licensing fee grants a license thus allowing a licensee to broadcast music within their venue without fear of breach of copyright. The licence offered by APRA takes the form of a 'blanket licence'; although, APRA offers the option for a licensee to deal directly with the creators of musical works. However, this option is of no practical application to this industry as it would require a licensee to create and maintain licensing / contractual arrangements with hundreds of separate entities.

Nightclubs – the licensing cost

The nightclub definition and the associated fee scale as relied on and applied by APRA is based on a definition and fee scale as determined by the Copyright Tribunal in *Phonographic Performance Company of Australia Limited (ACN 000 680 704) under section 154 (1) of the Copyright Act 1968 (Cth)[2007] ACopyT1 (10 July 2007)*.

To facilitate calculation of a license fee payable, the Copyright Tribunal created the following scale:

23.11.07-22.11.08 > .51Cents

23.11.08-22.11.09 > .64Cents

23.11.09-22.11.10 > .78Cents

23.11.10-22.11.11 > .91Cents

23.11.11 – onwards \$1.05Cents

In using the above, a final licensing fee is calculated in the following way: the above annual relevant figure is multiplied by the number of persons permitted in a venue pursuant to the venue's liquor license and the resultant figure is then multiplied by the number of nights that the venue operates per year.

For example a venue that is permitted to have 250 people on the premises and trades three nights per week or 156 nights per year incurs the following annual expense with respect to its APRA license fee:

.78Cents (Copyright Tribunal Fee for period 23.11.09-22.11.10) x 250 (no. of patrons as per liquor licence) x 156 (annual nights of operation) = \$30,420.00

On the 23.11.11 the annual licensing fee for this venue would increase to \$40,950.00: \$1.05 x 250 x 156

It is manifestly apparent that the costs associated with license fees are exorbitant, have potential to threaten the long term future of the industry, and are thus sufficient to require the ACCC to assist our members by their inquiring further into the practices of APRA with respect to the late night entertainment industry. On an individual basis, the fees paid by our members, when expressed as a percentage of total revenue, must be some of the highest of any industry.

It is acknowledged that in calculating fees payable, APRA, rather than relying on the number of patrons pursuant to a venue's liquor license, makes provision for proprietors to estimate the number of patrons attending their venue; however, this offers little relief with respect to the totality of cost as the overall cost remains excessive even for a venue trading below capacity.

The blanket license and the nightclub industry

The blanket license offered by APRA, in theory, is an effective mechanism as it provides totality with respect to protection from copyright infringement. However, its practical application is not as apparent.

The question common to our members is: 'how do I know that all the music being played in my venue is from APRA's catalogue and where it isn't why then should I pay a licensing fee to APRA with respect to the piece(s) of music that falls outside their catalogue'?

Members' report that the disc jockies, who are usually the only point of broadcast of music in a venue, often source tracks from small and independent music producers; therefore, much of the work sourced

and broadcast potentially falls outside of APRA's catalogue. Further, some creators of musical works, at least in the dance music genre, do not seek to align themselves with collection societies - music producers in this industry still have a strong 'underground' focus which takes them away from the commercial mainstream.

Paragraph 4.69 of the ACCC draft submission makes reference to APRA's preparedness to investigate ways in which the blanket licence system could be modified. Our members report that discussion with APRA in regards to this generally but with specific reference to licence affordability have yielded no result. APRA have shown no flexibility and have advised that our members must accept the licences on offer without compromise or modification.

With reference to the proceeding three paragraphs and the potentially unconscionable business arrangement that it creates, we declare a breach by APRA with respect to *The Trade Practices Act* s51AC, subsections 1, 2, 3.

The Proposal

What follows is designed to prompt thought, discussion, and focus with respect to requiring APRA's adherence to the undertakings made to the ACCC back in 2006 re modification of the blanket licensing system.

Our members have offered up an example of a novel solution that could provide some relief with respect to the financial burden currently experienced.

