

9 March 2010

By email: adjudication@accc.gov.au

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

Dear Sir

Re Australasian Performing Right Association Limited - Applications for Revocation and Substitution A90918-A90945

1. This submission is provided to the Australian Competition and Consumer Commission (ACCC) by Free TV Australia Ltd (Free TV) in relation to the Draft Determination issued by the ACCC on 8 February 2010 with respect to the applications for authorisation requested by Australasian Performing Right Association Ltd (APRA).
2. Free TV is the industry body representing all of Australia's commercial free-to-air television broadcasters (FTA Broadcasters). Amongst other things, Free TV is responsible for negotiating and managing the licences for its members to broadcast musical (including associated literary) works and sound recordings, which are granted by APRA and the Phonographic Performance Co of Australia Ltd (PPCA) respectively.
3. FTA Broadcasters are presently licensed by APRA to broadcast musical works which are used in television programs.
4. FTA Broadcasters have wide and unpredictable requirements with respect to music. Television programs are acquired by FTA Broadcasters from a variety of sources. For example, programs may be acquired pre-produced from overseas suppliers; may be produced in Australia by independent production companies; or are produced in-house by FTA Broadcasters. With the exception of the latter, FTA Broadcasters may not have control over the music that is used in the program.
5. Consequently, FTA Broadcasters benefit from APRA acting as a "one stop shop" providing blanket licences of music. Free TV sees no benefit in there being significant "gaps" in APRA's repertoire. Free TV is not particularly concerned whether those rights are held by way of a non exclusive licence or assignment.
6. Therefore, Free TV supports, in principle, the ACCC's proposed authorisation of APRA's collective licensing arrangements, subject to the following comments.

Period of authorisation

7. Free TV strongly supports limiting the authorisation to a period of 3 years.
8. Given both:
 - (a) the rapid changes in technology and market conditions for the delivery of content (e.g. digital downloads, streaming, IP TV, mobile telephony and digital television) and the potential for innovations to decrease transaction costs; and
 - (b) at the same time music collecting societies seeking increases in blanket licence fees (e.g. for nightclubs, restaurants, fitness centres, digital downloads and television),

APRA's authorisation must be reviewed in the short term to ensure that its arrangements deliver an overall public benefit.

Proposed licence back condition

9. While Free TV does not oppose the proposed licensing back condition, as the ACCC recognises in paragraph 4.123 of the Draft Determination, it is unlikely to be of any practical benefit to FTA Broadcasters.
10. Current international licensing practices are such that the right to broadcast musical and associated works in television programs will be acquired by the broadcaster from the relevant performing right collecting society within the broadcast territory. In Australia, this is APRA. As a consequence, licensing at source with respect to musical works rarely occurs in practice, as has been recognised by the ACCC in paragraph 4.144 of the Draft Determination.
11. The only practical opportunity that an FTA Broadcaster would have to engage in source licensing from composers (who are invariably APRA members), would be where a composer is commissioned by the FTA Broadcaster to provide compositions for a program. In those circumstances, FTA Broadcasters usually acquire all rights from such composers other than those rights that are controlled by APRA.
12. While it is theoretically possible for an FTA Broadcaster to also acquire those rights directly from composers through a licensing back process, there would be no benefits in doing so unless there was also a corresponding decrease in the amount paid to APRA under the blanket licence. Such a discounting mechanism could only be workable in relation to Australian broadcasts, however, in the absence of a clear mechanism for overseas broadcasters to also recover payments from their respective blanket licences.
13. Free TV therefore agrees with the ACCC's views expressed in paragraphs 4.123 & 4.145 that for licensees with unpredictable requirements for access to music (such as Free TV), direct dealing with composers is unlikely to deliver any real benefit and is of practical use to members in very limited circumstances.

Price

14. The real issue for FTA Broadcasters is the quantum of the licence fee payable to APRA.
15. In Free TV's submission the problems that the industry faces are as follows:

