

3 March 2010

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BY EMAIL

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

Dear Sir

Australasian Performing Right Association Limited – Application for 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** a submission on behalf of the Cinema Operators following the Draft Determination dated 8 February 2010.

Yours faithfully
MINTER ELLISON

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Copy to Mr Gavin Jones
Australian Competition and Consumer Commission

Submission by the Cinema Operators following the Draft Determination

Introduction

1. This submission is provided in response to the ACCC Draft Determination dated 8 February 2010 (**Draft Determination**) in respect of the application for revocation and substitution of authorisations A90918, A90919, A90921, A909022, A90924, A90925, A90944 and A90945 lodged by the Australian Performing Right Association Ltd (**APRA**).
2. The submission is made on behalf of 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 (the **Cinema Operators**).

Overview

3. The Cinema Operators support the Draft Determination issued by the ACCC including the proposed conditions C1, C2 and C3. Further specific comments regarding the form of the proposed conditions is provided below.
4. The Cinema Operators support the ACCC's proposal to limit authorisation to a period of 3 years.
5. The Cinema Operators in particular note and support the views expressed in the Draft Determination that:
 - (a) for predominantly "predictive" users in particular film producers/cinema operators, there is further scope for and benefit from increased direct dealing and competition between suppliers and between acquirers;¹
 - (b) there is scope for more progress on allowing adjustments to blanket licences in appropriate circumstances including an appropriate adjustment to the fee;²
 - (c) the anti-competitive detriment resulting from APRA's input and output arrangements will be more limited where their arrangements do not prevent direct negotiation between copyright owners and users and licensing arrangements allow adjustments to blanket licences in appropriate circumstances including an appropriate adjustment to the fee;³
 - (d) a fundamental impediment to users using APRA's licence back provisions is APRA's propensity to offer users blank licences and there being no discount to these licences which would incentivise direct dealing.⁴
6. The Cinema Operators support the need for greater flexibility in APRA's input arrangements to facilitate direct dealing between members and users, and the provision of blanket licences which permit adjustment to blanket licence fees to reflect directly

¹ Draft Determination paragraph 4.125.

² Draft Determination paragraph 4.226

³ Draft Determination paragraph 4.135.

⁴ Draft Determination paragraph 4.153.

licensed music. These are interrelated matters which need to be addressed to reduce the anti-competitive detriment resulting from APRA's arrangements.

APRA's input arrangements and Proposed Condition C1

7. The Cinema Operators support the view that the current requirements for licensing back of performance rights are cumbersome. The Cinema Operators submit in particular that the licence back arrangements are not well adapted to the granting of performance rights for music and films.
8. Paragraph 4.218 of the Draft Determination states that the cinema chain operators each year provide APRA with retrospective cue sheets detailing works contained in films, the duration for which each work is used in the film, each work's related rights holders and the percentage of total box office takings represented by each film and that this is done at the end of each year so that the actual box office receipts for the year to which licence fees are tied can be determined and for the purpose of apportioning royalties to APRA members and overseas rights' holders.
9. This statement appears to be based on paragraph 6.2.16 of APRA's supporting submission which states that it conducts a full census of music synchronised on film and publicly performed in cinemas and maintains a database of film cue sheets and that examples of film cue sheets and cue sheet information are contained in attachment 12. (Attachment 12 is confidential and the Cinema Operators have not seen it).
10. On our instructions the Cinema Operators do not provide APRA with cue sheets and related information. The Cinema Operators provide APRA with gross box office receipts for the preceding six month period for each cinema. Fees under the Cinema Operators blanket licences with APRA are based on a percentage of gross box office receipts and the information provided to APRA by the Cinema Operators is sufficient for determination of blanket licence fees payable.
11. It is noted that APRA's Distribution Practices document states at paragraph 28 that APRA receives box office revenue amounts and percentages from the Motion Picture Distributors Association of Australia and that this information is used together with the information on the music cue sheet to determine distribution payments for its members.
12. In any event it is clear from APRA's supporting submission and its Distribution Practices document that it has available to it a database of film cue sheets and cue sheet information including relevant information about the musical works contained in films. APRA uses this information, together with the percentage of total box office takings for each film to determine distribution payments to its members.
13. In respect of the licence-back arrangements with its members, the Cinema Operators submit that for music performed in the exhibition of films it would be sufficient for APRA's purposes in apportioning royalties to its members to know:
 - (a) the title of the work licensed back;
 - (b) the period of the sub-licence (which could be perpetual from a specified date); and
 - (c) the territory to which the sub-licence relates (for example, all of Australia).