The solution is a three-step process:

1. A disc jockey provides the venue's management with a list of tracks played during the night's operation. On a quarterly or otherwise basis, this list would then be forwarded onto APRA. A calculation would then take place in which the number of tracks played for that time period would be totalled. Then a further calculation would take place totalling the number of APRA registered tracks appearing on that list and these would then be expressed as a percentage of the total number of tracks listed.
2. The venue would provide APRA, on a quarterly or otherwise basis, details on the number of nights of operation and the number of attendees over that period.
3. Based on the information provided at step 2, APRA calculates a licensing fee for the period but issues a final licensing fee calculated on the percentage as derived from step 1.

For example 3000 tracks submitted (2000 of which are of APRA's collection), thus APRA tracks make up 66% of all tracks played; thus, a licensee will be required to pay only 66% of any APRA fee calculated for that time period.

Benefits to the producer of the musical works

Collection societies are created *inter alia* to protect the rights of the producers of copyrighted material and to derive revenue to these producers.

The system above ensures transparency with regards to the distribution of funds to musical producers who choose to affiliate themselves with APRA. With the licensee providing a detailed list, APRA will be better enabled to distribute monies to those who authored the broadcast works.

Furthermore, we would recommend that APRA publish the lists supplied by the licensees so as to ensure further transparency with respect to the distribution of royalties.

Our members support the distribution of license fees to the authors of musical work and as such they have a genuine interest in ensuring that the money they part with is distributed appropriately.

APRA and the Proposal

In calculating fees payable by licensees pursuant to a Live Performance Licence, APRA asks that a licensee do the following:

The Applicant must, within 28 days after APRA's request, supply APRA with a list of:

- (a) all music performed at the Premises;
- (b) the number of times performed; and
- (c) the duration of each performance,

in the form and for any period specified by APRA from time to time - Sourced: *APRA Licence Application Live Performances*; viewed 20 February 2010; <http://www.apra-amcos.com.au/MusicConsumers/MusicinBusiness/Hotel,Club,Motel,TavernorBar.aspx>

Thus, APRA has the administrative framework and experience to allow processing of information that could be supplied pursuant to the proposed scheme. APRA seemingly has the financial wherewithal to implement the system described above, for as of the 30 June 2009 APRA's revenue for the financial year was posted as being \$159.6 million dollars – Sourced: *Music + Rights = Respect; A Summary of APRA and AMCO's 2009 Financial Year Results*; viewed 20 February 2010; http://issuu.com/apraamcos/docs/yearinreview09?mode=a_p

Overseas Collecting Societies

Our members have reported attempts to source licensing rights from foreign based collecting societies because the fees required by foreign societies are less exorbitant in comparison to APRA's.

Specifically, members have approached the Canadian Collecting Society SOCAN and the United Kingdom's Collecting Society PRS. In both instances, members were told that these societies were not prepared to assist and that they should instead approach APRA with respect to the acquisition of any

licence sought - in terms of the advantageous creation and continuation of an uncompetitive environment, APRA are the beneficiaries of a system *par excellence*.

APRA's dispute resolution process

Our members also have experience with APRA's expert determination process. However, we are unable to comment further on this matter as per an agreement that APRA requested our members sign prior to entering the process. However, should the ACCC absolve us of any obligation as per the previous, we would happily disclose what has transpired.

Other members who have contemplated resolving their licensing problems via expert determination ultimately don't engage because of a concern with regards to the impartiality of the 'expert', the credentials of the 'expert', and the constraints that the current system places upon them.

Conclusion

The late night entertainment industry needs the assistance of the ACCC, for the demands placed upon it by APRA are excessive and unsustainable and contrary to the principals of fair dealings in business transactions. Towards the end of this decade, some of our members calculate licensing fees surpassing the \$50,000.00 per year level.

We call on the ACCC to become actively involved in ensuring APRA undertake a genuine commitment and program with respect to modifying the blanket license system.

Furthermore, we say that the current review period of APRA's collection policies by the ACCC remain on 3 year basis.

Given the unique and often misunderstood nature of our members' industry, we make ourselves available to work with both the ACCC and APRA, and we are hopeful of this occurring.

Yours sincerely,

Nicholas Albon
Solicitor
Secretary of the Association of Liquor Licensees Melbourne