- (a) music collecting societies do not take a holistic approach to the value of the music used, but rather seek to maximise the licence fees they can extract for the particular rights they licence. The vast majority of licensees of APRA's repertoire (including FTA Broadcasters) do not acquire those rights in isolation. The works to be broadcast or publicly performed are invariably embodied in sound recordings whether they are commercial sound recordings, production music, commissioned or live performances. Licences may be required to broadcast those sound recordings (e.g. from PPCA). In addition, a licensee may also require licences from AMCOS (to reproduce the works) and from ARIA (or its members) to reproduce the sound recording. The process of having to negotiate with up to four separate collecting societies or rights holders for the rights to use "music" is costly, repetitive, time consuming and highly artificial, particularly in circumstances where many of the rights will ultimately be held by the same entity or corporate group;
 - (b) each of the music collecting societies, in particular APRA, have market power in setting fees and seek to extract monopoly rents;
 - (c) there is no transparency as to how licence fees are calculated or valued;
 - (d) the recent trend of music collecting societies, most notably PPCA, has been to seek parity of licensing fees in circumstances where historically one of the collecting societies has been able to extract a higher licence fee than the other. This is done in circumstances where the relevant collecting society chooses to ignore the fact that the different forms of copyright may have different values in different markets; where there are differences in repertoire; or where one of the collecting societies may have, due to historical legal constraints, been able to extract the full amount that a particular licensee is willing to pay (or a monopoly rent) for all music rights;
 - (e) where one collecting society succeeds in obtaining an increase in licence fees in respect of the rights it controls, there is no automatic mechanism available to users to have the licence fees payable to other collecting societies for related rights in the same music adjusted. Collecting societies commence Copyright Tribunal proceedings to vary or confirm a licence scheme in isolation from each other. This creates the situation where the Copyright Tribunal cannot address the price to licence "music" across all of the licensing schemes.
16. These factors combined have forced licensees into a situation where the total amount of royalties payable for music could significantly increase (for example in the case of FTA Broadcasters, PPCA is currently seeking a 4,000% increase in its licence fees on the basis of parity with APRA).
17. Free TV submits that in the circumstances outlined above, the current safeguards against a misuse of market power, such as recourse through the Copyright Tribunal, are inadequate. This is because modern Copyright Tribunal proceedings require significant resources and take a significant amount of time to resolve. This, combined with the inherent uncertainty of such proceedings places an unacceptable burden on licensees. The ACCC appears to acknowledge in the Draft Determination that there are inadequacies in the process and that APRA is far from completely constrained in its ability to extract monopoly rents from users: see comments at paragraphs 4.166 & 4.168 of the Draft Determination.

18. Free TV therefore submits that the ACCC should take a holistic and practical approach to how music rights are acquired to accommodate adjustment of licence fees where there has been a significant change in the overall licence fees payable by licensees for the use of music.
19. In Free TV's submission, the authorisation granted to APRA should, therefore, include a mechanism whereby APRA must take into account any increase in licence fees payable by a licensee to another rights holder for the use of the same music in calculating its licence fees AND if necessary, adjust the licence fee down.
20. Such a process would be to the benefit of licensees, particularly those without the "deep pockets" otherwise required to take proceedings in the Copyright Tribunal in relation to multiple licensing arrangements, and would be more economically efficient for both licensees and collecting societies.

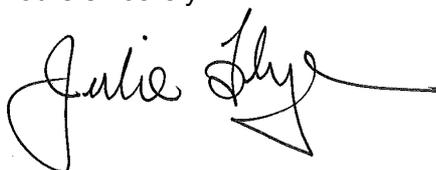
Alternative dispute resolution processes

21. With respect to the alternative dispute resolution process, the most significant disputes that occur for FTA Broadcasters occur when a particular licence or scheme is due to expire and the collecting society (whether it be APRA to PPCA) seeks a significant (e.g. above CPI) uplift in licence fees.
22. Given the cost and expense of prosecuting a Copyright Tribunal proceeding (and the way in which they are prosecuted), recourse to alternative dispute resolution at the time such negotiations arise would be beneficial to licensees as well as APRA.
23. Free TV submits that it is appropriate for the authorisation to contain more comprehensive alternative dispute resolution procedures, and that licensees should be able to elect which form of dispute resolution they wish to adopt, including whether to commence proceedings in the Copyright Tribunal. Given the cost implications of the different forms of dispute resolution available, licensees should be able to make decisions based on available resources and the value of the dispute.
24. As discussed above, a trend which has occurred in some recent Copyright Tribunal proceedings has been for a collecting society to lodge a new scheme asserting that it is entitled to the same or similar licence fees payable to another collecting society (e.g. this has occurred in relation to both digital downloads and broadcasting).
25. In such circumstances, however, alternative dispute resolution is unlikely to be useful if there is no independent economic evidence to establish the value of its licence and justification for the proposed uplift in fees.
26. Consequently, Free TV submits that an appropriate additional condition that should be placed on music collecting societies (including APRA) is that, in the case of industry schemes, they cannot seek an increase in licence fees without serving on the relevant industry body and the ACCC an independent economic report disclosing how it has valued the licence and justifying any increase in licence fees.
27. In this way, licensees will be able to make an informed decision in relation to the proposed licence scheme and be in a position to engage more meaningfully in any alternative dispute resolution process, or alternatively, can move directly to Copyright Tribunal proceedings.

28. Such processes as described above, will be of benefit to licensees as well as to APRA, as costs of contesting licence fees may be diminished through ADR processes, while the requirement that APRA provide transparency in its valuation process, will permit more informed engagement between the parties, and may, where economic justification for uplifts are adequately established, resolve any proceedings prior to commencement.

Thank you for the opportunity to comment on the Draft Determination.

Yours sincerely



Julie Flynn
CEO