14. This information together with the information which APRA already holds in relation to film box office and film music cue sheets would enable APRA to make appropriate adjustments in respect of its distributions to members.
15. A complementary but distinct issue is the information which would need to be provided by a sub-licensee to APRA in respect of any reduction in blanket licence fees applicable as result of direct dealing. Current licences with Cinema Operators do not provide for any such reduction, but if direct dealing increases and future licences provide for blanket licence fee reductions, then the licensee would need to provide information to APRA to permit quantification of appropriate reductions, and, where required, evidence as to directly licensed rights held.
16. The formula for fee reduction and details of the required reporting to document and justify discounts to blanket licences would be negotiated between APRA and the user. However given the music cue sheet information already available to APRA, the only relevant information not currently available to APRA would be the box-office takings of the licensee for films in which directly licensed music occurs. This information could be provided by the licensee.

Amendments to APRA's alternative dispute resolution procedures and Proposed Condition C2

17. The Cinema Operators support the proposed condition C2 set out in paragraph 4.227 of the Draft Determination.
18. The proposed condition C2 will direct the attention of the expert specifically to matters relevant to the flexibility of APRA's input arrangements and APRA's willingness to offer genuine discounts on blanket licence fees to take into account any direct dealing between the user and the copyright holder, matters which are key to reducing the anti-competitive detriment of APRA's arrangements.
19. The Cinema Operators suggest clarification of sub-point 2 of proposed condition C2 to further clarify the intended focus of the enquiry as follows:

'whether any amendments could be made to the conditions of the licence-back to an APRA member which would permit a sub-licence to the user to provide a genuine and workable alternative to the user relying on a blanket licence' .
20. The Cinema Operators support the ACCC's proposal not to authorise the changes proposed by APRA to the expert determination process which would have the effect that users with annual licence fees in excess of \$50,000 would be required to share the cost of expert determination.
21. In respect of alternatives to the present system of expert determination, the Cinema Operators submit that the present system of expert determination should be amended to provide that the licensee may elect to have the matter referred to mediation either as an alternative to expert determination or as a step prior to expert determination.
22. The Cinema Operators do not consider that arbitration would be a cost effective dispute resolution mechanism, in view of the expense, length and complexity which can attend arbitration proceedings.

Proposed Condition C3

23. The Cinema Operators support the proposed condition C3 as set out in paragraph 4.231 of the draft determination.
24. The proposed condition C3 will permit the ACCC to monitor not only the usage and effectiveness of APRA's ADR processes but also the views of appointed ADR experts in relation to the flexibility of APR's input arrangements and APRA's willingness to offer genuine discounts on blanket licence fees to take into account any direct dealing between the user and the copyright holder.

Period of authorisation

25. In conformity with their submissions made prior to the Draft Determination the Cinema Operators support the ACCC's proposal to limit authorisation to a period of 3 years.
26. The Cinema Operators submit that this period will permit the ACCC to review the working of the proposed conditions of authorisation and monitor progress in facilitation of direct dealing and discounted blanket licences.
27. In the Cinema Operator's submission a period of 3 years is also appropriate because of the continuing rapid changes in the market for performing rights in copyright music, driven primarily by changing technologies for the publishing, reproduction and playing of music, such as music downloads and video on demand over the internet, IP TV and downloads to mobile digital devices.

MINTER ELLISON

3 March 2010