Blanch, Belinda

From: Kate Haddock [haddock@bhf.com.au]
Sent: Tuesday, 16 March 2010 4:25 PM
To: Rouw, John
Subject: APRA - APPLICATIONS FOR REVOCATION & SUBSTITUTION
Attachments: article 17(g) 16 March 2010.pdf; ATT7334203.htm

Dear Mr Rouw

I refer to our telephone conversation yesterday, in which you asked me to confirm the operation of some aspects of proposed Article 17(g).

APRA has made the proposed amendments to Article 17(g) trying to achieve certainty while maintaining maximum flexibility. If it were to attempt to anticipate and deal with every potential application of the licence-back facility, it is concerned that the failure to do so comprehensively might disadvantage a member whose circumstances were not accommodated.

In requiring a member to provide details of the territory of the licence or the location of performances, APRA merely seeks to ensure that it does not also seek to grant licences where licences are already in place. APRA only requires sufficient information to achieve this aim.

I can confirm that proposed Article 17(g)(ii)(4) is intended to distinguish between the information that is required for licences-back for the purpose of communication (broadcast and online) and public performance (live and recorded music uses that comprise the majority of APRA licences, including cinema, background music, featured recorded music, fitness classes etc). It is anticipated that a member seeking to license-back for communication purposes will not be in a position to specify particular venues or premises to which a direct licence is granted, as generally a direct licence would be granted to a broadcaster, or to an online service provider, and it would be not reasonable to require details of all locations to which those communications would be made. I attach an amended draft of the proposed Article 17(g), which makes clearer the distinction between performances and communications. (This document is marked up as against the current Article 17 (g), not against the document sent to you last week).

Generally, it will be more reasonable in the case of a direct licence granted for public performances (as opposed to communications), for the member to give details regarding the location of performances so that APRA does not seek to license those premises for the performances of the relevant works. Again, APRA will require only such information as is reasonably necessary to determine whether a particular venue is already licensed.

If a member were to take a licence-back for the purpose of granting a licence to an internet radio station and all (unspecified) venues in Australia that performed music by means of that radio station in public, the licence-back would suffer from the following flaws:

- the licence between the member and the venues would not be in writing; and
- the member would not be able to provide any information to APRA that would enable APRA not to seek to grant a licence to particular premises.

However, if a member did seek to license-back works for such a purpose, then assuming that member's works were the only works communicated by the radio station, APRA would not license premises that were only performing the member's music by means of that radio station, once it had been advised that the performances were of that nature. APRA notes that in such circumstances, its costs of investigating the need for a licence would have been wasted, its

compliance costs of ensuring that the performances were as described would be increased, and the need for an indemnity from the member is clear (given that other APRA members may seek recourse against APRA if their works were unlicensed as a result of the licence-back, and it would be more difficult to ascertain whether the licensing-back member's works were being performed by means of another radio station or otherwise). However, as the works would remain in the APRA repertoire, there would be no need for APRA to notify all licensees that the APRA licence could not be relied on in respect of those works.

The situation can be compared to one in which a number of premises are performing music written by a writer who is not a member of any collecting society. In such instances, once APRA has verified that the works are not within its control, it does not seek to license the premises.

Obviously, if premises played music other than via that particular radio station, or if the radio station also communicated other APRA works, they would require an APRA licence, the APRA licence fee may require adjustment, and if the fee were to be adjusted the licensee would be required to report music use in far greater detail than currently occurs under a background music licence.

Please let me know if you require anything further.

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(g) It is a pre-condition of the grant of a Licence Back that:

(i) the purpose of the licence is to enable the member to grant a sub-licence of the Performing Right:

(ii) the member provides the Association with notice as set out on sub-paragraph (h) (in a form reasonably determined by the Board from time to time). The notice must provide sufficient information to identify the works the subject of the licence, the licensee, and the scope of the licence, including (as appropriate):

1. the title/s of the relevant work or works;
2. the name of the licensee and such other details as are reasonably necessary to identify whether a particular person has been granted a sub-licence;
3. the term of the licence, or if the licence is for particular performances or communications only, such details regarding the date or dates of the performance or communication as are reasonably necessary to identify the performances or communication to which the sub-licence relates;
4. the territory of the licence, or if the licence is for a public performance (as opposed to a communication) 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;
5. where applicable, the broadcasting or on-line service and if the licence is restricted to particular programs or content segments, the program or content segment in respect of which the proposed sub-licence will be granted, and if the licence is for the performance of works by means of cinematograph film, the title of the film in which the work appears.

The notice must contain:

1. where applicable, a signed consent to the proposed sub-licence and release and indemnity in a form reasonably required by the Board from time to time from all Interested Persons; and
2.
   a. an undertaking to pay reasonable costs to the Association, in accordance with the Board's published schedule of costs (if any), prior to the date of the first performance or communication or the date on which the proposed sub-licence is to take effect; and
   b. an undertaking to pay to the Association such further reasonable costs which may be actually incurred by the Association in connection with and/or arising out of the granting of the licence back to the member to the extent that such costs exceed the costs identified in the Board's published schedule;

(h) Notice

For live performances of the member's own works, performances by means of cinematograph films, and for all communications, the Association requires one week's notice. For all other public performances, the Association requires two weeks' notice.

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